BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. D201624

CHARLES A. MCLEMORE, EMPLOYEE — **CLAIMANT**

ARKANSAS STATE POLICE,
EMPLOYER — **RESPONDENT**

STATE OF ARKANSAS/
PUBLIC EMPLOYEE CLAIMS DIVISION,
CARRIER/TPA — **RESPONDENT**

OPINION AND ORDER FILED JANUARY 6, 2023

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in Pine Bluff, Jefferson County, Arkansas, on October 10, 2022.

The claimant, Mr. Charles McLemore, of Pine Bluff, Jefferson County, Arkansas, appeared in person, pro se.

The respondents were represented by the Honorable Robert H. Montgomery, Little Rock, Pulaski County, Arkansas, Managing Attorney, State of Arkansas, Public Employee Claims Division (PECD).

INTRODUCTION

In the amended prehearing order filed August 31, 2022, the parties agreed to the following stipulations, which they affirmed on the record at the hearing:

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

2. The employer-employee relationship existed on January 9, 1982, when the claimant sustained a compensable injury to his left shoulder and back (from the neck to the middle of the back) when he pushed a disabled car off the highway while working as a trooper for the Arkansas State Police (ASP).

3. The respondents have always paid all appropriate medical and indemnity benefits, and they continue to provide medical benefits and to pay for the claimant's medical treatment for the January 9, 1982, compensable injuries.

4. The claimant's average weekly wage (AWW) on the date of the January 9,

1982, compensable injury was $347.00, which corresponds to weekly indemnity rates of $140.00 for temporary total disability (TTD), and $105.00 for permanent partial disability (PPD) benefits.

5. The parties specifically reserve any and all other issues for future determination and/or litigation.

(Commission Exhibit 1 at 1; Hearing Transcript at 4-5).

Pursuant to the parties' mutual agreement the sole issue litigated at the hearing was whether the claimant is entitled to partial reimbursement – $9,775.68 of a total cost of $14,235.36 – for a bed and mattress he purchased at a Havertys furniture store. Specifically, the bed was a, "Tempur-Pedic Ergo Premier bed with a firm mattress." (Claimant's Exhibit 1 at 29). This is a pre-Act 796 of 1993 date of injury (DOI) and claim; therefore, the applicable law is that set forth in ***Ark. Stat. Ann.*** Section 81-1311 (Replacement 1976). (Comms'n Ex. 1 at 2; T. 4-5).

The claimant contends that on January 9, 1982, he was working as a trooper for the ASP when an elderly lady's car stalled in traffic, and the claimant pushed the car out of traffic onto the shoulder of the road and injured his shoulder and neck. The claimant contends the respondents should bear the responsibility for the partial payment of $9,775.68 out of a total purchase price of $14,235.36 aforementioned bed and mattress. The claimant specifically reserves any and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 2; T. 4-5).

The respondents contend they have paid, are paying, and will continue to pay for any and all appropriate medical and/or indemnity benefits to which the claimant is legally entitled as a result of his January 1982 compensable injuries. They contend the aforementioned bed and mattress for which the claimant is seeking partial reimbursement is not a medical apparatus that is reasonably necessary for treatment of his 1982 compensable injuries. The respondents specifically reserve any

and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 2; T. 4-5; and *see*, Respondents' Post-Hearing Brief).

The record includes the hearing transcript and any and all exhibits contained therein and attached thereto, as well as the blue-backed original of the Respondents' Post-Hearing Brief. The claimant was also offered the opportunity to submit a post-hearing brief or any case law he believed supported his case, however, he did not do so.

STATEMENT OF THE CASE

The facts in this case are largely undisputed. The claimant, Mr. Charles A. McLemore (the claimant) – an obviously intelligent, dignified, and amiable man – was 73 years old at the time of the subject hearing. On January 9, 1982, he was employed as a trooper with the ASP. On that date he injured his left shoulder and back, from his neck to his lower back, as he was assisting an elderly motorist by pushing her car off a roadway onto the shoulder of the road. The respondents accepted these injuries (which appear to be in the nature of sprain/strain injuries) as compensable, although it appears the claimant did not require or undergo significant or ongoing medical treatment at the time, and he continued working at full duty for the ASP for some 25 years thereafter until he retired in 2007. (T. 9-16; 27-57; 57-59).

One (1) year after his retirement, in 2008, the claimant underwent his first surgery, a lower back/lumbar spine surgery performed by Dr. David Redding. In 2015, some eight (8) years after he retired from the ASP, the claimant underwent a cervical fusion surgery by Dr. Justin Seale. Medical records from Dr. Seale reflect the claimant reached maximum medical improvement (MMI) for his neck/cervical spine condition on December 28, 2015. Dr. Seale assigned the claimant an 11% whole-body permanent anatomical impairment rating for the cervical spine

condition. (Respondents' Exhibit 1, at 1-2). Dr. Seale released the claimant to return to work or school on March 5, 2020, with, "no restrictions." (RX1 at 6). As of the date of the subject hearing no physician had recommended any additional surgery(ies) relative to either the claimant's lower back/lumbar spine or his neck/cervical spine conditions. The claimant receives regular pain management medications from his treating physician(s), for which the respondents continue to pay. As of the date of the hearing the respondents had paid in excess of $250,000.00 in medical and indemnity benefits on the claimant's behalf. In addition, on the record at the subject hearing the respondents stated it was their intention to continue to pay for any and all reasonably necessary medical treatment related to the claimant's January 9, 1982, compensable injuries. (Claimant's Exhibit 1 at 2-30; RX1 at 1-11; T. 15-59; T. 63-80).

On March 6, 2022, the respondents took the claimant's deposition. In his deposition the claimant testified that in March of 2021 he went to bed one night and woke up with back pain and sciatica. (T. 32-35; Respondents' Exhibit 2 at 17). He said this had happened "two other times", and thereafter he went to his doctor who prescribed physical therapy (PT) treatments, including neck manipulations, heat treatments, and use of a TENS Unit. He candidly testified these various pain management modalities did provide him with relief from his pain. (T. RX2 at 20-21).

After he underwent the aforementioned and admittedly effective pain management treatment, the claimant talked with his brother, Mr. Roger McLemore, about a new bed his brother had purchased. The claimant's brother's bed was the same as or substantially similar to the bed the claimant ultimately purchased. The claimant testified he tried-out his brother's bed a few times, liked it, and decided to get one for himself. He testified he went to Havertys to see what beds might be available. (RX 2 at 21-22).

The claimant further testified that after looking at the beds Havertys had available he then went to his treating physician, Dr. Shajaat, and asked him if he thought such a bed with a firm mattress would be helpful. Dr. Shajaat's May 19, 2021, report documenting this visit reflects the claimant's request for the bed:

> He wanted to purchase a firm bed mattress to help him on his back pain and is needing a DME order.

(RX1 at 7). On May 19, 2021, after the claimant requested it, Dr. Shajaat issued a recommendation for a Tempur-pedic Ergo-Premier bed and firm mattress. (CX1 at 29). This is precisely the make and model of the bed the claimant found while shopping for beds at Havertys. The claimant testified he had the cost estimate of the bed and mattress and went back home and, "my wife went with me out there" to Havertys. (RX2 at 27). He testified his wife said, "You've hurt long enough that you deserve this and you need it." (RX2 at 27). Thereafter, the claimant ordered the bed and paid for it a few weeks later on June 2, 2021. (CX1 at 31). On June 3, 2021, PECD mailed a letter to the claimant from Ms. Verlene Williams, a PECD claims adjuster, advising him PECD would not pay be able to pay for the bed and mattress. (CX1 at 32). The record reflects the claimant had already ordered the bed weeks before receiving Ms. Williams' June 3, 2021 letter, and had paid for it on June 2, 2021. (CX1 at 1).

The claimant called the PECD Division Director, Mr. Nathan Culp, who is himself an attorney. Mr. Culp cited an Arkansas Court of Appeals case, *Public Employee Claims Division v. Keys,* 99 Ark. App. 77 (Ark. App. 2007), as the legal basis for PECD's denial of the claimant's reimbursement request. Mr. Culp explained that pursuant to the applicable "old"/former law an employer was required to pay for a medical apparatus that was reasonably necessary for treatment of a compensable injury. (T. 63-66). Mr. Culp testified PECD deemed the particular type of bed

in question would not constitute a medical apparatus that was reasonable necessary for treatment of the claimant's compensable injuries as required by both the applicable statute and caselaw, and that is why PECD had denied reimbursing the claimant for the bed. (T. 66-70).

Finally, to summarize remainder of Mr. Culp's testimony, he explained his concern that paying for such a bed would create a bad precedent that would essentially require taxpayers to pay for a luxury bed. With respect to the applicable/prior workers' compensation law, Mr. Culp explained that since the bed at issue in this case was not necessary for treatment of a compensable injury, it would be violative of the legal precedent the court of appeals set forth in Keys for PECD to use taxpayer money to pay for such a bed, especially based on the specific facts of this case. (T. 79; 69-81).

The claimant's last witness was his brother, Mr. Roger McLemore; however, the parties agreed on the record to stipulate that Mr. McLemore's brother would be to bolster the claimant's own testimony that he had tried-out his brother's bed and that is how the claimant, "found out there might be something that would give me relief and let me get sleep." (T. 82).

DISCUSSION

Just as it is under Act 796 of 1993, pursuant to the prior workers' compensation law the burden of proof was upon the claimant to prove by a preponderance of the credible evidence of record that he is entitled to the benefits requested. *See, e.g., Voss v. Ward's Pulpwood Yard,* 248 Ark. 465, 452 S.W.2d 629 (1970). The claimant was injured on January 9, 1982. ***Ark. Stat. Ann***. § 81-1311 was the applicable statute in effect at the time of his injury. This statute provided as follows:

> The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing services, and medicine, crutches, artificial limbs *and other apparatus as may be reasonably necessary for the treatment of the injury received by the employee*.

(***Ark. Stat. Ann.*** § 81-1311 (Repl. 1976)) (Emphasis added).

In Act 796 of 1993 the legislature revised this section so as to provide a broader range of ancillary medical services and supplies to injured workers to include, "medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, *and other apparatus as may be reasonably necessary in connection with the injury received by the employee*." ***Ark. Code Ann***. § 11-9-508(a) (2022 Lexis Supp.) (Emphasis added).

Based on both the applicable statute and caselaw as applied to the facts of this case, I am compelled to find the claimant has failed to meet his burden of proof in demonstrating that what is essentially a luxury bed marketed and sold to the general public is not, nor can it credibly be deemed to constitute a medical apparatus that is reasonably necessary for the claimant's compensable injuries for the following reasons.

First, the plain language of ***Ark. Stat. Ann.*** § 81-1311 (Repl. 1976) clearly does not require the respondents to reimburse the claimant for a luxury bed and mattress marketed to the general public that costs more than $14,000.00. Indeed, the applicable statute is completely and wholly silent with respect to either a bed and/or mattress. Moreover, the statute clearly linked the term, "apparatus" only to *medical services reasonably necessary for treatment of* the compensable injury. It simply cannot be credibly argued that this luxury bed was or is necessary for treatment of the claimant's compensable injuries.

Second, our court of appeals clarified the interpretation of ***Ark. Stat. Ann.*** § 81-1311 as it applies to facts such as those at bar in *Keys, supra*. In *Keys*, the claimant was injured in 1979 and, tragically, his injury left him a paraplegic. He requested a hand-controlled, wheelchair accessible

vehicle. The Commission found this medical benefit was reasonably necessary and ordered PECD to pay for it. PECD appealed to the Arkansas Court of Appeals, arguing the Commission erred because the applicable statute did not even provide for or allow for the provision of such medical benefits. The court of appeals agreed with PECD, reversed the Commission's decision, and dismissed the claim for this requested medical benefit. In so doing the court specifically held:

> Here, we are limited to the language of the prior act, which allows provision *only of apparatus that is reasonably necessary for* <u>*treatment*</u> *of the compensable injury*…In light of the restriction of benefits for mechanical apparatus in the applicable statute to those necessary for treatment of injury, we hold that the provision of a private vehicle without restriction on the use thereof cannot reasonably be deemed necessary for the treatment of appellee's injury.

Keys, 99 Ark. App. 77, at 79. (Some emphasis added, some in original).

Likewise, in *Liberty Mutual Ins. Co. v. Chambers*, 76 Ark. App. 286 (Ark. App. 2002), the court of appeals noted the distinction between the prior law, ***Ark. Stat. Ann.*** § 81-1311, and Act 796 of 1993, specifically ***Ark. Code Ann.*** § 11-9-508, as concerning such medical benefits:

> Section 11-9-508(a) was amended by the 1993 act and *no longer ties "apparatus" to medical services*, but rather "other apparatus as may be reasonably necessary in connection with the injury received by the employee. *Chambers,* 76 Ark. App. 286, at 288.

Finally, in *Howard Carr v. Cooper Tire and Rubber Co.*, AWCC No. D201010 (Full Comm. Opinion dated March 30, 2022), the Full Commission cited the *Keys* case and commented on ***Ark. Stat. Ann.*** § 81-1311 as follows:

> ***Ark. Stat. Ann*** § 81-1311 (Repl. 1976) allows provision *only of apparatus that is reasonably necessary for* <u>*treatment*</u> *of the compensable injury*. The statute restricts benefits for mechanical apparatus to those which are necessary for <u>treatment of an injury</u>.

Carr, Full Comm. Opinion at 20) (Some emphasis added, some emphasis in original).

Both the pro se claimant and the respondents' attorney did an excellent job clarifying the legal issue in question, adducing the relevant facts, and arguing their respective cases. Pursuant to both ***Ark. Stat. Ann.*** Section 81-1311, as well as *Keys* and the other aforementioned legal precedents cited, *supra,* the law as applied to the facts of this case is clear and compels only one correct legal conclusion. Therefore, for all the aforementioned reasons, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations to which the parties agreed in the amended prehearing order filed August 31, 2022, which they affirmed on the record at the hearing, hereby are accepted as facts.

2. The claimant has failed to meet his burden of proof in demonstrating the luxury bed he ordered and purchased before he received PECD's final payment/reimbursement decision – a luxury bed that is available for sale to the general public at Havertys – constitutes an, "apparatus" that is reasonably necessary for treatment of his compensable injuries pursuant to ***Ark. Stat. Ann***. Section 81-1311. And *see, Keys,* and *Carr, supra.*

3. Therefore, this claim hereby is denied and dismissed.

If they have not already done so, the respondents hereby are ordered to pay the court reporter's invoice within ten (10) days of their receipt of this opinion and order.

IT IS SO ORDERED.

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Mike Pickens
Administrative Law Judge

MP/mp