20-0216

In the
SUPREME COURT OF APPEALS OF WEST VIRGINIA
Charleston, West Virginia

JOE D. BARGANSKI,

Petitioner,

vs.

Board of Review No. 2054671
Claim No. 2018005926
Order Date: 02/20/2020

CENTRE FOUNDRY & MACHINE COMPANY,

Respondent.

BRIEF ON BEHALF OF PETITIONER
JOE D. BARGANSKI

J. Robert Weaver, Esquire
State Bar No. 3957
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Counsel for Petitioner

March 12, 2020

PETITION FOR REVIEW

NATURE OF APPEAL

The claimant/petitioner, (hereinafter claimant) Joe D. Barganski, petitions for a review of the February 20, 2020, order of the Workers' Compensation Board of Review which affirmed the Administrative Law Judge's order dated September 26, 2019, that in-part affirmed the Claim Administrator's orders dated December 18, 2017 and February 8, 2018. Both orders denied the additional diagnosis code of septic knee and denied diagnostic testing, hospitalization and surgical intervention.

STATEMENT OF THE CASE

The claimant sustained an injury to his right knee on August 25, 2017, while participating in demolition of an old catwalk that went across the lower roof of his employer's plant. The catwalk was being cut into pieces and then thrown off the roof. At the time of his injury, the claimant was carrying several pieces of rusted steel and old wood towards the edge of the roof when his left foot suddenly slid out from under him causing him to fall with his body weight coming down on his right knee.

The claimant reported the injury the same day it happened to his supervisor, Johnny Shafer. Mr. Shafer had the claimant complete a Centre Foundry Accident Report. The injury occurred on Friday and the claimant was off the following Saturday and Sunday. He reported back to work on Monday August 28, 2017, and at that time reported the injury to Mr. Fred VanSickle, the Human Resources and Workers' Compensation officer for the employer. At that time, the claimant indicated to Mr. VanSickle that he thought he would be okay. However, later that week on Friday September 1, 2017, the claimant went back to see Mr. VanSickle because he was having severe pain and problems and needed to go to the doctor. At that time, the claimant was told by Mr. VanSickle that he had thrown away the original Accident Report the claimant filled out because the claimant thought he was going to be okay. Then, Mr. VanSickle instructed the claimant to complete a new Centre Foundry Accident Report, except this time he told the

claimant to list September 1, 2017, as the date of injury. The claimant followed the instructions from Mr. VanSickle and put September 1, 2017, as the date of injury on the Accident Report and on the workers' compensation claim form.

The claimant was instructed to go to Corporate Health at Wheeling Hospital to be evaluated. The claimant was treated at Corporate Health but was also referred to the emergency department at Wheeling Hospital due to concerns of possible internal derangement of the hardware in the claimant's right knee from a prior surgery.

The claimant had a prior injury to his right knee with the same employer on February 4, 2016. That claim was only approved for a sprain of the right knee. However, following his 2016 injury the claimant came under the care of orthopedic surgeon Allan Tissenbaum who diagnosed him with varus malalignment of the right knee with effusion. As a result, the claimant had to undergo a right total knee replacement or arthroplasty on October 18, 2016 by Dr. Tissenbaum. At the time of the right knee surgery, hardware was placed into the claimant's right knee. This is the hardware that the doctor at Corporate Health was concerned about when he referenced possible internal derangement in the right knee.

Corporate Health completed the bottom half of the Employee's and Physician's Report of Injury on September 7, 2017, the same day the top half of the form was completed by the claimant. The physician indicated on the claim form that the claimant sustained an occupational injury on September 1, 2017, (actually August 25, 2017) which he diagnosed as a right knee contusion. The claimant was then referred to the orthopedic department at Wheeling Hospital where his prior right knee surgery had been performed the year before. The claimant was evaluated by Jeffrey Abbott, also an orthopedic surgeon and partner of Dr. Tissenbaum who no longer worked there. Dr. Abbot's assessment of the claimant's knee was infection of total right knee and he indicated that the claimant needed incision and drainage surgery with polyethylene liner exchange and static anabolic spacer. He also requested that septic knee be added as a compensable diagnosis in the claim.

By order dated December 18, 2017, and again on February 8, 2018, the Claim Administrator denied the additional diagnosis of septic knee, denied diagnostic testing, hospitalization and surgical intervention. These orders were protested by the claimant. In support of his protests, the claimant testified by deposition on June 21, 2018.

