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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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SUPREME COURT CLERK

VISION MINING, INC.,

APPELLANT,

v.

BRIEF ON BEHALF OF THE APPELLEE

JESSE GARDNER;
HON. DOUGLAS W. GOTT, ALJ;
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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BY: 

Hon. Thomas E. Springer III
Attorney for Appellee,
Jesse Gardner

CERTIFICATE OF SERVICE

On this the 7 day of October, 2010, I hereby certify that I have mailed the foregoing Brief to: Hon. Anthony Finaldi, FERRERI & FOGLE, 203 Speed Bldg., 333 Guthrie Green, Louisville, KY 40202; Hon. Douglas Gott, Pushin Bdg., 400 E. Main St., Bowling Green, KY 42420; Workers' Compensation Board, Office of Workers' Claims, 657 Chamberlin Ave., Frankfort, KY 40601; Mike Dixon, Commissioner, Dept. of Workplace Standards, 1047 U.S. HWY 127 S., Ste. 4, Frankfort, KY 40601; Hon. Jack Conway, Attorney General, Commonwealth of Kentucky, 1024 Capital Center Dr., Ste.

200, Frankfort, KY 40601; Hon. Dwight T. Lovan, Commissioner, Department 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 federal expressed 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,
Jesse Gardner

STATEMENT CONCERNING ORAL ARGUMENTS

The Appellee, Jesse Gardner, 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 Jesse Gardner's State and Federal Rights to Equal Protection. The Appellee, Jesse Gardner, is a 64 year old (DOB: 8/18/46) former coal miner who labored in the underground coal mines of Western Kentucky for approximately 37 years. Jesse filed his Form 102 over the Certificate of Service date of August 29, 2007. Attached with Jesse's Form 102, was an x-ray interpretation performed by Dr. Robert Powell who read Jesse's July 13, 2007 x-ray as positive for coal workers' pneumoconiosis, Category 2/2.

At his testimony taken on November 20, 2008, Jesse testified about his prior coal mining employment.

“Q: What kind of work did you do there?

A: I was shot for awhile, drove a shuttle car, moved from there to unit helper.

Q: What does a shot fire do?

A: You shoot the coal, you blast it where they can load it out with a loader.

* * *

And further testified:

Q: About how many years have you worked in the coal mines?

A: Just a little over thirty seven.

Q: Thirty seven years?

A: Yes.

Q: And in that thirty seven year span of time, did you work underground, did you work above ground?

A: All my time was underground.

Q: All underground?

A: Yes.”

The employer obtained an x-ray interpretation performed by Dr. Jerome Wiot, who read Jesse's December 27, 2007 x-ray as negative for coal workers' pneumoconiosis. Pursuant to the provisions of KRS 342.316, Jesse's x-rays were then read by the State "consensus panel". Dr. Kenneth Anderson read the x-ray interpretation of December 27, 2007 positive for coal miners' pneumoconiosis, Category 1/0. However, the remaining two (2) State "B" Readers, Dr. Jarboe and Dr. Pope, did not find the existence of compensable coal workers' pneumoconiosis. In accordance with the holding in Hunter Excavating vs. Bartrum, 168 S.W.3d 381, (KY. 2005). Jesse obtained the x-ray interpretation of Dr. Glen Baker, who read Jesse's December 27, 2007 x-ray as positive for coal workers' pneumoconiosis, Category 1/0. Accordingly, at the time his claim was submitted to the Administrative Law Judge for adjudication, the record contained three (3) positive "B" Reader x-ray interpretations, along with three (3) negative "B" Reader x-ray interpretations. The Administrative Law Judge, being unable to fully consider Jesse's credible testimony regarding this 37 plus years of underground coal mining employment and Jesse's continuous coal dust exposure, was forced to adopt the consensus finding and dismissed his claim. Despite three (3) compensable x-ray readings, Jesse was unable to overcome the "clear and convincing" standard to rebut the consensus finding. It was from this dismissal that Jesse originally appealed, and in particular, the fact that he was unlawfully discriminated against due to the type of occupational exposure and occupational disease from which he suffers. As correctly decided by the Kentucky Court of Appeals, Jesse is not afforded the same protection

under the law that similarly situated 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 with an additional positive x-ray, as in the case sub judice, 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 Jesse'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, as is the case sub judice, 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. Jesse Gardner worked over 37 years laboring in the coal mines of Western Kentucky. Jesse Gardner 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. Jesse Gardner 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.

The Appellee is well aware of this Honorable Court's holding in Durham vs. Peabody Coal Company, 272 S.W.3d 192 (KY. 2008). That case held KRS 342.316 constitutional and not in violation of equal protection as it pertains to coal miners who suffers from coal workers' pneumoconiosis and workers who suffers from traumatic injuries. However, the precise equal protection issues presented in this appeal were not addressed by this Honorable Court in Durham, Id. Indeed, the Appellant has argued that stare decisis applies, erroneously claiming that the issues presented in Durham, Id. are identical to the issues presented in this appeal. As this Honorable Court noted in Durham,

"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 diseases. Thus, the argument is not preserved for our review."

