

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**CHRISTOPHER LUSK,**  
**Claimant Below, Petitioner**

**vs.) No. 19-0562** (BOR Appeal No. 2053680)  
(Claim No. 2018005667)

**SPARTAN MINING COMPANY,**  
**Employer Below, Respondent**

**FILED**

July 31, 2020

EDYTHE NASH GAISER, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner Christopher Lusk, by Counsel Reginald D. Henry, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Spartan Mining Company, by Counsel Sean Harter, filed a timely response.

The issues on appeal are medical benefits, temporary total disability, and additional compensable conditions. The claims administrator denied a left shoulder MRI on February 23, 2018. On June 4, 2018, in five separate decisions, the claims administrator denied the addition of left shoulder tendonitis to the claim, denied authorization of left wrist physical therapy, denied a referral to neurology, closed the claim for temporary total disability benefits, denied left shoulder physical therapy, and denied retroactive authorization for left wrist surgery. The Office of Judges reversed the denial of authorization of left wrist physical therapy and authorized the treatment; reversed the denial of a referral to neurology and authorized the referral; reversed the closure of the claim for temporary total disability benefits; and affirmed the remainder of the claims administrator's decisions in its November 14, 2018, Order. The Order was affirmed by the Board of Review on May 17, 2019.

The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. 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. Lusk, a utility worker, was injured in the course of his employment on September 6, 2017. The Employees' and Physicians' Report of Injury indicates he was at work when a falling

rock struck his left forearm. He was diagnosed with a compound comminuted radial fracture. Mr. Lusk was transported to Raleigh General Hospital and underwent surgery for an open left forearm fracture. It was noted that he would be unable to work for eight to ten weeks. The claims administrator held the claim compensable for unspecified fracture of the lower end of the left radius. Temporary total disability benefits were granted from September 7, 2017, through November 3, 2017.

Mr. Lusk was treated for the compensable injury by George Charron, M.D. On October 2, 2017, he was seen for follow-up for his left radial surgery. Mr. Lusk was experiencing pain and swelling as well as difficulty moving his left hand. Dr. Charron recommended physical therapy and wrote a work excuse stating that Mr. Lusk could not use his left hand at work for six weeks. Notes from the claims administrator indicate Mr. Lusk underwent left wrist surgery on May 24, 2018. Mr. Lusk requested that Dr. Charron bill the surgery through his private insurance. His left shoulder physical therapy was also to be billed through his private insurance.

In an October 31, 2017, treatment note, Dr. Charron noted that Mr. Lusk was still having range of motion difficulties and stiffness in his wrist and fingers. X-rays showed that his radial fracture was treated with a plate but that there was little bone formation at the fracture sight. Dr. Charron barred Mr. Lusk from using his left hand at work for another three weeks. On November 14, 2017, Dr. Charron found that Mr. Lusk required a CT scan for left wrist problems. He wrote a work note indicating Mr. Lusk could not work with his left hand for an additional six weeks. On November 27, 2017, Mr. Lusk reported difficulty closing his left hand. A CT scan showed healing of the radial fracture and a possible left scaphoid fracture. Dr. Charron recommended additional physical therapy. Mr. Lusk could lift no more than five pounds with the left hand for six weeks. On December 5, 2017, Mr. Lusk still had limited range of motion in the left hand. He was to continue physical therapy and could return to work with no lifting over five pounds for six months. Attached to the treatment note was an Attending Physician's Report indicating Mr. Lusk was not at maximum medical improvement.

A November 21, 2017, left upper extremity CT scan showed some healing of the radial fracture, though fracture lines remained visible. It also showed a persistently displaced, non-healed ulnar fracture. On January 9, 2018, Prasad Rao Mukkamala, M.D., performed an examination and opined that Mr. Lusk had not reached maximum medical improvement. He found significant range of motion limitations in the left wrist and hand and recommended additional physical therapy.

