OPINION ENTERED: November 9, 2012

CLAIM NO. 200574423

DAVID BURGESS PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

DANT-CLAYTON CORP.
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER DISMISSING

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BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. David Burgess ("Burgess") seeks review of the Opinion and Order rendered June 21, 2012 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") determining transforaminal injections recommended by Dr. Lawrence Peters are not reasonable, necessary or related to the effects of his August 23, 2005 work-related low back

injury. Burgess also appeals from the order rendered July 19, 2012 overruling his petition for reconsideration.

On appeal, Burgess argues the ALJ erred by "exercising a medical opinion" when he observed Burgess' feet appeared to be black in color and not of a reddish, shiny color as typically seen in cases of Chronic Regional Pain Syndrome ("CRPS"). Similarly, Burgess argues the ALJ "attempted to play medical doctor" in his opinion by describing the symptoms of Raynaud's phenomenon and Buerger's disease and inferring how they would relate to Burgess' symptoms without medical proof. Burgess also argues the ALJ erred in relying upon Dr. Travis' medical opinion since it was based upon pure speculation. We dismiss Burgess' appeal.

On January 24, 2011, Burgess filed a motion to reopen and a medical fee dispute to compel Dant-Clayton Corporation ("Dant-Clayton") to pay for transforaminal injections recommended by Dr. Peters, his treating pain management physician. Dr. Peters diagnosed CRPS due to Burgess' work-related low back injury which occurred on August 23, 2005 and subsequent surgeries. Dr. Peters opined such treatment is reasonable and necessary.

In support of his motion to reopen, Burgess attached a Form 110-1, Agreement as to Compensation and

Order Approving Settlement entered into by the parties on November 18, 2008. The agreement states Burgess sustained a L5/S1 disc herniation on August 23, 2005 while shoveling slag for Dant-Clayton requiring a L5 laminectomy, bilateral L5/S1 decompression, L5/S1 microlumbar discectomy and transforaminal fusion. The agreement reflects Burgess is to receive a compromised permanent total disability award. Pursuant to the agreement, Burgess waived his right to vocational rehabilitation benefits and to reopen the claim to seek additional benefits, but reserved his right to future medical treatment. Burgess also attached Dr. Peters' letter dated August 31, 2009 addressing the efficacy of the transforaminal epidural steroid injections. Dr. Peters opined the injections settled sixty to seventy percent of Burgess' leg pain and noted his back problems would respond to different treatment.

By order dated February 16, 2011, J. Landon Overfield, Chief Administrative Law Judge ("CALJ") sustained Burgess' motion to reopen. The CALJ also ordered Dr. Peters be joined as a party to the claim.

Dant-Clayton submitted the medical report rendered September 23, 2011 by Dr. Russell L. Travis, a neurosurgeon. He opined Burgess has low back and bilateral lower extremity pain of undetermined etiology. Dr. Travis

opined he was unable to relate Burgess' current problems to the August 23, 2005 injury. He found the CRPS diagnosis unsubstantiated, noting no information existed in the medical records justifying such diagnosis. Dr. Travis noted the IASP diagnostic protocol calls for CRPS to be excluded from consideration by discovery of other conditions which could account for the presentation. Dr. Travis opined several medical conditions, including Raynaud's phenomenon and Buerger's disease, are more likely to be the appropriate diagnosis, rather than CRPS. Dr. Travis found no indication for epidural steroid injections because a radicular problem could not be confirmed. Dr. Travis recommended additional testing to rule out conditions such as Buerger's disease, thrombosis, aortic calcification, Raynaud's phenomenon, and multiple other problems.

Burgess submitted the medical report of Dr. Peters dated January 25, 2012. Dr. Peters disagreed with Dr. Travis' report noting Burgess' treatment history began with the 2002 initial back surgery after his return to work. He noted Burgess then suffered a work-related disc herniation resulting in a L5-S1 fusion and decompression surgery, which for reasons unknown worsened his condition. Dr. Peters noted Burgess developed other problems

consistent with CRPS. Burgess underwent lumbar sympathetic blocks which seemed to settle some of the CRPS symptoms, and improve his hyperalgesia and allodynia. A repeat MRI showed impingement of the nerve root by hardware, and he underwent emergency low back surgery, after which his symptoms worsened.

Dr. Peters noted between the second and third surgeries, Burgess exhibited symptoms consistent with early CRPS including foot swelling, allodynia and asymmetric leg swelling. The CRPS symptoms improved with the sympathetic blocks. Dr. Peters noted Burgess' symptoms started acutely a few weeks post surgery and were one-sided. Burgess had hyperthermia, hyperhidrosis, allodynia, loss of hair, and loss of range of motion in his toes and foot - all symptoms of early CRPS. Dr. Peters noted Buerger's disease and Raynaud's phenomenon do not generally occur abruptly following a surgery or in a unilateral fashion and subsequently progress. Burgess had no prior symptoms suggesting the other conditions.

Dr. Peters diagnosed CRPS and opined the impingement of the nerve root by the hardware associated with the fusion was the triggering cause of his CRPS. Dr. Peters opined it would be a waste of time and effort to undergo additional testing as suggested by Dr. Travis to

rule out other medical conditions. Following the most recent surgery, selective nerve root blocks were administered resulting in a “40% or better reduction in the patient’s leg pain for 4 ½ months, after which point the pain began to return somewhat.” Dr. Peters opined nerve root blocks provide Burgess the most relief for a prolonged amount of time and he is a candidate for continuing treatment.

Burgess testified at the final hearing held on April 24, 2012. At the hearing, the ALJ noted the issue to be addressed was the reasonableness, necessity and relatedness of the transforminal injections. Burgess testified he injured his low back several years before, which was resolved through settlement. As a result of his injury, he underwent two surgeries and continues to have low back and bilateral leg problems. Immediately prior to the settlement, Burgess testified his lower back was inflamed around the scar tissue, and he had shooting pain and cramps down his left leg. Both legs were swelling resulting in his skin tearing open, causing fluid to seep out. Burgess testified at the time of settlement, all parties were aware of this problem and all medical bills had been paid by Dant-Clayton.

Following the settlement, Burgess testified his treatment with Dr. Peters included pressure point shots, epidurals and pain medications. The treatment helped his low back and legs and he continues to see Dr. Peters on a monthly basis. Burgess estimated he had received thirty-five percent relief of his condition. Shortly thereafter, Dr. Peters' office contacted Burgess and told him they were no longer being paid to perform injections because they were not providing sufficient relief. Burgess testified the shots had helped his pain and swelling in his legs, and in hindsight, helped more than thirty-five percent. He testified the injections resolved his leg swelling.

Burgess testified his low back pain and leg swelling increased after he was unable to receive the injections. He showed the ALJ his swollen leg, explaining his toenails were rotting off, his skin turned black and his swelling was "nowhere near this" when he received the injections. Burgess testified he has never been referred to a vascular surgeon, nor has he been tested for or diagnosed with Buerger's disease or Raynaud's disease.

On cross-examination, Burgess testified he had a prior back injury in 2002 and was already seeing Dr. Peters before his work-related injury. Burgess testified he could

not recall receiving injections prior to the 2005 work-related injury.

In the Opinion and Order rendered June 21, 2012, the ALJ reviewed Burgess' testimony and the two conflicting medical reports. The ALJ also stated he viewed Burgess' legs at the hearing and observed "his feet appeared to be black in color and not of a reddish shiny color as typically seen in cases of Chronic Regional Pain Syndrome." The ALJ noted he is not a physician and was not attempting to make a medical diagnosis or propose a cause for Burgess' condition. He emphasized he was making a layperson observation Burgess' lower extremities appeared black in color as if they were not getting adequate circulation.

The ALJ determined the transforaminal lumbar spine injections are not reasonable, necessary or related to the effects of Burgess' August 23, 2005 work-related low back injury. The ALJ found Dr. Travis' opinion persuasive and determined Burgess:

> has not met his burden of proving that he suffers from Chronic Regional Pain Syndrome as a result of his August 23, 2005, work-related low back injury and two subsequent failed surgical repairs and that he suffers from bilateral lower extremity pain of undetermined etiology.

Since the proposed injections were recommended by Dr. Peters to treat what he believes is CRPS, the ALJ found the injections were not reasonable or necessary. Therefore, Dant-Clayton is not responsible for payment of the injections.

In his petition for reconsideration, Burgess argued the injections recommended by Dr. Peters provide cure and relief from the effects of his work-related injury. He noted Dr. Peters diagnosed him with CRPS and found the injections reasonable because Burgess had shown significant improvement in the past with the injections.

Burgess also argued, as he does in this appeal, Dr. Travis' opinion is pure speculation and conjecture when he suggested other diagnoses for which there was no basis, no diagnostic testing, and nothing to support his opinion. Burgess argued Dr. Travis' opinion has placed the ALJ in the position of "playing doctor."

Burgess also argued, as he does on this appeal, the ALJ erred by providing a medical opinion when he stated Burgess' feet appeared to be black and not of a reddish, shiny color as typically seen in cases of CRPS. Burgess argues this statement is pure speculation, has no basis in law or fact, is not supported by the evidence in the record and was made by an ALJ with no medical training. He

requested Dant-Clayton be found responsible for Burgess' medical treatment, including any additional testing for purposes of diagnosing other medical conditions suggested by Dr. Travis. Burgess' petition was overruled as a re-argument of the merits of the claim by order rendered July 19, 2012.

Burgess filed a "Notice of Appeal" on August 17, 2012, appealing from the June 21, 2012 Opinion and Order and the July 19, 2012 Order denying his petition for reconsideration. Burgess identified the Defendants/ Respondents as Dant-Clayton and the ALJ. Burgess certified a copy of the notice was mailed to the Department of Workers' Claims, the ALJ, and counsel for Dant-Clayton. Burgess did not name Dr. Peters in the Notice of Appeal nor was a copy of the notice mailed to him. Similarly, Burgess mailed copies of his brief to the ALJ and counsel for Dant-Clayton, but did not serve a copy of his brief on Dr. Peters despite his being joined by order of the CALJ.

Because he failed to name an indispensable party in his notice of appeal, we dismiss Burgess' appeal for lack of jurisdiction. Since Dr. Peters' proposed treatment is at the heart of this appeal, he is an indispensable party. 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).

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 sole issue raised by Burgess on appeal is a post-settlement medical dispute concerning the work-relatedness and necessity of the transforminal injections administered by Dr. Peters who was not named as a respondent in the notice of appeal. 803 KAR 25:010 §21(2)(c)(2) requires the petitioners to denote all parties as respondents against whom the appeal is taken.

803 KAR 25:010 § 21 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 a case from the ALJ to the Board and places all parties named therein under the Board's jurisdiction. Both this 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). The case law clearly establishes strict, not substantial, compliance is required with regard to naming all dispensable parties.

Johnson v. Smith, 885 S.W.2d 944, 950 (Ky. 1994); City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990); Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918, 921 (Ky. App. 1998), ("[t]he substantial compliance doctrine simply does not apply to notices of appeal."). As the case law plainly states, dismissal is the result mandated for failure to name an indispensable party. City of Devondale v. Stallings, supra. Contrary to the dissent, this is consistent with our previous holding in Lexington Fayette Urban County Government v. Scott Kelsey, and Scott Kelsey v. Lexington Fayette Urban County Government, Claim No. 2010-81696 (January 17, 2012).

Consequently, we are without jurisdiction to rule on the merits of the argument Burgess raises on appeal. Dr. Peters was an indispensable party, but he was not named in Burgess' notice of appeal. The absence of Dr. Peters as a party to this appeal prevents the Board from granting complete relief, and more particularly the relief sought by Burgess on appeal.

That said, had we retained jurisdiction of this issue, we would have affirmed the ALJ. In a post-award medical fee dispute, the burden of proof to demonstrate the medical treatment is unreasonable or unnecessary is with the employer while the burden remains with the claimant

concerning questions pertaining to work-relatedness or causation of the condition. *See* KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993); National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). Since Burgess was unsuccessful in demonstrating he suffered from CRPS as a result of his work-related injury, the question on appeal would have been whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

We conclude the ALJ was well within his discretion in finding persuasive Dr. Travis' opinion. The record entailed two conflicting medical opinions, as well as Burgess' testimony. The ALJ was free to choose which medical opinions he found more persuasive and merely pointing to other evidence in the record supporting a different outcome will not result in reversal on appeal. Therefore, had we retained jurisdiction, we could not say the outcome arrived at by the ALJ was so unreasonable based upon the evidence it must be reversed as a matter of law.

Based upon the foregoing, **IT IS HEREBY ORDERED** the appeal filed by Burgess is **DISMISSED** in its entirety.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS COMPENSATION BOARD

SMITH, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

MEMBER, STIVERS. This Board has consistently held that when a physician's treatment is the subject of a medical fee dispute, the physician is an indispensable party and must be named as a party on appeal. However, I submit the requirement of naming the physician as a party applies only when the party opposing the physician's treatment is appealing the decision of the ALJ.

Where the party appealing and the physician are similarly-situated in the claim and their position on appeal is the same, the physician is not an indispensable party. First, the physician has the right to file a notice of appeal; if he does not, the party who is advocating that same position may file a notice of appeal and assert the physicians' position. Therefore, in the case *sub judice*, since the claimant has filed a notice of appeal and is

advocating the same position as the physician, the physician's absence does not prevent this Board from granting complete relief. In the case *sub judice*, the Board is able to grant complete relief as the physician's interests are being represented by the petitioner. Since the physician's absence does not prevent a full resolution of the appeal and complete relief, he or she by definition is not an indispensable party. Because the appeal should not be dismissed, I respectfully dissent.

That said, I agree with the majority's opinion that, on the merits, the ALJ's decision should be affirmed.

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