

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 22, 2019

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
VACATING & REMANDING

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

STIVERS, Member. United Parcel Service, Inc. ("UPS") appeals from the September 19, 2018, Opinion and Award ruling on its June 29, 2017, Amended Medical Fee Dispute and the October 5, 2018, Opinion ruling on its Petition for Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). In the September 19, 2018, Opinion and Award, the ALJ determined the contested left shoulder arthroscopy with

biceps release is compensable. The ALJ further determined an EMG/NCV and topical compound cream are non-compensable.

On appeal, UPS asserts the ALJ erred by failing to make a finding regarding the work-relatedness of the contested left shoulder arthroscopic surgery. UPS also asserts the ALJ's finding the contested left shoulder arthroscopic procedure is compensable based upon the principle of promissory estoppel is erroneous. Fleitz filed a *pro se* brief.

BACKGROUND

As the left shoulder arthroscopy with biceps release is the only contested medical treatment at issue in this appeal, we will not discuss evidence related to the EMG/NCV or topical compound cream.

The record contains a Form 110 Settlement Agreement entered into between Fleitz and UPS, and approved by Hon. Sheila Lowther, Administrative Law Judge, on May 8, 2001. The settlement agreement indicates Fleitz sustained a left shoulder labral tear on August 24, 1999, when a package fell and hit her. Fleitz underwent arthroscopic surgery on her left shoulder, and Dr. Frank Bonnarens assessed a 6% impairment rating. Fleitz and UPS settled for a total amount of \$1,631.34. The settlement did not include a buyout of future medical expenses.

The first pertinent Motion to Reopen/Medical Fee Dispute was filed by UPS on February 8, 2017, contesting whether an EMG/NCV of the left upper extremity was reasonable and necessary treatment of Fleitz's work injury.

UPS filed the June 8, 2017, medical records review report of Dr. Andrew DeGruccio. Regarding the contested left shoulder arthroscopy with biceps release, Dr. DeGruccio opined as follows:

Dr. Bonnarens clearly indicated at one point that he was considering lateral epicondylitis and cervical spine pathology, none of which would be thought directly related to anything from her left shoulder. He has subsequently now indicated that she might be a candidate for a long head of the biceps release, and there is [sic] question whether or not this would be considered medically appropriate and necessary and related to the work injury. Unfortunately, without examining the claimant, I cannot confirm this diagnosis and I cannot really comment on whether it is currently medically necessary. My guess is that it would be very hard to believe that something that happened in 1999 and surgeries thereafter could have resulted in missed pathology for this many years, and now need biceps tenolysis, especially if it was not determined necessary during her three previous surgeries. It would be very unlikely that the recommended release of the long head of the biceps is directly related to the original injury and/or surgeries, but again I cannot confirm that diagnosis and the medical appropriateness of that treatment without actually examining the claimant.

On June 13, 2017, UPS filed a “Motion to Suspend Benefits,” requesting an order suspending Fleitz’s medical and income benefits until she appears for an Independent Medical Examination (“IME”). In its motion, UPS asserted, in part, as follows:

Plaintiff was scheduled for an IME with Dr. Andrew DeGruccio on June 7, 2017 to address reasonableness, necessity, and work-relatedness of proposed medical treatment, including, but not limited to, the EMG/NCV which is the subject of this medical fee dispute. Plaintiff was aware of the IME, and was advised that failure to

appear for the IME could result in suspension of her benefits, but Plaintiff did not attend the IME.¹

The record contains a letter, dated June 26, 2017, to Dr. Frank Bonnarens from Liberty Mutual Insurance, indicating as follows: “Utilization review for the above named individual [Margaret Fleitz] has been completed and the following treatment/service is approved as stated below.” This letter was filed in the record on August 7, 2017. Under “additional information” is the following:

Arthroscopy, release of biceps left shoulder was pre-certified per peer review.

Actual service dates are dependent upon the treating provider or servicing facility’s scheduling needs....

A separate letter was sent to Dr. Bonnarens, also filed in the record, pre-certifying a shoulder sling.² The letters indicate Fleitz was sent a copy of both.

On June 29, 2017, UPS filed a “Motion to Amend Medical Dispute” and an amended Form 112 Medical Fee Dispute in order to contest the compensability of the left shoulder arthroscopy with biceps release “on the basis of work-relatedness/causation.”³ The motion to amend states, in part, as follows:

Defendant/Employer disputes compensability of a request for left shoulder arthroscopy with release of the biceps on the basis of work-relatedness/causation. Plaintiff failed to attend an IME with Dr. Andrew DeGruccio on June 7, 2017. There is a pending Motion to Suspend Benefits before the ALJ related to Plaintiff’s failure to attend. As noted in that motion,

¹ The Certificate of Service indicates the Motion to Suspend Benefits was mailed to both Fleitz and Dr. Bonnarens on the date it was filed in LMS.

