

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**ROGER THOBURN, Petitioner**

**July 20, 2012**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 101598 (BOR Appeal No. 2044576)**  
**(Claim No. 2009083393)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**CONSOLIDATION COAL COMPANY, Respondent**

**MEMORANDUM DECISION**

Petitioner, Roger Thoburn, by M. Jane Glauser, his attorney, appeals the Board of Review Order closing his claim for temporary total disability benefits. Consolidation Coal Company, by Edward M. George, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated November 23, 2010, in which the Board affirmed an April 21, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's closure of the claim for temporary total disability benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition, response, 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.

The Board of Review held the claim should be closed for temporary total disability benefits following Dr. Sushil Sethi, M.D.'s opinion that Mr. Thoburn is at maximum medical improvement for the compensable lumbar strain. Mr. Thoburn asserts that his medical evidence establishes the need for continued temporary total disability benefits.

On March 6, 2009, Mr. Thoburn suffered a low back injury after lifting a box of resin in the course of his employment. Following this accident Mr. Thoburn sought medical treatment at Wheeling Hospital where he was diagnosed with lumbar strain and no further testing was conducted at that time. The claims administrator ultimately approved lumbar strain as a compensable condition. Mr. Thoburn testified during his deposition that he previously injured his lumbar spine in a work-related accident. Additionally, Mr. Thoburn acknowledged he refused epidural injections when suggested because prior injections did not help with pain.

Mr. Thoburn underwent an MRI of the lumbar spine on March 14, 2009, which revealed diffuse bulging annulus at the L4-5 disc level with moderately severe central spinal stenosis along with significant degenerative changes at the L5-S1 disc level with anterolisthesis of L5 on S1. A follow-up x-ray of the lumbar spine on May 29, 2009, also revealed bilateral spondylitic defects and anterolisthesis of L5 on S1. Treatment notes from Corporate Health following the compensable injury indicated Mr. Thoburn continued to complain of low back pain and was ultimately referred to Dr. Matt El-Kadi for additional treatment options.

Dr. El-Kadi evaluated Mr. Thoburn's injuries and initially recommended epidural injections which Mr. Thoburn declined because prior injections did not help an earlier back injury. Thereafter, Dr. El-Kadi recommended Mr. Thoburn undergo lumbar fusion. Dr. Ronald Hargraves agreed with the lumbar fusion surgery; however, Dr. Hargraves indicated the surgery should be performed at least a year after the date of injury. Mr. Thoburn underwent the lumbar fusion with Dr. El-Kadi.

On August 3, 2009, Dr. Sethi performed an independent medical evaluation of Mr. Thoburn. Dr. Sethi recommended Mr. Thoburn undergo trial epidural injections. If, however, Mr. Thoburn declined epidural injections Dr. Sethi opined Mr. Thoburn should be found at maximum medical improvement. Following this recommendation, Dr. Sethi issued an amended report wherein he recommended a 5% impairment to the lumbar spine pursuant to West Virginia Code of State Rules § 85-20-C.

The Office of Judges held Mr. Thoburn did not present any evidence substantiating the necessity for continuing temporary total disability benefits. In support thereof, the Office of Judges considered Dr. Sethi's finding of maximum medical improvement and opinion that to a reasonable degree of medical probability the degenerative disease of the lumbar spine and the spondylolisthesis were neither caused by nor aggravated by the March 6, 2009, injury. Thus, the Office of Judges affirmed the claims administrator's Order closing Mr. Thoburn's claim for temporary total disability benefits. The Board of Review reached the same reasoned conclusion in its Order of November 23, 2010.

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 Court affirms the Board of Review Order closing Mr. Thoburn's claim for temporary total disability benefits.

Affirmed.

ISSUED: **July 20, 2012**

CONCURRED IN BY:

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin not participating