

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305468

GALA L. ASKEW,
EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED FEBRUARY 13, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL in
Batesville, Independence County, Arkansas.

Claimant represented by HONORABLE GARY DAVIS, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE CURTIS NEBBEN, Attorney
at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on
December 15, 2003 in Batesville, Arkansas. A prehearing
order was entered in this case on September 25, 2003. A
copy of this prehearing order set out the stipulations
offered by the parties and outlined the issues to be
litigated and resolved at the present time. A copy of this
prehearing order was made Commission's Exhibit No. 1 to the
hearing.

The following stipulations were submitted by the
parties and are hereby accepted:

1. The employer/employee relationship existed on or
about May 19, 2003.

2. This claim is currently controverted in its entirety.
3. On that date, the claimant was earning wages sufficient to entitle [her] to a compensation rate of \$161.00 per week for TTD and \$154.00 per week for PPD.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable injury.
2. Her entitlement to benefits.
3. Controverted attorney fee.
4. Request for MRI ordered by initial treating physician.

In her prehearing contentions, the claimant contended that she sustained admittedly compensable injuries to the spine on or about May 19, 2003. The claimant contended that she has been seen by Dr. Mark Woods at the behest of the respondents. Dr. Woods apparently recommended an MRI scan, which respondents refused to pay for. This matter has been controverted for purposes of attorney's fees. The claimant reserves the right to pursue other benefits to which

claimant may become entitled in the future. The claimant's attorney clarified at the start of the hearing that temporary total disability is not at issue at this time. The record also indicates that prior to the hearing the claimant in fact underwent the MRI scan which was initially recommended by Dr. Woods.

The respondent contends that the claimant did not sustain an injury arising out of an in the course of her employment as defined by the Arkansas Workers' Compensation Act. This prehearing contention included, but was not limited to, the allegation that the claimant has no measurable and objective findings to support her injury. The respondent's attorney clarified at the conclusion of the hearing that their compensability defense is based solely on an alleged lack of objective medical findings in the record causally related to the incident that occurred on May 19, 2003. In this regard, the respondent notes that Dr. Woods' reports on May 19 and May 23 do not reflect any reference to spasms. The first references to spasms are contained in the June 13, 2003 report of Dr. Zini and the July 1, 2003 report of Dr. Zini (Exhibit pages 10 and 12). In addition, the respondent notes that Dr. Zini's reference to spasm is contained in the "diagnosis" section of his reports. In

this regard, the "Dr. Comments" section of Dr. Zini's July 1, 2003 report has been left blank, and the "Dr. Comments" section of Dr. Zini's June 13, 2003 report indicates that a physical examination was conducted, and the results of the physical examination discussed tenderness but not spasm.

DISCUSSION

Ark. Code Ann. § 11-9-102(4) (D) provides that "[a] compensable injury must be established by medical evidence supported by objective findings as defined in subdivision (16) of this section." Section 16 provides in relevant part that "'Objective findings' are those findings which cannot come under the voluntary control of the patient."

As I understand the respondent's argument in the present case, since the only two places where the term "spasm" have ever been mentioned in Dr. Zini's reports are in the (1) complaint section and (2) diagnosis section, the respondent appears to argue that Dr. Zini's diagnosis of spasm is based solely on the claimant's complaints of spasm. Since the "Dr. Comments" sections of Dr. Zini's reports reference on one occasion tenderness but on no occasion spasms, the respondents' argument may be well taken. Stated another way, it is difficult if not impossible for me to look solely at these sections Dr. Zini's reports and state a

conclusion with any confidence, one way or the other, as to whether or not Dr. Zini ever in fact personally observed or felt muscle spasms in the claimant's lumbar spine.

In trying to determine whether or not the claimant has met her burden of proof, however, I note that at the same time Dr. Zini diagnosed muscle spasms, he was also prescribing the claimant Lorcet Plus and Soma. According to the Physician's Desk Reference (56th Ed. 2002), Soma is a muscle relaxant. I note that on one occasion the Arkansas Supreme Court has found "absurd" a Commission finding that a prescription for medication "as needed for muscle spasm" is a direction to a patient rather than a medical finding. The Arkansas Supreme Court concluded that "a doctor would not prescribe medication directed to be taken 'as needed for muscle spasm' if he did not believe muscle spasms were existent." Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000).

In addition to the complaints, diagnosis, and prescription medication for muscle spasms, I also note with interest that when the claimant first presented to Dr. Burnette on June 3, 2003, some two weeks after the accident, Dr. Burnette performed a physical examination where he did identify trigger points in the lumbar spine and did in fact

perform injections for those trigger points. (Exhibit page 4 and 7). I note that a majority of the Full Commission, apparently based on unpublished Court of Appeals precedent, has previously found that trigger points, like muscle spasms, are objective medical findings. See Rivera v. Shelby Group, Inc., Full Workers' Compensation Commission, Opinion filed January 14, 2000 (E605465); Powell v. Excel Corporation, Full Workers' Compensation Commission, Opinion filed September 12, 2000 (E810504).

Absent any published further guidance from the Commission or the Courts, I find based on the Arkansas Supreme Court's reasoning in Estridge, supra, that Dr. Zini's diagnosis of muscle spasm and prescription of muscle relaxants are sufficient, considered together, to establish by a preponderance of the credible evidence in the record that the claimant's lumbar spine injury is established by medical evidence supported by objective findings of muscle spasm. Likewise, I also find that Dr. Burnette's description of specific trigger points during his physical examination of the lumbar spine, in conjunction with his injection of those trigger points, to also establish by a preponderance of the credible evidence in the record that the claimant's lumbar spine injury is established by medical

evidence supported by objective trigger point findings in the record in light of the Commission's comments in Rivera and Powell, supra.

I also find that the trigger points identified by Dr. Burnette on June 3, 2003 and the muscle spasms diagnosed by Dr. Zini on June 13, 2003 and again on July 1, 2003 have been established by a preponderance of the credible evidence in the record to be causally related to the low back injury that occurred at work on May 19, 2003. In reaching this conclusion, I note the absence of any evidence in the record indicating that the claimant was suffering from any type of back problems prior to May 19, 2003, and I note that the claimant remained in severe low back pain during the entire period in question following the incident on May 19, 2003. In reaching my conclusion that the claimant has established a causal connection by a preponderance of the evidence, I also note that Dr. Woods' office notes from May 19, 2003 and May 23, 2003 make no comment regarding either the presence or absence of muscle spasms or trigger points. The first physician who appears to have made any notation regarding the presence or absence of these symptoms was Dr. Burnette for trigger points and Dr. Zini for muscle spasms. In light of the close temporal relationship between Dr. Burnette's

and Dr. Zini's findings shortly after the accident at work, and in light of the lack of evidence of any preexisting condition along with the persistent nature of the claimant's symptoms in the medical reports beginning on May 19, 2003, the claimant has established by a preponderance of the credible evidence in the record that the objective medical findings described above are in fact causally related to the May 19, 2003 injury at work at issue.

With regard to the claimant's award of benefits, I find that all of the medical treatment described in the medical reports in the record was reasonably necessary as either diagnostic and/or therapeutic treatment for the compensable low back injury that the claimant experienced. The respondent has presented no evidence in the record which would for any reason persuade me that the MRI and nerve conduction study diagnostic tests were inappropriate in light of the symptoms in the claimant's back and lower extremities. Likewise, in considering the nature of the injury diagnosed, the prescription medication, office visits, and injections all appear appropriate for the claimant's symptoms and the injury diagnosed.

Because the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is limited to 25% of

compensation for indemnity benefits payable to the claimant. However, attorney's fee shall not be awarded on medical benefits as a general rule. Ark. Code Ann. § 11-9-715. Because this claim was controverted in its entirety, I find that the claimant's attorney is entitled to a fee on any indemnity benefits to which the claimant may be entitled in the future. However, in light of the legal constraints, I find that the claimant's attorney cannot be awarded a fee on the medical benefits awarded herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer/employee relationship existed on or about May 19, 2003.
2. This claim is currently controverted in its entirety.
3. On that date, the claimant was earning wages sufficient to entitle [her] to a compensation rate of \$161.00 per week for TTD and \$154.00 per week for PPD.
4. The claimant has established by a preponderance of the evidence that she sustained a compensable back injury on May 19, 2003.
5. Specifically, the claimant has established by a preponderance of the evidence that her low back

injury sustained on May 19, 2003 is established by medical evidence and supported by objective findings.

6. The claimant has established by a preponderance of the evidence that all of the medical treatment that she has received for her low back injury prior to the hearing in this case was in fact reasonably necessary for treatment of that injury.

ORDER

The respondent is directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25% attorney's fee on any indemnity benefits to which the claimant may be entitled in the future, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge