

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
July 15, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLES E. KEENE,
Claimant Below, Petitioner

vs.) **No. 11-1198** (BOR Appeal No. 2045324)
(Claim No. 2005038635)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent

and

CPC LOGISTICS, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Charles E. Keene, by Robert Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by David Stuart, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated July 19, 2011, in which the Board reversed an October 27, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's August 21, 2009, decision granting Mr. Keene no additional permanent partial disability award for his left ankle injury. 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 that the Board of Review's decision is based upon a material

misstatement or mischaracterization of the evidentiary record. This case satisfies the “limited circumstances” requirement of Rule 21(d) of the Revised Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion.

Mr. Keene injured his left ankle and leg on March 22, 2005, when he fell while working in the back of a truck. On May 12, 2005, the claim was held compensable for phlebitis veins, cellulitis/abscess of the leg, Achilles bursitis/tendonitis, and sprain/strain of the ankle. Mr. Keene has sustained at least three previous ankle injuries, and has received a prior 15% permanent partial disability award for his left ankle.

In its Order reversing the October 27, 2010, Office of Judges’ Order and reinstating the August 21, 2009, claims administrator’s decision, the Board of Review held that Mr. Keene had been fully compensated for the March 22, 2005, injury through the prior 15% permanent partial disability award. Mr. Keene disputes this finding and asserts that the evidence of record demonstrates that he is entitled to an additional 15% permanent partial disability award, for a total award of 30%.

The Office of Judges pointed to Dr. Gerbo’s opinion that Mr. Keene has 30% whole person impairment as a result of his left ankle injuries. The Office of Judges then found that Mr. Keene is entitled to an additional 15% permanent partial disability award, for a total award of 30% for his left ankle injury. We find that the reasoning of the Office of Judges was sound, and that the Board of Review’s reversal of the decision of the Office of Judges was not supported by the evidence of record.

For the foregoing reasons, we find that the decision of the Board of Review is based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is reversed and the claim is remanded with the instruction to reinstate the October 27, 2010, decision of the Office of Judges.

Reversed and remanded.

ISSUED: July 15, 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