



West Virginia Workers' Compensation Law Notes

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CARRIER HELD LIABLE FOR CLAIMANT'S ATTORNEY'S FEES AND COSTS

In the case of *Sandra Cassella v. Mylan Pharmaceuticals, Inc.*, (*In re: Attorney Fees & Costs*), 766 S.E.2d 912 (2014), the Supreme Court of Appeals of West Virginia recently addressed the applicability of the legislative amendment to W.Va. Code §23-5-16, which became effective on July 12, 2013. The Court held that the statute applies prospectively, not retroactively. Of more significance to the readers of this publication is the substance of the statute.

New subsection (c) of the statute provides that payment of attorney fees and costs for successful recovery of denied medical benefits may be charged or received by an attorney and paid by the private carrier or self-insured employer for a claimant or dependent. The purpose of the amendment is to provide a financial incentive for lawyers to represent workers' compensation claimants seeking medical benefits. Prior to the enactment of the statute, claimants had difficulty retaining counsel because of the hourly rates charged by most attorneys and because there was no "award" which could form the basis of a contingent fee relationship.

The pertinent language may be found at W.Va. Code §23-5-16(c), which provides as follows:

(c) Except attorney's fees and costs recoverable pursuant to subsection (c) section twenty-one [§22B-2C-21], article two-c of this chapter, an attorney's fee for successful recovery of denied medical benefits may be charged or received by an attorney, and paid by the private carrier or self-insured employer, for a claimant or dependent under this section. In no event may attorney's fees and costs be awarded pursuant to both this section and subsection (c), section twenty-one, article two-c of this chapter.

(1) If a claimant successfully prevails in a proceeding relating to a denial of medical benefits brought before the commission, successor to the

commission, other private carrier or self-insured employer, whichever is applicable, as a result of utilization review, arbitration, mediation or other proceedings, or a combination thereof, relating to denial of medical benefits before the Office of Judges, Board of Review or court, ***there shall additionally be charged against the private carriers or self-insured employers, whichever is applicable, the reasonable costs and reasonable hourly attorney fees of the claimant.*** Following the successful resolution of the denial in favor of the claimant, a fee petition shall be submitted by the claimant's attorney to the Insurance Commissioner or his or her successors, arbitrators, mediator, the Office of Judges, the Board of Review, or court, whichever enters a final decision on the issue. An attorney representing a claimant must submit a claim for attorney fees and costs within thirty days following a decision in which the claimant prevails and the order becomes final.

(2) The Insurance Commissioner or his or her successors, arbitrators, mediator, the Office of Judges, the Board of Review, or court shall enter an order within thirty days awarding reasonable attorney fees not to exceed \$125 per hour and reasonable costs of the claimant to be paid by the private carriers or self-insured employers, whichever is applicable, which shall be paid as directed. In no event may an award of the claimant's attorney's fees under this subsection exceed \$500 per litigated medical issue, not to exceed \$2,500 in a claim.

(3) In determining the reasonableness of the attorney fees to be awarded, the Insurance Commission, arbitrator, mediator, Office of Judges, Board of Review, or court shall consider the experience of the attorney, the complexity of the issue, the hours expended, and the contingent nature of the fee. (*Emphasis added*)

REGULATION INVALID: IN OFFICE CHELATION THERAPY REIMBURSEABLE

Jennifer Moore worked for K-Mart Corporation for 30 years, using belt sanders and grinders to refinish furniture. She worked in a small room with poor ventilation and was exposed to furniture dust and metal dust. She was ultimately diagnosed with peripheral neuropathy due to toxic exposure to heavy metals in the workplace. She filed a claim for workers' compensation and, following litigation, the claim was ruled compensable.

In 2008, the claimant's physician, Dr. Murphy began treating claimant with intravenous chelation therapy, a chemical process in which a synthetic solution is injected into the bloodstream to help remove heavy metals and/or minerals from the body. There was no question as to the medical necessity for that treatment. Dr. Murphy performed this therapy in his office. The carrier denied reimbursement for the expense of the therapy pursuant to West Virginia Code of State Rules §85-20-62.2 (2006) which provides, in part, that: "The Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, will not reimburse for IV chelation therapy performed in office." The same therapy performed elsewhere would be reimbursable.

The Administrative Law Judge reversed the claim's administrator's order, concluding that reimbursement was appropriate because "[t]he Claim Administrator must provide medically related and reasonably required medical treatment., healthcare or healthcare goods and services under the W.Va. Code §23-4-3 and 85 CSR 20." The Board of Review reversed, noting that the claim's administrator's order was consistent with the regulatory bounds of the workers' compensation system.

The Supreme Court of Appeals did not agree. The Court noted that there was no rational basis to deny reimbursement for medically necessary chelation therapy treatment when performed in an office. One of the overriding purposes of the Act is to provide reasonable and necessary medical treatment to employees who are injured on the job. W.Va. Code §23-4-1. The regulation which denies reimbursement for in office therapy is inconsistent with West Virginia Code §23-4-3, which provides that the claim's administrator must provide medically related and reasonably required medical treatment, healthcare or healthcare goods and services.

As such, in the case of *Jennifer Moore v. K-Mart Corporation*, No. 12-1127, Filed February 5, 2015, the Supreme Court of Appeals held West Virginia Code of State Rules §85-20-62.2 (2006) invalid.



ATTENTION READERS, the editors of Thomson, Rhodes & Cowie [West Virginia Workers' Compensation Law Notes](#) invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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