

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

RICHARD D. SPURLOCK, Petitioner

January 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 101561 (BOR Appeal No. 2044615)**
(Claim No. 2009068404)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
APPALACHIAN POWER COMPANY, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated November 9, 2010, in which the Board affirmed a May 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 26, 2009, and May 1, 2009, decisions granting Mr. Spurlock no permanent partial disability award and closing the claim for permanent partial disability benefits. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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 petition 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 a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In its Order, the Office of Judges found that Mr. Spurlock did not have a permanent impairment resulting from his October 29, 2008, right knee injury based upon the opinions of Dr. Bachwitt and Dr. Mukkamala. Mr. Spurlock disputes this finding and requests that this Court reverse the November 9, 2010, decision of the Board of Review and grant him an additional independent medical examination to determine the amount of permanent impairment resulting from the meniscal tear that he sustained on October 29, 2008.

Both Dr. Bachwitt and Dr. Mukkamala found that Mr. Spurlock was suffering from a right knee sprain only, had reached maximum medical improvement, and did not have any permanent impairment resulting from his October 29, 2008, injury. The Office of Judges placed great weight on the opinion of Dr. Bachwitt, an orthopedic surgeon, who found that arthroscopy was not necessary. Dr. Fuller, Mr. Spurlock's treating physician, disagreed with Dr. Bachwitt and Dr. Mukkamala and felt that Mr. Spurlock had not reached maximum medical improvement and was suffering from a meniscal tear, for which he recommended arthroscopy. Although the claims administrator did not authorize an arthroscopy, one was performed at Mr. Spurlock's expense on June 12, 2009, by Dr. Tao and clear evidence of a meniscal tear resulting from the October 29, 2008, injury was found. The Office of Judges and the Board of Review failed to consider the evidence of a meniscal tear obtained from the arthroscopy and did not grant Mr. Spurlock a new independent medical evaluation to determine the amount of permanent impairment resulting from the meniscal tear that Mr. Spurlock suffered on October 29, 2008.

For the foregoing reasons, we find that the decision of the Board of Review is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the decision of the Board of Review is reversed and the case is remanded for an independent medical evaluation.

Reverse and Remand.

ISSUED: January 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Margaret L. Workman
Justice Brent D. Benjamin

DISSENTING:

Justice Robin J. Davis
Justice Thomas E. McHugh