

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

October 7, 2015

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

**GALEN D. BUTTS,**  
**Claimant Below, Petitioner**

vs.) **No. 14-0473** (BOR Appeal No. 2049081)  
(Claim No. 2012039240)

**M A BONGIOVANNI, INC.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Galen D. Butts, by Lawrence E. Sherman Jr, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. M A Bongiovanni, Inc., by Steven K. Wellman, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 18, 2014, in which the Board reversed and vacated a December 16, 2013, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's July 16, 2012, decision to close the claim for temporary total disability benefits. The Office of Judges granted benefits from July 11, 2012, through September 13, 2012, and thereafter as substantiated by the medical evidence. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Butts, a carpenter for M A Bongiovanni, Inc., was retrieving materials out of a tool box when the lid fell and landed on his right wrist. The claim was held compensable for a right wrist contusion and Mr. Butts was awarded temporary total disability benefits from June 19, 2012, through July 11, 2012. On July 11, 2012 Mr. Butts reported to Troy Foster, M.D., for an

evaluation. Dr. Foster is a physician in M A Bongiovanni's preferred provider organization. Dr. Foster opined that Mr. Butts could be released to go back to work. He further opined that any symptoms that Mr. Butts was experiencing were due to his previous surgeries and longstanding arthritis instead of his June 14, 2012, injury. On July 16, 2012, based upon the report of Dr. Foster, the claims administrator closed the claim for temporary total disability benefits because there was not enough evidence to show he continued to be temporarily and totally disabled. Mr. Butts protested.

On September 4, 2012, Mr. Butts reported to Bernard Swope, M.D., for evaluation. Dr. Swope is not a member of M A Bongiovanni's preferred provider organization. Dr. Swope opined that Mr. Butts had made no progress in his condition and that he remained temporarily and totally disabled.

The Office of Judges found that Dr. Swope's assessment was more probative than Dr. Foster's assessment and thus increased the period of Mr. Butts's temporary total disability benefits from July 11, 2012, through September 13, 2012. The Office of Judges noted that the opt-out provisions in West Virginia Code of State Rules § 85-21-9.5 (2005) did not apply because its decision did not in any way authorize treatment. M A Bongiovanni, Inc., protested.

The Board of Review noted that Dr. Swope was not in the employer's preferred provider organization and thus the Office of Judges improperly relied on his opinion. The Board of Review noted that pursuant to West Virginia Code of State Rules § 85-21-9.5 "[t]emporary total disability must be certified by a provider within the approved managed health care plan, unless the opt-out provisions of this rule have been satisfied." The Board of Review opined that because Dr. Swope was not a preferred provider and Mr. Butts did not meet the opt-out provisions, he was not entitled to temporary total disability benefits for the period found by the Office of Judges. The Board of Review reinstated the decision of the claims administrator.

We agree with the decision of the Board of Review. By the plain language of West Virginia Code of State Rules § 85-21-9.5 "[t]emporary total disability must be certified by a provider within the approved managed health care plan, unless the opt-out provisions of this rule have been satisfied." Because Dr. Swope was not a preferred provider and Mr. Butts did not meet the opt-out provisions, Dr. Swope's report could not be relied upon. Dr. Foster's report opined that Mr. Butts was ready to return to work on July 11, 2012, and that he was no longer temporarily and totally disabled.

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: October 7, 2015**

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Robin J. Davis  
Justice Brent D. Benjamin  
Justice Allen H. Loughry II

**DISSENTING:**

Justice Menis E. Ketchum