

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**LEONARD A. KINNEY, Petitioner**

**March 29, 2012**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 101364 (BOR Appeal No. 2044590)**  
**(Claim No. 2010199414)**

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
BLUESTONE INDUSTRIES, Respondent**

**MEMORANDUM DECISION**

Petitioner, Leonard A. Kinney, by Anne L. Wandling, his attorney, appeals the Board of Review order denying compensability for his right knee injury. Bluestone Industries, by Jeffrey B. Brannon, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated October 13, 2010, in which the Board affirmed a May 19, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of compensability for a right knee injury. 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, response, 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 briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the revised rules.

Mr. Kinney asserts he suffered a right knee injury and left eye laceration, on June 16, 2009, when he slipped and fell in the course of his employment with Bluestone Industries. Mr. Kinney testified during deposition that he was attempting to clean the tail piece on a belt when he stepped on an anchor pin resulting in his falling on a shovel carried by another employee and suffering an eye laceration. At the same time, Mr. Kinney reported he twisted his knee. At that time, Mr. Kinney was examined by a supervisor, who was an emergency medical technician, and returned to work. On June 17, 2009, Mr. Kinney completed an Employee's Accident Report documenting the knee and eye injuries. Following the accident, Mr. Kinney also acknowledged he sought treatment with Dr. Ryckman and Dr. Katherine Hoover; however, he failed to mention the right knee injury to either

physician. Mr. Kinney acknowledged he saw Dr. Hoover on a regular basis for pain management. Mr. Kinney also acknowledged he was involved in three automobile accidents and did not disclose this information in the interrogatories from Bluestone Industries, because he did not feel this information was relevant to his claim.

Mr. Kinney did not seek treatment for the knee injury until July 20, 2009, at which time he complained of pain in his right knee following a work injury. Mr. Kinney underwent an x-ray of his right knee which was normal; however, the examining physician opined internal derangement of the knee, with a possible medial meniscus tear. MRI studies of the right knee showed a small tear of the posterior horn of the medial meniscus. On August 26, 2009, Mr. Kinney underwent a right knee arthroscopy, partial medial meniscectomy, and chondroplasty.

The Office of Judges held the issues of credibility regarding Mr. Kinney's right knee injury should be resolved against compensability. Mr. Kinney's co-workers, present at the time of the accident, did not corroborate the injury, there was a five week delay in seeking medical attention while seeing a physician for separate musculoskeletal issues, and Mr. Kinney's testimony regarding his dates of work are not corroborated by work records. The Office of Judges noted Mr. Kinney's responses to interrogatories omit key information about past compensable injuries, past noncompensable injuries, past medical treatment, and past litigation. "[Mr. Kinney's] responses were not candid, truthful or forthcoming. His reasons for not admitting this information cannot be considered an oversight." "[Mr. Kinney's] testimony and statements provide the only evidence linking the right knee injury with the incident of June 16, 2009." The Office of Judges, too, found no basis for compensability or for disputing the Claims Administrator's findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of October 13, 2010.

The record demonstrates Mr. Kinney reported a work injury on June 17, 2009, through the completion of an Employee's Accident Report. Mr. Kinney was also examined by a supervisor who was an emergency medical technician following the injuries. W. Va. Code § 23-4-1a provides "[e]very employee who sustains an injury subject to this chapter, or his or her representative, shall immediately on the occurrence of the injury or as soon thereafter as practicable give or cause to be given to the employer or any of the employer's agents a written notice of the occurrence of the injury, with like notice or a copy of the notice to the workers' compensation commissioner." "[T]he claimant has the burden of establishing by positive evidence, or by evidence from which the inference can be fairly and reasonably drawn, that he sustained an injury in the course of and resulting from his employment." Emmel v. State Compensation Director, 150 W.Va. 277, 281, 145 S.E.2d 29, 32 (1965). Such proof is required under the provisions of the Code, 1931, 23-4-1, as amended, which clearly state that before injured workmen are entitled to payment from the compensation fund it must be determined that their injuries have occurred "in the course of and resulting from their employment." *Id.*

The Office of Judges and Board of Review focus on Mr. Kinney's lack of candor regarding the interrogatories and his failure to mention a right knee injury to either of his treating physicians prior to July 20, 2009. However, Mr. Kinney did complete an Employee's Accident Report on June 16, 2009, one day after his alleged injuries. This Court previously held in order for a claim to be

held compensable three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment. Syllabus Point 1, Barnett v. State Workmens' Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970). Further, "[i]n determining whether an injury resulted from a claimant's employment, a causal connection between the injury and the employment must be shown to have existed." Syllabus Point 2, Emmel, 150 W.Va. at 277, 145 S.E.2d at 29.

Here, Mr. Kinney did not seek medical treatment for his right knee injury until five weeks after the alleged injury occurred. However, according to W. Va. Code § 23-4-15(a) an employee is entitled to benefits under workers' compensation when a proper application is completed within six months from and after the injury. The Office of Judges misconstrued the evidence in this claim to deny compensability for Mr. Kinney's injury. Under the standards set forth in Barnett, Mr. Kinney suffered a personal injury, as found in the x-ray and MRI studies showing a small tear of the posterior horn of the meniscus. Second, Mr. Kinney's completion of the accident report on June 17, 2009, satisfies the notification requirements of W. Va. Code § 23-4-1a and further establishes the injury is work-related. Finally, Mr. Kinney was examined by a supervisor who is an emergency medical technician on the date of injury. The eye laceration was accepted as a compensable component, and it follows that the right knee injury should also be accepted as a compensable component of this claim. Therefore, this Court reverses the matter for development of the record to determine if Mr. Kinney fully complied with the requirements of W. Va. Code R. § 85-20-7, *et seq.*

For the foregoing reasons, we find that the decision of the Board of Review is in clear violation of a constitutional or statutory provision, it is clearly the result of erroneous conclusions of law, or it is based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the Court reverses and remands this matter for further proceedings to determine whether Mr. Kinney fully complied with the reporting requirements set forth in W. Va. Code R. § 85-20-7, *et seq.*

Reversed and Remanded.

ISSUED: **March 29, 2012**

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Justice Robin J. Davis