Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 2, 2021

CLAIM NO. 199967121

UNITED PARCEL SERVICE INC. PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

MARGARET FLEITZ;
FRANK BONNARENS, M.D.;
EMPIRE PHARMACY SE; AND
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING & REMANDING

* * * * * *

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

BORDERS, Member. United Parcel Service Inc. ("UPS") appeals from the November 30, 2020 Remand Opinion and Order and the December 19, 2020 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ found the surgery performed by Dr. Frank Bonnarens is compensable.

On appeal, UPS argues the ALJ erred in finding the surgery compensable based upon promissory estoppel, and in finding the surgery was work-related. We agree and reverse the ALJ's determination that the doctrines of promissory estoppel and *res judicata* are applicable to this claim. We remand for a determination of whether the evidence in the record establishes the surgery performed by Dr. Bonnarens is causally related to Margaret Fleitz's ("Fleitz") 1999 work injury, and if not, the surgery must be found not compensable.

This claim is now before this Board for a fourth time. In our September 18, 2020 Opinion Vacating and Remanding, we summarized the prior history of the claim as follows, *verbatim*:

> This claim is now before this Board for a third time. A brief recitation of the relevant procedural history of this Medical Fee Dispute is therefore necessary. Margaret Fleitz ("Fleitz") suffered a work-related left shoulder labral tear on August 24, 1999 while working for UPS. On May 8, 2001, the parties, *pro se*, entered into a Form 110 settlement agreement paying Fleitz a lump sum of $1,631.34 for permanent partial disability ("PPD") benefits based on a 6% impairment rating with future medicals left open pursuant to KRS 342.020.
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> On February 8, 2017, UPS moved to reopen this claim to assert a Medical Fee Dispute contesting the reasonableness and necessity of an EMG/NCV of the left upper extremity. In support of its motion, UPS submitted a medical records review report from Dr. Andrew DeGruccio opining the proposed surgery would probably be non-compensable, as it did not appear to be work-related, but he could not be sure until he physically examined Fleitz.
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> Fleitz was scheduled for an Independent Medical Evaluation ("IME") on June 7, 2017 with Dr. DeGruccio, but she refused to attend. On June 13, 2017, UPS filed a Motion to Suspend Benefits until

Fleitz attended the IME. While this motion was pending before the ALJ, Liberty Mutual sent a letter to Fleitz and Dr. Bonnarens pre-certifying the proposed surgery as being reasonable and necessary per Utilization Review guidelines.

On June 29, 2017, UPS filed a Motion to Amend the Medical Fee Dispute to challenge the proposed surgery on the basis of work-relatedness/causation per Dr. DeGruccio's report. This Motion was sustained by Order dated July 11, 2017. The record indicates both Dr. Bonnarens and Fleitz received copies of both the Motion to Amend and the Order sustaining the motion. Fleitz underwent the challenged surgery on July 12, 2017.

On February 20, 2018, UPS renewed its Motion to Suspend Benefits, and. In an Order dated February 22, 2018, the ALJ ordered Fleitz to attend an IME with Dr. DeGruccio. In his April 5, 2018 report, Dr. DeGruccio opined the surgery was not work-related.

In the February 22, 2019 Opinion, the ALJ determined as follows *verbatim*:

> The doctrine of promissory estoppel provides as follows:
>
> "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only be enforcement of the promise. The remedy granted for breach may be limited as justice required."
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> *Sawyer v. Mills*, 295 S.W.3d 79, 89 (Ky. 2009), quoting *Meade Constr. Co. v. Mansfield Commercial Elec, Inc.* 579 S.W.2d 105; and Restatement (Second) of Contracts.
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> While the Supreme Court in *Sawyer* was drawing a distinction between promissory estoppel and equitable

estoppel, the definition is clearly still good law and is applicable in this claim.

There is no dispute that the Medical Payment Obligor transmitted to the medical providers a pre-authorization for the disputed surgery. There is no evidence that they ever, prior to the surgery being done withdrew that pre-authorization. Ms. Fleitz wanted to have the surgery and Dr. Bonnarens intended to do the surgery once it was authorized. It is reasonable to expect that the pre-authorization would induce Ms. Fleitz and Dr. Bonnarens to proceed with the surgery.

If the promise of payment, as demonstrated through the pre-authorization, is not enforced then injustice cannot be avoided. In this matter, Ms. Fleitz has already had the surgery due to being induced to same by the pre-authorization. Dr. Bonnarens and any attendant providers provided the medical services after being induced by the preauthorization. At this point, someone has to absorb the costs of the procedure. If the Medical Payment Obligor does not pay Dr. Bonnarens and the attendant medical providers then either Ms. Fleitz has to pay them, or a speculative third party has to pay them, or Dr. Bonnarens will not be paid. In other words, but clearly, if the Medical Payment Obligor does pay for the surgery someone else will and that situation would be a direct result of the promise, not kept, by the Medical Payment Obligor to pay for the surgery. That would be an injustice, which can be avoided by enforcing the promise.

Finally, I find no limitations on the remedy beyond having the Medical Payment Obligor pay for the entire cost of

> the surgery, according to the fee schedule. Clerical errors happen and I understand that. But under the law and the facts, there is no other responsible party such that would mitigate the amount the Medical Payment Obligor owes.

This Board then issued their first Opinion on appeal Vacating and Remanding to the ALJ, specifically ordering the ALJ to set forth the evidence of record substantiating the applicability of the doctrine of promissory estoppel in light of UPS's June 13, 2017 Motion to Suspend Benefits, which was certified as mailed to both Fleitz and Dr. Bonnarens contesting the proposed surgery. This Board further ordered that if should the ALJ find the doctrine of promissory estoppel not applicable, he must resolve the medical fee dispute on its merits.

In response to the Board Opinion Vacating and Remanding, the ALJ issued a Remand Opinion setting forth that "Dr. Bonnarens did not respond to my letter. There is no other proof to rely. The surgery by Dr. Bonnarens is not compensable." Fleitz then appealed. As the ALJ's Opinion on Remand did not address nor follow the Board's instructions, and the claim was again remanded with the same instructions as set forth in the Board's original Opinion of February 22, 2019.

In response to the second Opinion of the Board Vacating and Remanding this claim, the ALJ entered the following Opinion on Remand, *verbatim*:

> This claim is before the Administrative Law Judge on Remand from the Kentucky Workers' Compensation Board. The undersigned is directed to indicate what evidence of record, as of the September 19, 2018 Opinion and Order that would support the doctrine of promissory estoppel. There is no need to summarize the evidence as it has been summarized in the September 21, 2018 Opinion.

I believe the June 26, 2017 pre-authorization sent by the workers' compensation carrier, Liberty Mutual, to the treating surgeon, Dr. Frank Bonnarens sufficiently supports the doctrine of promissory estoppel.

I understand that this piece of evidence has already been discussed in the September 21, 2018 Opinion. However, what I failed to do, among the many errors made by both parties, and myself was to discuss 803 KAR 25:190 §1(5). "'Preauthorization' means a process whereby payment for a medical service or course of treatment is **assured** in advance by a carrier." (emphasis added)

While I regret my previous error it is my duty to correct it and to point out accurately, that while I failed to cite to the appropriate and ultimately more helpful specific regulation that I was nonetheless aware of this general principle in workers' compensation and it generally, to an extent, informed my original decision making process.

I also believe, and find, that the specific language of the regulation is unambiguous and controlling despite the presence of, arguably, a notification by the Medical Payment Obligor to the doctor and injured worker of a different reason to contest the surgery, beyond, reasonableness and necessity. The regulation does not state that pre-authorization guarantees a finding of reasonableness and necessity. It does not say the MPO may contest the treatment on other grounds. It states preauthorization assures payment.

I also believe, and find, that the above regulation codifies into workers'

> compensation the doctrine of promissory estoppel, at least as regards the payment of medical benefits and the use of pre-authorization.
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> Likewise, the ALJ acknowledges that pro se Plaintiffs are held to the same standard as attorneys. However, it is also true that some leeway should be given to them, *Beechman v. Commonwealth*, 657 S.W.2d 234 (Ky. 1983). In cases such as this, when the pre-authorization was clearly given, the burden should not be placed on the Plaintiff to prove why it is not enforceable, even in light of the possible, alternative reasons to deny the surgery. In fact, the mere argument that the surgery was not compensable as a little confusing to the undersigned, I cannot imagine the confusion it causes Ms. Fleitz.
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> Ultimately, while it would have been better had I cited to 803 KAR 25:190 § 1(5) in the September 21, 2018 Opinion my failure to do so does not mean it does not apply, in fact it does, and it informed my decision. The June 26, 2017 pre-authorization, combined with the regulation and the doctrine of promissory estoppel, makes the surgery by Dr. Bonnarens compensable.
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> With respect, I believe the rules of procedure require me to make a dispositive ruling. Therefore, the September 21, 2018 Opinion and Order is re-instated in its entirety.

UPS filed a Petition for Reconsideration requesting additional findings of facts as to the evidence the ALJ relied on in application of the doctrine of promissory estoppel and his finding the contested shoulder surgery is compensable. More specifically, it sought additional findings providing the evidentiary basis for a finding that Dr. Bonnarens was induced to

perform surgery. UPS accurately points out that Dr. Bonnarens was joined as a party to this Medical Fee Dispute on March 23, 2017, and was given numerous opportunities to respond and provide evidence regarding the compensability of the proposed surgery, but chose not to participate. UPS argues there is simply no evidence of record to indicate any reliance by Dr. Bonnarens on this alleged promise to pay, only speculation. It accurately sets forth the doctrine of promissory estoppel requires two elements: 1. The promise to pay, and 2. Reliance on that promise.

In response to UPS' petition, the ALJ ruled as follows, *verbatim*:

> This matter comes before the undersigned on the Medical Payment Obligor's Petition for Reconsideration.
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> The MPO asks for further findings of fact regarding what supports the application of promissory estoppel.The ALJ has resolved this matter based on 803 KAR 25:190 §1(5), which assures payment when a pre-authorization is sent.
>
> The facts and evidence have been sufficiently summarized. The MPO is free to attempt an appellate argument to the effect that the clear and unambiguous language of the regulation be supplanted but I am not free to ignore the plain language of the regulation.
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> There is no law, whether statute, regulation, or case law, which prevents me from applying the specific language of the regulation, even at this late date, when clearly the regulation covers the very issue which has been in dispute from the beginning.
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> Again, the undersigned regrets that I did not cite to it sooner and the difficulty we have all been put to but it undoubtedly applies. The Petition is OVERRULED.

In its third appeal, UPS argued the ALJ once again failed to set forth additional findings of fact supporting the application of the doctrine of promissory estoppel. UPS additionally argued the ALJ misinterpreted the law regarding promissory estoppel and erroneously relied on 803 KAR 25:190(1)(5).

In the September 18, 2020 Opinion, our ruling and direction to the ALJ were as follows:

> The ALJ was clearly instructed on more than one occasion to specifically address what facts in the record supported his finding that the doctrine of promissory estoppel was applicable to this situation. In the Opinion and Order dated May 20, 2020, the ALJ determined 803 KAR 25:190 (1)(5) effectively codifies the doctrine of promissory estoppel into Kentucky Workers' Compensation law. We disagree.
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> 803 KAR 25:190(1)(5) states, "Preauthorization means a process whereby payment for medical services or course of treatment is assured in advance by a carrier." KRS 342.020(1) states in pertinent part, "…the employer shall pay for the cure and relief from the effects of an injury…..the medical, surgical, and hospital treatment…as may be reasonably required at the time of the injury and thereafter…" Therefore, the Employer is responsible for medical expenses incurred by an injured worker that are reasonable, necessary, and related to the work injury. Addington Resources v Perkins, 947 S.W.2d 421 (Ky. App. 1997).
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> In this case, the ALJ concluded that because 803 KAR 25:190(1)(5) defines "preauthorization" as an assurance of payment of a proposed medical procedure, this administrative regulation effectively codifies the doctrine of promissory estoppel. As we have set forth above, arguably the doctrine of promissory estoppel may apply in the workers' compensation setting, however, we do not believe it is codified by the above regulation.
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> The portion of the Regulation cited by the ALJ is the "Definitions" section of 803 KAR 25:190 and "pre-

authorization" is defined as outlined above. However, further review of the Regulation shows that the only time the term "pre-authorization" is used is in reference to the request for pre-authorization from a medical provider, not in the decision rendered from Utilization Review.

The result of the Utilization Review process is not "pre-authorization;" it is a Utilization Review decision or recommendation (See 803 KAR 25:190 Section 5(1)(a)(1)). That is because the Utilization Review process is not a determination of compensability. It is a process for review of the reasonableness and medical necessity of treatment. "Utilization Review" is defined as, "a review of the medical necessity and appropriateness of medical care and services for purposes of recommending payments for a compensable injury or disease." 803 KAR 25:190 Section 1(6).

In order for medical treatment to be compensable, it must also be work-related. Simply issuing a letter advising that Utilization Review had been completed and the treatment had been "pre-certified" is not the same as providing "pre-authorization" or a promise to pay. It is merely a finding that the treatment has been determined to be reasonable and necessary.

UPS did not contest the surgery on the basis of reasonableness and necessity. Surgery was contested because it was not for treatment of Fleitz's 1999 work injury. While the Utilization Review decision addressing reasonableness and necessity of surgery was communicated to Fleitz and Dr. Bonnarens prior to surgery ever being performed, both Fleitz and Dr. Bonnarens were served with a copy of UPS' June 29, 2017 Motion to Amend Medical Dispute. This Motion was served on both Fleitz and the requesting surgeon, Dr. Bonnarens, thirteen days prior to the July 12, 2017 surgery.

Although the ALJ found Dr. Bonnarens and any attendant providers provided this surgery after being induced by "pre-authorization," there is no basis for such a finding because no "pre-authorization" was ever

given. There is no evidence Dr. Bonnarens did not receive the June 29, 2017 Motion to Amend, indicating surgery was being contested on the basis of work-relatedness. Dr. Bonnarens was joined as a party by Order dated March 23, 2017. He was given numerous opportunities to participate in this matter by appearing at teleconferences, submitting medical records or reports, or appearing at a hearing. Despite more than seventeen months of litigation over these medical disputes, he did not participate and did not submit anything stating he had relied on the June 26, 2017 Utilization Review letters as some form of promise to pay.

Accordingly, we **VACATE** that portion of the ALJ's Opinion dated May 14, 2020 and the June 3, 2020 Order on Petition for Reconsideration finding that the doctrine of promissory estoppel is codified in 803 KAR 25:190(1)(5) and therefore is applicable to this case. We **REMAND** the claim to the ALJ to set forth facts articulating exactly how the doctrine of promissory estoppel applies and exactly how Fleitz and Dr. Bonnarens were induced to move ahead with the surgery in light of the fact UPS had moved to challenge the surgery and to suspend benefits due to Fleitz's failure to attend an IME. If the ALJ determines the doctrine of promissory estoppel does not apply, then he shall decide the Medical Fee Dispute on the merits.

The ALJ's findings on remand are as follows, *verbatim*:

This matter is on Remand from the Kentucky Workers' Compensation Board. The Board instructs me to list what evidence I relied upon to find the doctrine of promissory estoppel applicable.

I relied on the fact that the pre-authorization transmitted by Liberty Mutual on June 26, 2017 did not in anyway say that it only applied to reasonableness and necessity, not work-relatedness/causation.

I relied on the fact that the Medical Payment Obligor's June 29, 2017 Motion, while certainly discussing the difficulty in obtaining proof on causation, was couched as a Motion to Suspend Benefits, which

would not necessarily inform any party, attorney or otherwise, that the pre-authorization was invalid.

I relied on the fact that the Motion to Suspend Benefits and the Motion to Amend the Medical Dispute have never been properly served on Dr. Bonnarens. The MPO filed both of those pleadings on: Frank Bonnarens, M.D., 3605 Northgate Circle, Ste. **202**, New Albany, IN, 47150 despite his correct address being: Frank Bonnarens, M.D., 3605 Northgate Circle, Ste. **102**, New Albany, IN, 47150. Therefore, while the Order, which again was only mailed the day before the surgery, was correctly mailed, neither the Motion to Suspend or the Motion to Amend was, or ever has been served on Dr. Bonnarens. It is inappropriate to hold him liable for their content and inaccurate to conclude that their filing should have put him on notice that the pre-authorization was invalid.

I relied on the fact that the Order sustaining the Motion to Suspend Benefits was not entered until July 11, 2017, making it highly unlikely that either Ms. Fleitz or Dr. Bonnarens could have been aware of that Order before proceeding with the surgery on July 12, 2017.

Indeed, despite the fact that the Department has always and consistently mailed pleadings to Dr. Bonnarens, at his correct address, the MPO has always, and consistently, mailed pleadings to Dr. Bonnarens at the wrong address. The MPO has undertaken no effort to prove that Dr. Bonnarens has ever received any of its pleadings and especially has failed to prove he received the Motion to Suspend or the Motion to Amend. The MPO, as the party proffering the pleadings is responsible for the failure to correctly serve them and has the burden to cure the defect or prove it was of no effect.

I relied on the fact that to the best of my knowledge, and the record so demonstrates, no one informed Ms. Fleitz that the pre-authorization only covered reasonableness and necessity, and not work-relatedness, until the August 2, 2017 telephonic conference, when she was told by counsel for the MPO, who had previously been unaware of the pre-authorization. This was after she had the surgery.

I relied on the statements made by Ms. Fleitz, that she had the surgery because the surgery was approved, which creates a reasonable inference that she thought it was going to be paid for. Indeed, any other inference would be unreasonable. (Hearing Transcript. p. 22, 08/08/2018).

I relied on the fact that nowhere in 803 KAR 15:190 § 1(5) does it say that it only applies to reasonableness and necessity. It never occurred to me, before, that it only applied to reasonableness and necessity.

I relied on the fact that while I understand that *pro se* Plaintiffs aren't held to a lesser standard than attorneys that the facts of this case, to say the least, are not novel, not to practioners who in the past have universally assumed the medical expenses would be compensable, but there is no case law to rely on. As the Board has noted, this is a novel issue. Therefore, to conclude that Ms. Fleitz, regardless of her status as an attorney, should have known something that in past wouldn't even have occurred to attorneys, is flawed.

I also rely on the fact that sophisticated businesses like the MPO also shouldn't be held to a lesser standard than attorneys, and escape clear responsibility. As the Board correctly notes this case, as far as appellate practice goes, though, again, the situation is not unknown to attorneys; this is a novel situation with no case law. I find it highly unlikely that the MPO intentionally transmitted a pre-authorization to the medical provider with the expectation that both Ms. Fleitz and the medical provider would understand that it only concerned reasonableness and necessity and not work-relatedness. This is an argument crafted by counsel after the fact. This is of course entirely permissible. Skilled attorneys frequently craft arguments that through their skill are accepted even when previously the same arguments have been rejected. *Vision Mining, Inc. v Gardner,* 364 S.W.3d 455 (Ky. 2011); *Parker v. Webster County Coal,* 529 S.W.3d 759 (Ky. 2017).

However, one of the elements of promissory estoppel is to determine which party is better able to

shoulder the burden of the promise made, even if erroneously made.

I point these facts out not to re-write the same Opinion but to meet the Board's instructions. In fact, the ***promise*** of payment was transmitted by the MPO to the medical provider, even if inadvertent. There was nothing done, prior to the surgery, including the Motion to Suspend Benefits or Motion to Amend, that would have necessarily informed even a skilled and experienced practioner that the promise was invalid or withdrawn for any reason.

The MPO has not presented any evidence on the subject that when the MPO transmitted the promise of payment they expected or assumed that the recipient would know it did not really promise payment. This argument was made after the fact but there is no evidence of it.

In short, while Ms. Fleitz and Dr. Bonnarens are not treated with any leeway because they are *pro se* nor should they be penalized for giving the pre-authorization it's expected due and weight. Due and weight which are only now, on appeal, being argued is invalid.

In summary, the evidence reflects that the MPO transmitted a promise of payment, even if the transmittal was inadvertent. The evidence reflects that Ms. Fleitz relied on the promise of payment to proceed with the surgery. The record reflects that the first Ms. Fleitz or the undersigned was informed that the promise was partial or qualified was after the surgery. There is no evidence or case law that shows that Ms. Fleitz should, or even could even if she was an experienced attorney, have known that the Motion to Suspend Benefits or Motion to Amend nullified the promise of payment.

Finally, Ms. Fleitz should absolutely not be penalized for initially not wanted to go to the IME with Dr. DeGruccio. Represented Plaintiffs routinely object to IMEs. Pleadings are filed and considered, telephonic conferences are held and a resolution is achieved, typically with the Plaintiff going to the IME. Ms. Fleitz should have never been penalized, ultimately, for not wanting to go the IME. Because the MPO, even without

the IME, filed a records review from Dr. DeGruccio, along with its Motion to Suspend and Motion to Amend it's irrelevant in the long term. The crux of the matter is the MPO inadvertently, but without intent that it be viewed as a qualified promise, transmitted the promise of payment.

I find, based on the foregoing, that the surgery is compensable. Should the Board find none of these trigger the application of promissory estoppel or 803 KAR 25:190 § 1(5) I can make no further findings on the subject.

As for the underlying medical dispute, although I have found the MPO liable for the surgery, there is simply no evidence whatsoever upon which to resolve this matter. As the MPO has consistently argued, and the Board has found, the pre-authorization guaranteed payment if the issue was only reasonableness and necessity. That leaves the issue of work-relatedness.

On this issue, I have no reliable proof, either way. The Board has ruled that any proof produced by Dr. Bonnarens after the first Opinion cannot be considered. However, the report and opinions of Dr. DeGruccio are equally invalid.

Dr. DeGruccio clearly, and repeatedly, based his opinion that the surgery was not work-related on the mistaken belief that the Plaintiff had multiple surgeries to her shoulder prior to her work-related injury on August 24, 1999. This is a clear error which the Plaintiff has refuted in her unrebutted testimony. (HT, pp. 18-20)

This error is material to Dr. DeGruccio's conclusion that the currently contested surgery is not work related. The MPO has filed no medical records or other evidence to prove Ms. Fleitz had these alleged surgeries, mostly likely because they didn't occur and there is no record of them. Dr. DeGruccio's opinions on the work-relatedness of the surgeries must be discarded. *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004). Indeed this case is a mirror image of *Cepero* when in that case a doctor whose opinion in favor of work-relatedness was rejected as a matter of law when he didn't know about prior surgeries.

> Therefore there no medical opinion from the MPO regarding lack of work-relatedness.
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> The ALJ understands that the Plaintiff bears the burden of proof on work-relatedness. Although, frankly, this creates an odd procedural situation in which one could question whether the Medical Dispute is even properly before this ALJ anymore inasmuch as the MPO has filed it with neither evidence contesting the reasonableness and necessity or work-relatedness of the treatment.
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> However, the file as a whole does contain two separate Opinions, which are *res judicata*, on the issue of work-relatedness. These include the September 24, 2013 Opinion by Judge Swisher and the February 24, 2015 Opinion by Judge Williams. In the first, Judge Swisher found treatment to the shoulder non-compensable as not reasonable and necessary but did include a notation of a compensable work-related injury to the shoulder. In the second, Judge Williams found treatment to the shoulder both reasonable and necessary and work-related.
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> Finally, we have the Plaintiff's testimony that she has never, prior to August 24, 1999 or after, any injury to her left shoulder other than the one sustained for the Defendant.
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> All of this allows a reasonable inference and finding that the surgery to the left shoulder is work-related. It is therefore substantively compensable.

UPS filed a Petition for Reconsideration requesting additional findings of fact as to how the Utilization Review determination could be viewed as a promise to pay or as pre-authorization. UPS further requested additional findings establishing the evidentiary basis for the ALJ's finding that Dr. Bonnarens was induced to perform surgery or relied upon the Utilization Review's determination. UPS also requested additional findings regarding service of the motions on Dr.

Bonnarens, the medical evidence the ALJ relied upon in finding the surgery is work-related, and the effect of the rulings in prior medical fee disputes.

On reconsideration, the ALJ provided as follows, *verbatim*:

> This matter comes before the undersigned on the Medical Payment Obligor's Petition for Reconsideration.
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> The first part of the Petition is an argument regarding whether or not a pre-authorization guarantees payment or if it only assures the medical provider that the reasonableness and necessity of the surgery is not disputed. The ALJ made this point in the third Remand Opinion not to dispute the Board's findings that it does not guarantee payment, which is now the law of the case. I made this point because I was instructed to make further findings of fact. The MPO and the Board have clearly noted that Ms. Fleitz and Dr. Bonnarens, as pro se litigants, are not given any more leeway than an attorney when applying the law. I felt, therefore, in order to comply with the WCB's instructions, that it behooved me to point out that even experienced attorneys were unaware of this interpretation of the regulation and therefore this interpretation should not be held against Ms. Fleitz or Dr. Bonnarens.
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> Second, as to the error in Dr. Bonnarens' address I noted that there is no proof that he ever received the Motion to Suspend Benefits and Motion to Amend. The Board Ordered me to make findings as to why, in light of the Motion to Suspend and the Motion to Amend, that the pre-authorization should not be accepted as a blanket promise. I made the correct finding that there is no proof Dr. Bonnarens ever got the Motions inasmuch as on their face the Motions use a different address than the DWC has for Dr. Bonnarens. That Dr. Bonnarens received the pre-authorization, which appears that it may have been faxed, but even if it wasn't, isn't proof that the also got the Motions. Counsel, understandably because the law of the case is that he has not filed evidence, mischaracterizes Dr. Bonnarens' participation in these matters. They state that he has not participated. They do this to emphasize that it is he, not them, who bears the burden for his non-participation. Rather, the

> record reflects that Dr. Bonnarens did not participate when his mailing address was wrong but that when Ms. Fleitz personally brought it to his attention he did file evidence. This evidence was Struck by the Board under the theory that the time to file evidence has passed. That is the law of the case but I remain dubious that there is any proof that Dr. Bonnarens has ever been appropriately notified of these proceedings with sufficient service of process. That I was the first person, other than Ms. Fleitz, to notice this, on my fourth Opinion, third Remand Opinion, does not do me any credit but it must be noted. It is up to the party who served the pleadings incorrectly to prove that the party upon whom service was attempted got the pleadings.
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> Third, I disagree with the MPO's interpretation of the basis for Dr. DeGruccio's opinion and see no reason to belabor that point as I sufficiently set forth my findings in the third Remand Opinion. Dr. DeGruccio clearly feels that Ms. Fleitz had shoulder surgeries prior to her work injury but his is incorrect.
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> Fourth and finally, I agree entirely with the MPO. If it is the law of the case that Dr. Bonnarens always got all pleadings and the law of the case that the letter he filed is not admissible and the case must be resolved entirely on work-relatedness and if it is found that Dr. DeGruccio's opinions are probative then the matter must be resolved in favor of the MPO, which is the decision I made in the first Remand Opinion.
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> To the extent the Petition requested further findings it is SUSTAINED pursuant to my findings above. To the extent it seeks any other relief it is OVERRULED.

On appeal, UPS again argues the ALJ erred in finding the surgery compensable based upon promissory estoppel, and in finding it work-related. UPS notes the ALJ continues to refer to the June 26, 2017 Utilization Review pre-certification as a "promise of payment" despite the Board's holding that "[s]imply issuing a letter advising that Utilization Review had been completed and the treatment had been 'pre-certified' is not the same as providing 'pre-authorization' or

a promise to pay." The ALJ acknowledged in his December 19, 2020 Order on Petition for Reconsideration that the June 26, 2017 Utilization Review pre-certification was not a guarantee of payment. Thus, UPS submits that the ALJ agreed there was no promise of payment. As such, the doctrine of promissory estoppel does not apply. Without first establishing a promise of payment, there can be no reliance on such a promise. Furthermore, UPS asserts the ALJ failed to cite any evidence that Dr. Bonnarens relied on a promise of payment. UPS submits there is no such evidence. UPS notes the ALJ stated in his most recent Remand Opinion, "Should the Board find none of these trigger the application of the doctrine of promissory estoppel or 803 KAR 25:190(1)(5) **I can make no further findings on the subject.**" UPS contends vacating and remanding this claim to the ALJ for additional findings of fact will be a futile endeavor. It requests the Board instruct the ALJ to enter an Opinion finding there is insufficient evidence to apply the doctrine of promissory estoppel, and therefore, that doctrine is not applicable and surgery is not compensable.

Regarding the issue of work-relatedness, UPS argues this situation was contemplated by the Kentucky Court of Appeals in Mengel v. Hawaiian-Tropic Northwest & Central, 618 S.W.2d 184 (Ky. App. 1981), which held that when the question is one properly within the province of medical experts, the Board is not justified in disregarding the medical evidence. Fleitz sustained a work-related left shoulder labral tear in 1999, which was surgically repaired. Nearly twenty years later, a doctor recommended a left biceps release. UPS contends it would not be readily apparent to a laymen whether the need for a biceps tendon release is related

to a work-related labral tear from 18 years ago, or if it is a new unrelated issue. UPS argues Fleitz failed to file any medical evidence establishing the contested surgery was related to her 1999 work injury. Thus, she failed to meet her burden of proof.

UPS argues the ALJ erred in holding the prior Opinion of Judge Robert Swisher is *res judicata* as to the issue of work-relatedness. While Fleitz sustained a work-related labral tear to the left shoulder in 1999, Judge Swisher's finding of the same is irrelevant to the issue of whether a biceps release requested 18 years later is work-related. Likewise, reliance on Judge Jane Rice-Williams' Opinion from 2015 is misplaced. That Medical Fee Dispute only addressed reasonableness and necessity of physical therapy and is not *res judicata* as to whether completely different medical treatment, challenged on a completely different basis, is compensable. UPS notes the ALJ stated in his Order on Petition for Reconsideration that he agreed entirely with UPS as to work-relatedness of surgery, but then qualified that agreement. UPS asserts that, regardless of those qualifications, whether the left shoulder arthroscopy with biceps repair relates to a labral tear clearly requires a medical opinion, and the record is devoid of one. UPS asserts that, since Fleitz bore the burden of proof on the issue of work-relatedness, the ALJ must issue a finding the surgery is not work-related.

We previously ruled that simply issuing a letter advising that Utilization Review had been completed and the treatment had been "pre-certified" is not the same as providing "pre-authorization" or a promise to pay. It is merely a finding that the treatment has been determined to be reasonable and necessary. Thus, the Utilization Review decision standing alone is insufficient to constitute pre-

authorization or a promise to pay. The ALJ has identified no evidence, other than the Utilization Review determination, indicating there was a pre-authorization or a promise to pay. Absent proof of a promise to pay, there can be no application of promissory estoppel. Therefore the ALJ's findings on remand are insufficient to support the application of promissory estoppel, and he stated he could make no additional findings on the issue. Accordingly, we reverse the ALJ as to the application of promissory estoppel.

We likewise find no basis for the application of *res judicata*. This is a settled claim, with the agreement identifying a labral tear as the injury sustained and for which future medical treatment was awarded. The concept of *res judicata* bars re-litigation of a cause of action previously adjudicated between the same parties. It requires a final judgment, identity of subject matter and mutuality of parties. BTC Leasing Inc. v. Martin, 685 S.W.2d 191 (Ky. App. 1984). *Res judicata* has a limited effect in medical fee disputes, because medical benefits necessarily relate to an employee's evolving physical condition. Here, the question of a biceps tendon injury was never previously litigated. Prior medical disputes did not identify the contested treatment as related to a biceps tendon injury. Thus, there is no final judgement or identity of subject matter between the present dispute and the prior disputes. Accordingly, rulings in the prior disputes are not *res judicata* regarding the biceps tendon surgery.

As promissory estoppel and *res judicata* do not apply, the present dispute turns upon the issue of causation/work-relatedness of the surgery. When the question of causation involves a medical relationship not apparent to a layperson, the

issue is properly within the province of medical experts. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184, 186-187 (Ky. App. 1981). In a medical dispute reopening, the claimant is obligated to present medical evidence to overcome expert medical testimony on issues of causation, which are not apparent to a layperson. Kingery v. Sumitomo Electrical Wiring, 481 S.W.3d 492 (Ky. 2015). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980). The case *sub judice* requires a medical opinion to link the present surgery to the remote labral tear. UPS submitted *prima facie* evidence in the form of Dr. Andrew DeGruccio's opinion that the surgery was not related to the work injury. The ALJ ultimately rejected Dr. DeGruccio's opinion on work-relatedness. However, the ALJ explicitly held, "I have no reliable proof, either way." Therefore, the record contains no substantial medical evidence causally relating the contested surgery to the work injury.

Regarding the ALJ's findings on service of the motions on Dr. Bonnarens, we note his request to the Medical Payment Obligor seeking authorization for the surgery was submitted on letterhead using the designation of Suite 202. In the prior dispute, Dr. Bonnarens submitted treatment notes also bearing the address with Suite 202. Although the Department of Workers' Claims may list Suite 102 as his address, the request and treatment notes submitted by Dr. Bonnarens bearing the Suite 202 address are evidence that Dr. Bonnarens would be presumed to receive the pleadings sent to that address. No contrary evidence was submitted.

There is no evidentiary basis to conclude Dr. Bonnarens did not receive the motions addressed to him at Suite 202.

Accordingly, the November 30, 2020 Remand Opinion and Order and the December 19, 2020 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **REVERSED.** This claim is **REMANDED** for entry of an Opinion finding the surgery non compensable in conformity with this Opinion.

ALVEY, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

DISTRIBUTION:

COUNSEL FOR PETITIONER: **LMS**

HON K. LANCE LUCAS
HON SARAH C ROGERS
1521 CAVALRY LN, STE 103
FLORENCE, KY 41042

RESPONDENTS:

MARGARET FLEITZ, PRO SE **USPS**
2906 WINDSOR FOREST DR
LOUISVILLE, KY 40272

DR FRANK BONNARENS M.D. **USPS**
3605 NORTHGATE CIRCLE, STE 202
NEW ALBANY, IN 47150

EMPIRE PHARMACY SE **USPS**
PO BOX 1523
HAVERTOWN, PA 19083

ADMINISTRATIVE LAW JUDGE: **LMS**

HON CHRIS DAVIS
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601