

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 27, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

JENNIFER MOORE, Petitioner

**vs.) No. 11-0102 (BOR Appeal No. 2044547)
(Claim No. 2008046357)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
K-MART CORPORATION, Respondent**

MEMORANDUM DECISION

Petitioner Jennifer Moore, by George Zivkovich, her attorney, appeals the decision of the Board of Review.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 15, 2010, in which the Board affirmed an April 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's July 3, 2008, decision denying Ms. Moore's request to have the claim held compensable for toxic exposure to heavy metals. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Ms. Moore is employed as a preventative maintenance technician with K-Mart Corporation. During the course of her employment she was exposed to dust produced by grinding, sanding, and cutting metal. While employed as a preventive maintenance technician, Ms. Moore began to experience a burning and tingling sensation in her feet. On March 6, 2008, Dr. Folwell noted that a February 19, 2008, elemental hair analysis conducted by Genova Diagnostics contained findings consistent with heavy metal exposure. In a September 11, 2009, deposition, Dr. Murphy testified that he had diagnosed Ms. Moore with peripheral neuropathy due to toxic metal accumulation. He noted

that her urine tested positive for exposure to heavy metals following chelation therapy. He recommended continued intravenous chelation therapy to remove the toxic metal accumulation.

In its Order reversing the decision of the claims administrator and holding the claim compensable, the Office of Judges found that there is no evidence of record that contradicts Ms. Moore's contention that her symptoms are caused by her employment. On December 15, 2010, the Board of Review rejected portions of the Office of Judges' reasoning and two findings of fact, and affirmed the Office of Judges' decision to hold the claim compensable.

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: June 27, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh