

SUPREME COURT OF KENTUCKY

Vision Mining, Inc. v. Gardner

364 S.W.3d 455 (Ky. 2011) · Decided December 22, 2011

SUMMARY

The Kentucky Supreme Court considered equal-protection challenges to Kentucky’s statutory consensus procedure and clear-and-convincing-evidence standard for coal workers’ pneumoconiosis claims. The court compared those requirements with the procedures and evidentiary standards applicable to other occupational pneumoconiosis claims and reviewed the claims of Jesse Gardner and Joe Martinez. The opinion concluded that the challenged statutory provisions denied coal workers equal protection under the law.

CASE DETAILS

COURT	Supreme Court of Kentucky
WRITING FOR THE COURT	Justice Scott; Scott; Cunningham; Minton; Noble; Schroder; Abramson; Venters
JURISDICTION	Kentucky
DECIDED	December 22, 2011
DISPOSITION	affirmed
PROCEDURAL POSTURE	Two coal workers sought workers’ compensation benefits under Kentucky Revised Statutes chapter 342. Administrative law judges dismissed both claims after consensus-panel X-ray readings were negative for coal workers’ pneumoconiosis. The Workers’ Compensation Board affirmed but declined to decide the constitutional issues; the Court of Appeals reversed, holding the statutory consensus procedure and clear-and-convincing rebuttal standard unconstitutional. The Supreme Court of Kentucky affirmed the Court of Appeals.
STANDARD OF REVIEW	Constitutionality of statutory classifications reviewed under rational-basis review applicable to social and economic legislation; legislative acts are presumed constitutional, but classifications must have a rational relationship or substantial and justifiable connection to a legitimate governmental interest.
PRECEDENTIAL VALUE	published precedential opinion of the Supreme Court of Kentucky

PARTIES

Vision Mining, Inc., Peabody Coal Company v. Jesse Gardner, Joe Martinez, Hon. Douglas W. Gott, Administrative Law Judge, Hon. R. Scott Borders, Administrative Law Judge, Workers' Compensation Board, Dwight Taylor Lovan, Commissioner, Department of Worker's Claims, Hon. Jack Conway, Attorney General of the Commonwealth of Kentucky, Christopher J. Smith, Executive Director, Office of Workplace Standards, Kentucky Labor Department

TOPICS

workers compensation

equal protection

rational basis review

constitutional law

statutory interpretation

PRACTICE AREAS

workers compensation

constitutional law

equal protection

administrative law

statutory interpretation

QUESTIONS PRESENTED

1. Whether KRS 342.316's consensus procedure for determining coal workers' pneumoconiosis violates equal protection.
2. Whether KRS 342.316(13)'s requirement that a claimant rebut a consensus finding by clear and convincing evidence violates equal protection.
3. Whether the disparate evidentiary treatment of coal workers' pneumoconiosis claimants, as compared with claimants suffering from other forms of pneumoconiosis, has a rational basis or substantial and justifiable reason.

HOLDINGS

1. KRS 342.316's two-step consensus procedure arbitrarily subjects coal workers' pneumoconiosis claimants to a more stringent procedure than workers suffering from other forms of pneumoconiosis and therefore violates the equal-protection guarantees of the Fourteenth Amendment and Sections 1, 2, and 3 of the Kentucky Constitution.
2. KRS 342.316(13)'s requirement that a coal workers' pneumoconiosis claimant rebut a consensus finding by clear and convincing evidence is unconstitutional because it imposes a higher burden than the standard applicable to other occupational pneumoconiosis claimants without a rational basis or substantial and justifiable reason.
3. Preferential benefits available to some coal workers do not justify imposing a more stringent consensus procedure and rebuttal standard on coal workers' pneumoconiosis claimants.

KEY QUOTATIONS

"Simply put, 'pneumoconiosis is pneumoconiosis is pneumoconiosis.'" (at 458)

"Because we consider the classification of coal workers' pneumoconiosis claimants to be arbitrary in regard to the more stringent proof or procedures required and believe that the disparate treatment afforded such

workers lacks a rational basis or substantial justification, we hold that the consensus procedure and the clear and convincing evidentiary standard are unconstitutional.” (at 473)

“Pneumoconiosis caused by exposure to coal dust is the same disease as pneumoconiosis caused by exposure to dust particles in other industries, yet coal workers face different, higher standard-of-proof requirements than those other workers.” (at 474)

FACTUAL BACKGROUND

Jesse Gardner worked underground in coal mines for approximately 37 years and submitted medical and testimonial evidence supporting a diagnosis of coal workers’ pneumoconiosis, but a three-reader consensus classified his X-ray as 0/0. Joe Martinez worked underground in coal mines for approximately 34 years, but a consensus panel likewise classified his X-ray as showing no pneumoconiosis. The ALJs dismissed both claims because the additional evidence did not rebut the consensus findings by clear and convincing evidence. Kentucky law subjected coal workers’ pneumoconiosis claims to a consensus-panel procedure and a heightened rebuttal standard that did not apply to other occupational pneumoconiosis claims.

PROCEDURAL HISTORY

Jesse Gardner and Joe Martinez filed claims for coal workers’ pneumoconiosis benefits. The ALJs dismissed the claims because the claimants failed to overcome negative consensus readings under the statutory clear-and-convincing standard. The Workers’ Compensation Board affirmed, and separate Court of Appeals panels reversed on equal-protection grounds. The Supreme Court consolidated the appeals and affirmed.

DISPOSITION

affirmed

CASES CITED

- Kentucky Harlan Coal Co. v. Holmes, 872 S.W.2d 446 (Ky. 1994)
- Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000)
- Hunter Excavating v. Bartrum, 168 S.W.3d 381 (Ky. 2005)
- Cain v. Lodestar Energy, Inc., 302 S.W.3d 39 (Ky. 2009)
- Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008)
- City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)
- Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989)
- D.F. v. Codell, 127 S.W.3d 571 (Ky. 2003)
- Steven Lee Enterprises v. Varney, 36 S.W.3d 391 (Ky. 2000)
- Cain v. Lodestar Energy, Inc., 302 S.W.3d 39 (Ky. 2009)
- Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)
- McLaughlin v. State of Florida, 379 U.S. 184 (1964)
- Frontiero v. Richardson, 411 U.S. 677 (1973)

- Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408 (Ky. 2005)
- Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718 (Ky. 2005)
- United States v. Lopez, 514 U.S. 549 (1995)
- Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980)
- Brown v. Board of Education, 347 U.S. 483 (1954)
- United Dry Forces v. Lewis, 619 S.W.2d 489 (Ky. 1981)
- Sims v. Board of Education of Jefferson County, 290 S.W.2d 491 (Ky. 1956)
- Brooks v. Island Creek Coal Co., 678 S.W.2d 791 (Ky. App. 1984)
- Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)

OPINION

SCOTT, J.

Opinion of the Court by Justice SCOTT. Notwithstanding their 37 and 34 years' work in underground coal mines, the Workers' Compensation Board affirmed decisions to dismiss both Appellants' applications for benefits because the "consensus readings" of their X-rays interpreted them to be negative for coal workers' pneumoconiosis (black lung).¹ On review, however, two separate Court of Appeals' panels held the "consensus procedure" required by KRS 342.316 for proving the existence of coal workers' pneumoconiosis and the "clear and convincing" standard the statute requires to rebut such a consensus unconstitutional.