² It appears these letters were filed in the record by Fleitz, as an envelope addressed from her to the ALJ and date-stamped on August 4, 2017, was included with the letters.

³ The Certificate of Service indicates the Motion to Amend was mailed to both Fleitz and Dr. Bonnarens on the date it was filed in LMS.

Defendant/Employer is unable to adequately address compensability of treatment without an IME. Dr. DeGruccio did perform a records review and his report is being filed concurrently with this motion. He stated that based on his review of the records, many of Plaintiff's symptoms have no direct relation to her 8/24/1999 work injury or her left shoulder directly. He noted that her symptoms started to evolve approximately two years ago and were no longer in the same area of her shoulder or arm as they were before. As for the specific surgery Dr. Bonnarens has now recommended, Dr. DeGruccio stated it would be very unlikely that the recommended release of the long head of the biceps is directly related to the original injury and/or surgeries, but cannot confirm that diagnosis and the medical appropriateness of that treatment without examining Plaintiff. (emphasis added).

By order dated July 11, 2017, the ALJ sustained UPS' June 29, 2017, Motion to Amend its Medical Dispute to contest the left shoulder arthroscopy.

The record indicates Fleitz underwent the contested left shoulder arthroscopy with biceps release on July 12, 2017.

In an order dated August 2, 2017, the ALJ ruled as follows:

This matter comes before the undersigned following a telephonic status conference attended by the Plaintiff and the Medical Payment Obligor through counsel. The Plaintiff states she has received the disputed left shoulder surgery but is uncertain if or who has paid for it. She states she has a letter from the Medical Payment Obligor agreeing to pay for the surgery. Counsel states she has not seen the letter but suspects it only resolves one aspect of the pending dispute. Plaintiff has filed a verbal response to the Motion to Compel attendance at an IME with Dr. DeGruccio to the effect that Dr. DeGruccio [sic] is biased due to his prior relationship with Dr. Bonnarens. Plaintiff will file the letter from Liberty Mutual. Defendant will file a Reply to Plaintiff's objection. Further Orders will be issued when those are received.

On February 20, 2018, UPS filed a "Renewed Motion to Suspend Benefits," as the ALJ had not yet ruled on its original June 13, 2017, Motion to

Suspend. On February 22, 2018, the ALJ ordered Fleitz to attend an IME by Dr. DeGruccio.

On March 15, 2018, UPS filed another “Motion to Amend Medical Dispute” and an amended Form 112 Medical Fee Dispute contesting the compensability of a topical compound pain cream.

UPS filed the April 5, 2018, IME report of Dr. DeGruccio. After performing a physical examination of Fleitz, he set forth the following answers:

1. In your opinion, what is Ms. Fleitz’s current diagnosis?

A. In my opinion, at this time, the claimant’s diagnosis is the syndrome of inappropriate pain behavior and exaggerated pain behavior. I believe her pain has become non-physiologic, and as in my previous note in 2017, I cannot relate any of the need for current care and current symptoms to anything that happened in 1999, or the subsequent care from the injury in 1999.

2. Are her current complaints causally related to the left shoulder injury she suffered at UPS on August 24, 1999, and was the surgery performed by Dr. Bonnarens on 07/12/2017 and the resulting postoperative care causally related to and medically necessary as a result of the 1999 work injury, and if not, what do you attribute Mr. [sic] Fleitz’s ongoing symptoms and need for treatment?

A. I will refer back to my 2017 note, where I indicated that there was no possible way from a medically prudent perspective to relate her evolving and new symptoms to anything that happened in 1999 or the few subsequent years thereafter, to her work injury. I continue to feel that to be the case. Her symptoms went through a dramatic evolution that was quite different towards the end from where they were in the middle, and at the beginning. No orthopedic surgeon from a medically prudent perspective could suggest that the symptoms that she was reporting in 2017 had anything to do, specifically, with anything that occurred in 1999. When one considers the poor outcome

from this most recent surgery, it would suggest an ongoing pain behavior that is inappropriate in nature, and not likely to respond to traditional care. The ongoing symptoms, and need for treatment having nothing to do with the work injury at this point, and everything to do with a self-induced inappropriate pain behavior that has evolved over time.

3. Does Ms. Fleitz require any future treatment as a result of the 08/24/1999 work-related injury to her left shoulder? If so, please provide a recommended treatment plan.

A. No treatment in 2017 or going forward would be in any relation to anything that occurred on 08/24/1999, and I will remain consistent with that opinion in consideration to the previous report that I generated in 2017.

Fleitz testified at the August 8, 2018, Hearing. Regarding the contested left shoulder arthroscopy with biceps release, Fleitz testified as follows:

Q: Okay. The last surgery that we – that you had in – on July 12th of 2017 is the one that we’re here to discuss that UPS has disputed is compensable. That surgery, was that on July 12, 2017?

A: Yes.

Q: Okay. And I know you have filed some letters from Liberty Mutual dated June 26th of 2017 that they had sent to Doctor Bonnarens stating that the arthroscopy and the release of the biceps on the left shoulder was pre-certified per peer review. My office then filed on June 29th of 2017, a document titled a Motion to Amend a Medical Dispute. We served that on you at your address. You can look at that and see if that is your correct address.

A: It is.

Q: Okay. And we also served that on Doctor Bonnarens. Do you recall receiving this document?

A: I don’t know what the document is.

Q: Okay.

A: I mean...Okay. Yes, I did get this.

Q: Okay. And if you read the first sentence of that second paragraph there, would you just read that sentence into evidence for me please?

A: Starting here?

Q: Yes.

A: It says, 'Defendant employer disputes compensability of a request for left shoulder arthroscopy with release of the biceps on the basis of work relatedness/causation.'

Q: Thank you. So, wouldn't you agree that based on this that you had knowledge that UPS was contesting compensability of that surgery prior to when you had that surgery done on July 12, 2017?

A: No, because I don't understand all of that legal information. I mean, it – it was given to Doctor Bonnarens and I was told I had a [sic] approval for the surgery and that's why the surgery was done. That was dated in you said June and the surgery was approved in July.

Q: That was filed three days after that peer review was issued. But, you did receive this document; correct?

A: I probably did. I can look through here and see, but I mean, I'm sure if you mailed it to me I would have gotten it.

In the September 19, 2018, Opinion and Award, the ALJ set forth the following findings regarding the compensability of the contested left shoulder arthroscopy with biceps release:

“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 by enforcement of the promise. The remedy granted for breach may be limited as justice required.”

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.

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 pre-authorization. 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.

UPS filed a petition for reconsideration requesting the ALJ to provide findings as to the work-relatedness of the left shoulder arthroscopy with biceps release. UPS also requested the ALJ to provide the evidentiary basis for his finding Dr. Bonnarens was induced by the Utilization Review to perform the surgery.

In the October 5, 2018, Opinion on Petition for Reconsideration, the ALJ overruled UPS's petition reasoning as follows:

This matter comes before the Administrative Law Judge on the Medical Payment Obligor's Petition for Reconsideration. The compensability of the surgery is controlled by the doctrine of promissory estoppel as set forth in the Opinion and Order. This finding makes MOOT any other ruling on the subject. The finding and Order is supported by substantial evidence and the law. The findings sought by the Medical Payment Obligor are not in the interest of judicial economy. The Petition is OVERRULED.

On appeal, UPS first asserts the ALJ erred by failing to determine the work-relatedness of the contested left shoulder arthroscopy with biceps release. In response to UPS' second argument, we vacate the ALJ's finding that the left shoulder arthroscopy is compensable and remand for additional findings.

ANALYSIS

We are compelled to point out that, while we are sympathetic to Fleitz's predicament, *pro se* claimants are treated no differently by this Board than claimants represented by counsel, and a *pro se* claimant assumes all the risks and rewards associated with self-representation. Smith v. Bear, Inc., 419 S.W.3d 49, 55 (Ky. App.

2013). We also acknowledge the occurrence of procedural failings on behalf of all parties that, had they been avoided, might have mitigated the problem the parties now face.

We first note that although the Board is not privy to exactly what was communicated to the ALJ, the record indicates he was likely unaware of the fact the arthroscopic surgery was pre-certified at the time he sustained UPS' Motion to Amend its Medical Fee Dispute on July 11, 2017, as the letters sent to Dr. Bonnarens and Fleitz were filed in the record on August 7, 2017, nearly one month *after* Dr. Bonnarens performed the surgery. While we are unable to determine who filed the pre-certification letters in the record, it appears that Fleitz mailed them to the ALJ on August 4, 2017, and they were subsequently filed in the record on August 7, 2017.

We also note UPS, at no time, formally withdrew its pre-certification of the surgery. Even though UPS filed an amended Medical Fee Dispute contesting the surgery on the grounds of *work-relatedness*, and pre-certification was based on a finding the surgery was reasonable and necessary treatment, UPS failed to file a motion withdrawing or revoking the pre-certification which, out of an abundance of caution, would have been prudent.

Finally, Fleitz failed to comply with relevant procedural rules in this litigation when she refused to submit to the scheduled IME with Dr. DeGruccio on June 7, 2017. Multiple documents in the record, including letters from Fleitz and a returned check for the IME, reflect that Fleitz adamantly refused to attend the IME with Dr. DeGruccio due to alleged "bias." In response to Fleitz's refusal to appear for an IME with Dr. DeGruccio, UPS filed a Motion to Suspend Benefits on June 13,

2017, *nearly one month before Fleitz took it upon herself to have the contested surgery*. UPS was forced to file a Renewed Motion to Suspend Benefits on February 20, 2018, as the ALJ did not rule on its original Motion to Suspend. Again, we note the Certificate of Service attached to UPS' original June 13, 2017, Motion to Suspend Benefits indicates the motion was mailed to both Fleitz and Dr. Bonnarens on the date it was filed, and the motion clearly sought a suspension of medical benefits as well as income benefits. On February 22, 2018, *seven months after Fleitz underwent the contested surgery*, the ALJ finally ordered Fleitz to attend an IME with Dr. DeGruccio.

UPS, pursuant to KRS 342.205, had the right to request that Fleitz attend an IME by a duly-qualified physician of UPS' choosing, and her allegation of bias was ultimately determined to be an inadequately supported ground for refusing to attend an IME. Fleitz's refusal to attend an IME with Dr. DeGruccio caused significant delay in this litigation and prevented UPS from obtaining a conclusive medical opinion on the issue of work-relatedness of the contested surgery until she finally submitted to an examination on April 5, 2018, *nearly nine months after she had the contested surgery*.

Fleitz's representation in her response brief to this Board that she "never refused to do anything that UPS, Dr. Degruccio [sic], Judge Davis or Dr. Benares [sic] has requested" rings false in light of the record. Despite the fact that Fleitz has proceeded *pro se*, she still must comply with the "relevant rules of procedural and substantive law." Smith v. Bear, Inc., *supra*. She failed to do so here with respect to attending an IME with Dr. DeGruccio.

Nonetheless, despite this procedural quagmire, before the ALJ can find the surgery compensable based upon the doctrine of promissory estoppel, he must set forth additional findings articulating exactly how this doctrine applies under the specific set of facts in this litigation.

The doctrine of promissory estoppel, as articulated by the Supreme Court of Kentucky in Barbara Lucinda Sawyer v. Melbourne Mills, Jr., 295 S.W.3d 79, 89 (Ky. 2009), is 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 by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

“Promissory estoppel can be invoked when a party reasonably relies on a statement of another and materially changes his position in reliance on the statement.” Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636 (Ky. App. 2003).

While we are unable to find a workers’ compensation case resolved under the doctrine of promissory estoppel, we will concede that it may be applicable here with adequate findings based upon the record. However, the ALJ failed to make adequate findings, despite UPS requesting additional findings in its petition for reconsideration. On remand, the ALJ must set forth exactly how Fleitz and Dr. Bonnarens were induced to move ahead with the contested surgery on July 12, 2017, in light of the fact UPS filed an amended Medical Fee Dispute on June 29, 2017, *only three days* after the June 26, 2017, letter pre-certifying the surgery and in light of UPS’ June 13, 2017, Motion to Suspend Benefits. If we assume the Motion to Suspend

Benefits was mailed to Fleitz and Dr. Bonnarens on the same day it was filed in LMS, June 13, 2017, as represented in the Certificate of Service, we can assume both received it nearly four weeks before the contested surgery took place on July 12, 2017, and were put on notice UPS had moved to suspend both medical and income benefits due to Fleitz's failure to attend the IME. Similarly, if the amended Medical Fee Dispute was mailed to Fleitz and Dr. Bonnarens on the same day it was filed in LMS, Thursday, June 29, 2017, as represented in the Certificate of Service, we can assume both would have received a copy on Saturday, July 1, 2017, and Dr. Bonnarens would have been made aware of the motion at some point during the work week starting on Monday, July 3, 2017.⁴ This is not a case where Fleitz and Dr. Bonnarens received the letter indicating the surgery was pre-certified and weeks were allowed to pass before UPS filed its amended Medical Fee Dispute. *The amended Medical Fee Dispute was filed three days later.*

Compounding the ambiguity surrounding who received what and when is the fact Dr. Bonnarens, as noted by UPS in its petition for reconsideration, failed to participate in these proceedings despite being joined as a party on March 23, 2017. Therefore, the record is devoid of any information from Dr. Bonnarens, *one of the parties that could have relied upon the pre-certification to his detriment*, regarding what he received or did not receive in the mail.

