

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305468

GALA L. ASKEW,
EMPLOYEE

CLAIMANT

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

RESPONDENT

OPINION FILED JUNE 17, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

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

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

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed February 13, 2004. In
said order, the Administrative Law Judge made the
following 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
temporary total disability 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.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the February 13, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful

rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion which affirms and adopted the findings of the Administrative Law Judge. Based upon my de novo review of the entire record, I find that the claimant has

failed to establish the compensability of her claim by objective medical findings. The claimant was first examined by Dr. Mark Woods on May 19, 2003, the date of the alleged injury. Dr. Woods's medical records reveals that the claimant complained of pain after lifting while at work. Dr. Woods's examination of the claimant's back revealed;

"There's mild tenderness on palpation of the left lower back. Not as severe on the right. The patient had good strength in the arms and legs. - There was noted to be some light touch loss of sensation on the left side."

Dr. Woods diagnosed the claimant with low back strain and prescribed pain medications. According to the Physician's Desk Reference, the medications prescribed by Dr. Woods, Vioxx, Skelaxin, and Lorcet, are all indicated for the relief of acute or moderate to moderately severe pain. When the claimant returned to Dr. Woods on May 23, 2003, she continued to complain of pain. During his examination of the claimant, Dr. Woods again only noted tenderness on palpation of the low back. There is no indication that the claimant presented with muscle spasms at that time. Since the claimant continued to complain of pain, without any improvement, Dr. Woods recommended an MRI. Respondents controverted

the claimant's entitlement to any additional medical treatment based upon the lack of objective medical findings.

Once the respondents controverted the claim, the claimant sought additional medical treatment from her family physician, Dr. David Burnette. Dr. Burnette examined the claimant on June 3, 2003. Like Dr. Woods, Dr. Burnette did not record the presence or existence of muscle spasms. At best, Dr. Burnette recorded "[right] L5 trigger" and "trigger point at left L4." The Administrative Law Judge stated that the Full Commission has previously found that trigger points were objective medical findings, relying upon Rivera v. Shelby Group, Inc., Full Commission Opinion filed January 14, 2000 (E605465); and Powell v. Excel Corp., Full Commission Opinion filed September 12, 2000 (E810504). I do not read these opinions as broadly as the Administrative Law Judge. First, in the Rivera case cited by the Administrative Law Judge, the Full Commission remanded a case to the Administrative Law Judge after the Court of Appeals in an unpublished opinion found that the trigger points as noted in the Rivera case were objective medical findings. As the Court of Appeals decision in Rivera is an unpublished opinion, I am unable to find

that the Rivera decision stands for the proposition that all references to trigger or trigger points indicate the presence of object medical findings per se. The analysis applied by the Court of Appeals in Rivera is not published and is therefore of little precedential value. In Powell, the Full Commission did not find trigger points to be objective, but rather noted that the claimant's medical records revealed the presence of either muscle spasms or trigger points. In my opinion, the burden is upon the claimant to establish that in this claim, just as the claimant in the Rivera case established, that the notation "[right] L5 trigger" indicated object medical findings and not just a notation of tenderness or pain. Dorland's Medical Dictionary does not define the term trigger or trigger point. Stedman's Medical Dictionary, 26th edition, defines trigger as a "term describing a system in which a relatively small input turns on a relatively large output, the magnitude of which is unrelated to the magnitude of the input." Applying this definition, it is impossible to determine whether the term "trigger" as used in the claimant's medical records indicates an objective medical finding. Without further explanation from the claimant's physicians, the term "trigger" may

imply spasms or it may simply imply complaints of pain which are not in accord with the amount of pressure applied. Accordingly, I cannot find that the claimant in the present claim has proven by a preponderance of the evidence that Dr. Burnette's reference to "trigger" and "trigger point" indicated the presence of objective medical findings.

The claimant sought treatment from Dr. James Zini on June 13, 2003, at which time she complained that the shots did not provide any relief. Dr. Zini only noted tenderness on the left at L5 during his physical examination, yet he diagnosed the claimant with lumbar spasm. Dr. Zini prescribed 350 mg of Soma, which the Administrative Law Judge found to be a muscle relaxant. However, my review of the Physician's Desk Reference 2002, 56th Edition, reveals that Soma which is available in 350mg is "indicated as an adjunct to rest, physical therapy, and other measures for the relief of discomfort, associated with acute, painful musculoskeletal conditions." This drug does produce muscle relaxation by blocking interneuronal activity. However, Soma Compound which is available in 200mg is more specifically indicated "as an adjunct to rest, physical therapy, and other measures for the relief of

pain, muscle spasm, and limited mobility associated with acute, painful musculoskeletal conditions." (emphasis added). Since Dr. Zini prescribed Soma and not the Soma Compound, I am not persuaded to find by a preponderance of the evidence that Dr. Zini prescribed the medication for muscle spasm and not for pain. Moreover, unlike the physician in Estridge v. Waste Management, 343 Ark, 276, 33 S.W.3d 167 (2002), Dr. Zini did not prescribe Soma "as needed for muscle spasm." Upon her follow-up visits with Dr. Zini on July 1, 2003, and August 13, 2003, the claimant complained that she was still having severe muscle spasm, however, there is no evidence that Dr. Zini noted the presence of muscle spasm during his physical examinations of the claimant. Furthermore, the MRI conducted on August 28, 2003, revealed normal findings, as did the September 11, 2003, nerve conduction study. Accordingly, I am constrained to find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury which is supported by objective medical findings.

Therefore, I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury which is supported by objective medical findings.