Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 13, 2013

CLAIM NO. 199100135

D & D MACHINERY MOVERS
(AS INSURED BY OHIO CASUALTY) PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

MITCHELL PLOWMAN
D & D MACHINERY MOVERS
(AS INSURED BY KAGC/ADMINISTERED
BY LADEGAST & HEFFNER)
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. D & D Machinery Movers as insured by Ohio Casualty (hereinafter referred to as "Ohio Casualty") appeals from the June 10, 2013, Opinion and Award of Hon. Edward Hays, Administrative Law Judge ("ALJ") denying and dismissing Ohio Casualty's October 5, 2012, Motion to

Reopen and Medical Fee Dispute and ruling in favor of D & D Machinery Movers as insured by Kentucky Association of General Contractors (hereinafter referred to as "KAGC"). Ohio Casualty also appeals from the July 8, 2013, “Order on Petition for Reconsideration.”

Ohio Casualty raises three issues on appeal. First, Ohio Casualty asserts the Form 110 does not prevent Ohio Casualty from contesting the compensability of Mitchell Plowman's ("Plowman") treatment. Second, it maintains substantial evidence does not support a finding that Plowman's 2010 fusion and subsequent treatment are related to his 1990 injuries. Finally, it argues the ALJ's finding KAGC properly administered the claim is erroneous.

As a means of efficiently summarizing the procedural background of the litigation prior to the filing of Ohio Casualty's Motion to Reopen and Medical Fee Dispute on October 5, 2012, we adopt the ALJ's summary in the June 10, 2013, Opinion and Order which is as follows:

> This matter involved an unusual medical fee dispute. The original Claimant and present Respondent, Mitchell Plowman, sustained two work-related injuries, the first occurring on May 29, 1990, and the second occurring on November 7, 1990. On each occasion he was employed by D & D Machinery Movers. At the time of the first injury, the Defendant-Employer was insured by Ohio Casualty. At the time of the second injury, the

Defendant-Employer was insured by Kentucky Association of General Contractors (hereinafter "KAGC").

A settlement agreement was approved in October of 1992 wherein liability for income benefits was divided among the two insurance carriers and the Special Fund, due to the arousal of a pre-existing degenerative disc disease in the low back. The agreement further reflected that KAGC would pay the first $30,000.00 of future medical expenses, after which any surplus medical expenses would be divided equally between the two insurance carriers.

For approximately 18 to 20 years after the settlement agreement, KAGC, through Ladegast & Heffner Claim Service, Inc., paid all of Mr. Plowman's medical expenses. However, in 2010 a major low back surgery pushed the medical expenses to a total of $72,441.79, well above the $30,000.00 threshold, and KAGC sent a request for reimbursement of one-half of the medical expenses in excess of $30,000.00 to Ohio Casualty. The amount sought by KAGC was $21,104.53.

Ohio Casualty then sought documentation of the medical treatment that had been rendered to and on behalf of Mr. Plowman and after investigation, including the seeking of peer review and an IME from Dr. Bart J. Goldman, Ohio Casualty denied liability and filed a motion to reopen and a medical fee dispute, in which Ohio Casualty challenged any responsibility for medical expenses and filed a prospective dispute as to future liability. The Movant, Ohio Casualty, indicated it was contesting compensability based upon a violation of the 45-day rule as set forth in KRS

342.020(1). Ohio Casualty seeks an order from the ALJ finding the lumbar fusion, prescription treatment plan, and medical treatment plan unreasonable and/or unnecessary, or not causally related, or barred as not provided within 45-days pursuant to KRS 342.020(1), or assignment to an ALJ with the scheduling of a Benefit Review Conference and the allowance by the parties to investigate the claim and present evidence on the question of whether such current and future treatment is compensable.

An Order of Submission was issued on April 11, 2013, under which it was noted that the only dispute between the parties involved the prior agreement between the two workers' compensation insurance carriers as to the interpretation and application of the agreement reached between them in 1992. The Order of Submission did further allow the parties some additional time to submit evidence, noted that both parties had agreed to waive a Formal Hearing, and ordered the claim taken under submission as of April 9, 2013. Subsequent thereto, some additional evidence was filed in the record, position statements or briefs have been filed by the original Claimant and by each of the insurance carriers. Further, KAGC has filed a motion to strike the brief of Ohio Casualty, claiming that Ohio Casualty has introduced a new issue alleging the inappropriate administration of the claim, and that said issue was raised for the first time in the final brief of Ohio Casualty. A response has been filed by Ohio Casualty, all of which has been considered by the ALJ. Ohio Casualty claims that KAGC has filed additional medical evidence and has moved the claim be removed from

> submission and that Movant, Ohio Casualty, be given an opportunity to respond to the medical report filed by KAGC. All of these pleadings have been reviewed by the ALJ and a decision will now be rendered.

The record contains the September 28, 1992, Form 110 Settlement Agreement executed by Plowman, the Special Fund, Ohio Casualty and KAGC, approved on October 5, 1992, by Hon. James L. Kerr, Administrative Law Judge. The Form 110 reflects the dates of injury are August 29, 1990, and November 7, 1990, and the nature of Plowman's injury is described as follows:

> Low back strain, degenerative disc disease L4-L5-S1, bulging disc lumbar spine, significant restrictions on lifting, bending, stooping, has not returned to work, has not been released to return to work, permanently physically disabled from performing the essential functions of previous employment.

Attached to the Form 110 is an "Addendum to Agreement as to Compensation." Paragraph 3 of which reads as follows:

> The Plaintiff/Employee shall further receive [handwritten] from the Defendant/Employer, D & D Machinery, a self-insured entity; all future medical expenses reasonably related to the Plaintiff's lower back condition up to the amount of $30,000.00, after which point all future medical expenses reasonably related to the Plaintiff's lower back condition shall be paid by

> the Employer split equally between Ohio Casualty and D & D Machinery's self-insured entity.

Paragraph 5 of the Addendum reads as follows:

> The parties further agree that this is a settlement of a disputed claim, that the Defendant/Employer has not by entering into this agreement acknowledged that Plaintiff's lower back condition is due in part or solely to the work injuries of 5/29/90 or 11/7/90, and all issues, including liability of the Defendant/Employer, and liability as between Ohio Casualty and the self-insurer of D & D Machinery remain contested issues.

Ohio Casualty's Form 112 Motion to Reopen describes the nature of the dispute as follows:

> 1. The claimant was injured on May 29, 1990 and November 7, 1990. A settlement agreement was approved by ALJ Kerr on October 5, 1990.
>
> 2. All medical bills have been paid pursuant to KRS 342.020.
>
> 3. Based upon recent peer review of Dr. David McKenas the lumbar fusion, current medication plan, and current medical treatment plan for low back pain have been deemed unrelated to the original work injury. Causation notwithstanding, peer review has concluded that ongoing use of the current prescription treatment plan and medical treatment plan is unreasonable and unnecessary. Furthermore, Ohio Casualty disputes reimbursement of bills over the $30,000.00 mark, as a statement for services was not received within 45 days of the date treatment was initiated.

> WHEREFORE, the Movant prays for a proper Order finding the lumbar fusion, prescription treatment plan and medical treatment plan, unreasonable and/or unnecessary or not causally related or barred as not provided within 45 days pursuant to KRS 342.020(1), or assignment to an Administrative Law Judge with the scheduling of a Benefit Review Conference and the allowance by the parties to investigate the claim and present evidence on the question of whether such current and future treatment is compensable.

On October 25, 2012, KAGC filed a Form 112 Medical Fee Dispute in which it set forth the nature of the dispute as follows:

> The claimant, Mitchell Plowman, sustained low back injuries in the course of his employment on May 29, 1990 (Ohio Casualty liability) and on November 7, 1990 (KY AGC liability). A settlement agreement was approved on October 5, 1992. Liability for income benefits was divided among the two carriers and the Special Fund, due to arousal of pre-existing degenerative disc disease. As to medical expenses, the agreement reflected that the KY AGC would pay the first $30,000.00 of future medical expenses, following which liability for medical expenses would be split equally between the two carriers.
>
> The movant paid its share of medical expenses pursuant to the terms of the settlement agreement and subsequently has sought reimbursement from the co-defendant for its one-half liability for medical expenses in excess of $30,000.00. The co-defendant, Ohio Casualty, has now disputed liability

> for its share of the medical expenses. This medical dispute is being filed therefore, simply to establish that the movant will be liable only for one-half of compensable medical expenses in the future.
>
> **This is a continuing objection to future statements, services or treatment of the same nature or for the same condition.**

By order dated November 14, 2012, Hon. J. Landon Overfield, Chief Administrative Law Judge, sustained Ohio Casualty's motion. The claim was later assigned to ALJ Hays.

Due to the complexity of the issues on appeal, we set out the ALJ's "Analysis, Findings of Fact, and Conclusions of Law" in the June 10, 2013, Opinion and Award which is as follows:

> As noted in the Introduction above, this claim involves a dispute regarding the agreement reached between the two workers' compensation insurance carriers in 1992, involving the liability of the carriers for the Claimant's future medical expenses under KRS 342.020. Although Ohio Casualty has argued that Ladegast & Heffner improperly administered the claim for medical benefits and the rendering of medical benefits to the Claimant, to which allegation KAGC claims is a new issue, inappropriately raised for the first time in Ohio Casualty's final brief. In the opinion of this ALJ, the entire matter boils down to the question of whether or not the medical treatment rendered to and

on behalf of the original Claimant, Mitchell Plowman, has been work-related or causally connected to the original injuries sustained by Claimant and, secondly, whether such medical treatment has been reasonable and necessary. If so, then Ohio Casualty is responsible for its share of the medical expenses. If not, then Ohio Casualty is not responsible for any portion of the medical expenses.

The dispute as to the timing of the seeking of reimbursement by KAGC is not a meritorious defense. The 45-day rule applies to the time in which a medical provider is to seek payment for medical services rendered. In this matter at hand, the dispute is between two workers' compensation insurance carriers. The dispute does not involve an actual medical provider. The ALJ finds that KAGC gave appropriate notice to Ohio Casualty of its claim for reimbursement and that KAGC properly provided documentation of its claim to Ohio Casualty. Ohio Casualty then investigated the matter and eventually took a position under which it denied responsibility and filed a medical fee dispute. KAGC has maintained that Ohio Casualty’s filing of a medical fee dispute was untimely and should not be entertained by the ALJ. The ALJ has reviewed the positions of each of the parties and the respective responses filed thereto and finds that none of the filings have been inappropriate. The ALJ will not strike any of the pleadings filed herein, but will render a decision on the merits of the claim, which, as indicated above, primarily involved the questions of causation/work-relatedness and reasonableness and/or necessity. The ALJ would further note that Ohio Casualty’s complaints of not having

been provided appropriate documentation to be without any merit or justification. As noted by KAGC, it was the choice of Ohio Casualty to close its file and to ignore its future responsibility to the Claimant. It is disingenuous for Ohio Casualty to now claim foul and to argue that it was not provided appropriate documentation and was not given an opportunity to evaluate the treatment that was being rendered to the Claimant; the selection of a 113 physician, or the failure to require an appropriate selection; and the alleged failure to require an appropriate treatment plan. The ALJ finds that KAGC's administration of the claim for medical expenses has not been inappropriate, but has been within the statutes and regulations applicable thereto.

The ALJ will now consider the merits of the matter. The Claimant offered testimony by way of deposition on March 26, 2013. The testimony of Mitchell Plowman has been closely considered by the ALJ. Mr. Plowman verified that his back was injured during each of the work-related incidents. On the first occasion, he and a co-worker were setting stacker forms that came loose and fell down on top of them. On the second occasion, he and a co-worker were moving a piece of machinery with the use of a device called a Johnson Bar which slipped out of position causing his back to be jerked. He returned to work after the first injury but has not returned to work following the second injury. Mr. Plowman testified credibly that he had suffered chronic low back pain. Originally, the pain radiated into both legs.

An Agreement as to Compensation of Mr. Plowman's claim for indemnity benefits,

as well as an agreement as to responsibility for future medical expenses, was reached between the two insurance carriers and was approved by the Hon. James L. Kerr, ALJ, on October 5, 1992. The nature of the injury was described as “low back strain, degenerative disc disease L4-L5-S1, bulging disc lumbar spine, significant restrictions on lifting, bending, stooping, has not returned to work, has not been released to return to work; permanently physically disabled from performing the essential functions of previous employment.” In the Addendum to the Agreement, Mr. Plowman was to receive compensation of $205.32 per week, representing 77.5% permanent partial disability benefits for 425 weeks, apportioned 50/50 between the Special Fund and the Defendant-Employer. The Defendant-Employer’s responsibility was apportioned equally between the two workers' compensation insurance carriers. The Agreement also contained a specific provision under which it was agreed that KAGC would be responsible for payment of future medical expenses reasonably related to the Claimant’s lower back condition up to the amount of $30,000.00, after which point all future medical expenses reasonably related to the Claimant’s lower back condition would be divided equally between Ohio Casualty and KAGC. The Claimant verified the terms of the Agreement.

Mr. Plowman testified that his low back pain had been consistent and continuous. His medical treatment had been regular and had been rendered to him and on his behalf throughout the period of time following the approval of the Agreement as to compensation. He has never sustained any intervening injuries and the nature of his pain has

not changed. Since the dispute has arisen between the two insurance carriers, Mr. Plowman testified he has had difficulty in obtaining appropriate medical treatment.

Mr. Plowman testified that in October of 2010, Dr. Alexis Norell [sic] performed low back surgery that was paid for by KAGC. The rendering of the surgical services resulted in total medical expenses of $72,441.79, causing the total medical expenses to far exceed the $30,000.00 threshold.

Mr. Plowman verified that he has never been pain free at any time since the work-related injuries. He has always been on pain medications and has always undergone treatment for his pain.

The ALJ has considered the affidavit of Debbie Smith, an adjuster with Ladegast & Heffner, together with the attached copies of letters between Mr. Dave Long of Ohio Casualty and Ms. Carrie Berry of KAGC or Ladegast & Heffner. Ohio Casualty states that its dispute as to the compensability of Claimant's ongoing treatment is based upon the Utilization Review of Dr. McKenas, the IME of Dr. Huhn, and the report of Dr. Goldman. Dr. Huhn evaluated the Claimant on February 6, 2012, and determined that Claimant had a lumbar sprain/strain as the result of the two work-related incidents. Dr. Huhn noted that Claimant has severe and advanced osteoarthritis which caused boney deterioration and degeneration of the lumbar spine. However, he opined these changes were age-related and were not causally related to the 1990 injuries. Dr. Bart Goldman opined on March 25, 2013, that Claimant's fusion surgery was related to his degenerative disc disease which pre-existed the work

accidents and which "gets worse with age." In the opinion of Dr. Goldman, Mr. Plowman's fusion surgery was "related to his pre-existing degenerative disc disease rather than either of the two strain injuries in 1990." The ALJ would note that the problem with Dr. Goldman's report is that it attempts to go all the way back in time and to undermine the Agreement reached between the parties, as well as the applicable law of the case. To Dr. Goldman's credit, he does recognize and acknowledge the problem with his opinion, when he states on page 3 of his report, as follows:

"Therefore, while it is my opinion that medically this gentleman's current treatment is related to his pre-existing degenerative disease rather than either of the two strain injuries in 1990, it appears that it has been adjudicated that treatment for his degenerative disc disease in his lumbar spine is compensable as related to those two strain injuries. If this was indeed the original agreement, then both carriers would be equally responsible for any expenses over $30,000.00 including the cost of this gentleman(*sic*) fusion."

Of course, this is precisely what has occurred. The parties agreed in 1992 that even though Claimant had a dormant pre-existing condition, it was aroused into disabling reality by the work-related incidents. Pursuant to a long line of cases, which have consistently held that the defendant-employer is responsible for the arousal of dormant pre-existing conditions into disabling reality, the medical treatment rendered to and on behalf of Mr. Plowman, and paid for by KAGC, is compensable. McNutt Construction/First General

Services v. Clifford F. Scott, et al., 40 S.W.3d 854 (Ky. 2001). There being no significant changes in the nature and consistency of the pain or the limitations and restrictions of the Claimant, the low back problems that have persisted throughout the last 20+ years are related to the original work-related incidents in the opinion of this ALJ. Further, the treatment rendered by the Claimant's treating physicians has not been shown to be unreasonable or unnecessary. In post-settlement medical disputes, the Plaintiff bears the burden of proof on questions of causation, but the Defendant-Employer has the burden to show the medical treatment to be unreasonable and/or unnecessary. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

The peer review offered by Ohio Casualty was from Dr. McKenas, who performed only a records review and might not have had access to the complete treatment records. In essence, Dr. McKenas opined that the mechanism of injury as described could not have caused Claimant's current complaints. It is the opinion of this ALJ, Dr. McKenas' opinion is an attempt to re-litigate or to change the result that was agreed to by the parties in 1992. The mechanism of injury was agreed to have been sufficient to have caused the Claimant's injuries and the impairment resulting therefrom. Even Dr. Goldman has acknowledged that if the parties agreed that the injuries aroused the pre-existing degenerative disc disease, then the insurance carriers would be jointly responsible for the current medical treatment. The ALJ so finds.

On the other hand, KAGC has provided medical records from Dr. Phil Tibbs in

1990-1991; Dr. Tchou at University of Kentucky Medical Center in 1991, who assigned a 26% whole person impairment; Dr. James Templin in 1992, who assigned a 20% permanent impairment; and Dr. Jerry Brackett, Claimant's family physician, who saw Claimant on dozens of occasions between 1994 and 2002. On the last visit with Dr. Brackett, he noted Claimant had back pain secondary to work injury that was "ongoing."

