

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 12, 2014

CLAIM NO. 198331304 & 198211806

CAROL ROBERTS

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE

UNITED PARCEL SERVICE
LIBERTY MUTUAL INSURANCE
ERIC GOEBEL, M.D.
CHRISTOPHER NEWELL
and HON. DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Carol Roberts ("Roberts"), *pro se*, appeals and United Parcel Service ("UPS") cross-appeals from the May 29, 2013, Interlocutory Opinion and Order, the June 25, 2013, Order, the August 26, 2013, Opinion and Order, the September 17, 2013, Order, and the September 19, 2013,

Order rendered by Hon. Douglas Gott, Administrative Law Judge ("ALJ") resolving a medical fee dispute filed by UPS. In the May 29, 2013, Interlocutory Opinion and Order, the ALJ dismissed the medical fee dispute after finding UPS did not timely initiate utilization review and/or file a motion to reopen. In subsequent orders, the ALJ determined Roberts was entitled to a new van to haul her wheelchair, but ordered UPS was not required to pay the ordinary costs of maintaining the vehicle including insurance, taxes, and general maintenance. The ALJ also ordered Roberts was not entitled to leather seats for the van and overruled Roberts' motion for sanctions pursuant to KRS 342.310.

Because of the issues raised on appeal, a history of this claim is necessary.

Roberts initially filed a claim alleging left ankle and back injuries occurring while in the employ of UPS. In an Opinion and Award rendered March 4, 1985, the Workers' Compensation Board determined Roberts' ankle injury and back injury resulted in a 14% and 10% occupational disability, respectively.¹ A subsequent reopening filed by Roberts in June 1987 resulted in an

¹At the time of this decision, the Kentucky legislature had not enacted legislation creating the current adjudication system.

opinion and award finding Roberts was totally occupationally disabled due a worsening of her condition.

Roberts later filed a motion to reopen requesting UPS be responsible for maintenance of Roberts' outdoor swimming pool at her home. Hon. Thomas Nanney, Administrative Law Judge, determined an enclosed swimming pool with attending therapist was not an appliance contemplated by the Act and ordered UPS was not liable for these items.²

Another medical fee dispute was resolved in an opinion dated April 23, 2002, by Hon. J. Landon Overfield, Administrative Law Judge ("ALJ Overfield"). ALJ Overfield determined Roberts was entitled to a motorized wheelchair but not "handicap-equipped van."

Both parties appealed from that decision. In a September 25, 2002, opinion affirming, this Board identified the issues on appeal as follows:

On appeal, Roberts argues 1) the van is necessary for the cure and relief from the effects of her injuries, and 2) the award of the wheelchair/scooter was insufficient in that it did not provide for certain option accessories that would make the scooter safer, more functional and transportable. UPS contends 1) Robert's [sic] appeal is untimely and must be dismissed, and 2)

²The new Workers' Compensation Board affirmed the decision in an opinion rendered February 25, 1994.

the ALJ erred in ordering UPS to provide a motorized wheelchair/scooter combination.

The Board disagreed with UPS' argument that a motorized wheelchair/scooter was not an appliance contemplated by the statute stating as follows:

We admit to being unable to locate any published or unpublished authority from our appellate court addressing the compensability or medical necessity of a motorized wheelchair. We believe this question, however, is so basic as to preclude any reasonable argument to the contrary. A wheelchair, motorized or otherwise, is an appliance within the purview of the statute which may be determined a medical necessity based on the quality of the proof.

. . .

The ALJ chose to rely on the reports of Dr. Carothers rather than the peer review physicians. Contrary to UPS's argument, Dr. Carothers' failure to rebut or appeal from the decision of the utilization review reports is not dispositive. Regardless of a treating physician's response to or appeal of utilization review, those reports are not entitled to additional weight. Utilization review is a pre-litigation tool and is not a substitute for an ALJ's independent weighing of the totality of the medical evidence of record. [cite omitted]

Regarding the necessity of the van, the Board held as follows:

Conversely, for the same reasons the wheelchair/scooter is compensable, the van is not. Again, we are unable to

locate any guidance from our appellate courts on the question of whether a handicap-equipped van constitutes an appliance contemplated by the statute. Professor Larson, in his treatise on workers' compensation summarized the case law on the issue by stating:

As to specially-equipped automobiles for paraplegics, New York, North Carolina, and South Dakota have denied reimbursement, on the ground that an automobile is simply not a medical apparatus or device. Some states have held contra. Pennsylvania has approved installation of hand controls in claimant's automobile. The statute in Maine is not limited to medical apparatus or devices but more broadly includes reasonable and proper medical aids and physical aids made necessary by the injury (Emphasis original.) (Footnotes omitted).

Vol. 5, Arthur Larson, Larson's Workers' Compensation, Chapter 94, § 94.03 (2002). Our independent research of out-of-state cases, while not exhaustive, leads us to the conclusion that whether a specially equipped vehicle or retrofitted vehicle may constitute a compensable item is a question of statutory interpretation.

The Workers' Compensation Board has addressed this particular question on only one occasion. In Uninsured Employers' Fund v. Thomas D. Rossi, Claim No. 92-32098 rendered September 30, 1994, we determined, relying on National Pizza Co. v. Curry, supra, that a handicap-equipped vehicle was

both reasonable and necessary for the psychological or physiological affects [sic] of paraplegia and that such an award was within the meaning of 'appliances' contained with KRS 342.020. Assuming for the moment the correctness of that decision, the ALJ's denial of the medical equipped van must still be affirmed.

Here, both Dr. Carothers and Roberts sang the praises of the Rascal scooter because of its increased maneuverability, ease of control and transportability. The evidence clearly established that Robert was not only able to drive, but was able to load, unload, and transport her current scooter in her privately owned vehicle. Furthermore, Dr. Carothers' assessment of the need for a van was extremely limited and equivocal at best. For those reasons, we believe the ALJ drew a fair inference from Dr. Carothers' reports that a handicap-equipped van would only be necessary if the motorized wheelchair/scooter were not provided. Although not directly addressed by the ALJ, implicit in his findings that the electric wheelchair/scooter would provide a viable alternative to a handicap-equipped van must necessarily include that optional equipment necessary to load/unload and transport utilizing Roberts' existing vehicle. We have not been directed to any evidence of record, nor could we find any, which would compel an alternative finding. [cite omitted] In light of the unique facts in this case, an expenditure of \$60,000 for a handicap-equipped van is neither reasonable nor necessary for the cure and relief of Roberts' injury. [cite omitted].

In an October 3, 2008, Opinion, Award, and Order resolving a subsequent medical dispute, Hon. Richard Joiner, Administrative Law Judge ("ALJ Joiner") determined as follows:

1. It has previously been found that Plaintiff sustained work-related injury(ies) on November 28, 1981 and on March 23, 1983. The defendant-employer had due and timely notice of plaintiff's injuries.

2. Causation/work-relatedness of present and future medical treatment for the original work injuries; reasonableness and necessity of present and future medical treatment for the original work injuries has been raised as an issue. The prior decisions can reasonably be construed as having decided that the 1981 ankle injury is a significant factor in creating an impairment to Ms. Roberts's ability to walk. I cannot make any blanket finding in favor of the employer on these issues. Each of those needs to be addressed on a case-by-case basis.

3. A Tempur-Pedic queen size electrical bed. A product in question that has been requested is a Tempur-Pedic bed. The advertising material and marketing material submitted into evidence represents that the mattress and bed will improve the quality of the patient's life. While the mattress and bed may have some beneficial effect, that beneficial effect does not make the mattress and bed a medical appliance, a surgical appliance, nor a hospital appliance. It is not such an appliance. Unless the mattress is an appliance covered by K.R.S. 342.020, the employer cannot be made to pay for

it. Having decided that the mattress in question is not something that the employer can be made to pay for, I need not reach the issues of whether the mattress is reasonably required for treatment of Ms. Roberts's low back condition or whether the need is caused by the injury of March 23, 1983.

4. Lift chair, and gel cushion. The lift chair was deemed to be medically necessary and appropriate and consistent with medical standards by Dr. Melanie H. Toltzis. She found that the accessory gel cushion is not medically necessary. The chair has also been recommended by Dr. Tamberly McCoy (November 10, 2004) and Dr. Sanapati (November 15, 2004), both in relation to the injuries. I accept those determinations.

5. Aquacise exercise program. This was recommended by Dr. Carothers as early as November 10, 1992. I accept this recommendation.

6. Physical therapy. I do not see any current recommendation for specific physical therapy and therefore cannot approve it.

7. Weight loss program. A weight-loss program, while it is likely to be beneficial to the patient, is not a treatment for the effects of the injury. I do not believe the employer is obligated to pay for this.

8. Rhizotomy. I do not find any specific recommendation for a rhizotomy. It will not be ordered.

9. Ankle replacement. Dr. Rouben appears to recommend an ankle fusion as opposed to an ankle replacement. He referred Ms. Roberts to Dr. Hockenbury who determined that Ms. Roberts is not

a candidate for ankle replacement. I find that ankle replacement is not an appropriate treatment for the effects of the 1982 ankle injury.

10. Psychological therapy or treatment. I believe that Ms. Roberts's psychological condition is not the result of her injury therefore, I do not award any psychological or psychiatric treatment as treatment for the injury.

11. Repairs or modifications to be made to Ms. Roberts's motor vehicle will be considered because evidence has been submitted to demonstrate that the repairs or modifications can be performed at a reasonable expense. It has previously been determined that Ms. Roberts is entitled to a motorized chair or scooter as a medical device. She should have the opportunity to transport this scooter and has offered what appears to be an estimate for \$237.87 to modify her van so that she will have the necessary springs to take care of the transportation problem. I find this is a reasonable request.

CONCLUSIONS

1. Carol L. Roberts sustained work-related injuries on November 28, 1981 and on March 23, 1983. She gave due and timely notice of these injuries.

2. As a result of one or both of these injuries, Carol Roberts should be provided with a lift chair.

3. As a result of one or both of these injuries, Carol Roberts should be provided with an aquacise exercise program.

4. As a result of one or both of these injuries, Carol Roberts should be

provided with repairs or modifications to her motor vehicle in accordance with the estimates that had previously been submitted. Recognizing that the estimates are no longer current, I will authorize such improvements not to exceed \$500 without prior approval from the administrative law judge.

5. Carol L. Roberts does not require a Tempur-Pedic Queen size electrical bed, a gel cushion, a weight-loss program, or psychological therapy or treatment as medical expense reasonably required for the cure and relief of the effects of either the injuries.

6. Carol Roberts does not require physical therapy or any rhizotomy at this point in time in relation to either of these injuries.

In a December 2009 opinion, this Board affirmed in part, vacated in part, and remanded to the ALJ for additional findings on the sole issue of the compensability of a Tempur-Pedic queen-size electric bed.³ On remand, ALJ Joiner concluded Roberts was entitled to the Tempur-Pedic queen-size electric bed. The ALJ's decision on remand was not appealed.

On January 14, 2014, UPS filed a motion to reopen, Form 112 medical fee dispute and motion to join Dr. Eric Goebel as a party asserting its filing was based on a request for a wheelchair van for Roberts which it was

³The appeal to the Court of Appeals was dismissed.

contesting. It contended utilization review was not applicable since the request was not for a medical service as defined in 803 KAR 25:190 Section 5. UPS attached a copy of Neurosurgical Consultant's form containing Dr. Goebel's handwritten notation submitted by Roberts upon which Roberts wrote:⁴

12-12-12

Mike Beck (Liberty Mutual)

Here is your demanded prescription for the van in order for me to be able to have a life, got the wheelchair you've had a prescription for, for 14 months and refused to provide transportation for. You and Sharon Smith LIED, you said you were waiting on word from HOME OFFICE. They told me yesterday its [sic] your office's choice to get it approved!

Also, you suppose [sic] to provide me a medical card, get me one.

Carol Roberts
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UCC1-308

In a March 11, 2013, Order, the ALJ indicated he had conducted a telephonic conference concerning the medical fee dispute. Significantly, the ALJ indicated another telephonic conference would be conducted on March 19, 2003, at which time he would take up Roberts' objection to attending a medical evaluation requested by UPS and her

⁴Dr. Goebel is a member of Neurosurgical Consultants.

objection to the medical fee dispute as not being timely which the ALJ treated as an oral motion to dismiss.

To his March 19, 2013, Order, the ALJ attached the following letter he had received from Dr. Goebel:

Ms. Roberts is a lady I saw previously with a CAT scan of her lumbar spine that demonstrated some stenosis at L3-4, but this was fairly moderate in nature. She had a lot of back pain. She had been electric wheelchair dependent for some time. When I saw her previously there was nothing surgical to do with her and I think her problem is multifactorial.

When I saw her she had insisted that she get a prescription for a wheelchair accessible van. I did not think that was really necessary. She was really argumentative with me about this and very insisted upon, "this was her right and she deserved it given all her activities she had done in the past." I essentially gave into her. I gave her a prescription for it and this has been denied. She is fighting this and in my opinion I do not think there is any absolute necessity for her to have this van. I do not see anything medically that absolutely warrants it, and even though I prescribed it before it was essentially out of her persistence that I was willing to do this.

Noting the letter speaks to the issue of the wheelchair van, and Roberts may want time to develop additional evidence, the ALJ extended proof time for an additional thirty days to allow Roberts the opportunity to introduce evidence in support of her claim for a wheelchair van. A

telephonic benefit review conference was set for May 1, 2013.

On March 21, 2013, UPS filed a response to the oral motion representing that on November 6, 2012, Roberts sent Liberty Mutual Insurance Company ("Liberty Mutual") a September 7, 2012, note from Dr. Mark Milsap, an ophthalmologist with Physicians Eye Center, stating she needed a van with a lift that can support a 400 pound wheelchair. UPS contended Dr. Milsap is not Roberts' designated treating physician and as an ophthalmologist, is not qualified to render an opinion concerning the need for a wheelchair van. It stated Roberts does not have a compensable ophthalmological condition. It represented Michael Beck, with Liberty Mutual, informed Roberts on November 9, 2012, in a telephonic conference that Dr. Milsap, as an ophthalmologist, is not qualified to make a recommendation for a wheelchair van. It also represented that on December 12, 2012, Roberts submitted a note from Dr. Goebel prescribing a wheelchair van. Accordingly, it asserted the request for authorization of wheelchair van was contested in a timely fashion by virtue of its Form 112 filed on January 10, 2013, and requested the motion be overruled.

On March 27, 2013, the ALJ entered an order relative to *ex parte* communications and e-mails which had either been sent to him or the Department of Workers' Claims which were not filed in the record. He indicated copies were sent to counsel for UPS. The ALJ stated that in an e-mail dated March 26, 2013, Roberts transmitted a motion to dismiss which was not made a part of the record. He stated the motion raises an issue which was brought up during the March 11, 2013, conference which he would consider at the next conference. Because Roberts' motion to dismiss reiterated the issue she raised in the initial conference regarding the timeliness of the filing of UPS' medical fee dispute, the ALJ considered it as an issue preserved for ruling. Accordingly, the ALJ attached Roberts' motion to dismiss to the order. The ALJ noted UPS had recently filed a written response concerning Roberts' objection. However, to the extent the e-mail from Roberts made assertions to which UPS wished to respond, it had ten days to do so. The ALJ indicated he would rule upon the merits of the motion in the near future.

On April 8, 2013, Roberts filed a response to the ALJ's March 27, 2013, Order to which she attached an estimate for the wheelchair van which included a leather

upgrade costing \$9,990.00. The total invoice for the van was \$80,045.23.

On April 10, 2013, the ALJ entered an order in part scheduling a hearing for May 13, 2013, in Owensboro, Kentucky. The ALJ noted proof would remain open on the sole issue regarding the necessity of the wheelchair van through the date of the telephonic benefit review conference scheduled for May 1, 2013. The ALJ indicated the sole issues were the need for the wheelchair van and Roberts' motion to dismiss the medical fee dispute.

On April 16, 2013, UPS filed the April 3, 2013, letter of Dr. Goebel in which he stated he spoke to UPS' attorney. He noted Roberts was apparently requesting a lift chair because of the "findings in her back." Dr. Goebel stated the MRI revealed moderate stenosis at L3-4 and in the remainder of the spine there was nothing significant. In his opinion, individuals with severe stenosis developed lower extremity weakness when they walked for an extended period. However, moderate stenosis "never does that" and would not lead to one being unable to get out of a chair. He stated there was no indication for the lift chair.

On that same date, UPS filed a supplemental medical fee dispute indicating Custom Cycle & Mobility

Supply submitted an estimate of \$3,108.65 for a Golden Technology Liftchair which it characterized as "maximum comfort, large" which included the cost of delivery and set up. UPS cited to Dr. Goebel's April 3, 2013, letter as the basis for contesting the compensability of the liftchair. UPS attached the bill it received from Custom Cycle & Mobility Supply.⁵

On April 22, 2013, Roberts filed voluminous documents one of which included a copy of the prescription/order form on which Dr. Milsap wrote "patient needing a van with lift that can support a wheelchair over 400 pounds." The copy of the prescription also contains Roberts' handwritten note:

Per our phone conversation 11-6-12
transmission date
Per your email 11-5-12
Attn: Mike Beck
Liberty Mutual
603-559-2401
Page 1 of 1
Transmitted 11-6-12
For Carol L. Roberts

So I can have a way to transport the new wheelchair which has been cleared. There is no wheelchair lift to attach to my or any vehicle to transport its weight therefore its [sic] imperative you get a van with drive on capability to transport it.

⁵ On that same date, UPS also filed a motion to join Custom Cycle & Mobility Supply as a party.

On April 26, 2013, Roberts filed another group of documents including a letter addressed To Whom It May Concern from Phillip Smith, the owner of Custom Cycle & Mobility Supply. He stated that after an extensive search he was unable to find a lift for the rear of a pickup truck that would carry a 400 pound wheelchair. He noted most hitches are limited to 350 pounds and the lift itself weighs over 100 pounds. Therefore, the lift and chair will reach a weight of over 500 pounds. He stated the lifts will only pick up 350 pounds. Roberts also attached a letter addressed to her from Dan D. Jordan of Superior Van & Mobility. In that letter, Mr. Jordan discussed her need for a vehicle to transport her Quantum 6000 wheelchair. He suggested Roberts needed a full size van for transportation of her power wheelchair which had a lift in the side door or rear door. He noted the full size van will require a raised roof and raised door for access to the doorway to secure a wheelchair. He noted adding securement hardware and retractable tie-downs is required to secure the wheelchair.

On April 29, 2013, UPS filed a notice of withdrawal of the supplemental medical fee dispute indicating it was paying for the contested lift chair which

was being purchased at the price quoted by Custom Cycle & Mobility Supply.

On May 1, 2013, the ALJ entered an order indicating that on that same date he conducted a telephonic benefit review conference. The ALJ noted at the beginning of the conference Roberts withdrew her request for a hearing and requested the claim be submitted on the record to which UPS had no objection. However, UPS requested a short extension of proof time through May 14, 2013, in order to respond to some of the evidence filed by Roberts. The ALJ also noted UPS had withdrawn the supplemental dispute regarding the liftchair. The ALJ ordered the medical fee dispute regarding the compensability of the wheelchair submitted as of May 15, 2013.

On May 6, 2013, the transcript of the April 19, 2013, deposition of Michael Beck ("Beck") with Liberty Mutual was filed in the record.⁶ Beck testified his title with Liberty Mutual is Complex Director and as such he supervised a group of individuals who manage high exposure workers' compensation claims. He acknowledged that in November 2012 he received a fax of a wheelchair van

⁶ The transcript reflects Roberts participated in the deposition via telephone.

prescription written by Dr. Milsap. Beck estimated he received the fax on either November 8 or 9. He testified he spoke with Roberts on November 9, 2012, and advised he could not accept the prescription written by an "eye doctor" because Dr. Milsap was not her designated physician and he did not have the appropriate specialty to prescribe such a vehicle. Beck advised Roberts would need an orthopedic or neurological physician to evaluate her and comment on her need for a handicap-van. Beck testified that on December 11, 2013, he received a prescription for a wheelchair van from Dr. Goebel. He acknowledged Liberty Mutual had already paid for the Tempur-Pedic bed, electric scooter, and a wheelchair, as well as \$500.00 for vehicle repairs. Beck went on to provide various dates on which Liberty Mutual had paid for repairs to the wheelchair and/or the lift chair. Beck noted that in her original claim Roberts did not allege a compensable work-related eye condition.

On May 14, 2013, UPS filed a print out from Cheric Manufacturing and from Scoota Trailer, LLC regarding trailers which are equipped to transport a power chair.

On May 29, 2013, the ALJ entered, in relevant part, the following Interlocutory Opinion & Order:

Discussion of the Evidence

Voluminous amounts of evidence (and extraneous materials) have been filed in this claim, and the ALJ has reviewed all of it. Because the ALJ finds that the Defendant did not comply with the applicable regulations by timely referring for Utilization Review an initial prescription for the van - one written by another physician prior to Dr. Goebel - evidence primarily related to that issue will be set forth below.

On September 7, 2012, Roberts obtained a prescription from Dr. C. Mark Millsap, an ophthalmologist, stating as follows: "Patient needing a van with a lift that can support a wheelchair over 400 pounds." (Exhibit 1 to this Opinion.) She submitted that prescription to the carrier on either November 6, 2012 (Roberts' notation on Exhibit 1) or November 7, 2012 (Liberty Mutual representative depo, *infra*, p. 3.)

The Defendant filed its motion to reopen with accompanying Form 112 on January 14, 2013. The Defendant noted its challenge to the wheelchair van that on December 11, 2012 had been recommended by Dr. Goebel, a neurosurgeon. (Exhibit 2 to this Opinion.) No medical evidence was attached to the Motion or Form 112 supporting that position. The Motion and Form 112 were silent as to Dr. Millsap's previous prescription.

Roberts filed a motion to dismiss on the grounds that the medical dispute had not been timely filed following the carrier's receipt of Dr. Millsap's prescription for the van. In various orders, the ALJ noted that he was passing ruling on the timeliness issue to the merits of the dispute, and gave

the parties time to submit proof on both of the pending issues.

In its written response to the motion to dismiss, the Defendant stated that it did not file a medical dispute in response to Dr. Millsap's prescription because, as an ophthalmologist, he "is not qualified to render an opinion regarding the need for a wheelchair van; (Roberts) does not have a compensable ophthalmological condition."

During proof time, the Defendant took the deposition of Michael Beck, a supervisor of high-exposure claims for the Defendant's carrier, Liberty Mutual. Beck testified that after receiving Dr. Millsap's prescription for the van on November 7, 2012:

I spoke to Miss Roberts on November 9, 2012 approximately 3:40 p.m., and explained to her that we could not accept the prescription for the handicap van that was written by the eye doctor since he was, one, not her designated physician, and two, not the appropriate specialty that should have been prescribing such a vehicle...

