

BREATHING EASIER: EQUAL PROTECTION AND WORKERS' COMPENSATION FOR COAL WORKERS' PNEUMOCONIOSIS IN *DURHAM V. PEABODY COAL COMPANY*

MATTHEW C. COCANOUGHER*

I. INTRODUCTION

The coal industry finds itself in a unique position when dealing with workers' compensation benefits. On one hand, it wants to adequately compensate those who suffer from a disease caused by exposure to the very mineral they extract. On the other hand, it needs to make sure that the claims for benefits are only provided to those who actually develop the disease. Coal Workers' Pneumoconiosis (hereinafter "CWP") is difficult to diagnose. As a result, there have historically been problems with coal miners drawing workers' compensation benefits for CWP when they "met criteria for compensation only because they smoked cigarettes or had [a] non-respiratory disability such as heart disease, hypertension or obesity."¹ A 1980 study determined that out of 150 coal miners who were workers' compensation claimants, "none had progressive massive fibrosis (hereinafter "PMF"), the only true disabling form of coal workers' pneumoconiosis."² The study warned that we should "not try to delude ourselves that coal mining leads to disabling respiratory impairment in the absence of PMF."³

In Kentucky, which ranks third in the United States for coal production,⁴ the legislature has been forced to frequently address the aforementioned problems. Through numerous amendments to the relevant statute, the Kentucky legislature has tried to balance the rights of the miners against the rights of the state to compensate only those who meet the criteria for the disease.⁵ This balancing act was reviewed by the Kentucky Supreme Court in *Durham v. Peabody Coal Co.*, which specifically

* Comments Editor, KENTUCKY JOURNAL OF EQUINE, AGRICULTURE, & NATURAL RESOURCES LAW, 2010-2011. B.A. 2008, Centre College, J.D. expected May 2011, University of Kentucky College of Law.

¹ Lawrence Martin, *Pitfalls in Diagnosis of Occupational Lung Disease for Purposes of Compensation – One Physician's Perspective*, 13 J.L. & HEALTH 49, 54 (1999) (citation omitted).

² W. Keith C. Morgan, N. LeRoy Lapp & Douglas Seaton, *Respiratory Disability in Coal Miners*, 243 JAMA 2401, 2403 (1980).

³ *Id.* at 2404.

⁴ Tim Huber, *EPA Delays 79 Mine Permits: Agency Wants Fewer, Smaller Valley Fills, Seeks More Monitoring*, CHARLESTON DAILY MAIL, Oct. 1, 2009, at 1B, available at NEWSBANK Record No. 2009274535.

⁵ See Department of Workers' Claims, <http://www.labor.ky.gov/workersclaims/> (last visited Jan. 26, 2010) [hereinafter, "Dep't of Claims"].

addressed the constitutionality of a statutory provision that treated injured coal miners differently than those injured in a traumatic accident for workers' compensation purposes.⁶

Section II of this Comment will address the legal background of workers' compensation law in Kentucky. In addition, section II will discuss the procedure for bringing a workers' compensation claim and provide a brief overview of CWP and its diagnosis. Section III will focus on the case history of *Durham*. Section IV will analyze the court's reasoning in *Durham* by focusing on the holding. Section V will address potential impacts of *Durham* on the coal industry and coal miners as a whole. Section VI will conclude this Comment.

II. LEGAL BACKGROUND

It is helpful to examine a few key concepts of Kentucky workers' compensation law, especially as it relates to the coal industry, to fully understand the context of the *Durham* case. Generally, workers' compensation attempts to "restore an income stream to an injured worker to the extent it has been severed by an industrial injury or occupational disease."⁷

A. Workers' Compensation Law in Kentucky

Kentucky's workers' compensation program covers "approximately 80,000 employers and 1.7 million employees," with program costs around \$1.5 billion per year.⁸ It has gone through many changes in recent decades, particularly because of issues faced by the coal industry.

In 1996, the "premiums in the coal industry had risen 89 percent in the preceding two years."⁹ Not only was the coal industry dealing with these higher premiums, but "the number of workers receiving awards in the previous seven years had more than doubled, despite no evidence of [an] increase in on-the-job injuries."¹⁰ In response to these costly problems, the Kentucky legislature enacted wide scale reforms in December 1996.¹¹ These reforms focused on continuing to protect injured employees while lessening the financial burden on employers.¹²

The workers' compensation laws were revised again in 2000, reinstating the Workers' Compensation Board as the first appellate avenue

⁶ *Durham v. Peabody Coal Co.*, 272 S.W.3d 192 (Ky. 2008).

⁷ Dep't of Claims, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

before taking a claim to the Court of Appeals.¹³ Finally, the laws were amended in 2002 by “providing that coal miners who leave the coal mining industry and are determined to suffer from the occupational disease of coal worker’s pneumoconiosis (black lung) should have an opportunity to make [a] transition to other employment by education and retraining programs.”¹⁴ It is this procedure set forth in the 2002 revision that was constitutionally challenged by the coal miners in *Durham v. Peabody Coal Co.*¹⁵

B. Workers’ Compensation Procedure

Kentucky Revised Statutes (hereinafter “KRS”) Chapter 342 covers workers’ compensation law.¹⁶ The chief function of this chapter is “to provide timely medical services for the cure or relief of the injury; and to provide rehabilitation and retraining services to injured workers unable to return to their former jobs.”¹⁷ The specific statute at issue in this case is KRS 342.316, which establishes the procedure for a coal miner filing for workers’ compensation benefits because of CWP.¹⁸

C. Coal Workers’ Pneumoconiosis

The Center for Disease Control (hereinafter, “CDC”) defines CWP as “a lung disease caused by inhaling coal mine dust.”¹⁹ Alarming, “according to recent studies by the National Institute for Occupational Safety and Health (hereinafter, “NIOSH”), about one of every 20 miners participating in our program has X-ray evidence of some pneumoconiosis.”²⁰

The disease varies in severity; for example, “[i]n its early stages, . . . the disease may not prevent you from working or carrying on most normal activities.”²¹ However, if “the disease progresses from simple to complicated pneumoconiosis, a condition also called progressive massive fibrosis [exists].”²² The CDC also notes that “there is no cure for the damage that the dust has already done to your lungs.”²³

¹³ Dep’t of Claims, *supra* note 5.

¹⁴ *Id.*

¹⁵ *Durham*, 272 S.W.3d at 194.

¹⁶ See KY. REV. STAT. ANN. § 342 (West, Westlaw through 2009 legislation).

¹⁷ Dep’t of Claims, *supra* note 5.

¹⁸ KY. REV. STAT. ANN. § 342.316 (West, Westlaw through 2009 legislation).

¹⁹ NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, CENTERS FOR DISEASE CONTROL, COAL WORKERS’ X-RAY SURVEILLANCE PROGRAM: FREQUENTLY ASKED QUESTIONS & RESOURCE LIST (NIOSH Pub. No. 2002-122) (2002), <http://www.cdc.gov/niosh/docs/2002-122>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

To determine which category of CWP is present, it is important to understand the effect that coal dust has on miners. As pointed out by the United States Occupational Health and Safety Organization, “[c]oal dust causes pneumoconiosis, bronchitis and emphysema in exposed workers.”²⁴ Medically, “[s]imple CWP is characterized by development of coal macules, a focal collection of coal dust particles with a little reticulin and collagen accumulation.”²⁵ This forms lesions which “may be visible as small opacities (less than 1 cm in diameter) on X-rays.”²⁶ When a medical professional examines the X-rays, “[t]he profusion of small opacities is classified into four major categories (0, 1, 2, or 3), with subdivisions reflecting variation within the major category; category 1/0 or higher is considered radiographic evidence of pneumoconiosis.”²⁷

III. CASE HISTORY

Durham v. Peabody Coal Co. is a consolidated case of coal miners who worked in coal mines for 30 to 35 years each.²⁸ Each miner claimed to suffer from Category 1 CWP.²⁹ Accordingly, each applied for workers’ compensation benefits under KRS 342.316, which governs the procedure for determining workers’ compensation benefits for CWP.³⁰ Both the workers and their employers submitted X-rays as evidence of whether CWP existed.³¹ The workers’ experts concluded that the miners had either Category 1/0, 1/1, or 1/2 CWP.³² The employers’ experts reported Category 0/0, a complete absence of the disease, for all of the miners.³³

Where an employer’s expert evidence conflicts with a worker’s expert evidence and one of the readings is low enough to deny the claimant benefits while the other is high enough to grant benefits, KRS 342.316(3)(b)4.e is used and a panel of three NIOSH certified “B” readers³⁴

²⁴ Occupational Safety and Health Administration, U.S. Department of Labor, Occupational Safety and Health Guideline for Coal Dust (less than 5 percent SiO₂), <http://www.osha.gov/SLTC/healthguidelines/coal-dust-less-5-percent-sio2/recognition.html> (last visited, Jan. 28, 2010).

²⁵ *Id.*

²⁶ *Id.*

²⁷ M.D. Attfield & E.L. Peterson, *Advanced Pneumoconiosis Among Working Underground Coal Miners – Eastern Kentucky and Southwestern Virginia, 2006*, 56 MORBIDITY AND MORTALITY WKLY REP. 652, 653 (2007), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5626.pdf>.

²⁸ See *Durham*, 272 S.W.3d at 194.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ “A “B” reader is a physician (not necessarily a radiologist) who has taken a course on reading pneumoconiosis chest X-rays according to the standards to the International Labor Organization (hereinafter, “ILO”), and passed a timed X-ray interpretation test.” Martin, *supra* note 1, at 59.

determine the amount of the disease actually present.³⁵ However, in situations where both initial readings from the employer and employee are high enough for the employee to receive benefits, but there is a disparity with the expert's determination of the category of disease, the Kentucky Supreme Court recently held that using the KRS 342.316(b)4.e process of the "B" readers is unconstitutional.³⁶ This decision was limited to a discrepancy in readings when both parties agree there is evidence of CWP and does not restrict the "B" readers process when the initial readings of the X-rays by the experts show either a presence of CWP or a total absence of CWP.³⁷

In *Durham*, the panel of "B" readers agreed that each of the coal miner's X-ray evidence produced a 0/0 or negative reading.³⁸ After a decision by the panel, KRS 342.316(13) states in part that "[t]he consensus classification shall be presumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence."³⁹ Thus, a worker may rebut the panel's consensus with clear and convincing evidence. This is the provision which was constitutionally challenged by the miners.

Instead of trying to rebut the "B" readers' findings, the coal miners brought this action and argued that "KRS 342.316 discriminates unlawfully between workers who are injured by a harmful occupational exposure to coal dust and those who become physically disabled by a traumatic injury."⁴⁰ The miners also argued that the statute denied them equal protection under the Fourteenth Amendment of the United States Constitution because it requires them to "submit clear and convincing evidence. . . , [the toughest standard to meet in civil litigation,] while other workers [could] prove an injury with only a preponderance of the evidence."⁴¹ They further contended that KRS 342.316 limits them to X-ray evidence and strips the administrative law judge (hereinafter, "ALJ") "of the discretion to consider a worker's credible testimony regarding breathing difficulties" and the type and amount of exposure to coal dust.⁴²

³⁵ KY. REV. STAT. ANN. § 342.316(3)(b)4.e (West, Westlaw through 2009 legislation).

³⁶ *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 43 (Ky. 2009).

³⁷ *Id.*

³⁸ *Durham*, 272 S.W.3d at 194.

³⁹ KY. REV. STAT. ANN. § 342.316(13) (West, Westlaw through 2009 legislation).

⁴⁰ *Durham*, 272 S.W.3d at 194.

⁴¹ *Id.* at 194–95.

⁴² *Id.* at 195.

