

RENDERED: SEPTEMBER 28, 2007; 2:00 P.M.
TO BE PUBLISHED

OPINION MODIFIED NOVEMBER 9, 2007

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002628-WC

GLENN LUTZ

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-02141

ENERGY CONVERSION CORPORATION;
HON. J. LANDON OVERFIELD, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION BOARD;
WILLIAM EMRICK, ACTING EXECUTIVE DIRECTOR,
OFFICE OF WORKERS' CLAIMS; CHRISTOPHER H.
SMITH, EXECUTIVE DIRECTOR, OFFICE OF
WORKPLACE STANDARDS; AND GREGORY
D. STUMBO, ATTORNEY GENERAL OF THE
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: HOWARD AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Glenn Lutz petitions for the review of an opinion of
the Workers' Compensation Board (Board), entered October 27, 2006, affirming the

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

decision of an administrative law judge (ALJ) dismissing Lutz's workers' compensation claim against Energy Conversion Corporation. Lutz's sole argument is that Kentucky Revised Statute (KRS) 342.316, which deals with pneumoconiosis² disease, is unconstitutional because it violates his right to equal protection under the law. We disagree and thus affirm.

Lutz, who was born on May 13, 1950, is a former coal miner who worked for approximately 30 years in coal mines in western Kentucky. His last employer was Energy Conversion Corporation, and he last worked in the mines in 2000. Lutz alleges that the cumulative effect of being exposed to coal dust for 30 years caused him to suffer breathing problems attributable to pneumoconiosis.

On December 13, 2002, Lutz filed an “Application for Resolution of Coal Workers' Pneumoconiosis Claim”, alleging that he became affected by pneumoconiosis in October 2000. In support of his claim, Lutz attached the x-ray ILO report of Dr. Matthew Vuskovich establishing category 1/2 pneumoconiosis. In response, Energy Conversion Corporation submitted its own ILO report, prepared by Dr. Jerome Wiot, reading another chest x-ray of Lutz. Dr. Wiot's ILO report concluded that Lutz's x-ray was completely negative for pneumoconiosis.

Because there was no consensus, the x-rays were submitted to a panel of “B” readers. *See* KRS 342.316(3)(b)4.e. The three-member panel, consisting of Drs. James Lockey, Dennis Halbert, and William Kendall, unanimously agreed that the x-ray

² Pneumoconiosis is otherwise known as black lung disease.

read by Dr. Vuskovich had the best quality and would be used by the panel. The consensus interpretation was negative and was submitted to the ALJ.

Lutz did not submit in rebuttal an additional report of the x-rays considered by the consensus panel, as authorized by an Office of Workers' Claims regulation. Accepting the panel's findings, the ALJ dismissed Lutz's claim on January 30, 2006. Lutz appealed the ALJ's decision to the Board, arguing that KRS 342.316 was an unconstitutional infringement on his right to equal protection under the law. The Board affirmed the ALJ's decision, correctly noting that it did not have the authority to rule on Lutz's constitutional challenge. This petition for review followed.

Lutz argues that KRS 342.316 is “unconstitutional in that it violates the injured coal miner's rights to equal protection under the United States Constitution Amendment 14, and the Kentucky Constitution Sections 1, 2, and 3.”³ We disagree.

Lutz argues that KRS 342.316 is discriminatory against coal miners complaining of pneumoconiosis, as opposed to other workers subjected to more immediate and traumatic injuries, because they are treated differently. First, Lutz states that miners with pneumoconiosis must overcome the presumption of an adverse finding of a consensus panel by clear and convincing evidence (KRS 342.316(13)), while other injured workers must only prove their cases by a preponderance of the evidence.⁴

Second, Lutz states that miners with pneumoconiosis are unfairly limited to x-ray

³ We note at this point that the Kentucky Supreme Court upheld the constitutionality of KRS 342.316 from an attack on due process grounds in *Hunter Excavating v. Bartrum*, 168 S.W.3d 381 (Ky. 2005).

⁴ The Kentucky Supreme Court recognized this distinction between KRS 342.315(2) and KRS 342.316(13) in *Hunter Excavating v. Bartrum*, *supra*.

evidence in the type of proof that they may present. He notes that such miners may not introduce additional evidence such as the number of years they were exposed to coal dust and the type of work they performed.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that persons similarly situated must be treated alike. *See Weiland v. Bd. of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, 92 (Ky. 2000). Lutz contends that coal miners with pneumoconiosis are similarly situated with miners who have suffered more traditional-type injuries. We disagree.

Coal miners with pneumoconiosis contracted their disease through exposure to coal dust over a period of time. Miners with more traditional-type injuries generally suffered their injuries immediately and in a traumatic manner. While occupational diseases are often difficult to diagnose, the cause of traumatic injuries is usually readily apparent. The type of injury is significantly different and the manner required to prove such injuries is different. The presence of coal miner pneumoconiosis is required to be proven by x-ray evidence. *See Hunter Excavating*, 168 S.W.3d at 385. In short, we disagree that miners with pneumoconiosis and miners with traditional-type injuries are similarly situated. Therefore, in light of the differences in the two groups, we conclude that they need not be treated the same. Thus, we see no equal protection violation in this regard.

Even if the two groups were construed to be similarly situated, we perceive no equal protection violation. “[T]he General Assembly may properly classify in its legislation provided ‘the objective is legitimate and the classification is rationally related

to that objective.’” *Mullins v. Manning Coal Corp.*, 938 S.W.2d 260, 263 (Ky. 1997), quoting *Chapman v. Eastern Coal Corp.*, 519 S.W.2d 390, 393 (Ky. 1975). “Consistent with its statutory authority, the Department of Workers’ Claims has a legitimate interest in the orderly and efficient processing of claims and in limiting the introduction of evidence that is no more than cumulative.” *Hunter Excavating, supra*. Furthermore, “[e]videntiary restrictions may be imposed if they are reasonably calculated to advance a legitimate interest of the tribunal and do not unduly burden the interests of the parties.” *Id.* In light of the differences in the type of injuries and the manner of proving those injuries, we conclude that the legislature had a legitimate state interest in enacting the statutory scheme challenged herein. Therefore, we conclude that the statute does not violate the equal protection rights of coal miners who may have a claim for pneumoconiosis.

Accordingly, the opinion of the Workers’ Compensation Board is affirmed.

HOWARD, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I must dissent from the opinion of the majority. I would hold that the imposition of the clear and convincing standard of proof is a clear violation of the Equal Protection Clause of both the United States and Kentucky constitutions. It not only treats those presenting a claim for workers’ compensation due to pneumoconiosis differently than other claimants; it requires of those workers a standard of proof greater than that required for any litigant for damages in the Commonwealth. Further, the manner in which KRS 342.316 requires the

Administrative Law Judge treat the evidence completely removes all authority to find facts and strips the ALJ of the discretion permitted that fact finder in all other workers' compensation cases. I would hold the statute unconstitutional.

BRIEF FOR APPELLANT:

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**BRIEF FOR APPELLEE, ENERGY
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