

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

December 5, 2012

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

**FRANK J. McCARTY, Petitioner**

**vs.) No. 11-0658** (BOR Appeal No. 2045159)  
(Claim No. 2008008979)

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
MOUNTAIN EDGE MINING, INC., Respondent**

**MEMORANDUM DECISION**

Petitioner Frank J. McCarty, by Patrick Maroney, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Mountain Edge Mining, Inc., by Robert Busse, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 21, 2011, in which the Board affirmed a September 21, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 14, 2009, decision granting Mr. McCarty a 0% permanent partial disability award for his right knee contusion. 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. McCarty was working for Mountain Edge Mining, Inc. as a barge operator when he injured his right knee. On September 6, 2007, the claim was held compensable for a contusion of the knee. On April 14, 2009, the claims administrator granted Mr. McCarty a 0% permanent partial disability award for the right knee contusion.

The Office of Judges affirmed the claims administrator's Order, finding the 4% impairment found by Dr. Guberman was related to meniscal tears, and not the knee contusion.

On appeal, Mr. McCarty argues that he received benefits for the meniscal tear, making it compensable, and is entitled to a 4% permanent partial disability award. Mountain Edge Mining, Inc. argues that Mr. McCarty failed to appeal an order denying meniscal tear as a compensable component in the claim, and as his impairment relates to that condition, he is not entitled to a permanent partial disability award. On September 14, 2009, Dr. Guberman recommended 4% impairment for the compensable injury, finding that the meniscal tears were directly related to the compensable injury. Drs. Bachwitt, Short, and Amores found that the meniscal tears were not related to the compensable injury, and Dr. Bachwitt found that Mr. McCarty had no impairment resulting from the knee contusion. Further, Dr. Crompton noted after performing surgery on Mr. McCarty's knee that the tear was mainly associated with degenerative changes and degenerative joint disease.

In reaching the decision to affirm the claims administrator's 0% permanent partial disability award, the Office of Judges noted that the only impairment found by a physician was related to meniscal tears. The Office of Judges also noted that on the day of injury there were degenerative changes and loose bodies already present in the knee. Dr. Bachwitt found that a simple knee contusion would not be a sufficient twisting injury to cause a meniscal tear. The Office of Judges concluded that the 4% impairment recommended by Dr. Guberman was clearly related to a non-compensable condition, and affirmed the 0% permanent partial disability award. The Board of Review reached the same reasoned conclusion in its decision of March 21, 2011. We agree with the reasoning and conclusions of the Board of Review.

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: December 5, 2012**

**CONCURRED IN BY:**

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