Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 21, 2014

CLAIM NO. 200057847

MALLINCKRODT GROUP, INC.
NORMAN E. HARNED
AND HARNED, BACHERT & MCGEHEE, PSC PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

TERRY DANIELS
HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE
AND JACK CONWAY, ATTORNEY GENERAL
FOR THE COMMONWEALTH OF KENTUCKY RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Mallinckrodt Group, Inc. ("Mallinckrodt"), Norman E. Harned, and Harned, Bachert & McGehee, PSC ("Harned") seek review of the September 2, 2011, order of

Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") limiting his attorney fee to $12,000.00 related to his representation of Mallinckrodt in multiple medical fee disputes resolved by Hon. Chris Davis, Administrative Law Judge ("ALJ Davis") in a March 2, 2011, opinion and order. Harned also appeals from the September 21, 2011, order of the CALJ denying his petition for reconsideration. In addition, Harned appeals from the September 7, 2013, order of Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ Miller") limiting his attorney fee to $12,000.00 related to his representation of Mallinckrodt in two medical fee disputes resolved by ALJ Miller in a June 28, 2013, opinion and order. An in depth summary of the procedural history of this case is necessary to the resolution of these two appeals.

Hon. Kevin King, Administrative Law Judge ("ALJ King") rendered an August 26, 2002, opinion resolving the claim filed by Terry Daniels ("Daniels") for an alleged injury to her low back occurring on November 1, 1998, and an injury to her head and neck occurring on October 5, 2000, while in the employ of Mallinckrodt. ALJ King determined Daniels did not sustain a low back work injury and Mallinckrodt had no liability for income or medical benefits related to Daniels' low back condition. However,

ALJ King determined Daniels sustained an injury to the cervical spine and Mallinckrodt was liable for income and medical benefits flowing from that injury. ALJ King concluded that as a result of the cervical injury, Daniels had an 18% impairment for the injury to her cervical spine, a 30% impairment for a vestibular condition, a 20% impairment for a psychological condition, and was permanently totally disabled. Daniels' claim for her 1998 low back injury was dismissed. The decision was not appealed.

On December 31, 2008, Mallinckrodt filed a motion to reopen and a Form 112, medical fee dispute, contesting three bills it had received from Dr. Drema Enochs, at Chiropractic Rehab and Injury Center, and a bill from Jackson Purchase ER, PSC, and Dr. Kest for treatment of an ear infection. It asserted these bills were not compensable because they were incurred for non-work-related illness and the statements had been submitted more than forty-five days after service had been provided. On January 5, 2009, Mallinckrodt filed a motion to join Chiropractic Rehab and Injury Center and Jackson Purchase ER, PSC, as parties. On January 14, 2009, the CALJ entered an order joining Chiropractic Rehab and Injury Center and Jackson Purchase ER, PSC, as parties and granting Daniels

and the medical providers twenty days to file a response to the motion. Daniels filed a *pro se* response. By order dated February 4, 2009, the CALJ sustained Mallinckrodt's motion to reopen to the extent the matter would be referred to an ALJ. On February 18, 2009, the medical fee dispute was assigned to ALJ Davis. On July 9, 2009, ALJ Davis entered an order noting the parties had explained a settlement of the claim would require calculation of a "Medicare set-aside" which would take time to prepare and wished to place the claim in abeyance so settlement can be fully explored before the matter stands submitted for a decision. ALJ Davis ordered the claim placed in abeyance and all proof deadlines suspended. The parties were to file status reports within sixty days of the date of the order.

On August 17, 2009, Mallinckrodt filed a "Supplemental Motion to Reopen by Movant" and "Supplemental Medical Dispute." Mallinckrodt noted Daniels had fallen on or about April 19, 2009, at her home and had requested approval of a cervical MRI and a CT myelogram. It stated utilization review was performed by Dr. Lisa Gill who concluded the cervical CT myelogram and MRI were not medically necessary. It attached the reports of Dr. Gill and other medical records.

On September 3, 2009, Daniels filed a response indicating the most recent supplemental medical dispute should be joined with the pending medical dispute currently in abeyance and assigned to ALJ Davis.

Daniels' April 15, 2010, deposition reflects she underwent additional neck surgery after the August 26, 2002, award. At the time of her deposition she had been wearing a collar for approximately three months which had been prescribed by Dr. Rex Arendall, in Nashville. Dr. Arendall ordered a cervical myelogram which was performed on March 2, 2010. He also requested a cervical discogram. Daniels indicated she has constant pain and burning in her head, neck, and back which extends down her left arm and into her hand. Her left palm is insensitive to touch and her fingers go numb. Apparently, Daniels chose to undergo two of the contested diagnostic studies as reports dated March 2, 2010, concerning a myelogram of two or more regions, a cervical spine CT with contrast, a thoracic spine CT without contrast, and a lumbar spine CT without contrast were subsequently introduced into evidence. Voluminous medical records were introduced by both parties.