In so doing, both panels of the Court of Appeals determined that such provisions denied the claimants and other workers who suffer from coal workers' pneumoconiosis equal protection under the law by placing a more stringent burden of proof on them than those who suffer from pneumoconiosis from other sources.

Having heard these two cases together and having extensively reviewed their records and histories, we agree with the conclusions of the Court of Appeals. I. PNEUMOCONIOSIS AND WORKERS' COMPENSATION These appeals involve an equal protection challenge to KRS 342.316, which defines the evidentiary procedure and standard for coal workers' pneumoconiosis claims.

As a result, before delving into their background, we believe it prudent to address the distinctions, if any, between coal workers' pneumoconiosis (contracted from coal dust) and pneumoconiosis contracted from other dusty particulates, as well as to outline the differing statutory treatment of coal workers' pneumoconiosis versus other pneumoconiosis. A. Pneumoconiosis Although the disease is given different names depending upon the source of the dust, there is no "natural" or "real" medical distinction between coal workers' pneumoconiosis and other occupational pneu-

moconiosis: “Pneumoconiosis” is simply a generic term for a lung disease evidenced by pigmentation and fibroid induration.

The disease is traceable to not only coal dust, but other types of dust particles as well. Some of these include: aluminum (aluminosis), asbestos (asbestosis), cotton dust (byssinosis), iron (siderosis), sandstone (silicosis), tobacco (tabacosis), and ostrich feathers (ptilosis).

The fact that these many other environmental sources of particles also cause pneumo-coniosis is the proverbial fly in the ointment for this legislative scheme. There is no medical evidence whatever that any characteristic of disease, itself, supports a “natural” or “real” distinction in the class of workers who contract it, based on whether the employee was a coal miner or custodian of the ostrich cage at the Louisville Zoo.

Kentucky Harlan Coal Co. v. Holmes, 872 S.W.2d 446, 458 (Ky.1994) (Stephens, C.J., dissenting). Simply put, “pneumoconiosis is pneumoconiosis is pneumoconiosis.” Id. at 456 (quotation marks omitted); see also Stedman’s Medical Dictionary 1522 (28th ed.2006) (describing pneumoconiosis as “[i]nflammation commonly leading to fibrosis of the lungs caused by the inhalation of dust incident to various occupations....”).

B. Statutory Treatment Despite the fact that there is no real distinction between the various forms of pneumoconiosis, Chapter 342 of the Kentucky Revised Statutes treats coal workers differently than those from other occupations with respect to workers’ compensation.² Specifically, these varying claimants endure different procedures and presumptions and enjoy distinct benefits.

I. Procedure and Presumptions For coal workers’ pneumoconiosis, KRS 342.316(3) requires a different procedure to establish its existence than it requires for all other types of pneumoconiosis. In addition, KRS 342.316(13) requires “clear and convincing” evidence to rebut a panel consensus for coal workers’ pneumoconiosis claims, while KRS 342.315(2) — addressing other occupational pneumoconiosis and diseases — requires only “a reasonable basis” to rebut a university evaluator’s clinical findings and opinions, i.e. a standard lower than “clear and convincing.” Magic Coal Co. v. Fox, 19 S.W.3d 88, 95 (Ky.

2000). a. The Procedure for Coal Miners In the first instance, KRS 342.316(3) requires a two-step “consensus” procedure for evaluating X-ray evidence of coal workers’ pneumoconiosis. Hunter Excavating v. Bartrum, 168 S.W.3d 381, 382 (2005). Pursuant to this statute, a claimant must submit an X-ray, along with an interpretation of that X-ray. KRS 342.316(3)(b)l.

The employer may then submit its own X-ray and interpretation. KRS 342.316(3)(b)4.d. If the two interpretations do not agree, the highest quality X-ray is sent to a panel consisting of three individual “B” readers,³ chosen at random, who issue their own interpretation. KRS 342.316(3)(b)4.e. If a consensus is not reached by the panel,^{4,5} the ALJ renders a decision based on the evidence submitted.

Id. If, however, as is often the case, there is a consensus,⁶ copies of the report are considered as evidence. Id. For all practical purposes, this consensus is the only evidence controlling the result. To encourage a consensus among the three randomly selected “B” readers, KRS 342.794(4) provides that the “readers” are evaluated not only with respect to the timeliness and completeness of their reports, but also as to “the frequency at which the physician’s classification of X-rays differs from the consensus reading.” In fact, the statute compels removal of a physician “from the ‘B’ reader list... if the physician’s interpretations of X-rays are not in conformity with the consensus reading fifty percent (50%) of the time.” Id. (emphasis added).

Secondly, once a consensus is reached by at least two of the three chest X-ray interpreters, it is presumptively correct “unless overcome by clear and convincing evidence.” KRS 342.316(13). In *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky.1989), this Court concluded 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.” However, beyond establishing the boundaries (somewhere between preponderance of evidence and beyond a reasonable doubt), the Court asserted that it could provide no definition or guideline as to how a court should apply, this evidentiary standard: 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 or approach to 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. Id. (emphasis added). Yet, in other instances, we have defined the standard as “proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” See, e.g., *Commonwealth Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky.2010) (citation omitted); see also *Black’s Law Dictionary* 636 (9th ed.2009) (defining “clear and convincing evidence” as “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”).

In the context of coal workers’ pneumo-coniosis claims, the decision of the ALJ in the Gardner claim demonstrates that additional X-ray evidence, testimonial evidence as to increasing difficulty breathing, and over 37 years’ work in underground mining, did not constitute “clear and convincing evidence” sufficient to rebut the consensus reached by two chest X-ray interpreters.

See *infra* Section II.A. Thus, as indicated, overcoming the presumption *460 created by a “B” reader consensus is practically impossible.^{7,8} b. The Procedure for Other Pneumo-coniosis Claimants In contrast to coal workers’ pneumoconi-osis, KRS 342.316(3)(b)4.b. and KRS 342.315(1) require workers suffering from non-coal-related pneumoconiosis to only undergo a university evaluation rather than a consensus process.

In this regard, KRS 342.316(3)(b)4.b. provides that “[t]he commissioner shall assign the claim to an administrative law judge and, except for coal workers’ pneumoconiosis claims, shall promptly refer the employee to such physician or medical facility as the commissioner may select for examination.” (Emphasis added). And, KRS 342.315(1) states that “[t]he commissioner shall contract with the University of Kentucky and the University of Louisville medical schools to evaluate workers who have had injuries or become affected by occupational diseases covered by this chapter.”⁹ Thus, it is fair to say in these non-coal cases, it is the total evaluation which is important, not just an X-ray interpretation.

Moreover, workers suffering from non-coal-related pneumoconiosis are not required to produce “clear and convincing evidence” to rebut these evaluations. Upon sufficient grounds, the ALJ may disregard them. KRS 342.315(2) states that “the clinical findings and opinions of the [university] evaluator [are] afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions... fall[s] on the opponent of that evidence.” In *Fox*, 19 S.W.3d at 95, this Court rejected the Workers’ Compensation Board’s determination that this presumption could only be overcome by “clear and convincing evidence.” Based upon KRE 301, the Court instead recognized the discretion afforded an ALJ with respect to non-coal-related pneumoconiosis and held that that KRS 342.315(2) only calls for a reasonable basis to rebut a university evaluator’s clinical findings and opinions: *461KRS 342.315(2) creates a rebuttable presumption which is governed by KRE 301 and, therefore, does not shift the burden of persuasion.

Pursuant to KRS 342.315(2), the clinical findings and opinions of the university evaluator constitute substantial evidence of the worker’s medical condition which may not be disregarded by the fact-finder unless it is rebutted. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 312.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence.

In instances where a fact-finder chooses to disregard the testimony of the university evaluator, a reasonable basis for doing so must be specifically stated. *Id.* at 98 (emphasis added). Yet, in coal workers’ pneumoconiosis claims, the authority of the fact-finder to weigh the conflicting medical evidence is restricted. Based upon the language of KRS 342.316, along with the relevant subsections of KRS 342.315 and KRS 342.794, we believe that coal workers’ pneumoconiosis claimants are subjected to much more stringent statutory treatment than all other pneumoconiosis claimants.

Specifically, a coal workers’ pneumoconiosis claimant must endure a more exacting procedure to prove his claim and is subjected to a much higher rebuttable standard,¹⁰ if rebuttable at all (in life, at least).¹¹ 2. Benefits Perhaps in an attempt to justify the disparate treatment between coal workers’ pneumoconiosis and other pneumoconiosis stemming from the two-step “consensus”

procedure and the “clear and convincing” evidentiary standard, KRS 342.732 offers different benefits for coal claimants than KRS 342.730, which generally addresses the determination of income benefits for disability.

Thus, some of these coal workers’ pneumoconiosis benefits, although they still require a “consensus finding” of ^{*462}pneumoconiosis, do not require proof of the impairment. For instance, KRS 342.732(()a) 1. entitles those who suffer from Category 1 coal workers’ pneumoconiosis (as determined by a consensus) to a “retraining incentive benefit” (RIB) without submitting proof that the condition produces a permanent impairment rating: If an employee has a radiographic classification of category 1/0, 1/1 or 1/2, coal workers’ pneumoconiosis and spirometric test values of eighty percent (80%) or more, the employee shall be awarded a one (1) time only retraining incentive benefit which shall be an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee’s average weekly wage as determined by KRS 342.740, but not more than seventy-five percent (75%) of the state average weekly wage, payable semimonthly for a period not to exceed one hundred four (104) weeks....

This benefit requires that he or she quit working in the coal mines, KRS 342.732(l)(a)8., and attend school, KRS 342.732(()a)2. However, only a de minimis number of coal workers who filed claims received a RIB from 2003 to 2010.¹² Furthermore, in lieu of a RIB, KRS 342.732(i) (a)7. entitles workers who are at least 57 years old on the date of the last exposure to elect to receive up to 425 weeks of benefits based on a 25% disability rating without actually proving a permanent impairment rating: An employee who is age fifty-seven (57) years or older on the date of last exposure and who is awarded retraining incentive benefits under subparagraphs 1. to 4. of this paragraph, may elect to receive in lieu of retraining incentive benefits, an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee’s average weekly wage, not to exceed seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740 multiplied by the disability rating of twenty-five percent (25%) for a period not to exceed four hundred twenty-five (425) weeks, or until the employee reaches sixty-five (65) years of age, whichever occurs first....

(Emphasis added).¹³ We note, however, that these presumptions equate with expected medical findings for coal workers’ pneumoconiosis. Holmes, 872 S.W.2d at 455 (“The presumptions employed in KRS 342.732 bear both a direct and rational connection to the medical realities concerning the seriousness of the degree of coal workers’ pneumoconiosis present in a given worker.”).

In contrast, KRS 342.730 does not offer equivalent benefits for non-coal pneumoconiosis claimants without proof and a finding of an actual impairment. Moreover, coal workers seeking benefits pursuant to KRS 342.732(i) (a)1. or 7. are bound by the unequivocal restrictions enunciated by KRS 342.732(6): In no event shall income benefits awarded under this section be

stacked or added to income benefits awarded under KRS 342.730 to extend the period of disability and in no event shall income or retraining incentive benefits be paid to the employee while the employee is working in the mining industry in the severance or processing of coal as defined in KRS 34.2.0011(23)(a).

(Emphasis added). The essential point, however, is that all coal mining claimants, including those seeking benefits, or even retraining benefits, are subjected to the two-step “consensus” procedure and corresponding “clear and convincing” evidentiary standard of KRS 342.316, as well as the statute’s minimum exposure requirement in the processing of their claims: Income benefits for the disease of pneumoconiosis resulting from exposure to coal dust or death therefrom shall not be payable unless the employee has been exposed to the hazards of such pneumoconiosis in the Commonwealth of Kentucky over a continuous period of not less than two (2) years during the ten (10) years immediately preceding the date of his or her last exposure to such hazard, or for any five (5) of the fifteen (15) years immediately preceding the date of such last exposure.

KRS 342.316(4)(b). With this statutory framework and the delineation of pneumoconiosis in mind, we now turn to the facts of the two cases before us. II. BACKGROUND A. The Gardner Claim Jesse Gardner was born in 1946. He filed an application for benefits under KRS 342.732 on August 15, 2007, after working as an underground coal miner for 37 years.

The application stated that his last exposure to coal dust occurred on January 31, 2005. He did not assert a specific respiratory impairment.¹⁴ The parties subsequently submitted the following evidence: Party “B” reader X-ray Date Quality grade Category
Claimant Dr. Powell 2/2 07/13/2007 2
Employer Dr. Wiot 0/0 12/27/2007 1
Because the parties’ reports were not in consensus, the Office of Workers’ Claims (now the Department of Workers’ Claims) hired a panel of three randomly-selected “B” readers to whom they submitted the X-rays with directions to choose the better quality X-ray and render a report of that X-ray.

The panel reported as follows: “B” reader X-ray date Quality grade Category
Dr. Anderson 12/27/2007 216 I/O
Dr. Jarboe 12/27/2007 1 0/0
Dr. Pope 12/27/2007 2 0/0
The Office then notified the parties that the panel consensus was category 0/0. *464 Gardner then submitted in rebuttal an additional report in which another physician, Dr. Baker, gave the December 27, 2007 X-ray a quality grade of 1 and opined that it revealed parenchymal abnormalities consistent with category 1/0 pneumoconiosis.

Gardner thereafter testified at the hearing concerning the coal mine employers for whom he had worked and the nature of the work that he performed underground. He also testified to experiencing increasing difficulty breathing during the past year, particularly if he walked quickly, climbed steps, or carried something that was heavy. He stated that he began to smoke when was about 16 years old and smoked about a pack a day until quitting many years ago.

He also stated that no physician informed him that he suffered from pneumoconiosis until Dr. Powell diagnosed the condition in August 2007. In spite of his 37 years' experience in underground coal mining,¹⁷ as well as the subsequent X-ray and testimonial evidence of pulmonary dysfunction, the ALJ dismissed Gardner's claim, finding that he failed to rebut the presumption that the consensus classification was correct with clear and convincing evidence to the contrary.

Affirming, the Board noted that, as an administrative tribunal, it lacked jurisdiction to decide Gardner's constitutional question. See *Blue Diamond Coal Company v. Cornett*, 300 Ky. 647, 189 S.W.2d 963 (1945). As noted, however, the Court of Appeals panel reversed, holding that both the consensus procedure and the clear and convincing evidentiary standard for rebutting a panel consensus were unconstitutional.¹⁸ B. The Martinez Claim Joe Martinez was born in 1937.¹⁹ He filed an application for benefits under KRS 342.732 on October 24, 2002, after working as an underground coal miner for 34 years.

His application stated that his last exposure to coal dust occurred on October 1, 2000. He did not assert a specific respiratory impairment.²⁰ The parties subsequently submitted the following evidence: Party "B" reader X-ray Date Quality grade Category Claimant Dr. Baker 05/17/2002 3 1/0 Employer Dr. Pope 12/23/2002 2 negative *465 Because the parties' reports were not in consensus, the Office of Workers' Claims hired a panel of three randomly-selected "B" readers to whom they submitted the X-rays with directions to choose the better quality X-ray and render a report of that X-ray.

The panel reported as follows: Quality "B" reader X-ray date grade Category Dr. Rosenberg 12/23/2002 2 0/1 Dr. Ramakrishnan 12/23/2002 2 0/0 Dr. Dineen unknown 1 0/0 The Office then notified the parties that the panel consensus was category 0/0. There is no indication that either party submitted any rebuttal evidence.

In spite of Martinez's 34 years' experience in underground coal mining, the ALJ dismissed the claim, finding that he failed to rebut the consensus classification with clear and convincing evidence. As in the Gardner case, the Board noted it lacked jurisdiction to decide the constitutional question that Martinez raised and thus affirmed.

The Court of Appeals also reversed, holding that both the consensus procedure and the clear and convincing evidentiary standard for rebutting a panel consensus were unconstitutional.²¹ To properly assess whether this procedure and the evidentiary standard are unconstitutional, we must now examine the purposes, tests, and precedents with respect to equal protection under the law as recognized by both the United States and Kentucky Constitutions.

III. EQUAL PROTECTION Citizens of Kentucky enjoy equal protection of the law under the 14th Amendment of the United States Constitution and Sections 1, 2, and 3 of the Kentucky

Constitution. *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky.2003). Simply put, the 14th Amendment requires persons who are similarly situated to be treated alike. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct.

3249, 87 L.Ed.2d 313 (1985). And Sections 1, 2, and 3 of the Kentucky Constitution also provide that the legislature does not have arbitrary power and shall treat similarly situated persons equally. In sum, the goal of the 14th Amendment to the United States Constitution, as well as Sections 1, 2, and 3 of the Kentucky Constitution, is to “keep[] governmental decision makers from treating differently persons who are in all relevant respects alike.”²² *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct.

2326, 120 L.Ed.2d 1 (1992). However, because nearly all legislation differentiates in some manner between different classes of persons, neither the federal nor state constitutions forbid such classification per se. *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

Accordingly, the level of judicial scrutiny applied to an equal protection challenge depends on the classification made in the statute and the interest affected by it. See *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). Currently, there are three levels of review applicable to an equal protection challenge. See, e.g., *Steven Lee Enterprises v. Varney*, 36 S.W.3d 391, 394-95 (Ky.2000).

Strict or intermediate scrutiny applies whenever a statute makes a classification on the basis of a “suspect”²³ or “quasi-suspect”²⁴ class, respectively.²⁵ *Codell*, 127 S.W.3d at 575-576 (discussing strict and intermediate scrutiny). Conversely, “if the statute merely affects social or economic policy, it is subject” to a less searching form of judicial scrutiny, i.e. the “rational basis” test.

Id. at 575 (citation omitted). Workers’ compensation statutes concern matters of social and economic policy. *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 42 (Ky.2009). As a result, such a statute is not subject to strict or immediate scrutiny and therefore must be upheld if a “rational basis” or “substantial and justifiable reason” supports the classifications that it creates: Statutes... 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....

A statute complies with Kentucky equal protection requirements if a “reasonable basis” or “substantial and justifiable reason” supports the classifications that it creates. *Id.* at 42-43 (footnotes omitted). Although the rational basis standard certainly favors the government, it would be incorrect to state that courts always hold that legislatively-created classifications are rationally related to a legitimate state interest.

The United States Supreme Court has made it abundantly clear that the three levels of review constitute guidelines for constitutional inquiry and are not dispositive edicts. See, e.g., *Adarand*

Constructors, Inc. v. Pena, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (“[W]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact.”).²⁶ Furthermore, both our nation’s highest court and this Court have, in several cases, recognized equal protection violations based upon the rational basis standard.

In *Allegheny Pittsburgh Coal Co. v. County Com’n of Webster County, W. Va.*, 488 U.S. 386, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989) and *City of Cleburne*, 473 U.S. 432, 105 S.Ct. 3249, the United States Supreme Court unanimously identified equal protection violations based upon the rational basis standard.^{27,28} In *Allegheny*, a West Virginia county tax assessor valued the petitioner’s real property on the basis of its recent purchase price, yet made only minor modifications in the assessments of land which had not been recently sold, thereby resulting in gross disparities in the assessed value of generally comparable property,²⁹ 488 U.S. at 338, 109 S.Ct.

633. The Supreme Court noted that a tax selection scheme may divide property into classes and assign to each class a different tax burden “[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy....” *Id.* at 344, 109 S.Ct. 633 (citation and quotation marks omitted) (internal quotation omitted) (emphasis added).

However, West Virginia had not drawn such a distinction; rather, the assessor, on her own initiative, ⁴⁶⁸applied the state tax laws in a manner resulting in the disparity. *Id.* at 345, 109 S.Ct. 683. Because it had “no doubt that [the] petitioners ha[d] suffered from... ‘intentional systematical undervaluation by state officials’ of comparable property in” the same county, the court held that the practice “denied [the] petitioners the equal protection of the laws....” *Id.* at 338, 346, 109 S.Ct.

633. In *City of Cleburne*, a Texas city denied a special use permit for the operation of a group home for the mentally retarded pursuant to a municipal zoning ordinance requiring permits for such homes. 473 U.S. at 435, 105 S.Ct. 3249. Our nation’s highest court stated that “where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts [should be] very reluctant... to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.” *Id.* at 441⁴⁴², 105 S.Ct.

3249. However, the court refused to countenance arbitrary classifications: The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives — such as “a bare... desire to harm a politically unpopular group,”... are not legitimate state interests.

Id. at 446-447, 105 S.Ct. 3249 (citations omitted). “Because... the record [did] not reveal any rational basis for believing that the [group] home would pose any special threat to the city’s legitimate interests,” the court deemed the ordinance invalid as applied. *Id.* at 448, 105 S.Ct. 3249

(emphasis added). Following in the footsteps of the United States Supreme Court, this Court has also found equal protection violations based upon the rational basis standard.³⁰ For instance, in *Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 723 (Ky.2005), the procedure of the Natural Resources and Environmental Protection Cabinet required prepayment before mining permittees could obtain a formal hearing to challenge an assessment.

Importantly, the procedure allowed individuals, but not corporations, a means to obtain a waiver from the prepayment requirements. *Id.* Moreover, it was uncontroverted that Kentec Coal Company could not afford to post the bond requested to contest the assessment on appeal. *Id.* We could not “discern any rational basis, or legitimate state interest, to explain — much less justify — the arbitrary singling out of a corporation (from individuals) for such disparate treatment.” *Id.* at 726.

Stated succinctly, we found this treatment to be repugnant to our conception of equal protection: It is just not within our democratic ideas, customs or maxims to grant equal justice and due process only to those who can afford to pay and to deny such rights to those who cannot. Such a notion flies in the face of the belief of “equal justice under the law.” *Id.* at 725.³¹ Thus, our precedent, along with that of the United States Supreme Court, demonstrates that the rational basis standard, while deferential, is certainly not demure.

