OPINION ENTERED: May 24, 2013

CLAIM NO. 201200592

LAURA M. RAGLE PETITIONER

VS. **APPEAL FROM HON. ALLISON E. JONES, ADMINISTRATIVE LAW JUDGE**

MIGHTY DOLLAR #24, INC.
and HON. ALLISON E. JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
AFFIRMING IN PART AND DISMISSING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Laura Ragle ("Ragle") seeks review of the Opinion and Award rendered December 17, 2012 by Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ"), dismissing her claim for additional temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits against Mighty Dollar #24 ("Mighty

Dollar”). The ALJ determined Ragle sustained temporary work-related neck and back injuries on December 9, 2010, resulting in no permanent impairment, and found additional medical treatment neither reasonable nor necessary. Neither party filed a petition for reconsideration.

On appeal, Ragle argues the ALJ erred by failing to provide a reasonable basis for discounting the opinion of Dr. Jared Wilson, her treating physician. Ragle argues the ALJ failed to address portions of her avowal testimony regarding statements allegedly made by Dr. Henry Tutt during the independent medical examination (“IME”). Ragle also argues the ALJ erred in failing to refer her for a university evaluation. Finally, Ragle argues the ALJ erred “in failing to consider an award of medical benefits regardless of a finding that the petitioner was not entitled to income benefits.” Mighty Dollar argues Ragle’s appeal must be dismissed for failure to name indispensable parties. Because substantial evidence exists in the record to support the ALJ’s determination, and no contrary result is compelled, we affirm in part, and dismiss in part.

The October 10, 2012 benefit review conference (“BRC”) order and memorandum identified in part the following stipulations: Ragle sustained a work-related injury on December 9, 2010; no temporary total disability

benefits have been paid; Mighty Dollar has paid $13,199.87 in medical expenses; Ragle retains the physical capacity to return to the type of work performed at the time of injury; Ragle missed no work due to her work-related injury and returned earning equal or greater wages. The parties listed benefits per KRS 342.730, average weekly wage, unpaid or contested medical expenses and injury as defined by the Act as contested issues. The ALJ also listed "cyclobenzaprine, ketoprofen, baclofen, lidocaine, gabapentin + hydrocodone + injections as reflected in the Form 112" as other contested issues. On October 31, 2012, pursuant to a motion by Mighty Dollar, the ALJ amended the October 10, 2012 BRC order to conform to the proof attached to the Form 112. In the Form 112, Mighty Dollar also contested monthly office visits with West Lake Primary Care.

On May 7, 2012, Ragle filed a Form 101 alleging she injured her "back and neck" on December 9, 2010 when she attempted to lift a truck door, which had been tied down, causing her to jam her back. Ragle attached cervical and lumbosacral spine MRI reports, both dated March 9, 2011. The lumbosacral MRI report demonstrated a "very small" left paramedian disc bulge at L2-L3 without central canal stenosis or narrowing of the neural foramen and a small broad-based disc bulge at L4-L5 with minimal narrowing of

the neural foramina. The cervical MRI report demonstrated some changes of spondylosis at C4-5, C5-C6 and C6-C7; small disc bulge at C4-5 with some posterolateral spurring on the right and/or unco-vertebral hypertrophy; disc osteophyte complex at C5-6 which is broad-based but slightly greater on the right and may be associated with some narrowing of the right neural foramen; and small disc osteophyte complex at C6-7 with some unco-vertebral hypertrophy or posterolateral spurring on the right and possible minimal narrowing of the right neural foramen at C6-7.

Ragle also filed the February 2, 2011 records from Lake Cumberland Regional Hospital reflecting complaints of neck, shoulder and back pain radiating into her right leg due to a work-related injury in December 2010. Ragle was diagnosed with lumbosacral and cervical strain and referred to her primary care physician. Ragle submitted notes from West lake Primary Care indicating Dr. Wilson restricted her from lifting over five pounds for six weeks on March 23, 2011, and also referred her to Drs. Dirk Franzen and O. Amr El-Naggar.

Mighty Dollar, as insured by Kentucky Employer's Mutual Insurance ("KEMI"), filed a motion to join medical providers and a Form 112 medical fee dispute on July 13, 2012, contesting responsibility for ongoing L5-S1

transforaminal injections, office visits with West Lake Primary Care and prescriptions of "CMPD-Ketoprofen, Baclofen, Cyclobenzoprine, Lidocaine, Gabapentin and Hydrocodone." At the hearing, counsel for Mighty Dollar clarified the contested monthly office visits refer to those with Dr. Wilson located at West Lake Primary Care. It asserts it has already approved and funded two neurosurgical referrals, a pain management referral, "SI" joint injections, aqua therapy, and L5-SI transforaminal injections.

In support of the motion, Mighty Dollar attached the March 23, 2011 record from Dr. Franzen. He stated Ragle had "just a myofascial strain/sprain type injury that just hasn't been treated yet." He ordered physical therapy and declined to assign work restrictions. It also attached the July 25, 2011 neurological report of Dr. El-Naggar, who noted physical therapy had failed and recommended right sacroiliac joint injection by Dr. David Weber. Mighty Dollar submitted the medical records of Dr. Weber which reflect he administered right sacroiliac joint injections on August 24, 2011 and September 20, 2011, as well as a right L5-S1 transforaminal epidural steroid injection on November 2, 2011. Dr. Weber requested authorization for a second

right L5-S1 transforaminal epidural injection following the success of the first one on November 21, 2011.

Mighty Dollar also attached the February 5, 2011 utilization review denial by Dr. Bart Olash, who opined the following treatment is not medically necessary for the cure and relief of the December 2010 work injury: continued treatment with Dr. Weber, including the requested second L5-S1 transforaminal injection; continued treatment with Westlake Primary Care; and continued medication of CMPD-Ketoprofen, Baclofen, Cyclobenzaprine, Lidocaine, Gabapentin and Hydrocodone. Dr. Olash stated he agreed with Dr. Henry Tutt's October 25, 2011 report. Dr. Olash concluded Ragel sustained a minor work injury on December 9, 2010, consisting of a musculoligamentous strain to the cervical and lumbar spine areas for which she did not seek treatment for over two months. Dr. Olash noted no physician recorded functional abnormalities and physical findings suggesting work pathology. He found the MRI results are within normal limits for her age.

Mighty Dollar attached the January 17, 2012 utilization review reconsideration by Dr. Michael Chunn who upheld Dr. Olash's previous determination that continued treatment with West lake Primary Care and the continued medication are neither medical necessary nor appropriate.

Dr. Chunn opined Ragle's strains to her neck and lower back, have resolved. KEMI attached the January 20, 2012 utilization review reconsideration by Dr. James Patrick Murphy who agreed continued treatment with Dr. Weber, including the second L5-SI transforminal injection, is unnecessary or inappropriate for the December 9, 2010 work injury. He found Ragle's original work injury had resolved.

By order dated July 27, 2012, the ALJ joined "the Pain Center of Lake Cumberland/Dr. David Weber" and "West Lake Primary Care" as parties/providers of the contested medical services.

Mighty Dollar also submitted Dr. Tutt's October 25, 2011 report. Dr. Tutt noted his examination revealed normal musculoskeletal and neurological findings. He opined the MRI studies demonstrated minor degenerative changes consistent with the natural aging process. Dr. Tutt diagnosed probable cervical and lumbar strains due to the December 9, 2010 work-related injury, which subsequently resolved. He found Ragle had reached maximum medical improvement and assigned a zero percent impairment rating. He further opined Ragle is capable of performing her usual job duties without restriction. He stated injection therapy is unnecessary and recommended a self-directed program of

core back strengthening exercises, weight reduction, progressive ambulation and fitness.

Ragle testified by deposition on December 11, 2012 and at the hearing held October 24, 2012. Ragle, a resident of Russell Springs, Kentucky, was born May 7, 1961 and is a high school graduate. Her work history consists primarily of working as a department manager and head cashier. She began working for Mighty Dollar as a manager in May, June or July 2009 when the store first opened. Ragle also became the manager of Mega Bargain when it opened in July 2010. Mega Bargain is adjacent to and shares a common door with Mighty Dollar, which are both operated by the same owner. At the time of her injury, Ragle was working as a manager for both stores and received two paychecks. As a manager, Ragle oversees the day-to-day operations and store employees, and also takes care of payroll, scheduling, receiving and ordering.

