STATE OF WEST VIRGINIA
WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLES E. COMAS	:	JCN: 2023005626
	:	
Petitioner/Claimant,	:	BOR NO. 2023005626
	:	
	:	ICA No. 23-ICA-466
	:	
	:	DOI: September 5, 2022
v.	:	
	:	
BASS PRO GROUP, LLC	:	
	:	
Respondent/Employer.	:	

PETITIONER / CLAIMANT'S

APPEAL BRIEF

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I. Assignments of Error

(1) The ICA erred by failing to apply *Moore v ICG Tygart Valley LLC*, 247 W.Va. 292, 879 S.E.2d 779 (2022); in that the claimant has never previously complained of left knee pain nor been treated for any prior left knee injuries or symptoms, and has had continuous symptoms since his work related injury. As such, his medial meniscus tear should be a compensable component of his claim, and reasonable treatment including arthroscopic surgery, should be approved.

(2) The ICA erred to the extent it gave any weight to Dr. Soulsby's opinion, particularly the claim that the claimant would have developed symptoms at some point in the near future regardless of the work injury. Dr. Soulsby's conclusion is speculative and inconsistent with *Moore v ICG Tygart Valley.*

(3) The ICA erred in affirming the denial of arthroscopic left knee surgery by ignoring the progression of treatment for a knee injury that is recognized under Rule 20, and by failing to apply *Moore v ICG Tygart Valley* to the issue of treatment.

II. Statement of the Case and Procedural History

The claimant is employed by Bass Pro Group (d/b/a Cabella's), working in the warehouse loading trucks. (App. Ex. 1) He has held this position for approximately two years. (App. Ex. 1)

On September 5, 2022, the claimant was working the midnight shift. (App. Ex. 1) He was using a pallet jack on the loading dock and the dock plate was wet.

(App. Ex. 1) When the claimant stepped on the pallet plate, his foot slipped and he fell onto the concrete floor. (App. Exs. 1, 2) His left knee twisted as he was falling, and he immediately felt a sharp, burning pain on the inside of his left knee. (App. Ex. 1) Prior to his fall on September 5, 2022, the claimant had never had any problems, symptoms, complaints or pain in his left knee. (App. Ex. 1)

The claimant immediately reported the incident to his supervisor. (App. Ex. 1) The claimant was unable to work the rest of his shift. (App. Ex. 1) The claimant went to the emergency room, where he was diagnosed with a left knee strain. (App. Exs. 1, 3) X-rays of his left knee showed no fractures and mild degenerative joint disease. (App. Ex. 3) He was taken off work for three days and iced his knee. (App. Ex. 1) The swelling and burning sensation in his left knee has continued since his September 5, 2022 fall. (App. Ex. 1) The claimant's symptoms are aggravated by bending his knee, walking and going up and down stairs. (App. Ex. 1)

The claimant was evaluated at Occupational Medicine on September 15, 2022, where he was diagnosed with a left knee sprain. (App. Ex. 4) It was noted the claimant had no prior history of injuries to his left knee. (App. Ex. 4) A medial meniscus tear was suspected, and light duty, physical therapy and an MRI were recommended. (App. Ex. 4) By Orders dated October 11, 2022, physical therapy and an MRI were authorized. (App. Ex. 5) On October 26, 2022, the claim was ruled compensable for a left knee sprain. (App. Ex. 5)

The claimant went to physical therapy for five weeks, and it did not help his condition. (App. Ex. 6) On October 20, 2022, the claimant had a left knee MRI which showed degenerative tearing of the posterior horn of the medial meniscus with

associated mild cartilage loss and osseous edema, and small joint effusion. (App. Ex. 3) Corporate Health recommended an orthopedic referral. (App. Ex. 4) By decision dated October 26, 2022, a referral to Dr. Abbott, an orthopedic surgeon, was approved. (App. Ex. 5)

Dr. Abbott first saw the claimant on November 11, 2022, and noted the claimant had constant pain and swelling in his knee since his fall at work. (App. Ex. 7) Dr. Abbott diagnosed the claimant with "acute medial meniscus tear of left knee" related to his compensable injury, and osteoarthritis of the left knee. (App. Ex. 7) Dr. Abbott recommended left knee arthroscopy surgery. (App. Ex. 7)

The employer had a record review performed by Dr. Soulsby on December 23, 2022. (App. Ex. 8) Dr. Soulsby never actually saw the claimant. (App. Ex. 8) Dr. Soulsby concluded that the claimant did have a medial meniscus tear, and that left knee arthroscopy is a reasonable and necessary treatment for such a condition. (App. Ex. 8). However, Dr. Soulsby indicated the meniscus tear was degenerative in appearance and he felt it pre-existed the work injury of September 5, 2022. (App. Ex. 8) Dr. Soulsby bolstered his opinion by stating among people with radiographic evidence of osteoarthritis, the prevalence of a meniscal tear was 63% of those people who had knee pain, aching and stiffness on most days and 60% in people with no symptoms. (App. Ex. 8) Dr. Soulsby then speculated that the claimant's meniscus tear was unrelated to his work injury. (App. Ex. 8). Dr. Soulsby does not have any definitive proof of a prior meniscus tear, as there are no MRIs of the claimant's knee prior to his work injury. Dr. Soulsby did acknowledge that the work injury may have caused an exacerbation of the degenerative condition. (App. Ex. 8) Dr. Soulsby did

note that Wheeling Hospital records reflected the claimant had no prior difficulties with his left knee, but he did not correlate any of his review to the requirements of *Moore v ICG Tygart Valley LLC.*

In January of 2023, the claimant's left knee gave out while he was picking up a box at work. (App. Exs. 1, 3) He was wearing his knee brace at the time. (App. Ex. 1) He went to the hospital, and was told he had aggravated his September 5, 2022 left knee injury. (App. Exs. 1, 3)

Based on Dr. Soulsby's record review, the claims administrator denied Dr. Abbott's request for left knee arthroscopy on December 28, 2022. (App. Ex. 5) The claimant protested this denial. In a decision dated September 28, 2023, the BOR affirmed the denial of left knee arthroscopy. (App. Ex. 9) The ICA upheld the BOR decision in a ruling dated March 25, 2024. The claimant is appealing the ICA decision.

III. Summary of Argument

The claimant had degenerative joint disease in his left knee, and possibly even a pre-existing, asymptomatic meniscus tear. However, it is uncontroverted that the claimant had absolutely no complaints, symptoms, problems or injuries of his left knee prior to his work injury on September 5, 2022. There is no dispute that the claimant has had constant pain and swelling, and even giving way of his left knee, since his September 5, 2022 work injury.

The BOR and ICA decisions failed to consider or even mention *Moore v ICG Tygart Valley.* Per *Moore*, a claimant's disability will be presumed to have resulted from the compensable injury if: (1) before the injury, the claimant's preexisting disease or

condition was asymptomatic, and (2) following the injury, the symptoms of the disabling disease or condition appeared and continuously manifested themselves afterwards. In a case very similar to the instant matter, *Click v Arcelormittal U.S.*, 21-0128 (W.Va. October 18, 2022), the West Virginia Supreme Court reiterated the holding in *Moore* and noted the primary issue was to determine whether the claimant's preexisting medial meniscus tear was asymptomatic prior to the compensable injury. In the instant case, there is no evidence of any complaints, symptoms, injuries or problems with the claimant's left knee prior to his compensable work injury. As such, the claimant's meniscus tear should be a compensable component of this claim.

The ICA decision also indicates the compensability order approves a knee sprain, and not a medial meniscus tear and osteoarthritis of the left knee. The ICA then limited the claimant's treatment solely to W.Va. C.S.R. § 85-20-43b, and failed to take into account the progressive nature of the diagnosis and treatment provisions for knee injuries under Rule 20. Progressive treatment of ongoing knee complaints include things like an MRI and referral to an orthopedic surgeon – both of which were approved by the carrier. It was not until Dr. Abbott added the diagnosis of medial meniscus tear and recommended surgery, that authorization was withheld. This exact progression of treatment was also recognized in the *Click* decision.

Statement Regarding Oral Argument

The Claimant requests the ability to present oral argument.

IV. Argument

Standard of Review:

Pursuant to W. Va. Code §23-5-12a:

> Any employer, employee, claimant, or dependent who shall feel aggrieved by a decision of the Workers' Compensation Board of Review shall have the right to appeal to the West Virginia Intermediate Court of Appeals, created by §51-11-1 *et seq.* of this code, for a review of such action... .
>
> ... The review by the court shall be based upon the record submitted to it and such oral argument as may be requested and received. The Intermediate Court of Appeals may affirm, reverse, modify, or supplement the decision of the Workers' Compensation Board of Review and make such disposition of the case as it determines to be appropriate. Briefs may be filed by the interested parties in accordance with the rules of procedure prescribed by the court. The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are: (1) In violation of statutory provisions; (2) In excess of the statutory authority or jurisdiction of the Board of Review; (3) Made upon unlawful procedures; (4) Affected by other error of law; (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"When it appears from the proof upon which the Workmen's Compensation [Board of Review] acted that its finding was plainly wrong an order reflecting that finding will be reversed and set aside by this Court." Syllabus point 5, *Bragg v. Comm' r*, 152 W. Va. 706, 166 S.E.2d 162 (1969). Syl. pt. 1, *Bowers v. Comm'r*, 224 W. Va. 398, 686 S.E.2d 49 (2009). In *Barnett v. State Workmen's Compensation Commissioner,* 153 W.Va. 796, 172 S.E.2d 698 (1970), the Supreme Court explained that "[w]hile the findings of fact of the [BOR] are conclusive unless they are manifestly against the weight of the evidence, the legal conclusions of the [BOR], based upon such findings, are subject to review by the courts." 153 W.Va. at 812, 172 S.E.2d at 707 (quoting Emmel v. State Compen. Dir., 150 W.Va. 277, 284, 145 S.E.2d 29, 34 (1965)).

Discussion of Authorities and Argument

(A) The Impact of *Moore v ICG Tygart Valley*

Three elements must exist for a finding of compensability. There must be (1) a personal injury, (2) received in the course of employment, and (3) resulting from the employment. *Barnett v State Workmen's Compensation Commissioner*, 153 W. Va. 796, 172 S.E.2d 698 (1970), and *Jordon v State Workmen's Compensation Commissioner*, 156 W.Va. 159, 191 S.E.2d 497 (1972). There is no dispute that the claimant fell at work and twisted his knee, and that immediately after the fall, he experienced continuous pain and swelling in his left knee.

It was not until after the work injury that a medial meniscus tear was diagnosed for the first time, symptoms and pain were present for the first time, and surgery was recommended for the first time. Dr. Abbott diagnosed the meniscus tear and related it to the compensable injury. The MRI describes the medial meniscus tearing as "degenerative," and Dr. Soulsby opines that the tearing preexisted the injury. Dr. Soulsby also noted there was no history of prior knee problems, and that 60% of people with osteoarthritis were likely to have a meniscal tear without any symptoms.

This factual scenario places this case squarely within the realm of *Moore v ICG Tygart Valley LLC*, 247 W.Va. 292, 879 S.E.2d 779 (2022). Per *Moore:*

> A claimant's disability will be presumed to have resulted from the compensable injury if: (1) before the injury, the claimant's preexisting disease or condition was asymptomatic, and (2) following the injury, the symptoms of the disabling disease or condition appeared and continuously manifested themselves afterwards. There still must be sufficient medical evidence to show a causal relationship between the compensable injury and the disability, or the nature of the accident, combined with the other facts of the case, raises a natural inference of causation.

Syllabus Point 5.

It is undisputed in this case that the claimant suffered a left knee injury at work on September 5, 2022, and that the claimant's left knee was completely asymptomatic prior to his September 5, 2022 work injury. Per the claimant's testimony:

Q: And prior to September 5th of 2022, had you ever had any prior problems with your left knee?
A: No, I haven't.
Q: Any symptoms with your left knee previously?
A: Nothing.
Q: No complaints? No pain? No anything?
A: No pain. Nothing.
Q: Okay. Have you had sort of constant pain since the incident on September 5th?
A: Yes, every day.
Q: Okay. And swelling?
A: Swelling, yep.