IV. THE COURT'S ANALYSIS

A. The Holding

The Kentucky Supreme Court ultimately held that "inherent differences between coal workers' pneumoconiosis and traumatic injuries provide a reasonable basis or substantial and justifiable reason for different statutory treatment."⁴³ The court reached this decision after determining that while CWP can develop into a disabling disease, the state has a legitimate interest in treating CWP differently than traumatic injuries suffered on the job.⁴⁴ After explaining that the miners failed to bring a more comprehensive argument that would have included a comparison to workers with traumatic injuries and "other occupational pneumoconioses or diseases,"⁴⁵ the court stated that in a workers' compensation setting "all claimants bear the burden of proof and the risk of nonpersuasion before the ALJ."⁴⁶ It reasoned that KRS 342.316 explicitly states that if a claimant's evidence is challenged by sufficiently persuasive evidence, that claimant must then produce more convincing evidence for rebuttal or their claim will be unsuccessful.⁴⁷ Furthermore, the court found that "[w]hen met with evidence more convincing than his own, a claimant's burden on rebuttal is even higher."⁴⁸ The court concluded its analysis by reasoning that the types of evidence used for traumatic injuries will have to vary with the type of injury, but evidence for CWP is proved with X-ray evidence; therefore, there was "a reasonable basis for treating the conditions differently."⁴⁹

i. State's Interest in Treating Workers with CWP Differently

The court began its analysis by stating that the Fourteenth Amendment "requires persons who are similarly situated to be treated alike."⁵⁰ It recited the general proposition that statutes "concerning social or economic matters generally comply with federal equal protection requirements if the classifications that they create are rationally related to a

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ *Id.* at 194 n.2.

⁴⁶ *Durham*, 272 S.W.3d at 196 (citing *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. Ct. App. 1984); *Snawder v. Stice*, 576 S.W.2d 276 (Ky. Ct. App. 1979); *Young v. Burgett*, 483 S.W.2d 450 (Ky. 1972); *Roark v. Alva Coal Corp.*, 371 S.W.2d 856 (Ky. 1963)).

⁴⁷ *Id.* at 196.

⁴⁸ *Id.*

⁴⁹ *Id.* at 198.

⁵⁰ *Id.* at 195.

legitimate state interest.”⁵¹ The court also noted that its “[a]nalysis begins with the presumption that the legislative acts are constitutional.”⁵²

The court then addressed the state’s interest in upholding the current procedure for determining benefits for CWP claims by describing the history of amendments to KRS 342.316. It found that “in 1987, legislators relied on testimony from medical experts that coal workers who suffer from pneumoconiosis should be encouraged to find other employment but that even category 3 simple pneumoconiosis is not usually associated with any significant decrease in lung function.”⁵³ The court noted that these reforms were an “attempt to control the cost of coal workers’ pneumoconiosis claims, particularly by workers with no significant respiratory impairment.”⁵⁴

The court found further support for the state’s interest in treating these groups differently by pointing out the distinguishing factors between traumatic injuries and CWP.⁵⁵ It observed that traumatic injuries, unlike CWP, take place suddenly and are easier to differentiate from one another.⁵⁶

ii. KRS 342.316 Does Not Deny Equal Protection

The court began its equal protection analysis by acknowledging that KRS 342.316(13), which imposes a clear and convincing evidence standard to overcome the “B” readers consensus, may appear discriminatory.⁵⁷ However, it then reasoned that while KRS 342.316(13) may appear unfair, the coal miner must go through the same process as any other worker attempting to file a successful workers’ compensation claim.⁵⁸

Since the “B” readers’ procedure was the one at issue, the court next focused on the merits of this evidentiary requirement.⁵⁹ It held that “although the claimants offered substantial evidence in the form of an x-ray interpretation of category 1 pneumoconiosis, their employers met that evidence with equally persuasive substantial evidence to the contrary.”⁶⁰ The unbiased “B” readers are to be used in this type of situation to help determine the miner’s actual health condition.⁶¹ Even, as in this case, when

⁵¹ *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 440 (1985)).