It is also noted by the ALJ that prior to the laminectomy, discectomy, and fusion performed by Dr. Norell [sic] in 2010, the proposed treatment was sent to Utilization Review by Dr. Peter Kirsch, who noted that Mr. Plowman was neurologically compromised from an objective standpoint. He identified severe spinal stenosis at L4-L5 with a Grade I spondylolisthesis. Dr. Kirsch also noted that Claimant had failed conservative treatment and that the recommended surgery was reasonable. The records of Dr. Hammad Malik indicate Claimant has had continuous low back pain for more than 20 years. Dr. Malik noted the history of Claimant's chronic lumbar pain revealed that the pain is the result of the work incident. Dr. Malik also noted that the spinal fusion in 2010 by Dr. Norell [sic] gave Claimant some relief from his leg pain and paresthesias, even though the back pain persists.

In conclusion the ALJ finds that KAGC has complied with the terms of the Settlement Agreement; that KAGC has appropriately administered the rendering of medical treatment to the Claimant; that all of the Claimant's medical treatment has been work-related and causally connected to the original injuries, and have been reasonable and necessary. The ALJ finds no merit in

> the position of Ohio Casualty and finds no reason as to why Ohio Casualty should not be held to the terms and conditions of the Agreement as to Compensation dated October 5, 1992.

Accordingly, the ALJ overruled KAGC’s motion to strike, resolved the medical fee dispute filed by Ohio Casualty in favor of KAGC, and ordered Ohio Casualty to reimburse KAGC one-half of the medical bills in question. The ALJ stated this was a continuing order and any future attempts by Ohio Casualty to disregard its obligation would be closely scrutinized.

In its petition for reconsideration, Ohio Casualty alleged four errors. First, it alleged the ALJ erred by finding the Form 110 prevents Ohio Casualty from contesting Plaintiff's medical treatment as related to his degenerative condition rather than his work injuries. Second, it alleged the ALJ erred by refusing to consider Dr. McKenas' opinion when determining causation. Third, it contended the ALJ's finding that Plowman's pain has not changed in 20 years since the original injury is erroneous. Finally, it argued the finding KAGC properly administered the claim is erroneous.

KAGC filed a petition for reconsideration requesting the ALJ enter a finding that each party is responsible for 50% of all reasonable and necessary medical

expenses related to the work injury. It also requested the ALJ order the parties to confer regarding future payment of medical expenses and Ohio Casualty pay one-half of any unpaid bill or out-of-pocket expenses directly to the medical provider or Plowman, respectively.

In the July 8, 2013, order on reconsideration, the ALJ determined as follows:

> This claim is before the undersigned Administrative Law Judge on the Petition for Reconsideration filed on June 24, 2013, by the Defendant-Employer, D & D Machinery Movers (as insured by Ohio Casualty), for reconsideration of the ALJ's Opinion and Order rendered on June 10, 2013, (herein "the Opinion"), and on the Petition for Reconsideration filed on June 24, 2013, by the Respondent, Kentucky AGC/Ladegast & Heffner Claims Service, Inc., for reconsideration of the Opinion.
>
> Both movants raise several issues. Ohio Casualty claims under paragraph five of the Form 110 that it did not agree, and specifically so stated, that Plaintiff's low back condition was in part or solely due to the work injuries of May 29, 1990, and further maintains that it did not agree as to the respective liability of Ohio Casualty and AGC/Ladegast & Heffner. Paragraph five of the addendum to the Form 110 contains typical language that the parties agree that by entering into a settlement of the disputed claim, the Defendant-Employer is essentially agreeing to nothing. Ohio Casualty now wants to rely upon such language. The ALJ finds that such language is

completely inconsistent with the language and intent contained in other portions of the Form 110, under which Ohio Casualty was responsible of a lump sum of $19,260.58, and was further responsible for payment of one-half of future medical expenses in excess of $30,000.00, as contained in paragraph three of the addendum to Form 110.

In the Opinion rendered herein, the ALJ has already interpreted and applied the terms of the Form 110 as deemed appropriate. The ALJ is not going to reiterate all of the findings and conclusions contained in the Opinion. The ALJ found that all of Claimant's medical treatment has been work-related and causally connected to the original injuries, and have further been reasonable and necessary. As stated in the Opinion, the Plaintiff continues to have the burden of proving the current medical treatment was causally connected to the original work injuries. The ALJ has so found and if there be any doubt, does hereby confirm and reiterate that the ongoing effects of the original work injuries were and are causally connected to the medical treatment that has been rendered to Plaintiff since 1992. The efforts of Ohio Casualty to avoid all of the consequences of the agreement into which it entered with a fellow insurer, based on the proposition that the terms of a Form 110 cannot be used as an admission against any party in a reopening, in the opinion of this ALJ is not a sufficient basis on which to allow Ohio Casualty to renege on its agreement with Kentucky AGC.

The Respondent, Kentucky AGC, has petitioned the ALJ to do three things: (1) to specifically find that each employer/carrier is 50% liable for all

> reasonable and necessary medical treatment related to the work injuries, (2) to require the parties to confer with each other as to the manner in which all future medicals will be handled, and (3) to the extent that Mitchell Plowman has paid "out of pocket," if any, that he be reimbursed for same by Ohio Casualty for its 50% share of any recent medical expenses that have been paid by the Claimant or medical expenses that remain unpaid, and that said expenses should be ordered paid or reimbursed directly by Ohio Casualty to Mitchell Plowman or the appropriate medical provider. These three points are considered by the ALJ to be clarifications of the orders contained in the Opinion and are therefore **sustained** and **granted**.
>
> In conclusion, the Petition for Consideration of Kentucky AGC is **sustained** and **granted**. The Petition for Consideration filed on behalf of Ohio Casualty is **overruled** and **denied**. To reiterate, the parties shall confer as to the precise manner in which all future medicals will be handled. The ALJ shall expect the parties to fully cooperate and to act reasonably with respect to this matter. In the event an agreement cannot be reached, then either party may file a motion to reopen and seek more direct and specific guidance as to the handling of future medical expenses. In the event that becomes necessary, the ALJ will scrutinize very closely the actions of any party which are found to be unreasonable.

Ohio Casualty's first argument on appeal is as follows:

The ALJ erred in finding that the 1992 Form 110 prevents Ohio Casualty from contesting Plaintiff's medical treatment as related to his degenerative condition rather than his work injuries because the parties never agreed that Plaintiff's lumbar complaints were work related; the terms of a Form 110 cannot be considered as an admission against any party; and the agreement considering Plaintiff's lumbar condition 20 years ago is not dispositive regarding treatment at [sic] from 2010 forward.

a) In the addendum to the 1992 Form 110, it was specifically agreed that there was a dispute regarding whether Plaintiff's condition and complaints were work related and the compensability of treatment and liability between the parties were 'contested issues.'

> **5) The parties further agree that this is a settlement of a disputed claim, that the Defendant/Employer has not by entering into this agreement acknowledged that Plaintiff's lower back condition is due in part or solely to the work injuries of 5/29/90 or 11/7/90, and all issues, including liability of the Defendant/Employer, and liability as between Ohio Casualty and the self-insurer of D & D Machinery remain contested issues.**

(Form 110 addendum, p.2)

While the ALJ ignored this paragraph, stating that paragraph 5 of the Addendum was 'completely inconsistent with the language and intent contained

> in other portions of the Form 110' including the lump sum by Ohio Casualty and the agreement between the insurers to pay medical expenses, it is improper for the ALJ to 'pick and choose' which parts of the Form 110 are binding and which parts are not. (Order on PFR, p.1-2).

The Board is not unmindful of the language in KRS 342.125(7) and that no statement contained in a settlement agreement is an admission against the interests of a party upon reopening. That said, the ALJ has the discretion to make independent findings and determine, as in the case herein, the nature of the injury at the time of the settlement agreement. Beale v. Faultless Hardware, 837 S.W.2d 893 (Ky. 1992).

At first blush, it appears the ALJ bound all parties to the description of Plowman's injuries as set forth in the settlement agreement, as the ALJ repeatedly referred to what the parties "agreed" to at the time of the settlement. An example of this is on page 8 of the June 10, 2013, Opinion and Order when the ALJ stated "[t]he parties agreed in 1992 that even though Claimant had a dormant pre-existing condition, it was aroused into disabling reality by the work-related incidents."

Nevertheless, it is clear that the ALJ also made his own independent findings regarding the nature of

Plowman's injuries separate from the language in the settlement agreement. For instance, on pages five through seven of the Opinion and Order, the ALJ discussed Plowman's testimony regarding his injuries and his chronic subsequent low back pain. Additionally, on page nine, the ALJ discussed the medical records which led him to determine, independent from the language in the 1992 settlement agreement, the nature of Plowman's injuries. The ALJ considered the medical evidence submitted in this medical fee dispute and made a determination that the contested medical treatment was reasonable and necessary to treat Plowman's lumbar spine injuries as represented in the Form 110 settlement agreement and as independently determined by the ALJ. This is well within the ALJ's discretion.

Concerning the ALJ’s interpretation of paragraph 5 of the addendum to the 1992 settlement agreement as merely being generic language indicating Ohio Casualty agrees to nothing, it is well within the ALJ's discretion to determine this "language is completely inconsistent with the language and intent contained in other portions of the Form 110."

Clearly, KRS 342.125(7) prohibits the ALJ from considering the language in a settlement agreement as an “admission against the interest of any party.” However, this section does not prohibit the ALJ from considering the

language contained in the agreement in making his own determination regarding an issue raised on reopening which pertains to the settlement agreement. The ALJ did not deem the language as an admission against Ohio Casualty's interest. Rather, based on his own independent findings of fact, the ALJ concluded the parties' definition of the injury in the settlement agreement was accurate. Consequently, Ohio Casualty was not prevented from contesting the compensability of Plowman's treatment based on the contents of the previously executed Form 110.

We find no merit in Ohio Casualty's next argument that substantial evidence does not support a finding Plowman's 2010 fusion and subsequent treatment is related to the 1990 work events. Ohio Casualty argues as follows:

> The reason for the changes to *all* medical experts in this claim is that since 1992 Plaintiff's [sic] has had ongoing degenerative deterioration of his spine; *no* medical expert has related the need for this surgery to his work related strain/sprain injuries or even the arousal of his pre-existing degenerative changes in 1992.

After a thorough review of the June 10, 2013, Opinion and Award and the July 8, 2013, order on reconsideration, we conclude substantial evidence supports the ALJ's determination Plowman's lumbar fusion and subsequent treatment are causally related to his 1990

lumbar injuries. In the "Analysis, Findings of Fact, and Conclusions of Law" in the June 10, 2013, opinion and award, the ALJ devoted a substantial portion of his findings of fact to discussing in detail the medical evidence that cut for and against a causal connection between the work injuries and the treatment in question. This has been set out verbatim herein. The Board's task is to verify that such evidence exists.

The ALJ relied upon the September 9, 2010, precertification report, conducted before the requested fusion surgery, by Dr. Peter Kirsch in which the following question was posed to him: "Is the requested posterior lumbar interbody fusion L4-5 medically necessary and appropriate as treatment of the 11/07/1990 work injury?" Dr. Kirsch responded as follows:

> At present, the patient is neurologically compromised from the objective standpoint. He has sensory complaints and imaging studies identify severe spinal stenosis at L4-5 with a grade I spondylolisthesis. He has failed conservative treatment. I support the above request to improve function and decrease symptoms.

The ALJ also relied upon certain medical records of Dr. Hammad Malik, dated October 30, 2012, November 28, 2012, and January 8, 2013, in which he noted Plowman has been experiencing low back pain for a duration of twenty

years. Under "setting in which it first occurred," Dr. Malik stated "work related injury."

Finally, the ALJ relied upon the medical records of Dr. Jerry Brackett. In a medical record with an illegible date, Dr. Brackett, under "HPI" wrote back pain secondary to work injury. Dr. Brackett also noted the back pain was "ongoing."

Fundamental to the ALJ’s authority is the discretion to interpret this medical evidence as comprising substantial evidence which supports a determination the 2010 fusion surgery and subsequent treatment is reasonable, necessary and causally connected to Plowman's 1990 injuries. Because the above-recited medical evidence constitutes substantial evidence supporting the ALJ’s determination, this determination cannot be disturbed.

Finally, in its appeal brief, Ohio Casualty provides an extensive laundry list of alleged ways in which KAGC improperly administered its claim, including but not limited to the following:

> KAGC's administration of this claim was not in accordance with the provisions of the workers' compensation Act; specifically, KAGC did not properly obtain a statement for services prior to paying medical bills; no Form 113 physician was designated; no treatment plans were obtained; no peer reviews or any opinion regarding causation were

> obtained; and Plaintiff's medical bills were not paid according to the fee schedule.

