

SUPREME COURT OF APPEALS OF WEST VIRGINIA

James R. Orren v. Magnum Coal Company

Orren v. Magnum Coal Co. · No. No. 15-0269 · Decided February 4, 2016

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed a Board of Review decision awarding James R. Orren a total of 5% permanent partial disability for his compensable right ankle injury. The court held that Orren was not entitled to an additional award based on claimed varus deformity or right knee impairment.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                      |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Appeals of West Virginia                                                                                                                                                                                                                            |
| WRITING FOR THE COURT | Chief Justice Menis E. Ketchum; Justice Robin J. Davis; Justice Brent D. Benjamin; Justice Margaret L. Workman; Justice Allen H. Loughry II                                                                                                                          |
| JURISDICTION          | West Virginia                                                                                                                                                                                                                                                        |
| DECIDED               | February 4, 2016                                                                                                                                                                                                                                                     |
| DOCKET                | No. 15-0269                                                                                                                                                                                                                                                          |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                             |
| PROCEDURAL POSTURE    | Petitioner appealed a West Virginia Workers’ Compensation Board of Review order affirming an Office of Judges order that awarded him an additional 2% permanent partial disability for his compensable right ankle injury.                                           |
| STANDARD OF REVIEW    | The Board of Review's decision is affirmed unless it is in clear violation of a constitutional or statutory provision, clearly results from erroneous conclusions of law, or is based upon a material misstatement or mischaracterization of the evidentiary record. |
| PRECEDENTIAL VALUE    | Nonprecedential memorandum decision                                                                                                                                                                                                                                  |
| PARTIES               | James R. Orren v. Magnum Coal Company                                                                                                                                                                                                                                |

TOPICS

- workers compensation
- appellate procedure
- standard of review
- administrative law

## PRACTICE AREAS

Workers compensation

Administrative law

Appellate procedure

## QUESTIONS PRESENTED

1. Whether Orren was entitled to an additional 5% permanent partial disability award based on the entirety of Dr. Guberman's impairment assessment, including impairment for varus deformity.
2. Whether the Board of Review clearly erred by affirming the Office of Judges' award of only an additional 2% permanent partial disability for the compensable right ankle injury.

## HOLDINGS

1. The Board of Review did not clearly violate a constitutional or statutory provision, reach an erroneous conclusion of law, or materially misstate or mischaracterize the evidentiary record by affirming an additional 2% award, resulting in a total 5% permanent partial disability award for the right ankle.
2. An appellate court will not disturb the Board of Review's decision when it is not in clear violation of a constitutional or statutory provision, is not clearly the result of an erroneous conclusion of law, and is not based on a material misstatement or mischaracterization of the evidentiary record.

## KEY QUOTATIONS

*“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.” (3)*

## FACTUAL BACKGROUND

Orren, an underground coal miner, injured his right knee and ankle on May 3, 2009, when his leg became caught on a forklift scoop. The claim was held compensable for a right ankle medial malleolus fracture and knee contusion. Multiple physicians issued differing impairment evaluations, ranging from 1% to 10% whole-person impairment, but the administrative tribunals credited the ankle range-of-motion assessments supporting a total 5% award and rejected additional impairment ratings for varus deformity and the right knee.

## PROCEDURAL HISTORY

The claims administrator initially awarded Orren 1% permanent partial disability and later granted no additional award beyond a prior 3% award. The Office of Judges reversed in part and awarded an additional 2%, for a total 5% award for the right ankle. The Board of Review affirmed, and Orren appealed to the Supreme Court of Appeals of West Virginia, which affirmed the Board's decision.

## DISPOSITION

affirmed

## OPINION

PER CURIAM.

STATE OF WEST VIRGINIA FILED SUPREME COURT OF APPEALS February 4, 2016  
RORY L. PERRY II, CLERK SUPREME COURT OF APPEALS JAMES R. ORREN, OF WEST  
VIRGINIA Claimant Below, Petitioner vs.) No. 15-0269 (BOR Appeal No. 2049848) (Claim No.  
2009091937) MAGNUM COAL COMPANY, Employer Below, Respondent MEMORANDUM  
DECISION Petitioner James R. Orren, by Reginald D. Henry, his attorney, appeals the decision of  
the West Virginia Workers' Compensation Board of Review.

Magnum Coal Company, by Henry C. Bowen, its attorney, filed a timely response. This appeal  
arises from the Board of Review's Final Order dated February 25, 2015, in which the Board  
affirmed a September 26, 2014, Order of the Workers' Compensation Office of Judges.

In its Order, the Office of Judges reversed the claims administrator's September 6, 2013, decision  
granting Mr. Orren a 3% permanent partial disability award for his right ankle. The Office of  
Judges granted Mr. Orren an additional 2% award for a total of a 5% permanent partial disability  
award.

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. Orren worked as an underground coal miner for Magnum Coal Company. On May  
3, 2009, Mr. Orren injured his right knee and right ankle when his leg was caught on the scoop of  
a fork lift. He was treated at St. Francis Hospital where he was diagnosed with an acute fracture of  
the right ankle.

The claims administrator held the claim compensable for a closed fracture of the medial malleolus  
of the right ankle and a contusion of the knee. Mr. Orren was placed in a cast and received several  
months of physical therapy under this claim. 1 Following this period of treatment, Paul Bachwitt,  
M.D., evaluated Mr. Orren and determined that he had similar range of motion in both his right  
and left knees.

Dr. Bachwitt, however, found that Mr. Orren had 1% whole person impairment for loss of range of  
motion related to his right ankle fracture under the American Medical Association's Guides to the  
Evaluation of Permanent Impairment (4th ed. 1993). Based on Dr. Bachwitt's evaluation, the  
claims administrator granted Mr. Orren a 1% permanent partial disability award.

After this decision, Bruce A. Guberman, M.D., evaluated Mr. Orren. He found that Mr. Orren had normal range of motion in his right knee, but he determined that Mr. Orren had 4% impairment for loss of range of motion in his right ankle. Saghir R. Mir, M.D., also evaluated Mr. Orren. He determined that Mr. Orren had no symptoms in his right knee but had aching and throbbing in his right ankle.

He determined that Mr. Orren's right knee contusion had completely healed. He found that Mr. Orren had 3% whole person impairment related to his right ankle. The Office of Judges then reversed the claims administrator's decision and granted Mr. Orren an additional 2% permanent partial disability award above the 1% award granted by the claims administrator's decision.

The Office of Judges granted Mr. Orren a total of a 3% permanent partial disability award. Dr. Guberman then evaluated Mr. Orren a second time. He found that Mr. Orren started working as a dispatcher for Magnum Coal Company because it was a less strenuous job. Mr. Orren reported to Dr. Guberman that his symptoms had gotten worse and that he experienced periodic swelling in his ankle two to three times a week.

Dr. Guberman found that Mr. Orren had reached his maximum degree of medical improvement and that he now had 5% impairment for loss of range of motion in his right ankle. He also found that Mr. Orren had 5% impairment for varus deformity of the right ankle. Dr. Guberman believed that Mr. Orren had no impairment related to his right knee.

However, he combined the impairment for his ankle and varus deformity and found that Mr. Orren had a total of 10% impairment. Following this evaluation, Mr. Orren submitted an application to reopen his claim for an additional permanent partial disability award. Prasadarao B. Mukkamala, M.D., then evaluated Mr. Orren.

Although Dr. Mukkamala noted that Mr. Orren complained that the pain in his ankle forced him to walk on the outside of his foot, he determined that Mr. Orren only had 1% whole person impairment for loss of range of motion due to his ankle injury. He also found that Mr. Orren had no impairment due to his right knee. Based on Dr. Mukkamala's evaluation, on September 6, 2013, the claims administrator granted Mr. Orren no additional permanent partial disability award above the previously granted 3% award for his right ankle.

Robert B. Walker, M.D., also evaluated Mr. Orren and determined that he had 5% whole person impairment related to loss of range of motion in his right ankle. Dr. Walker found that Mr. Orren also had 5% whole person impairment for loss of range of motion in his right knee. Combining the rating for the loss of range of motion in his right ankle and right knee, Dr. Walker found that Mr. Orren had 10% impairment related to his compensable injury.

On September 26, 2014, the Office of Judges reversed the claims administrator's decision and granted Mr. Orren an additional 2% permanent partial disability award for a total of a 5% award

for his right ankle. The Board of Review affirmed the Order of the Office of Judges on February 25, 2015, leading Mr. Orren to appeal. 2 The Office of Judges concluded that Mr. Orren sustained 5% whole person impairment related to his right ankle injury which entitled him to an additional 2% permanent partial disability award.

The Office of Judges based this determination on Dr. Guberman's and Dr. Walker's calculation of the loss of range of motion in Mr. Orren's right ankle. The Office of Judges determined that Dr. Guberman's and Dr. Walker's right ankle range of motion testing was more persuasive than the impairment recommendations of Dr. Bachwitt, Dr. Mir, and Dr. Mukkamala, particularly considering that the evidence in the record showed that Mr. Orren's ankle injury had progressed.

The Office of Judges, however, did not adopt the impairment recommendation of Dr. Guberman related to varus deformity or of Dr. Walker related to the right knee. The Office of Judges determined that these ratings were not corroborated by the evidence in the record, including the remainder of the evaluations in the record.

The Board of Review adopted the findings of the Office of Judges and affirmed its Order. On appeal, Mr. Orren argues that he is entitled to an additional 5% permanent partial disability above the 5% award granted by the Office of Judges. Mr. Orren asserts that the Office of Judges should have adopted Dr. Guberman's entire whole person impairment recommendation including the 5% impairment he found related to varus deformity.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Orren has presented sufficient evidence that he is entitled to an additional 2% permanent partial disability award above the 3% award he was previously granted.

However, he has not demonstrated that he is entitled to an additional 5% permanent partial disability award above the 5% award granted by the Office of Judges. The evidence in the record, including the notation in Dr. Mukkamala's evaluation indicating that Mr. Orren has modified his gait to reduce his pain, shows that his ankle injury has progressed and that he is entitled to an additional permanent partial disability award above the 3% award he was previously granted.

Because the range of motion testing of Mr. Orren's ankle conducted by Dr. Mukkamala and Dr. Walker entitled him an increase in his permanent partial disability award, the Office of Judges was within its discretion in adopting this portion of their evaluations.

The Office of Judges also provided sufficient reasons for not granting Mr. Orren an additional permanent partial disability award based on Dr. Guberman's assessment of his varus deformity or Dr. Walker's assessment of his right knee impairment.

The impairment Dr. Guberman and Dr. Walker calculated for these conditions was not reflected in the remainder of the evidence in the record, and the Office of Judges properly disregarded their

recommendations. 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: February 4, 2016  
3 CONCURRED IN BY: Chief Justice Menis E. Ketchum Justice Robin J. Davis Justice Brent D. Benjamin Justice Margaret L. Workman Justice Allen H. Loughry II 4