

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

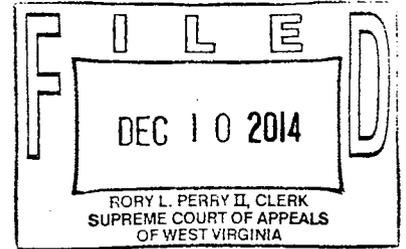
JENNIFER MOORE,

Claimant Below, Petitioner,

v

K-MART CORPORATION,

Employer Below, Respondent.



CASE NO.: 12-1127

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

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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 it 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 Petitioner contends that W.VA. Code of State Rules §85-20-62.2 (2006) is arbitrary and capricious and thus should be struck down.

## II

### STATEMENT OF FACTS

The statement of facts have been covered in detail in the Petitioner's previous petition, as well as, the Petitioner's supplemental brief. The facts set forth here will be in response to some of the facts alleged by the Respondent in its supplemental brief.

The Petitioner saw Dr. Jonathan Murphy, an internal medicine specialist, for chelation therapy in this claim. Dr. Murphy diagnosed the Petitioner with peripheral neuropathy due to her exposure to toxic metals. Dr. Murphy did indicate in his testimony that there were other causes such as diabetes, renal disease, and thyroid problems. However, Dr. Murphy testified that there was no evidence in the record that the Petitioner was suffering from any other conditions that could cause peripheral neuropathy. He was able to narrow down the peripheral neuropathy to her exposure to the toxic metals she was exposed too on a daily basis for a great number of years at her place of employment.

Dr. Folwell, in his deposition confirmed that the Petitioner did not have nerve damage caused from any of these conditions such as thyroid, renal, diabetes, and no evidence of any nerve damage caused from a back problem. An allegation was made by the Respondent that chelation therapy was

mired in controversy and that Dr. Folwell acknowledged the same.

What Dr. Folwell acknowledged was that he was familiar with the American Heart Association's concern about chelation therapy being utilized with cardiac issues of blockage, cholesterol blockages, or atherosclerosis. Dr. Folwell testified that he was not familiar with any controversy over the use of chelation therapy for heavy exposure to toxic metals and Dr. Murphy testified that chelation therapy had been approved by the FDA for the treatment of exposure to toxic metals.

### 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?

### 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 in 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.

The Petitioner 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. 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.

In its response brief, the Respondent argued that the only evidence submitted by the Petitioner in support of her protest to the Claim Administrator's order of July 15, 2010, was Dr. Murphy's letter complaining about the pertinent regulatory provisions of West Virginia Code of State Rules, 85-20-62.2 (2006). That contention is unfounded. Dr. Brian Folwell's deposition was admitted into evidence, along with Dr. Jonathan Murphy's deposition, as well as testing results, and the medical records, Dr. Murphy's curriculum vitae, and also Dr. Folwell's curriculum vitae.

As noted, Dr. Murphy is board certified in internal medicine and familiar with the principles of toxicology. Dr. Murphy indicated that chelation therapy is not available in any hospital in the State of West Virginia and thus the rule in question, bars anyone from getting the treatment. The Respondent also stated that it recognized its obligation to pay for reasonable medical services and then stated that such services must be within the regulatory bounds of the Workers' Compensation system. The only treatment that has helped the Petitioner has been the chelation therapy, which the Claim Administrator for the Respondent refuses to pay.

The Respondent also argued that the rule in question does not require that such therapy take place in a hospital. The Respondent further stated that it merely permits a Claim Administrator to deny reimbursement for such therapy as performed in the doctor's office. As noted by Dr. Murphy, again, this chelation therapy is not available in any hospital in West Virginia, and thus based on this arbitrary rule the Petitioner is barred from getting the treatment paid for because of this rule.

The Respondent referenced a NCAHF policy statement on chelation therapy in its response brief. This was never introduced as evidence in this claim and thus should not be considered by This Honorable Court as it deliberates in making a decision. However, if this Honorable Court considers this policy statement, it should be noted that the controversy surrounding chelation therapy has to

do with the use of that therapy for coronary artery disease, peripheral vascular disease, Alzheimer's disease, multiple sclerosis, amyotrophic lateral sclerosis, autism, and many other serious medical problems. The policy statement acknowledged that chelation therapy can be used to treat heavy metal poisoning with the use of the chelating agent EDTA. That chelating agent was the one that was used in the case bar. Evidence in this claim indicates that the diagnosis for determining that the Petitioner had heavy metals in her body was based on the urinalysis, which showed the abnormal and elevated levels of heavy metals in her body. As noted by Dr. Murphy, heavy metal exposure can enter the body through the surfaces of the skin, which he stated was the way the Petitioner was exposed to the heavy metals.

Thus, the Petitioner contends that there maybe be a controversy involving chelation therapy, but not when the therapy is used to treat heavy metal exposure. Chelation therapy has been approved by the FDA for the treatment of heavy metal exposure. The chelation therapy that was performed in this claim had nothing to do with artery disease, peripheral vascular disease, Alzheimer's disease, multiple sclerosis, amyotrophic lateral sclerosis, autism, or any other serious medical problem. The only condition that the Petitioner received chelation therapy for was peripheral neuropathy, which both of her treating doctors stated was due to the heavy exposure to toxic metals.

Finally, the Respondent argued that this claim was decided expeditiously. The Petitioner indicates otherwise. The claim was initially denied by the order dated July 3, 2008, and on April 29, 2010, the Office of Judges' reversed the Claim Administrator's order and held the claim compensable and ordered benefits paid. The Petitioner then presented bills to the Claim Administrator concerning the chelation therapy. On July 15, 2010 the Claim Administrator denied the medical bills for the therapy. This matter is now before this Honorable Court for decision and it has been six (6) years since the Petitioner underwent this treatment and her medical bills have not been paid by the Claim Administrator. Thus, the claim has not been expeditiously handled by the Claim Administrator.

VI

CONCLUSION

Based on the aforesaid, the Petitioner 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 Petitioner underwent and will undergo in the future.

Respectfully submitted this 9<sup>th</sup> day of December, 2014.

  
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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on the 9<sup>th</sup> day of December, 2014, a true copy of the foregoing and hereto annexed Supplemental Response 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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