⁴ If the pre-certification letter to Dr. Bonnarens, to which Fleitz was cc'd, was mailed on the date it was generated, Monday, June 26, 2017, it is safe to assume both received a copy of the letter on or around Wednesday, June 28, 2017.

This Board is aware of Fleitz's representations in her *pro se* response brief indicating neither she nor Dr. Bonnarens received a "letter or notification...to stop the authorization of the surgery."⁵ She writes, in part, as follows:

As stated in the previous brief, I would not have had the surgery nor would Eastpointe surgery center [sic] scheduled the surgery if there had not been an authorization given to them. I spoke with billing and also with the department that schedules the surgeries to verify that no letter or notification was received to stop the authorization of the surgery. To this date none has been received. If Eastpointe would have received that notice they would have postponed the surgery. I also asked Eastpointe surgery center if the authorization they received, which is the same one that I received and Dr. Bonnarens received, would have been sufficient for them to schedule the surgery or would they have requested another authorization. I was instructed that the authorization they received was the authorization for them to schedule surgery. Ms. Rogers had me read a paper that she stated was mailed to me as well as Dr. Bonnarens stating that the surgery was I believe postponed, and I stated in the last brief, I have not received that notice, neither has Dr. Bonnarens or Eastpointe surgery center. I don't know what the letter entailed as I was only given one page to read, I don't know what else was in the rest of the letter. The notice I just received on October 3, 2018 showing the information submitted by Ms. Rogers states that the letter was sent out 'thirteen days prior to the July 12, 2017 surgery to myself and to Dr. Bonnarens.' In the hearing on August 8th in Frankfort with Judge Davis, Ms. Rogers stated the letter was sent 2 days after they received notice of the authorization for surgery. I am confused as to which one it is? And to this date that letter has not been received.

However, despite Fleitz's representations in her response brief, there is nothing documented in the record corroborating what she and Dr. Bonnarens

⁵ This Board will presume the "letter" and "notice" referred to above is the June 29, 2017, "Motion to Amend Medical Dispute" and amended Form 112 Medical Fee Dispute.

allegedly did not receive in the mail. In fact, Fleitz's testimony at the August 8, 2018, hearing is that she received UPS' June 29, 2017, Motion to Amend its Medical Fee Dispute.⁶ Once again, pursuant to Smith v. Bear, supra, despite the fact that Fleitz is proceeding *pro se*, she still must comply with the "relevant rules of procedural and substantive law." Therefore, Fleitz's assertion in her brief as to what she and Dr. Bonnarens did not receive must be substantiated with documentation in the record. It was not.

On remand, the ALJ must set forth the evidence in the record substantiating the applicability of the doctrine of promissory estoppel in light of UPS' June 13, 2017, Motion to Suspend Benefits which, according to the Certificate of Service, was mailed to both Fleitz and Dr. Bonnarens on the date it was filed, the June 29, 2017, Motion to Amend its Medical Fee Dispute contesting the arthroscopic surgery based on work-relatedness which, according to the Certificate of Service, was mailed to both Fleitz and Dr. Bonnarens on the date it was filed, and Fleitz's refusal to attend an IME with Dr. DeGruccio until April 5, 2018, nearly nine months after she underwent the contested surgery.

Should the ALJ find the doctrine of promissory estoppel is not applicable, he must resolve the medical fee dispute on its merits.

Our resolution of UPS's second argument on appeal renders the first argument moot.

Accordingly, the ALJ's determination the left shoulder arthroscopy with biceps release is compensable based upon the doctrine of promissory estoppel, as

⁶ "I mean...Okay. Yes, I did get this."

set forth in the September 19, 2018, Opinion and Award and the October 5, 2018, Opinion on Petition for Reconsideration is **VACATED**. This claim is **REMANDED** for additional findings and a decision in accordance with the views expressed in this opinion.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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