

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

ROGER L. CUTRIGHT
Claimant Below, Appellant

vs.) No. 35747 (BOR Appeal No. 2043469)
(Claim No. 2008045326)

**WEST VIRGINIA OFFICE INSURANCE
COMMISSION and MAINLINE, LLC,**
Appellees

FILED

June 22, 2011

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

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review order dated March 4, 2010, in which the Board reversed the Workers' Compensation Office of Judges' August 18, 2009, order granting temporary total disability benefits "for such periods of time as [Appellant] can demonstrate that he was unable to perform his work due to temporary disability occasioned by the compensable injury." In its order, the Board reinstated the Claims Administrator's order of September 5, 2008, which closed the claim on a temporary total disability basis. This appeal was timely filed by the claimant. The claimant requests that this Court grant his Petition for Appeal, reverse the Board's March 4, 2010, order, and reinstate the Office of Judges' order of August 18, 2009, which directed the Claims Administrator to reopen the claim for temporary total disability benefits for such periods of time as can be demonstrated by credible medical evidence that the claimant was, in fact, temporarily and totally disabled.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decision of the lower tribunal, this Court is of the opinion that the decisional process would not be significantly aided by oral argument. 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.

DISCUSSION

On April 18, 2008, while employed as a welder with Mainline, LLC, the claimant sustained a compensable low back injury. On June 4, 2008, the claimant's treating physician, Dr. James Weinstein, requested authorization for a hemi-laminotomy/laminectomy on the

claimant's lumbar spine. The surgery request was denied by order of the Claims Administrator, which order was later reversed by order of the Workers' Compensation Office of Judges. The Board subsequently reversed the Office of Judges' order authorizing the requested surgery and reinstated the Claims Administrator's order denying the request for surgery. The claimant appealed to this Court.

Meanwhile, the claimant underwent a hemi-laminotomy/laminectomy on his lumbar spine and filed a separate request with the Claims Administrator for temporary total disability benefits. By order entered September 5, 2008, the Claims Administrator denied the request and closed the claim on a temporary total disability basis. By order of the Workers' Compensation Office of Judges dated August 18, 2009, the Claims Administrator's order was reversed and it was ordered that "the claimant is entitled to temporary total disability benefits for such periods of time as he can demonstrate that he was unable to perform his work due to temporary disability occasioned by the compensable injury."¹ The claimant's employer appealed, and by order entered March 4, 2010, the Board reversed the order of the Office of Judges and reinstated the Claims Administrator's order closing the claim on a temporary total disability basis. The Board found "that any temporary total disability of the claimant was due to the surgery he underwent on June 17, 2008" and that "[a]s the law of the case at the present time is that the surgery was not authorized, the September 5, 2008 order closing the claim on a temporary total disability basis must be reinstated."

The present appeal before this Court of the Board's March 4, 2010, order reinstating the Claims Administrator's order closing the claim on a temporary total disability basis is necessarily dependent upon our decision in the separate but related appeal regarding the claimant's request for surgery. By Mandate of this Court entered February 14, 2011, we reversed the November 18, 2009, order of the Board and remanded "with directions to enter an order reinstating the June 8, 2009, order of the Workers' Compensation Office of Judges authorizing a hemi lumbar laminotomy/laminectomy L5-S1[.]"² Because the claimant's request for surgery has thus been authorized, "the claimant is entitled to temporary total disability benefits for such periods of time as he can demonstrate that he was unable to perform his work due to temporary disability occasioned by the compensable injury[.]" as determined by order of the Office of Judges.

Upon a thorough review of the briefs of the parties and the evidence of record, this

¹The Office of Judges' order further concluded that "[t]he Record. . . demonstrates that the claimant was temporarily and totally disabled from performing his customary work at least for the period of time during his recovery from surgery[.]"

²See Supreme Court Case No. 35617.

Court finds that the Board's order dated March 4, 2010, is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. *See* W.Va. Code 23-5-12 (1995). Accordingly, for the foregoing reasons, the decision of the Board of Review dated March 4, 2010, is reversed, and this matter is remanded to the Board of Review for entry of an order reinstating the Workers' Compensation Office of Judges' order dated August 18, 2009, which had directed the Claims Administrator to reopen the claim for temporary total disability benefits for such period of time as can be substantiated by proper and credible medical evidence.

Reversed and remanded with directions.

ISSUED: June 22, 2011

CONCURRED IN BY:

Chief Justice Workman

Justice Davis

Justice Benjamin

Justice Ketchum

Justice McHugh