

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2010-SC-000438

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APPEAL FROM COURT OF APPEALS OF KENTUCKY SUPREME COURT CLERK
NO. 2009-CA-000927-WC
(WORKERS' COMPENSATION BOARD NO. 02-01692)

PEABODY COAL COMPANY,

APPELLANT,

v.

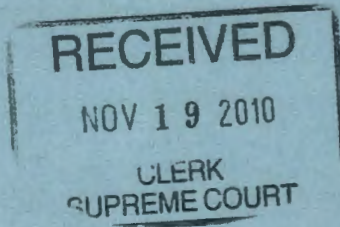
BRIEF ON BEHALF OF THE APPELLEE

JOE MARTINEZ;
HON. R. SCOTT BORDERS, ALJ;
WORKERS' COMPENSATION BOARD,

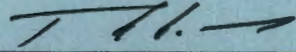
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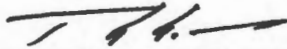
BY: _____


Hon. Thomas E. Springer III
Attorney for Appellee,
Joe Martinez

CERTIFICATE OF SERVICE

On this the 17 day of November, 2010, I hereby certify that I have mailed the foregoing Brief to: Hon. Peter Glauber, BOEHL, STOPHER & GRAVES, LLP, 2300 Aegon Center, 400 West Market St., Louisville, KY 40202; Hon. R. Scott Borders, 8120 Dream St., Florence, KY 41042; Hon. Christopher H. Smith, Office of Workplace Standards, Kentucky Labor Department, 1047 U.S. 127 South, Frankfort, KY 40601; Workers' Compensation Board, Office of Workers' Claims, 657 Chamberlin Ave., Frankfort, KY 40601; Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY

40601; and, an original and ten (10) copies were mailed to the Kentucky Supreme Court Clerk, 700 Capital Avenue, State Capitol, Room 209, Frankfort, KY 40601.

BY: 

Hon. Thomas E. Springer III
Attorney for Appellee,
Joe Martinez

STATEMENT CONCERNING ORAL ARGUMENTS

The Appellee, Joe Martinez, requests oral argument before this Honorable Court as the issues presented in this appeal are unique and of great importance to the miners who labor in the coal mines of Kentucky.

STATEMENT OF BENEFITS PENDING REVIEW

The Appellee submits there are no benefits awarded by the Administrative Law Judge.

STATEMENT OF PENDING LITIGATION

The Appellee submits that there are no other pending litigation matters between the parties and any other Court except the case sub judice.

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COUNTER-STATEMENT OF THE CASE

This an appeal filed by the employer seeking reversal of the Decision of the Kentucky Court of Appeals who rightly decided that House Bill 348, KRS 342.316 and its progeny are unconstitutional as it violates Joe Martinez's State and Federal Rights to Equal Protection. The Appellee, Joe Martinez, is a 73year old (DOB: 2/6/37) former coal miner who labored in the underground coal mines of Western Kentucky for approximately 34 years. Joe filed his Form 102 over the Certificate of Service date of October 24, 2002. Attached with Joe's Form 102, was an x-ray interpretation performed by Dr. Glen Baker who read Joe's May 17, 2002 x-ray as positive for coal workers' pneumoconiosis, Category 1/0.

At the Hearing conducted on August 28, 2003, Joe testified about his prior coal mining employment.

“Q: How many years, sir, have you worked in the mines?

A: For Peabody around thirty, and I had two years with Pyro Mining,

About eighteen months with Island Creek, and six months with Bunny Coal.

Q: Has this work, sir, been underground, strip, or a combination of both?

A: Combination of both.

Q: How much underground and how much strip?

A: Bunny Coal was all at the tippel, and then up to '81 or '82, I worked underground, and then I went to Camp Nine and was in the tippel for about a year, got laid off, came back in 1996, and then I retired in 2000.

Q: So how many years do you think you worked underground, and how many years do you think you worked on the surface?

A: Well, I'll say about five and a half years outside, and the rest of it was underground.

Q: Each and every day that you worked for these four companies that you have listed on this work history, were you exposed to and did you inhale coal dust?

