OPINION ENTERED: June 21, 2013

CLAIM NO. 199300757

DON TIPPETT PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

SWITCH ENERGY
SPECIAL FUND
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING

* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. On February 13, 2013, Hon. Steven G. Bolton, Administrative Law Judge, ("ALJ") issued an order resolving a medical dispute filed by Switch Energy finding treatment rendered to Don Tippett ("Tippett") by Dr. Phillip A. Tibbs only partially compensable. Tippett filed

a petition for reconsideration on March 8, 2013 which was denied by the ALJ in an order entered April 9, 2013.

Tippett filed a notice of appeal on May 6, 2013, naming Switch Energy, the Special Fund, and the ALJ as respondents, but failed to name Dr. Tibbs. Switch Energy filed a Notice of Cross-Appeal on May 13, 2013, and also filed a motion to dismiss Tippett's appeal for failure to join an indispensable party. On May 22, 2013, long after the thirty (30) days for filing a notice of appeal had expired, Petitioner filed an amended notice of appeal naming Dr. Tibbs as a respondent.

On May 29, 2013, this Board entered an order providing fifteen (15) days for Petitioner to show cause as to why the appeal should not be dismissed for failure to join an indispensable party. On June 6, 2013, Petitioner filed a response to the show cause order acknowledging it failed to include Dr. Tibbs in its notice of appeal due to a typographical error.

It is clear Dr. Tibbs, an indispensable party, was not joined in 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 arguments raised by Petitioner. 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 on appeal concerns a medical dispute regarding treatment rendered by Dr. Tibbs. Dr. Tibbs, however, was not named in a timely manner as a respondent in the notice of appeal as required by 803 KAR 25:010 Section 21 (2)(c)(2) which mandates the petitioner denote all parties against whom the appeal is taken as respondents. It was only after realizing the original notice of appeal was defective that Petitioner attempted to correct the mistake by filing a motion to amend the notice of appeal, well beyond the time limit for a proper filing. *See* 803 KAR 25:010 Section 21 (2)(a).

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 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 courts of justice have repeatedly held failure to name a party in the notice of appeal to the Board is a jurisdictional defect fatal to the appeal. Com. of Kentucky, Dept. of Finance, Div. of Printing v. Drury, supra; Peabody Coal Co. v. Goforth, 857 S.W.2d 167 (Ky. 1993); *Cf.* City of Murray v. Billington, No. 2003-SC-0840-WC, 2004 WL 2128722 (Ky. 2004). The case law clearly establishes strict, not substantial compliance is the rule for failure to name 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.

Without question, Dr. Tibbs is an indispensable party to this appeal. However, he was not named in the

notice of appeal filed May 6, 2013. It was not until May 22, 2013 when Petitioner filed the amended notice of appeal naming Dr. Tibbs. This attempt was well beyond the 30 day limit for filing a timely notice of appeal as contained in 803 KAR 25:010 Section 21 (2)(a). For this reason, Petitioner's attempt to amend the notice of appeal is denied. We conclude the absence of Dr. Tibbs from this appeal prevents the Board from granting complete relief. Consequently, we are obligated to dismiss the appeal for lack of jurisdiction. It is further noted that had this Board retained jurisdiction, we would have affirmed the ALJ's decision because it was supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Since Dr. Tibbs, an indispensable party was not timely and properly joined as a party to this appeal, **IT IS HEREBY ORDERED** Tippett's appeal is **DISMISSED.** Based upon the response filed June 14 2013, Switch Energy's appeal is also **DISMISSED**.

STIVERS, MEMBER, CONCURS.

_____
MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON JOHNNIE L TURNER
P O BOX 351
HARLAN, KY 40831

COUNSEL FOR RESPONDENT:

HON KATHERINE BANKS
P O BOX 1350
PRESTONSBURG, KY 41653

RESPONDENTS:

SPECIAL FUND
1047 US HWY 127 SOUTH, STE 4
FRANKFORT, KY 40601

ADMINISTRATIVE LAW JUDGE:

HON STEVEN G BOLTON
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601