BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510083

DONALD BERNDT	CLAIMANT
AMERICAN EAGLE	NO. 1 RESPONDENT
CHARTIS CLAIMS, INC. CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	NO. 3 RESPONDENT

OPINION FILED APRIL 18, 2011

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by NEAL HART and JASON HATFIELD, Attorneys, Little Rock and Fayetteville, Arkansas.

Respondents No. 1 represented by RANDY MURPHY, Attorney, Fayetteville, Arkansas.

Respondent No. 2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

Respondent No. 3 represented by CHRISTY KING, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 18, 2011, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 28, 2010, and a pre-hearing order was filed on October 28, 2010. A copy of the pre-hearing order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury on September 17, 2005.

4. The claimant is entitled to a weekly compensation rate of $199 for temporary total disability and $154 for permanent partial disability.

5. The claimant reached maximum medical improvement on June 1, 2010.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's pulmonary embolism.

2. Permanent total disability or wage loss.

3. Second Injury Fund liability.

4. Attorney's fees.

Claimant's contentions are:

> "Claimant had a compensable back injury and subsequent surgeries. Subsequent to the first surgery, Claimant was hospitalized for a pulmonary embolus and deep vein thrombosis, which two orthopedic surgeons (including one IME physician) have opined "are complications from his surgery." Respondents No. 1 should be responsible for medical expenses related to these complications. Respondents No. 1 have not paid for all medical care related to Claimant's back injury, and should be liable for this. Claimant's work injury and its consequences have rendered him permanently and totally disabled. Alternatively, Claimant has suffered wage-loss disability, in an amount to be determined at trial. The Second Injury

> Fund may have liability in this case. Claimant's attorney is entitled to the maximum statutory attorney's fee on all controverted benefits."

Respondents No. 1's contentions are:

> "Respondents No. 1 contend that Claimant's pulmonary embolism was not related to Claimant's employment. Respondents No. 1 contend that Claimant is not permanently and totally disabled. Respondents No. 1 further contend that all appropriate benefits in relation to the Claimant's compensable low back injury have been and are being paid."

Respondent No. 2's contentions are:

> "The Second Injury Fund takes no position until discovery has been completed."

Respondent No. 3's contentions are:

> "Pursuant to A.C.A. §11-9-525(b)(1), Second Injury Fund liability must be determined prior to consideration of the Death and Permanent Total Disability Trust Fund liability. If the Second Injury Fund is found to not have liability and the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with A.C.A. §11-9-502. Therefore the Trust Fund has not controverted the claimant's entitlement to benefits. The Death and Permanent Total Disability Trust Fund will state its contentions upon completion of discovery."

The claimant in this matter is a fifty-year-old male who was employed by the respondent as a ramp technician. The claimant's duties included pushing out and pulling up airplanes, cleaning out the inside of aircrafts, dumping aircraft lavatories, and the hauling and loading of baggage. On September 17, 2005, the claimant sustained an admittedly compensable injury to his low back.

The admittedly compensable injury occurred when the claimant was helping another employee load an electric wheelchair weighing 350 pounds into a smaller airplane. The claimant testified that the gentleman helping him load the wheelchair lost control of it which caused the claimant to hyperflex his back rupturing the disc between L5 and S1.

The claimant's compensable injury eventually caused him to have surgical intervention on November 30, 2005, performed by Dr. C. Tony Raben. During the surgical procedure, the claimant underwent a disc decompression and fusion at L5-S1 and also had a small umbilical hernia repair. After the surgery, the claimant was admitted into the Northwest Medical Center of Washington County for recovery and after care.

It is undisputed in this case that the claimant suffered a pulmonary embolism sometime after his November 30, 2005, surgery. At hearing, the claimant gave the following credible testimony regarding the pulmonary embolism and its time line:

> "Q. Okay. When did you have - was it after the first surgery you had the pulmonary embolism?
>
> A. Yes, it was after the first surgery.
>
> Q. And how long was that after your surgery?
>
> A. Just a few days.
>
> Q. Were you very - were you inactive immediately after your surgery?
>
> A. Yes. The surgery itself took four hours and then I had to lay in a hospital bed. They kept me overnight there. And from there, I had to go home and lay in bed because I wasn't able to move properly yet. I mean, I'd just

> been cut on both sides and there was nothing - it just happens, you know. I had the pneumatic pads on, but they didn't seem to do what they were supposed to do.
>
> Q. Were you hospitalized for the pulmonary embolism?
>
> A. Yes, I was, yes."

The claimant was hospitalized for his pulmonary embolism and was given extensive medical care for the treatment of his pulmonary embolism. The claimant has asked the Commission to consider whether or not his pulmonary embolism is a compensable consequence of his admittedly compensable low back injury.

On April 14, 2006, Dr. Raben authored a letter regarding the claimant's November 2005 disc surgery and his pulmonary embolism. The body of that letter is as follows:

> "Mr. Donald Berndt had surgery on November 2005 for disc herniation. Since his surgery he has had a pulmonary embolus as well as deep vein thrombosis. Both of these conditions are complications from his surgery. If you need further information, please feel free to contact us at the number provided above."

On December 26, 2006, the claimant underwent a medical evaluation at the request of the claimant's workers' compensation case manager, Gail Sheffield. This evaluation was performed by Dr. James B. Blankenship. The report from that medical evaluation indicates that the case manager, Ms. Sheffield, asked a series of five questions to Dr. Blankenship and he answers these questions in the medical evaluation report. Although the questions themselves were not provided in the record, the answer to question number one obviously regards the claimant's umbilical hernia repair and lumbar

surgery in relation to his post surgery complications. That answer states as follows:

> "Concerning his umbilical hernia repair that was done at the time of his surgery, I do not feel like that his hernia repair is related to any of his medical complications after his surgery. All of these complications are directly related to his lumbar procedure."

It is clear from my review of all the medical records in this matter including the opinions of Dr. Raben and Dr. Blankenship that the claimant's undisputed pulmonary embolism was a consequence of his admittedly compensable lumbar surgery. As such, Respondents No. 1 shall bear the burden of the medical costs associated with the treatment of his pulmonary embolism.

The claimant, in this matter, has also asked the Commission to consider whether or not he is permanently and totally disabled, or alternatively, suffered wage loss disability as a result of his admittedly compensable injury. In order to prove that he is totally and permanently disabled, the claimant must be injured to the extent that he can only perform services that are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.

The claimant, in this matter, has undergone three major surgeries regarding his admittedly compensable back injury. As previously stated, the first surgery was performed by Dr. Raben on November 30, 2005, at which time the claimant underwent a disc decompression and fusion at L5-S1. The claimant then underwent severe post surgical complications in the form of a pulmonary embolism.

The claimant underwent a second operation performed by Dr. Raben at St. Mary's Hospital on March 21, 2007. The preoperative and postoperative diagnosis states, "Low back pain previously operated lumbar spine. Pseudoarthrosis. Failed hardware."

Finally, the claimant had a third surgery in the form of a revised fusion. A medical record from a visit with Dr. Raben on January 18, 2008, states:

> "Donald continues to complain of his back pain and I still believe that the best way to handle this is going to be to revise his anterior fusion. He did well for a period of time with a posterior fusion, however as that did not hold as far as the hardware is concerned and he once again has significant motion. We need to go ahead and anteriorly revise the fusion."

Although I do not find the operative report from this planned third surgical intervention, I note that the claimant testified as such and also a follow up report by Dr. Raben from June 1, 2010, does indicate that this surgery occurred. The claimant, at hearing, gave testimony about the surgical intervention he had regarding his admittedly compensable back injury. The claimant's testimony here is somewhat unique in that the claimant's work history includes that of a surgical technician. That portion of the transcript is as follows:

> "Q. And you had - you mentioned one surgery. How many surgeries have you had on your low back as a result of this specific injury?
>
> A. I have had three major surgeries and one minor involving a nerve stimulator being placed. The first surgery was considered a 360. That's where they go through the abdomen and place a plate and then they roll you over and they finish up the plate in the back side.

> Six months out from that, the screws - the titanium screws snapped causing everything to rupture and fall apart. I was taken back into surgery a few months later where I had rods and screws put in to stabilize it. The stabilization was too far curvature forward, so they had to go back in and place in a pneumatic plate in between L5 and S1 to stabilize the vertebras so that I would be able to walk somewhat. And from that was the nerve damage, which caused my back to hurt so much all the time. They decided to pt in a nerve stimulator, which to this point it really doesn't do much help at all.
>
> Q. Okay. And who did all those surgeries?
>
> A. Dr. Raben did all of the neurology back and Dr. Luo did the neuro-stimulator."

The previously mentioned medical note by Dr. Raben on June 1, 2010, the claimant's visit with Dr. Raben, in part, states as follows:

> "This 50 yr old male presents for follow-up low back pain and to see if WCC can get a MMI. He states he is about the same as last visit. He is going to join the Wellness center in Rogers. They have a heated pool, and room to walk with all kinds of classes he might need to joint.
>
> Comprehensive Interval History is as follows: Donald presents back today for independent medical evaluation and to get the maximum medical improvement rating. Don needs to understand that at some pont in the future he will require further surgical intervention including decompression and fusion above the level previously instrumented. He will require pain management and occasional physical therapy. He may require durable medical equipment including motorized wheelchair, temperpedic mattress, canes and braces and replacement for these throughout the years. I would suggest a on-going physical therapy program including gymnasium membership with access to warm water pool.

> Partial permanent impairment raring for two level multiply operated lumbar spine would be 15% of his body as a whole; this is according to the Arkansas modification of the American Medical Association Guides to Permanent Impairment. He remains completely and totally disabled from his previous line of employment and I'm not sure that eh will be employable in any capacity within the next two years or better. Vocational rehabilitation, job restructuring, reeducation, and/or retraining might be necessary for him."

Upon review of the documents introduced and the testimony in this matter, it is clear that the claimant never received a functional capacity evaluation nor did the claimant ever receive any type of vocational rehabilitation in this matter. The claimant credibly testified at the hearing regarding his current physical condition in that he is limited to lifting only eight pounds, he can only stand for fifteen to twenty minutes and sit for fifteen to twenty minutes. The claimant testified that he has a stool in his restroom that can be adjusted in height and he uses this to take a shower, shave, and brush his teeth. He stated that he is unable to stand for a period of time without back pain and that he must use an extended scrub pad to reach his feet and legs because he is not able to reach that far down. The claimant testified that he is not able to reach down and tie his own shoes and that he wears flip flops 99 percent of the time so he does not have to worry about socks. The claimant also testified that when he has to move long distances he has to use the assistance of a wheelchair. The claimant also testified regarding having to stop driving an automobile in that he loses feeling in his right leg and would be unable to control the automobile with the loss of that feeling.

The claimant, in this matter, is a high school graduate and joined the military immediately after high school. He joined the United States Army for a period of seven years and eventually became a medic with the Army Special Forces Tenth Group out of Seattle, Washington at Fort Louis. After leaving the military, the claimant went to work at the Las Vegas Hilton Casino where he worked as a med tech.

After that, the claimant became a certified nurses' aid and in 1992 began working as a surgery technician at Sale Memorial Hospital in Neosho, Missouri. With that job, the claimant was required to lift heavy trays of medical equipment up to seventy-five pounds without assistance. The claimant also had to lift heavy weights when he was a nurses' aid which included lifting and moving patients. The claimant's employment with Respondent No. 1 began somewhere around 2005 and at that job he performed duties as a ramp technician which included pushing and pulling planes and lifting baggage up to seventy-five pounds.

