

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**MCELROY COAL COMPANY, Petitioner**

**October 28, 2011**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 100961 (BOR Appeal No. 2043954)**  
**(Claim No. 2005204330)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**TERRY ROSE, Respondent**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated July 13, 2010, in which the Board affirmed a December 22, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's March 11, 2009, decision closing Mr. Rose's claim for temporary total disability benefits after payment from February 12, 2008, to April 14, 2008, and granted temporary total disability benefits through January 18, 2009. The appeal was timely filed by the petitioner. 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 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.

In its Order reversing the claims administrator's decision to close the claimant's claim for temporary total disability benefits, the Office of Judges held that the claimant was entitled to temporary total disability benefits through January 18, 2009. McElroy Coal Company disputes this finding and asserts that the claimant's failure to seek immediate treatment for his right leg injury resulted in an unreasonable prolongment of his recovery period, and that

the claims administrator's order of March 11, 2009, should be affirmed because the claimant was released to return to work on June 2, 2008.

The Office of Judges found that the record conclusively showed that the claimant was temporarily and totally disabled until he returned to work on January 18, 2009. (December 22, 2009, Office of Judges Order, p. 4). The Office of Judges also found that as a direct result of the claimant's original left knee injury, he fell in April 2008 and injured his right leg. *Id.* He was scheduled to return to work on June 4, 2008, but was unable to do so because of his right leg injury; on that day his right leg injury was diagnosed as a healing fracture. *Id.* The Board of Review reached the same reasoned conclusion in its decision of July 13, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, 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. Therefore, the denial of the petitioner's request for the claimant's temporary total disability benefits to cease on June 4, 2008, is affirmed.

Affirmed.

**ISSUED: October 28, 2011**

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh