

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**HAROLD DEAN BASHAM,**  
**Claimant Below, Petitioner**

**vs.) No. 100633 (BOR Appeal No. 2043871)**  
**(Claim No. 2009049472)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER,**  
**Commissioner Below, Respondent**

**and**

**BOXLEY AGGREGATES OF WEST VIRGINIA, LLC,**  
**PIONEER MID-ATLANTIC, INC.,**  
**RALEIGH STONE COMPANY,**  
**BECKLEY STONE COMPANY, and**  
**HANSON AGGREGATES PMA, INC.,**  
**Employers Below, Respondent**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated April 21, 2010, in which the Board affirmed a November 13, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges rejected Mr. Basham's claim for occupational pneumoconiosis benefits on August 21, 2008. The appeal was timely filed by the petitioner, and both the Insurance Commissioner and Boxley Aggregates of West Virginia, LLC filed a response. 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, the Court is of the opinion that this case 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

**FILED**

**July 15, 2011**

**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

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 denial of Mr. Basham's request for occupational pneumoconiosis benefits. Mr. Basham has been employed at the same rock quarry since 1981; however, it has been under the ownership of several different entities during that time. Currently, and since 2001, it has been owned by Respondent Boxley Aggregates of West Virginia, LLC ("Boxley"). Mr. Basham testified that since Boxley has owned the quarry, he has been exposed to silica sand and rock dust daily.

The Office of Judges noted that the only evidence in support of Mr. Basham's assertion of dust exposure is his testimony. Thus, it found Boxley's evidence to be "the most persuasive and convincing due to its basis on scientific data." (Nov. 13, 2009 Office of Judges Order, p. 5). Specifically, Boxley installed a dust suppression system at the time that it purchased the quarry. Its own testing as well as MSHA's testing have found dust levels to be below the permissible limits. Finally, Mr. Basham works in an enclosed control house the majority of the time and has access to breathing protection. Accordingly, the Office of Judges found that Mr. Basham has not satisfied the exposure requirements set forth in W. Va. Code § 23-4-1. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of April 21, 2010.

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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of Mr. Basham's claim for occupational pneumoconiosis benefits is affirmed.

Affirmed.

ISSUED: July 15, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman  
Justice Robin Jean Davis  
Justice Menis E. Ketchum  
Justice Thomas E. McHugh

DISSENTING:  
Justice Brent D. Benjamin