On May 20, 2010, Mallinckrodt filed a "Second Supplemental Motion to Reopen by Movant" and "Second Supplemental Medical Dispute" concerning a request for a

cervical discogram with post CT scan. It indicated the matter had been submitted to utilization review and Dr. Richard Mortara concluded the cervical discogram with a post CT scan is not medically necessary.

A formal hearing was conducted on January 25, 2011, at which only Daniels testified.

On March 2, 2011, ALJ Davis rendered an opinion and order. ALJ Davis resolved the dispute concerning the compensability of the medical bills in favor of Mallinckrodt finding as follows:

> The Administrative Law Judge has carefully reviewed all of the records, reports, testimony and arguments made in this claim. As an initial matter the Administrative Law Judge notes that Judge King made specific, now *res judicata*, findings that the cervical injury, the psychological condition and the vestibular condition are all work related and that the low back condition was not work-related and/or dismissed as time barred when filed. The undersigned need not address whether or [sic] any of the compensable conditions do, in a broad sense, mandate future medical treatment. The issue is the reasonableness and necessity of the proposed treatment. Of course, the undersigned must also find if some of the bills were submitted in a timely fashion and if the medical fee dispute itself was timely filed.
>
> As to the question of whether or not the medical fee disputes were filed in a timely fashion the undersigned is aware of no requirement that this be

> proven by direct testimony from the insurance adjuster or other representation of the medical payment obligor. It has always been accepted that if counsel representing the medical payment obligor avows, through his affidavit attached to the medical fee dispute, that the medical bills were received on a specific date then that is the date they were received.
>
> The undersigned therefore accepts the statements made in the Form 112, that the medical bills were not received until December 1, 2008. The undersigned also accepts that, on their face, the contested medical bills from Drema Enochs, D.C./Chiropractic Rehab and Injury Center, Jackson Purchase Medical Center, and Dr. Kest were all for services occurring more than forty-five days prior to December 1, 2008. None of these medical providers has [sic] entered an appearance or shown cause as to why this delay was justified or reasonable. As a result the undersigned concludes that all of these medical bills were not timely submitted and therefore are non-compensable. This decision, by intent, does not address the work-relatedness or the reasonableness and necessity of the treatment rendered.

ALJ Davis resolved the dispute over the contested diagnostic studies in favor of Daniels finding as follows:

> As for the MRI and discogram the undersigned is most persuaded by the opinions of the treating physician, Dr. Rex Arendall and the underlying facts of the case. First, as the Respondent points out, the MRI and the myelogram were eventually done despite the Movant’s denial and they were used by Dr. Arendall to formulate an up-to-date

> diagnosis and treatment recommendations. Even Dr. Prince used those tests in forming her opinions. Based on the opinions of Dr. Arendall, Dr. Love and the evidence as a whole the MRI and the myelogram are compensable as reasonable and necessary and work-related.
>
> As for the discogram the undersigned will note two relevant and applicable rules and facts. First, simply because one physician or person would pursue a particular test or procedure and another would not does not, automatically, make either person or physician unreasonable and does not automatically make the test or procedure unreasonable or unnecessary.
>
> Second, Dr. Arendall, an unbiased treating physician, has clearly set forth his rationale and basis for requesting the discogram. Specifically, he wants to use this test, which he believes is more exact, to determine the exact symptoms and areas affected by the herniated disks. He will then use this information to pursue more specific treatment options.
>
> Based on this and the over all [sic] evidence and opinions of Dr. Arendall the proposed discogram is also compensable as reasonable and necessary and work-related.
>
> Based on all of the foregoing this medical fee dispute is resolved in favor of the Respondent as to the MRI, myelogram and discogram and in favor of the Movant as to the timeliness of bills from Dr. Enoch, Dr. Kest and Jackson Medical Center.

Daniels filed a petition for reconsideration which the ALJ overruled by order dated April 12, 2011.

On August 8, 2011, Harned filed a motion and affidavit for attorney's fees. Harned noted he had filed three medical fee disputes on behalf of Mallinckrodt. Harned stated after ALJ Davis' April 5, 2011, opinion and order but before he overruled Daniel's petition for reconsideration, Daniels submitted requests for reimbursement of mileage expenses for travel for medical treatment spanning the period from January 4, 2010, to January 25, 2011. She also requested reimbursement of expenses for travel to Owensboro, Kentucky, for the January 25, 2011, hearing. Further, he noted Daniels submitted a request for medical expenses incurred between January 7, 2010, and March 8, 2010, for the treatment by her dentist, Taylor Dental, for temporary mandibular joint ("TMJ") syndrome, a medical condition found non-compensable in the original opinion and award. There was also a request for treatment of the TMJ syndrome from Dr. Michael Bobo. Harned represented that after researching the matter, Mallinckrodt took the position the expenses were non-compensable because the expenses were either presented beyond the sixty day period, were litigation expenses, or were for dental treatment not related to the compensable injuries. Mallinckrodt also took the position the dispute over reimbursement of these expenses was not joined in the

then existing medical fee dispute before ALJ Davis, and Daniels waived her claim for reimbursement. Harned attached a copy of the letter he wrote to Daniels' counsel explaining the reasoning for the denial. Harned noted Daniels' counsel indicated he intended to challenge the denial. Harned provided an explanation for the requested attorney's fees. He maintained the attorney's fee incurred subsequent to the receipt of the request for reimbursement on or about April 5, 2011, was in essence a fourth proceeding which he indicated did not result in the formal filing before ALJ Davis but resulted in substantial work by him and his firm. Accordingly, Harned requested approval of the following fees:

	Time Spent	Fees Incurred
First Motion to Reopen/Medical Fee Dispute	Attorney 57.2 Paralegal 19.9	$9,672.20
Second Motion to Reopen/Medical Fee Dispute	Attorney 28.7 Paralegal 1.3	$4,348.70
Third Motion to Reopen/Medical Fee Dispute	Attorney58.7 Paralegal 22.9	$10,255.75
Reimbursement Requests Submitted April 5, 2011	Attorney 5.8 Paralegal 5.35	$1,260.55

In his affidavit, attached as Exhibit A, Harned asserted the requested fees did not exceed the statutory maximum for each proceeding nor were the fees dependent upon the result

achieved. In support of his request, Harned relied upon the holding in Lamb v. Fuller, 32 S.W.3d 518 (Ky. App. 2000).

In a September 2, 2011, order the CALJ concluded, in relevant part, as follows:

> Counsel for Defendant-Employer has moved for attorney's fees totaling $24,276.65. Counsel seeks to justify a fee in excess of $12,000, the limit placed on attorney's fees for representation of a client in a single proceeding by KRS 342.320 by referring to 'three medical fee disputes' having been determined in the proceeding. The CALJ is of the opinion that such a distinction is not applicable in this matter and that counsel is limited to a fee of $12,000.

A $12,000.00 attorney fee was approved by the CALJ.

On September 6, 2011, Daniels filed a verified motion to reopen and a Form 112 seeking an order requiring Mallinckrodt to pay mileage and medical expense reimbursements which were sent to the carrier on April 5, 2011. Daniels represented she had submitted the requests for reimbursement more than thirty days ago and the insurance carrier had thirty days from that date to either perform utilization review or file a motion to reopen. She asserted Mallinckrodt had failed to file a medical fee dispute or motion to reopen within thirty days after receipt of the request and therefore was precluded from

denying the reimbursement requests and should be ordered to reimburse her. In addition, Mallinckrodt should be required to pay her attorney's fee. Daniels attached the letter her counsel received from Harned to which Harned alluded in his motion for approval of attorney's fees. She attached itemizations of mileage and copies of the medical bills.

On September 13, 2011, Mallinckrodt responded to the motion to reopen.

On September 14, 2011, Harned filed a petition for reconsideration requesting the CALJ reconsider the September 2, 2011, order granting a $12,000.00 attorney's fee.

On September 21, 2011, the CALJ entered two orders; one denying Harned's petition for reconsideration and the other sustaining Daniels' motion to reopen to the extent the matter would be referred to an ALJ for final adjudication.

On October 21, 2011, Harned and Mallinckrodt filed a notice of appeal regarding the CALJ's September 2, 2011, and September 21, 2011, orders.

On October 18, 2011, the medical fee dispute filed by Daniels was assigned to ALJ Miller.

On November 2, 2011, Hon. Michael W. Alvey, Chairman, Workers' Compensation Board ("Chairman Alvey"), ordered the appeal placed in abeyance and the claim remanded to the ALJ for resolution of the pending medical fee dispute.[1]

On January 17, 2012, Mallinckrodt filed a "New Motion to Reopen by Movant," a Form 112 styled "New Medical Dispute," and a motion to join Dr. Alunet Ozturk as a party to the claim. In the Form 112 and motion to reopen, Mallinckrodt noted Dr. Ozturk had submitted a request for authorization for treatment of Daniels consisting of "therapeutic blocks: trigger point injections, left interscalene muscles x 3 blocks and interscalene nerve block, left and physical therapy, as treatment for his diagnosis of thoracic outlet compression (CTOS) syndrome."[2] It represented utilization review was sought and Dr. Paul Loubser concluded the trigger point injections were not clinically indicated and the interscalene nerve block treatment and massage therapy treatment were not medically necessary. Although Mallinckrodt did not believe it was obligated to file a supplemental motion to reopen and

[1] Chairman Alvey entered a similar order on November 30, 2011.

