Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 22, 2014

CLAIM NO. 200700233

BEVERLY MILLS PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

UNIVERSITY OF KENTUCKY
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AND ORDER DISMISSING
* * * * * *

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

STIVERS, Member. Beverly Mills ("Mills") seeks review of the July 15, 2013, opinion and order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"), resolving a medical fee dispute in favor of the University of Kentucky ("UK"). Mills also appeals from the August 9, 2013, order overruling her petition for reconsideration.

A Form 110- Agreement as to Compensation and Order Approving Settlement dated January 7, 2010, reflects Mills was injured on April 14, 2003, and October 24, 2006. She sustained injuries to her neck, left knee, and right shoulder. It states Mills was "status post cervical fusion and status post left partial medical meniscectomy and partial synovectomy." The agreement reflects Mills had already received a period of temporary total disability benefits. Mills received a lump sum in settlement of her claim for these injuries and she did not waive her right to medical benefits.

This medical fee dispute relates to the October 24, 2006, injury which occurred when a patient kicked Mills twice in the left knee. Dr. Darren Johnson, an orthopedic surgeon at the University of Kentucky Medical Center, treated Mills' knee injury and he performed a partial medial meniscectomy in December 2007.

During her June 20, 2013, deposition, Mills testified that in 2011 she fell at her home near her pool when her knee buckled under her. She was taken to the emergency room. Dr. Johnson advised her to continue taking anti-inflammatories. Significantly, Dr. Johnson's latest medical record of June 8, 2011, indicates Mills was walking alongside the new pool she was building when she stumbled

and fell face first onto her right knee. Dr. Johnson characterized this as a non-work-related injury. He concluded "she has aggravated an arthritic condition." Because she was unable to obtain further appointments with Dr. Johnson, Mills sought treatment with Dr. Gregory D'Angelo in 2012. Ultimately, Dr. D'Angelo recommended Euflexxa injections into the left knee. He administered three injections in April 2013.

On November 28, 2012, UK filed a motion to reopen, a Form 112 medical fee dispute, and a motion to join Drs. Johnson and D'Angelo. In the motion, UK referenced the settlement agreement which indicated Mills has a 1% whole person impairment as a result of the work-related knee injury. It represented all medical bills had been paid. Based on the recent opinion of Dr. Peter Kirsch that Mills' current treatment and medical plan is unreasonable, medically unnecessary, and not causally related to the left knee injury of October 24, 2006, UK contested the compensability of any future treatment of Drs. Johnson and D'Angelo. Attached to the Form 112 is the letter of Dr. Kirsch in which he stated Mills' current complaints and the treatment of her left knee were not related to the October 24, 2006, work injury. Instead, Dr. Kirsch believed the complaints and treatment were related

to the fall of May 30, 2011. Dr. Kirsch noted Mills had a diagnosis of advancing degenerative arthritis in the left knee which was not related to the work injury. Dr. Kirsch believed this arthritic condition pre-existed the October 2006 injury and is not work-related. Accordingly, Dr. Kirsch opined the proposed Euflexxa injections were not reasonable and necessary treatment of the knee condition resulting from the October 24, 2006, work injury.

Notably, Dr. D'Angelo appealed the utilization review decision based on Dr. Kirsch's report. As a result, Dr. Thomas Loeb conducted a peer review appeal and also determined the Euflexxa injections were not medically necessary. Dr. Loeb opined the meniscal repair was "insurance against developing arthritis" and therefore the "pre-existing progressive degenerative arthritic process" that had taken place was not due to the work injury. He believed the use of Euflexxa was not medically necessary as treatment of the work injury. Therefore, he agreed with Dr. Kirsch the use of Euflexxa as ongoing treatment of the work injury should be denied.

On January 14, 2013, Hon. Robert Swisher, Administrative Law Judge ("ALJ Swisher"), entered an order noting UK had questioned the medical treatment recommended by Drs. Johnson and D'Angelo and was relying upon the

utilization review ("UR") report of Dr. Kirsch and the medical report of Dr. Loeb. Finding UK had made a *prima facie* showing for reopening, ALJ Swisher sustained its motion, joined Drs. Johnson and D'Angelo as parties, and set the matter for a telephonic mediation conference. Thereafter, UK introduced the February 7, 2013, report of Dr. Gary Bray.

On March 15, 2013, ALJ Swisher entered an Order Following Mediation Conference on Reopening for Medical Dispute stating that since no issues had been resolved, the claim was reassigned to the ALJ. The order set a proof schedule.

UK filed the medical records of Dr. Johnson generated in 2006, 2007, 2008, and 2011. It also introduced various medical records from the University of Kentucky Medical Center relating to Mills' treatment. UK also introduced an addendum report of Dr. Bray dated May 29, 2013. Mills introduced the records of Dr. D'Angelo dated September 13, 2012, October 11, 2012, and November 29, 2012. Mills also introduced the medical records from the University of Kentucky Medical Center dated May 30, 2011.

The June 10, 2013, Benefit Review Conference ("BRC") order reflects the bills and treatment of Drs.

Johnson and D'Angelo were at issue. The BRC order states the contested issue concerns the reasonableness, necessity, and work-relatedness of the Euflexxa injections and ongoing treatment of the left knee. The BRC order stated the parties waived a hearing and the claim was submitted as of the date of the order.

On June 25, 2013, Mills' June 20, 2013, deposition was introduced in the record. Thereafter, both parties submitted briefs.

In the July 15, 2013, opinion and order, after summarizing the reports of Drs. Kirsch, Loeb, Bray, the treatment records of Dr. Johnson, and the records and report of Dr. D'Angelo, the ALJ concluded as follows:

> After careful consideration of the evidence in this case, the ALJ finds that Plaintiff has not sustained her burden of proving that the recommended treatment for her current complaints is work related. The ALJ found the opinions of Dr. Bray and Dr. Loeb to be detailed and convincing. The ALJ was further persuaded by Dr. Johnson's notes documenting a "non-work-related" fall that had exacerbated symptoms. Dr. D'Angelo never saw Mills until September of 2012, after the unrelated fall; in a November 29, 2012 treatment note, he failed to support causation despite the opportunity to do so. Dr. D'Angelo's notes suggested that Mills had suffered from continued problems since her work injury; however, as Dr. Bray noted, there is no evidence of any treatment from 2008 until she had the fall by the

> pool at home in 2011. Finally, the ALJ found significant the extent of degenerative changes noted in Mills' knee in 2006 and 2007. She suffered a work related meniscal tear in 2006; such was successfully repaired by surgery; and the current arousal of degenerative changes that she is experiencing has been shown to be age related or related to the fall in 2011, and not the work injury in 2006.
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> The Defendant's motion to reopen is sustained, and the pending medical dispute is resolved in its favor.

Mills filed a petition for reconsideration asserting as she does on appeal, that the ALJ failed to consider her deposition testimony and portions of Dr. D'Angelo's records which contained his unequivocal opinion that Mills' arthritic condition was brought into disabling reality by the work injury. Mills argued her testimony and Dr. D'Angelo's unequivocal opinion warranted reconsideration and reversal of the ALJ's determination.

By order dated August 9, 2013, the ALJ indicated he had considered Mills' testimony but did not believe her opinion supported a finding in her favor. The ALJ concluded "these matters are primarily decided based on medical evidence, and the medical evidence in the case dictated the decision that was made."

On appeal, Mills challenges the ALJ's decision arguing his "findings of fact are inaccurate, incomplete, or

inadequate." Mills notes the ALJ relied upon the opinions of Drs. Bray and Loeb as well as Dr. Johnson's treatment note in which he referred to Mills' 2011 fall as being non-work-related. Mills argues the ALJ failed to consider her testimony and at a minimum, he should have made a finding of fact as to the credibility of her testimony pertaining to the 2011 fall and the pain she experienced after the 2007 surgery. Mills argues her testimony establishes her knee gave away at times following the 2007 surgery and her unstable knee was the cause of her 2011 fall. Accordingly, Mills requests the decision of the ALJ be vacated and remanded to the ALJ for further consideration of the issues.

Our review of the record reveals Mills' notice of appeal does not name Drs. Johnson and D'Angelo as parties to the appeal. Mills' appeal relates solely to the compensability of the proposed Euflexxa injections to be rendered by Dr. D'Angelo and the treatment by Dr. Johnson of her knee. Thus, both physicians are indispensible parties to this appeal. The 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 the argument raised by Mills on appeal.

An indispensable party to an appeal is one whose absence prevents the tribunal from granting complete relief among those 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 sole issue raised by Mills on appeal is a medical dispute concerning treatment administered by Drs. D'Angelo and Johnson who were not named as respondents in the notice of appeal as directed by 803 KAR 25:010 § 21 (2)(c)(2) which requires the petitioners to denote all parties as respondents against whom the appeal is taken.

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

> Review of Administrative Law Judge Decisions.
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> (1) General.
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> (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 counter-part 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).
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> . . . .
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> 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 notice of appeal, when properly filed, transfers jurisdiction of the claim from the ALJ to the Board and places all parties named therein within the Board's jurisdiction. The Board and the Kentucky appellate courts have repeatedly held that failure to name a party in the notice of appeal to the Board is a jurisdictional defect fatal to the appeal. Comm. of Kentucky, Dept. of Finance, Div. of Printing v. Drury, supra; Peabody Coal Co. v. Goforth, 857 S.W.2d 167 (Ky. 1993).

It is well-established that failure to name an indispensible party in the notice of appeal is a jurisdictional defect which results in dismissal of the

appeal. City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990). *See also* Tippett v. Switch Energy, WCB 199300757 (June 21, 2013). However, CR 73.02(2), as amended in 1985, sets out a policy of substantial compliance: "Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion."

The Kentucky Supreme Court recently reaffirmed its adherence to this policy. In Flick v. Estate of Wittich, 396 S.W.3d 816 (Ky. 2013), a notice of appeal was filed employing the case style used in the trial court proceedings. Thus, the caption named the Estate of Wittich as the "plaintiff" and Flick as the "defendant". The body of the document correctly identified that judgment from which the appeal was taken, but did not designate any appellant or appellee. The Court refused to dismiss the appeal, determining that no prejudice had resulted and all parties had fair notice of the appeal. "[O]ur policy of substantial compliance ensures the survival of an appeal despite clerical errors when no prejudice results from those errors and notice is sufficiently conveyed to the necessary parties." Id. at 824. *See also* Commonwealth v. Maynard, 294 S.W.3d 43, 46 (Ky. App. 2009)("[P]oorly drafted notices of appeal can meet the jurisdictional

mandate … so long as the court is satisfied that the notice of appeal, when reasonably read in its entirety is sufficient to confer fair notice to all indispensable parties of their status as a party to the appeal.”).

In the case *sub judice*, there was not substantial compliance since the failure not to name Drs. Johnson and D’Angelo as parties to this appeal, in the caption and in the body of the document, prevents the Board from granting the relief Mills seeks on appeal. The case law establishes that dismissal is mandated for failure to name an indispensable party. City of Devondale v. Stallings, supra. Consequently, we are obligated to dismiss Mills’ appeal for lack of jurisdiction.

That said, assuming, *arguendo*, we had jurisdiction to resolve this appeal, we believe the decision of the ALJ is supported by substantial evidence. As previously noted, both Drs. Kirsch and Loeb believed Mills’ current left knee problems were due to pre-existing osteoarthritis and thus were not related to the work injury. Therefore, the treatment rendered by Drs. Johnson and D’Angelo is not related to the October 24, 2006, work injury. Similarly, Dr. Johnson concluded Mills’ current left knee problems stemming from the 2011 fall were not related to her work injury.

In his February 7, 2013, and May 29, 2013, reports, Dr. Bray opined the osteoarthritis in Mills' left knee is not directly related to her work injury. Dr. Bray noted the clinical and x-ray findings were consistent with wear and tear arthritis and not due to a traumatic episode. Consequently, he believed Mills' arthritic condition pre-existed the October 24, 2006, work injury and was symptomatic at that time. Although future treatment was indicated, Dr. Bray did not think the treatment related to the October 24, 2006, work injury. He believed the treatment recommended by Dr. D'Angelo is reasonable; however, he concluded the Euflexxa injections and subsequent treatment were not related to the work injury. Dr. Bray noted the severity of the arthritis at the time Dr. Johnson performed the arthroscopy were too advanced to be directly related to Mills' work-related injury. Therefore, the decision of the ALJ on the merits would have been affirmed.

Accordingly, for the reasons stated herein, **IT IS HEREBY ORDERED AND ADJUDGED** the appeal filed by Mills is **DISMISSED**.

ALL CONCUR.

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FRANKLIN A. STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

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