

STATE OF WEST VIRGINIA
WEST VIRGINIA SUPREME COURT OF APPEALS
Supreme Court No.: 24-290

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

**PETITIONER / CLAIMANT'S
REPLY APPEAL BRIEF**

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REPLY ARGUMENT

The ICA decision is clearly wrong in that it is favoring form over substance and refusing to look at the complete picture in this claim. The short summary of the ICA's decision is that the claim was initially recognized for a knee sprain and surgery is an appropriate treatment for a knee sprain. However, such a limited view is ignoring all the evidence that was submitted as the claim developed, and ignoring requests from the claimant and his orthopedic surgeon, to recognize the meniscus tear.

The claimant may not have submitted a formal diagnosis update form, but all the information that was provided contained even more information than a diagnosis update form would, in support of recognizing a meniscus tear. Such information included the following:

- The claimant's protest (when he was pro se) to the surgery denial, repeatedly mentioned he was seeking arthroscopic surgery for a meniscal tear that occurred during a work related accident. (App. Ex. 12)
- 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)
- 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)

- Even the employer's record review physician, Dr. Soulsby, admitted the claimant had a torn medial meniscus. (App. Ex. 8)

In fact, the decision to deny surgery dated December 28, 2022 (App. Ex. 5) was based on the claims specialist favoring Dr. Soulsby over Dr. Abbott. It was not denied on the grounds the tear didn't exist, or the issue of treatment for the tear was not properly before the claims rep, or that surgery was not an appropriate treatment for a knee sprain. The denial was based on the carrier siding with Dr. Soulsby, who felt the tear was pre-existing and/or inevitable due to degenerative changes, and not due to the work injury.

The insurer's basis for the surgery denial is the exact reason why *Moore v ICG Tygart Valley LLC*, 247 W.Va. 292, 879 S.E.2d 779 (2022) is applicable in this case. 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. 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 surgery was not denied because the claim had only been recognized for a knee sprain. The surgery was denied because Dr. Soulsby felt the meniscus tear was due to degenerative changes. In such a case, the Court is required to weigh the *Moore* factors.

In this case, the BOR and ICA decisions are clearly wrong because the BOR and ICA decisions failed to consider or even mention *Moore v ICG Tygart Valley*.

Medical treatment should be approved if it 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.

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 – and any review of the facts would have to include a review of the *Moore* criteria.

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 Reply Supreme Court Brief was had upon counsel for the employer by electronically serving a copy to counsel of record on this 3rd day of July, 2024 as follows:

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