A: Yes, sir, because at Pyro I was working at the face, started as a shooter, and you had to go in there and shoot one hole at a time, and you couldn't hardly find your way back from the first shot, it was like a three-way place, and you talk about getting sick...the first week I thought for awhile that I was never going to make it, because I wasn't use to the powder, you talk about a headache, Good Lord.

* * *

Q: Were you working forty hours a week or more than forty hours a week when you were working for most of these companies?

A: Well, every time I had a chance to catch up and learn a machine, I'd start going around and trying to learn how to run different pieces of equipment like loaders, cutting machines, shuttle cars, and after I was there about six months, they let me start running equipment. And then I started doubling back about every third...I'd probably double back on Monday, Wednesday and Friday on every opportunity. And even on the days I didn't double back, I'd stay through the shift.

Q: So you were working more than forty hours a week most of the time?

A: Yeah, after I got my pay sheet I found some where I was working 125 hours in two weeks." (Transcript of Evidence at Hearing, pgs. 5 – 7 and pg. 8)

The employer obtained an x-ray interpretation performed by Dr. Robert Pope, who read Joe's January 23, 2002 x-ray as negative for coal workers' pneumoconiosis. Pursuant to the provisions of KRS 342.316, Joe's x-rays were then read by the State "consensus panel" whose majority opinions rendered a negative finding of compensable coal workers' pneumoconiosis. The Administrative Law Judge was unable to fully consider Joe's credible testimony regarding his 34 plus years of underground coal mining employment and continuous coal dust exposure and was forced to accept the consensus

finding and subsequently dismissed Joe's claim for coal workers' pneumoconiosis on June 22, 2007. It is from this dismissal that Joe appeals, and in particular, that due to the type of injury he sustained, he was not afforded the same protections under the law that similarly situated injured workers are guaranteed under the Kentucky Workers' Compensation Statutes.

ARGUMENT

I. THE KENTUCKY COURT OF APPEALS WAS CORRECT IN HOLDING THAT KRS 342.314 IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE INJURED COAL MINER'S RIGHTS TO EQUAL PROTECTION UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTIONS 1, 2 AND 3 OF THE KENTUCKY CONSTITUTION.

KRS 342.316 unfairly and unlawfully discriminates against coal miners who are injured by and through exposure to coal dust, as opposed to workers exposed to other forms of occupational particulates.

Under KRS 342.316, a coal miner who has been exposed to injurious coal dust must file a claim pursuant to KRS 342.316(3), which consists of an application, along with a positive, compensable x-ray. The Appellee/responsible employer must then obtain its own "B Reader" x-ray, and if the two (2) findings are not in "consensus", the x-ray films are forwarded on to three (3) State "B" Readers. The findings of the three (3) State "B" Readers are binding, unless the miner is able to rebut the presumption by clear and convincing evidence. (Hunter Excavating vs. Bartrum, 168 S.W.3d 381 (KY. 2005.)) The Bartrum, Id., decision did permit the injured miner and employer to submit an additional x-ray interpretation. However, even if a miner did file an additional positive x-ray, such evidence alone is not sufficient to overcome the consensus panel's finding by clear and

convincing evidence. Indeed, as noted by the Kentucky Court of Appeals, such burden of proof is impossible for the coal miner to overcome. (See Court of Appeals Decision, 2007-CA- 000874-WC, a copy of which is attached for reference)(pgs. 4 and 5). Had Joe's occupational disease been caused by a particulate other than coal dust, his claim would have been treated more favorably under Kentucky Workers' Compensation Statutes.

A miner who is disabled due to coal workers' pneumoconiosis must overcome a higher and more stringent degree of persuasion-clear and convincing to rebut the consensus finding. The "clear and convincing" evidentiary standard was defined by this Honorable Court in Fitch vs. Burns, 782 S.W.2d 618 (KY. 1989),

"We conclude that where the "burden of persuasion" requires proof by clear and convincing evidence, the concept relates more than anything else to an attitude to or approach weighing the evidence, rather than to a legal formula that can be precisely defined in words. Like proof beyond a reasonable doubt, "proof by clear and convincing evidence" is incapable of a definition any more detailed or precise than the words involved. It suffices to say that this approach requires the party with the burden of proof to produce evidence substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt."

Furthermore, this evidentiary standard was recently defined by the Kentucky Court of Appeals in A.D.B vs. Commonwealth of Kentucky, 405 S.W.3d 255 (KY. App. 2006),

"Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people."

Other types of Civil Actions that require the clear and convincing burden of proof include actions for fraud, termination of parental rights, defacto custodianship, as well as proving actual malice in a defamation suit. The rationale behind this higher burden of

persuasion in those types of cases is self-evident. However, no other worker in the State of Kentucky must meet this extraordinarily high burden of proof, which stands in stark contrast to the preponderance of the evidence standard enjoyed by other similarly situated workers, which merely requires a claimant to prove that it is "more likely than not" that he/she suffered a compensable injury. (Commonwealth of Kentucky vs. Anderson, 934 S.W.2d 276 (KY. 1996))

At the rebuttal stage, the x-ray readings of record, at a maximum, are two (2) positive (miner's reading and one (1) consensus panel reading) versus three (3) negative (employer's reading and two (2) consensus panel readings). Even if the miner placed into evidence a second positive reading and the employer submitted none, this evidentiary "tie" is insufficient as a matter of law to rebut the consensus finding. Thus, it is impossible for the miner to overcome this burden of proof, a burden no other injured worker must satisfy.

Based solely on the fact that the miner's injury stems from years of exposure to coal dust, he is discriminated against in that similarly situated workers who are exposed to different types of occupational particulates and suffer from other occupational diseases are treated differently and more favorably. In other words, a worker who is exposed to limestone dust is afforded greater protection under the Workers' Compensation Laws. Furthermore, in a non-coal dust occupational disease claim, the ALJ is not bound by the majority opinion contained in contradicted medical evidence. Indeed, other occupational

disease claims utilize a University evaluator whose opinion creates a rebuttal presumption; a presumption which neither shifts the risk of non-persuasion to the Defendant or raises the bar with regard to the claimant's burden of persuasion. (Magic Coal Company vs. Fox, 19 S.W.3d 88 (KY. 2000) Furthermore, if the presumption is rebutted, it is reduced to a permissible inference. The ALJ must then weigh the conflicting evidence and decide which is most persuasive. (A.K Steel vs. Adkins, 253 S.W.3d 59 (KY. 2008))

Indeed, as long as the ALJ states a reasonable basis for his rejection of the opinion of the University evaluator, the Judge's Decision shall not be disturbed. Furthermore, the ALJ is afforded wide latitude and discretion to rely on rebuttal evidence in rejecting the findings of the University evaluator. Bullock vs. Goodwill Coal Company, 214 S.W.3d 890 (KY. 2007).

In non CWP cases, the ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. vs. Perkins, 947 S.W.2d 421 (KY. App. 1997). Furthermore, "the ALJ may reject any testimony or believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary parties' total proof." Caudill vs. Mahoney Discount Stores, 560 S.W.2d 15 (KY. 1977). Furthermore, a workers' testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. Hush vs. Abrams, 584 S.W.2d 48 (KY. 1979).

Under KRS 342.315, the ALJ has been stripped of all of the discretion afforded him under the Workers' Compensation Laws. The role of the ALJ has been replaced by

the autonomous and mechanical consensus process. The ALJ has little, if any, legal room to consider any additional evidence other than the consensus finding, and the Claimant's possible second positive x-ray. The ALJ is not permitted to take into account the years of hazardous exposure to coal dust, the type of work the miner performed, other treatment records, as well as the miner's own credible testimony regarding his shortness of breath, inability to function, and the type and location of work he performed in the mines. Joe Martinez worked over 34 years laboring in the coal mines of Western Kentucky. Joe Martinez has testified under oath that he inhaled coal dust each and everyday of his coal mining life. These facts are not allowed to be considered by the ALJ in rebutting the consensus finding. Joe Martinez has been denied equal protection under the law based solely on the type of occupational particulate he inhaled.

This discrimination between types of injured workers suffering from occupational diseases caused by different types of occupational particulates is arbitrary, capricious and not rationally related to any State interest. Furthermore, there is no substantial or justifiable reason for the discriminatory classification contained in KRS 342.316.

This Honorable Court has already held that KRS 342.316 is unconstitutional in a very limited and narrow circumstance. Cain vs. Lodestar Energy, 320 S.W.3d 39 (KY. 2009) found KRS 342.316 violative of the coal miners' rights to equal protection where both he and the employer's x-rays revealed a compensable finding. In other words, the disparate treatment of miners based solely on the degree of difference between his and his employer's positive x-ray was unconstitutional. While this holding was very limited, it does lend support to Joe's argument that compelling coal miners to overcome both the

consensus panel and an impossible burden of proof while other similarly situated workers enjoy the University Evaluator and preponderance of the evidence standard violates the coal miners' right to equal protection.

However, the holding in Cain, Id. clearly is not dispositive of the issues presented in this appeal, nor was that holding the primary basis of the Kentucky Court of Appeals Decision. Contrary to the Appellant's argument, the Kentucky Court of Appeals acknowledged that Cain "did not reach the issue presented here." (pg. 8)

As noted in Finance Administration Cabinet vs. Beyer, 193 S.W.3d 755 (KY. App. 2006), "to survive a Constitutional attack upon equal protection grounds, the challenged classification must be rationally related to legitimate governmental interests." KRS 342.316, and its associated Regulations, violate the injured miner's rights to equal protection as such classification is not rationally related to any legitimate State interest.

The Appellant asserts in its Brief that the holding in Kentucky Harlan Coal Company vs. Holmes, 872 S.W.2d 446, (KY. 1994), supports the constitutionality of KRS 342.316. In Holmes, Id., the coal company challenged the constitutionality of the 1987 revisions to KRS 342.732 which, among other changes, increased the amount only coal companies paid into the Special Fund. The 1987 Legislation was enacted to remedy the serious financial burden placed upon Kentucky industry as a whole due to coal mining. The Legislative history referenced in Holmes, Id., and cited in the Appellant's Brief, (pg. 11) referred to the economic reality some 23 years ago, and the rationale behind the changes made to KRS 342.732 at that time. The Appellee agrees with the

Kentucky Court of Appeals that the holding in Holmes, Id. has no application in the case presented before this Honorable Court. The current version of KRS 342.316, the consensus panel, and the clear and convincing burden of proof borne by coal miners did not exist at the time of the Holmes, Id. Decision. Accordingly, the Appellee's reliance on Holmes, Id. is misplaced.

The 14th Amendment to the United States Constitution entitles U.S. Citizens to equal protection under the law. Commonwealth vs. Howard, 969 S.W.2d 700 (KY. 1998). Furthermore, Sections 1, 2 and 3 of the Kentucky Constitution affords Kentucky citizen's greater protection, requiring a reasonable basis or substantial and justifiable reason for discriminatory Legislation in any as of social and economic policy. Elkhorn vs. Cheyenne Resources, 163 S.W.3d 408 (KY. 2005). KRS 342.316 is violative of Sections 1, 2, and 3 of the Kentucky's Constitution as there is no reasonable basis for discrimination between injured coal miners who suffer from years of exposure to coal dust and contract coal miners' pneumoconiosis, and a worker who is exposed to a different occupational particulate and suffers from an occupational disease. Based upon the type of exposure, these workers are classified and treated differently. There is no legitimate state objective rationally related to this arbitrary classification. It has long been a law of this Nation and Commonwealth that if classifications or deprivations of liberty rest on grounds wholly irrelevant to a reasonable state objective, equal protection is violated. Kentucky Association with Chiropractors, Inc. vs. Jefferson County Medical Society, 549 S.W.2d 817 (KY. 1977). Furthermore, when economic and business rights

are involved rather than fundamental rights, substantive due process requires that a Statute be rationally related to a legitimate state objective. Stevens vs. State Farm Mutual Auto Insurance Company, 894 S.W.2d 64 (KY. 1995).

The Appellant argues that this disparate treatment between coal miners and workers who suffer from other occupational diseases is constitutionally permissible. The Appellant bases its argument on the fact that workers who suffer from non-CWP occupational diseases must allege a pulmonary impairment and submit a permanent impairment rating in order to make a prima facie case for entitlement to benefits. However, such comparison is not valid. Martinez has not claimed he has been denied equal protection based upon the evidentiary threshold to file a claim. Rather, Martinez has claimed that KRS 342.314 violates his right to equal protection based upon the procedure by which his claim is adjudicated, and the impossible burden of proof he must overcome; the highest burden of any injured worker in the State of Kentucky.

The Legislature is free to select the evidentiary threshold to file a claim. Indeed, the Legislature is free to raise or lower the threshold a worker must meet to file his claim without fear of a successful constitutional challenge. (See Shamrock Coal Company, Inc. vs. R. Cletus Maricle, 5 S.W.3d 130 (KY. 1999), increasing the degree of respiratory impairment required to file a claim).

(See also, Mullins vs. Manning Coal Corporation, 938 S.W.2d 260 (KY. 1997), KRS 342.315(3)(b) affirming two (2) year exposure requirement).

In the case sub judice, Martinez met the legislatures proscribed threshold by filing the x-ray interpretation by Dr. Glen Baker. Once Martinez was “in the proverbial door”,

his constitutional safeguards, including equal protection, came into play. The issue on this appeal is not whether the different threshold requirements for non-CWP claims and occupational disease claims are permissible, rather, the question presented before this Honorable Court is whether the procedure for the adjustment for Mr. Martinez's claim is constitutional. Both Mr. Martinez and the Kentucky Court of Appeals believe it is not.


It has well been the law of the Commonwealth that an injured worker must prove a harmful change in the human organism by objective medical evidence. Gibbs vs. Premier Scale Company, 50 S.W.3d 754 (KY. 2001). Accordingly, any miner who has years of injurious exposure to coal dust meets this burden by filing his claim, which requires a positive x - ray with a compensable finding. As it has been stated numerous times by the Kentucky Courts, "The Workers' Compensation Act is social Legislation, the purpose of which is to compensate workers who are injured in the course of their employment for a necessary medical treatment and for a loss of wage earning capacity without regard to fault. Adkins vs. R & S Bodico, 58 S.W.3d 428 (KY. 2001). Furthermore, as stated in City of Louisville vs. Slack, 39 S.W.3d 809 (KY. 2001), "all Workers' Compensation Laws are intended to be liberally construed to accomplish their humanitarian purposes." KRS 342.316 thwarts this state objective in its autonomous and mechanical approach to determining whether an injured worker has a compensable coal mining occupational disease. By stripping down the functions of the ALJ in determining whether or not an injured worker has contracted coal miners' pneumoconiosis, the Statute has actually served to thwart the Legislative and

historical intent of the Kentucky Workers' Compensation Statutes. Indeed, there is not a plausible policy reason for discriminating against injured workers solely on the basis of the type of occupational injury and disability from which they suffer. It is therefore, no surprise that the number of compensable claims have significantly diminished and decreased under this coal miners' pneumoconiosis revision. It is equally without surprise that the coal miners' pneumoconiosis Special Fund continues to grow as few claims are being paid. Clearly, this approach to determining whether or not an injured worker suffers from compensable coal miners' pneumoconiosis has utterly thwarted the purpose of the act, which is to provide compensation to those coal miners who have spent their entire working lives laboring in the underground coal mines of Kentucky contributing to both their Corporation and the economy of this State.

CONCLUSION

KRS 342.316 unlawfully discriminates between workers who are injured over time by harmful occupational exposure to coal dust versus those workers who are injured over time by harmful occupational exposure to other particulates. Not only is KRS 342.316 not rationally related to any state objective, but it raises the bar so high that it actually serves to prevent and deny the benefits to truly injured coal miners.

WHEREFORE, the Appellee prays that this Honorable Court affirm the Decision of the Kentucky Court of Appeals holding that KRS 342.316 is unconstitutional.

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