

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA12-1024

AMERICAN EAGLE AIRLINES AND
SPECIALTY RISK SERVICES

APPELLANTS

V.

DONALD BERNDT

APPELLEE

Opinion Delivered April 10, 2013

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F510083]

AFFIRMED

PHILLIP T. WHITEAKER, Judge

This is the second appeal in this case from the Workers' Compensation Commission. *See Am. Eagle Airlines v. Berndt*, 2012 Ark. App. 220. In *Berndt* this court affirmed the Commission's decision that Berndt's pulmonary embolism was compensable; however, we held that the Commission had improperly applied the "odd lot" doctrine to find Berndt was permanently and totally disabled. *Berndt*, 2012 Ark. App. 220, at 6–7. Accordingly, we reversed the Commission's decision of permanent and total disability and remanded for specific findings to support its determination. *Id.* Upon remand, the Commission again found Berndt permanently and totally disabled. American Eagle has now appealed the decision to this court, contending that substantial evidence does not support the Commission's finding. We affirm.



Pursuant to Arkansas Code Annotated section 11-9-519(e)(1) (Repl. 2012), “permanent total disability means inability, because of compensable injury or occupational disease, to earn any meaningful wage 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 the 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 court considers the claimant’s motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant’s loss of earning capacity. *Id.*

When reviewing a decision of the 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, 374 S.W.3d 51.



This court must affirm the Commission's decision 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 reverse the Commission's decision only 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 their testimony are within the exclusive province of the Commission. *Id.*

The medical evidence before the Commission reflects that Berndt was working for American Eagle 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 injury, Berndt underwent three surgeries on his back: 1) a disc decompression and fusion at L5–S1, 2) a procedure to remove failed hardware, and 3) a final procedure to revise a failed fusion. Complications from his surgeries included development of a pulmonary embolism and deep-vein thrombosis. Berndt received a 15% permanent-impairment rating to the body as a whole based upon his compensable back injury. Dr. Tony Raben gave the following opinion concerning Berndt's functional capacity:

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.

In addition to the medical evidence, the Commission had evidence concerning Berndt's work history, his physical limitations, his daily restrictions, and his pain. Berndt testified that he is limited to lifting no more than eight pounds. He cannot stand or sit for more than fifteen or twenty minutes. The only place he is comfortable and able to relax is



lying in bed with his feet elevated. He cannot bend over to tie his shoes or put on socks, so he wears slip-on shoes or flip-flops most of the time. He has to use a claw to help pick things up, and he cannot get out of the tub without assistance. Berndt also testified that the pain in his back causes numbness and tingling in his legs, and there are times when he gets up and does not realize that he cannot feel his legs, so he falls. He had to give up driving because of the lost feeling in his legs. He uses a wheelchair if he and his wife go anywhere for a long period of time.

Based upon all the evidence, the Commission found Berndt permanently and totally disabled. The Commission found that Berndt was “physically functional” prior to his injury, but was currently “greatly restricted” in his physical abilities. The Commission pointed to Berndt’s inability to lift anything over eight pounds; his limitations on walking, standing, stooping, and crawling; and his chronic pain. The Commission also noted Dr. Raben’s opinion that Berndt would need to undergo yet another surgery in the future. Finally, the Commission concluded that Berndt was physically unable to perform productive employment for any employer.

American Eagle contends that the evidence does not support the Commission’s finding that Berndt is unable to earn any meaningful wages “in the same or other employment.” American Eagle notes that Berndt has a high-school education; was in the Army; and held various jobs prior to his compensable injury, including being a medic in the Army, a medical technician at a casino, and a certified nurse’s aide and surgery technician. American Eagle also points to Berndt’s previous work history as a medical dispatcher, which



Berndt described as “office work.” Although American Eagle concedes that the medical testimony reflects that Berndt would be unable to perform his previous job duties for the airline, it asserts that the evidence did not support a conclusion that he was unable to perform light, sedentary work. American Eagle suggests that Berndt’s real problem is his lack of motivation to return to work or to seek vocational training. Because there was “nothing in the medical records or [Berndt’s] testimony to indicate that his current condition would prevent him from undertaking such sedentary employment in the future,” American Eagle argues that the Commission incorrectly concluded that Berndt was totally and permanently disabled.

Berndt asserts that the evidence clearly showed he was permanently and totally disabled. Concerning motivation, Berndt acknowledged that he did not have any employment-related goals and had no motivation to return to school. He testified, however, that no doctor had released him to go back to work, but if he could get rid of the pain, he would go back to work “tomorrow.” Berndt further said that he would cooperate with a vocational rehabilitation specialist if one were offered to him, but American Eagle had not offered him any retraining.

We hold that the Commission’s finding that Berndt was permanently and totally disabled was supported by substantial evidence. The Commission rejected American Eagle’s argument that Berndt had not returned to work due to his lack of motivation, and so do we. Berndt clearly could not perform the strenuous kinds of jobs he held prior to his injury, and the Commission accepted his testimony that he was unable to perform sedentary work.



Cite as 2013 Ark. App. 230

Giving the deference that is due to the Commission's credibility determinations, *see Phillip Morris USA v. James*, 79 Ark. App. 72, 83 S.W.3d 441 (2002), we affirm the Commission's conclusion that Berndt met his burden of proving entitlement to permanent and total disability benefits.

Affirmed.

GLADWIN, C.J., and HARRISON, J., agree.

Anderson, Murphy & Hopkins, L.L.P., by: *Randy P. Murphy* and *Kyle E. Burton*, for appellants.

Jason M. Hatfield, P.A., by: *Jason M. Hatfield*, for appellee.