

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

October 17, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**CONSOLIDATION COAL COMPANY, Petitioner**

vs.) **No. 11-0475** (BOR Appeal No. 2045239)  
(Claim No. 2008024293)

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
HENRY W. ASTON, Respondent**

**MEMORANDUM DECISION**

Petitioner Consolidation Coal Company, by Edward M. George III, its attorney, appeals the West Virginia Workers' Compensation Board of Review's Order granting attorney's fees and expenses. Henry W. Aston, by M. Jane Glauser, his attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated February 17, 2011, in which the Board affirmed an October 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges granted Mr. Aston's request for attorney fees and expenses resulting from the claims administrator's March 10, 2009, Order which the Office of Judges found unreasonably denied 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 briefs, and record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Aston suffered a right knee injury in the course of his employment and temporary total disability benefits were authorized from January 23, 2008, through March 21, 2008. The Order further held that additional benefits were available if the claims administrator received additional evidence from the treating physician outlining continued disability. Mr. Aston provided the March 12, 2008, report of Dr. Grubbs which included a copy of the claimant's accident report, his office notes, diagnostic tests, and reports of Dr. Marra. The claims administrator acknowledged receipt of the March 12, 2008, report and noted that the request for

benefits was based upon the proposed surgical treatment of Dr. Marra and could not be used as a basis for paying temporary total disability benefits. It held that medical records documenting the surgical treatment would be needed prior to authorization for extending temporary total disability benefits through June 20, 2008.

The required documentation was not received and the claims administrator closed the claim for temporary total benefits. Respondent argues that the requested report from Dr. Marra was not submitted until after the deadline established by the claims administrator. Thereafter, Mr. Aston filed a petition for attorney's fees and costs in connection with the appeal of the claims administrator's decision to deny additional temporary total disability benefits.

On appeal, the Office of Judges found that the claims administrator denied additional temporary total disability benefits after March 21, 2008, because the claimant did not proceed with the suggested surgery for his injured right knee. However, the Office of Judges reasoned that the self-insured employer either knew or should have known that it had rejected the claim at the time the surgery was requested, therefore, the claimant was not able to proceed with the requested treatment unless the surgeon agreed to proceed without payment from workers' compensation or arrange payment through private insurance. Mr. Aston testified on July 8, 2008, that he was attempting to negotiate the need for surgery to his knee with his private insurance carrier.

The Office of Judges concluded that the claims administrator's Order was unreasonable due to the fact that the claims administrator had rejected the claim at the time that the surgery was requested. Because the claim's administrator's decision was found to be unreasonable, based upon the record as it existed at the time of the Order, the Office of Judges awarded the claimant attorney's fees and expenses in the litigation of this sole issue. The Board of Review reached the same conclusion in its October 29, 2010, Order.

The Office of Judges fails to articulate any other reason to support the conclusion that the claims administrator improperly denied the additional temporary total disability benefits. We find that the record, as it existed at the time, was not sufficient for the claims administrator to find that Mr. Aston continued to be temporarily and totally disabled after March 21, 2008.

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 Court reverses the Board's decision to affirm the granting of attorney's fees and expenses and the claim's administrator Order is reinstated.

Reversed.

**ISSUED: October 17, 2012**

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

**DISSENTING:**

Justice Thomas E. McHugh