Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 19, 2016

CLAIM NO. 199434306

ELISHA CREECH PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

PERRY COUNTY BOARD OF EDUCATION
HON JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Elisha Creech ("Creech") appeals from the December 7, 2015 Medical Fee Opinion and Order and the February 16, 2016 Order on Petition for Reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). The ALJ determined the contested treatments are not related to Creech's work injury. He appeals,

arguing the evidence compelled a result in his favor. We affirm.

Creech injured his low back and legs in a 1994 fall, which necessitated lumbar surgery. By Opinion and Order dated June 27, 1997, Creech was awarded income benefits and medical benefits. On August 20, 2015, his employer, Perry County Board of Education ("Perry County"), filed a motion to reopen to challenge the work relatedness, the reasonableness and necessity for ongoing prescriptions of methadone, cyclobenzaprine, lansoprazole, Colace and celecoxib. It also challenged injections, monthly urine drug screens and office visits.

Creech submitted the affidavit of his treating physician, Dr. Ionut Stefanescu-Sturz. Dr. Stefanescu-Sturz stated the contested injections, office visits and urine screens were related to low back pain from the work injury. He identified Creech's diagnosis as "status post-surgery with degenerative disk disease."

Perry County submitted the independent medical evaluation report of Dr. Russell Travis, dated June 15, 2015. Dr. Travis conducted a medical records review and physical examination. He first expressed difficulty in identifying any diagnosis for Creech due to an incomplete

medical history and gross symptom magnification on physical exam. Because injections had provided no relief to Creech, Dr. Travis concluded they are not medically necessary or reasonable. He likewise concluded monthly office visits to Dr. Stefanescu-Sturz and monthly urine drug screens are not medically reasonable or necessary. He opined lansoprazole, Colace, cyclobenzaprine and celecoxib are not related to the work injury in 1994 or medically necessary. Dr. Travis strongly recommended Creech wean from methadone, and explained his current dosage is “entirely inappropriate”.

Dr. John Rademaker conducted a utilization review and concluded none of the contested prescription medications are medically reasonable or necessary for the cure or relief of Creech’s 1994 work injury. He opined the monthly office visits to Dr. Stefanescu-Sturz, as well as the injections and monthly drug screens, are not reasonable or necessary.

The ALJ relied upon Dr. Rademaker and Dr. Travis to conclude the challenged treatments and prescription medications are not related to Creech’s work injury. She explained, “Dr. Sturz states the current treatment is in part due to degenerative changes. This supports the opinions stated by Dr. Rademaker and Dr. Travis, that

current treatment is related to long-standing degenerative changes and would not be related to the work injury of [1994]." Creech petitioned for reconsideration, arguing the evidence compelled a different result. The petition was denied.

On appeal, Creech again asserts the evidence compels a result in his favor. He contends Dr. Stefanescu-Sturz's opinion should be afforded more weight because he is the treating pain management specialist. Further, he claims the ALJ mischaracterized the evidence when she noted Dr. Stefanescu-Sturz stated "the current treatment is in part due to degenerative changes."

In a post-award medical fee dispute, the employee bears the burden to establish the contested treatment is work-related. National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App. 1991). The employer bears the burden of establishing the reasonableness and necessity of the treatment. Id. Perry County successfully established the contested treatment and prescriptions are not causally related to the 1994 work injury and not reasonable or necessary. Therefore, on appeal, the question is whether substantial evidence supports the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). "Substantial

evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

The opinions of Dr. Travis and Dr. Rademaker constitute the requisite substantial evidence to support the ALJ's decision. Both physicians opined the contested prescriptions, monthly office visits and drug screens are not reasonable and necessary for the cure or relief of the 1994 injury. Because Dr. Travis expressed difficulty in identifying any current diagnosis, he concluded all of the contested treatments are unnecessary and unreasonable. Further, he was unable to find any relation between the contested treatment and the 1994 work injury. Dr. Rademaker reached an identical conclusion.

Dr. Stefanescu-Sturz's opinion is not afforded greater weight because he is the treating physician. Wells v. Morris, 698 S.W.2d 321 (Ky. App. 1985). Rather, it simply represents conflicting proof which the ALJ was free to reject and which does not require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Furthermore, we disagree the ALJ mischaracterized his report.

In the typed portion of Dr. Stefanescu-Sturz's affidavit, it states he is making the following statements "concerning treatment of [Creech's] work-related injury." Later in the document, in handwriting, Dr. Stefanescu-Sturz identified the current working diagnosis as "status post-surgery with degenerative disc disease." The ALJ enjoys the discretion to draw reasonable inferences from the evidence. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). Based on these somewhat conflicting statements in the report, the ALJ's interpretation of Dr. Stefanescu-Sturz's opinion is reasonable. We note Dr. Stefanescu-Sturz was not deposed or asked to submit any further information for the ALJ's consideration.

As a final matter, Perry County asserts, in its response brief, that this appeal should be dismissed because Creech failed to join Dr. Stefanescu-Sturz. It argues he is an indispensible party to the appeal, and his absence requires dismissal. He was included in the service of process before the ALJ, though he did not participate. However, he was not included on the notice of appeal or otherwise served a copy of the pleadings in this claim before the Board.

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). "In determining whether a party is truly necessary on appeal, the court must ask 'who is necessary to pursue the claim … If a party's participation in the appeal is unnecessary to grant relief, and requiring its participation would force unnecessary expense on the party, then … such a party is not indispensable.'" Browning v. Preece, 392 S.W.3d 388, 392 (Ky. 2013) *quoting* Nelson County Bd. of Educ. v. Forte, 337 S.W.3d 617, 625 (Ky. 2011). The issue is whether the party has "an interest that would be *affected* by the decision of the Court of Appeals, regardless of whether that interest is affected adversely or favorably." Id.

We have also reviewed the administrative regulations pertaining to medical fee disputes. 803 KAR 25:012 §1(5) requires the moving party to a medical fee dispute to join the medical provider as a party to the dispute. When appealing an ALJ's decision in a medical fee dispute, 803 KAR 25:010 §21(2)(c) requires that the notice

of appeal shall “denote all parties against whom the appeal is taken as respondents”. Thus, while the regulations require the medical provider to be joined as a party to the dispute, there is no analogous regulation requiring their inclusion as a party to an appeal. Similarly, whether a party is indispensible at trial pursuant to CR 19.02 does not necessarily dictate whether that same party is indispensible on appeal.

The Kentucky Supreme Court analyzed this distinction in Braden v. Republic-Vanguard Life Ins. Co., 657 S.W.2d 241 (Ky. 1983). In Braden, the widow of a deceased mortgagor sought to recover the balance of the mortgage payments due from a credit life insurer. The trial court ordered the mortgage holder, Baldwin-United, to be joined as a party. It then sustained the insurer’s motion for summary judgment as to the merits of the claim. The widow appealed, arguing the insurer’s affirmative defense was inapplicable. However, she did not name Baldwin-United as a party to the appeal. The Supreme Court concluded Baldwin-United was not an indispensible party to the appeal, explaining:

> But we see no reason to require Baldwin-United as an indispensable party to the appeal. CR 73.03 requires that a “notice of appeal shall specify

all of the appellants and all of the appellees ...” Failure to specify any party whose absence prevents the appellate court from granting complete relief among those already parties would be fatal to the appeal. Levin v. Ferrer, Ky., 535 S.W.2d 79 (1975). But the only relief the appellant seeks in this case is reversal of the summary judgment with remand to the trial court to decide whether Republic-Vanguard has an affirmative defense to payment of the policy coverage. Assuming the appellant should prevail upon the merits, the judgment may still order Baldwin-United, which is still a party at the trial level, paid according to its interest in the proceeds. The critical difference is who is necessary to pursue the claim and who has a right to the proceeds. For this reason New York Life Ins. Co. v. McCane, 276 Ky. 712, 124 S.W.2d 1057 (1939), dealing with who is necessary at the trial level, is not applicable. Assuming the claim is ultimately successful Baldwin-United will receive payment, but Braden's estate will receive the benefit. As the party standing to receive the benefit, Braden's estate has standing to pursue the claim.

Baldwin-United has been forced into this case by the appellee who has demanded its presence as an indispensable party. Baldwin-United has taken little or no active part in pursuing the merits of the claim or attacking the life insurance company's defenses. It appears to be satisfied that it will be paid either from the insurance proceeds or by mortgage payments. There is no incentive for Baldwin-United to pay the expenses which arise in connection with an appeal. We do not interpret the rules

> as requiring joinder as an indispensable party to an appeal of a party who is unnecessary to the decision of the appeal and who would incur an unnecessary expense if its presence was required.

Here, Dr. Stefanescu-Sturz is in a similar position to Baldwin-United in Braden. He did not take an active role in the litigation of this medical fee dispute before the ALJ. Like Baldwin-United, his interest is collateral: there is no dispute as to the provider's right to compensation for services rendered. Furthermore, as this dispute also involves the compensability of continued treatment, Dr. Stefanescu-Sturz has no interest in any future treatment. Rather, the dispute is between Perry County and Creech as to who is responsible for payment. Any decision by this Board would affect only Perry County's responsibility for payment to the providers. For these reasons, we conclude Dr. Stefanescu-Sturz is not an indispensible party to this appeal. As such, there is no basis to dismiss this appeal.

For the foregoing reasons, the December 7, 2015 Medical Fee Opinion and Order and the February 16, 2016 Order on Petition for Reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

ALVEY, Chairman. While I agree with the result the majority reached in affirming the ALJ's decision, I must respectfully dissent. I believe Dr. Stefanescu-Sturz is an indispensable party to this appeal, and failure to name him is fatal. 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, I believe we are without jurisdiction to rule on the merits of the argument raised by Creech, and the appeal should be dismissed.

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.

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.

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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> . . . .
>
> 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 indispensable 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). Since this appeal involves a medical dispute, the treatments administered by Dr. Stefanescu-Sturz are directly involved. The failure to name Dr. Stefanescu-Sturz prevents his ability to participate in the proceedings which have a direct impact upon him. Therefore, I believe he is an indispensable party, and failure to name him prevents any determination other than complete dismissal of the appeal.

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