

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 15, 2016

CLAIM NO. 200370431

ANITA KEELING

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

ROYAL COACH ENTERPRISES
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
VACATING ORDERS, DISMISSING APPEAL & REMANDING

* * * * *

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

STIVERS, Member. Anita Keeling ("Keeling"), *pro se*, seeks review of the July 20, 2015, Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") in which the ALJ purported to resolve a medical dispute in favor of Royal Coach Enterprises ("Royal Coach") and suspended all medical

benefits until such time as Keeling attends "examinations and at least one deposition scheduled by the movant."

On April 13, 2005, Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman") entered an opinion and award finding Keeling had a 5% impairment rating as a result of a lumbar strain and awarding income and medical benefits solely for the lumbar injury.

On April 23, 2009, Hon. J. Landon Overfield, former Chief Administrative Law Judge, approved a settlement agreement in which Royal Coach bought out the remaining 160 weeks of permanent partial disability ("PPD") benefits to which Keeling was entitled pursuant to ALJ Coleman's award. The agreement reflects the present worth of Keeling's PPD benefits equaled \$2,925.51. The agreement states medical benefits were to remain open on cervical, thoracic, and lumbar spine strains as per the original opinion and award.

On September 18, 2013, Royal Coach filed a motion to reopen, a Form 112, and a motion to join The Medical Center and Imaging Consultants of Kentucky as parties to the medical fee dispute. Specifically, Royal Coach contested the medical treatment Keeling sought from The Medical Center in Scottsville from Dr. Richard Ribeyre. The dispute arose after Dr. Ribeyre obtained a CT of the

lumbar spine which showed a mild diffuse disc bulge with no evidence of spinal stenosis and degenerative facet joint disease at L4-5 and L5-S1. Keeling had provided a history of the October 10, 2003, injury and said her symptoms were worse the previous week. Royal Coach represented it obtained a medical records review from Dr. Patricia Blackwell to determine whether this medical treatment was causally related to the work injury. Dr. Blackwell concluded there was no causal relationship to the effects of the lumbar strain she sustained on October 10, 2003. Royal Coach stated its carrier received a bill from The Medical Center in the amount of \$3,345.35 for services provided on August 7, 2013, and a bill from Imaging Consultants in the amount of \$253.00 for services provided on that same date. Both bills were attached. The dispute centered on whether the medical services provided by The Medical Center and Imaging Consultants of Kentucky were causally related to the October 10, 2003, work injury.

On October 21, 2013, the ALJ entered an order finding Royal Coach had made a *prima facie* showing for reopening and joined The Medical Center and Imaging Consultants of Kentucky as parties to the medical fee dispute. The order also set a telephonic conference.

On November 12, 2013, on his own motion, the ALJ rescheduled the telephonic conference for November 26, 2013.

On December 2, 2013, the ALJ entered a Scheduling Order Following Initial Conference on Medical Dispute Reopening indicating the type of challenged or unpaid procedures at issue were medical bills and diagnostic testing. The basis for the challenge to the bills and treatment was the reasonableness/necessity and causation/work-relatedness. A telephonic benefit review conference ("BRC") was set for January 7, 2014.

Keeling's December 12, 2013, deposition was filed in the record on January 6, 2014.

On January 9, 2014, the ALJ entered a BRC order setting a telephonic conference for March 11, 2014. The order reflects Keeling, The Medical Center, Imaging Consultants, and Royal Coach were to be served.

On January 9, 2014, Royal Coach filed a Witness List and Statement of Proposed Stipulations and Notice of Contested Issues. It designated as evidence Keeling's recent deposition, the prior Opinion and Award, and the medical records covering the period from October 12, 2013, to April 28, 2015, the records of The Medical Center of

Scottsville, the report of Dr. Blackwell, and the bills from The Medical Center and Imagining Consultants.

Filed in the record with no stamp is a June 10, 2014, letter from Keeling to the ALJ with numerous medical records attached in which Keeling stated as follows:

Per our conference on January 7th, you where requesting Dr. McCords [sic] medical records on me. In my deposition on December 12th, they ask me to sign a medical waiver and consent form. I did. They also had me sign a [sic] Employment waiver and consent. I did with no attorney present. They since have got my medical records from Dr. McCord and he clearly states that my previous injury was related to the 2003 injury. I can't obtain them now, only a [sic] attorney representing can. So we all know, I don't have one.

I believe I am intitled [sic] to my medical records. Only thing I have is medical records from 2003 injury that Kemi sent me and attorney Jeff Sampson, that is no longer representing me. Hands are tied once again. Hope what I do have is helpful.

On January 27, 2014, Keeling filed a letter from Dr. David McCord and his medical records both dated November 6, 2013.

On February 25, 2014, Keeling submitted the following note to the ALJ dated February 14, 2014:

Mr. Fogle sent this apt date to me in the mail to see this Dr. Baker, without notifying me of when I could go. I work part-time Mon-Wed and I have

told them this. They just set this appt without asking me when I could go. I called Shannon Valdes on Feb 3rd and got her voice mail and explained they needed to Re-Schedule, never got a call back. So I called again on Feb 10th and got voice mail of Shannon Valdes, then finally she returns call on Feb 11th. Telling me she couldn't re-schedule. I let her know I was scheduled to work. I couldn't attend on that day. They needed to set it up on a Thurs or Friday. She said she couldn't that it was not possible. So, I needed to let you know that in case they say otherwise.

I am not refusing to see this Doctor. Just need to make it possible for me to attend. Thank you.

As noted in her letter, Keeling attached the January 8, 2014, letter from a paralegal of Royal Coach's attorney indicating she was to be examined by Dr. Robert Baker in Louisville, on February 19, 2014. The letter directed that if Keeling was unable to keep the appointment the paralegal should be notified immediately. Failure to notify the paralegal of the inability to attend more than seven days before the examination date would require imposition upon the employee of a cancellation fee charged by the physician. Further, if Keeling required pre-payment of mileage expenses to attend she was to contact the paralegal as soon as possible and payment would be issued. Otherwise, she would receive a check after she attended the

evaluation. The MapQuest directions to Dr. Baker's office were enclosed.

On March 12, 2014, the ALJ entered another BRC order stating as follows: "**A hearing is passed.** Respondent-Keeling's IME is being rescheduled. Movant shall cc the ALJ with the letter scheduling her IME. Matter is continued to allow the IME to take place."

On July 7, 2014, Royal Coach filed a Status Report representing it originally scheduled Keeling's deposition for October 22, 2013, and she did not appear. The deposition was rescheduled for December 12, 2013, at Bowling Green which Keeling attended. Royal Coach had scheduled an Independent Medical Evaluation ("IME") to be conducted by Dr. Baker on February 19, 2014. It stated Keeling was sent a letter regarding this evaluation on January 8, 2014. On February 11, 2014, it represented Keeling contacted Royal Coach and indicated she could not attend the IME because she was working three jobs. She asked if it could be moved to Thursday. Keeling was advised Dr. Baker did not perform evaluations on Thursday and she needed to make arrangements to attend the evaluation as scheduled. Keeling again advised she would not attend the IME. Royal Coach represented it later

confirmed with Dr. Baker that Keeling did not appear. Royal Coach was charged a no show fee of \$750.00.

Royal Coach noted that on March 12, 2014, the ALJ held a telephonic conference with the parties, and the issue of Keeling refusing to attend the IME with Dr. Baker was discussed. At that time, the ALJ instructed Keeling to attend the IME which was to be rescheduled. Royal Coach represented the IME with Dr. Baker was rescheduled for May 14, 2014, and Dr. Baker later advised that Keeling did not attend. Royal Coach was again charged a no show fee of \$750.00. It represented the IME with Dr. Baker cannot be rescheduled because Dr. Baker is no longer performing IMEs. Royal Coach stated it desired Keeling be seen by Dr. Baker because he examined Keeling during the original litigation and his opinions were relied upon by the ALJ Coleman in resolving the contested issues.

