

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Delores Turner v. Cornerstone Building Brands

No. 21-0593 (BOR Appeal No. 2056692) (Claim No. 2020003410) · No. No. 21-0593 (BOR Appeal No. 2056692) (Claim No. 2020003410) · Decided February 10, 2023

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the Board of Review’s decision concerning Delores Turner’s request for authorization of an MRI arthrogram for a compensable shoulder injury. The court held that the issue was moot because Turner underwent shoulder surgery without obtaining the requested diagnostic study. The court found no substantial question of law or prejudicial error and affirmed the Board’s order.

CASE DETAILS

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| COURT                 | Supreme Court of Appeals of West Virginia                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| WRITING FOR THE COURT | Per Curiam; Chief Justice Elizabeth D. Walker; Justice Tim Armstead; Justice John A. Hutchison; Justice William R. Wooton; Justice C. Haley Bunn                                                                                                                                                                                                                                                                                                                                                                                                                            |
| JURISDICTION          | West Virginia                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| DECIDED               | February 10, 2023                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| DOCKET                | No. 21-0593 (BOR Appeal No. 2056692) (Claim No. 2020003410)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| PROCEDURAL POSTURE    | Petitioner's appeal from the West Virginia Workers’ Compensation Board of Review's affirmance of the Office of Judges' dismissal as moot of a request for authorization of an MRI arthrogram.                                                                                                                                                                                                                                                                                                                                                                               |
| STANDARD OF REVIEW    | Under W. Va. Code § 23-5-15, the Court gives deference to the Board of Review's findings, reasoning, and conclusions and may not conduct a de novo reweighing of the evidentiary record when the Board affirmed prior rulings on the same issue. Reversal or modification is permitted in those circumstances only for a clear violation of a constitutional or statutory provision, clearly erroneous conclusions of law, or a material misstatement or mischaracterization of the evidentiary record. Questions of law arising from Board decisions are reviewed de novo. |
| PRECEDENTIAL VALUE    | Published memorandum decision; the opinion states that a memorandum decision is appropriate under Rule 21 of the West                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

## Virginia Rules of Appellate Procedure.

### PARTIES

Delores Turner v. Cornerstone Building Brands

### TOPICS

workers compensation

mootness

standard of review

appellate procedure

administrative law

### PRACTICE AREAS

workers compensation

administrative law

appellate procedure

### QUESTIONS PRESENTED

1. Whether the request for authorization of an MRI arthrogram was moot after Turner underwent shoulder surgery without waiting for the arthrogram.
2. What standard of review governs the Supreme Court of Appeals' review of the Board of Review's decision.

### HOLDINGS

1. The request for authorization of the MRI arthrogram was moot because the diagnostic study was intended to determine whether surgery was necessary, and Turner underwent the surgery before the arthrogram was performed.
2. The Court reviews questions of law arising from Board of Review decisions de novo, while deferring to the Board's findings, reasoning, and conclusions and refraining from de novo reweighing of the evidentiary record under the circumstances specified in W. Va. Code § 23-5-15.

### KEY QUOTATIONS

*"The court may not conduct a de novo reweighing of the evidentiary record"* (at 1)

*"Because the surgical procedure was actually performed without the requested MRI arthrogram, the issue is clearly moot."* (at 3)

### FACTUAL BACKGROUND

Turner injured her left shoulder while lifting windows at work on July 8, 2019, and the claim was accepted for an unspecified left shoulder joint sprain. After an unremarkable MRI and an independent medical evaluation finding no rotator cuff tear or indication for arthroscopy, her treating physician requested authorization for an MRI arthrogram to determine whether surgery was necessary. The claims administrator denied the request, but before the issue was resolved Turner underwent subacromial decompression and labral repair. Because the surgery had already occurred without the requested diagnostic study, the lower tribunals concluded that the request was moot.

### PROCEDURAL HISTORY

The claims administrator denied authorization for an MRI arthrogram of Turner's left shoulder. The Office of Judges concluded that the request was moot because Turner underwent shoulder surgery without waiting for the arthrogram and dismissed the issue. The Board of Review adopted the Office of Judges' findings and affirmed, and the Supreme Court of Appeals affirmed the Board's order.

## DISPOSITION

affirmed

## CASES CITED

- Hammons v. W. Va. Off. of Ins. Comm'r, 235 W. Va. 577, 582-83, 775 S.E.2d 458, 463-64 (2015)
- Justice v. West Virginia Office Insurance Commission, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012)
- Davies v. W. Va. Off. of Ins. Comm'r, 227 W. Va. 330, 334, 708 S.E.2d 524, 528 (2011)

## OPINION

### PER CURIAM.

FILED February 10, 2023 EDYTHE NASH GAISER, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS DELORES TURNER, Claimant Below, Petitioner vs.) No. 21-0593 (BOR Appeal No. 2056692) (Claim No. 2020003410) CORNERSTONE BUILDING BRANDS, Employer Below, Respondent MEMORANDUM DECISION Petitioner Delores Turner, a self-represented litigant, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review").

Cornerstone Building Brands, by Counsel Steven K. Wellman and James W. Heslep, filed a timely response. The issue on appeal is Ms. Turner's entitlement to medical benefits. The claims administrator denied a request for an MRI arthrogram on March 31, 2020.

On March 30, 2021, the Workers' Compensation Office of Judges ("Office of Judges") found the issue of the MRI arthrogram moot, insofar as Ms. Turner had undergone surgery without waiting for the MRI arthrogram to be performed. This appeal arises from the Board of Review's Order dated June 28, 2021, in which the Board affirmed the Order of the Office of Judges.

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. The standard of review applicable to this Court's consideration of workers' compensation appeals has been set out under W. Va. Code § 23-5-15, in relevant part, as follows:

(c) In reviewing a decision of the Board of Review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board's findings, reasoning, and conclusions....

1 (d) If the decision of the board represents an affirmation of a prior ruling by both the commission and the Office of Judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

The court may not conduct a de novo reweighing of the evidentiary record.... See *Hammons v. W. Va. Off. of Ins. Comm'r*, 235 W. Va. 577, 582-83, 775 S.E.2d 458, 463-64 (2015). As we previously recognized in *Justice v. West Virginia Office Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012), we apply a de novo standard of review to questions of law arising in the context of decisions issued by the Board.

See also *Davies v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 330, 334, 708 S.E.2d 524, 528 (2011). Ms. Turner sustained an injury to her left shoulder on July 8, 2019, while lifting windows as a laborer for Simonton Windows. She was initially examined at MedExpress and diagnosed with left shoulder strain. Ms. Turner was later diagnosed with an unspecified sprain of the left shoulder joint.

In an Order dated August 26, 2019, the claims administrator found the claim compensable for an unspecified sprain of the left shoulder joint. Ms. Turner underwent an MRI of the left shoulder on November 20, 2019. The MRI indicated a normal MRI of the shoulder with no traumatic sequelae.

The supraspinatus muscle and tendon within the rotator cuff were found to be normal in appearance with no degeneration or tearing. The infraspinatus, teres minor, and subscapularis muscles and tendons were also normal. Ms. Turner was seen by Jason L. Gessell, D.O., on January 3, 2020, and reported that she had recently participated in physical therapy and received two corticosteroid injections.

Neither treatment provided relief. On examination, Dr. Gessell found tenderness of the biceps tendon in the lateral aspect of the shoulder. Range of motion testing indicated motion was mildly limited by pain, especially forward flexion and abduction of the last 30 degrees. Dr. Gessell stated that Ms. Turner had left rotator cuff strain, subsequent encounter, along with a strain of the muscle tendon of the rotator cuff of the left shoulder.

He discussed the risks, benefits, and alternatives with Ms. Turner after diagnostic fluoroscopy of the left shoulder. Following his examination, Dr. Gessell requested authorization for an MRI arthrogram of the left shoulder.

The requested arthrogram was to determine whether surgery was necessary. Prasadarao Mukkamala, M.D., performed a physical examination of Ms. Turner for an Independent Medical Evaluation on January 13, 2020. Dr. Mukkamala diagnosed a sprain/strain resulting from the July 8, 2019, injury. He concluded that there was absolutely no evidence of a rotator cuff tear or other significant pathology.

Although her treating physician was recommending arthroscopy, Dr. Mukkamala found no indication for arthroscopy based on the physical examination and unremarkable MRI. Dr. Mukkamala concluded that Ms. Turner reached her maximum degree of medical improvement, and he assessed 2% whole person impairment due to reduced range of motion. <sup>2</sup> On March 31, 2020, the claims administrator entered an Order denying authorization for an MRI arthrogram of Ms. Turner's left shoulder.

The claims administrator indicated that the decision was based upon Dr. Mukkamala's report dated January 13, 2020. Ms. Turner protested the claims administrator's decision. In support of her protest, Ms. Turner submitted a letter, with accompanying medical billing records, from First Settlement Orthopaedics, dated September 11, 2020, and Marietta Surgery Center, dated December 21, 2020, showing that Dr. Gessell performed subacromial decompression and labral repair.

<sup>1</sup> She also introduced billing statements from United Anesthesia, Inc., for the surgical procedure, as well as a letter from Mountain River Physical Therapy noting her post-surgical left shoulder/upper extremity therapy. Ms. Turner also submitted mileage reimbursement requests for attending therapy at Mountain River Physical Therapy. Ms. Turner returned to Dr. Gessell on November 20, 2020, for a follow-up visit after her subacromial decompression and labral repair of the left shoulder.

In his Progress Note, Dr. Gessell reported that the left shoulder was treated by an open surgical procedure and that she was doing well by participating in therapy twice a week. Physical examination revealed that Mr. Turner's wounds were healed and showed no signs of infection, erythema, or warmth. She had full passive range of motion with forward flexion, abduction, and external rotation.

Ms. Turner was directed to follow up in six weeks. Following the examination, Dr. Gessell planned to request that a labral tear be added to the claim and noted that he believed that the findings of the shoulder were a direct result of the injury.

On appeal, Ms. Turner argues that although the claims administrator denied a request for an MRI with dye, Dr. Gessell decided that she needed to have surgery on her shoulder because her pain became unbearable. In an Order dated March 30, 2021, the Office of Judges found the issue of the

MRI arthrogram moot, insofar as Ms. Turner had undergone surgery without waiting for the MRI arthrogram to be performed.

The Office of Judges determined that Ms. Turner cannot now receive an MRI arthrogram to determine if surgery is necessary, since the surgery was already performed without obtaining the testing. Although the arthrogram was found to be medically related and reasonably necessary at the time it was requested, the Office of Judges concluded that the issue is now moot.

As a result, the claims administrator's Order dated March 31, 2020, was dismissed as moot. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on June 28, 2021.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. The Office of Judges did not err in finding the issue moot insofar as the diagnostic study was intended to determine whether surgery was necessary.

Because the surgical procedure was actually performed without the requested MRI arthrogram, the issue is clearly moot. The Board of Review's Order dated June 28, 2021, is affirmed. Affirmed. ISSUED: 1 The surgical treatment performed by Dr. Gessell was not requested or authorized through Ms. Turner's workers' compensation claim. 3 CONCURRED IN BY: February 10, 2023 Chief Justice Elizabeth D. Walker Justice Tim Armstead Justice John A. Hutchison Justice William R. Wooton Justice C. Haley Bunn 4