

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIMS NOS. F513736 & F513737

MITCHEL FENDLEY

CLAIMANT

**SHERWIN WILLIAMS CO.
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED DECEMBER 14, 2006

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant appeared PRO SE.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Hot Springs, Arkansas on November 3, 2006. A prehearing conference was held on August 29, 2006 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without exception.

At the prehearing conference, the parties agreed there were July 29, 2005 and September 12, 2005, compensable injuries. A change of physician order was entered by the Commission in May 2006, changing the claimant's authorized treating physician from Dr. Kevin McLeod to Dr. Steven Cathey. Respondents contend medical benefits, to include an independent medical evaluation, have been paid in the amount of \$4,234.29. Dr. Earl Peebles performed the independent medical evaluation.

The claimant contends that additional medical treatment is reasonable and necessary and the responsibility of respondents. The claimant also requests

reimbursement for medical benefits and mileage he has paid out of pocket since seeing Dr. Cathey. The claimant would like to continue treating with Dr. Thomas Hart and Dr. John Bomar, a chiropractor.

Respondents contend the claimant was granted his one time change of physician to Dr. Cathey and respondents paid for Dr. Cathey's evaluation.

Respondents contend that Dr. Cathey did not recommend further treatment; however, if additional medical treatment was required, respondents would authorize Dr. Cathey to administer such. Respondents contend that Dr. Hart and Dr. Bomar are unauthorized physicians and their treatment is not reasonable and necessary for the claimant.

ISSUES TO BE LITIGATED

1. Additional medical benefits.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was a July 19, 2005, and a September 12, 2005, compensable injury.
2. The claimant has failed to prove by a preponderance of the evidence that the additional medical treatment with Dr. Bomar and Dr. Hart is reasonable and necessary.

DISCUSSION

The claimant, 54 years old, is a store manager for the respondent employer and has been employed by the respondent since 1972. The claimant sustained a compensable injury on July 19, 2005, when he was moving heavy boxes of tile and paint. The claimant sustained a low back strain and pulled muscles and was successfully treated. The claimant sustained a second injury on September 12, 2005, when he was helping load a heavy bundle of carpet. The claimant sought medical treatment with Dr. Bomar and he placed a permanent lifting limitation on the claimant.

The claimant was also evaluated and treated by Dr. McLeod, an orthopedic surgeon who prescribed medication and ordered a MRI. The claimant also underwent an Independent Medical Evaluation from Dr. Earl Peebles on November 30, 2005. Dr. Peebles returned the claimant to work without restrictions and stated he did not need additional medical care. The claimant sought a change of physician to Dr. Cathey and Dr. Cathey opined on June 6, 2006, that no additional medical treatment was needed but did opine a permanent lifting limitation was warranted.

According to the claimant, he continued with his full range of responsibilities at work and again began to experience additional pain and discomfort. The claimant began treating with Dr. Bomar, a chiropractor, and he referred the claimant to Dr. Hart. Dr. Hart recommended a discogram. The claimant is requesting the discogram and any other medical care that is warranted following the discogram.

The claimant described his symptoms as low back pain, burning sensation in his lower back, tingling and aching in his right foot, occasional pain in his right leg and pain in his neck and shoulder due to the strain of lifting. Under cross examination, the

claimant confirmed that he had similar complaints in 1985 and also similar complaints following a 1992 vehicle accident. The claimant confirmed that Dr. Adametz noted in January 1993 that the claimant's MRI showed a disc herniation at L5-S1 and he was also treating with Dr. Bomar. The claimant was treating with Dr. Bomar from 12 to 18 visits annually following the 1992 vehicle accident. The claimant confirmed on cross examination that additional chiropractic visits were being requested. The claimant confirmed that the disability forms that were completed by Dr. James Blackmon on April 28, 1993, indicated disc herniation at L4-5 with encroachment and a S1 nerve encroachment on the right and these are essentially the same problems he continues to have today. The claimant also confirmed that he saw Dr. McLeod on April 12, 2005, for similar problems that he is having today.

The claimant confirmed that he had an independent medical evaluation with Dr. Peeples and the results were normal. Following the examination with Dr. Peeples, the claimant changed physicians from Dr. McLeod to Dr. Steven Cathey. Dr. Cathey opined that the straight leg test was negative and there were no spasms or restriction of movement in the back, as well, after going over the MRI. The claimant confirmed that Dr. Cathey did not recommend a discogram. The claimant further testified that he has not tried to return to see Dr. Cathey but decided to see Dr. Bomar and Dr. Hart on his own.

Ark. Code Ann. §11-9-508(a) (Supp. 2005) provides that an employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. The employee has the burden of proving by a preponderance of the evidence that medical treatment is

reasonable and necessary. *Hamilton v. Gregor Trucking*, ___ Ark. App. ___, ___ S.W.3d ___ (March 16, 2005). What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission. *Id.*

After considering the credible evidence in this matter, I find the claimant has failed to prove by a preponderance of the evidence that additional medical treatment with Dr. Thomas Hart and Dr. Bomar is reasonable and necessary and the responsibility of respondents. The claimant in this matter sustained an admitted compensable injury and received medical treatment from Dr. Kevin McLeod, an orthopedic specialist, who ordered a MRI. Dr. McLeod did recommend an evaluation by a neurosurgeon. Respondents requested an IME by Dr. Earl Peeples and that was accomplished on November 30, 2005. Dr. Peeples examined the claimant and reviewed his MRI and some pertinent medical reports and ultimately noted the claimant's MRI presented degenerative changes not unusual for the claimant's age. Dr. Peeples did not assign a permanent impairment rating in excess of the 12% rating previously assigned the claimant in 1994. Dr. Peeples did not feel additional medical treatment was needed and diagnosed the claimant with "resolved lumbar strain, lumbar degenerative disc and facet changes, with intermittent low back symptoms." Resp. Exh. No. 1, p. 52. The claimant asked for a change of physician to Dr. Steven Cathey, a neurosurgeon, and that was granted. The claimant was evaluated on June 6, 2006, and Dr. Cathey opined:

His neurological exam is negative. He specifically has no sign of lumbar radiculopathy. Straight leg raising is negative bilaterally. Point tenderness is noted in the lower lumbar area on the right. There is, however, no paraspinous muscle spasm or restriction of movement noted. (Resp. Exh. No. 1,

p. 54.)

Dr. Cathey's report indicates he reviewed the MRI of the claimant's back and notes the degenerative disc disease at multiple levels and the small left paracentral disc protrusion at L3-L4 with no resulting canal stenosis or nerve root impingement. Also, Dr. Cathey opined these degenerative changes were not unusual for the claimant's age. Respondents have acknowledged that additional reasonable and necessary medical treatment with Dr. Cathey has not been controverted.

ORDER

The claimant has failed to prove by a preponderance of the evidence that the additional medical treatment with Dr. Bomar and Dr. Hart is reasonable and necessary and related to the compensable injuries. The claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**