

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**CARMEN DESTEFANO JR.,
Claimant Below, Petitioner**

FILED
October 25, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-1634 (BOR Appeal No. 2045861)
(Claim No. 990051859)

**WHEELING-PITTSBURGH STEEL CORPORATION,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Carmen Destefano Jr., by Robert M. Williams, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Wheeling-Pittsburgh Steel, by Lucinda L. Fluharty,¹ its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated November 4, 2011, in which the Board affirmed a March 30, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 26, 2010, decision which held that Mr. Destefano had been fully compensated by his prior 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. Destefano incurred significant burns on his back on February 1, 1999, in the course of and resulting from his employment at Wheeling-Pittsburgh Steel Corporation. Mr. Destefano received a 20% permanent partial disability award related to his physical injury and a 13% permanent partial disability award related to his psychiatric impairment. On March 8, 2007, Dr.

¹ Lucinda L. Fluharty of Jackson Kelly, PLLC, withdrew as counsel for employer, Wheeling-Pittsburgh Steel Corporation on October 3, 2012, after submitting its Response Brief.

Guberman diagnosed Mr. Destefano with second degree burns and he found a 24% impairment rating based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). However, when Dr. Martin evaluated Mr. Destefano under the *Guides* on March 3, 2010, he found that Mr. Destefano had only 10% impairment from his burn injury. Based on Dr. Martin's report, the claims administrator denied Mr. Destefano's application for additional permanent partial disability, on March 26, 2010, finding that he had been fully compensated by his prior award. Following the claims administrator decision, Mr. Destefano was also evaluated by Dr. Langa, who found that he had second degree burns and recommended a 10% impairment rating based on the American Medical Association's *Guides*. The claims administrator's decision was affirmed by the Office of Judges on March 30, 2011. The Order of the Office of Judges was affirmed on November 4, 2011, leading to this appeal.

The Office of Judges concluded that Mr. Destefano had been fully compensated by his prior 20% permanent partial disability award for the scarring that was incurred as a result of his February 1, 1999, burn injury. The Office of Judges placed significant weight on the reports of Dr. Martin and Dr. Langa who both found 10% impairment due to Mr. Destefano's burn scars. The Office of Judges compared the recommendations of Dr. Martin and Dr. Langa to the recommendation of Dr. Guberman, who found 24% impairment from the scarring. But the Office of Judges placed more weight on the recommendations of Dr. Martin and Dr. Langa because they occurred later in time. The Office of Judges found that, since Mr. Destefano had already received a 20% permanent partial disability award, he had been fully compensated by the prior award. The Board of Review adopted the findings of the Office of Judges and affirmed its Order on November 4, 2011.

We agree with the conclusion of the Board of Review. The Office of Judges based its determination on a preponderance of the evidence and had specific and legitimate reasons for placing more significant weight on the recommendations of Dr. Martin and Dr. Langa than on the recommendation of Dr. Guberman. The 10% impairment rating recommended by both Dr. Martin and Dr. Langa is consistent with the evidence in the record. Since Mr. Destefano has previously received a 20% permanent partial disability award, he has been fully compensated for the scarring related to his February 1, 1999, injury,

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 25, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum