

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 OCTOBER 10, 2012

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.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed August 1, 2012. The administrative law judge
found that the claimant proved he was permanently and
totally disabled. After reviewing the entire record *de*
novo, the Full Commission affirms the administrative law
judge's opinion.

I. HISTORY

Don Berndt, now age 52, testified that he graduated from high school and then served in the United States Army from 1979-1985. Mr. Berndt testified that he worked as a medical specialist in Army Special Forces. After leaving the Army, the claimant became employed with a hotel as a security medical technician. The claimant testified that he worked for a time as a certified nurse's aide, then became employed in a hospital surgery department from 1992 until 2000. The claimant testified that he became employed as a ramp technician for the respondents in about 2005. The claimant testified, "Being a ramp person you did various jobs, pushing out planes, pulling up planes, cleaning the inside of the aircraft, dumping the lavatory, and hauling of - loading and unloading of baggage up to 75 pounds. Anything over that, you would get assistance with."

The parties stipulated that the claimant sustained a compensable injury on September 17, 2005. The claimant testified that he "hyperflexed" his back while attempting to help lift a 350-pound wheelchair onto a plane. The claimant began treating with Dr. Cyril A. Raben in October 2005. An MRI in October 2005 showed a focal disc extrusion at L5-S1. Dr. Raben performed a diskectomy at L5-S1 in November 2005.

The claimant was hospitalized in December 2005 with a diagnosis of pulmonary embolus. Dr. Raben stated in April 2006, "Mr. Donald Berndt had surgery in 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." The claimant was assessed with a bilateral pulmonary embolism in May 2006. Dr. Raben performed a posterolateral fusion at L5-S1 in March 2007. The post-operative diagnosis was "Low back pain. Previously operated lumbar spine. Pseudoarthrosis. Failed hardware."

The claimant followed up with Dr. Raben in July 2007:

Donald presents today doing really well if he's not forced to undergo arduous work. I feel at this point, he is completely and totally disabled from his previous line of employment. He would be limited to light or sedentary duty only and may not be able to complete an eight hour day; his work ability would be sporadic. He must avoid highly vibrational situations with no long-standing, no long sitting, frequent breaks, frequent change of position with only 20 minutes at a time for sit, stand, or walk, and no exposure to noxious fumes or chemicals or electrical hazards. No working in a bent over posture, no working in an over head posture, no repetitive bend, lift, or twist with frequent breaks and frequent change of position. No climbing and no exposure to extremes of temperature.

He will require the attention of a pain management physician and will need medication for pain with follow-up control. At some point, he will

probably require further surgical intervention for removal of the hardware and as a direct result of this fusion/decompression and probable extension of his fusion mass cephalad.

Dr. Raben performed additional surgery in December 2007: "Removal of anterior hardware, revision fusion with instrumentation, STALIF L5-S1, external bone stimulator." According to the record, Dr. Raben performed another surgery in February 2008: "Revision anterior lumbar interbody fusion with instrumentation."

The parties stipulated that the claimant reached maximum medical improvement on June 1, 2010. Dr. Raben reported on or about June 1, 2010:

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 join.

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 point 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 impairment rating 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 he 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.

A pre-hearing order was filed on October 28, 2010. The claimant contended, among other things, that the respondents should be responsible for medical expenses related to complications from surgery, *i.e.*, pulmonary embolus and deep vein thrombosis. The claimant contended that the compensable injury and its consequences had rendered him permanently and totally disabled. The claimant contended in the alternative that he had suffered wage-loss disability. The respondents contended, among other things, that the claimant was not permanently and totally disabled.

The parties eventually agreed to litigate the following issues:

1. Compensability of the claimant's pulmonary embolism.
2. Permanent total disability or wage loss.
3. Second Injury Fund liability.
4. Attorney's fees.

A hearing was held on January 18, 2011. The claimant described his permanent restrictions: "I'm only allowed to

lift 8 pounds, which is equivalent to a gallon of milk. [Dr. Raben] told me not to lift anything over a gallon of milk. My limitations as far as standing and sitting is usually 15 to 20 minutes. Walking is approximately the same. The only place that I am comfortable to where I am able to relax is where I'm laying in bed with my feet elevated...." The claimant testified that he was restricted in bending, stooping, and crawling. The claimant described his chronic pain as "Imagine a hot poker stabbing you in the back and burning, okay, and then the pain radiates out. Well, it radiates out and goes all the way down my right leg, about halfway down my left leg and shoots up my spine into my brain to where I have headaches all the time." The claimant testified on cross-examination that he was receiving Social Security Disability and that he was receiving veterans' disability payments.

An administrative law judge filed an opinion on April 18, 2011. The administrative law judge found that the claimant's pulmonary embolism was causally related to the compensable injury. The administrative law judge found that the claimant proved he was permanently and totally disabled. The Full Commission affirmed and adopted the administrative

law judge's decision, and the respondents appealed to the Arkansas Court of Appeals.

In an opinion delivered March 28, 2012, the Court of Appeals affirmed the Commission's finding that treatment for the claimant's pulmonary embolism was compensable. *American Eagle Airlines v. Berndt*, 2012 Ark. App. 220. However, the Court reversed and remanded for specific findings to support the Commission's determination of permanent and total disability. The Full Commission subsequently remanded the case to the administrative law judge.

The administrative law judge filed another opinion on August 1, 2012. The administrative law judge found, among other things, that Respondent No. 2, Second Injury Fund, was not liable for benefits. The respondents do not appeal that finding. The administrative law judge found that the claimant proved he was permanently and totally disabled. The respondents appeal the award of permanent total disability to the Full Commission.

II. ADJUDICATION

When a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon

wage-loss factors. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Id.* The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Id.* In considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. *Id.*

Ark. Code Ann. §11-9-519(e) (Repl. 2002) provides:

- (1) "Permanent total disability" means inability, because of compensable injury, to earn any meaningful wages in the same or other employment.
- (2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

An administrative law judge found in the present matter, "5. The claimant has proven by a preponderance of the evidence that he is permanently and totally disabled." The Full Commission affirms this finding. The claimant is middle-aged, age 52, with only a high school education. The claimant served as a medical specialist in the Army and also

worked for a large hotel as a medical technician. The claimant became employed with the respondents in about 2005. The claimant testified that he was "ramp technician" for the respondent-employer, and the claimant's testimony indicated that he was occasionally required to perform manual labor.

The parties stipulated that the claimant sustained a compensable injury on September 17, 2005. The claimant testified that he injured his back while attempting to lift a heavy wheelchair onto an airplane. The claimant subsequently began treating with Dr. Raben. Dr. Raben performed surgical procedures in November 2005, March 2007, December 2007, and February 2008. Dr. Raben has opined that the claimant will need to undergo yet another surgery in the future. The claimant was physically functional before the compensable injury. Now, following the compensable injury and after several surgical procedures, the claimant's physical activities are greatly restricted. The claimant is unable to lift any objects weighing over eight pounds. The claimant is limited in walking, standing, stooping, and crawling. The claimant now suffers from chronic pain which the claimant described as "a hot poker" stabbing him in the back.

Dr. Raben stated in July 2007 that the claimant would not be able to return to manual labor. The parties stipulated that the claimant reached maximum medical improvement on June 1, 2010. Dr. Raben assigned the claimant a 15% anatomical impairment rating and opined that the claimant was "completely and totally disabled from his previous line of employment." Although the respondents assert that the claimant is not motivated to return to work, there are no medical opinions of record contradicting Dr. Raben's opinion that the claimant is physically unable to return to his former employment as a ramp technician. The record does not demonstrate that the claimant would be able to perform such physical activities as loading and unloading baggage for the respondents. Nor does the record show that the claimant is physically able to perform productive employment for any employer. In accordance with Ark. Code Ann. §11-9-519(e) (Repl. 2002), the Full Commission finds that the claimant proved he was permanently totally disabled.

Based on our *de novo* review of the entire record, and pursuant to the remand from the Court of Appeals, the Full Commission affirms the administrative law judge's finding that the claimant proved he was permanently totally

disabled. The claimant proved that the September 17, 2005 compensable injury was the major cause of his permanent total disability. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant is permanently and totally disabled. Based upon my *de novo* review of the record, I find that the claimant has failed to met his burden of proof.

The claimant's treating physician opined that the claimant was not physically capable of returning to his

"previous line of employment;" however no physician has ever declared that the claimant is totally disabled from working in a much lighter capacity. In finding that the claimant is permanently and totally disabled, the majority only considered the claimant's most recent employment with respondent which required heavy lifting of loading and unloading baggage. After finding that Dr. Raben had precluded the claimant from returning to this heavy duty employment, the majority then concludes that the claimant is not physically able to perform productive employment for any employer. In reaching this finding, however, the majority has failed to even consider the claimant's past work experience, his transferable skills, and the many other factors which weigh in a wage loss determination and which clearly demonstrate that the claimant is not permanently and totally disabled. Admittedly, the claimant sustained a compensable injury for which he has received a 15% permanent impairment rating, and which has resulted in some degree of wage loss disability. However, despite the claimant's contentions to the contrary, the claimant is still capable of living a productive life. The record reveals that the claimant has simply failed to make any effort to go back to work or seek retraining. The claimant has experience in an

office environment as a medical dispatcher and he possesses computer skills. Clearly, his office job did not require heavy physical labor. Inasmuch as the claimant is highly intelligent, personable, and has experience in light and sedentary office work, I cannot find that the claimant has proven by a preponderance of the evidence that he is permanently and totally disabled. Accordingly, I must respectfully dissent for the majority's opinion.

KAREN H. MCKINNEY, COMMISSIONER