This standard encompasses the long held principle that “ [classification ‘must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.’ ” *McLaughlin v. State of Fla.*, 379 U.S. 184, 190, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (citation omitted) (emphasis added); see also *Frontiero v. Richardson*, 411 U.S. 677, 683, 93 S.Ct.

1764, 36 L.Ed.2d 583 (1973) (“Under ‘traditional’ equal protection analysis, a legislative classification must be sustained unless it is ‘patently arbitrary’ and bears no rational relationship to a legitimate governmental interest.”) (emphasis added); *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 414 (Ky.2005) (“ ‘[Arbitrary and irrational] discrimination violates the Equal Protection Clause even under the rational-basis standard of review.’”) (footnote omitted) (emphasis added).

Simply put, arbitrary selection “ ‘can never be justified by calling it classification.’ ” *McLaughlin*, 379 U.S. at 190, 85 S.Ct. 283 (citation omitted).³² Having set forth the differing statutory evidentiary treatment of pneumoconiosis claims, the background of the two cases on appeal, and the purposes, tests, and precedents with respect to equal protection, we will now address whether the procedure and evidentiary standard that KRS 342.316 applies only to coal workers’ pneumoconiosis claimants infringes upon coal workers’ rights to equal protection under the law.

IV. ANALYSIS Gardner and Martinez assert that both the “consensus procedure” and the “clear and convincing” evidentiary standard KRS 342.316 applies to coal workers’ pneumoconiosis claims violate the rights of coal workers to equal protection under the law.

The claimants contend that the statute unfairly and unlawfully discriminates against coal workers who are injured by, and through exposure to coal dust, as opposed to workers who suffer from pneumoconiosis from other sources. According to the claimants, this unfavorable treatment is arbitrary, capricious, and not rationally related to any legitimate state interest.

Moreover, they allege there no substantial and justifiable reason to support it exists. Our analysis begins with the presumption that legislative acts are constitutional. *United Dry Forces v. Lewis*, 619 S.W.2d 489 (Ky.1981); *Sims v. Board of Education of Jefferson County*, *470290 S.W.2d 491 (Ky.1956); *Brooks v. Island Creek Coal Co.*, 678 S.W.2d 791 (Ky.App.1984).

Although we have considered other equal protection challenges before, this is the first challenge based on the less favorable statutory evidentiary treatment to which coal workers’ pneumoconiosis claimants are subjected compared to all other pneumoconiosis claimants.³³ In *Holmes*, 872 S.W.2d at 448-449, a coal company³⁴ contested the benefits afforded coal workers’ pneumoconiosis claimants pursuant to KRS 842.732.

With respect to its equal protection challenge, the coal company essentially argued that the statute’s irre-buttable presumption of total disability discriminated unlawfully between coal companies and businesses in other industries.³⁵ We disagreed, as the statute was designed to deal with the undue burden being placed on other Kentucky industries at the time by the coal industry: We find that KRS 342.782... was a part of a comprehensive revamping of the entire Kentucky Workers’ Compensation Act.

This was a dearly demonstrated response to the widely recognized need to deal with the ominous burden placed on all of Kentucky industry, through Special Fund assessments, by the cost of workers’ compensation claims relating to the coal industry. It was a founded fear that because of the burgeoning cost of workers’ compensation, particularly due to the pay-as-you-go method of Special Fund financing, industries would leave the state or fail to locate in Kentucky, thereby increasing unemployment.

Approximately 78% of the Special Fund’s overall liability and over 95% of its liability for occupational disease was attributable to the coal industry.[36] *Id.* at 452-453 (emphasis added). Thus, there was a rational basis for the disparate treatment we reviewed at the time.

Moreover, a classification upheld for one purpose does not ipso facto justify a classification made for another purpose. Compare *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974) (holding that a Florida statute giving widows, but not widowers, a \$500 exemption from property taxation did not violate equal protection), with *Wengler v. Druggists Mut.*

Ins. Co., 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980) (holding that a Missouri law denying a widower workers' compensation benefits for his wife's work-related death unless he was either mentally or physically *471incapacitated or could prove dependence on his wife's earnings, but granting a widow death benefits without proof of dependence, violated equal protection).

Each classification must be measured by its relation to the alleged governmental purpose. See 16B C.J.S. Constitutional Law § 1108 (stating that the guarantee of equal protection "prohibit[s] the state from according unequal treatment to persons placed by a statute into classes for reasons wholly unrelated to the purpose of the legislation or a legitimate state purpose.") (citing *Cherokee County v. Greater Atlanta Homebuilders Ass'n, Inc.*, 255 Ga.App.

764, 566 S.E.2d 470 (2002)). Finally, as we have noted, in *Holmes*, this Court found the presumptions under attack to equate to the expected medical findings for coal workers' pneumoconiosis. 872 S.W.2d at 455 ("The presumptions employed in KRS 342.782 bear both a direct and rational connection to the medical realities concerning the seriousness of the degree of coal workers' pneumoconiosis present in a given worker."). "[I]t is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28, 96 S.Ct.

2882, 49 L.Ed.2d 752 (1976) (quoting *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43, 31 S.Ct. 136, 55 L.Ed. 78 (1910)). In *Durham v. Peabody Coal Co.*, 272 S.W.3d 192, 194 (Ky.2008), coal workers argued that the consensus procedure of KRS 342.316 discriminated unlawfully between workers who are injured by a harmful occupational exposure to coal dust and those who become physically disabled by a traumatic injury.

This Court then rejected their argument because "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, as illustrated by the disparity in x-ray interpretations offered in each of these cases.

The court noted in *Kentucky Harlan Coal Company v. Holmes*, 872 S.W.2d 446 (Ky.1994), that when amending KRS 342.316 and enacting KRS 342.732 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.

The court also noted that the 1987 amendments were a legislative attempt to control the cost of coal workers' pneumoconiosis claims, particularly by workers with no significant respiratory

impairment. The present statutes address those same concerns.

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 195-196 (emphasis added).

Although we rejected equal protection challenges in *Holmes* and *Durham*, we found an as-applied equal protection violation with respect to the KRS 342.316 consensus procedure in *Cain*, 302 S.W.3d 39. In that case, the claimant, seeking a RIB award, submitted a “B” reader’s report that showed the existence of category 2/1 pneumoconiosis while his employer submitted evidence that he suffered only from category 1/1 disease; both submissions supported the claimant’s entitlement to a RIB award.

Id. at 43. Nonetheless, because the reports were not in consensus, KRS 342.316(3)(b) 4.e. required the claim *472to be submitted to a consensus panel and the appointed panel subsequently reached a consensus of category 0 and the ALJ thereafter dismissed the claim. *Id.* at 41, 48.

Thus, we unanimously concluded that the statute denied the claimant equal protection because there was “no rational or reasonable basis for such discrimination[37] where the employer’s evidence effectively concedes the worker’s entitlement to a RIB.” *Id.* at 43.

Here, KRS 342.316(3), along with the relevant subsections of KRS 342.315 and KRS 342.794, treat coal workers’ pneumo-coniosis claimants more stringently than all other pneumoconiosis claimants. However, even though the disease is given different names depending upon the source of dust, there is no “natural” or “real” distinction between coal workers’ pneumoconiosis and other forms of pneu-moconiosis.