(App. Ex. 1, pages 12-13). It should also be noted that prior to his work injury, the claimant had been performing a very strenuous job loading trucks for several years, and had absolutely no symptoms, complaints, pain or treatment of his left knee prior to his September 5, 2022 injury.

In the *Click v Arcelormittal U.S.* case, the facts are very similar to the instant case. Mr. Click experienced a pop in his knee while shoveling coal. X-rays showed degenerative joint disease and he was referred to orthopedics and for an MRI. The MRI showed a medial meniscus tear, degeneration and osteoarthritis. In *Click*, the decision of the claims manager rejecting the claim was overturned, and the case was remanded for a determination of whether the preexisting tear was asymptomatic before the compensable injury. In this case, the evidence already exists that the claimant's left knee was asymptomatic prior to his work injury. Therefore, under the *Moore* standard, the claimant's medial meniscus tear should be included as a compensable component of this claim.

(B) Dr. Soulsby's Speculative Opinion

In his record review, Dr. Soulsby concluded that because of osteoarthritis and degenerative medial meniscus tear in his left knee, it was reasonably certain "the claimant would have developed symptoms at some point in the near future regardless of the work incident." Dr. Soulsby's conclusion is completely speculative, and the Court has held that evidence is inadequate if it is based wholly on speculation. *Clark v. Workmen's Comp. Comm'r*, 155 W.Va. 726, 733, 187 S.E.2d 213 (1972).

Dr. Soulsby's opinion isn't even consistent with the statistics he cites. Per the study cited by Dr. Soulsby "Sixty-one percent of the subjects who had meniscal tears in their knees had not had any pain, aching, or stiffness during the previous month.". (App. Ex. 10). The study cited by Dr. Soulsby also drew no conclusions about whether symptoms would develop in people with osteoarthritis and a meniscus tear seen per MRI, or the role an injury would play in developing symptoms. (App. Ex. 10). In fact, the study clearly shows that a significant majority of people (61%) with osteoarthritis and a meniscal tear will not have any symptoms – making it more likely than not that the claimant's injury played a significant role in his development of knee symptoms, making it more likely than not that the claimant would have remained asymptomatic had the injury not occurred, and making it more likely than not that the injury triggered the need for surgery.

Moore also took into account the type of speculative argument Dr. Soulsby is making, and found it was not a factor for denying compensation.

> The fact that an employee, injured in performing services arising out of and incidental to his employment, was already afflicted with a progressive disease that might someday have produced physical disability, is no reason why the employee should not be allowed compensation under, Workmen's

> Compensation Act, for the injury, which, added to the disease, superinduced physical disability. Syllabus *Hall v Compensation Commissioner*, 110 W.Va. 551, 159 S.E. 516 (1931); Syllabus Point 1, *Charlton v State Workmen's Compensation Commissioner,* 160 W.Va. 664, 236 S.E.2d 241 (1977).

Syllabus Point 3. Therefore, Dr. Soulsby's claim that treatment should not be authorized for the claimant's meniscus tear because he might have developed symptoms someday, is an insufficient basis to deny treatment.

(C) Progressive treatment of knee injuries under Rule 20

The BOR decision, upheld by the ICA, states "the claim is left knee sprain and per W.Va. C.S.R. § 85-20-43b, surgery is an inappropriate treatment for knee sprain." However, the BOR and ICA did not take into account all the treatment guidelines for injuries to the knee and meniscal injuries, and the appropriate and approved progression of the claimant's treatment when it became obvious he had more than just a sprain.

In fact, the guidelines of Rule 20 were followed in this case. Rarely do medical professionals jump to the most severe conclusions when treating a knee injury. Conservative treatment approaches are tried, and if they are not successful, more diagnostic tests and assessments are performed, which may warrant additional treatment, up to and including surgery.

§ 85-20-42 "Treatment Guidelines: Injuries to the Knee" adopts this progressive approach.

> 42.1. The vast majority of knee injuries result from direct trauma to the joint or are caused by torsional or angulatory forces. These injuries vary in severity from simple ligamentous strains to complex injuries involving ligamentous disruption with meniscal damage and associated fracture. This guideline is designed to guide the practitioner in the appropriate

> management of these injuries and to establish a logical sequence for the diagnostic evaluation and treatment of the more complex injuries.

§ 85-20-42.1 goes on to note that "In general, knee injuries should be referred for orthopedic consultation and/or treatment under the following circumstances: a. Failure of a presumed knee sprain to show progressive resolution and respond to appropriate conservative treatment in a period of three (3) weeks."

Upon presenting with a presumed knee sprain, the claimant then went through the conservative modalities set forth in § 85-20-43, including x-rays (that were negative for a fracture), application of ice, and physical therapy. However, when these modalities failed to resolve the claimant's symptoms after more than three weeks, he was referred for an orthopedic assessment, as recommended under Rule 20. See § 85-20-42.1 which requires an orthopedic consult and/or treatment if a knee sprain does not respond to conservative treatment in 3 weeks, and § 85-20-43(b)(3) which states it is "inappropriate treatment" not to refer for a consultation after three weeks.

It should also be noted that the conservative treatment recommendations, and then the orthopedic consultation, were all approved by the insurer. See orders of October 11, 2022 authorizing physical therapy and an MRI, and the order of October 26, 2022 authorizing referral to Dr. Abbott. But, when the employer received an updated diagnosis from Dr. Abbott of "acute medial meniscus tear of the left knee and a reasonable treatment request for knee arthroscopy, suddenly surgery is denied as being beyond the scope of Rule 20.

The claimant's medical records clearly document that his knee complaints did not improve with conservative treatment. § 85-20-44.1 states "the mechanism of [a meniscal] injury is similar to that for knee sprains but symptoms of pain and swelling fail

to resolve in the anticipated period of time and the symptoms frequently include a sensation of "catching or giving away" of the joint. In fact, the claimant described exactly such an incident in January of 2023, when his left knee gave out while he was picking up a box at work.

§ 85-20-44 indicates appropriate treatment when a sprain does not resolve includes an MRI, which in this case was authorized and documented an acute medial meniscus tear. Rule 20 also recognizes arthroscopic surgery as an appropriate treatment for a meniscus tear, which was recommended by Dr. Abbott.

What started as a knee sprain, progressed through the treatment guidelines of Rule 20 to a meniscus tear requiring surgery. In effect, the denial of surgery was also a denial to update the diagnosis to medial meniscus tear. This is exactly the treatment progression that occurred in *Click v Arcelormittal U.S,* supra. In *Click*, the claim was remanded to determine if the claimant's knee was asymptomatic prior to the work injury, and if so, the meniscus tear would be compensable. In the instant case, evidence was already developed that the claimant's left knee was asymptomatic prior to his work injury. Even if the claimant had a pre-existing meniscus tear, it did not require surgery until after the compensable work injury. As such the request for arthroscopy should have been approved.

Medical treatment should be approved it if is medically related and reasonably required medical treatment, health care or health care goods and services under W.Va. Code §23-4-3 and 85 CSR 20. Dr. Abbott has concluded that the claimant's compensable injury requires left knee arthroscopy surgery. Even Dr. Soulsby admits left knee arthroscopy surgery is reasonable and necessary for the claimant's condition. Also, Rule

20 (85-CSR-20-44) indicates surgery is an approved treatment approach for a medial meniscus tear.

The ICA also implies that treatment for the now symptomatic meniscus tear should be denied on a technicality – that the claimant never asked for the addition of a meniscus tear to the claim. "Although the rules and regulations governing the workers' compensation system in this state are necessarily detailed and complex, we must be careful to prevent those deserving of compensation from being thwarted by technicalities or procedural niceties," *Martin v. Workers Compensation Div.,* 210 W.Va. 270, 275, 557 S.E.2d 324, 329 (2001). "The Workmen's Compensation Law is remedial in its nature, and must be given a liberal construction to accomplish the purpose intended." *Repass v. Workers' Comp. Div.*, 212 W.Va. 86, 92, 569 S.E.2d 162, 168 (2002). See also *Gearry v Valley Grove Volunteer Fire Department*, 22-ICA-275 (May 23, 2023).