Barring Ohio Casualty's argument regarding KAGC's alleged violation of the 45-day rule pursuant to KRS 342.020(1), this litany of alleged procedural errors was first brought to the ALJ's attention in Ohio Casualty's May 22, 2013, brief to the ALJ. Ohio Casualty failed to raise any such objections throughout the course of this litigation, noticeably even after the April 11, 2013, Order of Submission characterized the dispute as follows:

> This claim involves a prior agreement between two workers' compensation insurance carriers for work-related injuries occurring on May 29, 1990, and November 7, 1990, while Plaintiff, Mitchell Plowman, was employed by D & D Machinery Movers & Millwrights, Inc.

We also note that while the parties, pursuant to the April 11, 2013, Order of Submission, had until May 10, 2013, to file briefs to the ALJ, Ohio Casualty filed its brief late on May 22, 2013, making its eleventh-hour arguments regarding alleged procedural errors all the more dilatory. In response to Ohio Casualty's May 22, 2013, brief to the ALJ, KAGC filed a "Motion to Strike Brief of Ohio Casualty" asserting as follows:

> Comes the Defendant, D & D Machinery, as insured by KAGC, and hereby moves to strike the Brief filed on behalf of D &

> D Machinery as insured by Ohio Casualty. As grounds for this Motion, the defendant would state that while Ohio Casualty has raised issues in its Brief which were never previously raised in the claim, specifically, they have alleged that this defendant did not properly administer the payment of medical expenses in this claim, by not obtaining statements for services, not obtaining a From 113, not obtaining a treatment plan, not obtaining Utilization Review, etc. No such allegations were made in the Motion to Reopen or any other pleading filed on behalf of Ohio Casualty, until it filed its Brief. If Ohio Casualty truly believed those allegations to be accurate, it would have set them out as part of the grounds for its Motion to Reopen and this defendant would have taken appropriate proof. Ohio Casualty, however, apparently realizing the obvious weakness of its position in this case, has interjected an entirely new issue, belatedly, in its Brief. Introduction of a new issue, alleging inappropriate administration of the claim, in the final Brief in the claim is completely inappropriate and the Brief should be stricken from the record.

In light of the wide range of alleged procedural errors being contested by Ohio Casualty, presenting them to the ALJ for the first time in its brief comprises a waiver of its right to contest any alleged errors outside of the argument raised in Ohio Casualty's October 5, 2013, Motion to Reopen and Medical Fee Dispute pertaining to KAGC's alleged violation of the 45-day rule pursuant to KRS

342.020(1). Significantly, in its motion to reopen, Ohio Casualty stated, based upon the peer review of Dr. David McKenas, the lumbar fusion and current medical treatment plan for the low back pain were deemed unrelated to the original work injury. It went on to state, causation notwithstanding, peer review concluded the ongoing use of the current prescription treatment plan and medical treatment plan is unreasonable and unnecessary. Ohio Casualty also stated it was contesting reimbursement of the medical bills because a statement for services was not received within forty-five days of the date treatment was initiated. Ohio Casualty did not raise as an issue KAGC's improper administration of the claim. Similarly, in its Form 112, Ohio Casualty stated "peer review was performed on the contested treatment" and in addition it was contesting compensability based upon a violation of the forty-five day rule set forth in KRS 342.020(1). In response to question six in the Form 112 requesting a brief description of the nature of the dispute, Ohio Casualty stated "please see attached affidavit." Our review of the Form 112 and the attachments reveals no such affidavit. Further, in its Statement of Proposed Stipulations and Notice of Contested Issues filed April 4, 2013, Ohio Casualty merely stated as follows:

1. Compensability of medical bills submitted by Ladegast and Heffner to Ohio Casualty

2. Compensability of current and ongoing medical treatment of Plaintiff

At no time during the proceedings, prior to the filing of briefs, did Ohio Casualty raise the issue of KAGC improperly administering the claim. Clearly, it never sought to amend its Form 112. Thus, like the ALJ, we too find Ohio Casualty's allegation of improper administration to be disingenuous.

Regarding the applicability of the 45-day rule, in the June 10, 2013, Opinion and Award, the ALJ determined the 45-day rule is not relevant to the dispute at hand. We agree. The clear and unambiguous language in the portion of KRS 342.020(1) that mandates a submission of a statement of services within 45 days pertains only to the "provider of medical services." As KAGC is an insurer and not a medical provider, this statutory provision has no relevance to when it was required to submit medical bills to Ohio Casualty. The ALJ's determination that the 45-day rule is not applicable will not be disturbed.

Accordingly, concerning all issues raised by Ohio Casualty on appeal, the June 10, 2013, Opinion and Award

and the July 8, 2013, order on reconsideration are **AFFIRMED**.

ALL CONCUR.

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