

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

October 21, 2013

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

**DAVID SMITH,  
Claimant Below, Petitioner**

**vs.) No. 11-1680** (BOR Appeal No. 2046167)  
(Claim No. 2007211108)

**AMFIRE, LLC,  
Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner David Smith, by Otis Mann Jr., his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Amfire, LLC, by Robert Busse, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 2, 2011, in which the Board affirmed a May 20, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 22, 2010, decision closing the claim for temporary total disability benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Smith was injured on June 25, 2006, when he was struck by a falling rock. The claim was held compensable for contusion of the shoulder, thigh, hip, chest wall, and back; lumbar sprain; lumbar radiculopathy; and herniated lumbar disc. Following the compensable injury, Mr. Smith received temporary total disability benefits. On September 12, 2007, Dr. Greenburg, Mr. Smith's treating physician, found that he had reached maximum medical improvement, although he stated at a later time that Mr. Smith had not reached maximum medical improvement because he had not completed treatment with a pain management specialist. Dr. Mukkamala found that

Mr. Smith had reached maximum medical improvement as of September 24, 2007. On October 22, 2010, the claims administrator closed the claim for temporary total disability benefits.

In its decision affirming the October 22, 2010, claims administrator's decision, the Office of Judges held that the claim was properly closed for temporary total disability benefits. Mr. Smith disputes this finding and asserts that he is entitled to additional temporary total disability benefits from December 19, 2007, through June 27, 2008.

West Virginia Code § 23-4-7a (2005) states that temporary total disability benefits are not paid after a claimant has reached maximum medical improvement, is released to return to work, or actually returns to work, whichever occurs first. The Office of Judges found that based on a preponderance of the evidence, Mr. Smith had reached maximum medical improvement by September 24, 2007, which it further found is consistent with Dr. Greenburg's September 12, 2007, report. As noted by the Office of Judges, the evidence of record does not establish that Mr. Smith is entitled to additional temporary total disability benefits. The Board of Review reached the same reasoned conclusions in its decision of December 2, 2011. We agree with the reasoning and conclusions of the Board of Review.

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 decision of the Board of Review is affirmed.

Affirmed.

**ISSUED: October 21, 2013**

**CONCURRED IN BY:**

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II