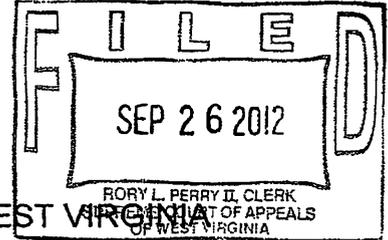


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

12-1127

JENNIFER MOORE, ✓

Petitioner,

West Virginia
Insurance Commission

K-MART CORPORATION, ✓

Respondent.

JCN: 2008046357 ✓

BOARD OF REVIEW APPEAL NO.: 2046853 ✓

FROM THE WORKERS' COMPENSATION BOARD OF REVIEW

dated 8/29/12

PETITION FOR APPEAL

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I

KIND OF PROCEEDING AND NATURE OF RULING

By Order dated July 3, 2008, the Claims Administrator denied compensability of the claim, holding that the Claimant was suffering from a non-work related issue. The Claimant filed a timely protest to this Order.

Evidence was introduced. At the close of the evidence, the case was submitted to the Office of Judges for a decision.

By Order dated April 29, 2010 the Office of Judges reversed the Claims Administrator's Order of July 3, 2008 and held the claim compensable, and ordered benefits paid, as the reliable evidence of record shall warrant.

The Employer filed a timely appeal with the Workers' Compensation Board of Review, and the case was briefed and argued.

By Order dated December 15, 2010, the Board of Review affirmed the Office of Judges' Order of April 29, 2010, which held the claim compensable, with the following modifications and exceptions:

1. In Findings of Fact #4, "February 9, 2008" is modified to "February 29, 2008."
2. In Findings of Fact #5, the second sentence is not adopted.
3. In Findings of Fact #10, the next to last sentence is not adopted.
4. The Board does not adopt the findings/discussion/conclusions regarding chelation therapy.

The Board further noted that its decision shall not be interpreted as a ruling on whether or not chelation therapy will be authorized, and that treatment is a separate issue and is not part of this litigation.

This matter is currently before this Honorable Court on appeal for the reason that the Board of Review failed to adopt the next to last sentence in Finding No. 5 that the Claimant was referred for testing, and Dr. Folwell noted the studies of Genova Diagnostic which reveal findings consistent for heavy metal exposure, and in Finding of Fact No. 10 which held Dr. Murphy recommended chelation therapy as treatment for the Claimant's condition which was rendered and has improved the Claimant's symptoms according to further urine tests from December 8, 2008 to the present. Moreover, the Board of Review did not adopt any of the findings, discussion or conclusions regarding chelation therapy, and said that that was a separate issue.

The Claimant then presented bills to the Claims Administrator regarding chelation therapy. On July 15, 2010, the Claims Administrator denied the medical bills for the chelation therapy from May 1, 2008 through October 15, 2010.

By Order dated January 12, 2012, the Office of Judges reversed the Claims Administrator's Order dated July 15, 2010, only in so far as it denied IV chelation therapy. That Order was then appealed by the Employer.

By Order dated August 29, 2012, the Board of Review reversed the Office of Judges' Order of January 12, 2012, and reinstated the Claims Administrator's Order of July 15, 2010 which denied medical bills for IV chelation therapy performed in Dr. Murphy's office.

The Claimant contends that the evidence in this case demonstrates that the medical bills for the IV chelation therapy should be paid.

II

STATEMENT OF FACTS

This is a claim concerning exposure to toxic metals.

The Claimant filed a Workers' Compensation claim with Sedgwick, who is the Claims Administrator for Sears. This claim was assigned a date of injury of April 17, 2008. The Claimant worked had worked for Sears for thirty-three years. She began working there on May 3, 1976, and is currently employed there.

She became employed with Sears in 1976, and has been employed there to the present. She began working as a preventative maintenance technician, repairing scratches and rebuilding items brought back to the shop in May of 2006. In performing the PMT job, she was required to use tools, consisting of belt sanders, grinders, and drummer tools, which were all electronically operated. She testified that a drummer tool was a small tool 6 to 8 inches long with a handle that the user can change different discs. This tool was used to smooth out surfaces. The belt sander was used to remove scratches and rust spots off ratchets. She performed these jobs from may of 2006 until April 17, 2008. The reason that she stopped this job, was she had informed her manager that she had been exposed to heavy metals because of the grinding and sanding. The room where she did this grinding and sanding was rectangular, with metal shelving on both sides. On the left hand side of the room there was a table with a belt sander and a grinder. The sander was set up in a plastic tub like someone would use in performing laundry to catch filaments from the sander. There was also a grinder and air compressor in this room, along with a desk with her computer. There were no windows and no ventilation in the room. There was one door that she exited and entered.

During this time from March 2006 until April 17, 2008, other employees were working in the room, also grinding and sanding as well. The Claimant only sanded and ground ratchets. There were also 2 circular saws in the room that were used by other employees. The Claimant worked 5 days a week, 8 hours a day. She would occasionally come in on a Sunday to work overtime. During an average week that she worked, she would use the grinder, sander and drummer tool to work on

the ratchets during the entire 5 days. During this time that she operated the grinding machine, the sander, the belt sander and the drummer tools, she was exposed to metal dust. The metal dust came from the ratchets. She testified that when she sanded and ground the ratchets, the metal dust would fly into the air. She stated she was exposed to this metal dust on a daily basis, and certainly every time she operated the belt, sander, the grinder and the drummer tool. The Claimant was never provided any breathing protection by Sears when she operated these pieces of machinery. The Claimant purchased a mask for herself after she was advised by her treating physicians to wear a mask, in early April of 2008. When she operated these machines, she would see a black cloud in the air. In using these machines, metal dust was accumulated in the work area. She stated that the dust would be on the floor, rugs, cabinets, on her work clothes, her hands, her computer, and on the telephone. She testified that in operating these various machines, she became extremely dirty. She had to clean her work place every day by dusting and sweeping the metal dust from the floor.

The Claimant testified she began noticing problems with her feet in June of 2006. She noticed a burning and a tingling. She first sought medical treatment with her family doctor, Dr. Terry Cook, in September of 2006. Her condition continued to get worse because of the burning and tingling. This burning and tingling, at that time, was confined to the bottom of her feet. Her family doctor diagnosed her condition as plantar faciitis, but then decided to refer her to a podiatrist in Marietta. The podiatrist thought that the Claimant had a broken bone in her foot which turned out not to be the case. She was advised by him to purchase orthotics, which she did, but that did not help the pain at all. She continued to have the same symptoms.

She then came under the care of Dr. Folwell, a chiropractor here in Parkersburg, West Virginia. She underwent an EMG and a hair follicle test. Dr. Folwell, after having the hair follicle

test performed, suggested that she undergo Chelation treatment, and recommended Dr. Murphy in Charleston. She testified that has been treating with Dr. Murphy ever since that referral was made. She stated that the Chelation treatment helps with the burning and tingling, but it still has not gone away completely. She indicated that she saw Dr. Murphy at least once a month. Her past medical treatment did not reflect anything that would be contributing to her polyneuropathic condition.

The Claimant testified that she still has the symptoms. She stated that the tingling and the burning is still there, but after she has the Chelation treatment, it eases. She stated that after a week or two the burning and tingling gradually starts back. She stated that there is never a day that it is not there, but it is just not as intense as it used to be.

The Claimant's treating physician, Dr. Byron Folwell, testified. Dr. Folwell testified as follows regarding his training for administering EMG's and his forensic experience:

"Q. Are you a member of any organizations consisting of members of your profession?

A. Yes. American Chiropractic Association, the ACA.

Q. In connection with your certification with regard to EMG and EMG diagnostics, are you certified in terms of both administering EMG's and also reading the results of the EMG's?

A. Yes, I am.

Q. And can you explain, if you could and if you know, what the difference is between the training that you had to administer and read EMG's and the training that would be available, say, to someone in a physician's office who is doing the same thing?

A. Typically a medical neurologist or even an osteopathic neurologist would administer these kinds of tests. You would also find a physical medicine specialist in the area of medical training will offer these kinds of tests.

It has expanded now in the chiropractic field. One of my colleagues, Dr. Ronald Fudala, F-U-D-A-L-A, in Cincinnati, Ohio has performed these types of studies and taught the course work for over 20 years now. So it is now well accepted within our field to train and perform these particular studies.

It is a required post-graduate course that is often required in each of the states

of 120 hours minimum before being allowed to offer this. There are course and tests that are offered and required through the sponsor schools. The case that I went through was with the National Chiropractic College in Lumbard, Illinois outside of Chicago with National Chiropractic College, or now I think that they refer to themselves as the National University of Health Sciences.

So far as being able to interpret and understand these kinds of studies that are application appropriate, we feel like it is an excellent tool in helping us in differential diagnosis and assessment of patients when the test is appropriately applied.

Q. Dr. Folwell, have you testified as an expert in your field in administrative proceedings, as well as in civil proceedings in court prior to today?

A. Yes, I have.

Q. Have you testified and given expert opinion with regard to the administration and the interpretation of the results of EMG tests?

A. Yes, I have.

Q. And have you done so in regard to claims involving Workers' Compensation?

A. I have testified in Workers' Compensation cases."

Dr. Folwell testified that the Claimant first presented in his office on January 17, 2008 for complaints relating to pain at the bottom of her feet for which she reported symptoms beginning as early as June of 2006. He stated that the Claimant reported a pain level of 6 out of 10. In addition to the pain in her feet, she also complained of sensation of pins and needles on the dorsum of her feet. The Claimant's own medical history was absent for diabetes.

Insofar as the injury history goes, she related that she had worked for Sears for several years, but her job for the last few years was working with sanding down or grinding ratchets. Regarding her exposures, he testified as follows:

"And she went on to describe that in the grinding process, that there was a kind of a black film of particulate matter that would go into the air when she would grind away on the tools, and they would – this particulate matter would be seen laying about the floor and in around the work station that she was involved with.

And I further questioned her regarding any type of protection against the potential breathing hazards or exposures to that materials that was, you know, shot off from this particular grinding process, and she said there was none for personal –

PPD, or personal protection equipment available for them to use. This apparently had been the procedure that had been in place for many years, even with employees even prior to her.

Q. Did she tell you whether or not she engaged in this refurbishing of these tools on a regular basis while employed at Sears retail for the past several years?

A. She indicated she had not done this initially when she was employed with them, but had been doing it for a few years when an employee who had done it before, I don't know the details, shifted departments or worked elsewhere or retired, and she took over doing much of that on a regular basis for a couple of years prior to seeing me in 2008, and I think prior to 2006."

Dr. Folwell testified that the Claimant advised him that there was no ventilation equipment in the area where she worked. Based on her summary of her history, and his examination, he felt that he needed to further investigate the possibility of exposure to heavy metals. He determined at that time, based on his clinical examination and the history, that exposure to heavy metals was causing her symptoms.

Dr. Folwell defined the term polyneuropathy as an individual with aspects of paresthesia relating to a pins and needles sensation or a numbing. He testified that it can be secondary to metabolic issues, infectious issues, and **exposure to heavy metals**. He further indicated that nothing in her medical history demonstrated that she had any metabolic issues, such as diabetes or infectious diseases.

To further test her condition, Dr. Folwell recommended an EMG test, which was performed on January 24, 2008. After having administered the EMG and the nerve conduction studies and getting the results, and after the history that he had obtained from the Claimant indicating that she did not have diabetes, had never been diagnosed with diabetes, and also finding there was no indication of exposure to any type of exotic virus or disease, Dr. Folwell narrowed the scope of his inquiry to the exposure to heavy metals. Dr. Folwell testified that he is trained in the forensic aspect of trying to determine whether heavy metal exposure was a possible cause for a patient's condition,

and then the recommendation was to get the patient into the hands of an appropriate physician who could treat the condition, which is the course that he undertook.

The doctor testified that the next step he took was to get a hair analysis performed by Genova Diagnostics, which was performed on February 19, 2008. Dr. Folwell stated that he submitted hair samples to Genova Diagnostics, and received a report showing that the Claimant had several toxic elements in the high end above the reference range which were worse in uranium, lead, nickel and gadolinium. Having received these test results, the doctor testified that he felt the Claimant had been exposed to heavy metals at her workplace, and further testified that based on a reasonable degree of certainty, that the exposure that occurred was work related.

After having received the results of the hair sample test, he referred the Claimant to Jonathan Murphy for additional testing. He testified that Dr. Murphy recommended Chelation therapy, which is the introduction of one or more agents into the body through the blood stream for the purpose of causing the substance, heavy metals, to be excreted from the cells and to enter the blood and then through the urinary system into the urine where it is discharged. He received urine toxic metal tests from Dr. Murphy collected on December 18, 2008 which showed elevated levels of aluminum, nickel, and thorium. He also testified regarding a test that Dr. Murphy performed on June of 2008 which found elevated levels of aluminum, lead, nickel, cadmium and mercury. In a review of his treatment, he stated as follows:

“Q. Let me go back and review a few things. First of all, when you saw Jennifer Moore in January of 2008, she gave you a history and told you of her symptoms, and then you set out to try to nail down the potential causes, correct?”

A. Correct.

Q. And you, through testing and examination, eliminated what would be potential causes stemming from spinal cord compression or some other type of neurological condition, is that correct?

A. Correct.

Q. And so in the course of eliminating the various potential causes, you also eliminated plantar fasciitis through the use of the EMG test, as well as the nerve conduction test?

A. Well, the nerve conduction and EMG would be more pertinent to other potentially –

Q. That is right, okay

A. – use of polyneuropathy, such as EMG or various motoneuron diseases, and radiculopathy or radiculitis from the lower back or spine that may create that potential symptom.

Q. And the plantar fasciitis was eliminated as a diagnosis on the basis that the symptoms of that condition do not fit the symptoms that she was describing to you?

A. Correct.

Q. At the end of your assessment in January and after you had conducted the EMG and nerve conduction test, you were left with a concern that she had been exposed to heavy metals?

A. Absolutely.

Q. That is when you referred her for the hair analysis, and then ultimately sent her to see Dr. Murphy?

A. Correct.”

Concerning the causation of her problem, Dr. Folwell testified as follows:

“Q. Let me ask you a series of questions. I want you to answer these to a reasonable degree of medical probability. Based on your examination and your treatment of Jennifer Moore, do you have an opinion as to whether or not there was any condition that might have been causing her polyneuropathy, the pins and needles effect, the pain in the bottoms of her feet that would be related to things that you would customarily see in your chiropractic practice?

A. Again, based on the exam and the history and testing, I really can't see any other contributing factors with Mrs. Moore that would be causing the polyneuropathy-based symptomatology.

Q. Based on the same things that I mentioned, the history, your examination, and so forth, did you see any evidence through any of the tests or in the medical history or

anything that she told you that somehow the pins and needles issue in the feet, the pain in the feet were related to diabetes?

A. No. Her history was relatively unremarkable for poor health in this arena for herself personally, her personal medical history.

Q. Did you see any evidence, again, based on the same things that I have mentioned, and to a reasonable degree of medical probability, did you see any evidence from your observation, from your testing that would indicate that the problems that she was experiencing in her feet in January of 2008 were related in some way to plantar fasciitis?

A. It is not related to plantar fasciitis.

Q. And again, to a reasonable degree of medical probability, and based on the same things that I mentioned in the previous question, was there anything to indicate to you that the problems that she was having in both of her feet in January of 2008 were related in some way to a cracked or broken bone in the left foot?

A. It was not related to some past history of a fracture of her left foot.

Q. And so are you satisfied that you narrowed down the potential causes of the conditions that you observed in her in January of 2008 to anything outside of the scope of this potential heavy metal exposure?

A. I am very satisfied.

Q. And that, of course, after you narrowed the scope of the inquiry, you sent her to see – you sent Jennifer to see Dr. Murphy who conducted tests and confirmed your suspicion, is that correct?

A. That is correct.”

The Claimant’s treating physician, Dr. Jonathan Murphy, next testified. Dr. Murphy is Board Certified in **internal medicine**, pediatrics, and holistic medicine. He first saw the Claimant on April 14, 2008 for pain in her feet, constant and severe. He testified the Claimant had peripheral neuropathy. He also testified that based on her work history she was exposed to metal dust. He diagnosed her condition as peripheral neuropathy by examining the cranial nerves, checking her range of motion in the upper and lower extremities, and then following that with a sensory test. The doctor testified that he had the Claimant undergo tests which were done under his direction. He

testified regarding the protocol as follows:

“Q. Can you go through the protocol of the testing?

A. The protocol is 500 milligrams oral of DMSA at which time the bladder is empty. From then, all urine for the next six hours is collected. The urine is collected into a large container with a lid on it, of course.

At the end of the six hours, the bladder is to be fully empty, thereby having an empty-bladder time 0 and empty bladder at hour 6.

Q. I believe you used the initial D—

A. It would reveal the urinary volume of secretions, then a small specimen is taken from that after it is mixed well, and delivered by Federal Express to Doctor’s Data, Incorporated in Chicago where mass spectographic determination of levels of toxic metals, along with chemical analysis for grabamine (phonetic) of the urine specimen is obtained, and the ratio is given of the toxic metals to the urinary tracking, thereby standardizing the test across all shapes and sizes of people.

Q. What is DMSA?

A. Dimercaptosuccinic acid is a heavy metal finding agent originally indicated for the treatment of lead poisoning and iron poisoning in children.

Q. When was this test conducted?

A. On December 18 of 2008, and I think that we may have done this twice. Excuse me.

Q. When was the first test done?

A. On June 5 of 2008.

Q. And it was – the sample was collected in your office?

A. No. This sample is collected by the patient in her own residence.

Q. So she brought the sample to you?

A. Yes. Well, she didn’t even bring it to me. She delivered it through Federal Express to Doctor’s Data. I was not in the chain of custody of her specimen.

Q. Do you have any reason to question anything about the specimen?

A. Being that it is rarely ordered, and that she was a patient who I ordered it on, I have to no reason to suspect that anything other than her completing it as instructed would have gone on, no.

Q. The samples were obtained by her, sent to Doctor's Data at your request?

A. Correct.

Q. Did you get any results from that initial testing?

A. Let me go back here. I want to go back and make a correction here because –

Q. Sure.

A. I previously mentioned DMSA, but we did Jennifer's different, and in fact, I will give you that information now. We used a different metal chelater named EDTA, ethylenediaminetetraacetate, which is a heavy metal chelater which is used for the treatment of heavy metal toxicity such as lead and arsenic.

Q. You used the term "chelater." What does that mean?

A. That is to reach with a claw at the molecular level and grab an object, in this case a metal, metal molecule.

Q. According to the copy of the test results that I have, it shows that the test, the data, I guess, was collected on June 5 of 2008?

A. Yes.

Q. And it was apparently received by Doctor's Data on June 9, 2008?

A. Yes.

Q. And then they did their study, and the results were done on June 11, 2008.

A. Yes.

Q. What were the results of that initial test?

A. Demonstrated elevated levels of aluminum, lead, nickel, and borderline elevated levels of cambium.

Q. Was that in the two-page document?

A. Yes. In general it also showed, her essential elements were in good supply and/or abundant supply, which is different, although it may look similar on the document, to an excess.

Also had relatively high levels of zirconium, which is not very common, and deficient levels of iron.

Q. For somebody like me that knows absolutely nothing about this, what findings

on this test that was done on, or completed anyway, on June 11, 2008 was any cause for concern for you as her treating physician?

A. Well, having given her the diagnosis of peripheral neuropathy and recognizing that her physician had looked at, you know, usual causes of peripheral neuropathy, and then finding these results, I was able to conclude that her peripheral neuropathy would likely be due to toxic metal accumulation, toxicity, manifesting, of course, as peripheral neuropathy.

Q. And again, if I have – forgive me if I have already asked this. Define the term “peripheral neuropathy” for the judges that are going to hear this.

A. Peripheral neuropathy is an abnormality of nerves that are in the peripheral nervous system, and the manifestations can be that of sensory, such as touch sensation or other sensations, and they can also be movement, such as motor peripheral neuropathies in which muscles are effected.

Peripheral neuropathy is a general term that includes both sensory and motor neuropathies of any cause, and it manifests typically as weakness, if there is a muscle component, or numbness and abnormal sensation if it is mainly a sensory-based peripheral neuropathy.

Q. What, in your opinion, has caused the peripheral neuropathy in this patient?

A. Toxic effects of metals, toxic metals upon her peripheral nerves.

Q. And the symptoms that she described to you or complaints that she made to you, are those consistent with the types of complaints that someone would have who has been diagnosed with peripheral neuropathy?

A. Yes.”

Dr. Murphy also had the Claimant undergo additional testing in the summer of 2008. He stated that there were elevated levels of lead, aluminum and nickel. He stated that the type of treatment he prescribed for her was Chelation therapy, intravenously, using EDTA and doing this once a week between twenty and thirty treatments. The Chelation treatment, according to the doctor, was offered as an intravenous mixture which is given to increase the rate of detoxification. He further stated that there could be additional physical effects and that he was hoping to increase her rate of excretion of the toxic metals that she had in her system, which he started on May 1, 2008 and has continued since then. The Claimant has had approximately thirty treatments, and reported there

was less numbness and tingling in her feet. He testified that he felt she would need 4 of these treatment per year. He testified that there were no neuropathic problems in her feet based on the EMG, that she was not a diabetic, and that she was not suffering any problems with her thyroid or kidneys. The doctor further testified that the tests that he had performed through Doctor's Data confirmed that she has been exposed to heavy metals in her job. He further testified that based on a reasonable degree of medical certainty, that it was work related. He further testified that he felt that her grinding and sanding heavy metals work was a contributing factor to her retention of the heavy metals in her body.

A Urine Toxic Metals test, done on December 18, 2008 showed elevated levels of aluminum, lead, nickel and thorium. A June, 2008 test from Doctor's Data showed elevated levels of aluminum, lead, and nickel. An EMG test performed by Dr. Folwell on January 24, 2008 showed the test not containing any neuropathic problems with the Claimant. A Hair Analysis test performed on February 19, 2008 showed high levels in uranium, lead, nickel and gadolinium.

The Claimant had tests performed at Microbac Laboratories Inc., in Marietta, Ohio, on November 25, 2009, which tests also reflected that the Claimant had toxic metals in her system.

This claim was held compensable, but the Board of Review has previously refused to consider anything regarding the chelation therapy.

A report from Dr. Murphy dated July 26, 2011 was introduced into evidence. In that report, Dr. Murphy noted his experience with toxicity and his resident training in internal medicine. Regarding his internal medicine training, he is Board certified, and treated cases for toxic metal poisonings during his residency. At the Charleston Women and Children Hospital he treated metal poisonings. In addition he has studied and completed the metal toxicology course taught by the American Academy for the Advancement of Medicine, and has been testing and treating patients for

heavy metal toxicity since 2002. He has tested hundreds of patients with unexplained symptoms for toxic metal burdens and where appropriate has treated them through metal chelation and detoxification. In that report he noted that there are no toxic metal chelation programs in hospitals in the State of West Virginia. He has treated dozens of patients for toxic metal accumulation and has not had any complications from the treatments, nor has he found a patient who has not benefitted from the removal of these metals.

III

ASSIGNMENT OF ERRORS

WHETHER THE BOARD OF REVIEW'S ORDER OF
AUGUST 29, 2012 SHOULD BE REVERSED AND
THE MEDICAL BILLS FOR THE CHELATION THERAPY
BE PAID?

IV

DISCUSSION OF LAW

The sole issue before this Honorable Court is whether the medical bills for the chelation therapy for the dates of service from May 1, 2008 through October 15, 2010 should be paid.

85 CSR 20§62.2 provides as follows:

“All chelation therapy (oral and IV) requires prior authorization and consultation with a Board Certified Medical Toxicologist, an occupational medicine specialist, or general internist familiar with principals of toxicology, prior to initiation of the therapy. In the rare incident in which acute encephalopathy occurs as the result of heavy metal toxicity, a consultation with the Poison Control Center will serve as confirmation of the need for such chelation therapy. The Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, will not reimburse for IV chelation therapy performed in office.”
W.Va. C.S.R. § 85-20-62.2.

The burden of establishing a Workmen's Compensation claim rests upon the one who asserts it. W.Va Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

The Claim Administrator must provide medically related and reasonably required medical treatment, health care or healthcare goods and services under the W.Va. Code §23-4-3 and 85 CSR 20. In making this determination, the treatment must be for an injury or disease received in the course of or as a result of employment.

V

ARGUMENT

THE BOARD OF REVIEW'S ORDER OF AUGUST 29,
2012 SHOULD BE REVERSED AND THE MEDICAL
BILLS FOR THE CHELATION THERAPY BE PAID.

The Claimant contends that the Board of Review's Order of August 29, 2012 should be reversed. The Claimant contends that the medical evidence in this claim justifies the chelation therapy.

The Office of Judges in its Order held as follows:

"The medical bills cited in the subject order are those of Dr. Jonathan Murphy, MD., for the period of May 1, 2008 through October 15, 2010. The record demonstrates that Dr. Murphy first saw the claimant in April of 2008, upon referral from Dr. Folwell. Dr. Murphy recommended chelation therapy. Dr. Murphy described chelation therapy as being given intravenously to increase the rate of excretion of the toxic heavy metals the claimant had in her system. Dr. Murphy testified this treatment was offered in an attempt to increase the levels in the claimant's system to go down to improve the nerve conduction and the neuropathy symptoms. At the time of his deposition on September 11, 2009, Dr. Murphy testified that the claimant had about thirty treatments at that time with the last one being August 6, 2009. Dr. Murphy indicates that the claimant was done with treatment for now and recommended four treatments per year in the future.

In regards to the subject protest, the evidence of record supports a finding that IV chelation treatment is medically related and reasonably necessary for the subject injury/disease. The claim has been held compensable for conditions related to metal exposure. Dr. Murphy, who is board certified in internal medicine, pediatrics and holistic medicine and has taken an American College for Advancement of Medicine toxicology course, as well as studied toxicology independently, has recommended and treated the claimant with chelation therapy in an attempt to detoxify the claimant's body of toxic metals. The employer has offered no medical opinion which refutes the findings or the opinion of Dr. Murphy. In addition, the claimant has given sworn testimony that although it does not eliminate her symptoms, it does help. There is nothing of record that discredits the claimant's testimony as to the effects of chelation therapy.

The sole portion of 85CSR20§62.2 on which the Claim Administrator bases the subject order regards the directive that IV chelation therapy performed in office will

not be reimbursed. In his correspondence dated July 26, 2010, Dr. Murphy explains he offers such services to make IV chelation treatments affordable by charging the claimant only \$105.00, whereas, he maintains that IV chelation treatment can run over \$400.00 per unit. The factual accuracy of the aforesaid costs cannot be determined by the record, however, it is noteworthy that 85 CSR 20§ 6.2 directs that whenever possible, the treating physician should use the least costly mode of treatment.

85CSR20§62.2 also requires that all chelation therapy requires prior authorization and consultation with a Board Certified Medical Toxicologist, an occupational medicine specialist or general internist familiar with principals of toxicology, prior to initiation of the therapy. That while it is apparent that the claimant did not obtain pre-authorization for such therapy, such may partially be explained by the fact that this was a rejected claim during the time the bulk of these services were rendered. As to the consultation requirements, it is reasonable that Dr. Murphy's qualifications would satisfy the aforesaid criteria. Nevertheless, the reasonableness of the amount of the bills, which are the subject of the Claim Administrator's Order dated July 15, 2010, cannot be determined because as previously mentioned, they are not of record."

The Claimant contends that, under CSR, Section 85-20-62.2, Dr. Murphy has met the requirements, being a general internist familiar with the principles of toxicology, prior to the initiation of the therapy.

Regarding the Rule that the Claims Administrator will not reimburse IV chelation therapy performed in office, which the therapy in this case was performed in office, the Claimant contends that is an unreasonable rule and regulation. This rule is arbitrary and capricious and there is no viable reason or justification for precluding a qualified doctor, who exists in this case, from administering this therapy from his office. First of all, as noted by Dr. Murphy, there are no toxic metal chelation programs in hospitals around the State of West Virginia. Furthermore, the Claimant contends that the evidence in the claim demonstrates that this chelation therapy has helped her. Moreover, the claim was initially in the rejected mode and the bulk of the treatment was done during this time period when the claim rejected, which however, has now been ruled compensable.

This Rule prohibits a qualified general internist such as Dr. Murphy from treating patients with this particular type of therapy. There is absolutely no reason given in this Rule why chelation

therapy is prohibited when it is performed in an office. The bills for the medical treatment should not be denied due to the fact that they have helped the Claimant, who has these toxic metals in her system due to her exposures at work. The Claimant had no other place to go within the State of West Virginia for this treatment.

VI

CONCLUSION

Based on the aforesaid, the Claimant respectfully prays that this Honorable Court reverse the Board of Review's Order of August 29, 2012.

Respectfully submitted this 25th day of September, 2012.



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 25th day of September, 2012, a true copy of the foregoing and hereto annexed Petition for Appeal of Jennifer Moore, was deposited in the facilities of the United States Mail, addressed to the following at the last address known to the undersigned:

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