The claimant testified that following his initial right knee surgery by Dr. Tissenbaum on October 18, 2016, he did not have any problems whatsoever. The claimant testified that he walked 65 miles of the Appalachian Trail that summer following his surgery. He stated it was not until his injury of August 25, 2017, when his right leg folded under him that he began to have problems with the right knee.

Following his injury on August 25, 2017, Dr. Tissenbaum had to perform surgery on the claimant in September, 2017 at which time he took the right knee completely out and put in an anabolic spacer which the claimant indicated was like a straight piece of pipe. The purpose of removing the knee was to allow Dr. Abbott to be able to treat the infection. The claimant remained without a right knee until March 5, 2018, when Dr. Abbott performed an additional surgery at which time, he replaced the right knee. The claimant indicated they did not use the old right knee but rather inserted a completely new knee which was more heavy duty. However, on May 13, 2018, the claimant had to have an additional surgery by Dr. Abbott because he developed an infection in his right knee. The claimant testified that Dr. Abbott basically cleaned out the infection, replaced all of the hardware and then closed his knee back up. Thus, the claimant testified he has undergone a total of four right knee surgeries with the first one being after his injury in February, 2016 and the other three surgical procedures following this current injury of August 25, 2017.

The claimant testified he was still off from work under the care of both Dr. Abbott and Dr. Fukuta, his infection disease doctor. The claimant testified on page 27 of his deposition that he had discussed with Dr. Fukuta whether or not she felt that his septic knee was related to his

August 25, 2017 injury. He indicated that Dr. Fukuta said that during the fall he had bruised his knee and since it was an artificial knee there was a lack of circulation. Further, she indicated that the dried-up blood within the knee is what became infected. The infection was basically due to not having regular blood circulation that he would have had if he had a normal knee.

The claimant requested that the diagnosis of septic knee be covered as a compensable diagnosis and also requested that the diagnostic testing, hospitalization and surgical intervention he had required be covered as part of this workers' compensation injury. He also requested temporary total disability benefits since he has been unable to work since the injury.

The employer introduced two separate independent medical reports from doctors who only evaluated the claimant on one occasion. Neither of these physicians was involved in the treatment or care of the claimant regarding his right knee. Further, neither of these physicians is an infectious disease doctor who will be the most qualified to comment on the nature of the claimant's septic knee. No other physician would be as qualified to give an opinion about the claimant's septic knee and whether it was related to the 2016 injury or the current 2017 injury as is Dr. Fukuta.

The claim was subsequently submitted for a decision. By order dated September 26, 2019, the Office of Judges affirmed the Claim Administrator's orders dated December 18, 2017, and February 8, 2018, both of which denied the additional diagnosis code of septic knee and denied diagnostic testing, hospitalization and surgical intervention.

By order dated February 20, 2020, the Workers' Compensation Board of Review affirmed the September 26, 2019, decision of the Office of Judges and the Board adopted the Findings of Fact and Conclusions of Law. The claimant now seeks a review of this decision.

ASSIGNMENT OF ERROR

1. The Board of Review erred as a matter of fact.
2. The Board of Review erred as a matter of law.
3. The Board of Review erred in not applying the rule of liberality.

ARGUMENT AND POINTS OF AUTHORITY

W.Va. Code §23-4-1g provides that, for all awards made on or after July 1, 2003, the resolution of any issue shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined merely by counting the number of witnesses, reports, evaluations or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

Because the decision of the Board of Review represents an affirmation of the decisions of both the Claim Administrator and the Administrative Law Judge, the Supreme Court of Appeals may only reverse or modify the decision if it finds the decision is in clear violation of constitutional or statutory provision, is 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. W.Va. Code §23-5-15(c).

