

ARKANSAS COURT OF APPEALSDIVISION III
No. CA11-1035AMERICAN EAGLE AIRLINES and
SPECIALTY RISK SERVICES
APPELLANTS

V.

DONALD BERNDT

APPELLEE

Opinion Delivered March 28, 2012APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F510083]AFFIRMED IN PART; REVERSED
AND REMANDED IN PART**RAYMOND R. ABRAMSON, Judge**

Appellants American Eagle Airlines and Specialty Risk Services appeal from the Arkansas Workers' Compensation Commission's decision affirming and adopting the findings of the Administrative Law Judge (ALJ), who found (1) that a surgery performed to treat appellee Donald Berndt's compensable injury caused him to develop a pulmonary embolism and (2) that Berndt is permanently and totally disabled. We hold that there was sufficient evidence to support the Commission's decision finding that the treatment for Berndt's pulmonary embolism was compensable. However, we reverse and remand for specific findings to support the Commission's determination of permanent and total disability.

On September 17, 2005, Donald Berndt was working for American Eagle Airlines as a ramp technician when he suffered an admittedly compensable back injury while loading an electric wheelchair onto an airplane. As a result of his back injury, Berndt underwent a disc decompression and fusion at L5-S1 on November 30, 2005. While performing these

procedures, Dr. C. Tony Raben also repaired a small umbilical hernia unrelated to the accident.

A few days after Berndt returned home from the surgery, he developed a pulmonary embolism and deep vein thrombosis. This required additional medical treatment and intervention related solely to these complications. A clinic note by Dr. Raben on February 23, 2006, states that Dr. Raben had advised Berndt that his deep vein thrombosis and subsequent lung problems were caused by his surgery and, therefore, were related to his injury. In a subsequent April 14, 2006 letter, Dr. Raben wrote:

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.

In December 2006, Berndt underwent an independent medical evaluation (IME) by Dr. James Blankenship. In the IME, Dr. Blankenship opined:

Concerning his umbilical hernia repair that was done at the time of his surgery, I do not feel like that [sic] 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.

Berndt underwent a second operation on March 21, 2007, after the hardware from the previous operation failed. Although the operative report is not in the record, it is clear that a third surgery was performed in February 2008 to revise the fusion in his back.

On June 1, 2010, Dr. Raben gave the following opinion with regard to whether Berndt had reached maximum medical improvement (MMI):

Partial permanent 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.

After hearing Berndt's testimony and reviewing the evidence in the record, the ALJ found that, based on the opinions of Drs. Raben and Blankenship, Berndt's pulmonary embolism was a consequence of his admittedly compensable lumbar surgery and ordered American Eagle to pay the medical costs associated with the treatment of that condition. The ALJ further found that Berndt was permanently and totally disabled because he had 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."

American Eagle appealed the decision to the full Commission. In its majority opinion, the Commission affirmed the ALJ and adopted the opinion of the ALJ as its own. American Eagle now appeals, arguing that the Commission erred (1) in finding that there was substantial evidence that the pulmonary embolism was caused by his compensable injury and (2) in applying the odd-lot doctrine in order to determine whether Berndt was permanently and totally disabled. In the alternative, American Eagle asserts that, even if the correct standard for permanent and total disability were applied, there was insufficient evidence to support the Commission's finding of permanent and total disability.

When reviewing a decision of the Workers' Compensation Commission, the court of appeals views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *Evans v. Bemis Co., Inc.*, 2010 Ark. App. 65, ___ S.W.3d ___. This court must affirm the decision of the Commission if it is supported by substantial evidence. *Id.* Substantial evidence is that evidence which a reasonable mind

might accept as adequate to support a conclusion of the Commission. *Id.* We only reverse the Commission's decision if we are convinced that fair-minded persons could not have reached the same conclusion with the same facts before them. *Id.* Questions regarding the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Id.* When the Commission, as it did in this case, affirms and adopts the ALJ's findings, this court considers both the ALJ's decision and the Commission's opinion. *Montgomery v. J & J Lumber Co.*, 2011 Ark. App. 129.

American Eagle first argues that there was no competent medical-opinion testimony that the pulmonary embolism was precipitated by the compensable lumbar surgery as opposed to the non-compensable hernia repair surgery. American Eagle notes that Dr. Raben did not make it clear which aspect of the surgery caused the pulmonary embolism and that Dr. Blankenship did not even review any medical records pertaining to the pulmonary embolism when preparing his IME. Based on this limited evidence, American Eagle argues that no reasonable person could conclude that the pulmonary embolism was caused by the compensable surgery without resort to gross speculation. We disagree.

When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for every natural consequence that flows from that injury. *McDonald Equip. Co. v. Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989). The basic test is whether there is a causal connection between the two episodes. *Jeter v. B.R. McGinty Mech.*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). The determination of whether the causal connection exists is a question of fact for the Commission to determine. *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986).

Here, Dr. Raben made the following statement in his physician's notes after a February 23, 2006 clinic visit:

Don has questions as to whether or not the deep vein thrombosis (DVT) and the subsequent problems that he is having with his lungs and breathing are related to his surgery. I have told him that, most certainly, it is related and, therefore, related to his injury.

Dr. Raben then followed up with a letter dated April 14, 2006, in which he stated that Berndt's pulmonary embolus and deep vein thrombosis were complications of his surgery. Thus, Dr. Raben was clearly of the opinion that Berndt's vascular problems were related to his compensable injury. Therefore, even without the subsequent opinion of Dr. Blankenship, there was sufficient evidence to support the Commission's findings.

American Eagle next argues that the Commission erroneously applied the abolished odd-lot doctrine to find that Berndt was permanently and totally disabled. The odd-lot doctrine was abolished by Act 796 of 1993, codified at Ark. Code Ann. § 11-9-522(e) (Supp. 1999) and provided benefits for an employee who was injured to the extent that the only services he could perform were so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist and he may be classified as totally disabled. *Patterson v. Ark. Dep't of Health*, 70 Ark. App. 182, 15 S.W.3d 701 (2000).

Here, the Commission found that Berndt was permanently and totally disabled. In doing so, the Commission stated that Berndt had 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." Thus, the Commission relied on the odd-lot doctrine to determine whether Berndt was permanently and totally disabled. This

it cannot do.

Berndt, relying on the concurring opinion of Commissioner Hood, argues that, because the standard set forth in the odd-lot doctrine was encompassed in the current definition of permanent and total disability, under either standard, Berndt would be found permanently and totally disabled.

Pursuant to Arkansas Code Annotated section 11-9-519(e)(1) (Repl. 2002), “[p]ermanent total disability’ means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.” The burden of proof is on the employee to prove inability to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(2). Permanent total disability shall be determined in accordance with the facts. Ark. Code Ann. § 11-9-519(c).

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.*

While Berndt may be correct in his argument that the factors considered by the Commission would also support a claim of permanent and total disability under the current statute, we cannot make that determination at this time, because the Commission's finding of permanent and total disability was supported in part by its improper finding under the odd-lot doctrine. We therefore reverse and remand the matter to the Commission for entry of findings of fact and conclusions of law utilizing the correct standard for permanent and total disability.

Affirmed in part; reversed and remanded in part for additional findings.

GRUBER and MARTIN, JJ., agree.