[2] As noted by the ALJ, Dr. Ozturk is the medical director of Cabell Huntington Hospital Regional Management Center and a professor at Marshall University School of Medicine.

medical fee dispute, Mallinckrodt stated it was doing so out of an abundance of caution.

On January 23, 2012, Daniels filed a supplemental medical fee dispute asserting the insurance company was aware of the treatment recommended for her as early as November 8, 2011, which included the nerve block and trigger point injections. She argued since the treatment is reasonable, necessary, and work-related, and Mallinckrodt's insurance carrier had been aware of the recommended treatment for more than thirty days and had not filed a medical fee dispute, the ALJ should order Mallinckrodt to pay for the treatment.

On February 3, 2012, Mallinckrodt filed a response to the supplemental medical fee dispute. Because of a deficiency in the motion, on March 1, 2012, ALJ Miller overruled Mallinckrodt's motion to reopen. However, she indicated upon correction and resubmission of the motion, it would be reconsidered. On the same date, ALJ Miller joined Dr. Ozturk as a party to the dispute.

On March 21, 2012, Mallinckrodt filed an "Amended New Motion to Reopen" and a motion for leave to file an amended new motion to reopen. On July 31, 2012, ALJ Miller sustained Mallinckrodt's motion for leave to file an amended new motion to reopen and the motion to join Dr.

Ozturk. ALJ Miller also set a proof schedule. Thereafter, numerous medical records were submitted regarding the two medical fee disputes.

A formal hearing was conducted on January 31, 2013, after which the parties submitted briefs.

On June 28, 2013, ALJ Miller rendered an opinion and order resolving both medical disputes in favor of Daniels. Significantly, the introduction in the opinion and order specifically notes each party had filed a medical dispute. Concerning the medical dispute filed by Daniels, ALJ Miller concluded as follows:

> As it relates to "reasonable grounds" for purposes of 803 KAR 25:096 § 11, it has been interpreted to mean justification for failure to carry forward with the legal obligation of submitting out-of-pocket and travel expenses in proper form within the mandatory sixty day period. I find that the Plaintiff has proven she had those reasonable grounds. Persuasive to the undersigned is the testimony of the Plaintiff. The undersigned finds the Plaintiff very credible. She clearly has experienced a long and painful existence since her injury. Her testimony regarding the attempts at procuring payment for her medical treatment, along with the continual denials lead the undersigned to conclude there are reasonable grounds for her delay in submitting the request for reimbursement.
>
> As the Court has noted knowledge of an employer’s assertion that the

condition being treated is non-work-related constitutes reasonable grounds for failing to direct a provider to submit bills for treating the condition to the employer or for failing to seek reimbursement for bills paid personally.

The Defendant/employer's letter of June 13, 2011 to Plaintiff makes it clear the long-standing position of the Defendant that it did not consider the treatment for which the Plaintiff sought reimbursement was related to her work injury. While that may be a valid defense in addition to the timely aspect of the request, it is not justifiable reason for not proceeding according to the regulatory structure. Given the record in this matter, the undersigned does not find the Defendant/employer's position tenable as it relates to the regulatory and statutory mandates of MFD resolution.

Lastly, the Defendant/employer avers KRS 342.270(1) requires the Plaintiff during pendency of a claim to present all causes of action which had accrued or were known to him or her. The Defendant/employer's position was the Plaintiff's failure to bring her TMJ claim as a defense to the MFD. However, in an unpublished Opinion the Kentucky courts held neither KRS 342.270(1) nor the holding in Slone vs. Jason Coal Company 902 SW2d 820 (Ky. 1995) bars the addition of a psychological claim later in the claim because neither pertains to successive reopenings. The ALJ must consider that all of the injurious consequences of a work-related injury are compensable.

For all the above stated reasons, the undersigned finds the Defendant/employer responsible for the

> payment of the mileage and expenses of the plaintiff as presented in this MFD. The Defendant/employer shall not be responsible for any expenses related to the litigation of this matter.

Regarding the treatment recommended by Dr. Ozturk contested by Mallinckrodt, ALJ Miller concluded as follows:

> Pursuant to KRS 342.020 the Defendant/employer is responsible to pay for the cure and relief of the effects of a work-related injury. In a post-award medical fee dispute, the burden of proof regarding the reasonableness and necessity of treatment is with the employer, while the burden remains with the claimant concerning questions pertaining to the work-relatedness or causation of the condition. See KRS 342.020; Mitee Enterprises vs. Yates, 865 SW2d 654 (Ky. 1993); Addington Resources, Inc. vs. Perkins, 947 SW2d 421 (Ky. App. 1997); R.J. Corman Railroad Construction vs. Haddix, 864 SW2d 915 (Ky. 1993) and National Pizza Co. vs. Curry, 802 SW2d 949 (Ky. App. 1991).
>
> In cases involving conflicting testimony by medical experts, the discretion to choose between conflicting expert opinions rests exclusively with the Administrative Law Judge. Staples Inc., vs. Konvelski, 56 SW3d 412 (Ky. 2001); Square D. Company vs. Tipton, 862 SW2d 308 (Ky. 1983)
>
> I find that Dr. Ozturk's opinion and records support the reasonableness and necessity of his treatment of the Plaintiff. I also find his opinion as to the causal connection of his treatment to the Plaintiff's work injury persuasive. Dr. Ozturk's opinion as to causation is bolstered by the

> other medical opinions in the record, including Dr. Loubser. While Dr. Loubser did not find medical necessity, the opinion of Dr. Ozturk is supported by the opinion of Aprile Edwards, RN. However, the most persuasive evidence as to the reasonableness and necessity of the injective therapy is the testimony of the Plaintiff as to the relief the treatments provide. Presently, in order to continue to obtain medical treatment, Plaintiffs' providers have submitted the bills to Medicare and/or her personal insurance. Considering all of the evidence in this record, the undersigned finds the treatment provided by Dr. Ozturk is reasonable, necessary and related to Plaintiff's 2000 work injury. For this finding the undersigned relies on the opinion and records of Dr. Ozturk and the testimony of the Plaintiff.

On July 11, 2013, Mallinckrodt filed a petition for reconsideration which ALJ Miller overruled by order dated July 25, 2013.

On August 23, 2013, Harned filed a motion and affidavit seeking separate attorney's fees for each medical dispute requesting as follows:

	Time Spent	Fees Incurred
Plaintiff's Motion to Reopen for reimbursement of medical expenses, travel expenses, litigation proceedings, etc.	Attorney/Paralegal 60.2 hrs.	$7,921.69

Second Motion to Reopen/Medical Fee Dispute	Attorney/Paralegal 77.0 hrs.	$9,993.31

Harned attached a statement of services performed by him and his law firm in connection with the claims. Harned asserted the requested fees did not exceed the statutory maximum contained in KRS 342.320(2)(a) for each proceeding.

On September 17, 2013, ALJ Miller granted in part, and denied in part, Harned's motion stating as follows:

> **IT IS HEREBY ORDERED** that the Defendant/employer's Motion for Attorney's Fee is **GRANTED in part and DENIED in part**. The Defendant/employer's attorney moved for approval of attorney's fee in two separate amounts. The Defendant's counsel requested an award of $7,921.69 for the defense of the Medical Fee Dispute filed by the Plaintiff. An additional amount of $9,993.31 was requested for the defense in the Medical Fee Dispute filed for treatment sought by Plaintiff, plus any 'other fees incurred in defense of this claim after the dates encompassed herein not to exceed the statutory maximum for each case.'
>
> KRS 342.320(8) controls the issue of attorney's fees for representation employers in proceedings under this chapter. That pertinent section states:
>
> > Attorney's fees for representing employers in proceedings under this

> chapter pursuant to contract with the employer shall be subject to approval of the administrative law judge in the same manner as prescribed for attorney representation of employees. Employer attorney's fees are subject to the limitation of twelve thousand dollars ($12,000) maximum fees except that fees for representing employers shall not be dependent upon the result achieved. Employer attorney's fees may be paid on a periodic basis while a claim is adjudicated and the payments need not be approved until the claims resolution process is completed. Fees for legal services in presenting a claim for reimbursement from the Kentucky coal workers' pneumoconiosis fund shall not exceed one thousand dollars ($1,000). All such approved fees shall be paid by the employer and in no event shall exceed the amount the employer agreed by contract to pay.

The Defendant/employer's counsel argues the Court of Appeals in Lamb vs. Fuller, 32 SW3d 518 (KY. App. 2000) stands for the proposition that the requested fees do not exceed the statutory maximum in KRS 342.320(2)(a) for each proceeding. In Lamb vs. Fuller, *supra*, the Court of Appeals held an attorney representing a workers' compensation claimant on two separate claims for injuries on two separate dates is entitled to two

> separate fees, even when those claims are litigated together.
>
> I do not find Lamb vs. Fuller controlling in the issue at bar. Lamb vs. Fuller dealt with attorney's fees pursuant to KRS 342.320(2)(a) -– that section of the statute deals with attorney's fees of the attorney representing the plaintiff. The section of the statute governing attorney's fees for representing employers in proceedings under this chapter is KRS 342.320(8). That section, as noted above, clearly limits said attorney's fees to $12,000.00. KRS 342.320(8) does not delineate between original actions, re-openings or interlocutory actions.

Accordingly, ALJ Miller awarded an attorney's fee of $12,000.00.

On October 14, 2013, Harned and Mallinckrodt filed a notice of appeal concerning ALJ Miller's September 17, 2013, order.

Upon Harned's motion to remove from abeyance, to consolidate, and for a briefing schedule, on November 20, 2013, Chairman Alvey ordered the first appeal removed from abeyance, consolidated the appeals, and set a briefing schedule.

The only brief filed on appeal is that of Harned and Mallinckrodt.

On appeal, Harned asserts Mallinckrodt is entitled to pay its counsel for each medical dispute as

each constitutes a separate proceeding and the CALJ and ALJ Miller misinterpreted KRS 342.320(8) in limiting his attorney's fee to $12,000.00 in each proceeding. He argues a proceeding should not be defined to include the original claim and all future medical disputes stemming from the claim. Consequently, each of the five disputes constitute separate proceedings involving five separate and distinct issues, and he is entitled to an attorney's fee for each medical dispute.

Harned posits when the first medical dispute arose the employer did not know a second medical dispute would arise. Similarly, the employer was not aware a third medical dispute would arise when it filed its second medical dispute. Additionally, while the fourth medical dispute was pending the employer could not anticipate the fifth medical dispute. He maintains each medical dispute required the continued involvement of counsel. Harned argues limiting attorney's fees for all disputes to just one dispute would effectively result in employers paying all claimed medical expenses regardless of the legitimacy. He argues it would be impossible for an employer to obtain counsel to represent it in disputes when it does not have the ability to pay counsel for the fair value of the work performed. Harned cites to Lamb v. Fuller, supra, in which

the Court of Appeals held a claimant's attorney was not foreclosed under the attorney's fee statute from obtaining an award of separate attorney's fees merely because the attorney filed a single application for the adjustment of more than one claim. Harned argues the logical extension of the ruling in Lamb is to interpret KRS 342.320 to mean each separate dispute is a single proceeding entitling the employer's attorney to an attorney's fee of up to $12,000.00 for each medical dispute.

Harned also argues limiting the amount a defendant can pay its counsel to defend all disputes in multiple proceedings is a constitutional violation. He asserts KRS 342.320 is unconstitutional "if 'proceeding' is restricted to mean all fee disputes are 'one' proceeding." Because this Board lacks the ability to rule on constitutional issues, we will not address Harned's second argument. However, we believe our ruling in this case renders Harned's second argument moot.

At issue is whether multiple attorney's fees may be awarded for representing an employer in multiple medical disputes even though the medical disputes are litigated simultaneously and resolved by a single opinion and order. We conclude Harned is entitled to a separate fee for representing Mallinckrodt in separate and distinct medical

disputes regardless of the fact the medical disputes were litigated simultaneously and resolved by one opinion and order. However, by the same token supplemental or subsequent medical disputes filed by the employer during an ongoing proceeding may be, under certain circumstances, one medical dispute. In resolving the question of what constitutes a separate medical dispute, the facts and the evidence which must be introduced in each are determinative. In other words, if there are multiple medical disputes asserted which entail the introduction of the same evidence and ultimately turn on the resolution of one central issue then regardless of multiple filings, those filings may just constitute one medical fee dispute. Further, we conclude where defense counsel, in one proceeding before the ALJ, is called upon to defend a medical fee dispute and to also file a separate medical dispute, he or she is entitled to an attorney’s fee for the service rendered in each.

KRS 342.320(7) and (8) read in relevant part as follows:

> (7) In a claim that has been reopened pursuant to the provisions of this chapter, an attorney's fee may be awarded by the administrative law judge subject to the limits set forth in subsection (2) of this section. ...

> (8) Attorney's fees for representing employers in proceedings under this chapter pursuant to contract with the employer shall be subject to approval of the administrative law judge in the same manner as prescribed for attorney representation of employees. Employer attorney's fees are subject to the limitation of twelve thousand dollars ($12,000) maximum fees except that fees for representing employers shall not be dependent upon the result achieved. Employer attorney's fees may be paid on a periodic basis while a claim is adjudicated and the payments need not be approved until the claims resolution process is completed.

We will first address the appeal of the CALJ's September 2, 2011, and September 21, 2011, orders. The Supreme Court's holding in Lamb v. Fuller, supra, is insightful. There, the Supreme Court stated as follows:

> We agree that the decision to file a single Application for Adjustment of Claim form should not foreclose an award of separate attorney fees in a case where the claimant has prosecuted and has been compensated for multiple claims.

Id. at 520.

Here, the initial medical dispute filed by Mallinckrodt on December 31, 2008, pertained to medical bills it had received from Chiropractic Rehab & Injury Center and Jackson Purchase ER, PSC. Approximately, nine months later a supplemental motion to reopen and medical dispute was filed regarding a cervical CT myelogram and MRI

of the cervical spine. The second supplemental medical dispute filed approximately nine months thereafter pertained to a cervical discogram. The initial medical dispute filed by Mallinckrodt was separate and distinct and unrelated to the subsequent dispute filed regarding the cervical CT myelogram, cervical MRI, and cervical discogram. The medical dispute concerning the compensability of the medical bills involved a completely different factual background than the subsequent medical dispute. Similarly, the evidence introduced in the initial medical dispute was not relevant to the issue raised in the subsequent motions to reopen and Forms 112.

In his March 2, 2011, opinion, ALJ Davis treated the medical fee disputes as two completely separate claims. Concerning the first-in-time medical dispute, ALJ Davis noted the medical providers had not entered their appearance or shown cause why the delay in submitting the bills was justified or reasonable. Thus, the medical bills were not compensable. In resolving the supplemental and second supplemental medical disputes, ALJ Davis treated both as one dispute. The medical disputes were all based upon requests made by Dr. Arendall for diagnostic tests. Before the filing of the last two motions and Forms 112, it appears Daniels saw Dr. Arendall on October 22, 2009.

Although Dr. Arendall's October 22, 2009, medical records are extremely hard to read, it is evident from his October 15, 2010, letter and the February 2, 2010, note of Dr. Riley Love that Dr. Arendall requested Daniels undergo a cervical myelogram and discogram. As the medical fee dispute styled "Supplemental Medical Dispute" pertained to an MRI and cervical myelogram, we believe it is reasonable to conclude Dr. Arendall requested all three studies be performed. Significantly, ALJ Davis specifically stated he was persuaded by Dr. Arendall's opinions in determining the MRI and discogram were compensable. ALJ Davis also stated he relied upon Drs. Arendall and Love in concluding the MRI and myelogram were compensable.[3] Ultimately in concluding all the contested diagnostic tests were compensable, ALJ Davis was persuaded by Dr. Arendall, the treating physician. ALJ Davis went on to explain why the CT myelogram, MRI of the cervical spine, and cervical discogram were all compensable. Thus, as in Lamb, there were two separate disputes before the ALJ.

[3] We note Dr. Arendall was listed as a party to the medical fee dispute on the opinion and order. However, we are unable to find a motion to join Dr. Arendall as a party or an order joining Dr. Arendall as a party. Because the portion of this file relating to the dispute decided by ALJ Davis was purged, the file had to be recreated utilizing the electronic file. That file contains no motion or order relating to Dr. Arendall.

Significantly, after Mallinckrodt filed its supplemental motion to reopen and Form 112 on August 17, 2009, Daniels filed a response requesting the dispute be joined with the initial medical dispute filed by Mallinckrodt and also assigned to ALJ Davis. We are unable to find an order consolidating the medical disputes. Nevertheless, as in Lamb, the fact the disputes were resolved in a single proceeding and by one decision does not prohibit Harned from receiving separate attorney's fees.

Therefore, Harned was entitled to an attorney's fee for representing Mallinckrodt for the first medical dispute independent of his entitlement to an attorney's fee for the subsequent medical dispute. However, as to the "Supplemental" and "Second Supplemental" medical disputes filed by Mallinckrodt on August 17, 2009, and May 20, 2010, we believe those filings were a single medical dispute as both disputes pertained to the diagnostic studies requested by Dr. Arendall in order to determine Daniels' future course of treatment. As such, the supplemental and second supplemental medical disputes were one claim or proceeding. Consequently, Harned was entitled to a separate attorney fee independent of the first dispute not to exceed $12,000.00 for prosecuting the second dispute.

Accordingly, the CALJ's orders of September 2, 2011, and September 21, 2011, limiting the total attorney's fee in the medical disputes resolved by ALJ Davis' March 2, 2011, opinion and order shall be reversed. Harned shall be entitled to an attorney's fee not to exceed $12,000.00 for his representation of Mallinckrodt in the first medical dispute regarding the compensability of the chiropractic and emergency room bills. Harned shall also be entitled to an attorney's fee not to exceed $12,000.00 for prosecuting the supplemental medical dispute and the second supplemental medical dispute not to exceed $12,000.00. That portion of the CALJ's September 2, 2011, and September 21, 2011, orders refusing to grant Harned three attorney fees will be affirmed.

That said, although it appears Harned is not contending he is entitled to a fourth attorney fee as he did in his motion for approval of attorney fee to the CALJ, since there are only three medical fee disputes, Harned is not entitled to an attorney fee for having to respond to correspondence he received after the March 2, 2011, opinion but before ALJ Davis' April 12, 2011, order ruling on Daniels' petition for reconsideration.

Concerning ALJ Miller's January 7, 2013, order, we conclude ALJ Miller erred in determining Harned was not

entitled to an attorney's fee not to exceed $12,000.00 for defending the medical dispute filed by Daniels, and a separate attorney's fee not to exceed $12,000.00 for prosecuting the medical dispute on behalf of Mallinckrodt. Again, in the proceedings before ALJ Miller, the medical fee disputes were completely factually different. The medical dispute filed by Daniels sought reimbursement for mileage and medical bills. The medical dispute filed by Mallinckrodt concerned the treatment recommended by Dr. Ozturk. More importantly, in the proceedings before ALJ Miller, Harned was defending the first-in-time medical fee dispute and subsequently prosecuted a medical dispute on behalf of Mallinckrodt, the factual basis for which was completely different than the medical dispute filed by Daniels.

Further, unlike the proceedings before ALJ Davis, Mallinckrodt had no ability to control both medical fee disputes as it was defending one and prosecuting one. The proceedings presided over by ALJ Miller involved two separate claims, and as such, Harned was entitled to be paid for representing Mallinckrodt in both matters with each attorney's fee subject to the $12,000.00 limit set forth in KRS 342.320(8). Consequently, the January 17,

2013, order of ALJ Miller limiting Harned's attorney fee in the proceedings to $12,000.00 shall be reversed.

In summary, Harned is entitled to an attorney's fee not to exceed $12,000.00 for filing the initial medical dispute on December 31, 2008. Harned is also entitled to an attorney's fee for representing Mallinckrodt in the second and third filings not to exceed $12,000.00. Concerning the medical dispute resolved by ALJ Miller in the June 28, 2013, opinion and order, Harned shall be entitled to an attorney's fee not to exceed $12,000.00 for defending the medical dispute filed by Daniels. Similarly, Harned shall be entitled to an attorney's fee not to exceed $12,000.00 for prosecuting Mallinckrodt's medical dispute filed after Daniels' motion to reopen to file a medical dispute was sustained.

In reversing and remanding, we emphasize we are not addressing the amount of the attorney fee to which Harned is entitled in any of the proceedings before either of the ALJs, as that is not within our authority.

Accordingly, those portions of the September 2, 2011, and September 21, 2011, of the CALJ limiting Harned's attorney fee to $12,000.00 as it pertained to the medical fee disputes resolved by ALJ Davis' March 2, 2011, opinion and order is **REVERSED**. Those portions of the September 2,

2011, and September 21, 2011, orders of the CALJ determining Harned is not entitled to three or four attorney fees is **AFFIRMED**.

Concerning the medical fee dispute resolved by ALJ Davis' March 2, 2011, opinion and order, this claim is **REMANDED** to the CALJ for a determination of the attorney's fee to which Harned is entitled for prosecuting the first medical dispute not to exceed $12,000.00 and a determination of the attorney's fee to which Harned is entitled for prosecuting the second medical dispute not to exceed $12,000.00.

Further, the January 7, 2013, order of ALJ Miller determining Harned is only entitled to an attorney's fee relative to the issues resolved in the June 28, 2013, opinion and award is **REVERSED**. This matter is **REMANDED** to ALJ Miller for a determination of the attorney's fee to which Harned is entitled not to exceed $12,000.00 for his defense of the medical dispute filed by Daniels and the attorney's fee to which Harned is entitled not to exceed $12,000.00 for his prosecution of the medical dispute on behalf of Mallinckrodt.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

CHAIRMAN, ALVEY. I respectfully dissent. I believe in this action the attorney fee for Mr. Harned should be limited to $12,000.00 for the proceedings before Hon. Chris Davis, Administrative Law Judge, as approved by Hon. J. Landon Overfield, Chief Administrative Law Judge for the reasons set forth in his decision. I also believe Mr. Harned should be limited to an attorney fee of $12,000.00 in the proceedings before Hon. Jeanie Owen Miller, Administrative Law Judge. Merely because there are supplemental add-ons to medical fee disputes, new original actions for which additional attorney fees should accrue are not created. Therefore, I respectfully dissent and would affirm both the attorney fee awards rendered by both CALJ Overfield and ALJ Miller.

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