The Administrative Law Judge incorrectly concludes in the order that the denial of the diagnosis of septic knee and denied diagnostic testing, hospitalization and surgical intervention are proper based upon the report of Dr. Kelly Agnew dated October 25, 2017. Dr. Agnew concluded that there was no direct and causal relationship to the work-related injury based upon his cursory medical review. However, to the contrary, Dr. Fukuta has clearly stated that the infection which the claimant developed after his August 25, 2017, injury is unequivocally not related to the February, 2016 injury. Dr. Fukuta clearly explains in her report of November 1, 2017, that when she took care of the claimant following his 2016 injury it was due to a severe MRSA infection. But her current care of the claimant for the August 25, 2019 injury has been due to a right knee prosthetic joint infection due to Streptococcus. Thus, because the causative organisms are different, Dr. Fukuta is able to distinguish between the claimant's initial MRSA infection in 2016 and the current Streptococcus resulting from this compensable injury. This medical evidence from Dr. Fukuta clearly constitutes direct causal relationship to the work-related injury contrary to the opinion of Dr. Agnew who only evaluated the claimant oon one occasion.

Thus, while Dr. Stoll, the other independent medical examiner, and Dr. Agnew believe that there is no direct causal relationship between the claimant's injury and the need for the surgery and the diagnosis of septic knee, diagnostic testing and hospitalization, their opinions should be afformed little if any weight. These are both one-time examining physicians, neither of whom are board certified in infectious disease. Thus Dr. Abbott and Dr. Fukuta are of the opinion that the claimant's need for the surgery and the additional diagnosis code and hospitalization are directly related to the claimant's work-related injury. Their opinions should be afforded greater weight because they are the claimant's surgeon and infection disease treater for this injury.

The Board of Review and the Administrative Law Judge both failed to fully review and properly weigh the medical evidence of record. The totality of the medical evidence indicates that both decisions are clearly wrong as they failed to give the proper weight to the evidence from Drs. Abbott and Fukuta.

CONCLUSION

Wherefore, the claimant/petitioner, Joe D. Barganski, respectfully requests that his petition be granted and the aforesaid final order be reversed, and that the additional diagnosis code of septic knee be added to his claim and that the diagnostic testing, hospitalization and surgical intervention which were previously denied be reversed and approved. Lastly, the claimant requests that he be paid temporary total disability benefits for all periods of time he was off from work while under the care of Drs. Abbott and Fukuta as a result of the August 25, 2017, injury.

Respectfully yours,

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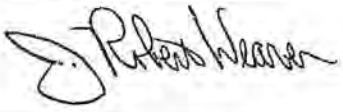
By 

WV State Bar ID No: 3957

March 12, 2020

CERTIFICATE OF SERVICE

I, J. Robert Weaver, counsel for Petitioner herein, do hereby certify that I served the foregoing Petition upon the following by hand delivery and/or by mailing a true and accurate copy of the same via the United States Mail, postage prepaid, on this the 12th day of March, 2020.

HAND DELIVERY:

Edythe Nash Gaiser, Clerk
State of West Virginia
Supreme Court of Appeals
State Capitol Building
Charleston, WV 25305

VIA UNITED STATES' POSTAL SERVICE:

Alyssa Sloan, Esquire
Steptoe & Johnson
400 White Oaks Blvd
Bridgeport, WV 26330

J. ROBERT WEAVER

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20-0216

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FILED
MAR 12 2020

APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: Joe D. Barganski v. Centre Foundry & Machine Company

Petitioner: Joe D. Barganski Respondent: Centre Foundry & Machine Company

Counsel: J. Robert Weaver Counsel: Alyssa Sloan

Claim No.: 2018005926 Board of Review No.: 2054671

Date of Injury/Last Exposure: 08/25/2017 Date Claim Filed: 09/01/2017

Date and Ruling of the Office of Judges: 09/26/2019

Date and Ruling of the Board of Review: 02/20/2020

Issue and Relief requested on Appeal: Addition of diagnosis of septic knee, diagnostic testing, hospitalization, surgical intervention

CLAIMANT INFORMATION

Claimant's Name: Joe D. Barganski

Nature of Injury: Right Knee

Age: 45 Is the Claimant still working? ■Yes ☐No. If yes, where: Centre Foundry

Occupation: Maintenance No. of Years: 20 yrs.

Was the claim found to be compensable? ■Yes ☐No If yes, order date: 12/18/2017

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): _____ Old Fund or New Fund (please circle one)

Date of Last Employment: _____

Total amount of prior PPD awards: _____ (add dates of orders on separate page)

Finding of the PTD Review Board: _____

List all compensable conditions under this claim number: _____
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?
☐Yes ■No
(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? ☐Yes ■No
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? ☐Yes ■No
If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.