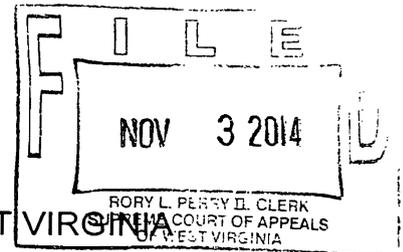


ARGUMENT
DOCKET



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

JENNIFER MOORE,

Claimant Below, Petitioner,

v

K-MART CORPORATION,

Employer Below, Respondent.

CASE NO.: 12-1127

**SUPPLEMENTAL BRIEF OF THE PETITIONER, JENNIFER MOORE,
CLAIMANT BELOW**

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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.

By the Supreme Court of Appeals Order dated May 6, 2014, the Supreme Court of Appeals ordered this matter be scheduled for oral argument under Rule 20 of the Rules of Appellant Procedure, on a date during the September 2014 term of Court. On May 19, 2014, the Petitioner, Jennifer Moore, by her counsel, George Zivkovich, moved that the case be scheduled for oral argument under Rule 20 of the Rules of Appellant Procedure during the January, 2015 term of Court.

By Order dated May 20, 2014, the Supreme Court of Appeals granted the extension and further ordered that three (3) copies of a Supplemental Brief be filed on or before November 3, 2014 by the Petitioner, with the Respondent filing a like number of Briefs within thirty (30) days of the Petitioner's Brief, and any reply brief being necessary to be filed by the Petitioner within fifteen (15) days of the Respondent's Brief.

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

As stated in the Petitioner's previous Petition, this is a claim concerning exposure to toxic metals and an indepth discussion of the facts were set forth in the original Petition. These statements of fact are a brief summary of those previously set forth.

The facts of the case reveal that the Claimant was exposed to toxic metals during her course of employment with the Employer in this claim. As a result of this exposure to toxic metals which were found in testing, the Claimant has developed peripheral neuropathy, which her treating physicians have determined to be a result of the toxic metals exposure. **This claim has been held compensable for medical conditions resulting from exposure to heavy metals at work.**

As a result of the toxic metal exposure, the Claimant underwent chelation therapy, performed by Dr. Jonathan Murphy, who obtained his Doctorate of Medicine at West Virginia University School of Medicine in Morgantown in 1985, and is medically licensed to practice medicine and surgery, and is also Board Certified in Internal Medicine, pediatrics, and holistic medicine. Dr. Murphy administered chelation therapy, which is a medical procedure that involved the administration of chelating agents to remove heavy metals from the body. The Claimant was

diagnosed with peripheral neuropathy that her treating physicians concluded was a result of the heavy metal exposure. The purpose of the chelation treatment, which is offered in an intravenous manner, was to increase the Claimant's excretion of the toxic metals in her system, thereby getting the levels to be reduced and improve the nerve conduction and the neuropathy symptoms. Both Dr. Jonathan Murphy and the Claimant indicated that her condition had improved after this treatment was rendered. Jonathan Murphy, Claimant's treating physician, testified that the treatment has been FDA approved, and that chelation therapy was not available in any West Virginia hospital at the time that he treated the Claimant, nor at the time that he was deposed in this matter.

III

ASSIGNMENT OF ERRORS

WHETHER IT IS ARBITRARY AND CAPRICIOUS TO
DENY REIMBURSEMENT FOR MEDICALLY NECESSARY
INTRAVENOUS CHELATION THERAPY UNDER
W.VA. CODE OF STATE RULES 85-20-62.2(2006), WHEN
THERAPY IS PERFORMED IN A PHYSICIAN'S OFFICE
AS OPPOSED TO A HOSPITAL?

IV

DISCUSSION OF LAW

W.Va. Code §23-1-1(b), states: "It is the further intent of the Legislature that this chapter be interpreted *so as to assure the quick and efficient delivery of indemnity and medical benefits to*

injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the Legislature that workers' compensation cases *shall be decided on their merits...*" [Emphasis added.]

Further, at W.Va. Code, §23-1-1©, it is declared, "The purpose of the commission is to ensure the *fair, efficient* and financially stable administration of the workers' compensation system of the state of West Virginia." [Emphasis added.]

Additionally, in W.Va. Code §23-4-7 the legislative policy is expressed as "to provide benefits to an injured claimant *promptly*," and in W.Va. Code §23-4-7a, the legislative policy is expressed as follows: "injured claimants should receive the type of *treatment* needed as *promptly as possible*."

W.Va. Code §23-5-13 provides that "*It is the policy of this chapter that the rights of claimants for workers' compensation be determined as speedily and expeditiously as possible to the end that those incapacitated by injuries and the dependents of deceased workers may receive benefits as quickly as possible* in view of the severe economic hardships which immediately befall the families of injured or deceased workers...*It is also the policy of this chapter to prohibit the denial of just claims of injured or deceased workers or their dependents on technicalities.* [Emphasis added.]

In the case of State ex rel McKenzie v. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002), this Honorable Court held as follows:

9. "Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute."

Syllabus Point 4, Maikotter v. University of W.Va. Bd. Of Trustees, 206 W.Va. 691, 527 S.E.2d 802 (1999).

10. “It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.” Syllabus Point 3, Rowe v. W.Va. Dept. Of Corrections, 170. W.Va. 230, 292 S.E.2d 650 (1982).

In the case of Bowers v. West Virginia Office of the Insurance Commissioner, 224 W.Va. 398, 686 S.E. 2d 49 (2009), this Honorable Court held that procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute.

In the case of Lovas v. Consolidation Coal Co., 222 W.Va. 91, 662 S.E.2d 645 (2008), this Honorable Court held that the judiciary is the final authority on issues of statutory construction, and this Honorable Court is obliged to reject administrative constructions that are contrary to the clear language of the statute. The Court further held that although an agency may have power to promulgate rules and regulations, the rules and regulations must be reasonable and conform to the laws enacted by the legislature.

In Hale vs. West Virginia Office of the Insurance Commissioner, 724 S.E.2d 752, 228 W.Va. 781 (2012), this Honorable Court held that to be valid, a regulation promulgated by an administrative agency must carry out the legislative intent of its governing statutes.

The Claim Administrator must provide medically related and reasonably required medical treatment, healthcare or healthcare goods and services under W.Va Code §23-4-3 and 85 CSR 20.

West Virginia Code of State Rules 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.

West Virginia Code of State Rules 85-20-4.1, provides as follows:

“The treatment guidelines, standards, protocols, and limitations thereon provided for the injuries and diseases listed in this section are designed to assist health care providers in the evaluation and treatment of injured workers. The provisions of this Rule are not intended to strictly dictate results and it is recognized that there may be extraordinary cases that require treatments in addition to the treatments set forth in this Rule. However, the treatments and limitations on treatments set forth in this Rule are presumed to be medically reasonable and treatments in excess of those set forth in this rule are presumed to be medically unreasonable. A preponderance of evidence, including but not limited to, detailed and documented medical findings, peer reviewed medical studies, and the elimination of causes not directly related to a compensable injury or disease, must be presented to establish that treatments in excess of those provided for in this Rule are medically reasonable. To receive reimbursement from the Commission for treatment in excess of that provided for in this Rule, all providers must thoroughly document and explain the action taken and the basis for the deviation from this Rule and shall receive authorization before providing said treatment. [Emphasis added.]

V

ARGUMENT

WEST VIRGINIA CODE OF STATE RULES 85-20-62.2(2006)
SHOULD BE STRUCK DOWN BECAUSE IT IS ARBITRARY
AND CAPRICIOUS IN DENYING REIMBURSEMENT FOR
MEDICALLY NECESSARY INTRAVENOUS CHELATION
THERAPY WHEN THE THERAPY IS PERFORMED IN A
PHYSICIAN’S OFFICE AS OPPOSED TO A HOSPITAL.

The Claimant contends that West Virginia Code of State Rules 85-20-62.2 (2006) is arbitrary and capricious because it denies reimbursement for medically necessary intravenous chelation therapy performed in a physician's office as opposed to a hospital. This denial of payment is tantamount to a denial of medical treatment, unreasonable, arbitrary and capricious, and also in contravention of the Legislative intent to assure the quick and efficient delivery and payment of medical benefits promptly.

As stated in McKenzie vs. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002), any rule or regulation drafted by any agency in the State of West Virginia must faithfully reflect the intention of the Legislature and may not issue a regulation which is inconsistent with, alters or limits its statutory authority. In Bowers, Lovas, and Hale previously cited, this Court has held that a rule promulgated by an administrative agency will be upheld as long as the rule is reasonable and in conformance to the laws enacted by the Legislature.

In the case at bar, the intent of the Legislature has not been followed by the fact that reimbursement for chelation therapy shall only be reimbursed when performed in a hospital. The Claimant was administered chelation therapy by a Board Certified Internal Medicine Specialist in his office. The facts of this case reveal that no West Virginia hospital at the time this case was being litigated provided chelation therapy, and thus, the Claims Administrator's denial of payment in the case is in effect a denial of the necessary treatment that the Claimant needed. The Rule forces a claimant to either pay for this treatment rendered in a doctor's office out of Claimant's own pocket or seek some payment other than the Workers' Compensation carrier who is should be responsible for the payment.

In looking at the Rule itself, there was nothing contained therein to explain why this treatment could only be reimbursed when performed in a hospital. The authors of West Virginia

Code of State Rules 85-20-62.2 obviously recognize chelation treatment as a proper treatment for an individual exposed to toxic metals; however, there is nothing in the Rule to explain why this treatment could only be reimbursed when performed in a hospital.

The facts of the case reveal that the therapy was performed by a physician educated in one of our State Universities, who was Board Certified in Internal Medicine and has experience in toxicology. The evidence also reveals that the Food and Drug Administration of the Federal government has given its seal of approval to chelation therapy. Further, at the time this case was litigated, there was no hospital in the State of West Virginia providing this type of therapy. The intent of the Rule is to preclude a claimant from getting medically approved therapy for exposure to toxic materials paid for by the claims administrator in a claim that was ruled compensable for exposure to toxic metals, and which the evidence reveals are in high levels in the Claimant's body. Further, the fact that the Rule has no explanation as to why it will reimburse only for therapy performed in a hospital further adds to arbitrary and capriciousness of the Rule as written, due to the fact that the therapy that was performed in this claim actually helped the Claimant's condition.

W.Va Code §23-4-3(a)(1), provides that claims administrators shall disburse and pay for personal injuries to the employees who are entitled to benefits under this chapter, such sums for healthcare services as may be reasonably required. In this case, the Claimant was exposed to toxic materials contained in her body, the claim was ruled compensable, and the treatment actually helped her.

As noted in West Virginia Code of State Rules, 85-20-4.1, the provisions of Rule 20 are not intended to strictly dictate results and it is recognized that there may be extraordinary cases that require treatments in addition to the treatments set forth in this Rule. This is certainly a case that required treatment above and beyond than that set forth in West Virginia Code of State Rules, 85-20-

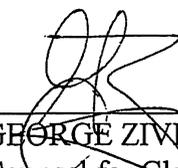
62.2 for the reason that no hospital in this State provided such therapy.

VI

CONCLUSION

Based on the aforesaid, the Claimant respectfully prays that this Honorable Court reverse the Board of Review's Decision and strike down West Virginia Code of State Rules 85-20-62.2 (2006), as being arbitrary and capricious, and authorize the payment of the chelation therapy that the Claimant underwent and will undergo in the future.

Respectfully submitted this 31st day of October, 2014.



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 31st day of October, 2014, a true copy of the foregoing and hereto annexed Supplemental Brief of the Petitioner Jennifer Moore, Claimant Below, 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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