

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

BARRY WESTMORELAND, Petitioner

June 27, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 11-0095 (BOR Appeal No. 2044790)**
(Claim No. 2010099702)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
HUNTINGTON ALLOYS CORPORATION, Respondent**

MEMORANDUM DECISION

Petitioner Barry Westmoreland, by Edwin Pancake, his attorney, appeals the decision of the Board of Review. Huntington Alloys Corporation, by Steven Wellman, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 22, 2010, in which the Board affirmed a June 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 3, 2009, decision rejecting Mr. Westmoreland's request to have the claim held compensable for left knee sprain and left knee effusion. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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 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.

Mr. Westmoreland works as a pulpit operator for Huntington Alloys Corporation. On July 15, 2009, he felt a pop in his left knee while walking down a flight of stairs; his left knee gave out when he was walking later that same day. On July 16, 2009, Mr. Westmoreland was diagnosed with advanced osteoarthritis and a large joint effusion in his left knee.

Mr. Westmoreland has a longstanding history of degenerative disease in his left knee, dating at least as far back as 1987, when he was treated for spontaneously occurring joint effusion of the left knee. In 1994, Mr. Westmoreland underwent a left knee arthroscopy for the treatment of a degenerative meniscal tear and was diagnosed with degenerative changes. The record indicates that he has consistently reported pain in his left knee and has been continually diagnosed with degenerative changes in his left knee following the arthroscopy.

In its Order affirming the claims administrator's decision, the Office of Judges held that Mr. Westmoreland did not sustain an injury in the course of and resulting from his employment. Mr. Westmoreland disputes this finding and asserts that the record demonstrates he was injured in the course of and resulting from his employment, based on the wear and tear to his left knee occasioned by his past occupational requirements of walking and climbing on hard surfaces, and based on his testimony that this wear and tear lead to a work-related injury on July 15, 2009. Huntington Alloys asserts that Mr. Westmoreland failed to demonstrate that he sustained an injury in the course of and resulting from his employment.

In its Order, the Office of Judges relied heavily on Mr. Westmoreland's history of left knee symptoms related to degenerative disease. The Office of Judges stated that the mere fact that Mr. Westmoreland was required to work on his feet does not demonstrate that his degenerative disease is work-related. As noted by the Office of Judges, Mr. Westmoreland engaged in a very active lifestyle outside of his employment that subjected him to the risk of developing degenerative disease in his knees. Finally, the Office of Judges found that the evidence of record indicates that Mr. Westmoreland did not sustain an acute injury to his left knee and that his degenerative disease was not caused by his employment. The Board of Review reached the same reasoned conclusion in its decision of December 22, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: June 27, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum