

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 4, 2015

CLAIM NO. 199407153

JERRY D. MOORE

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

CHRISTOPHER NEWELL
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION & ORDER
DISMISSING

* * * * *

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

STIVERS, Member. Jerry D. Moore ("Moore") appeals from the February 20, 2015, Order on Reconsideration by Hon. John B. Coleman, Administrative Law Judge ("ALJ") in which the ALJ granted United Parcel Service's ("UPS") petition for reconsideration and relieved UPS of its obligation to pay medical expenses associated with Moore's thoracic spine condition.

On appeal, Moore asserts as follows:

The above exhibits clearly demonstrate that Respondent and its insurer, Liberty Mutual, had ample notice of Petitioner's thoracic spinal injury prior to the settlement with Petitioner in April, 1997, a settlement in which Respondent agreed to pay for Petitioner's future medical expenses. Judge Coleman's January 13, 2015 opinion and order was excellent. It analyzed the medical evidence of Petitioner's pre-1997 thoracic injury. He correctly noted that KRS 342.020 mandates that employers have a responsibility to pay for the cure and relief from the effects of an injury or occupational disease. Judge Coleman also noted that in fee disputes such as this, the employer has the burden of proving that the contested medical treatment is not reasonable or necessary for the cure and relief or a work injury. Respondent has in this case entirely failed to meet its burden to prove that a thoracic MRI of Petitioner is not reasonable or necessary for the relief of Petitioner's debilitating injury. At the end of his January 13, 2015, order Judge Coleman correctly noted the parties' 1997 agreement that Respondent would pay for all reasonable and necessary medical treatment reasonably related to the injury. At the end of his January 13, 2015 order Judge Coleman correctly deferred to the overwhelming medical evidence that the thoracic spine injury was related to Petitioner's compensable injuries.

...

In Judge Coleman's Order on Reconsideration he noted, "the plaintiff timely filed his application

for benefits for injuries and it is clear from this medical evidence that **while not clearly delineated on the settlement form or the form 101**, the plaintiff was receiving treatment not only to the cervical spine with the thoracic spine as well as a consideration of part of his injury of October 11, 1993 and September 8, 1995." (Emphasis added.) Judge Coleman, after discussing his interpretation of Ramsey, concluded, "The ALJ finds little difference in the case at bar from that case except for the fact that this involves treatment of an **unclaimed thoracic spine injury** wherein the Ramsey case involves treatment for an unclaimed depressive condition." (Emphasis added.) Upon a careful reading of Judge Coleman's Order on Reconsideration it appears that he relied exclusively upon the words "cervical spine & right shoulder" that were written on the settlement agreement. That result is harsh and manifestly unfair to Petitioner.

For the purposes of this appeal, the procedural history begins with the filing of UPS's August 7, 2014, Motion to Reopen and Form 112 Medical Fee Dispute. In the Motion to Reopen, UPS asserted as follows:

1) The Respondent/Plaintiff alleged work-related injuries to his cervical spine and right shoulder on October 11, 1993 and September 8, 1995. That claim settled April 8, 1997 with medical benefits remaining for these body parts under KRS 342.020; (See Form 110 attached to August 5, 2014 Form 112)

2) Now, Dr. Amr O. El-Nagggar requests a CT scan of the Respondent/Plaintiff's

thoracic spine; (See attachment to August 5, 2014 Form 112)

3) As such, the Movant/Defendant contests the work-relatedness/causation of Dr. El-Naggar's treatment request;

In the Form 112, UPS describes the nature of the dispute as follows:

The Respondent/Plaintiff alleged work-related injuries to his cervical spine and right shoulder on 10/11/93 and 9/8/95. The claim settled 4/8/97 with medical benefits remaining for these body parts under KRS 342.020. Now, Dr. Amr O. El-Naggar requests a CT scan of the Respondent/Plaintiff's thoracic spine. As such, the Movant/Defendant contests the work-relatedness/causation of Dr. El-Naggar's treatment request.

Attached to the Form 112 is the April 8, 1997, Form 110 Agreement as to Compensation and Order Approving Settlement in which the nature of the injury is described as follows: "Cervical Spine & Right Shoulder."

On August 7, 2014, UPS moved to join Dr. El-Naggar who had requested the CT scan of Moore's thoracic spine.

The September 29, 2014, Scheduling Order Following Initial Conference on Medical Dispute Reopening indicates the challenged procedure is a CT scan of the

thoracic spine and the basis for the challenge is causation/work relatedness.

The November 19, 2014, Benefit Review Conference Order in Medical Dispute ("BRC Order") lists work-relatedness of "CT Thoracic Spine."

In the January 13, 2015, Opinion and Order (Medical Dispute), the ALJ offered the following analysis and conclusions:

The plaintiff's injuries occurred on October 11, 1993 and September 8, 1995. The injuries were identified as cervical and right shoulder injuries. The claim was settled by agreement approved on April 8, 2007. The plaintiff retained his rights under KRS 342.020. In a subsequent medical dispute opinion rendered December 7, 2012, it was determined that additional physical therapy was compensable treatment for the work injury to his cervical spine. In a medical dispute opinion rendered May 9, 2014, the undersigned ALJ determined the plaintiff's medication regimen prescribed by Dr. Karen Saylor was compensable for treatment of the work injury.

The defendant indicates in its Motion to Reopen and Medical Fee Dispute that the plaintiff's alleged work injuries of October 11, 1993 and September 8, 1995 were to his cervical spine and right shoulder, but the current requested treatment is for the plaintiff's thoracic spine.

The medical provider whose treatment was contested also offered an

opinion on the reasonableness and necessity of the treatment for the cure and/or relief of the effects of the work related injury. In a letter dated September 19, 2014, Sarah Todd, PA-C, for Dr. El-Naggar, indicated the plaintiff is being treated for discogenic back pain, lumbar radiculopathy, spondylolisthesis and thoracic back pain. She opined the thoracic spine injury was related to the 1993 and 1995 work injuries and indicated the thoracic CT scan was necessary to determine if there is any surgical pathology. In addition, she noted the plaintiff has failed treatment with physical therapy, epidural steroid injections and numerous medications.

In a letter dated August 4, 2014, Dr. Karen Saylor indicated the plaintiff has had increased pain in his thoracic area. She pointed out the plaintiff had a thoracic MRI in August 1998 as well as physical therapy to that area. She noted the plaintiff's prior treatment for thoracic pain centers around a work injury sustained at that time. She reviewed the plaintiff's medical records from [sic] time which appear to substantiate the fact he was having thoracic pain at that time.

Numerous prior medical records were also filed into evidence. The records include a report from Lexington Diagnostic wherein a thoracic MRI obtained on August 22, 1994 revealed annular bulging from T8 through T11. Also included in the medical records is a utilization review report dated February 12, 1998 wherein it was determined that a thoracic MRI scan was medically reasonable and necessary. A thoracic MRI obtained on April 23, 1999

revealed small focal disc protrusions from T6 through T9 without significant compromise of the canal or compression of the cord. Records from Berea Hospital indicate the plaintiff underwent physical therapy in 1995 for neck and upper thoracic pain. Records from Dr. John Sipple indicate the plaintiff had chiropractic treatment in 1995 for work related cervical disc syndrome as well as brachial neuritis and radiculitis at T4-5. Records from Dr. John Allen indicate the plaintiff was treated for complaints of mid and upper back pain in 2004. In a letter report, Dr. David Bullock indicated the plaintiff has sustained work injuries being in 1993 and 1995 resulting in neck and upper back pain as well as a third injury in 1999 resulting in increased problems in the lumbar spine.

It is the employer's responsibility to pay for the cure and relief from the effects of an injury or occupational disease, all medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may be reasonably be [sic] required at the time of the injury and thereafter during disability... K.R.S.342.020. However, treatment which is shown to be unproductive or outside the type of treatment generally accepted by the medical profession is unreasonable and non-compensable. This finding is made by the Administrative Law Judge based upon the facts and circumstances surrounding each case. *Square D Company v. Tipton* 862 SW2d 308 (Ky. 1993). In a post-award medical fee dispute, the employer has the burden of proving that contested medical treatment is not reasonable or necessary for the cure and relief of a work injury. *National Pizza Company v.*

Curry, 802 SW2d 949 (Ky. App., 1991). However, the burden of proving work relatedness and causation remains with the claimant. *R.J. Corman R.R. Construction Company v. Haddix, Ky.*, 864 SW2d 915 (1993).

The question presented herein is whether the request for thoracic spine CT scan is related to the plaintiff's work injury. The defendant points to the original settlement agreement which only references cervical spine and right shoulder as the injuries. However, the plaintiff has submitted a great deal of medical evidence indicating the treatment for the work injury has been to the cervical and thoracic spine since the date of his injury. He also submitted a letter from the treating physician who relates the request to the work injury and further notes it to be a reasonable and necessary request as the plaintiff has failed physical therapy, epidural steroid injections and numerous medications. As such, I am convinced by the proof offered from the plaintiff the request is reasonable and necessary and related to the effects of the work injury. While the settlement document did not clearly defined [sic] the thoracic spine as being a part of the work injury, the parties did agree the defendant will pay for all reasonable and necessary medical treatment reasonably related to the injury. In this instance, the medical evidence from the treating physician indicates that it is related. Therefore, it is compensable under KRS 342.020.

UPS filed a Petition for Reconsideration on January 26, 2015, asserting, in part, as follows:

The Respondent/Plaintiff has the burden of showing work-relatedness/causation in medical fee dispute on reopening. However, any claim for a procedure or treatment of the Respondent/Plaintiff's thoracic spine is time barred. KRS 342.185(1). He treated for his thoracic spine during the litigation of his underlying claim in the early 1990s yet failed to amend his claim to include it even after medical providers told him it was work-related. Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601 (Ky. 2006), et al., bars any such claim after two years;

In the February 20, 2015, Order on

Reconsideration, the ALJ ruled as follows:

This matter is before the ALJ on Petition for Reconsideration filed by the defendant. The defendant argues the plaintiff is not entitled to medical benefits for treatment of the thoracic spine as he never alleged dates of a thoracic spine injury as part of his claim which was settled by agreement approved on April 8, 1997. The medical evidence submitted by the plaintiff clearly indicates that the treatment the plaintiff was receiving before and after the approval of the settlement included the upper back along with the cervical spine. The plaintiff timely filed his application for benefits for injuries and it is clear from this medical evidence that while not clearly delineated on the settlement form or the form 101, the plaintiff was receiving treatment not only to the cervical spine with the thoracic spine as well as a consideration of part of his injury of October 11, 1993 and September 8, 1995.

In *Ramsey v. Sayre Christian Village Nursing Home*, 239 SW3d 56 (Ky. 2007), the Kentucky Supreme Court dealt with the situation wherein the plaintiff suffered from depression at the time of the original proceedings but did not include a claim for depression at that time. The court held that in such an instance the claimant cannot later seek treatment for the effects of depression resulting from the injury. In other words, the courts have begun treating symptoms of depression as a separate and distinct injury rather than as a symptom or effect of the work injury. While this is a harsh result, the ALJ is bound to follow the law as dictated by [sic] Supreme Court. The ALJ finds little difference in the case at bar from that case except for the fact that this involves treatment of an unclaimed thoracic spine injury wherein the Ramsey case involves treatment for an unclaimed depressive condition. As such, the Petition for Reconsideration must be GRANTED. The defendant is relieved of the obligation for payment of expenses associated with the thoracic spine under KRS 342.020.

On March 23, 2015, Moore, pro se, filed a Notice of Appeal in which he named "Christopher Newell" and "Hon. John B. Coleman" as Respondents.

As noted by UPS in its brief to this Board, Moore's notice of appeal does not name UPS or Dr. El-Naggar as parties to the appeal, both indispensable 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 Moore 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.

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 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).

. . . .

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). 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 the 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 to name UPS and Dr. El-Naggar as parties to this appeal in the caption and in the body of the Notice of Appeal prevents the Board from granting the relief Moore seeks on appeal. We note Moore attached a sweeping, five-page narrative to his Notice of Appeal, however, the actual Notice of Appeal fails to name two indispensable parties - UPS and Dr. El-Naggar. While we sympathize with Moore since he filed this Notice of Appeal *pro se*, we are obligated to hold Moore to the same standards as we would his counsel. 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 Moore's appeal for lack of jurisdiction.

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

ALL CONCUR.

FRANKLIN A. STIVERS, MEMBER
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