Accordingly, the issues raised in this appeal are ones of first impression and therefore, not subject to the doctrine of stare decisis.

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 Jesse'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). 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.

BY: _____


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APPENDIX

I. Court of Appeals Decision rendered on April 9, 2010

Commonwealth of Kentucky

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 342.16 provides that a claimant alleging CWP 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 claimant. We 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.

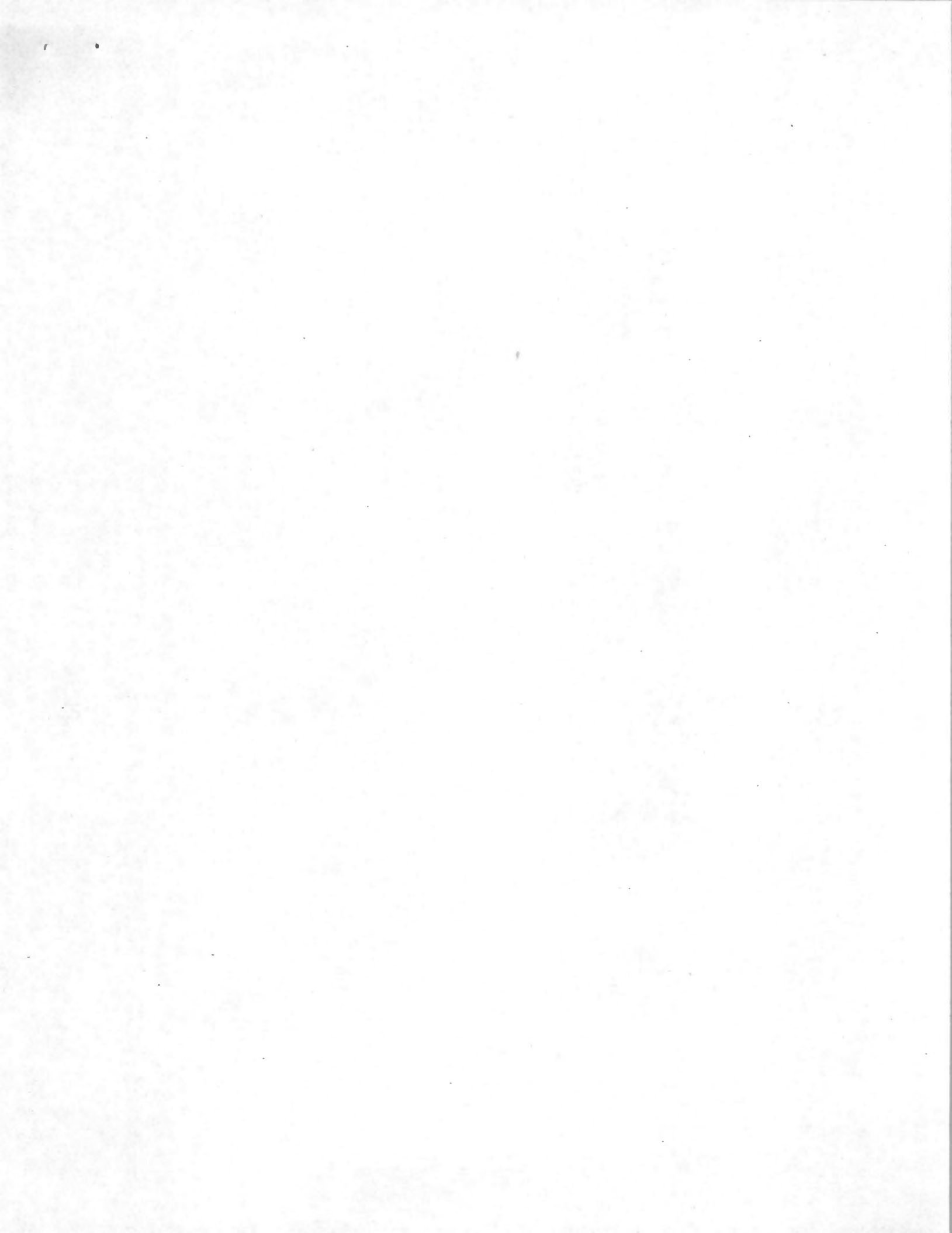
Id. at 197 (emphasis added). Said otherwise, radiographic examination determines the *presence* of pneumoconiosis, and oral testimony merely assists in determining the *cause*; *i.e.*, the particulate source of pneumoconiosis. Where a claim is based only on exposure to coal dust, presence or absence 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 Garcia'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, 2006 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.

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