Rational basis with a vengeance in Kentucky - workers compensation offsets in *Parker v Webster Co. Coal*[1]

In *Parker v Webster Co. Coal* the Kentucky Supreme Court overturned long-standing precedent to find a workers compensation offset rule (KRS 342.730(4)[2] to be unconstitutional and in breach of both the equal protection provision of the Federal and State Constitutions and to be a 'special law' contrary to Section 59 of the Kentucky Constitution. The issue of offsets is one of the most litigated issues of constitutional law as it applies to workers compensation.[3] In recent years a number of State supreme courts have ruled on this issue, some upholding the rule (e.g. Pennsylvania, Kansas),[4] some striking it down (e.g. Utah),[5] one (Montana) managing to do both in relation to different aspects of its workers compensation scheme.[6] Kentucky has now moved from the side of the majority of states which have upheld the rule (albeit by a narrow 4-3 majority in *McDowell*) to those which have rejected it (again by a 4-3 ruling). However, the ruling of the majority must be of the least convincing judgements on this issue. The court decided the case on the basis of an argument apparently not actually argued in court; it misapplied rational basis review by ignoring the fact that underinclusiveness is not determinative of equal protection challenges; and it concluded that the offset was a 'special law' (again not argued) without any detailed consideration of the issue.

The facts and the law

The facts can be dealt with shortly as they were not an issue in relation to the constitutional ruling.[7] Mr.Parker was 68 years old when he suffered a work-related injury and was already in receipt of old-age Social Security retirement benefits.

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[1] 2014-SC-000526-WC, April 27, 2017.

[2] This allows for the termination of workers' compensation benefits when the injured employee qualifies for "normal old-age Social Security retirement benefits" or two years after the employee's injury, whichever last occurs

[3] See M. Cousins "Equal protection, workers compensation and offset of benefits (again) – Caldwell v MACo Workers Compensation and Caputo v Workers' Compensation Appeal Board (Commonwealth of Pennsylvania)" (2012) Available at: http://works.bepress.com/mel_cousins/23/ and M. Cousins. "Legislative intention, equal protection, and offset of workers compensation benefits in Kansas: Hoesli v Triplett" *workers compensation* (2016). Available at: http://works.bepress.com/mel_cousins/97/

[4] Caputo v. WCAB (COM.), 34 A. 3d 908 (Pa. 2012); Hoesli v Triplett, 361 P.3d 504 November 20, 2015 (Kan 2015).

[5] Merrill v. Utah Labor Commission, 223 P.3d 1089 (Utah 2009).

[6] Contrast Reesor v. Mont. St. Fund, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019 (Mont. 2004); Satterlee v. Lumberman's Mut. Cas. Co., 2009 MT 368, 353 Mont. 265, 222 P.3d 566 (Mont. 2009); and Caldwell v MACo, 2011 MT 162, 361 Mont. 140, 256 P.3d 923 (Mont. 2011)

[7] The Court unanimously held that there was sufficient evidence to support the ALJ's finding that Parker suffered a work-related injury.

KRS 342.730(4) states in relevant part that

> All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, … , or two (2) years after the employee's injury or last exposure, whichever last occurs.[8]

The ALJ therefore ruled that that Mr. Parker, who had received two years of temporary total disability benefits, was not entitled to any additional income benefits related to his permanent disability. Parker argued, inter alia, that this violated the Equal Protection Clauses of the United States and Kentucky Constitutions.

The Kentucky Supreme Court had previously ruled in *McDowell v. Jackson Energy* that the offset was constitutional.[9] In that case, the majority of the Court, applying standard rational basis review and having reviewed the case law in other states and the jurisprudence, concluded that the offset was rationally related to the legitimate objectives of 'avoiding duplication of income benefits and reducing the overall cost of maintaining the workers' compensation system, thereby improving the economic climate for all citizens of the state'.[10]

The dissent, in contrast, would have held that

> Because of the federal government's revised stance on the availability of social security benefits to the working recipient [in the the Senior Citizens Freedom to Work Act of 2000 which reduced from 70 to 65 the age at which an earnings test would not be applied to reduce social security benefits], a relationship no longer exists between KRS 342.730(4) and the Commonwealth's interest in avoiding a duplication of benefits.[11]

Three years later a split court upheld *McDowell* in *Keith v. Hopple Plastics*.[12] Nonetheless the issue has remained a topic of debate and in 2015 the Kentucky Court of Appeal suggested that 'it is time for the Supreme Court to look at this issue again'.[13] The Court of Appeal appears to have found the approach of the dissent in *McDowell* to be more persuasive.

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[8] Note that in Autozone, Inc. v. Brewer, 127 S.W.3d 653 (Ky. 2004), the Supreme Court held that the first sentence of KRS 342.730(4) applied only to the awards of workers who qualified for old-age Social Security retirement benefits and could not be read purposively so as to apply to other retirement benefits.

[9] 84 S.W.3d 71 (Ky. 2002). Followed in Keith v. Hopple Plastics, 178 S.W.3d 463 (Ky. 2005).

[10] McDowell 84 S.W.3d 76 following Wynn v. Ibold, 969 S.W.2d 695 (Ky.,1998).

[11] 84 S.W.3d 79.

[12] 178 SW 3d 463 (Ky., 2005).

[13] Cruse v Henderson, 2015 Ky. App. LEXIS 103 (Ky, CA., 2015). This case was subsequently appealed to the Supreme Court and is currently active.

The ruling

The Supreme Court directly addressed the issue in *Parker* and, as we have seen, overturned *McDowell*. However, rather than following the approach of the minority in that case (one which has been adopted in some other states),[14] the majority adopted an entirely different approach, one which had not been raised or argued before the Court or in the proceedings below (per Minton CJ dissenting on the constitutional issue).

It was agreed that rational basis review applied. However, while the majority accepted that the thrust of Mr.Parker's arguments had related to age discrimination, it identified a different basis of discrimination. It held that 'the equal protection problem with KRS 342.730(4) is that it treats injured older workers who qualify for normal old-age Social Security retirement benefits differently than it treats injured older workers who do not qualify'.

Turning to an issue mentioned (only in passing) in the *McDowell* dissent, the majority pointed out that Kentucky teachers have a separate retirement program and do not participate in social security. Thus, teachers (covered only by the separate pension scheme) would not be subject to the limitation in KRS 342.730(4) because they would never qualify for Social Security retirement benefits. The majority held that '[t]here is no rational basis for treating all other workers in the Commonwealth differently than teachers'. It held that this disparate treatment did not accomplish the goals posited as rational bases for the offset provisions.

But as Minton CJ (with whom Hughes and VanMeter, JJ. joined) pointed out 'a statute's underinclusiveness in achieving its stated purpose is insufficient grounds to hold it unconstitutional under the rational-basis test'.[15] The Kentucky Supreme Court had previously ruled that a legislature is 'free to choose to remedy only part of a problem. It may select one phase of a field and apply a remedy there, neglecting the others.' Similarly, the US Supreme Court held that the

> Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination.[16]

The majority relied on *Vision Mining, Inc. v. Gardner* in which it had ruled that there was no rational basis for applying a different evidentiary standard to employees who contracted coal workers' pneumoconiosis than that applied to workers who

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[14] Indeed, the majority accepted that the objectives relied on in McDowell were 'rational bases for treating those who, based on their age, have qualified for normal Social Security retirement benefits differently from those who, based on their age, have yet to do so'.

[15] Citing Commonwealth Natural Res. & Envtl. Prot. Cabinet v. Kenetec Coal Co., Inc.,, 177 S.W.3d 718 at 740.

[16] Dandridge v. Williams, 397 U.S. 471, 486-7 (1970). For a practical example of the application of a deferential rational review standard in a case involving Kentucky, see Maxwell's Pic-Pac, Inc. v. Dehner, 739 F. 3d 936 (6th. Circuit., 2014). See Colin P. Pool, An Easy Case Makes Bad Law: The Misapplication of Heightened Scrutiny in Maxwell's Pic-Pac, Inc. v. Dehner, 887 F. Supp. 2d 733 (W.D. Ky. 2012) (December 15, 2012). University of Cincinnati Law Review, Vol. 82, No. 1, p. 331 (2013).

contracted non-coal workers' pneumoconiosis.[17] The facts of this case were, of course, very different to *Parker*. The majority of the Court had applied a heightened standard of rational basis review (without any clear legal basis for doing so) but this case provides little support for the approach in *Parker* where the basis for the more stringent application of rational review was the Court's refusal to accept that the issue of how teachers' pensions were treated was not determinative of the constitutionality of the general offset provision.[18]

Of course, it is entirely open to a state court to decide that a higher standard should apply under state law.[19] However, it is clear that such a heightened standard does *not* apply under Federal law (other than in those cases where the US Supreme Court adopts such an approach, unfortunately without explaining why it does so or even acknowledging that it is doing so).[20] In this case, the majority did not distinguish between its approach to the Federal and State equal protection provisions. It appears that (in law as opposed to in practice) equal protection analysis under Kentucky state law *may* involve a heightened standard. In a case involving economic policies, the Kentucky Supreme Court stated that the state may be required to articulate "a `reasonable basis' or a `substantial and justifiable reason' for discriminatory legislation".[21]

In *Parker*, the majority noted (at footnote 5) that

> while federal case law may be instructive regarding issues of equal protection, we are not bound to follow federal equal protection analysis. As we noted in *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 'the Kentucky Constitution's equal protection provisions . . . are much more detailed and specific than the Equal Protection Clause of the United States Constitution.' The analysis employed by our federal counter-parts acts as a floor, below which we may not fall, not as a ceiling, above which we may not rise. In fact, "we have construed our Constitution as requiring a `reasonable basis' or a `substantial and justifiable reason' for discriminatory legislation in areas of social and economic policy." In this case however, the preceding distinction, while important, is one without a difference because KRS 342.730(4) does not pass the less stringent rational basis test.

Thus the majority explicitly states that it is not employing a legally higher standard in this case. And if its is not, then its approach is legally incorrect.

The majority also ruled that KRS 342.730(4) violated the prohibition against special legislation found in Section 59 of the Kentucky Constitution. It cited its previous case

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[17] 364 S.W.3d 455 (Ky. 2011).

[18] In fact, the Vision Mining case is indicative of the majority's casual approach to disregarding precedent (including in that case Durham v Peabody Coal, 272 S.W.3d 192 (Ky. 2008))

[19] As, for example, the New Mexico Supreme Court recently did in a workers compensation context: Rodriguez v Brand West Dairy, 2016 NMSC 29.

[20] See, for example, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). See generally, R.C. Farrell, Equal Protection Rational Basis Cases in the Supreme Court since Romer v. Evans, 14 Geo. J.L. & Pub. Pol'y 441 (2016).

[21] Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408, 418-19 (Ky. 2005).

law to the effect that '[a] special law is legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others'[22] and ruled that KRS 342.730(4) favored those who will not qualify for normal old-age Social Security retirement while discriminating against those who do qualify. Minton CJ again dissented stating

> no party raised this issue at any point in the proceedings below nor offered any arguments in their brief to us suggesting that this statute is special legislation. Although we may affirm a lower-court ruling for any reason appearing in the record, case law and our own judicial prudence dictate that we should be reluctant to reverse a judgment for reasons not presented on appeal or argued below. And with respect to workers' compensation, KRS 342.285 further guides us; if the issue is not raised before an Administrative Law Judge, it may not be raised later on appeal. Because this issue appears for the first time in the majority opinion, we should refrain from addressing it without at least inviting the parties to brief this new constitutional argument.

Conclusion

This is clearly a controversial issue which has generated much litigation. Kentucky is not the first state to reverse its position on the unconstitutionality of an offset.[23] However, it is clear that applying rational basis law correctly (as the dissent would have done) the Kentucky provision should have been upheld. There is a valid argument that the offsets do not satisfy a heightened standard of review on the basis, for example, that the dissent in *McDowell* adopted *if* State law allows such a heightened standard. However, leaving aside the procedural issues in this case, to rule that a general rule which would otherwise be constitutional violates the Constitution because it does not apply to one (relatively small) group of workers is surely unsustainable applying any form of rational basis review. If social security rules are to be struck down on the basis of 'invidious discrimination' because they don't apply equally to everyone (who is similarly situated) it will be difficult to find a challenged provision which can be upheld.[24]

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[22] Board of Ed. of Jefferson County v. Board of Ed. of Louisville, 472 S.W.2d 496, 498 (Ky. 1971).

[23] Kansas has recently gone in the opposite direction: M. Cousins. "Legislative intention, equal protection, and offset of workers compensation benefits in Kansas: Hoesli v Triplett" *workers compensation* (2016). Available at: http://works.bepress.com/mel_cousins/97/

[24] Note that the majority appeared to assume that teachers were 'similarly situated' without giving any detailed consideration to the issue.