

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

RICHARD D. SPURLOCK, Petitioner

January 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**vs.) No. 100965 (BOR Appeal No. 2044078)
(Claim No. 2009068404)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
APPALACHIAN POWER COMPANY, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated June 29, 2010, in which the Board affirmed a January 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 9, 2009, decision to close the claim for temporary total disability benefits, and its June 15, 2009, denial of Mr. Spurlock's request to change treating physicians. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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 a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In its Order, the Office of Judges held that Mr. Spurlock's meniscus tear has not been added as a compensable condition, that he has been declared at maximum medical improvement by two independent medical examiners, and that he is not entitled to temporary total disability benefits concerning this condition, or authorization for treatment by a surgeon. Mr. Spurlock disputes these findings and requests that this Court reverse the June 29, 2010, decision of the Board of Review and grant him temporary total disability benefits from

October 29, 2008, to June 12, 2009, and reimbursement for the arthroscopy performed by Dr. Tao.

The Office of Judges relied on the opinions of Dr. Bachwitt and Dr. Mukkamala, who felt that arthroscopy was not necessary. Dr. Fuller, Mr. Spurlock's treating physician, disagreed with Dr. Bachwitt and Dr. Mukkamala and felt that Mr. Spurlock had not reached maximum medical improvement and was suffering from a meniscal tear, for which he recommended arthroscopy. Although the claims administrator did not authorize an arthroscopy, one was performed at Mr. Spurlock's expense on June 12, 2009, by Dr. Tao and clear evidence of a meniscal tear resulting from the October 29, 2008, injury was found. Dr. Fuller felt that Mr. Spurlock did not reach maximum medical improvement until after the June 12, 2009, arthroscopy.

In West Virginia Supreme Court of Appeals Case number 101561, this Court held that the Office of Judges and the Board of Review failed to consider the evidence of a meniscal tear obtained from the arthroscopy and failed to grant Mr. Spurlock a new independent medical evaluation to determine the amount of permanent impairment resulting from the meniscal tear that Mr. Spurlock suffered on October 29, 2008, and remanded for another independent medical evaluation in light of the clear evidence of a meniscal tear revealed on arthroscopy. Because a meniscal tear requiring a surgical repair resulted from Mr. Spurlock's injury on October 29, 2008, Mr. Spurlock is entitled to the payment of temporary total disability benefits from the time of his injury, October 29, 2008, until he reached maximum medical improvement on June 12, 2009, as well as reimbursement for the arthroscopy performed by Dr. Tao on June 12, 2009.

For the foregoing reasons, we find that the decision of the Board of Review is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the decision of the Board of Review is reversed and the case is remanded with instructions to grant Mr. Spurlock temporary total disability benefits from October 29, 2008, to June 12, 2009, and to reimburse him for the arthroscopy performed by Dr. Tao on June 12, 2009.

Reverse and Remand.

ISSUED: January 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Margaret L. Workman

Justice Brent D. Benjamin

DISSENTING:

Justice Robin J. Davis

Justice Thomas E. McHugh