Royal Coach indicated Keeling had not communicated with its counsel since she failed to appear for the IME with Dr. Baker on May 14, 2014. It represented counsel would be writing Keeling to request an explanation for her failure to appear.

Royal Coach asserted its ability to proceed with the medical fee dispute has been prejudiced by Keeling's failure to appear for the first deposition and her

subsequent failure to appear for the IMEs. Therefore, it requested the ALJ schedule a benefit review conference with the parties to appear in person, at the next available docket, to discuss how to proceed in the reopening.

Nothing was filed in the record until Royal Coach filed a Motion for Status Conference on July 7, 2015. In its motion, Royal Coach reiterated what it previously stated in its Status Report filed one year earlier. In addition, Royal Coach indicated Keeling had not communicated with its counsel since failing to appear at Dr. Baker's office on May 14, 2014, even though its counsel had written requesting an explanation for her failure to appear. Royal Coach again asserted its ability to proceed with the matter had been prejudiced by Keeling's failure to appear for the first deposition and her subsequent failure to appear for an IME. Thus, the ALJ should schedule a status conference directing the parties, especially Keeling, to appear in person at the next available docket. It indicated the ALJ had already ordered Keeling to attend the IME and she still failed to attend. Royal Coach represented it needed to proceed with the reopening but was precluded from doing so by Keeling's refusal to attend an IME. Royal Coach only requested the ALJ to issue an order

scheduling an in-person status conference on the next available docket.

The ALJ entered the following Order on July 20, 2015:

. . .

I accept as fact the allegations made in the Movant's Motion. I also believe that any further Orders or guidance from me will not compel or otherwise induce Ms. Keeling to cooperate with this matter beyond attending telephonic conferences. I understand her feelings on the subject but the requirements of the Act are clear. As such this medical fee dispute is resolved in favor of the Movant as to all pending issues and all medical benefits in this claim are HEREBY SUSPENDED until as such time as Ms. Keeling participates in attending examinations and at least one deposition scheduled by the Movant. This Order is Final and Appealable.¹

The record reveals Keeling filed a document received by the Department of Workers' Claims on August 12, 2015, which reads in total as follows:

Judge Davis 630 Claim #2003-70431
Motion to Re-Open & Appeal Order
Re-Schedule IME Evaluation By the
Moviant [sic].

¹ Even though the caption of the order lists Dr. David McCord as a party, we are unable to find an order joining him as a party to the proceedings.

Signed: Anita M. Keeling 8/11/2015

On August 13, 2015, the Department of Workers' Claims issued a letter stating:

A Notice of Appeal has been received and filed in this office regarding the above styled claim. The Petitioner(s), listed above, filed the Notice of Appeal on August 12, 2015.

In a September 2, 2015, Order this Board ordered the document styled "Motion to Re-open and Appeal Order" accepted as a validly filed Notice of Appeal and granting Keeling thirty days to file a brief. Attached to the Order are the applicable regulations which included the format for the petitioner's brief.

In an October 21, 2015, Order this Board noted Keeling had filed a non-compliant brief and granted her an additional thirty days from the date of the order to file a compliant brief.

On November 13, 2015, Keeling filed a document styled "Compliant Brief."

In a December 9, 2015, Order this Board accepted Keeling's brief as filed but directing any evidence attached to the brief including medical records and correspondence from her attorney be stricken from the record. Royal Coach was granted thirty days from the date of the order to file its brief.

On December 18, 2015, Royal Coach filed its brief.

We dismiss Keeling's appeal for two reasons. First, Keeling's purported Notice of Appeal is clearly deficient as it does not contain a caption naming any of the parties in the Notice of Appeal. In addition to failing to delineate it as a Notice of Appeal, the document filed by Keeling on August 12, 2015, fails to denote Keeling as the appealing party and the parties against whom the appeal is taken. In short, none of the parties in the medical dispute are listed as parties in the Notice of Appeal. Thus, the September 2, 2015, Order ordering the document filed August 12, 2015, as a validly filed Notice of Appeal and all subsequent orders shall be vacated. The document filed on August 12, 2015, states it is a "Motion to Reopen and Appeal Order." Royal Coach, The Medical Center, and Imaging Consultants, were not named as parties to the appeal. At this juncture of the proceedings, those parties are indispensable parties to the appeal. Failure to name an indispensable party is a jurisdictional defect fatal to an appeal. Commonwealth of Kentucky, Department of Finance, Division of Printing v. Drury, 846 S.W.2d 702 (Ky. 1993).

Consequently, we are without jurisdiction to rule on the merits of any argument or arguments raised by Keeling on appeal. An indispensable party to an appeal is one whose absence prevents the tribunal from granting complete relief among those already listed as parties. See CR 19.01; CR 19.02; Braden v. Republic-Vanguard Life Ins. Co., 657 S.W.2d 241 (Ky. 1983); Milligan v. Schenley Distillers, Inc., 584 S.W.2d 751 (Ky. App. 1979). As a matter of law, the failure to name an indispensable party is a jurisdictional defect fatal to an appeal – even one to this Board. Id.

The issue on appeal concerns a medical dispute directly related to Royal Coach, The Medical Center, and Imagining Consultants. These parties, however, were not named as parties in the purported Notice of Appeal as required by 803 KAR 25:010 Section 21 (2)(c)(2) which requires the petitioners to denote all parties as respondents against whom the appeal is taken.

KRS 342.285(1) provides:

An award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, **but either party may in accordance with administrative regulations promulgated by the executive director appeal to the**

Workers' Compensation Board for the review of the order or award. (Emphasis added.)

803 KAR 25:010 § 21 of the administrative regulations governing appeals to the Workers' Compensation Board expressly mandates:

Review of Administrative Law Judge Decisions.

(1) General.

(a) Pursuant to KRS 342.285(1), decisions of administrative law judges shall be subject to review by the Workers' Compensation Board in accordance with the procedures set out in this administrative regulation.

(b) Parties shall insert the language 'Appeals Branch' or 'Workers' Compensation Board' on the outside of an envelope containing documents filed in an appeal to the board.

(2) **Time and format of notice of appeal.**

(a) **Within thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers' Compensation Board.**

(b) As used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2).

(c) **The notice of appeal shall:**

1. Denote the appealing party as the petitioner;
2. **Denote all parties against whom the appeal is taken as respondents;**
3. Name the administrative law judge who rendered the award, order, or decision appealed from as a respondent;
4. If appropriate pursuant to KRS 342.120 or KRS 342.1242, name the director of the Division of Workers' Compensation Funds as a respondent; and
5. Include the claim number. (Emphasis added.)

803 KAR 25:010 § 21(2) is our administrative counterpart to CR 73.02(1)(a) and CR 73.03(1). Those rules provide respectively:

(1)(a) The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).

. . .

The notice of appeal shall specify by name all appellants and all appellees ("et al." and "etc." are not proper designation of parties) and shall identify the judgment, order or part thereof appealed from. It shall contain a certificate that a copy of the notice has been served upon all opposing counsel, or parties, if unrepresented, at their last known address.

The absence of indispensable parties to this appeal prevents the Board from granting complete relief,

and apparently the relief Keeling now seeks on appeal. Consequently, we are obligated to dismiss the appeal for lack of jurisdiction.

In addition, the appeal must also be dismissed because the ALJ's July 20, 2015, Order is interlocutory. Although the ALJ stated he was resolving the medical fee dispute in favor of Royal Coach, he also suspended Keeling's medical benefits until such time as she participates in the IME and at least one deposition. The order is inconsistent on its face as it is clear the ALJ retained jurisdiction of the medical dispute.

Even though we lack jurisdiction to rule on the contents of the July 20, 2015, Order, we observe the ALJ had no statutory authority to summarily resolve the medical dispute in favor of Royal Coach based on the record. Significantly, Royal Coach did not seek such a resolution. Further, Keeling had already attended one deposition. Royal Coach was not requesting the ALJ compel Keeling to attend a deposition. In its status reports and motion for status conference, Royal Coach complained Keeling did not attend the scheduled IMEs. Even though the ALJ improperly stated the medical fee dispute was resolved in favor of Royal Coach and designated the order final and appealable, he retained jurisdiction of the medical dispute since he

suspended Keeling's medical benefits until she participates in an IME and a deposition.

We note the sanction for intentionally failing to attend an IME is not dismissal but rather the suspension of the right to take or prosecute the proceedings.² KRS 342.205(3) states:

If an employee refuses to submit himself to or in any way obstructs the examination, his right to take or prosecute any proceedings under this chapter shall be suspended until the refusal or obstruction ceases. No compensation shall be payable for the period during which the refusal or obstruction continues. (Emphasis added)

As determined by the Court of Appeals in B.L. Radden & Sons, Inc. v. Copley, 891 S.W.2d 84 (Ky. App. 1995), placing a case in abeyance and ordering the cessation of the compensation payable during the period during which the refusal or obstruction continues is the only appropriate sanction available to the ALJ for a claimant's failure to appear at a scheduled medical examination.

Our review of the ALJ's order, leads us to conclude as a matter of law the ALJ's July 20, 2015, Order was interlocutory and does not represent a final and

² We offer no opinion as to whether such action is appropriate in the case *sub judice*.

appealable order. 803 KAR 25:010, § 21(2)(a), provides as follows:

Within thirty (30) days of the date of a final award, order or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order or decision may file a notice of appeal to the Workers' Compensation Board.

803 KAR 25:010, § 21(2)(b) defines a final award, order or decision as follows: "[a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2)."

Civil Rule 54.02(1) and (2) state as follows:

(1) When more than one claim for relief is presented in an action, ... the court may grant a final judgment upon one or more but less than all the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Hence, an order of an ALJ is appealable only if:

1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and, 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. *Cf. KI USA Corp. v. Hall*, 3 S.W.3d 355 (Ky. 1999); *Ramada Inn v. Thomas*, 892 S.W.2d 593 (Ky. 1995); *Transit Authority of River City v. Saling*, 774 S.W.2d 468 (Ky. App. 1980).

The ALJ's July 20, 2015, Order meets none of these requirements. Even though the ALJ attempted to summarily resolve the medical fee dispute, the ALJ obviously retained jurisdiction of this matter as he suspended Keeling's medical benefits until such time as she participates in an IME and a deposition. The ALJ's July 20, 2015, Order anticipates that once Keeling submits to an examination, the medical fee dispute will be resolved. Thus, the ALJ's order does not operate to terminate the action. Moreover, the ALJ's July 20, 2015, Order does not act to finally decide all outstanding issues, nor does it

operate to determine all rights of the parties so as to divest the ALJ once and for all of authority to decide the overall merits.

As a matter of law, therefore, the July 20, 2015, Order must be deemed interlocutory, and it is the ALJ as fact-finder, not this Board, who retains jurisdiction. See KRS 342.275.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED the Board's orders of September 2, 2015, October 21, 2015, and December 9, 2015, are **VACATED** and Keeling's appeal is **DISMISSED**. This claim is **REMANDED** to the ALJ for further proceedings.

ALVEY, CHAIRMAN, CONCURS IN RESULT ONLY.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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WORKERS' COMPENSATION BOARD

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