

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

KARL RICHARD BENNETT, Petitioner

vs.) **No. 101432 (BOR Appeal No. 2044631)**
(Claim No. 2009087929)

FILED

June 18, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
GOLD DIGGERS, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Karl Richard Bennett, by Robert L. Stultz, appeals the Board of Review Order rejecting his claim. Gold Diggers, Inc., by Patricia A. Jennings, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated October 25, 2010, in which the Board affirmed a May 27, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August, 26, 2009, Order, which rejected Mr. Bennett's claim because he was not exposed to coal dust or hazardous materials associated with occupational pneumoconiosis while employed by Gold Diggers, Inc. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the Office of Judge's Order, which rejected Mr. Bennett's claim. Mr. Bennett asserts that he was exposed to abnormal quantities of minute dust particles while employed by Gold Diggers, Inc. He argues that the very fact that he was provided with breathing equipment establishes that he was exposed to dust.

The Office of Judges acknowledged that "initially sand and dirt would be laid on the work site and that at the end of the day approximately one half hour to 45 minutes before quitting that clean-up work entailed sweeping up the sand and dirt[,] and at this time it is found that the claimant was exposed to an abnormal amount of dust." (May 27, 2010, Office of Judges Order, p. 5.) But, the majority of Mr. Bennett's work involved heavy equipment operation, and Mr. Bennett's superintendent noted that whoever operated the equipment during clean-up work was in an enclosed

cab with heating or air conditioning. *Id.* The Office of Judges concluded that Mr. Bennett was not consistently exposed to abnormal amounts of minute particles of dust during his average work day with Gold Diggers, Inc. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its October 25, 2010, decision.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the rejection of Mr. Bennett's claim is affirmed.

Affirmed.

ISSUED: June 18, 2012

CONCURRED IN BY:

Chief Justice Ketchum

Justice Robin Jean Davis

Justice Thomas E. McHugh

DISSENTING:

Justice Margaret L. Workman

Justice Brent D. Benjamin disqualified