⁵² *Durham*, 272 S.W.3d at 195 (citing *United Dry Forces v. Lewis*, 619 S.W.2d 489 (Ky. 1981); *Sims v. Bd. of Educ.*, 290 S.W.2d 491 (Ky. 1956); *Brooks v. Island Creek Coal Co.*, 678 S.W.2d 791 (Ky. Ct. App. 1984)).

⁵³ *Id.* (citing *Ky. Harlan Coal Co. v. Holmes*, 872 S.W.2d 446 (Ky. 1994)).

⁵⁴ *Id.* at 196.

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Durham*, 272 S.W.3d at 196.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

the three “B” readers consensus is against the X-ray evidence presented by the claimants, there is still a possibility of recovery for the claimant, as “KRS 342.316(13) provides a rebuttable presumption that a consensus of the three “B” readers is correct but allows the presumption to be overcome with clear and convincing evidence.”⁶² The court, therefore, considered this a reasonable procedure that did not violate equal protection.

iii. Clear and Convincing Evidence Standard on Rebuttal

The court cited *Fitch v. Burns*, which defined the clear and convincing evidence standard as “evidence substantially more persuasive than a preponderance of the evidence, but not beyond a reasonable doubt.”⁶³ In *Durham*, the court held that to overcome a consensus of the “B” readers, “[o]nly overwhelming evidence would reasonably overcome such evidence.”⁶⁴

In *Hunter Excavating v. Bartrum*, the court addressed this point more fully, finding that the “Department [of Workers’ Claims] has a reasonable basis for limiting any party to evidence that is relevant and not merely cumulative.”⁶⁵ The court, in *Durham*, held that “KRS 342.316 does not make it impossible to rebut the panel’s consensus by restricting the evidence that may be submitted;” the court, therefore, upheld the clear and convincing evidence standard needed to rebut the “B” reader consensus.⁶⁶

iv. Sufficiency of X-ray Evidence

When determining the sufficiency of X-ray evidence, it is helpful to look at the definitions contained in the workers’ compensation statute. The court found that the relevant portion, KRS 342.0011(1), “requires a work-related harmful change in the human organism to be evidenced by ‘objective medical findings’ and states that when used generally, the term ‘injury’ includes occupational diseases.”⁶⁷ Therefore, anyone seeking workers’ compensation benefits “must prove the existence of the work-related harmful changes with information that a physician gains through direct observation and/or testing that utilizes objective or standardized methods.”⁶⁸ For coal miners, the “X-ray is the objective method by which

⁶² *Id.*

⁶³ *Id.* at 196–97 (quoting *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky. 1989)).

⁶⁴ *Durham*, 272 S.W.3d at 197.

⁶⁵ *Id.* (citing *Hunter Excavating v. Bartrum*, 168 S.W.3d 381, 385 (Ky. 2005)).

⁶⁶ *Id.*

⁶⁷ *Id.* (quoting KY. REV. STAT. ANN. § 342.0011(1) (West, Westlaw through 2009 legislation)).

⁶⁸ *Id.* (citing KY. REV. STAT. ANN. § 342.0011(33) (West, Westlaw through 2009 legislation); *Gibbs v. Premier Scale Co./Indiana Scale Co.*, 50 S.W.3d 754 (Ky. 2001)).

physicians diagnose the presence of pneumoconiosis and categorize its severity.”⁶⁹ While the court agreed that a worker’s testimony about his length of exposure to coal dust can aid a physician in determining the “cause of pneumoconiosis,” it held that this type of testimony fails as “objective medical findings regarding the presence of the disease or the disease category.”⁷⁰

The court next addressed the Kentucky Administrative Regulations (hereinafter, “KAR”) which apply to KRS 342.316. It cited *Hunter Excavating*, which determined that the version of 803 KAR 25:009 in effect at the time violated due process because it prohibited a rebutting party from providing additional reports of the X-rays in evidence.⁷¹ This regulation was amended after the court in *Hunter Excavating* found it unconstitutional and the current form of 803 KAR 25:009, section 3(1) “allows a party seeking to rebut a panel’s consensus to submit an additional interpretation of one of the x-rays in evidence,”⁷² and 803 KAR 25:009, section 4(5) provides the ALJ with the authority to “allow timely cross-examination of a medical evaluator that participated in the consensus process at the expense of the moving party.”⁷³

The court concluded its reasoning concerning the state’s legitimate interest in treating the procedures for workers with CWP differently by stating the evidence needed to prove CWP is “proven with x-ray evidence,” while the evidence for a traumatic injury can vary with the type of injury.⁷⁴ It held that this “difference provides a reasonable basis for treating conditions differently.”⁷⁵ These findings allowed the court to ultimately hold that X-ray evidence is the medically objective way to determine whether CWP exists but that additional X-ray evidence could be submitted to the panel.⁷⁶

v. Dissent

The dissent in this case, written by Justice Scott, stated that “[y]ou simply can not, in these circumstances, fairly impose a more stringent, higher standard on one and not the other,” referring to CWP as opposed to workers with traumatic injuries.⁷⁷ Thus, the dissent found that the “statutory scheme of KRS 342.316 . . . violates the Equal Protection clause

⁶⁹ *Id.*

⁷⁰ *Durham*, 272 S.W.3d at 197.

⁷¹ *Id.* (citing *Hunter Excavating*, 168 S.W.3d at 385).

⁷² *Id.* at 198.

⁷³ 803 KY. ADMIN. REGS. 23:009 § 4(5) (West, Westlaw through Feb. 1, 2009).

⁷⁴ *Durham*, 272 S.W.3d at 198.

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *Id.*

of the United States and Kentucky Constitutions and is therefore unconstitutional.”⁷⁸

V. IMPLICATIONS

The Kentucky Supreme Court’s decision in *Durham* approved the Kentucky legislature’s most recent amendment to KRS 342.316.⁷⁹ The majority’s decision made clear that it believes this legislation is continuing to serve its purpose of separating valid claims from invalid claims and compensating those workers who are determined to be truly injured.⁸⁰ This decision also raises issues involving attorney costs, how to select the correct medical expert, and how to make the best comparison for an equal protection argument.

First, this decision could impose additional costs on attorneys representing Kentucky coal miners. As X-ray evidence is the only evidence which may actually be used to prove CWP, attorneys for coal miners bringing a workers’ compensation claim will be forced to go through the expense of hiring a medical expert to interpret their client’s X-rays before they know whether or not they have potentially successful claims. If the miner is complaining of the symptoms of CWP but it turns out that the X-rays do not show a sufficient presence of the disease, the attorney will then be faced with the decision of whether to get an additional expert opinion or abandon the claim. This could discourage attorneys from accepting workers’ compensation claims for miners with CWP from the outset.

On the other hand, attorneys representing Kentucky coal companies should also use this decision to prepare for employees’ workers’ compensation claims. While it may be costly for a coal company to take multiple X-rays for each employee’s claim, this may be a necessary step to rebut the “B” readers. As evidenced by *Durham*, having the ability to rebut the X-rays is a vital step in challenging a miner’s claim. The more X-rays and expert interpretations the coal companies have, the greater the chances of successfully separating the valid claims from the invalid claims. As the coal companies are paying the premiums for workers’ compensation insurance and losing long-time employees to CWP, they have a strong interest in ensuring that their workers are compensated according to the presence and severity of their disease.

⁷⁸ *Id.*

⁷⁹ *See id.*

⁸⁰ *See id.*

Furthermore, attorneys for both sides need to be wise in choosing medical experts to examine the X-rays. Dr. Lawrence Martin⁸¹ warns that while the “vast majority of physicians rely on independent radiologists to take and interpret chest X-rays on their patients. . . . [S]ome non-radiology trained physicians operate X-ray machines in their offices and then formally interpret the claimant’s chest X-ray.”⁸² Martin warns that “this practice can lead to over-interpretation,” which could affect whether the claim is accepted or rejected.⁸³ As a result, it could be to an attorney’s advantage to hire someone certified as a “B” reader to interpret the X-rays. This would allow the attorney to get a hypothetical indication of what the panel will decide if the matter progresses to that stage. It must also be considered, as evidenced by *Durham*, that choosing the wrong expert could give a claimant false hope of a successful claim, only to be trumped by the “B” readers.

Finally, *Durham* could shape future equal protection arguments for workers’ compensation claimants. The recent holding in *Cain* shows that the armor of KRS 342.316 may be pierced, as the court found the “B” reader procedure outlined in KRS 342.316(3)(b)4.e was unconstitutional when a worker with two initial X-rays that, while conflicting, still contained high enough readings to grant benefits.⁸⁴ However, the *Cain* decision also enhanced the rationale of *Durham* by citing to that decision for the proposition that the consensus process of the “B” readers does not deny equal protection to “all coal workers who raise pneumoconiosis claims.”⁸⁵ Read together, *Durham* and *Cain* may show that the Kentucky Supreme Court remains undecided regarding the constitutionality of KRS 342.316.

As the *Durham* court noted, the Equal Protection clause of the Fourteenth Amendment is designed so that “persons who are similarly situated” are treated alike.⁸⁶ A problem for the coal miners in *Durham* was that they did not compare their procedure with that of similarly situated workers. In response to the plaintiffs’ choice to compare the procedure for CWP with that of traumatic injuries, the court stated in footnote two that “[t]he workers failed to raise . . . their present, more comprehensive argument,”⁸⁷ which would have compared the procedure for coal miners with CWP to that of workers with “other occupational pneumoconioses or diseases.”⁸⁸ In addressing this failure on the part of the plaintiffs, the court

⁸¹ Lawrence Martin served as the Chief in the Division of Pulmonary and Critical Care Medicine at Mt. Sinai Medical Center in Cleveland as well as an Associate Professor of Medicine at Case Western Reserve School of Medicine. Martin, *supra* note 1, at 49 n.1.

⁸² Martin, *supra* note 1, at 58.

⁸³ *Id.*

⁸⁴ *Lodestar Energy, Inc.*, 302 S.W.3d at 43.

⁸⁵ *Id.* at 42 (citing *Durham*, 272 S.W.3d 192 (Ky. 2008)).

⁸⁶ *Durham*, 272 S.W.3d at 195.

⁸⁷ *Id.* 194 n.2.

⁸⁸ *Id.*

opened the door to the idea that the result may have been different had it been able to hear this more comprehensive argument. Thus, for potential claimants contemplating an equal protection claim, this footnote suggests that they must consider the importance of the “similarly situated” requirement when bringing an action.⁸⁹ It is not enough to focus on the requirements of the procedure that are being challenged; rather, in bringing a Fourteenth Amendment claim, one must make the correct comparison with a procedure affecting workers with a similar plight. As shown in *Durham*, the failure to make the right comparison can be the difference between a successful and an unsuccessful claim.

VI. CONCLUSION

Determining workers’ compensation benefits for those suffering from CWP has long been a difficult task. After numerous revisions to Kentucky statutes arising from problems with escalating premiums and extra benefits being awarded without an increase in those suffering from CWP, the Kentucky Supreme Court seems comfortable with many of the procedures currently set out in KRS 342.316, as evidenced by the holding in *Durham*. Therefore, attorneys representing parties from the coal industry should use *Durham* to better prepare for defending workers’ compensation claims for CWP, and attorneys representing workers should use this case to ensure qualified medical experts read the X-rays. While the Kentucky legislature may be able to breathe easier for the moment, it should not hold its breath. As X-ray evidence of CWP could become costly for attorneys and a winning equal protection argument has already prevailed in *Cain*, it will be interesting to see whether another equal protection argument would lead the Kentucky Supreme Court to find the entire statute unconstitutional, in which case the Kentucky legislature may once again find itself forced to amend KRS 342.316.

⁸⁹ *Id.* at 195.