It is clear from the review of the claimant's work history that the claimant has always engaged in employment that required him to have certain physical attributes that would allow him to pick up weights and move and bend freely. Due to the claimant's admittedly compensable injury, he no longer has that ability. Given Dr. Raben's assessment of the claimant in his June 1, 2010, clinic note in which he in part states, "He remains completely and totally disabled from is previous line of employment and I am not sure that he will be employable in any capacity within the next two

years or better," and the claimant's credible testimony regarding his various limitations, I find that the claimant is permanently and totally disabled. In my review of the record I find that the claimant has been injured to an extent that he could only perform services that are so limited in quality, dependability, and quantity that a reasonable stable market for those services does not exist.

The claimant has also asked the Commission to decide the issue of Second Injury Fund liability. The claimant testified that he did undergo several right knee surgeries between 1980 and 1981. However, the claimant also testified that he had no problems with his right knee that prevented him from performing any work activities that he choose to engage in since the surgeries were completed.

The claimant testified that he underwent a cervical fusion about ten years before his compensable back surgeries. The claimant was able to return to work after that cervical surgery and had no problems. The claimant's work history supports his credible testimony of not having cervical or knee difficulties after they were resolved with surgical intervention.

In order to prove Second Injury Fund liability, three hurdles must be meet as set out in Mid State Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). 1. The employee must have suffered a compensable injury at his present place of employment; 2. Prior to that injury the employee must have had a permanent partial disability or impairment and; 3. The disability

or impairment must have combined with the recent compensable injury to produce the recurrent disability status.

As to the first hurdle, here it is clear that the claimant suffered an admittedly compensable injury at the respondent's place of employment. As to the second hurdle, the claimant testified that he had no disability spurring from his right knee nor his prior cervical difficulties. However, both were resolved with surgical intervention thus some type of impairment must have existed. Although that it appears that the first two hurdles have been meet, the third hurdle cannot be meet in this matter. I find no evidence that the claimant's prior right knee or cervical difficulties in any way combined with the recent injury to produce the current disability status. I have found that the claimant is permanently and totally disabled; however, that permanent and total disability comes from and only from his current admittedly compensable lumbar spine injury.

The Second Injury Fund made a motion to be dismissed from this matter at the hearing conducted on January 18, 2011, due to its belief that Respondents No. 1 failed to comply with its request for discovery. I find that the Second Injury Fund's motion is moot in that I have found no Second Injury Fund liability.

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 witness and to observe his demeanor, the following findings of

fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 28, 2010, and contained in a pre-hearing order filed October 28, 2010, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that his medical difficulties in the form of a pulmonary embolism are a compensable consequence of the claimant's admittedly compensable low back injury.

3. Respondents No. 1 shall bear the burden of the medical costs associated with the treatment of the claimant's pulmonary embolism including reimbursement to any group medical providers that paid for treatment provided to the claimant regarding his pulmonary embolism subject to any offsets or credits applicable under Ark. Code Ann. §11-9-411.

4. Respondents No. 1 shall reimburse the claimant for any out of pocket expenses associated with the medical treatment for the treatment of his pulmonary embolism.

5. The claimant has proven by a preponderance of the evidence that he is permanently and totally disabled.

6. The Second Injury Fund has no liability in this matter and thus its motion to dismiss is moot.

7. The claimant has proven by a preponderance of the evidence that his attorney is entitled to a fee in this matter commiserate with the Arkansas Workers' Compensation Act.

ORDER

That Respondents No. 1 shall bear the costs associated with the treatment for the claimants compensable pulmonary embolism. This shall be subject to the provision set forth in A.C.A.§11-9-411. Respondents No. 1 shall reimburse the claimant for any out of pocket expense he suffered for the treatment of his compensable pulmonary embolism. That Respondents No. 1 and the Death and Permanent Total Disability Trust Fund shall pay all appropriate benefits to the claimant under the Arkansas Worker's Compensation Act, as he is permanently and totally disabled.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE