

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

**Mark Weese,
Claimant Below, Petitioner**

v.) **No. 22-0432** (BOR Appeal No. 2057512)
(JCN: 2019021929)

**Mastec, Inc.,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Mark Weese appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Mastec, Inc. filed a timely response.¹ The issue on appeal is a reopening for temporary total disability benefits. The claim administrator denied the reopening on July 23, 2023. In an order dated October 8, 2021, the Workers' Compensation Office of Judges ("Office of Judges") reversed the claim administrator's decision and reopened the claim for temporary total disability benefits from July 1, 2020, to October 17, 2020, and thereafter as supported by proper medical evidence. By order entered on May 9, 2022, the Board of Review reversed the Office of Judges and reinstated the claim administrator's denial of the reopening. Upon our review, we determine that oral argument is unnecessary and that this case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for reversal in a memorandum decision rather than an opinion. *See* W. Va. R. App. P. 21.

In April 2019, while working for respondent as a fuel truck driver, petitioner stepped in a hole and suffered a left foot sprain, a nondisplaced fracture of the medial malleolus of the left tibia, and a ruptured left Achilles tendon. The claim administrator held the claim compensable. Petitioner subsequently underwent surgery with Danny Fijalkowski, M.D., who used the flexor hallucis longus tendon from the big toe to repair the Achilles tendon. Petitioner later testified that Dr. Fijalkowski told him that one of the risks of transferring the flexor hallucis longus tendon is the possible upward curvature of the big toe, a problem that he now claims manifested with his foot and causes balance issues.

¹ Petitioner is represented by counsel Patrick Kevin Maroney, and respondent is represented by counsel Jeffrey B. Brannon.

After petitioner's release to return to work and the closure of the claim for temporary total disability benefits,² he stayed off work and applied for unemployment compensation while waiting to be assigned to a job by his union hall. While petitioner was still off work, he fell down while retrieving the mail on July 1, 2020, and sustained a trimalleolar fracture of the left ankle. To repair this fracture, Dr. Fijalkowski performed an open reduction and internal fixation of the bimalleolar, medial, and lateral malleoli. Also, in July 2020, petitioner filed a reopening application, and Dr. Fijalkowski completed the physician's section. Dr. Fijalkowski stated that there had been an aggravation or progression of the compensable injury because petitioner fractured his left ankle and had to have another surgery. Dr. Fijalkowski listed a closed trimalleolar fracture and acute left ankle pain as additional diagnoses. Dr. Fijalkowski indicated that petitioner was unable to perform his regular job duties and would be temporarily totally disabled from July 1, 2020, until October 17, 2020.

On July 23, 2020, the claim administrator denied a reopening for temporary total disability benefits on the ground that petitioner's July 1, 2020, fall constituted an intervening event. In its October 8, 2021, order, the Office of Judges reversed the claim administrator's decision. Contrary to the claim administrator's determination of an intervening event, the Office of Judges found that there was an aggravation or progression of the compensable injury when petitioner fell in July 2020. The Office of Judges credited petitioner's testimony about "the instability of his left foot following the [compensable] injury" and the transfer of the flexor hallucis longus tendon "to fix his Achilles [tendon] rupture" as being the cause of the instability. Therefore, the Office of Judges reopened the claim for temporary total disability benefits from July 1, 2020, to October 17, 2020, and thereafter as supported by proper medical evidence. When the Board of Review reversed the Office of Judges and reinstated the claim administrator's denial of the reopening in its May 9, 2022, order, the Board did not address whether there had been an aggravation or progression of the compensable injury. Instead, the Board concluded that petitioner was not entitled to temporary total disability benefits, which are designed to replace lost wages, when petitioner had not resumed working at the time of his fall.

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision effectively represents a reversal of a prior ruling of either the Workers' Compensation Commission or the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. *See* W. Va. Code § 23-5-15(c) & (e). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

² Petitioner was found at maximum medical improvement with regard to the compensable injury in March 2020 with 3% whole body impairment. Therefore, the claim administrator granted petitioner 3% permanent partial disability on March 12, 2020, and then closed the claim for temporary total disability benefits on April 13, 2020. Petitioner is not appealing the Board of Review's and Office of Judges' affirmations of the claim administrator's March 12, 2020, and April 13, 2020, orders.

Temporary total disability constitutes “[an] inability to return to substantial gainful employment requiring skills or activities comparable to those of one’s previous gainful employment during the healing or recovery period after injury.” *Allen v. Worker’s Comp. Comm’r*, 173 W. Va. 238, 242, 314 S.E.2d 401, 405 (1984). Pursuant to the Workers’ Compensation Act, West Virginia Code §§ 23-1-1 to 23-6-3, to reopen a claim, “the claimant must show a prima facie cause, which means nothing more than any evidence which would tend to justify, but not to compel the inference that there has been a progression or aggravation of the former injury.” Syl., *Harper v. State Workmen’s Comp. Comm’r*, 160 W. Va. 364, 234 S.E.2d 779 (1977).

After review, we find that the Board of Review was clearly wrong based upon the evidentiary record even when all inferences are resolved in favor of the Board’s decision. The Board improperly substituted its decision for that of the Office of Judges instead of reviewing the Office of Judges’ decision in accordance with West Virginia Code § 23-5-12(b).³ As we stated in *Conley v. Worker’s Compensation Division*, 199 W. Va. 196, 203, 483 S.E.2d 542, 549 (1997), the Board “must accord deference to decisions by the [Office of Judges].” (Citing W. Va. Code § 23-5-12(b)). In addition, the judging of a witness’s testimony and the weighing of evidence are the exclusive functions of the trier of fact. *State v. Guthrie*, 194 W. Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995). Although respondent argues that the Office of Judges erred in finding petitioner credible, petitioner’s testimony regarding having balance problems following the Achilles tendon repair is supported by Dr. Fijalkowski’s opinion that there was an aggravation or progression of the compensable injury when petitioner fell on July 1, 2020. As petitioner notes, Dr. Fijalkowski had treated him since the compensable injury. Therefore, based on Dr. Fijalkowski’s statements on the reopening application, we find that the Office of Judges properly reopened the claim for temporary total disability benefits from July 1, 2020, to October 17, 2020, and thereafter as supported by proper medical evidence. Accordingly, we reverse the Board of Review’s decision as to the issue raised in this appeal.⁴

Reversed.

ISSUED: April 30, 2024

CONCURRED IN BY:

³ Pursuant to West Virginia Code § 23-5-12(b), the Board of Review may reverse a decision of the Office of Judges if its findings are (1) in violation of statute; (2) in excess of statutory authority or jurisdiction; (3) resulted from unlawful procedures; (4) otherwise affected by an error of law; (5) clearly wrong based on reliable, probative, and substantial evidence; or (6) arbitrary or capricious or characterized by an abuse of discretion.

⁴ See *supra* note 2.

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton

DISSENTING:

Justice C. Haley Bunn

Bunn, Justice, dissenting:

I dissent to the majority's resolution of this case. I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, I believe a formal opinion of this Court was warranted, not a memorandum decision. Accordingly, I respectfully dissent.