As a result, we believe this case significantly differs from *Durham* and *Holmes*. Unlike *Durham*, different names do not justify differing treatment — all forms of pneumoconiosis (whatever type) develop gradually and can be difficult to diagnose. Furthermore, unlike *Holmes*, we discern no rational basis or substantial and justifiable reason for the singular two-step “consensus procedure” or the “clear and convincing” evidentiary standard, as it is simply counterintuitive to prescribe differing standard of proof requirements for the same disease.

Nor can the disparate treatment of coal workers be justified as a cost-saving measure, as it is axiomatic that, if the enhanced procedure saves money, the state would save more money by subjecting all occupational pneumoco-niosis claimants to the more exacting procedure and higher rebuttable standard.

Finally, we reject any contention that the two-step procedure promotes prompt and efficient processing of coal mining pneu-moconiosis cases, as an additional step presents nothing more than another formidable hurdle for the coal worker before he or she can receive compensation. Rather

than rely upon Durham and Holmes, we liken this case to those circumstances in which this Court or the United States Supreme Court identified an equal protection violation.

Again, whether caused by coal, rock, asbestos, or brick dust, “pneumoconiosis is pneumoconiosis is pneumoconiosis.” Holmes, 872 S.W.2d 446, 456 (Ky.1994) (Stephens, C.J., dissenting) (quotation marks omitted). Therefore, we follow our nation’s highest court’s decisions in Allegheny and City of Cleburne and refuse to countenance an arbitrary classification, i.e. prescribing differing standard of proof requirements for the same disease.

Moreover, we believe any venal element to an initial doctors’ medical diagnosis³⁸ in the context of coal workers’ pneumoconio-sis would apply with equal force to pneu-moconiosis caused by asbestos, rock, or metal dust.

To hold otherwise, we must assume that doctors providing the initial diagnosis for all other types of pneumoco-niosis are inherently more trustworthy, and thus the additional consensus panel is only necessary to defend against physicians that testify for coal workers. There is no basis for such an assumption limited *473to physicians from the coal fields of Kentucky and it belies common sense; it encapsulates the very meaning of arbitrariness, irrationality, and unreasonableness.³⁹ Because we consider the classification of coal workers’ pneumoconiosis claimants to be arbitrary in regard to the more stringent proof or procedures required and believe that the disparate treatment afforded such workers lacks a rational basis or substantial justification, we hold that the consensus procedure and the clear and convincing evidentiary standard are unconstitutional.

We pause, though, to address the contention that the preferential treatment afforded coal workers pursuant to KRS 342.732 justifies the more stringent procedural and evidentiary requirements of KRS 342.316.⁴⁰ Simply put, one type of disparate treatment does not constitute a rational basis or substantial and justifiable reason for another form of disparate treatment.^{41,42} Although certainly by no means *474equivalent, such an argument brings to mind the United States Supreme Court’s famous proclamation that “[s]eparate educational facilities are inherently unequal.” *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 495, 74 S.Ct.

686, 98 L.Ed. 873 (1954). In considering an equal protection challenge, a court does not engage in accounting of debits and credits; rather, the court must examine whether similarly situated individuals have been treated differently in that instance and, if so, whether or not such treatment is rationally related to a legitimate state interest. And, as we noted above, a classification upheld for one purpose does not ipso facto justify a classification made for another purpose; each classification must be measured by its relation to the alleged governmental purpose.

V. CONCLUSION Having carefully reviewed the record and the arguments of the parties, we cannot discern a rational basis or substantial and justifiable reason for the disparate treatment of coal workers in this instance. Pneumoconiosis caused by exposure to coal dust is the same disease

as pneumoconiosis caused by exposure to dust particles in other industries, yet coal workers face different, higher standard-of-proof requirements than those other workers.

This is an arbitrary distinction between similarly situated individuals, and thus it violates the equal protection guarantees of the Federal and State Constitutions. For the foregoing reasons, the decisions of the Court of Appeals in these cases are affirmed. CUNNINGHAM, NOBLE, and VENTERS, JJ., concur. SCHRODER, J., concurs in part and dissents in part by separate opinion.

MINTON, C.J., dissents by separate opinion in which ABRAMSON, J., joins.. Under the federal “black lung” act, 30 U.S.C.A. § 801 et seq., a negative chest X-ray, by itself, is insufficient to overcome a statutory presumption that a coal miner, who died before 1978 and had worked in the coal mines for 25 years before 1971, died of pneu-moconiosis. 30 U.S.C.A. § 921(c)(5); see also 20 C.F.R. § 727.204(d) (1980) (now 20 C.F.R. § 718.306(d)(3)); Battaglia v. Peabody Coal Co., 690 F.2d 106, 111 (7th Cir.1982) (In its enactment of the federal black lung act, “Congress had before it evidence that the length of coal mine employment, i.e., the length of exposure to coal dust, was directly related to the incidence of pneumoconiosis.”).

In fact, 30 U.S.C.A. § 921(c)(2-5) employs four “work period” presumptions relating to coal workers’ pneumoconiosis — two ten year, one fifteen year, and one twenty-five year presumption. However, under the existing “consensus procedure” 1 mandated by KRS 342.316, a lengthy work history in dusty coal mines is generally irrelevant versus a “consensus.”. An occupational disease results from injurious exposure due to the nature of the worker’s employment such that the employment is the proximate cause of the disease.

KRS 342.0011(2) and (3). Chapter 342 considers exposure to an occupational hazard to be injurious if it is sufficient to cause a disease independently of any other cause. KRS 342.0011(4). As a result, pneumoconiosis constitutes an occupational disease when caused by a sufficient work-related exposure to dust.. KRS 342.794(3) defines the term “B” reader. “ ‘B’ reader” means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of the National Institute of Occupational Safety and Health (NIOSH) or by the Appalachian Laboratory for Occupational Safety and Health (ALOSH), or their successors.

KRS 342.794(1) provides for a list of qualified “B” readers who interpret chest X-rays when the parties’ reports are not in consensus. Bartrum, 168 S.W.3d at 384-385..KRS 342.316(3)(b)4.f. sets forth the definition of consensus for purposes of establishing a coal workers’ pneumoconiosis claim: “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 *459progressive

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..

Parties commonly refer to the three randomly-selected "B" readers who consider the X-rays in a given claim as a consensus panel. Bartrum, 168 S.W.3d at 385.. According to the Commissioner's July 1, 2003 report to the Interim Joint Committee on Labor and Industry, 98% of panels reach a consensus.. Our conclusion that it is thus practically impossible to overcome the presumption created by a "B" reader consensus also finds support in the background underlying our decision in *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39 (2009).

In *Cain*, the claimant could not successfully rebut the consensus of 0/0 despite the fact his employer conceded in its response to his claim that he suffered from category 1/1 disease. *Id.* at 41, 43.. Given that the task is one of successfully rebutting at least two prior consensus "experts," we can only conceive of one scenario in which a coal worker can successfully rebut the presumption arising from the "consensus" with another expert opinion: an autopsy by a pathologist, which should scientifically resolve whether he or she suffered from pneumoconiosis and to what degree.

See Governor's Independent Investigation Panel, Upper Big Branch — The April 5, 2010, Explosion: a Failure of Basic Coal Mine Safety Practices (2011) (Of the 24 coal miner victims of the Upper Big Branch explosion with sufficient tissue for autopsy examination, 17 had coal workers' pneumoconiosis.); see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 32, 96 S.Ct.

