

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2007-CA-000010-WC

LARRY CAIN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-01726

LODESTAR ENERGY, INC.; WILLIAM EMRICK,  
ACTING EXECUTIVE DIRECTOR, OFFICE OF  
WORKERS' CLAIMS; CHRISTOPHER H. SMITH,  
EXECUTIVE DIRECTOR, OFFICE OF WORKPLACE  
STANDARDS, KENTUCKY LABOR DEPARTMENT;  
HONORABLE J. LANDON OVERFIELD, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND VANMETER, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

CAPERTON, JUDGE: Larry Cain (Cain) appeals from an opinion of the Workers'

Compensation Board (WCB) that affirmed the dismissal of his pneumoconiosis benefits

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<sup>1</sup> Senior Judge William L. Knopf, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Revised Statutes (KRS) 21.580.

claim by an administrative law judge (ALJ). The only issue on appeal is whether Kentucky Revised Statutes (KRS) 342.316 violates the equal protection guarantees of the Federal and State Constitutions. We find KRS 342.316 constitutional and thus affirm.

Cain brought forth his coal workers pneumoconiosis claim by filing the required form before the ALJ in October 2002. Cain also submitted a chest x-ray interpreted by Dr. Matthew Vuskovich.<sup>2</sup> Dr. Vuskovich determined that the x-ray was positive for pneumoconiosis<sup>3</sup> Category 2/1. Cain's employer, Lodestar Energy, Inc. (Lodestar) submitted a separate chest x-ray interpreted by Dr. B.T. Westerfield.<sup>4</sup> Dr. Westerfield concluded that the x-ray was positive for pneumoconiosis, Category 1/1. The ALJ sent the conflicting<sup>5</sup> x-rays to the consensus panel. The panel<sup>6</sup> classified the x-rays negative for pneumoconiosis. The ALJ accepted the consensus panel classification of no pneumoconiosis and dismissed Cain's claim. Cain appealed the dismissal to the WCB.

While Cain's case was pending, the Kentucky Supreme Court issued its opinion in *Hunter Excavating v. Bartum*, 168 S.W.3d 381 (Ky. 2005). The appellant in

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<sup>2</sup> Dr. Vuskovich is a "B" reader as required by KRS 342.316.

<sup>3</sup> Coal Workers' Pneumoconiosis is also known as "Black Lung."

<sup>4</sup> Dr. Westerfield is a certified "B" reader.

<sup>5</sup> While both x-rays were positive for pneumoconiosis they were not in consensus. Under KRS 342.316(3)(b)4.f.,

"Consensus is reached between two (2) chest X-ray interpreters when their classifications meet one (1) of the following criteria: each finds either category A, B, or C progressive massive fibrosis; or findings with regard to simple pneumoconiosis are both in the same major category and within one (1) minor category (ILO category twelve (12) point scale) of each other.

Since the two x-rays were not in the same major category and within one minor category of each other, consensus was not reached.

<sup>6</sup> The panel consists of three independent "B" readers.

*Hunter Excavating* challenged the constitutionality of the consensus process in KRS 342.316 on due process grounds. The Court found KRS 342.316 constitutional. However, the Court concluded that KRS 342.316 did not preclude the parties from submitting evidence to rebut the consensus panel classification. The WCB pursuant to the guidance given by *Hunter Excavating* remanded Cain's claim back to the ALJ for additional proof taking. Both parties filed additional evidence before the ALJ. Again, the ALJ accepted the consensus classification noting that Cain's evidence was insufficient to rebut the statutory evidentiary presumption that "[t]he consensus classification shall be resumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence." See KRS 342.316(13). The ALJ entered an order denying Cain's claim and Cain appealed.

On appeal to the WCB, Cain alleged that KRS 342.316 violated his equal protection rights under the Federal and State Constitutions by treating coal workers with pneumoconiosis differently than other injured workers. The WCB acknowledged that the Kentucky Supreme Court in *Hunter Excavating* held that KRS 342.316 did not violate due process guarantees under the United States and Kentucky Constitutions. The WCB noted that the court did not address whether KRS 342.316 violated equal protection guarantees. As such, the WCB affirmed the ALJ decision, concluding that the WCB was without power to entertain this constitutional issue. *Blue Diamond Coal Co. v. Cornett*, 189 S.W.2d 963 (Ky. 1945). Cain appeals to our Court.

While the Kentucky Supreme Court upheld the consensus process in *Hunter Excavation* from a due process attack, the Court did not address an equal protection claim.

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). Cain contends that coal miners with pneumoconiosis are similarly situated with miners who have suffered more traditional-type injuries. We note that Cain's equal protection argument does not address a situation in which two miners, each positive for pneumoconiosis but one with a greater disparity in readings than the other results in the one with the greater disparity having a clear and convincing burden while the other enjoys a preponderance of the evidence burden. Regardless, as to Cain's argument before this Court, we disagree.

Coal miners with pneumoconiosis contract their disease through exposure to coal dust over a period of time. Miners with more traditional-type injuries generally suffer 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.

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*, 168 S.W. 3d at 385. 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, we affirm the Workers Compensation Board’s opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Thomas E. Springer, III  
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BRIEF FOR APPELLEES:

Stanley S. Dawson  
Fulton & Devlin  
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