

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510083

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

OPINION FILED AUGUST 15, 2011

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

Claimant represented by the HONORABLE JASON HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondents No. 1 represented by the HONORABLE RANDY MURPHY, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents No. 1 appeal an opinion and order of the Administrative Law Judge filed April 18, 2011. In said order, the Administrative Law Judge made the following findings of fact and 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 is presently before the Full Commission on 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 is presently before the Full Commission on commiserate with the Arkansas Workers' Compensation Act.

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 April 18, 2011 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.

A. WATSON BELL, Chairman

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he was permanently and totally disabled. In my opinion, the claimant has failed to meet his burden of proof.

My review of the evidence demonstrates that the Law Judge and the majority have used the wrong standard to make a determination that the claimant was permanently and totally disabled. The standard employed by the Law Judge and the majority to determine whether the claimant was permanently and totally disabled is the odd lot doctrine. This standard is no longer applicable to injuries sustained after July 1, 1993. If the correct standard is applied to the facts of this case, the evidence demonstrates that the claimant is entitled to some wage loss disability benefits in addition to his

permanent anatomical impairment. However, the evidence does not demonstrate that the claimant is permanently and totally disabled.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority's finding that the claimant was permanently and totally disabled.

KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs.

CONCURRING OPINION

I concur with the majority opinion. I write separately to address the dissenting Commissioner's assertion that the wrong legal standard was used by the Administrative Law Judge to determine permanent and total disability.

Permanent total disability is defined as inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-519 (e) (1). The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-519 (e) (2). The

same factors considered when analyzing wage-loss disability claims are usually considered when analyzing permanent and total disability claims. See Ark. Code Ann. §11-9-519 (c); Rutherford v. Mid Delta Community Services, Inc., 102 Ark. App. 317, 385 S.W.3d 248 (2008). Such factors include the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Other factors include motivation, post-injury income, credibility, demeanor, prior work history and education. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), 54 Ark. App. 130, 923 S.W.2d 886 (1996).

The standard used by the Administrative Law Judge encompasses the above-cited standard. Under either standard, the same result is reached: the claimant is permanently and totally disabled. For this reason, I concur with the majority.

PHILIP A. HOOD, Commissioner