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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CLAIM NO. 2010-SC-000311-WC
DWC CLAIM NO. 07-01156

FILED
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VISION MINING, INC.,

APPELLANT,

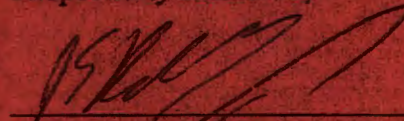
V.

BRIEF ON BEHALF OF THE APPELLANT

MR. JESSE GARDNER;
HONORABLE DOUGLAS W. GOTT
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD;
DWIGHT T. LOVAN, COMMISSIONER,
DEPARTMENT OF WORKERS' CLAIMS;
MIKE DIXON, COMMISSIONER,
DEPARTMENT OF WORKPLACE
STANDARDS; AND JACK CONWAY,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF KENTUCKY;

APPELLEES.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed, postage prepaid, to the following on August 9, 2010.

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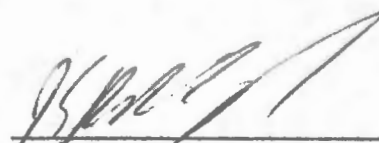
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INTRODUCTION

Appellant, Vision Mining, Inc., now appeals the Opinion from the Court of Appeals dated April 9, 2010, in which the panel assigned to hear the case determined that the consensus provisions of KRS 342.316(13) violate coal miners' rights to equal protection under the law. Vision Mining submits that the Court of Appeals' Opinion is erroneous as a matter of law in that it ignores and misinterprets precedent from the Kentucky Supreme Court, and should therefore, be reversed.

The Administrative Law Judge (ALJ), Honorable Douglas W. Gott, issued an Opinion and Order dated January 9, 2009 wherein he dismissed the Appellee, Jesse Gardner's, claim for retraining incentive benefits (RIB). The ALJ found that Gardner had not met his burden to prove that he suffers from coal workers' pneumoconiosis. In so finding, the ALJ stated he accepted the findings of the consensus panel, which read the x-ray films as negative. The ALJ noted that he did not find clear and convincing evidence to overcome the presumption in favor of the consensus panel's findings as required by KRS 342.316(13).

The ALJ's decision was affirmed by the Workers' Compensation Board ("Board"), but ultimately reversed and remanded by the Kentucky Court of Appeals. The Court decided that the consensus process in coal workers' pneumoconiosis claims, along with the requirement that the findings of the consensus panel be overcome by clear and convincing evidence, violate the rights of coal miners to equal protection under the law.

As this Honorable Court has repeatedly upheld the constitutionality of the consensus process in several prior decisions, we respectfully request that it reverse the decision of the Court of Appeals.

STATEMENT OF NEED FOR ORAL ARGUMENT

The Appellant hereby makes a request for oral argument. Appellant believes that oral argument is necessary in this matter, as the lower court has reversed precedent established by the Supreme Court.

STATEMENT OF BENEFITS PENDING REVIEW

No benefits were awarded by the Administrative Law Judge.

STATEMENT OF PENDING LITIGATION

There are no other pending litigation matters between the parties in any forum or Court, other than those for which this appeal is being sought.

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STATEMENT OF THE CASE

The Appellee, Jessie Gardner, is a 62-year-old former miner who last worked for the Appellant, Vision Mining, Inc., in 2005. He claims entitlement to retraining incentive benefits (RIB) based on the alleged existence of coal workers' pneumoconiosis. To this end, he submitted a positive x-ray report from Dr. Robert Powell dated August 15, 2007.

Appellant timely filed a Notice of Resistance on November 5, 2007 and submitted a report of Dr. Jerome Wiot who read a December 27, 2007 chest x-ray film as completely negative for coal workers pneumoconiosis but positive for emphysema. Thereafter, the x-ray films were submitted to a consensus panel for a re-reading pursuant to the provisions of KRS 342.316. The consensus panel unanimously agreed that the December 27, 2007 film was the film of the highest quality. Two of the three readers agreed that the film was definitely negative for pneumoconiosis, with the third reader interpreting the film as only marginally positive with a profusion of 1/0.

Gardner then submitted a marginally positive re-reading (1/0) of the December 27, 2007 film from Dr. Glen Baker. However, Administrative Law Judge (ALJ) Douglas W. Gott determined that this did not overcome the negative consensus of the panel reports. Gardner then filed an appeal challenging the constitutionality of the consensus process.

On April 17, 2009, the Kentucky Workers' Compensation Board entered an Opinion affirming the ALJ's decision. Gardner then filed a Petition for Review with the Kentucky Court of Appeals alleging that the consensus process violated a coal miner's right to equal protection under the law. Contrary to well established precedent from the Kentucky Supreme Court, the Court of Appeals determined that the consensus process and the mechanism to overcome the consensus panel's reading by clear and convincing evidence violates coal miners' rights to equal protection.

ARGUMENT

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN DETERMINING THAT KRS 342.316(13) VIOLATES A COAL MINER'S RIGHT TO EQUAL PROTECTION OF THE LAW

Gardner has argued that the consensus process is unconstitutional despite the Kentucky Supreme Court's recent ruling in Durham v. Peabody Coal, 272 S.W.3d 192 (Ky. 2008) and its previous ruling in Hunter Excavating v. Bartrum, 168 S.W.3d 381 (Ky. 2005). These cases conclusively establish that the consensus provisions and evidentiary requirements of KRS 342.316 do not violate coal miners' rights to due process and equal protection under the law. The Court of Appeals inexplicably ignored such precedent and decided that the consensus process in coal workers' pneumoconiosis claims violates the guarantees afforded to coal miners under the equal protection provisions of the Kentucky Constitution.

The Court's reliance on Cain v. Lodestar Energy 302 S.W. 3d 39 (Ky. 2009) is misplaced. Notably, it overlooks the fact that the holding in Cain was based on a very fact specific situation in which the consensus process was used following the submission of positive readings from the employer and the employee. That is not the case here, and the holding in Cain does not in any way suggest that the consensus and evidentiary provisions of KRS 342.316 are unconstitutional on their face. In fact, a correct reading of Cain and the other Supreme Court cases to address this issue reveal the exact opposite.

Vision Mining acknowledges that the Fourteenth Amendment to the United States Constitution requires persons who are similarly situated to be treated alike. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Moreover, workers' compensation statutes concern matters of social and economic policy. Such statutes comply with Federal Equal Protection requirements if the classifications they create are rationally related to a legitimate state interest. Id.

Furthermore, such statutes are presumed to be valid under the rational basis standard. Likewise, §§ 1, 2, and 3 of the Kentucky Constitution state that the legislature does not have arbitrary power and shall treat all persons equally. A statute complies with the Kentucky Equal Protection requirements if a reasonable basis or a substantial justifiable reason supports the classifications it creates. Elk Horn Coal Corporation v. Cheyenne Resources, Inc., 163 S.W.3d 408 (Ky. 2005); Waggoner v. Waggoner, 846 S.W.2d 704 (Ky. 1993). There is a presumption that legislative acts are constitutional. United Dry Forces v. Lewis, 619 S.W.2d 489 (Ky. 1981).

KRS 342.316(3) requires that a worker alleging that he is suffering from coal workers' pneumoconiosis submit a chest x-ray and a B-reader's interpretation of that x-ray. The employer is then allowed to offer an x-ray and an interpretation from a B-reader to rebut the interpretation offered by the afflicted worker. If the x-rays are not interpreted within one major category of each other they are then sent to a consensus panel pursuant to KRS 342.316 (3)(B)4E. Then the x-rays are submitted and interpreted by a panel of three B-readers for a consensus reading. If consensus between the B-readers is reached, the consensus classification shall be presumed to be the correct classification of the miner's condition unless the consensus reading is overcome by clear and convincing evidence. KRS 342.316 (13).

In Bartrum, this Court noted that KRS 342.316 and KRS 342.732 require the presence of coal workers' pneumoconiosis to be proven with x-ray evidence. The Court stated that there is nothing in KRS 342.316(3) "*that prevents a party from introducing the type of evidence that will rebut a consensus classification.*" The Court went on to note that "*KRS 342.316(3)(b)4g gives an ALJ broad discretion 'to order additional proof ...or to take such other action as may be appropriate to resolve [a] claim.'*" The Court concluded that KRS 342.316(3) does not deny parties a meaningful opportunity to rebut a consensus reading and that it is therefore constitutional.

However, the Court did decide that 803 KAR 25:009, §3(1) and (2) defeated the purpose of KRS 342.316(13) and KRS 342.316(3)(b)4g because those regulations prohibited a party from submitting additional reports of the x-rays the panel evaluated and prohibited an Administrative Law Judge from considering such reports. The Court concluded that these regulations exceeded the authority granted to the Department of Workers' Claims (DWC) to promulgate regulations and declared those particular regulations to be invalid.

This prompted the DWC to issue an amendment to the aforementioned regulations allowing the parties to submit an additional x-ray report interpreting one of the original x-rays. This allows the party trying to overcome the presumption in favor of the consensus panel to combine this new evidence with its previously submitted evidence. This amendment was first published in October of 2005.

The Kentucky Supreme Court has since reaffirmed the basic principles of Bartrum and ruled that the consensus process does not violate either the due process clause or the equal protection clause of the United States and/or the Kentucky Constitutions. Durham v. Peabody Coal, 272 S.W.3d 192 (Ky. 2008). (emphasis added). In Durham, the Court specifically found that the Kentucky General Assembly had a rational basis to provide for claims of coal workers' pneumoconiosis to be adjudicated through the use of the consensus panel, whose findings are afforded presumptive weight, which can only be overcome by clear and convincing evidence. Id. While the provisions of KRS 342.316(13) may at first glance appear discriminatory, the contested provisions of KRS 342.316 (13) do not actually impose a greater burden of proof on workers who claim entitlement to benefits for coal workers' pneumoconiosis. Id.

As this Court pointed out:

All claimants bear the burden of proof and risk of nonpersuasion before the ALJ with regard to every element of a workers' compensation claim. In order to sustain that burden, a claimant must go forward with substantial evidence to prove each element, in other words, with evidence sufficient to convince reasonable people. Such evidence has also been equated to evidence sufficient to survive a defendant's motion for a directed verdict if the matter were being tried by a jury. When met with equally convincing evidence, the claimant must offer more persuasive evidence in rebuttal or lose. When met with evidence more convincing than his own, a claimant's burden of rebuttal is even higher. KRS 342.316(13) acknowledges that reality. Id. at 196.

The Court also explained the reasons why traumatic injuries are distinctly different from coal workers' pneumoconiosis. A similar analysis applies when comparing coal workers' pneumoconiosis to other forms of occupational disease.

Importantly, pneumoconiosis can only be diagnosed through x-ray interpretation. While a claimant may be able to testify as to his breathing difficulties or the extent of his exposure to coal dust, such evidence is not probative as to whether or not the claimant actually suffers from pneumoconiosis. Such evidence is only probative as to the degree of a claimant's disability. In fact, many times, even workers with "category 3" simple pneumoconiosis do not show any significant decrease in lung function. Kentucky Harlan Coal Company v. Holmes, 872 S.W.2d 446 (Ky. 1994). Other types of occupational disease are diagnosed in ways other than a physician's review of a chest x-ray for parenchymal abnormalities. Id.

While the consensus panel procedure may not be entirely similar to the procedures in place for adjudicating traumatic injury claims and other types of occupational disease, it is substantially similar. Those procedures are codified by KRS 342.315, which provides for a qualified university evaluator to render an opinion as to the contested medical issues in a particular claim.

This Court made the same comparison in Bartrum, and determined that the consensus procedure did not deny due process to coal workers. In Holmes, the Court went further by comparing coal miners alleging pneumoconiosis to workers in other fields claiming pneumoconiosis arising from substances such as sandstone, asbestos, cotton dust, iron dust, and even ostrich feathers. The Court concluded that treating coal workers' claims for pneumoconiosis was based upon substantial distinctions that were "*necessary in view of the legislative history.*" Holmes at 455.

In the case at bar, the Court of Appeals mistakenly used this Court's recent Opinion in Cain v. Lodestar Energy to find KRS 342.316(13) unconstitutional on its face. In so doing, the Court of Appeals failed to acknowledge language in Cain that reads specifically to the contrary.

This Court noted that the claimant in Cain raised no issues that it failed to consider in Durham, when it upheld the constitutionality of KRS 342.316(13). Cain at 42. This Court went on to explain that the facts in Cain presented a unique and narrow situation that allowed an equal protection argument to be made. Id. In Cain, both the employer and the employee submitted x-ray readings that were positive for pneumoconiosis. The only difference between the readings was the fact that the employer submitted a Category 1 film and the employee submitted a Category 2 film. No evidence of impairment was submitted and the claimant was only seeking an award of RIB benefits.

However, because the films were not in the same major category, they were forwarded to the consensus panel for re-reading. A majority of the consensus panel readers found that the films were actually negative for coal workers' pneumoconiosis. Therefore, even though the employer's evidence would have allowed the claimant to receive a RIB award, benefits were

denied based on the consensus panel's negative reading. In finding that the consensus provisions of KRS 342.316 are unconstitutional as applied only to the facts of that claim, the Court stated,

KRS 342.316(3)(b)4.e. denied the claimant equal protection because it discriminated between him and a similarly-situated worker whose employer also submitted evidence of Category 1 disease but whose claim was not subject to the second phase of the consensus process. KRS 342.316(3)(b)4.e. created two classes of workers based solely on the amount of discrepancy between the worker's and employer's evidence. We discern no rational or reasonable basis for such discrimination where the employer's evidence effectively concedes the worker's entitlement to a RIB. We conclude, therefore, that KRS 342.316(3)(b)4.e. denies equal protection under both the federal and state constitutions *when applied to such a claim*. *Id.* at 43. (emphasis added).

The Court specifically noted that "*the claimant fails to show that the consensus process denies equal protection to all coal workers who raise pneumoconiosis claims.*" *Id.* at 40.

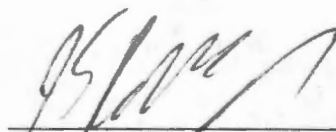
So, contrary to the lower court's Opinion, the facts present in Cain do not mirror the facts and arguments presented in this claim. Here, all of the evidence submitted by the employer includes negative chest x-ray interpretations. Entitlement to a RIB award was not conceded by the employer's evidence the way that it was in Cain.

Gardner has not presented a unique argument suggesting that the statute, as applied to him, is unconstitutional. Rather, he is simply attempting to reargue old cases in which facial challenges to the constitutionality of the consensus panel and evidentiary provisions of KRS 342.316 were rejected by this same Court. Accordingly, we respectfully request that this Honorable Court abide by the principles of *stare decisis* and reaffirm its prior holding that the consensus provisions and evidentiary requirements of KRS 342.316 do not violate the rights of coal miners to due process and equal protection under the law

CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse the April 9, 2010 Opinion of the Kentucky Court of Appeals, and remand the claim to that court with instructions to affirm the Opinion of the Worker's Compensation Board, which affirmed the January 9, 2009 Opinion & Order of the Administrative Law Judge.

Respectfully submitted,



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Court of Appeals

NO. 2009-CA-000874-WC

JESSE GARDNER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-01156

VISION MINING, INC.;
HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Jesse Gardner seeks review of an opinion and order of the Workers' Compensation Board (Board), affirming the dismissal of his

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

claim against Vision Mining, Inc. (Vision) by an Administrative Law Judge (ALJ).

Gardner contends that KRS 342.316, which defines the procedure for coal workers' pneumoconiosis² claims (CWP), is unconstitutional in violation of his right to equal protection under the law.³ We agree that the statute as applied to

coal workers is unconstitutional and, therefore, we reverse and remand.

Gardner is a 62-year-old former coal miner who worked in the underground coal mines of Western Kentucky for approximately 37 years. On September 4, 2007, Gardner filed a CWP claim for compensation. Attached to the application, as required by KRS 342.316(3)(a)(1), was an x-ray interpretation performed by Dr. Robert Powell. The interpretation indicated that Gardner was positive for CWP, category 2/2.

Vision Mining filed a notice of resistance and a notice of denial of Gardner's claim. Vision countered Dr. Powell's x-ray interpretation with its own x-ray interpretation performed by Dr. Jerome Wiot. Dr. Wiot found no evidence of CWP but noted evidence of emphysema.

Pursuant to KRS 342.316(3)(b)4.e., Gardner's x-ray was then referred to a three-physician panel of "B" readers, consisting of Dr. Kenneth Anderson, Dr. Thomas Jarboe, and Dr. Robert Pope. Dr. Anderson's reading indicated that Gardner was positive for CWP, category 1/0. Dr. Jarboe and Dr. Pope both

² Pneumoconiosis is more commonly known as black lung disease.

³ Pursuant to KRS 418.075, Gardner noticed the Attorney General of Kentucky of this constitutional challenge. The Attorney General elected not to defend and therefore is not a party to this appeal.

indicated that Gardner was negative for CWP. As a result of the two-physician consensus, pursuant to KRS 342.316(3)(b)4.f., the ALJ dismissed Gardner's claim. Gardner appealed to the Board, and the Board affirmed the ALJ. This appeal followed.

Our standard of review of a decision of the Workers' Compensation Board "is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The burden of persuasion is on the claimant to prove every element of a workers' compensation claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Of course, the Court of Justice is empowered and required to decide a proper challenge to the constitutionality of a state statute. This case presents such a challenge.

It is axiomatic that courts shall presume the constitutionality of statutes and that statutes shall be upheld when there is a rational basis for the legislative enactment. *Stephens v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 624 (Ky. 1995). Where denial of equal protection of the law is the basis for the constitutional challenge, we must search for a rational basis to justify disparate treatment of those who appear to be similarly situated. Only if we are unable to discover a rational basis may the equal protection challenge be sustained.

Gardner argues that the statute unconstitutionally violates his equal protection rights as a coal miner who suffers from pneumoconiosis by imposing more stringent procedural and substantive law requirements on coal worker claimants than on other pneumoconiosis claimants. He relies on *Durham v. Peabody Coal Co.*, 272 S.W.3d 192, 195 (Ky. 2008), as the decisional law standard established by Kentucky's highest Court:

The 14th Amendment to the United States Constitution requires persons who are similarly situated to be treated alike. Workers' compensation statutes concern matters of social and economic policy. Statutes are presumed to be valid and those concerning social or economic matters generally comply with federal equal protection requirements if the classifications that they create are rationally related to a legitimate state interest. Sections 1, 2, and 3 of the Kentucky Constitution provide that the legislature does not have arbitrary power and shall treat all persons equally. A statute complies with Kentucky equal protection requirements if a "reasonable basis" or "substantial and justifiable reason" supports the classifications that it creates. Analysis begins with the presumption that legislative acts are constitutional. [Emphasis added, internal citations omitted.]

Pneumoconiosis is defined as:

[I]nflammation commonly leading to fibrosis of the lungs due to the irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc.; the most prominent symptoms are: pain in the chest, cough, little or no expectoration, dyspnea, reduced thoracic excursion, sometimes cyanosis, and fatigue after slight exertion.

Stedman's Medical Dictionary 1109 (4th Lawyers' ed. 1976).

KRS 342.3 . . provides that a claimant alleging . WP must submit an x-ray, with an interpretation of the x-ray. The employer may then submit its own x-ray and interpretation. If the claimant's x-ray interpretation and the employer's x-ray interpretation are not in agreement, the highest quality x-ray is sent to a panel consisting of three individual "B" readers, chosen at random, for x-ray interpretation. If a consensus⁴ is not reached by the panel of "B" readers, the ALJ shall decide the claim on the evidence submitted. However, if a consensus is reached, the "classification shall be presumed to be the correct classification of the employee's condition unless overcome by *clear and convincing evidence.*" KRS 342.316(13) (emphasis added).

The clear and convincing evidence standard for coal workers sharply contrasts with the prevailing standard applied to workers seeking compensation for other pneumoconiosis claims such as exposure to limestone, various particulates, talc, graphite, etc. Not only is there a different evidentiary standard applied to coal workers than to others suffering from pneumoconiosis of a different etiology, the statutory scheme for adjudicating coal worker pneumoconiosis claims is significantly different. The principal difference in the statutory scheme is the use of the three physician "B" reader panel. Only coal worker pneumoconiosis claims are subjected to this procedure and to overcome a consensus of the three "B" reader panel, a claimant must show error by clear and convincing evidence. As a practical matter, overcoming the presumption created by a "B" reader consensus is

⁴ Under KRS 342.316(3)(b)4.f., a consensus is reached when two readers' findings of pneumoconiosis are in the same major category and within one minor category.

impossible. Non-coal worker pneumoconiosis claimants are not subjected to the foregoing procedure, and the standard of proof required is preponderance of the evidence rather than clear and convincing evidence.

A constitutional challenge to KRS 342.316 is not new to Kentucky courts. The Kentucky Supreme Court has held that KRS 342.316 does not violate equal protection of the law by treating CWP claims differently from claims for traumatic injury. *See Durham*, 272 S.W.3d 192. In support of its decision, the Court in *Durham* stated:

We conclude, however, that inherent differences between coal workers' pneumoconiosis and traumatic injuries provide a reasonable basis or substantial and justifiable reason for different statutory treatment.

Pneumoconiosis develops gradually and can be difficult to diagnose . . . [and] legislators relied on testimony from medical experts that coal workers who suffer from pneumoconiosis should be encouraged to find other employment. . . . As a rule, traumatic injuries occur suddenly and are more easily diagnosed. Workers who sustain traumatic injuries are not, as a rule, advised to change employment to avoid the risk of further injury.

Id. at 195-96. The Court also addressed the different *types* of evidence needed to prove the existence of pneumoconiosis in contrast to the types of evidence needed to prove the existence of other injuries.

X-ray is the objective method by which physicians diagnose the presence of pneumoconiosis and categorize its severity. A worker's statements concerning the nature and duration of his exposure to coal dust may assist a physician in determining the *cause* of pneumoconiosis but are not objective medical findings regarding the *presence* of the disease or the disease category. Nor are a

worker's statements describing symptoms such as breathing difficulties.

Id. at 197 (emphasis added). Said otherwise, radiographic examination determines the *presence* of pneumoconiosis, and oral testimony merely assists in determining the *cause; i.e.*, the particulate source of pneumoconiosis. Where a claim is based only on exposure to coal dust, presence or absence of the disease is determined exclusively by X-ray examination.

The *Durham* Court specifically declined to reach the issue presented here:

The workers failed to raise to the Court of Appeals their present, more comprehensive argument that the statute unfairly treats individuals who suffer from coal workers' pneumoconiosis differently from those who sustain traumatic injuries or suffer from other occupational pneumoconiosis or diseases. Thus, the argument is not preserved for our review.

Id. at 194-95 n.2. The foregoing statement leaves no doubt that the Court did not address the constitutionality of the statute as applied to those who claim pneumoconiosis from coal dust as opposed to those who claim pneumoconiosis from other sources.

The Kentucky Supreme Court has addressed the constitutionality of the types of evidence that may be considered and the stage at which a claim is subjected to the three-member consensus panel process. *See Hunter Excavating v. Bartrum*, 168 S.W.3d 381 (Ky. 2005); *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d

39 (Ky. 2009).⁵ However, these prior holdings did not reach the issue presented here. They did not compare CWP to the same disease or to an indistinguishable disease derived from other sources. However, the *Cain* Court determined that subjecting a worker to the second phase of the consensus process merely because the claimant's and the employer's category of positive results differed, notwithstanding that both reports confirmed the presence of the disease, was discriminatory.

KRS 342.316(3)(b)4.e. denied the claimant equal protection because it discriminated between him and a similarly-situated worker whose employer also submitted evidence of category 1 disease but whose claim was not subject to the second phase of the consensus process [due to the absence of any discrepancy]. KRS 342.316(3)(b)4.e. creates two classes of workers based solely on the amount of discrepancy between the worker's and employer's evidence. We discern no rational or reasonable basis for such discrimination where the employer's evidence effectively concedes the worker's entitlement to a RIB. We conclude, therefore, that KRS 342.[316](3)(b)4.e. denies equal protection under both the federal and state constitutions when applied to such a claim.

Id. at 43. The *Cain* case denounced the classification of workers, where the disease was confirmed, based solely on the amount of discrepancy between the worker's and the employer's evidence of disease. In this case, the discrepancy is between the different burdens of proof imposed on CWP claimants and other occupational pneumoconiosis claimants and with CWP claimants being subjected to the consensus panel while other pneumoconiosis claimants are spared the

⁵ Opinion rendered on March 19, 2009, petition for rehearing denied on August 27, 2009, finality in Supreme Court on August 27, 2009.

consensus panel. As such, *Cain* appears to support Gardner's contention that the statute as applied is unconstitutional.

It is clear that pneumoconiosis claims are appropriate for different treatment than traumatic injury claims. As the Court in *Durham* pointed out, traumatic injuries develop differently, they are diagnosed differently, and they result in different employment recommendations than do pneumoconiosis sufferers. As such, it is not unreasonable to require specific articulation of the evidence necessary to prove the presence of pneumoconiosis. The legislature has rationally determined that a different standard should apply.

The existence and category of pneumoconiosis are proven with x-ray evidence, but the evidence necessary to prove the existence and extent of a traumatic injury varies with the type of injury. That difference provides a reasonable basis for treating the conditions differently.

Durham, 272 S.W.3d at 198 (emphasis added). While this distinction is clear, it fails to articulate any basis for applying different requirements for pneumoconiosis claims where the disease is caused by different substances.

Although the sources of pneumoconiosis can differ, only claimants who contract the disease through inhalation of coal dust are subject to the three-member consensus panel and the consequent clear and convincing evidence standard necessary to overcome an adverse panel determination. As there is no discernable difference between a claimant who has contracted pneumoconiosis through the inhalation of coal dust and one who has contracted the disease through the inhalation of another particulate, we see no rational basis or "substantial and

justifiable reason” for imposing a different procedure and a higher burden on CWP claimants than on other occupational pneumoconiosis claimants. Accordingly, KRS 342.316 is unconstitutional insofar as it requires the three-member consensus panel and imposes a higher burden of proof upon CWP claimants than on other pneumoconiosis claimants. Simply stated, there is no rational basis for disparate treatment of industrial workers with the same occupational disease based on nothing more than the industry in which the disease was contracted.

Although the parties are represented by experienced Workers’ Compensation practitioners, neither party has paid more than passing attention to *Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446 (Ky. 1994), a decision of the Supreme Court decided 4-3. We infer from their failure to elaborate on the *Holmes* decision a belief that it is not of great significance to our decision in this case. The majority in *Holmes* upheld the constitutionality of KRS 342.732, a statute providing for income benefits and retraining incentive benefits for coal worker pneumoconiosis claimants. The statute was upheld against claims that treating coal workers pneumoconiosis differently from pneumoconiosis contracted in other industries was unconstitutional in violation of various state and federal constitutional provisions. The *Holmes* case contains broad dicta that can be read to support both sides of the argument. It concluded, however, that the statute was not unconstitutional based on the economic impact of an extraordinary number of coal workers pneumoconiosis cases at that time and the need to incentivize coal workers with pneumoconiosis to leave the industry, receive retraining, and to use

objective medical criteria when awarding benefits. In the context of KRS 342.732, the *Holmes* case recognized a compelling economic rationale for distinguishing between coal workers pneumoconiosis and pneumoconiosis contracted in other industries. As such, KRS 342.732 has a highly prospective feature in that it sought to remove diseased workers from the industry before they reached disability.

When the goals of the statute are considered, as did the majority in *Holmes*, the outcome is reasonable and the statute was properly upheld.

We have carefully considered the *Holmes* case as it may apply to the instant case. We have discovered little application. The case at bar involves a 37-year coal worker who claims that he has been deprived of equal protection of the law by having his case, unlike non-coal worker pneumoconiosis cases, referred to a three-member consensus panel and being required to overcome the consensus panel decision by clear and convincing evidence, a practical impossibility. Moreover, while not dispositive perhaps, we note that the statutory provisions under consideration here were not enacted until after the Supreme Court's decision in *Holmes*. Perhaps no area of the law is more statutorily intensive or less appropriate for traditional legal reasoning than Workers' Compensation. In Workers' Compensation cases, courts merely read the statutes and apply them as written unless a determination is made that the statute is unconstitutional.

This Court is not unmindful that funding sources for CWP claims and other such claims differ:

Income benefits for coal-related occupational pneumoconiosis shall be paid fifty percent (50%) by the Kentucky coal workers' pneumoconiosis fund as established in KRS 342.1242 and fifty percent (50%) by the employer in whose employment the employee was last exposed to the hazard of that occupational disease.

Compensation for all other occupational disease shall be paid by the employer in whose employment the employee was last exposed to the hazards of the occupational disease.

KRS 342.316(11). Although the foregoing statute provides for different payment sources depending on the etiology of the disease, this is insufficient to establish a rational basis for imposing additional burdens on Gardner and other CWP claimants based only on the *source* of the claimant's disease, rather than on the *presence* of the disease, and we can find no other reason for the disparity.

Although the statutes at issue here and throughout the Workers' Compensation Act are complex and frequently subjected to legislative modification, as we apply the presumption of constitutionality, fundamental principles should not be overlooked. Where the constitutional challenge is based on equal protection of the law, courts should refrain from embracing artificial distinctions merely to uphold a statutory provision. Likewise, merely because we must presume constitutionality does not require tortured reasoning, abandonment of common sense or ascribing unreasonable meaning to language. A fine statement of Kentucky law in this regard was written by Justice Charles Reynolds in the *Holmes* case:

The primary purpose of Kentucky Constitution, Section 59 is to prevent special privileges, favoritism, and discrimination, and to insure equality under the law. "A special law is legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others." *Bd. of Educ. of Jefferson County v. Bd. of Educ. of Louisville, Ky.*, 472 S.W.2d 496, 498 (1971).

While appellants assert the Act as special legislation, the appellees insist otherwise. As we have generally established in this jurisdiction, in order for a law to be general in its constitutional sense it must meet the following requirements: (1) it must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification. The second requirement is as essential as the first. *The legislature may not arbitrarily designate the severed factions of the original unit as two classes and thereupon enact different rules for the government of each. It is equally established that the classification, as made, must be based upon some reasonable and substantial difference in kind, situation or circumstance which bears a proper relation to the purpose of the statute.*

Holmes, 872 S.W.2d at 452 (emphasis added). The only distinction between CWP claimants and other pneumoconiosis claimants is the source of the disease. In all other respects, the disease process and the nature, extent and duration of the disease are the same. Imposing more onerous procedural and substantive burdens on coal workers than on others fails the test of "reasonable and substantial difference in kind, situation or circumstance[.]" The legislation under review does indeed "arbitrarily designate the severed factions of the original unit as two classes[.]" *Id.*

For the foregoing reasons, the April 17, 2009, opinion of the Workers' Compensation Board is reversed, and this cause is remanded for further proceedings consistent with this opinion.

WINE, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN PART AND DISSENTS IN

PART.

KELLER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with that portion of the majority's opinion holding that the "clear and convincing" evidentiary standard in coal workers' pneumoconiosis claims violates the constitutionally guaranteed right to equal protection. However, I respectfully dissent from that portion of the majority's opinion finding that the consensus panel procedure in coal workers' pneumoconiosis claims also violates that right.

As noted by the majority, the Supreme Court of Kentucky held that treating workers' compensation claimants who suffer from traumatic injuries differently from those who suffer from coal workers' pneumoconiosis does not violate the right to equal protection. *See Durham*, 272 S.W.3d 192. The Commonwealth has a rational basis for treating the two types of claimants differently because of the differences between traumatic injuries and coal workers' pneumoconiosis. However, as noted by the majority, there is no rational basis for placing a higher standard of proof on coal workers' pneumoconiosis claimants than on claimants suffering from other types of pneumoconiosis.

On the other hand, I believe that there is a rational basis for putting coal workers' pneumoconiosis claims through the consensus panel process while exempting other pneumoconiosis claims from that process. That rational basis can be found in the method used to determine the benefits available to the two types of claimants. To qualify for any benefits, a coal worker must first establish that he or she has coal dust related changes in his or her lungs via positive x-ray findings. Once a claimant establishes that, the amount of benefits available is directly tied to the severity of x-ray findings and the severity of breathing impairment. The entitlement to benefits for other pneumoconiosis claimants is determined using the same method as used in other occupational disease and traumatic injury claims. With other pneumoconiosis claims x-ray findings may be relevant, but they are not necessarily a threshold requirement to qualify for benefits or determinative of the benefit rate. Coal workers' pneumoconiosis claimants' benefits, unlike the benefits of any other claimants, are closely tied to x-ray findings. Therefore, I believe the legislature had a rational basis for establishing the consensus panel procedure to aid the ALJs in determining the accuracy of those findings.

**BRIEF AND ORAL ARGUMENT
FOR APPELLANT:**

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**BRIEF FOR APPELLEE, VISION
MINING, INC.:**

**Anthony K. Finaldi
Ward Ballerstedt
Louisville, Kentucky**

**ORAL ARGUMENT FOR
APPELLEE, VISION MINING, INC.:**

**Ward Ballerstedt
Louisville, Kentucky**

COMMONWEALTH OF KENTUCKY
KENTUCKY COURT OF APPEALS
CASE NO: 2009—CA—000874
WCB NUMBER: 2007-00156

JESSIE GARDNER

PETITIONER

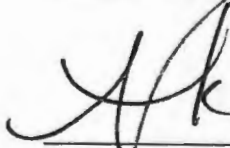
V. **RESPONSE TO PETITION FOR APPEAL/PETITION FOR REVIEW**

VISION MINING, INC.;
HONORABLE DOUGLASS GOTT,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

RESPONDENTS

* * * *

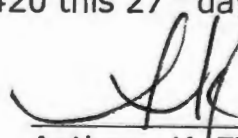
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Anthony K. Finaldi, hereby certify that the original and four (4) copies of the foregoing pleading was mailed to the **Kentucky Court of Appeals**, 360 Democrat Drive, Frankfort, KY 40601 with true and accurate copies delivered to **Workers' Compensation Board**, Appeals Branch, Department of Workers' Claims, Prevention Park, 657 Chamberlin Avenue, Frankfort, Kentucky 40601; **Mr. Thomas E. Springer, III, Esq.**, 28 Court Street, Madisonville, Kentucky 42431, and a copy to **Hon. Douglass W. Gott**, Pushin Building, 400 E. Main Street, Bowling Green, Kentucky 42420 this 27th day of May, 2009.



Anthony K. Finaldi

INTRODUCTION

The Petitioner has appealed the Administrative Law Judge's Opinion and ~~Order dated January 9, 2009 wherein the Honorable Douglass W. Gott~~ dismissed the Petitioner's claim for benefits. The Administrative Law Judge ("ALJ") found that the Petitioner had not met his burden to prove that he suffers from coal workers' pneumoconiosis. In so finding, the ALJ stated he accepted the findings of the consensus panel. The ALJ noted that he did not find clear and convincing evidence to overcome the presumption in favor of the consensus panel's findings as required by KRS 342.316(13). The ALJ's decision was affirmed by the Workers' Compensation Board ("Board").

The Petitioner is challenging the constitutionality of KRS 342.316, specifically the portion concerning the consensus process in coal workers' pneumoconiosis claims. The Respondent submits that the Kentucky Supreme Court has already addressed the constitutionality of the consensus process in both Durham v. Peabody Coal, 272 S.W.3d 192 (Ky. 2008) and Hunter Excavating v. Bartrum, 168 S.W.3d 381 (Ky. 2005). Accordingly, the Respondent respectfully requests that the Court affirm the decision of the ALJ and the Board.

STATEMENT OF NEED FOR ORAL ARGUMENT

The Respondent does not make a request for oral argument.

STATEMENT OF BENEFITS PENDING REVIEW

No benefits were awarded by the Administrative Law Judge.

STATEMENT OF PENDING LITIGATION

There are no other pending litigation matters between the parties in any forum or Court, other than those for which this appeal is being sought.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

KRS 342.316	2,5,6
<hr/>	
<u>Hunter Excavating v. Bartrum,</u> 168 S.W.3d 381 (Ky. 2005)	2,6
803 KAR 25:009	6
<u>Durham v. Peabody Coal</u> 272 S.W.3d 192 (Ky. 2008).....	2,6,7
<u>City of Cleburne v. Cleburne Living Center,</u> 473 U.S. 432, 439 (1985).....	7
<u>Elk Horn Coal Corp. v. Cheyenne Resources,</u> 163 S.W.3d 408 (Ky. 2005).....	8
<u>Waggoner v. Waggoner,</u> 846 S.W.2d 704 (Ky. 1993).....	8
<u>United Dry Forces v. Lewis,</u> 619 S.W.2d 489 (Ky. 1981).....	8
<u>Kentucky Harlan Coal Company v. Holmes,</u> 872 S.W.2d 446 (Ky. 1994).....	10

COUNTERSTATEMENT OF THE CASE

The Petitioner, Jessie Gardner, is a 62-year-old former miner who last worked for the Respondent, Vision Mining, Inc., in 2005. He claims entitlement to disability benefits based on the alleged existence of pneumoconiosis. To this end, he submitted a positive x-ray report from Dr. Robert Powell dated August 15, 2007.

The Respondent timely filed a Notice of Resistance on November 5, 2007 and submitted a report of Dr. Jerome Wiot who read a December 27, 2007 chest x-ray film as completely negative for coal workers pneumoconiosis but positive for emphysema. Thereafter, the x-ray films were submitted to a consensus panel for a re-reading pursuant to the provisions of KRS 342.316. The consensus panel unanimously agreed that the December 27, 2007 film was the film of the highest quality. Two of the three readers agreed that the film was definitely negative for pneumoconiosis, with the third reader interpreting the film as only marginally positive with a profusion of 1/0.

Petitioner submitted a marginally positive re-reading (1/0) of the December 27, 2007 film from Dr. Glen Baker. However, the Administrative Law Judge determined that this did not overcome the negative consensus of the panel reports. The Petitioner filed an appeal challenging the constitutionality of the consensus process. On April 17, 2009, the Kentucky Workers' Compensation Board entered an Opinion affirming the ALJ's decision. Petitioner now appeals the decision of the ALJ, as affirmed by the Board, to this Court.

ARGUMENT

I. THE BOARD DID NOT ERR AS A MATTER OF LAW IN AFFIRMING THE OPINION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE.

Respondent respectfully requests that the Court affirm the decision of the Administrative Law Judge, as affirmed by the Workers' Compensation Board. The Petitioner is arguing that the consensus process is unconstitutional despite the Kentucky Supreme Court's recent ruling in Durham v. Peabody Coal, 272 S.W.3d 192 (Ky. 2008) and its previous ruling in Hunter Excavating v. Bartrum, 168 S.W.3d 381 (Ky., 2005).

In Bartrum, the Court noted that KRS 342.316 and KRS 342.732 require the presence of coal workers' pneumoconiosis to be proven with x-ray evidence. The Court stated that there is nothing in KRS 342.316(3) "that prevents a party from introducing the type of evidence that will rebut a consensus classification." The Court went on to note that "KRS 342.316(3)(b)4g gives an ALJ broad discretion 'to order additional proof ...or to take such other action as may be appropriate to resolve [a] claim.'" The Court concluded that KRS 342.316(3) does not deny parties a meaningful opportunity to rebut a consensus reading and that it is therefore constitutional.

However, the Court did decide that 803 KAR 25:009, §3(1) and (2) defeated the purpose of KRS 342.316(13) and KRS 342.316(3)(b)4g because those regulations prohibited a party from submitting additional reports of the x-rays the panel evaluated and prohibited an ALJ from considering such

reports. The Court concluded that these regulations exceeded the Department of Workers' Claims authority to promulgate regulations and declared these particular regulations to be invalid.

The Department of Workers' Claims then issued an amendment to the aforementioned regulation allowing the parties to submit an additional x-ray report of one of the original x-rays. This regulation allows the party trying to overcome the presumption in favor of the consensus panel to combine this new evidence with its previously submitted evidence. This amendment was first published in October, 2005.

Furthermore, the Kentucky Supreme Court has reaffirmed the holding in Bartrum and ruled that the consensus process does not violate either the due process clause or the equal protection clause of the United States and/or the Kentucky Constitutions. Durham v. Peabody Coal, 272 S.W.3d 192 (Ky. 2008). (emphasis added)

As the Kentucky Supreme Court has already ruled on two occasions that the consensus process is constitutional, the Respondent respectfully requests that the relief requested by the Petitioner be denied.

The Respondent contends that KRS 342.316(3) does not impermissibly treat workers alleging coal workers pneumoconiosis differently than workers alleging other types of occupational disease. The Respondent acknowledges that the Fourteenth Amendment to the United States Constitution requires persons who are similarly situated to be treated alike. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

Workers Compensation statutes concern matters of social and economic policy. Such statutes comply with Federal Equal Protection requirements if the classifications that they create are rationally related to a legitimate state interest. Id. at 440. Furthermore, such statutes are presumed to be valid under the rational basis standard.

Sections 1, 2, and 3 of the Kentucky Constitution provide that the legislature does not have arbitrary power and shall treat all persons equally. A statute complies with the Kentucky Equal Protection requirements if a reasonable basis or a substantial unjustifiable reason supports the classifications it creates. Elk Horn Coal Corporation v. Cheyenne Resources, Inc., 163 S.W.3d 408 (Ky. 2005); Waggoner v. Waggoner, 846 S.W.2d 704 (Ky. 1993). There is a presumption that legislative acts are constitutional. United Dry Forces v. Lewis, 619 S.W.2d 489 (Ky. 1981).

KRS 342.316(3) requires that a worker alleging that he is suffering from coal workers' pneumoconiosis submit a chest x-ray and a B-reader's interpretation of that x-ray. The employer is then allowed to offer an x-ray and an interpretation from a B-reader to rebut the interpretation offered by the afflicted worker.

If the x-rays are not interpreted within one major category of each other they are then sent to a consensus panel pursuant to KRS 342.316 (3)(B)4E. The x-rays are submitted and interpreted by a panel of three B-readers for a consensus reading. If consensus between the B-readers is reached, the consensus classification shall be presumed to be the correct

classification of the miner's condition unless the consensus reading is overcome by clear and convincing evidence. KRS 342.316 (13).

In Durham, the Kentucky Supreme Court correctly noted that KRS 342.316 (13) does not actually impose a greater burden of proof on workers who claim benefits under KRS 342.732. The Court further noted that all claimants bear the burden of proof and the risk of non-persuasion before the Administrative Law Judge with regard to each and every element of a workers' compensation claim.

In order to sustain this burden, a claimant must go forward with substantial evidence to prove each element of his claim. Such evidence has also been equated to evidence sufficient to survive a defendant's motion for directed verdict if the matter were being tried to a jury. When met with equally convincing evidence, the claimant must offer more persuasive evidence in rebuttal, or lose. When met with evidence more convincing than his own, a claimant's burden on rebuttal is even higher. This Court concluded that the provisions of KRS 342.316(13) merely serve to acknowledge that reality.

In Durham, the Court also explained the reasons why traumatic injuries are distinctly different from coal workers' pneumoconiosis. A similar analysis applies when comparing coal workers pneumoconiosis to other forms of occupational disease. Pneumoconiosis can only be diagnosed through x-ray interpretations. While a claimant may be able to testify as to his breathing difficulties or the extent of his exposure to coal dust, such

evidence is not probative as to whether or not the claimant actually suffers from pneumoconiosis.

In fact, many times, even workers with "category 3" simple pneumoconiosis do not show any significant decrease in lung function. Kentucky Harlan Coal Company v. Holmes, 872 S.W.2d 446 (Ky. 1994). Other types of occupational disease are diagnosed in ways other than a physician's review of a chest x-ray for parenchymal abnormalities. Outward symptoms may be more readily apparent.

While the consensus panel procedure may not be entirely similar to the procedures in place for adjudicating traumatic claims and other types of occupational disease, it is substantially similar. The procedure is codified by KRS 342.315, which provides for a qualified university evaluator to render an opinion as to the contested medical issues in a particular claim. This Court made the same comparison in Bartrum, and determined that the consensus procedure did not deny due process to coal workers.

Both the university evaluation provisions and the consensus panel provisions provide for a neutral medical expert or experts to review the evidence in a workers' compensation claim and provide an opinion based on the contested issues of the claim. A university evaluator's opinion carries with it a rebuttable presumption of truth. A party seeking to overcome the opinion of a university evaluator also carries a heavy burden. Whether we want to call it a consensus panel re-reading or a university evaluation, both apply very similar procedures to separate types of cases.

Due to the distinct differences between coal workers pneumoconiosis and other occupational diseases, the legislature determined that the consensus process was the appropriate means for obtaining the most accurate and unbiased medical opinion. Therefore, even though workers alleging pneumoconiosis may be treated slightly differently than workers alleging other forms of occupational disease, the differences are minuscule and do not unfairly or arbitrarily discriminate against coal miners. The Appellant's Petition for Review should be denied.

CONCLUSION

For the foregoing reasons, Respondent requests that the Court affirm the Opinion of the Workers' Compensation Board, affirming the Opinion & Order of the Administrative Law Judge.

Respectfully submitted,

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