The ICA's opinion is not accurate, and at best is an extremely narrow view of the evidence. In fact, a referral to Dr. Abbott, an orthopedic surgeon, and an MRI, were approved by the claims administrator when all conservative treatment for a knee sprain failed. The sole purpose of the MRI and referral was to determine whether something more serious than a knee sprain was going on. The MRI revealed a medial meniscus tear, and Dr. Abbott diagnosed a medial meniscus tear and requested authorization for a left knee arthroscopy. Clearly, Dr. Abbott was seeking approval for surgery of the medial meniscus tear, which he related to the compensable injury.

In addition, on January 11, 2023 the claimant (who at that time was pro se) sent a letter to the claims specialist, stating "the claimant is seeking arthroscopic surgery for a meniscal tear that occurred during a work related accident." (App. Ex. 12). In

Huntington Alloys Corp. v. Cassady, No. 16-0568, (W. Va. May 5, 2017) (memorandum decision), the Supreme Court of Appeals explained that "West Virginia Code of State Rules § 85-20 does not prohibit the submission of a request for the addition of a compensable condition by the claimant or the claimant's representative." See also *Gasvoda v Murray Am. Energy, Inc.*, 22-ICA-108 (W.Va. ICA February 2, 2023).

The *Huntington Alloys v Cassady* case is also strikingly similar to this case because the claims administrator, who approved the claim for a shoulder strain, was fully aware the treating doctor diagnosed a rotator cuff tear and requested authorization for surgery, and had been provided medical records confirming the rotator cuff diagnosis. The request was then followed up by claimant's counsel. The Court held such a manner of requesting consideration of the rotator cuff and request for surgery was not unreasonable.

Interestingly, the *Huntington Alloys* decision also commented on the importance of recognizing the claimant had no shoulder symptoms prior to his work injury. It was really a pre-cursor to the *Moore v ICG Tygart Valley* decision, which commented on the importance of whether a potential underlying condition was symptomatic prior to a work injury. In the instant case, the ICA did not discuss *Moore* at all. In fact, *Moore* is extremely relevant, as the claimant in this case had absolutely no complaints, problems, pain or concerns with his knee prior to his work related injury, and it was error for the ICA to ignore *Moore* in its decision.

The Workers' Compensation Act requires the overseeing agency to "ascertain the substantial rights of the claimants in such manner as will 'carry out justly and liberally the spirit of the act' unrestricted by technical and formal rules of procedure." *Gearry v*

Valley Grove Volunteer Fire Department, 22-ICA-275 (May 23, 2023), citing *Culurides v. Ott*, 78 W.Va. 696, 90 S.E. 270 (1916). In *Moore*, the Court was not constrained by mere technicalities that elevate "form over substance." In *Moore*, the Court found that the failure to formally request inclusion of an additional diagnosis was no impediment to the addition of a compensable condition when the issue was "squarely before the Office of Judges" *Id.* at 787. Likewise, in *Best Buy v. Parrish*, No. 15-1153, (W.Va. Dec. 6, 2016) (memorandum decision), this Court affirmed the Office of Judges' addition of a diagnosis where six treating physicians related the condition to the work injury, despite the lack of formal request by way of a diagnosis update form. In the instant case, the claimant's medial meniscus tear and the need for surgery was squarely before the claims rep, the Board of Review and the Intermediate Court of Appeals.

W.Va. Code 23-4-1(g) requires a weighing of **all** the evidence:

> ...resolution of any issue raised in administering this chapter shall be based on 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.

However, "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." *Id.* In this case, a weighing of the evidence justifies the approval of arthroscopy surgery.

V. Conclusion

Based on the foregoing, the claimant requests this Court reverse the ICA's March 25, 2024 decision, and find the claimant's medial meniscus tear is a compensable component of his claim, that surgery to correct the tear was not necessary until after the

compensable injury, and authorize Dr. Abbott's request for left knee arthroscopy.

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CERTIFICATE OF SERVICE

Service of the Petitioner/Claimant's Supreme Court Brief was had upon counsel for the employer by electronically serving a copy to counsel of record on this 22nd day of May, 2024 as follows:

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