2882, 49 L.Ed.2d 752 (1976) ("[T]he findings of the Surgeon General and others indicated that although X-ray evidence was generally the most important diagnostic tool in identifying the presence or absence of pneumoconiosis, when considered alone it was not a wholly reliable indicator of the [a]bsence of the disease; that autopsy frequently disclosed pneumoconiosis where X-ray evidence had disclosed none; and that pneumoconiosis may be masked from X-ray detection by other disease.") (emphasis added) (footnotes omitted).

With this in mind, the unfairness of such an evidentiary threshold against a "negative" reading speaks for itself..These workers may, in some circumstances, be sent to a private physician, assuming that doctor is sufficiently affiliated with a university. See *Morrison v. Home Depot*, 279 S.W.3d 172 (Ky.App.2009) (holding that a doctor was sufficiently affiliated with medical school to be considered a university evaluator)..

We acknowledge that our conclusion that coal workers' pneumoconiosis claimants are subjected to a much higher rebuttable standard, at first blush, seems to contravene this Court's logic in *Durham v. Peabody Coal Co.*, 272 S.W.3d 192 (Ky.2008).

In *Durham*, this Court stated that "KRS 342.316(13) imposes no greater burden than on any other worker whose evidence is met with very persuasive contrary evidence": Although KRS

342.316(13) may appear to be discriminatory, it does not actually impose a greater burden of proof on workers who claim benefits under KRS 342.732. All claimants bear the burden of proof and the risk of nonpersuasion before the AU with regard to every element of a workers' compensation claim.

In order to sustain that burden, a claimant must go forward with substantial evidence to prove each element, in other words, with evidence sufficient to convince reasonable people. Such evidence has also been equated to evidence sufficient to survive a defendant's motion for a directed verdict if the matter were being tried to a jury. When met with equally convincing evidence, the claimant must offer more persuasive evidence in rebuttal or lose.

When met with evidence more convincing than his own, a claimant's burden on rebuttal is even higher. KRS 342.316(13) acknowledges that reality. 272 S.W.3d at 196 (emphasis added). This viewpoint, however, would require us to ascribe an unreasonable meaning to language and ignores our decision in Fox, which specifically rejected an argument that a university evaluator's findings could only be overcome by introducing "clear and convincing" evidence.

19 S.W.3d at 95. In fact, in discussing Fox, this Court stated that "KRS 342.316(13)... adopts the more stringent 'clear and convincing evidence' standard for rebuttal" compared to KRS 342.315(2). *Bart-rum*, 168 S.W.3d at 385.

Moreover, Durham ignored the improbability of "clearly and convincingly". rebutting "consensus experts," all of whom are physicians, with just another contradictory X-ray and another medical expert — that is other than a pathologist with actual slides if the claimant is then deceased.. See *supra* note 8.. According to the Kentucky Department of Workers' Claims for Retraining Incentive Benefits, only 11 coal workers received a RIB in 2003, 23 received a RIB in 2004, 2 in 2005, 26 in 2006, 9 in 2007, 5 in 2008, and 4 in 2009.

No RIB benefits were reported in 2010, but presumably this is a result of the Court of Appeals' opinions in the cases currently before this Court.. Although not pertinent to the case before us, we also note that KRS 342.732(1)(e) entitles workers who prove the presence of complicated pneumoconiosis (A, B, or C) to total disability income benefits without actual proof of the cause or the extent of the occupational disability: If it is determined, that an employee has radiographic classification of 3/2 or 3/3 occupational pneumoconiosis and respiratory impairment evidenced by spirometric test values of less than fifty-five percent (55%) of the predicted normal values, or complicated pneumoconiosis (large opacities category A, B, or C progressive massive fibrosis), there shall be an irrebuttable presumption that the employee is totally disabled resulting from exposure to coal dust, and the employee shall be awarded income benefits (Emphasis added)..Thus, Gardner's potential entitlement under Chapter 342 would have included a RIB, for which he would not have had to go to occupational rehabilitation schools, since he was over 57 years of age at the time.

See KRS 342.732(1)(a).. This refers to the category of disease.. Dr. Anderson noted that the X-ray was underexposed and mottled..In previous years, disability was presumed upon a finding of pneumoconiosis and ten years of service: Where the occupational disease is a compensable pneumoconiosis and there has been employment exposure for ten (10) years or more to an industrial hazard sufficient to cause the disability of pneumoconiosis, there shall be a rebuttable presumption that the disability or death was due to the compensable pneumoconiosis.

Wells v. Hamilton, 645 S.W.2d 353, 355 (Ky. App.1983) (setting forth an earlier version of KRS 342.316(5)); see also *Useiy v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-29, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976) (upholding a federal statute providing that "a coal miner with 10 years' employment in the mines who suffers from pneumoconiosis will be presumed to have contracted the disease from his employment" since there was a strong rational connection between proving long exposure to mine work and respiratory ailments, and developing pneumoconiosis.").

As illustrated by the claims addressed, the length of exposure, is now insufficient to rebut a "consensus.". One member of the panel, Judge Keller, dissented from the majority opinion to the extent that the opinion found the consensus procedure to violate equal protection, yet Judge Keller did find the "clear and convincing" standard to be unconstitutional..

In its brief, Peabody Coal Company obliquely argues that Martinez lacks standing in this appeal. However, we disagree.. Thus, Martinez's potential entitlement would have also included a RIB. See *supra* note 14.. This panel was unanimous in determining that both the consensus procedure and the "clear and convincing" rebuttable standard were unconstitutional..

In so doing, the guarantee of equal protection inhibits oppression as achieved politically through division. In this respect, there is truth to the old maxim, "United, we stand, divided, we fall.". Race, ethnicity, alienage, and national origin have been recognized by our nation's highest court as "suspect classes" subject to strict scrutiny. See *Regents of University of California v. Bakke*, 438 U.S. 265, 291, 98 S.Ct.

2733, 57 L.Ed.2d 750 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) ("[C]lassifications based on alienage... are inherently suspect and subject to close judicial scrutiny."); *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct.

1375, 87 L.Ed. 1774 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").. Gender and illegitimacy have been recognized as "quasi-suspect classes" subject to intermediate scrutiny. See *United States v. Virginia*, 518 U.S. 515, 531, 116 S.Ct.

2264, 135 L.Ed.2d 735 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."); *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988) ("[I]ntermediate scrutiny... has been applied to discriminatory classifications based on... illegitimacy.").. Strict scrutiny also applies "when a statute significantly interferes with the exercise of a fundamental right." *Codell*, 127 S.W.3d at 575 (citation omitted)..

Although it did not address equal protection or the three levels of scrutiny, *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) further demonstrates that the standards and tests developed by the Supreme Court actually mean something.

In that case, the court concluded that an activity must "substantially" affect interstate commerce in order to be within Congress's power to regulate it under the Commerce Clause. *Id.* at 559, 115 S.Ct. 1624. Applying that test, the court held that Gun-Free School Zones Act, which made it a federal offense for any individual to knowingly possess a firearm in a place that the individual believes or has reasonable cause to believe is school zone, exceeded Congress's Commerce Clause authority.

Id. at 561-562, 115 S.Ct. 1624. More pertinent to our analysis, this decision contravened the notion that Congress could justify its authority to pursue any legislative action by simply pointing to its commerce power despite failing to set forth any cognizable connection between the act and its affect on commerce. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127, 63 S.Ct.