Ragle testified she did not miss any work due to the December 9, 2010 injury and continues to work as a manager for both stores. Her duties have remained the same, but she stated she now lacks the physical capacity to perform many of them due to her injuries. Ragle testified Dr. Wilson has restricted her from lifting over five pounds. Mighty Dollar has accommodated her restrictions and limited

physical abilities. Ragle confirmed she currently earns a greater wage than she earned at the time of her injury. She denied any significant previous back, neck or right leg injuries.

Ragle testified that on December 9, 2010, she attempted to receive a truck, which requires her to open the dock door. Unbeknownst to her, two other employees had tied the door down with a rope to a metal bar attached to a plate on the floor as a practical joke. When Ragle attempted to open the door "it yanked me to the door and the plate . . . It had me up against the door, and it compressed me from head to toe." Ragle testified she sustained two herniated discs in her neck and three in her low back due to the December 9, 2010 incident. She experiences daily neck and low back pain, radiating into her right leg and down her foot. She also occasionally experiences numbness and tingling in both arms, as well as low back spasms.

Ragle testified she first sought treatment on February 2, 2011 with Lake Cumberland Regional Hospital. She then went to Dr. Wilson, her family physician. She has also seen Drs. Franzen, El-Naggar and Tutt. Dr. Wilson ordered two MRIs and physical therapy, which did not relieve her symptoms. Ragle was prescribed a TENS unit, which provided temporary relief. Dr. Weber has also administered

a series of injections, one of which provided “a lot” of relief, and another one provided “some” relief. She testified the injections made her life “livable.” Ragle was also prescribed the medication. Ragle explained while she was receiving the above-referenced medical treatment, her symptoms improved, but her work abilities were still limited.

Ragle testified the workers’ compensation insurer discontinued payment for her medical treatment, including the TENS unit, injections, and prescription medication listed on the BRC order causing her symptoms and physical capabilities to worsen, including her ability to lift, sit and stand. Ragle indicated some medical bills remained unpaid.

At the hearing, Ragle testified Dr. Tutt “wasn’t very pleasant” and would not allow her husband to accompany her during the IME. The ALJ found portions of Ragle’s hearing testimony regarding statements allegedly made by Dr. Tutt during the IME were inadmissible hearsay. She also noted the parties could have deposed Dr. Tutt to allow him to respond to Ragle’s allegations. The ALJ also noted the testimony has little relevance since:

> We only have his zero percent impairment rating. And he says very little about the medical fee dispute part of it,

> which is the only part that's currently at issue. The other doctors' reports as part of the Form 112 go into that far more in detail. So, I mean, I just don't think in the grand scheme of things the relevance outweighs the prejudice.

Thereafter, Ragle testified by avowal. She confirmed Dr. Tutt stated to her "if it were him, that he would be demanding that your doctor was finding out what was going on and doing something about it." Ragle also testified Dr. Tutt told her "he didn't think the TENS unit would be any more helpful to you than waving a rubber chicken over your head." Finally, Ragle testified Dr. Tutt advised she "needed to take the bull by the horns and join a Methodist Church."

Robert Ragle, Ragle's husband, also testified at the October 24, 2012 hearing. He testified Ragle experiences trouble sleeping, getting in and out of bed, walking, cleaning, sitting and standing since her work injury. He stated Ragle's symptoms had improved with the injections and use of the TENS unit. However, once her medical treatment ceased, her symptoms worsened. Her husband confirmed several medical bills are outstanding. He admitted Ragle has continued to work full time since the work incident.

Dr. Wilson, Ragle's treating physician from February 21, 2011 to December 6, 2011, testified by deposition on August 6, 2012. At the initial visit on February 21, 2011, Dr. Wilson's noted tenderness, paraspinal spasm, positive straight leg raising test and pain with active range of motion. He ordered x-rays of her right shoulder, lumbar spine and cervical spine, and MRIs of her cervical and lumbar spine. Dr. Wilson opined the March 9, 2011 MRI reports reflected abnormal findings, possibly related to Ragle's complaints.

Dr. Wilson referred Ragle to Dr. Franzen, a neurosurgeon, who recommended physical therapy. Dr. Wilson noted the physical therapy records reflect no significant improvements. He then referred Ragle to Dr. El-Naggar for a second neurosurgical opinion. Dr. El-Naggar diagnosed sacroilitis and lumbar degenerative disc disease, and recommended SI injections. Dr. Weber, a pain management physician, administered an epidural injection, which provided minimal improvement. Dr. Wilson testified the TENS unit also provided limited benefit to Ragle.

Dr. Wilson continued to treat Ragle until December 6, 2011, when the workers' compensation insurer determined medical treatment was no longer necessary. Dr. Wilson diagnosed degenerative disc disease, exacerbated by the

December 9, 2010 injury. Despite treatment, Dr. Wilson concluded Ragle made virtually no improvement and opined her injuries "are permanent." Dr. Wilson restricted Ragle from lifting, pushing and pulling over five pounds. He opined Ragle's December 2010 injury gave rise to her complaints, and her injuries are consistent with the objective testing. On cross-examination, Dr. Wilson stated the MRI reports demonstrate "absolutely no disc herniation or nerve impingement." He also confirmed Dr. Franzen diagnosed a myofascial strain/sprain type injury consistent with the injury mechanism.

On December 17, 2012, the ALJ issued an Opinion and Award dismissing Ragle's claim for additional benefits as not compensable. The opinion reflects copies were sent to Ragel's and Mighty Dollar's counsel, the Pain Center of Lake Cumberland/Dr. Weber, and West Lake Primary Care. The ALJ found as follows:

A. Burden of Proof

> "[T]he claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). "[T]o sustain that burden, a claimant must go forward with substantial evidence to prove each element, in other words, with evidence sufficient to convince reasonable people." *Durham*

v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008).

B. Standard of Review

The ALJ, as the fact-finder, has the discretion to determine the quality, character, and substance of the evidence in the record. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002); *Miller v. East Kentucky Beverage/Pepsico, Inc.,* 951 S.W.2d 329, 331 (Ky. 1997). The ALJ can choose "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). When one of two reasonable inferences may be drawn from the evidence, the finder of fact may choose. *Jackson v. General Refractories Co.*, 581 S.W.2d 10, 11 (Ky. 1979).

An ALJ must state the evidentiary basis for each legal conclusion with sufficient specificity to permit a meaningful administrative and judicial review. *Big Sandy Comm. Action Program v. Chaffins*, 502 S.W.2d 526, 531 (Ky. 1973).

VI. FINDINGS OF FACT, CONCLUSIONS OF LAW & EVIDENTIARY BASIS

A. Injury as Defined by the Act

1. <u>Principle of law.</u>

Under the Act, an injury is "any work-related traumatic event . . . arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." KRS 342.0011(1). The term

"objective medical findings" means clinical findings, observations, and other standardized testing performed as part of a physical examination as well as sophisticated diagnostic tests. *Gibbs v. Premier Scale Company/Indiana Scale Company*, 50 S.W.3d 754 (Ky. 2001). "The burden is on the claimant to prove by objective medical standards that the incident alleged produced a harmful change." *Laurel Grocery v. Woods*, 2004 WL 2129620, at *3 (Ky. 2004).

2. Findings of Fact.

The ALJ finds that Ragle sustained an injury as defined by the Act.

3. Evidentiary Basis/Analysis.

In reaching this conclusion, the ALJ relies on Dr. Wilson's initial examination of February 21, 2011, documenting objective findings of an injury, paraspinal spasms and positive straight leg raises.

B. Permanent Impairment/Benefits under KRS 342.730

1. Legal Principle.

To qualify for an award of PPD under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, she is also required to prove that the harmful change resulted in a permanent disability as measured by an AMA impairment. KRS 342.0011(11), (35), and (36).

2. Findings of fact.

The ALJ finds that Ragle's work injury caused only a temporary and transient myofascial cervical/lumbar strain/sprain without resulting permanent impairment.

3. Evidentiary Basis & Analysis

The ALJ relies on Dr. Franzen's March 23, 2011, office report. Dr. Franzen's impression was that Ragle "seems [to have sustained] largely just a myofascial strain/sprain type injury that just hasn't been treated yet . . . what little pathology she has in her neck is more around the right foramina which is not the side that has the sensory symptoms."

The ALJ also relies on Dr. Tutt's report following his October 25, 2011, IME of Ragle. This report was generated after Ragle had the additional treatment recommended by Dr. Franzen. Dr. Tutt, like Dr. Franzen, concluded that Ragle sustained only a strain or sprain. He examined Ragle after she had the additional treatment recommended by Dr. Franzen. He concluded that the injury was transient and did not result in an overall impairment.

While Dr. Wilson opined that the injury resulted in a permanent impairment, he did not make any findings based on the *AMA Guides 5th* as required by the Act. Furthermore, Dr. Wilson admitted on cross-examination that there was "absolutely no disc herniation or nerve impingement" identified in Ragle's diagnostics that would explain her radicular symptoms. He further stated that the diagnosis of myofascial strain/sprain was consistent

with the biomechanics of Ragle's injury i.e. attempting to lift the locked door. The ALJ further observes that Drs. Tutt and Franzen are neurosurgeons and Dr. Wilson practices family medicine.

C. Unpaid/Contested Medical Treatment.

1. Principle of law.

Unlike KRS 342.0011(11) and KRS 342.730(1), KRS 342.020(1) does not state that eligibility for medical benefits requires proof of a permanent impairment rating, of a permanent disability rating, or of eligibility for permanent income benefits. Moreover, it states clearly that liability for medical benefits exists "for so long as the employee is disabled regardless of the duration of the employee's income benefits." *See FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). To be compensable, however, medical treatment must be reasonable and necessary. Additionally, if proof has been presented that the claimant will not require future medical treatment for the effects of his work-related injury, an ALJ can make a valid determination that the claimant is not entitled to future medical benefits. *See Mullins v. Mike Catron Construction*, 237 S.W.3d 561, 563 (2007).

2. Findings of fact.

Further medical treatment is not reasonable and/or necessary for the cure and/or relief of Ragle's work injury.

> **3. <u>Evidentiary Basis/Analysis.</u>**
>
> The ALJ concludes that while Ragle suffered a work-related injury, its effect was only transient. It resulted in no permanent disability or lasting harmful change. The ALJ finds Dr. Tutt's conclusions that Ragle does not require any additional treatment beyond a home exercise program to be the most convincing. The ALJ observes that the medical opinions are largely in agreement that Ragle suffered only a strain or sprain type injury. For that injury, she has received substantial treatment including medications, a TENS unit, physical therapy, and injections. While she continues to complain of radicular type symptoms, the origins of those complaints are not clear. It has now been almost two years since the injury and based on Drs. Tutt, Olash, Chunn, and Murphy the ALJ finds that Ragle does not require any additional treatment.
>
> While Mighty Dollar was responsible for Ragle's initial treatment, its obligation has ceased. The ALJ does not find that any of the unpaid medical bills are for treatment that was reasonable and/or necessary to treat the sprain/strain.

No petition for reconsideration was filed. Subsequently, Ragle filed a notice of appeal "against the Respondent, Mighty Dollar #24, Defendant below and [the ALJ]," appealing the December 17, 2012 decision. Ragle's counsel certified the notice was mailed to the ALJ, the Workers' Compensation Board, the Commissioner of the

Department of Workers' Claims, and to Mighty Dollar's counsel. Similarly, Ragle's counsel certified a copy of her brief to the Board was mailed to the same parties.

On appeal, Ragle argues the ALJ erred by failing to provide a reasonable basis for discounting Dr. Wilson's opinion, and cited to Bullock v. Goodwill Coal Co., 214 S.W.3d 890 (Ky. 2007); Cyprus Mountain Coal v. Napier, 2003 SC-0409-WC (2004 Ky. Unpub. Lexis 93); and Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2009). Ragle argues the ALJ failed to address portions of her hearing testimony taken by avowal regarding various statements allegedly made by Dr. Tutt during the IME. Ragle argues the ALJ failed to refer her to a university evaluation. Finally, Ragle argues the ALJ erred "in failing to consider an award of medical benefits regardless of a finding that the petitioner was not entitled to income benefits." Ragle asserts the ALJ did not explain why Mighty Dollar's obligation to pay for additional medical treatment had ceased and fails to "address the issue of compensable medical benefits as distinguished from income benefits."

Ragle, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of her cause of action before the ALJ, including the extent and duration of any disability generated by the

work injury alleged. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Ragle was unsuccessful in her burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal.

Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, supra. Additionally, no petition for reconsideration was filed. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated differently, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

Here, the record contains substantial evidence supporting the ALJ's finding the December 9, 2010 work injury caused only a temporary and transient myofascial cervical/lumbar strain/sprain without resulting permanent impairment, and no contrary result is compelled. The ALJ specifically relied upon Drs. Franzen's and Tutt's opinions in making her determination. Likewise, Drs. Olash, Chunn and Murphy opined Ragle sustained a minor work injury, which has since resolved. The ALJ acted well within her discretion as fact-finder in relying upon Drs. Tutt and Franzen. Magic Coal Co. v. Fox, supra.

The ALJ explained why she did not find Dr. Wilson's opinion Ragle sustained a permanent injury more persuasive. As noted above, the ALJ stated Dr. Wilson failed to assess a permanent impairment rating as required by the Act. The only impairment assessment appears to be from Dr. Tutt, who assigned a 0% impairment rating. The ALJ noted Dr. Wilson acknowledged there was no disc herniation or nerve impingement present and stated a strain/sprain diagnosis is consistent with the injury mechanism.

Ragle's reliance on Bullock v. Goodwill Coal Co., supra, Cyprus Mountain Coal v. Napier, supra, and Magic Coal Co. v. Fox, supra, is misplaced because the above-referenced cases only address the presumptive weight afforded to the clinical findings and opinions of a university evaluator pursuant to KRS 342.315. Since substantial evidence exists in the record and no contrary result is compelled, we will not disturb the ALJ's determination Ragle's work injury caused a temporary and transient myofascial cervical and lumbar strain/sprain without resulting permanent impairment.

Ragle's argument the ALJ failed to refer her to a university evaluation upon her own motion was not properly preserved. 803 KAR 25:010 § 13(14) provides only those

issues preserved at the BRC for determination by the ALJ "shall be the subject of further proceedings." In the case *sub judice*, a referral to a university evaluation was not an issue raised at the BRC. In fact, the record reflects neither Mighty Dollar nor Ragle requested a university evaluation during proof time. Likewise, she neither raised this argument in her brief to the ALJ nor filed a petition for reconsideration.

We find no merit in Ragle's argument the ALJ failed to address portions of her avowal testimony regarding statements allegedly made to her by Dr. Tutt during the IME. It is significant Ragle did not file a petition for reconsideration requesting additional findings of fact regarding this issue. Therefore, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ does not justify reversal or remand if substantial evidence in the record supports the ultimate conclusion. Even if Dr. Tutt's opinion is not considered, the opinions of Drs. Franzen, Olash, Chunn, and Murphy constitute substantial evidence supporting the ALJ's determination.

Finally, we agree with Mighty Dollar's argument Ragle's appeal regarding the continuing medical treatment identified in the medical fee dispute must be dismissed for failure to name indispensable parties. Ragle filed a notice

of appeal, but only named the ALJ and Mighty Dollar as parties. However, Ragle's appeal specifically concerns Mighty Dollar's continuing obligation to pay for the injections by Dr. Weber of the Pain Center of Lake Cumberland and various treatments provided during her regular office visits with Dr. Wilson of West Lake Primary Care. Therefore, they are indispensable parties to her 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 Ragle on appeal regarding the medical dispute. 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. A central issue raised by Ragle on appeal is a medical dispute concerning treatment administered by Drs. Wilson and Weber. They were

not named as a respondent in the notice of appeal as directed by 803 KAR 25:010 Section 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.
>
> (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;
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> 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 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.

Without question, Drs. Wilson and Weber are indispensable parties, but were not named in Ragle's notice of appeal. We conclude the absence of Drs. Wilson and Weber as parties to this appeal prevents the Board from granting complete relief, and more particularly the relief

Ragle seeks on appeal. Consequently, we are obligated to dismiss that portion of her appeal regarding the medical dispute for lack of jurisdiction.

That said, had we retained jurisdiction of this issue, we would have affirmed the ALJ. Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail in his burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

> Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical

> expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Robertson, supra.

The ALJ correctly noted the above standard, and acted within her role as fact-finder in accepting the opinions of Drs. Tutt, Olash, Chunn, and Murphy who determined Ragle suffered a temporary and transient injury which resolved, with no need for additional medical treatment. In light of those medical opinions, the ALJ did not err in determining the injury in question was temporary in nature, and the evidence did not compel a finding Ragle was entitled to income benefits and/or for future medical benefits to treat her neck and back injuries.

Accordingly, the December 17, 2012 Opinion and Award rendered by Hon. Allison Emerson Jones, Administrative Law Judge, is **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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