

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

**Kevin Miller,**  
**Claimant Below, Petitioner**

vs.) **No. 22-0228** (BOR Appeal No. 2057428)  
(JCN: 2020024251)

**Grant County Mulch, Inc.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Kevin Miller appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Grant County Mulch, Inc., filed a timely response.<sup>1</sup> The issue on appeal is entitlement to temporary total disability benefits. Petitioner argues that the claims administrator closed the claim based upon incorrect information. In its November 13, 2020, order, the claims administrator closed the claim for temporary total disability benefits effective October 02, 2020. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the decision in its September 17, 2021, order. The order was affirmed by the Board of Review on February 22, 2022. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

On May 6, 2020, petitioner, a forklift operator, completed an Employees' and Physicians' Report of Injury stating that he jarred his neck and back when he hit a large hole when driving a forklift. Robin Goodwin, FNP-BC, of Preston Healthcare Services, completed the physician's section and found that petitioner suffered an occupational injury to his cervical, thoracic, and lumbar regions. Ms. Goodwin indicated that petitioner should not return to work until he underwent MRIs. However, x-rays showed that while there was curvature of the cervical spine, there was no acute fracture or subluxation. Regarding the thoracic and lumbar spines, x-rays revealed thoracolumbar curvature with degenerative disc disease with disc space narrowing and osteophyte formation at L3-L4 and L5-S1.

Petitioner completed a second Employees' and Physicians' Report of Injury on May 19, 2020. In this second report, petitioner stated that his back began to hurt immediately after he jarred

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<sup>1</sup>Petitioner is represented by Sandra K. Law, and respondent is represented by Jeffrey B. Brannon.

his body by hitting the hole with his forklift. A representative of Preston Healthcare Services also completed the second Employees' and Physicians' Report of Injury,<sup>2</sup> stating that petitioner would be temporarily and totally disabled from work from May 6, 2020, to June 2, 2020, due to trauma to the spinal cord.

The claims administrator held the claim compensable for a cervical sprain on June 2, 2020. However, the thoracic and lumbar regions were not included as compensable components of the claim because multilevel degenerative disc disease was documented in both. Moreover, the claims administrator authorized payment of temporary total disability benefits from May 6, 2020, to June 2, 2020, and thereafter provided that medical evidence of petitioner's continued disability was received.

Petitioner underwent an MRI of the cervical spine at Preston Memorial Hospital on June 7, 2020. Joseph Migaiolo, M.D, found the MRI unremarkable as there were no disc bulges or herniations, nor significant neural foraminal encroachment, nor spinal stenosis. The paraspinal soft tissues were also unremarkable.

Petitioner was seen by Ms. Goodwin on August 14, 2020. Petitioner was still experiencing neck and back pain. Ms. Goodwin made two diagnoses: (1) cervicalgia; and (2) low back pain, which would be pain in the lumbar region (not compensable). Ms. Goodwin provided petitioner a return-to-work slip "for [a] tentative return to work" on October 1, 2020.

The claims administrator suspended temporary total disability benefits on August 28, 2020, finding that based upon information received from "WVU Medicine, dated August 14, 2020," treatment for the compensable condition of a cervical sprain had exceeded the eight weeks allowed by West Virginia Code of State Rules § 85-20-35.5 (2006).<sup>3</sup> Due to the suspension of temporary total disability benefits, the claims administrator advised petitioner that the claim could be closed for temporary total disability benefits "in thirty (30) days" and that "[a]fter this thirty (30) day notice period," petitioner would receive a final decision.<sup>4</sup>

Subsequently, the claims administrator issued two separate orders closing the claim for temporary total disability benefits. The claims administrator apparently issued the first order, dated September 14, 2020, in error as that order closed temporary total disability benefits "effective August 12, 2020." In the second order, dated November 13, 2020, the claims administrator closed

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<sup>2</sup>The signature of the Preston Healthcare Services representative is not readable.

<sup>3</sup>West Virginia Code of State Rules § 85-20-35.5 (2006) provides that the estimated duration of care for a cervical sprain is "not to exceed 8 weeks."

<sup>4</sup>West Virginia Code § 23-4-7a(e) provides, in pertinent part, that the claims administrator "shall enter a notice suspending the payment of temporary total disability benefits but providing a reasonable period of time during which the claimant may submit evidence justifying the continued payment of temporary total disability benefits . . . ."

the claim for temporary total disability benefits “effective October 02, 2020,” which was consistent with its August 28, 2020, order that provided petitioner with a thirty-day notice period.

Five months after the claim’s closure for temporary total benefits, at a March 10, 2021, independent medical evaluation by Chuan Fang Jin, M.D., petitioner was determined to be at maximum medical improvement. Dr. Jin found that petitioner was at maximum medical improvement with 0% permanent impairment because the compensable cervical sprain was healed. Dr. Jin attributed the symptoms petitioner was experiencing to conditions not included as compensable components of the claim. Dr. Jin further stated that “[t]he physical exam and observation indicate[ ] that [petitioner]’s pain seems not explainable physiologically and seems exaggerated.”

In its September 17, 2021, order, the Office of Judges affirmed the claims administrator’s closure of the claim for temporary total disability benefits effective October 2, 2020. The Office of Judges determined that the claim was properly closed for temporary total disability benefits, explaining as follows:

Temporary total disability benefits cease when a claimant returns to work, is released to return to work[,] or reaches his maximum degree of medical improvement. In the present matter, the last word regarding [the] claimant’s continued temporary total disability was a release to return-to-work on October 1, 2020. The temporary total disability benefits were closed by [o]rder dated November 13, 2020, as of October 2, 2020.

The Board of Review adopted the Office of Judges’ findings and affirmed its order upholding the claims administrator’s closure of the claim for temporary total disability benefits on February 22, 2022.<sup>5</sup>

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 affirms prior rulings by both the Workers’ Compensation Commission and 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 based upon a material misstatement or mischaracterization of the evidentiary record. *See* W. Va. Code §§ 23-5-15(c) & (d). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. of Ins. Comm’n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

After review, we find no error in the closure of this claim for temporary total disability benefits effective October 2, 2020. Petitioner argues that the claim was closed for temporary total

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<sup>5</sup> The Board of Review corrected a typographical error in finding of fact no. 1 in the Office of Judges’ decision to reflect that the claim was closed for temporary total disability benefits from October 2, 2020, instead of October 22, 2020. The Board of Review also made a minor correction to finding of fact no. 16.

disability benefits based upon incorrect information. The claims administrator's August 28, 2020, order suspending temporary total benefits was incorrect to the extent it stated that petitioner saw a provider from WVU Medicine on August 14, 2020. In addition, the November 13, 2020, order closing the claim was erroneous to the extent that the claims administrator once again relied upon non-existent information. In closing the claim for temporary total disability benefits effective October 2, 2020, the claims administrator found that it had received information from WVU Medicine during August 2020 that petitioner was at "maximum medical improvement" with regard to his occupational injury. No determination of petitioner's maximum medical improvement was made in August 2020. Moreover, the Office of Judges and the Board of Review each failed to address the fact that the claims administrator suspended and then closed the claim for temporary total disability benefits based upon erroneous information.

However, to the extent that the Board of Review and the Office of Judges erred in failing to address the claims administrator's reliance on erroneous information, such error did not constitute reversible error. "This Court may, on appeal, affirm the judgment of the lower [tribunal] when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower [tribunal] as the basis for its judgment." Syl. Pt. 3, *Barnett v. Norfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).

West Virginia Code § 23-4-7a(e) provides, in pertinent part, that a finding "the claimant has reached his or her maximum degree of [medical] improvement terminates the claimant's entitlement to temporary total disability benefits regardless of whether the claimant has been released to return to work" and that "[u]nder no circumstances[,] shall a claimant be entitled to receive temporary total disability benefits either *beyond the date the claimant is released to return to work* or beyond the date he or she actually returns to work." (Emphasis added.) Therefore, pursuant to West Virginia Code § 23-4-7a(e), temporary total disability benefits cease when a claimant reaches maximum medical improvement, returns to work, *or receives a release to return to work*. Thus, the return-to-work slip Ms. Goodwin gave to petitioner for October 1, 2020 provides an alternate ground for affirmation under West Virginia Code § 23-4-7a(e). Accordingly, the claim was properly closed for temporary total disability benefits on October 2, 2020.

Affirmed.

**ISSUED: November 17, 2023**

**CONCURRED IN BY:**

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