In a January 16, 2018, treatment note, Dr. Charron opined that Mr. Lusk had reached a plateau for range of motion in the left forearm, wrist, and hand. He believed Mr. Lusk needed closed wrist manipulation. The claims administrator authorized closed left wrist manipulation on January 23, 2018. Dr. Charron performed debridement of the TFCC, excision of the ulnar styloid ossicle, and manipulation of the left wrist on February 7, 2018.

February 16, 2018, treatment notes by Dr. Charron indicate Mr. Lusk had left wrist pain and limited range of motion. On February 19, 2018, Dr. Charron requested a left shoulder MRI. Mr. Lusk was improving with physical therapy on February 27, 2018, but he reported left shoulder pain. On March 13, 2018, Mr. Lusk's wrist pain had improved. He was to lift no more than ten

pounds for six weeks and continue physical therapy for the radial fracture. The claims administrator denied a left shoulder MRI on February 23, 2018.

A March 16, 2018, left shoulder MRI showed mild spurring in the glenohumeral joint and a possible labral tear. In a March 20, 2018, Attending Physician's Report, Dr. Charron stated that Mr. Lusk could work limited duty. He had not yet reached maximum medical improvement. An operative report indicates Dr. Charron performed left shoulder acromioplasty on April 11, 2018. He found slight fraying of the labrum and some bursitis. The claims administrator suspended temporary total disability benefits on April 23, 2018, because the evidence indicated Mr. Lusk had a non-work-related condition that interrupted treatment of his compensable injury.

On May 11, 2018, Dr. Charron completed a diagnosis update listing the primary diagnosis as left shoulder rotator cuff tear and the secondary diagnoses as tendonitis, left distal radial fracture and TFCC wrist tear. He also saw Mr. Lusk that day, who reported left shoulder, forearm, wrist, and hand pain. He opined that it was difficult to determine the cause of Mr. Lusk's hand pain. Dr. Charron recommended physical therapy and referral to a neurologist. Mr. Lusk could work limited duty.

On May 24, 2016, Dr. Charron performed left wrist surgery for stiffness and a left forearm skin lesion. The lesion was removed and manipulation of the wrist and forearm was performed. He followed up on June 1, 2018, and Dr. Charron noted that Mr. Lusk still had left wrist pain. He was sent back to physical therapy and restricted to lifting no more than five pounds at work. On June 15, 2018, Mr. Lusk had full left elbow range of motion. He reported stiffness and pain in the left wrist. Dr. Charron recommended referral to a hand specialist. Mr. Lusk was also referred to physical therapy for status post left shoulder arthroscopy and a left radial fracture. Dr. Charron restricted him to lifting no more than ten pounds for six months and recommended a functional capacity evaluation. On June 29, 2018, Dr. Charron again recommended physical therapy and a functional capacity evaluation.

The claims administrator denied the addition of left shoulder tendonitis to the claim on June 4, 2018. In four other decisions that day, the claims administrator also denied authorization of left wrist physical therapy, denied a referral to neurology, closed the claim for temporary total disability benefits, and denied left shoulder physical therapy. On July 5, 2018, the claims administrator denied retroactive authorization for left wrist surgery.

Prasadarao Mukkamala, M.D., performed an independent medical evaluation on July 6, 2018, in which he found that Mr. Lusk reported shoulder pain five months after the compensable injury occurred. Dr. Mukkamala found that Dr. Charron performed left shoulder surgery and diagnosed bursitis. Dr. Mukkamala opined that the left shoulder condition was not related to the compensable injury. He found that Mr. Lusk had reached maximum medical improvement. He assessed 6% impairment for the left wrist/elbow. In a July 16, 2018, addendum, Dr. Mukkamala opined that the left shoulder condition was not related to the compensable injury. He noted that the original injury resulted from a rock striking the left forearm. He found no evidence that Mr. Lusk injured his left shoulder.

Mr. Lusk testified in a July 23, 2018, hearing that he had not worked since the compensable injury occurred. He stated that he had no shoulder symptoms immediately following the compensable injury. He had not returned to work because he was unable to perform any job with his ten pound lifting restriction. Mr. Lusk testified that his May 24, 2018, wrist surgery was processed through his private health insurance by accident.

In a July 31, 2018, treatment note, Dr. Charron stated that Mr. Lusk still had left forearm and hand pain. He was able to return to work but could lift no more than twenty pounds for six weeks. On August 14, 2018, Dr. Charron noted that Mr. Lusk still had left wrist and hand symptoms. Dr. Charron had no further treatment to offer and discharged him. He recommended that Mr. Lusk lift no more than forty pounds for six months.

In its November 14, 2018, Order, the Office of Judges reversed the denial of authorization of left wrist physical therapy and authorized the treatment; reversed the denial of a referral to neurology and authorized the referral; reversed the closure of the claim for temporary total disability benefits; and affirmed the remainder of the claims administrator's decisions on appeal.

Regarding the addition of left shoulder tendonitis to the claim, the Office of Judges determined that Dr. Charron diagnosed left shoulder tendonitis but failed to explain how it was related to the compensable injury in any of his treatment notes. Further, Mr. Lusk did not report left shoulder problems until several months after the compensable injury occurred. The Office of Judges found that Dr. Mukkamala opined in his independent medical evaluation that the left shoulder complaints were unrelated to the compensable injury. The Office of Judges found Dr. Mukkamala's opinion to be reliable and supported by the evidence of record.

Regarding the requested medical treatment, the Office of Judges found that a left shoulder MRI should not be approved because the left shoulder was not a compensable component of the claim. The Office of Judges approved the denial of left shoulder physical therapy for the same reason. The Office of Judges determined that authorization for left wrist surgery should also be denied. Pursuant to West Virginia Code of State Rules § 85-20-9.9 (2006), except in emergency situations, written authorization must be obtained before surgery. If such authorization is not obtained, reimbursement will be denied. The Office of Judges found that while the surgery was related to the compensable injury, it must be denied pursuant to the plain language of Rule 20.

Regarding the referral to neurology, the Office of Judges determined that Dr. Charron documented continued pain, weakness, and difficulty in the left hand and wrist. He requested referral to a neurologist for an evaluation. The Office of Judges found that the referral was related to a compensable injury and authorized the request. Regarding left wrist physical therapy, the Office of Judges determined that Dr. Charron requested physical therapy prior to the unauthorized wrist surgery. After the surgery, he stated that Mr. Lusk needed to continue physical therapy. The Office of Judges concluded that the surgery was related to the compensable injury and would have been approved if it was properly preauthorized. It found that the unauthorized surgery was not a reliable basis to deny physical therapy.

Lastly, the Office of Judges addressed temporary total disability benefits. It found that even when Mr. Lusk had surgery for the noncompensable left shoulder condition, he was still in treatment for his left wrist. The Office of Judges found no evidence of improvement in the left wrist condition or that Mr. Lusk had been released to full duty work. He testified at deposition that there were no positions available for him with the restrictions Dr. Charron placed on his left limb. The Office of Judges found that at the time temporary total disability benefits were suspended, Mr. Lusk had not been released to return to full duty work and had not been provided limited work by his employer. The Office of Judges therefore concluded that the claim should remain open for temporary total disability benefits as long as evidence was provided of Mr. Lusk's inability to return to work. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on May 17, 2019.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. There is no evidence of record relating the left shoulder injury to the compensable injury. The addition of left shoulder tendonitis was properly denied, as was treatment for the left shoulder. Left wrist surgery was also properly denied pursuant to Rule 20. Left wrist treatment in the form of referral to a neurologist and continued physical therapy were properly authorized based on a preponderance of the evidence. Lastly, the Office of Judges was correct to find that the claim should remain open for temporary total disability benefits as long as they were supported by medical evidence.

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 so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board of Review's findings, reasoning and conclusions, there is insufficient support to sustain the decision. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

**ISSUED: July 31, 2020**

**CONCURRED IN BY:**

Chief Justice Tim Armstead  
Justice Margaret L. Workman  
Justice Elizabeth D. Walker  
Justice Evan H. Jenkins  
Justice John A. Hutchison