I told her that she would need to get either an orthopedic or a neurological physician, a more appropriate type of doctor who could evaluate her and comment as to the need of the handicap van.

(depo p. 4-5).

Roberts then obtained the prescription for the van from Dr. Goebel, who, after being joined as a medical provider to this dispute,

retracted his recommendation in a report dated March 12, 2013.

Findings and Conclusions

The Administrative Law Judge grants Roberts' motion to dismiss this medical dispute and orders the Defendant liable for the prescribed van because the Defendant did not initiate Utilization Review as it was required to do in response to Dr. Millsap's prescription for the van; and because it did not timely file a motion to reopen, which, when filed, was not accompanied by medical evidence supporting its position that the van was not "compensable."

The Defendant states in its Brief that "Utilization Review does not apply since the request is not for a medical service per 803 KAR 25:190 §5." However, the ALJ finds that Roberts' claim meets several of the criteria for mandatory Utilization Review listed at 803 KAR 25:190 §5(1), including subsection (a), which requires UR when preauthorization of medical treatment is requested. Dr. Millsap's prescription for a wheelchair van is the same as a preauthorization request for medical treatment. The case law is as clear as the regulation in stating the requirement for a carrier to submit a provider's preauthorization request for Utilization Review. *Kentucky Associated General Contractors v. Lowther*, 330 S.W.3d 456 (Ky. 2011). Defendant UPS did not submit Dr. Millsap's request for utilization review, and did not file a medical dispute within 30 days. "If a contested expense is subject to utilization review, such as in the case of a pre-authorization request, the regulation prohibits a medical dispute from being filed before the process is exhausted but gives 'the employer or its

medical payment obligor' 30 days after the final utilization review decision in which to file a medical dispute." *Id.* at 460.

As it had expressed previously, the Defendant reiterates in its Brief that Dr. Millsap "is not qualified to address the Plaintiff's work-related back and left ankle problems..." (p. 6). However, Dr. Millsap is a "physician" - as defined at KRS 342.0011(32) - and therefore "qualified" to recommend treatment in a workers compensation claim. A carrier cannot avoid the requirement of Utilization Review because it believes a doctor's recommendations are outside his practice area. In this case, the claims professional improperly exercised the medical judgment that the prescribing physician was not qualified to recommend a particular medical benefit, and similarly expressed the judgment that only a certain type of medical specialist was "appropriate" for recommending such a benefit. For the ALJ to have had the opportunity to reject the recommendation of a physician whose specialty falls outside the scope of Roberts' work injuries, a medical dispute with supportive medical opinion had to be timely filed. (The suggestion in the Defendant's Brief, at page five, that the carrier was unaware "of the condition for which (the van) was being sought" - because the prescription was written by an ophthalmologist - is contradicted by Mr. Beck's account of his conversation with Roberts wherein he admitted that he knew why it was being prescribed.)

The exception to the 30-day rule for filing a motion to reopen/ medical dispute is initiation of the UR process, which the Defendant did not do. Even if

the Defendant had a basis on which to avoid the UR process, it would still have been required to file a motion to reopen and assert a medical dispute within 30 days of receipt of Dr. Millsap's prescription for the van. It did not do that either. In fact, 30 days had passed following Mr. Beck's receipt of Dr. Millsap's prescription before Dr. Goebel issued his own prescription; so the issue was "dead," or settled, by the time the Defendant filed its motion to reopen, making the subsequent filing of a motion to reopen of no consequence.

Mr. Beck testified that he also disregarded Dr. Millsap's prescription for the van because Dr. Millsap was not Roberts' "designated physician," i.e., her Form 113 doctor. However, there is no requirement that a request for medical benefits come from a Form 113 doctor. And further, defending against a medical bill or a treatment recommendation from a non-Form 113 doctor still requires the filing of a medical dispute within 30 days of receipt of the bill or request for preauthorization.

By not initiating utilization review upon Roberts' submission of Dr. Millsap's prescription for the wheelchair van; by not obtaining any medical evidence to support its denial and attaching it to the motion to reopen as required by 803 KAR 25:012 §1(3)(a)3; and by not filing a motion to reopen within 30 days of receipt of Dr. Millsap's prescription, the Defendant has waived its opportunity to deny the van.

The parties have not developed evidence on the scope of the benefit to which Roberts is entitled based on Dr. Millsap's prescription. Therefore, this

Opinion shall be interlocutory, and the parties are given 30 days to submit evidence on a reasonable cost for a "van with a lift that can support a wheelchair over 400 pounds," as prescribed by Dr. Millsap.

Interlocutory Order

The Defendant's motion to reopen to assert a medical dispute is dismissed on the grounds that the carrier did not timely initiate utilization review in response to Dr. Millsap's first request for the disputed medical benefit, the failure of which prevented the filing of a timely motion to reopen.

The claim shall remain pending for the purpose of ruling on any dispute as to the reasonable cost of the van prescribed by Dr. Millsap.

The ALJ will initiate a telephonic BRC on July 15, 2013 at 2:45 p.m. CT, 3:45 p.m. ET. Ms. Roberts shall advise the ALJ's office (270.746.7178) of the number at which she can be reached for that conference.

UPS filed a petition for reconsideration. On June 25, 2013, the ALJ entered, in relevant part, the following order:

. . .

As to the Defendant's petition for reconsideration, the ALJ finds no patent error in the Opinion, and therefore the petition is denied. KRS 342.281. The ALJ continues to believe that the Defendant was required to have Dr. Millsap's prescription for a "wheelchair van" submitted for utilization review, and to have timely filed a motion to reopen upon receipt

of Dr. Millsap's prescription. To again address a particular argument raised by the Defendant, the ALJ disagrees with its contention that it was unaware of the reason why Dr. Millsap, an ophthalmologist, prescribed the van based on the fact that the prescription "does not indicate for which of the Respondent/Plaintiff's myriad heal conditions, work related or not, the wheelchair van is prescribed." Judicial notice can be taken that Ms. Roberts has been in continuous contact with the carrier about one issue or another since her injury occurred some 30 years ago. More specifically, there is no doubt but that the subject of the wheelchair was raised with the carrier prior to Dr. Millsap's September 7, 2012 prescription. When Ms. Roberts faxed the prescription to the carrier, she confirmed in a note that the matter had previously been discussed between them by phone and email. Additionally, Ms. Roberts specifically wrote that she was requesting the van "to transport the new wheelchair" she had been provided by the carrier because of her work injuries. So the Defendant cannot reasonably contend that it was confused over whether the prescription for the van was related to the workers compensation claim. And to again address the argument that Dr. Millsap, as an ophthalmologist, was not qualified to provide a prescription for something related to back or ankle injuries, the ALJ continues to believe that the carrier must turn a blind eye to the qualifications of the physician from whom a request is made. Dr. Millsap is a "physician" as defined by KRS 342.0011(32), and it is up to the Defendant to properly contest a doctor's recommendation before an ALJ with evidence from a physician whose specialty might be found more suitable

for prescribing benefits related to a back and ankle injury.

Ms. Roberts has also filed a post-Opinion pleading that will be considered as a petition for reconsideration. Ms. Roberts states that she has raised a claim of "fees and expenses" against the Defendant for these proceedings. The ALJ sustains Ms. Roberts' petition to the extent that the ALJ committed a patent error in not addressing her claim, one the ALJ will consider as being for sanctions for unreasonable proceedings under KRS 342.310. The ALJ finds that the circumstances of this claim do not give rise to any award of sanctions, and therefore rejects that claim. Ms. Roberts additionally appears to express disagreement with the ALJ having made his opinion interlocutory in nature, and for providing additional proof time on a reasonable cost for the "wheelchair van." Those objections are overruled. Ms. Roberts is not entitled to unilaterally select a van of her choosing; the ALJ must determine from the evidence what the reasonable type and cost of a van shall be. A telephone conference remains scheduled for July 15, 2013 at 2:45 p.m. CT, 3:45 p.m. ET, at which time the ALJ will discuss the final submission of the claim for a decision on the extent of the Defendant's liability for the van.

On July 15, 2013, UPS filed a motion for a certified evaluation to determine the modifications required by the proposed wheelchair van.

The report of Jessica Schulthesis ("Schulthesis"), dated July 22, 2013, was introduced

setting forth the equipment she recommended in order for Roberts to be able to drive the van.⁷ Section A of that report indicates as follows: "Although this evaluation is unable to relate to her current reported diagnosis to her work injury, if she does have this wheelchair she will need a way to transport. The following equipment is recommended for her to be the driver." Among the equipment needed is a full size van "to accommodate the weight of her wheelchair combined with [Roberts'] weight which she is reported to be 250 pounds for a combined weight of 600 pounds." Section B of the report states that if Roberts should have the surgeries recommended or any other surgeries she believed Roberts would need to be a passenger. She listed the additional equipment which would be the absolute minimal equipment necessary for her to be a passenger. In Section C of the report, Schulthesis stated as follows: "It is recommended that if at all possible that a person ride in a proper vehicle seat instead of a wheelchair since that is the safest option." In order for Roberts to do this and also have the option to drive, Schulthesis provided a list of other needed equipment to be inserted in the van.

⁷ Schulthesis is employed by The Rehabilitation Center, Inc., as an occupational therapist, and certified driver rehab specialist.

On August 26, 2013, the ALJ entered the following order:

This claim is before the Administrative Law Judge following an Interlocutory Opinion and Order issued on May 29, 2013, at which time the ALJ dismissed the Defendant's motion to reopen to challenge a wheelchair van prescribed for Plaintiff Carol Roberts on grounds that it had not initiated Utilization Review; had not filed its dispute within the required 30 days; and had not filed any medical opinion supporting denial of the van. The ALJ reopened proof on the issue of the modification required for the van that Roberts was awarded.

Ms. Roberts filed an estimate from Superior Van & Mobility in Louisville. The quote specifies a 2013 Ford E250 van with modifications for her wheelchair. The total is \$80,045.23.

One of the motions filed after the Interlocutory Opinion was the Defendant's request to have Ms. Roberts seen for a "certified evaluation" to determine specifications or modifications to be made for a van to suit her requirements. The ALJ took that matter up in one of many telephone conferences he has conducted with the parties. Ms. Roberts objected to traveling for any such evaluation. The ALJ resolved the matter by allowing the evaluation that the Defendant requested, but requiring that it produce an evaluator in Roberts' hometown of Owensboro.

Jessica Schultheis, an occupational therapist and certified driver rehabilitation specialist with The Rehabilitation Center, Inc., in

Evansville Indiana, performed a "vehicle modification evaluation" on July 22, 2013. Ms. Roberts reported to Ms. Schultheis that she needed a van to accommodate a Quantum 6000 wheelchair that weighs more than 410 pounds. Ms. Schultheis noted that she had no records to substantiate which of Roberts' medical conditions were related to her work injury, and which were not. She said her recommendations "are based on her need due to her current medical state regardless of the cause." Her recommendations took the form of three sections in her report. The first section stated that if Ms. Roberts has a wheelchair prescribed for her work injuries "she will need a way to transport it," and thus recommended a "full size van" with modifications to accommodate her large chair. In the second section, Schultheis said that if Ms. Roberts underwent further surgeries that she said were being contemplated for her then the van should be modified to allow Roberts to ride as a passenger. The third section recommended further modifications related to having the option for Ms. Robert to drive the van herself, and be able to ride more safely as a passenger.

The ALJ has reviewed both parties' Briefs and related pleadings that have addressed the issue at hand from the beginning of this case.

The ALJ does not find that Ms. Schultheis' recommendations differ in any appreciable way from the Superior Van & Mobility estimate. The ALJ finds that the Defendant is liable for the full-size van specified by Superior Van & Mobility and "Section A" of Ms. Schultheis' report. Since Ms. Schultheis did not provide evidence showing that the modifications could be

reasonably made to a late-model, low-mileage van, the Defendant shall provide a new van.

The ALJ has not been provided medical or other evidence to establish the necessity of modifications for Ms. Roberts to travel in the van as a passenger. However, the Defendant is put on notice that if her work related conditions deteriorate as a result of future surgeries or otherwise to the point that allowance must be made for her to ride as a passenger then additional modification could be awarded through a subsequent medical dispute. Although the Defendant is not presently liable for the modifications for Roberts to travel as a passenger, it may be at risk of that expense in the future. Whether it is more cost-productive to provide that modification now to possibly avoid greater expense in the future is its decision.

Two specific items associated with the van have been placed at issue. The ALJ finds that the "leather upgrade" in the Superior Van & Mobility estimate is not the Defendant's liability. The ALJ has considered Ms. Roberts' argument on this point, but finds that leather seats are not required for any work related medical condition. Ms. Roberts is responsible for this added package if she chooses to have it in her van.

The ALJ finds that Ms. Roberts' request for a remote starter is reasonable, and is the Defendant's liability. Her condition requires, for example, that she be afforded the ability to start her vehicle and defrost the vehicle's windows in inclement weather from inside her home to avoid potentially hazardous, duplicate trips outside.

Order

1. Plaintiff Carol Roberts shall recover from Defendant United Parcel Service, Inc., a new, full-size van with modifications to transport her wheelchair as specified above.

2. The ALJ is in receipt of "Motion to Resolve Medical Dispute" that Ms. Roberts filed with the Department of Workers Claims on August 7, 2013. The ALJ considers that motion as a motion to reopen to assert a medical dispute, and grants that motion to the extent that the matter is placed at issue. The Defendant shall file a statement of its position on this dispute within 10 days. If the Defendant's pleading indicates that the issue raised by Ms. Roberts over wheelchair batteries is disputed, an order providing for a short proof schedule will be issued. To further restate and clarify for Ms. Roberts, the dispute she has raised over the wheelchair batteries is not yet ripe for decision and therefore this Order cannot address its merits.

UPS filed a petition for reconsideration and Roberts filed a motion to reconsider and motion for clarification. On September 17, 2013, the ALJ entered the following order:

As to pending matters, the ALJ orders as follows:

1) The Defendant's petition for reconsideration of the August 26, 2013 Opinion and Order is overruled. The ALJ believes he properly relied on written filings submitted by Ms. Roberts, and associated medical records, to determine that a remote starter is reasonable and necessary given her

physical condition from the work injury. The Defendant's argument that Ms. Roberts could modify her own van seems to the ALJ contrary to the report of Jessica Schulthesis, who it arranged to evaluate necessary modifications for Ms. Roberts' van.

2) Plaintiff Roberts' petition for reconsideration of the finding against her on the claim for leather seats in the van that was awarded is overruled. In the same petition, Ms. Roberts requested further findings with respect to 'upkeep' on the van. Such has not been before the ALJ, but he can state in this order the regular, ordinary cost of maintaining any vehicle, to include insurance and general maintenance, is her responsibility.

3) Ms. Roberts' motion of recovery of fees and expenses is overruled. There is no provision for such in the statute or regulations. There is a provision for an award of sanctions under KRS 342.310, but the ALJ has already ruled on June 25, 2013, that sanctions are not appropriate in this case.

4) Shortly before issuance of the August 26, 2013, Opinion and Order, Ms. Roberts filed a pleading that the ALJ considered to be her own motion to reopen to assert a medical dispute over batteries for her wheelchair. Paragraph number two of the Order on page four of that Opinion directed the Defendant to state its position on this issue. Nothing has been received. Therefore, the ALJ considers this matter to have been placed at issue for determination. The parties are given 30 days in which to submit evidence on this dispute.

5) On September 12, 2013, the Defendant filed a Form 112/medical dispute related to a request from Ms. Roberts

for the carrier to pay for pads for urinary incontinence that allegedly results from 'neurological damage' from the work injury. The Defendant has verified that it has received no medical record establishing the relatedness or necessity for the pads, as a result, it has no obligation to pay for them. This Form 112 of the Defendant, which is described as being filed 'in an abundance of caution,' was not required and is therefore dismissed.

6) Issues in this claim have previously been submitted on the record, with Ms. Roberts' affirmative waiver of her right to a Hearing. The ALJ does not believe it necessary to conduct another telephonic Benefit Review Conference with the parties on the remaining issue. If Ms. Roberts does not file a request for a Hearing on the issue involving the wheelchair batteries within 30 days, the ALJ will consider the Hearing to have been waived and will submit the pending dispute for decision.

On September 19, 2013, the ALJ entered an order noting the medical fee dispute over the replacement cost for wheelchair batteries was dismissed as moot since UPS had tendered a check to Roberts to purchase the replacement batteries. The ALJ stated "[t]his Order resolves all pending matters in this case, and is therefore a final Order."

On September 24, 2013, Roberts filed a response to UPS' position statement and new evidence to be entered

or added to the record, notice of fee schedule for litigating frivolous re-openings, motion to reconsider and clarification, and a motion to hold claim in abeyance in light of the recent supplemental medical fee dispute.

On September 24, 2013, the ALJ entered an order noting that since Roberts had filed an appeal he had lost jurisdiction and was unable to rule on the pleadings.

By order dated July 15, 2014, the Board placed the matter in abeyance and remanded the claim to the ALJ for a ruling on all pleadings filed on September 24, 2013.

On July 18, 2014, the ALJ entered an order in which he stated he would treat Roberts' motion to reconsider and motion for clarification as a petition for reconsideration. Noting no medical evidence was submitted in support of Roberts' entitlement to the leather upgrade, the ALJ reiterated his finding UPS was not liable for the leather upgrade package as it is not reasonable or necessary. The ALJ noted in the same pleading Roberts argued her claim for expenses had not been ruled on and he would treat this as a claim for sanctions and costs pursuant to KRS 342.310. The ALJ did not find the circumstances in this dispute to warrant assessment of sanctions. The ALJ also stated this order addressed another pleading filed by Roberts on September 24, 2013,

styled "Notice of Plaintiff's Fee Schedule for Litigating Frivolous Reopening." Finally, the ALJ ordered UPS was not liable for the expenses associated with the normal use and routine maintenance of the van which included gas, oil changes, and insurance which are expenses Roberts would have with any vehicle she owns. The ALJ noted any problem which developed with the mechanism of the van unique to her work injury such as the wheelchair lift would likely be UPS' liability. The ALJ concluded the other September 24, 2013, pleadings filed simultaneously did not present any issues to be ruled upon.

Significantly, neither party filed a petition for reconsideration or an appeal from the July 18, 2014, Order on Remand.

Based upon our review of Roberts' notice of appeal and brief, it seems Roberts contends the ALJ erred in denying the leather seat upgrade as he did not explain why he felt it was not warranted. Roberts asserts the leather seats are needed in order to allow her to make the transition from sliding from one seat to another. She states this is necessary because of her physical conditions which she outlines in depth. Roberts also argues the ALJ erred in not awarding fees and expenses as sanctions. Finally, it appears Roberts asserts the ALJ erred in not

ordering UPS to bear the responsibility for paying for the taxes and insurance on the van. We note Roberts states she can pay for the gas, oil changes, and the costs of licensing, but because of her income she cannot pay for the taxes and insurance to cover the van.

We believe we have identified all issues raised by Roberts based on the language contained on page six of Roberts' brief, wherein she states:

None of the other issues, before the ALJ should be addressed except the issues of the VAN, the upgrade, the insurance, the taxes, and it's licensing. THOSE are the ONLY issues before this body.

On cross-appeal, UPS argues it timely filed its motion to reopen. It cites to 803 KAR 25:096 §8(3) which reads: "[a]n obligation for payment or challenge shall not arise if a statement for services clearly indicates that the services were not performed for a work-related condition." UPS argues the prescription for the wheelchair van received from Dr. Milsap does not indicate the condition for which the wheelchair van was prescribed. It asserts since Roberts never alleged an eye injury it had no obligation to challenge the initial prescription received from Dr. Milsap. It maintains Dr. Milsap was not the "requesting medical provider" and there is no explanation

on the face of the prescription explaining why or for what it was written. Therefore, the van requested by Dr. Milsap was not for Roberts' work-related low back or left ankle injuries.

Liberty Mutual contends it did not deny the request, but because it was not familiar with Dr. Milsap, Beck informed Roberts he could not accept Dr. Milsap's prescription because he did not possess the appropriate specialty. Beck instructed Roberts to obtain a prescription from either an orthopedist or neurological physician. Thereafter, Roberts submitted a prescription from Dr. Goebel which indicates a diagnosis of lumbar stenosis. UPS argues that within thirty days of receiving Dr. Goebel's prescription, it filed a motion to reopen to contest the prescription.

UPS also argues the ALJ erred in concluding the request for the wheelchair was subject to utilization review, as 803 KAR 25:096 §8(3) exempts it from submitting Dr. Milsap's prescription to utilization review because the prescription clearly indicates the services were not for a work-related condition. It also notes Dr. Milsap does not indicate the prescription is for a low back or left ankle condition. Further, the fact Roberts handwrote on the prescription that it was for Roberts' new wheelchair is

irrelevant as Roberts is not the prescribing physician. UPS argues the wheelchair van is not medical treatment nor was there a request for pre-authorization of medical treatment. It contends a wheelchair van cannot be construed as medical, surgical, or hospital treatment as it treats nothing. Consequently, UPS had no obligation to implement the utilization review process.

UPS also asserts Dr. Milsap is not Roberts' Form 113 designated physician. Although it concedes treatment is not limited to a designated physician, UPS argues Dr. Milsap was not known to Liberty Mutual. Therefore, since the facts demonstrate no obligation arose to challenge the prescription, it should not be construed as a medical bill or treatment recommendation from a "non-Form 113 doctor" which still requires the filing of a medical fee dispute within thirty days of receipt of the bill or request for pre-authorization. UPS observes Dr. Milsap did not bill UPS nor was he seeking pre-authorization. It argues the evidence demonstrates a wheelchair van is neither causally related to Roberts' work injuries nor reasonable and necessary treatment of those injuries.

UPS also makes the following public policy argument:

This award of a wheelchair van is contrary to public policy. If allowed to stand, the medical fee dispute system governed by KRS Chapter 342, by extension, can only become further bogged down. Giving any physician authority to prescribe anything, even if the condition is not on the face of the prescription, because they are 'physicians' under statute will become costly. Moreover, claimants are not well served by those who prescribe items outside their specialties. They, in fact, could be harmed.

UPS argues, in the alternative, it should only be liable for the wheelchair van prescribed by Dr. Milsap. Therefore, the only requirement is that the van have a lift which can support a 400 pound wheelchair. Dr. Milsap found no other equipment necessary and does not state the van must be new. Thus, a used full size van can be customized with the accommodations.

For reasons other than those raised on appeal, we vacate and remand.

KRS 342.020(1) reads, in relevant part, as follows:

. . . The employer, insurer, or payment obligor acting on behalf of the employer, shall make all payments for services rendered to an employee directly to the provider of the services within thirty (30) days of receipt of a statement for services. The commissioner shall promulgate administrative regulations establishing conditions under which

the thirty (30) day period for payment may be tolled. The provider of medical services shall submit the statement for services within forty-five (45) days of the day treatment is initiated and every forty-five (45) days thereafter, if appropriate, as long as medical services are rendered. Except as provided in subsection (4) of this section, in no event shall a medical fee exceed the limitations of an adopted medical fee schedule or other limitations contained in KRS 342.035, whichever is lower. The commissioner may promulgate administrative regulations establishing the form and content of a statement for services and procedures by which disputes relative to the necessity, effectiveness, frequency, and cost of services may be resolved.

Pursuant to the above directive, 803 KAR 25:012 is the primary regulation relating to the resolution of medical fee disputes. Section (1) of that statute sets out the procedure for filing a medical fee dispute and reads, in relevant part, as follows:

Section 1. Procedure.

(1) A dispute regarding payment, nonpayment, reasonableness, necessity, or work-relatedness of a medical expense, treatment, procedure, statement, or service which has been rendered or will be rendered under KRS Chapter 342 shall be resolved by an administrative law judge following the filing of a Form 112 (Medical Dispute).

(2) Form 112 may be filed by an employee, employer, carrier or medical provider.

(3)(a) The Form 112 shall be accompanied by the following items:

1. Copies of all disputed bills;
2. Supporting affidavit setting forth facts sufficient to show that the movant is entitled to the relief sought;
3. Necessary supporting expert testimony; and
4. The final decision from a utilization review or medical bill audit with the supporting physician opinion.

(b) A single Form 112 may encompass statements, services, or treatment previously rendered as well as future statements, services, or treatment of the same nature or for the same condition, if specifically stated.

. . .

(6) Following resolution of a workers' compensation claim by final order, a motion to reopen pursuant to 803 KAR 25:010, Section 4(6), shall be filed in addition to the Form 112.

(a) Unless utilization review has been initiated, the motion to reopen and Form 112 shall be filed within thirty (30) days following receipt of a complete statement for services pursuant to 803 KAR 25:096.

(b) The motion to reopen and Form 112 shall be served on the parties, upon the employee, even if represented by counsel, and upon the medical providers whose services or charges are at issue. If appropriate, the pleadings shall

also be accompanied by a motion to join the medical provider as a party.

Consistent with the above provision, 803 KAR

25:096(8) states:

Section 8.

Payment or Challenge to Statement for Services Following Resolution of Claim.

(1) Following resolution of a claim by an opinion or order of an arbitrator or administrative law judge, including an order approving settlement of a disputed claim, the medical payment obligor shall tender payment or file a medical fee dispute with an appropriate motion to reopen the claim, within thirty (30) days following receipt of a completed statement for services.

(2) The thirty (30) day period provided in KRS 342.020(1) shall be tolled during a period in which:

(a) The medical provider submitted an incomplete statement for services. The payment obligor shall promptly notify the medical provider of a deficient statement and shall request specific documentation. The medical payment obligor shall tender payment or file a medical fee dispute within thirty (30) days following receipt of the required documentation;

(b) A medical provider fails to respond to a reasonable information request from the employer or its medical payment obligor pursuant to KRS 342.020(4);

(c) The employee's designated physician fails to provide a treatment plan if required by this administrative regulation; or

(d) The utilization review required by 803 KAR 25:190 is pending. The thirty (30) day period for filing a medical fee dispute shall commence on the date of rendition of the final decision from the utilization review. A medical fee dispute filed thereafter shall include a copy of the final utilization review decision and the supporting medical opinions.

(3) An obligation for payment or challenge shall not arise if a statement for services clearly indicates that the services were not performed for a work-related condition.

803 KAR 25:096 Section 1 (5) defines a statement for services as follows:

(5) "Statement for services" means:

(a) For a nonpharmaceutical bill, a completed Form HCFA 1500, or for a hospital, a completed Form UB-92, with an attached copy of legible treatment notes, hospital admission and discharge summary, or other supporting documentation for the billed medical treatment, procedure, or hospitalization; and

(b) For a pharmaceutical bill, a bill containing the identity of the prescribed medication, the number of units prescribed, the date of the prescription, and the name of the prescribing physician.

In interpreting the statute and the applicable regulations, the Supreme Court handed down Lawson v. Toyota Motor Mfg., Kentucky, Inc., 330 S.W.3d 452 (Ky. 2010) and

Kentucky Associated General Contractors Self-Insurance Fund

v. Lowther, 330 S.W.3d 456 (Ky. 2010). In Lawson, supra,

the Supreme Court stated as follows:

We determined today in *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther* [footnote omitted] that an employer wishing to contest liability for a proposed medical procedure must file a medical dispute and motion to reopen within 30 days of a final utilization review decision that recommends refusing pre-authorization. The rationale of *KAGC v. Lowther* applies with even greater force to a utilization review recommendation to grant pre-authorization. We conclude that in either instance an employer, having failed to invoke an ALJ's jurisdiction by filing a timely medical dispute and motion to reopen, may not circumvent KRS 342.020 and the regulations by engrafting such a dispute onto a worker's pending motion for TTD.

Contrary to the employer's assertion, the claimant's motion to reopen did not request "additional medical benefits." [footnote omitted] It requested TTD during her recovery from a pre-authorized surgery, a request that did not place the issue of reasonableness and necessity before the ALJ. A BRC memorandum listing the contested issues as being "med. fee dispute/compensability of surgery and TTD" is sufficiently broad to encompass a number of arguments, including one raised in the claimant's brief to the ALJ and to which the employer failed to object or respond. The argument being that the employer's failure to file a timely medical dispute and motion to

reopen to contest the favorable utilization review decision rendered the proposed surgery and related TTD compensable without regard to reasonableness and necessity. Mindful that the claimant reiterated the argument in her petition for reconsideration and preserved it on appeal, we conclude that the ALJ erred by dismissing the TTD request based on a finding that the surgery was not compensable.

Id. at 456.

In Kentucky Associated General Contractors Self-Insurance Fund, supra, the Supreme Court further explained:

. . . Initiation of the process tolls the 30-day period for challenging or paying medical expenses until the date of the final utilization review decision. [footnote omitted]

. . .

In cases involving a post-award medical dispute, the regulation requires a motion to reopen and medical dispute to be filed within 30 days of receipt of "a complete statement for services" unless utilization review has been initiated. [footnote omitted] If a contested expense is subject to utilization review, such as in the case of a pre-authorization request, the regulation prohibits a medical dispute from being filed before the process is exhausted [footnote omitted] but gives the "[t]he employer or its medical payment obligor" 30 days after the final utilization review decision in which to file a medical dispute. [footnote omitted]

II. CONCLUSIONS.

Neither KRS 342.020 nor the regulations states explicitly that an employer must file a medical dispute and motion to reopen within 30 days of receiving a final utilization review decision denying pre-authorization or pay for the medical treatment to which it pertains. We note, however, that the Board has interpreted the regulations since 2001 as equating a final utilization review decision to grant or deny pre-authorization with a "statement for services" that an employer must contest within 30 days or pay. [footnote omitted] We find no error in the Board's interpretation, having concluded that it is consistent with the authorizing statute as well as the regulatory language and being mindful of the principle that the courts give great deference to an administrative agency's reasonable interpretation of its own regulations. [footnote omitted]

KRS 342.020(1) authorizes the OWC to establish procedures for resolving disputes over the "necessity, effectiveness, frequency, and cost" of medical services. Pre-authorization and utilization review are two of the procedures the OWC adopted to accomplish that purpose. The term "statement for services" and the regulatory definition of the term may be construed as referring to a bill for services rendered previously, but that is not the only reasonable interpretation. We agree with the Board that the term also encompasses a final decision to grant or deny pre-authorization. We reach that conclusion because the very purpose of conducting utilization review of a pre-authorization request is to help the

employer decide whether to agree or refuse to agree to pay the bill for services rendered in providing the proposed medical treatment. [footnote omitted]

We find further support in 803 KAR 25:012, § 1(8) for our conclusion that the employer has the burden to initiate a formal medical dispute following a final utilization review decision denying pre-authorization. 803 KAR 25:012, § 1(8) is explicit in giving "[t]he employer or its payment obligor" 30 days after a final utilization review decision in which to file a medical dispute. The provision does not mention the injured worker or limit itself to retrospective utilization review. Although 803 KAR 25:012, § 1(2) permits an injured worker to file a medical dispute in order to obtain a decision on the compensability of a proposed medical treatment when a recalcitrant employer fails to do so, that fact does not absolve the employer of its burden to initiate the formal dispute.

