

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000032-WC

ANTHONY DURHAM

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-00424

PEABODY COAL COMPANY;
HON. RICHARD JOINER, 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, SENIOR JUDGE.¹

BUCKINGHAM, SENIOR JUDGE: Anthony Durham petitions for the review of an opinion of the Workers' Compensation Board (Board), entered December 12, 2006, affirming the decision of an administrative law judge (ALJ) dismissing Durham's

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.

workers' compensation claim against Peabody Coal Company (Peabody). Durham'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.

Durham, who was born on August 24, 1942, is a former coal miner who worked for over 35 years in coal mines in western Kentucky. Durham worked exclusively as a mechanic for Peabody all those years. He alleges that the cumulative effect of being exposed to coal dust over the years caused him to contract pneumoconiosis.

On March 3, 2004, Durham filed an “Application for Resolution of Coal Workers' Pneumoconiosis Claim,” alleging that he became affected by pneumoconiosis in October 2003. In support of his claim, Durham attached the x-ray ILO report of Dr. Matthew Vuskovich establishing category 1/1 pneumoconiosis. In response, Peabody submitted its own ILO report, prepared by Dr. Robert Pope, reading another chest x-ray of Durham. Dr. Pope's ILO report concluded that Durham's x-ray was 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. Schulteis, Rosenberg, and Dineen, unanimously agreed that the x-ray read by Dr. Pope had the best quality and would be used by the panel. The consensus interpretation was negative and was submitted to the ALJ.

² Pneumoconiosis is otherwise known as black lung disease.

Durham 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 Durham's claim on February 20, 2006. Durham 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 Durham's constitutional challenge. This petition for review followed.

Durham 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.

Durham 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, Durham 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, Durham states that miners with pneumoconiosis are unfairly limited to x-ray evidence in the type of proof that they may present. He notes that such miners may not

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*.

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). Durham 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 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:

Thomas E. Springer III
Madisonville, Kentucky

BRIEF FOR APPELLEE, PEABODY
COAL COMPANY:

Peter J. Glauber
Louisville, Kentucky