82, 87 L.Ed. 122 (1942) (upholding application of the Agricultural Adjustment Act, which regulated the volume of wheat moving in interstate and foreign commerce, to the production and consumption of homegrown wheat)..In *City of Cleburne*, Justice Marshall, along with Justices Brennan and Blackmun, disagreed with the majority's "disclaimer that no 'more exacting standard' than ordinary rational-basis review [was] being applied." 473 U.S. at 456, 105 S.Ct.

3249 (Cooper, J., concurring in part and dissenting in part). The majority had held that "the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation." *Id.* at 442, 105 S.Ct. 3249.

However, Justices Marshall, Brennan, and Blackmun joined the majority in recognizing an equal protection violation: The Court holds that all retarded individuals cannot be grouped together as the "fee-ble minded" and deemed presumptively unfit to live in a community. Underlying this holding is the principle that mental retardation per se cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability.

With this holding and principle I agree. *Id.* at 455-456, 105 S.Ct. 3249 (emphasis added).. The Supreme Court has found equal protection violations based on the rational basis standard in other

circumstances. See *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (holding that a Texas statute which withheld from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorized local school districts to deny enrollment to such children, was not rationally related to a legitimate state interest and therefore violated equal protection); *Romer v. Evans*, 517 U.S. 620, 116 S.Ct.

1620, 134 L.Ed.2d 855 (1996) (holding that an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons from discrimination was not rationally related to a legitimate state interest and therefore violated equal protection).. Specifically, the petitioner's property had been assessed at roughly 8 to 35 times more than comparable neighboring property, and these discrepancies continued for more than ten years with little change.

Allegheny, 488 U.S. at 344, 109 S.Ct. 633.. The Kentucky Supreme Court has found equal protection violations based on the rational basis standard in other circumstances. See *Codell*, 127 S.W.3d 571 (holding that statute revoking driving privileges for high school dropouts and academically deficient students was not rationally related to issue of whether a student's local school district operated an alternative education program and thus violated equal protection); *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408 (Ky.2005) (holding that a statutory 10% penalty against unsuccessful appellants in second appeals from superseded money judgments was not rationally related to a legitimate state interest and therefore violated equal protection)..

Although he contended that the classification between individuals and corporations was rationally related to a legitimate state interest, Justice Cooper acknowledged that the rational basis for differing treatment relates to fundamental distinctions, if any, between the groups affected. *Kentec Coal Co., Inc.*, 177 S.W.3d at 739 (Cooper, J., concurring in part and dissenting in part) ("In other words, fundamental differences between corporations and individuals can give rise to rational bases for imposing differential burdens between the two.")..

The *McLaughlin* language is quite similar to a pronouncement made by this Court in *Holmes*, 872 S.W.2d at 452: 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..

In *Bartrum*, 168 S.W.3d at 385, this Court determined only that the consensus procedure found in KRS 342.316 did not deny due process to workers who suffer from coal workers' pneumoconiosis.. Besides Kentucky Harlan Coal Company, the Department of Mines and Minerals and the Special Fund were also "arrayed against the constitutionality of the statute." *Holmes*, 872 S.W.2d at 449..

While not specifically characterized as such in *Holmes*, this was obviously the issue addressed, as the coal company would not have had standing to argue that KRS 342.732 unfairly and unlawfully discriminated against workers who suffer from pneumoconiosis contracted from sources other than coal dust. The rationalization set forth by the *Holmes* court has been extracted from its analysis of Section 59 of the Kentucky Constitution, which prevents special privileges, favoritism, and discrimination, as well as insures equality under the law.

872 S.W.2d at 451-454. However, this rationalization applies with equal force to equal protection analysis: Where the classification enacted by the legislature in the statute has a reasonable basis, such law does not constitute special or local legislation within the prohibition of Section 59 of the Kentucky Constitution nor does it deny the equal protection guaranteed by the United States Constitution.

Id. at 452 (emphasis added).. The discrimination stemmed from the differing treatment afforded the claimant versus “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.” *Cain*, 302 S.W.3d at 43.. Initial diagnoses are provided by physician “B” readers paid by the parties who often differ on issues as basic as the presence of the disease..

Chief Justice Minton emphasizes this argument in his dissent, as he argues the “[l]egislative history reveals the 2002 General Assembly’s concern with preventing ‘doctor shopping’ and the need to obtain unbiased medical opinions,” However, this argument overlooks the fact the university evaluator system was already in place for all pneumo-coniosis claims.

The 2002 amendments added the consensus procedure and the “clear and convincing” standard for rebutting a consensus — yet both the claimant and employer must still secure separate medical opinions to support or defend against the claims.. Along with the distinction in benefits, we are not unmindful that funding sources for coal workers’ pneumoconiosis claims and other such claims differ: (a) 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. (b) 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 based solely 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..In his dissent, Chief Justice Minton argues that “[t]he Federal Circuit Court of Appeals held that because one group received special benefits they were not similarly situated to other groups, rendering the Equal

Protection guarantee inapplicable.” See *Absher v. United States*, 805 F.2d 1025, 1026-27 (Fed.Cir.Ct.

App.1986). In *Absher*, 805 F.2d at 1025-1026, disabled military retirees brought an equal protection challenge to the constitutionality of 38 U.S.C. §§ 3104-3105 (1982), which precluded them from receiving both military retirement pay and Veteran’s Administration disability compensation at the same time. Instead, each was required to waive (taxable) retirement pay equal in amount to any VA (tax exempt) compensation received.

Id. at 1025. The Federal Circuit Court of Appeals rejected the challenge, as it did not consider the military retirees similarly situated with other federal civil retirees: The Claims Court, of course, took the position that “[t]he special benefits accorded retirees of the uniformed services are such that this class of individuals is not situated similarly to other groups that are not required to waive retirement pay to receive tax-free VA benefits.”_ We do not therefore discern error in the legal conclusion of the Claims Court.

Id. at 1026-1027. In so doing, the court confused causation with correlation. Specifically, disabled military retirees presumably receive special benefits because they are a distinct class, but they are not a distinct class because they receive special benefits.

To hold otherwise would allow legislative bodies to obviate the guarantee of Equal Protection by conferring nominal benefits to justify disparate treatment and thereby ignore the United States Supreme *474Court’s exhortation that arbitrary selection “ ‘can never be justified by calling it classification.’ ” *McLaughlin*, 379 U.S. at 190, 85 S.Ct. 283 (citation omitted).

The matter before us today illustrates such a concern. Again, only 11 coal workers received a RIB in 2003, 23 received a RIB in 2004, 2 in 2005, 26 in 2006, 9 in 2007, 5 in 2008, 4 in 2009, and none in 2010, even though Chief Justice Minton’s dissent acknowledges that there were at least 3,279 coal workers’ pneumoconiosis claims from 2001-2010. See *supra* note 12.

Simply put, such a miniscule “benefit” cannot justify foreclosing coal workers’ pneumoconiosis claimants from being subjected to the same procedure and rebuttable standard as other pneumoconiosis claimants.. Chief Justice Minton also notes that a statute “may be upheld over an [E]qual [P]rotection argument when a party is caused to bear a different economic burden or enjoys a different economic benefit.” *Stephens v. State Farm Mut.*

Auto. Ins. Co., 894 S.W.2d 624, 627 (Ky.1995). We agree, assuming “there is a reasonable basis or rational justification” for the differing treatment. *Id.* However, we reiterate that conferring a miniscule benefit does not justify disparate treatment.