

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 18, 2020

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, ALJ,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING & REMANDING

* * * * *

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

BORDERS, Member. United Parcel Service (“UPS”) appeals from the May 20, 2020 Opinion and Order and the June 3, 2020 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ”). On appeal, UPS argues the ALJ erred in determining the pre-authorization sent to Dr. Frank

Bonnarens on June 26, 2017 by Liberty Mutual Insurance Company, UPS' insurance carrier, sufficiently supported the doctrine of "promissory estoppel", in finding the contested surgery was compensable. We agree and Vacate and Remand for an Opinion in conformity with this Opinion.

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.

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.

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 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 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.

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.

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.

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.

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.

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.

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.

On appeal, UPS argues the ALJ once again failed to set forth additional findings of facts supporting the application of the doctrine of promissory estoppel to the facts of this claim, as ordered by this Board. It believes there are no facts to support its application. UPS additionally argues the ALJ misinterpreted the law regarding promissory estoppel and has erroneously relied on 803 KAR 25:190(1)(5) in error. As this issue has been before this Board on three occasions, we adopt the language set forth in our first Opinion Vacating and Remanding, in part, as follows *verbatim*:

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 precertification 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 grounds 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's 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 [footnote omitted] 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.

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." 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 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 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. 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.

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.

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).

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.

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.

ALL CONCUR.

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