

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F402332**

**JUDITH A. PAPINCHACK**

**CLAIMANT**

**HOLIDAY INN EXPRESS**

**RESPONDENT EMPLOYER**

**WAUSAU**

**RESPONDENT CARRIER**

**ORDER AND OPINION FILED SEPTEMBER 19, 2005**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on August 17, 2005. A prehearing conference was held on April 19, 2005 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 objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on February 23, 2004.
2. The compensation rates are \$226/170.
3. Respondents paid temporary total disability benefits through March 22, 2004.
4. Respondents paid temporary partial disability benefits from March 23, 2004 through May 7, 2004.

5. The claimant's average weekly wage is \$339.

The claimant contends that she is entitled to temporary partial disability benefits from May 7, 2004, through November 3, 2004, and temporary total disability benefits from November 4, 2004, to a date to be determined. The claimant also contends she is entitled to a psychological evaluation and entitled to prescription drugs of Lexapro and Miralax.

Respondents contend the claimant cannot prove that she sustained a psychological injury and controvert all medical related to such treatment. Respondents contend that all temporary total disability and temporary partial disability benefits that are owed have been paid. Respondents contend that the medications the claimant is now requesting for payment are not reasonable and necessary and related to the compensable injury. Respondents contend the end of the healing period is May 7, 2004.

### **ISSUES TO BE LITIGATED**

1. Temporary partial disability benefits.
2. Temporary total disability benefits.
3. Psychological evaluation.
4. Prescription medication.
5. Attorney's fees.

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 compensable injury on February 23, 2004.
2. The compensation rates are \$226/170.
3. Respondents paid temporary total disability benefits through March 22, 2004.
4. Respondents paid temporary partial disability benefits from March 23, 2004, through May 7, 2004.
5. The claimant's average weekly wage is \$339.
6. The claimant has proven by a preponderance of the evidence that she is entitled to temporary partial disability benefits from May 7, 2004, through November 3, 2004, when she only worked part-time.
7. The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from November 4, 2004, and thereafter.
8. The claimant has proven by a preponderance of the evidence that the two prescriptions drugs requested are reasonable and necessary.
9. The claimant has failed to prove by a preponderance of the evidence that the psychological evaluation is reasonable and necessary and related to her compensable injury.

## DISCUSSION

The claimant, 57 years old, began her employment with the respondent employer in 1993, working in a number of capacities, to include front desk, restaurant, housekeeping and concierge's floor. On the concierge's floor, the claimant's duties involved getting breakfast ready, happy hour food ready and cleaning up afterwards. The claimant also had to get all the beverages ready, which included soda, juice, beer and hard liquor. The claimant brought the beverages from downstairs on a cart to upstairs on the fourth floor.

The claimant injured her back on February 23, 2004, when she was lifting a case of beer during happy hour. The claimant had not previously experienced any back problems until this incident. The claimant immediately sought medical treatment, to include a neurosurgical evaluation but has not undergone back surgery. Conservative treatment has been recommended. According to the claimant, she returned to work in a light-duty capacity after being off work for about one month. The claimant worked light duty from May 7, 2004 until November 3, 2004, and then quit. According to the claimant, she was in too much pain to continue working. According to the claimant, since November 3, 2004, she continues to have back pain and her right leg goes out on occasion. She cannot sit or stand or walk for long periods and takes a number of prescription medications paid by respondents.

The claimant testified that her back condition had made her depressed and in a state where she does not want to be around anyone. The claimant has applied for social security disability and has been sent for a psychological evaluation. According to the claimant, the narcotic pain medication she takes causes her to be drowsy and

affects her ability to concentrate and she is unable to drive very much. The medication also causes her to be constipated. Dr. Norman Pledger has prescribed medication for the constipation, but respondents will not pay for this medicine. The claimant testified that she had been taking five to six Hydrocodone pills per day. Both Dr. Butchaiah Garlapati and Dr. Pledger have prescribed Lexapro for depression. The claimant testified that respondents initially paid for this drug but subsequently denied responsibility.

The claimant's doctor has recommended water therapy and her mom bought her a pool for her backyard and she gets in it regularly.

The claimant first contends that she is entitled to temporary partial disability benefits from May 7, 2004 through November 3, 2004, while she worked part time. The term temporary partial disability refers to the phase of permanent partial disability where the employee, although able to work at some gainful occupation, is still suffering from the effects of the injury, which effects may reasonably be anticipated to disappear within the time fixed for compensation. *Anchor Const. Co. v. Rice*, 252 Ark. 40, 479 S.W.2d 573 (1972).

In the present case, the claimant testified that she returned to work after her injury but could only work part time because of pain. The medical records support that the claimant continued to seek medical attention from her general practitioner, neurosurgeon and pain management specialists. She also continued to have diagnostic tests and go to physical therapy and received epidural injections. The contemporaneous medical reports did not indicate the claimant had reached maximum medical improvement during the period May 7, 2004 through November 3, 2004. Dr.

Barry Baskin, in his August 9, 2005, deposition, testified that he would put the claimant with her type injury at maximum medical improvement at six to eight weeks following her injury. Dr. Baskin diagnosed the claimant with a low back strain injury. While I appreciate Dr. Baskin's diagnosis of the claimant, I do not give his opinion great weight since it was not given until his May 31, 2005, examination and then again during his deposition. Dr. Baskin's opinion was given well past the time frame in question. There simply was no contemporaneous medical opinion in evidence that indicated the claimant had reached maximum medical improvement until November 22, 2004. I find the claimant has proven by a preponderance of the evidence that she remained in her healing period and continued to receive conservative treatment and therapy and she was able to work only part time and, therefore, I find she is entitled to temporary partial disability from May 7, 2004 through November 3, 2004.

The claimant contends she is entitled to temporary total disability benefits from November 4, 2004 through a date to be determined. In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

After considering all the credible evidence, I find the claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from November 4, 2004, forward. The claimant testified that she just was not able to continue working. The medical records reveal the claimant was not a surgical candidate and conservative treatment was undertaken, to include a number of diagnostic tests, physical therapy, medication and epidural injections. By

November 17, 2004, Dr. Michael Calhoun, a neurosurgeon, stated that the claimant had undergone three epidural steroid injections and he was referring her back to see if Dr. Garlapati had anything else to offer. Dr. Norman Pledger opined on November 22, 2004, that he was recommending total disability and his opinion reflected that the claimant had reached the end of her healing period. Dr. Baskin performed an independent medical evaluation on May 31, 2005, and opined that the claimant was past the point of maximum medical improvement. At Dr. Baskin's deposition, he was asked if the claimant had reached maximum medical improvement by November 22, 2004, and he stated that his opinion is that her exacerbation of her degenerative disc disease should have resolved in approximately eight weeks but certainly she should have reached maximum medical improvement by November 22, 2004. I find the preponderance of the evidence indicates she reached maximum medical improvement by November 22, 2004. I was not persuaded that the claimant was totally unable to earn wages after considering her testimony, her demeanor at the hearing and after reviewing the medical evidence. The claimant had no surgery and had stopped working on her own volition.

The claimant next contends that she is entitled to prescription medication for Lexapro and Miralax and contends both are related to her compensable injury. Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). In assessing whether a given

medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy.

*Deborah Jones v. Seba, Inc.*, Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

I find the claimant has proven by a preponderance of the evidence that the two prescription medications were prescribed by the authorized treating physicians and are related to her compensable injury. Dr. Baskin in his deposition confirmed that narcotic pain medication such as Hydrocodone can cause constipation and the claimant's treating physicians have prescribed this medication. Further, Dr. Baskin confirmed that the claimant's treating physician had prescribed Lexapro for depression. Dr. Baskin was questioned about depression and he opined:

Yes, it is believed in the – in the pain literature that patients that have chronic pain have a higher incidence of depression, and people with – people with depression, likewise, have a higher incidence of chronic pain. The two do go together. D., p. 23, lines 11-15.

I found Dr. Baskin's opinion on the need for these prescription medications to be persuasive in relation to the claimant's compensable injury and find the prescription medications to be reasonable and necessary.

The claimant next contends that a psychological evaluation is reasonable and necessary and related to her compensable injury. I find the claimant has failed to prove that the psychological evaluation is reasonable and necessary. In the present case, the claimant sustained an aggravation to her degenerative disc disease and was provided with conservative care. None of her treating physicians have ordered a psychological

evaluation in light of her back injury. In the deposition, Dr. Baskin was asked if it would be medically appropriate to refer a person who was complaining of chronic pain and depression for an evaluation with a psychologist or psychiatrist and he responded affirmatively. I simply did not find Dr. Baskin's single comment about the psychological evaluation to reach the level of reasonably necessary medical treatment for the back strain and conditions related to this injury. Dr. Baskin acknowledged other stress factors that might be present in the claimant's life that had a bearing on her psychological profile.

### **ORDER**

The claimant has proven by a preponderance of the evidence that she is entitled to temporary partial disability benefits from May 7, 2004 through November 3, 2004, when she only worked part-time. The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from November 4, 2004, and thereafter. The claimant has proven by a preponderance of the evidence that the two prescriptions drugs requested are reasonable and necessary. The claimant has failed to prove by a preponderance of the evidence that the psychological evaluation is reasonable and necessary and related to her compensable injury.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**