Id. at 460-461.

Those decisions mandate that upon receiving a complete statement for services or a request for pre-authorization, the employer must either pay the statement, authorize the procedure or treatment, initiate utilization review, or file a medical dispute.⁸

⁸ If utilization review is sought the time for filing a medical dispute is tolled.

In applying the above regulations and the case law, we conclude the notation of Dr. Milsap which Roberts sent to UPS' carrier did not constitute a statement for services nor a request for pre-authorization of a medical procedure or medical treatment. Leaving aside the fact Dr. Milsap is an ophthalmologist and Roberts had no work-related condition necessitating treatment by an ophthalmologist, the statement on a prescription pad does not constitute a "statement for services," as Dr. Milsap was neither billing for a medical procedure or treatment nor was he requesting pre-authorization for medical treatment. Further, Dr. Milsap did not submit this document to the employer or its carrier; Roberts did.

Consequently, had it filed a medical dispute after receiving Dr. Milsap's notation, UPS could not comply with 803 KAR 25:012 Section 1(3)(a)1 by attaching a copy of the disputed bill since there was none. Additionally, there was no reason to join Dr. Milsap pursuant to (6)(b) of section 1 as he is not a medical provider whose service or charge is at issue.

Dr. Goebel's handwritten notation stating "wheelchair van DX: lumbar stenosis" is also not a statement for services or request for pre-authorization of medical treatment. He provided no other information and

retracted his notation indicating Roberts required a van to transport her wheelchair.

Importantly, had UPS chosen not to contest these notations from both doctors, it could not pay a statement for services or for a procedure it pre-authorized. The regulations relating to the resolution of medical fee disputes require that the employer receive a statement for services or a request for pre-authorization for a specific treatment so that it understands what has been provided or is sought to be provided. Where services have been rendered, the statement for services informs the employer and/or the insurance carrier of the amount of its liability. In the case of a request for pre-authorization for treatment, an insurance carrier is able to consult an independent doctor regarding the need for and work-relatedness of the treatment as well as the workers' compensation fee schedule in order to determine its liability for the treatment sought to be pre-authorized. In this case, the statement "Wheelchair Van DX: Lumbar Stenosis" from Dr. Goebel nor the written statement of Dr. Milsap that "patient needing a van with lift that can support a wheelchair over 400 pounds," does not advise the employer of its potential liability. Both documents are open-ended statements and do not seek payment or approval

for any type of medical treatment. Similarly, when submitted neither could be a request for a specific type of medical device. Had a request for a medical device been submitted or prescribed by a doctor then the employer would have a reasonable estimate of the cost of the device.

Roberts, not the doctors, submitted a nebulous and general request, making it impossible for the insurance carrier to understand what the doctors believed was Roberts' specific need. 803 KAR 25:096 Section 8(1) requires the receipt of a completed statement for services. Here, the insurance carrier did not receive a completed statement for services. 803 KAR 25:190 Section 5(1) and (2) define when a claim is subject to utilization review and speaks to medical services reasonably related to the claim and the request for pre-authorization of a medical treatment or procedure. Since the notations of Dr. Milsap and Dr. Goebel did not constitute a bill for a medical service or request for pre-authorization of medical treatment or procedure, the medical fee dispute filed by UPS was premature as it had not received the necessary documentation triggering the need to file a medical fee dispute. Leaving aside the question of whether a doctor can state a patient is entitled to a van to haul his or her wheelchair, the handwritten notations, without more, do not

constitute a complete statement for medical services nor a request for pre-authorization.

In summary, the statements from Dr. Milsap and Dr. Goebel cannot be considered requests for pre-authorization of medical treatment. The notations from the doctors were not a statement for services. Thus, we believe the first time UPS was required to file a medical fee dispute was on April 8, 2013, when Roberts filed a "Response to the Order of Douglas Gott, ALJ dated March 27, 2013," and attached the "Order Acknowledgment" from Superior Van & Mobility, LLC for a van which cost 80,045.23. At that time the employer had received a statement for services, was aware of the type of van in which Roberts was seeking to haul her wheelchair, and the cost of the van. UPS was then required to file a medical fee dispute. UPS filed the initial medical fee dispute on January 14, 2013, approximately three months before Roberts filed the "Order Acknowledgement" for the van; thus, the medical dispute was timely.

Although UPS did not join Superior Van & Mobility, LLC as a party, its failure is of no significance as the ALJ's May 29, 2013, interlocutory opinion and order dismissed UPS' medical dispute on the grounds it did not timely initiate utilization review in response to Dr.

Milsap's request, thereby preventing it from timely filing a motion to join Superior Van & Mobility, LLC. The ALJ ordered the claim would remain pending for the sole purpose of determining the reasonable cost of the van prescribed by Dr. Milsap. Significantly, in his orders entered prior to the May 29, 2013, Interlocutory Opinion and Order, the ALJ indicated the issues pending were the compensability of the wheelchair van and Roberts' motion to dismiss. When the ALJ dismissed the medical fee dispute, UPS was not availed the opportunity to subsequently join Superior Van & Mobility, LLC, as a party.⁹

We are cognizant of the fact this is a hybrid situation because there has not been a statement from a medical provider either for services rendered or for pre-authorization of medical treatment. Further, there was no reason to join either Dr. Milsap or Dr. Goebel as a party to the proceeding as neither sought pre-authorization of proposed treatment nor payment for medical services rendered. However, our ruling is consistent with the Supreme Court's ruling in Lawson, supra, and KAGC, supra.

⁹ As a side note, in light of the ALJ's dismissal of the medical fee dispute, Superior Van & Mobility, LLC, was not a necessary party to this appeal as it was not a party and UPS was merely seeking to set aside the dismissal of its medical fee dispute and the order of August 26, 2013, directing it to pay for the van based on the estimates submitted by Superior Van & Mobility, LLC, less the amount for the leather upgrade.

As noted in KAGC, supra, the regulation requires a motion to reopen and medical disputes to be filed within thirty days of receipt of a complete statement for services unless utilization review has been initiated. As previously stated, the notations from Dr. Milsap and Dr. Goebel do not constitute a complete statement for services. As also discussed in KAGC, supra, this was not a request for pre-authorization of medical treatment. As noted by the Supreme Court in KAGC, supra, the purpose of conducting utilization review of a pre-authorization request is to help the employer to decide whether "to agree or refuse to agree to pay the bill for services rendered in providing the proposed medical treatment." Id. at 461. Here, the notes from Dr. Milsap and Dr. Goebel did not provide the necessary information to the employer in order to enable it to make a decision whether to agree or refuse to agree to pay for a van.

In light of our holding, we need not address the issues raised by UPS and Roberts on appeal.

Accordingly, the May 29, 2013, Interlocutory Opinion and Order, the June 25, 2013, Order, the August 26, 2013, Opinion and Order, the September 17, 2013, Order, and the September 9, 2013, Order to the extent they dismissed the medical fee dispute filed by UPS and ordered UPS to be

responsible for the van less the \$9,900.00 leather upgrade are **VACATED**. This matter is **REMANDED** to the ALJ for further proceedings regarding the medical fee dispute filed by UPS. On remand, the ALJ shall permit UPS reasonable time to join Superior Van & Mobility, LLC, as a party.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

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