Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 6, 2016

CLAIM NO. 198833596

OAKMONT MANOR PETITIONER

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

BONNIE BALDRIDGE
HON. JANE R. WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Oakmont Manor ("Oakmont") appeals from the October 19, 2015 Medical Fee Opinion and Order and the December 9, 2015 Order on Reconsideration rendered by Hon. Jane R. Williams, Administrative Law Judge ("ALJ"). The ALJ found Oakmont is responsible for Bonnie Baldridge's ("Baldridge") emergency room visits. Oakmont argues the

ALJ's finding of work-relatedness is not supported by substantial evidence. We affirm.

Baldridge filed her claim on August 16, 1988 alleging a back injury as a result of moving a patient. The claim was resolved based upon a 15% permanent partial disability by agreement approved May 25, 1990, with Baldridge retaining her right to future medical benefits.

Oakmont filed a motion to reopen and medical dispute on June 17, 2015 to challenge the work-relatedness, reasonableness and necessity of visits to King's Daughters Medical Center in 2014 and 2015. King's Daughters Medical Center and Greenup County EMS were joined as parties by order dated July 15, 2015.

Oakmont filed the May 5, 2015 utilization review report of Dr. Charles Carnel. Dr. Carnel opined the emergency room visits were reasonable, but were not related to the 1988 injury which was reported as a lumbar strain. Only the most recent imaging studies of the lumbar spine indicate a compression fracture of L-1. Thus, he concluded the fracture is not related to the 1988 injury.

Oakmont also submitted the February 10, 2015 report of Dr. David Jenkinson, who performed an independent medical evaluation. Baldridge complained of severe back pain. Dr. Jenkinson noted a recent, relatively minor

compression fracture at L1 that is not related to the work injury. He stated Baldridge had approximately twenty-five years of treatment for subjective complaints but there is no significant objective abnormality. He further noted she exhibited non-physiological signs and inappropriate pain behaviors during the examination. Dr. Jenkinson failed to discern any evidence she sustained a significant injury to her spine in 1988 that would be responsible for twenty-five years of severe intractable back pain. He opined Baldridge requires no current or future medical treatment relative to the 1988 injury, and continued use of narcotic analgesics is not justified. Dr. Jenkinson also referenced studies which demonstrate narcotic analgesics may be responsible for increased pain and should not be continued long term.

Oakmont and Baldridge filed records from Dr. Bal K. Bansal documenting treatment from February 2011 through April 14, 2015. Dr. Bansal consistently treated Baldridge for low back and leg pain. His notes from July 2, 2013 and May 14, 2014 specifically relate the treatment to the work related accident. On July 2, August 22, October 4, and December 8, 2013, and May 14, 2014, he also noted that when her pain gets worse, she has extremely high blood pressure for which she has been seen multiple times in the emergency room. On August 22, 2014, he noted that without OxyContin,

“the patient feels like her life is a living nightmare.” On April 14, 2015, Dr. Bansal noted Baldridge was found to have a compression fracture of L1 which probably happened around January 28, 2015. He noted the pain was agonizing at that time, but had improved somewhat by the April appointment. He stated Baldridge “prior to that was having lower back pain with pain in the left leg all the time”.

Baldridge filed records from King’s Daughters Medical Center documenting emergency room visits on September 12, 2013, December 13, 2013, November 27, 2014, and March 18, 2015. On each occasion, she gave a history of ongoing back pain for more than twenty years. Baldridge did not report any new injuries. On December 13, 2013, she reported her pain was worse because she had run out of pain medication and her doctor could no longer prescribe narcotics. On November 27, 2014, Baldridge reported she had a flare up of her pain for the past week. X-rays revealed osteopenia and a mild/moderate compression fracture at L1 of indeterminate age. The physical examination revealed decreased range of motion, tenderness, pain and spasm. The final diagnosis in the emergency room report was lumbar back pain. On March 18, 2015, Baldridge presented with chronic severe back pain radiating to her left foot. She gave a history that her pain was worse

since Saturday, but she stated she has had the injury for twenty-five years.

The ALJ's findings relevant to this appeal are as follows:

> In this specific instance, Defendant Employer has moved to reopen this claim to challenge the reasonableness, necessity, and work relatedness of treatment at Kings Daughters Medical Center, on November 16, 20, and 27, 2014; December 3, 2014; and February 25, 2015. The treatment records of Dr. Bansal are convincing as he is treating her for the work injury and Plaintiff's pain condition. The documentation of Dr. Bonsal, Kings Daughters Medical Center and Greenup County EMS, consistently document severe pain since the time of the work injury. For these reasons it is found Plaintiff has met her burden of proving the contested treatment is work related. Defendant Employer has not proven the treatment is not reasonable and necessary. Therefore the contested treatment is found compensable.

Oakmont filed a petition for reconsideration arguing the ALJ overlooked evidence and failed to consider that Dr. Bansal's records clearly indicated a new injury. By order dated December 9, 2015, the ALJ denied the petition for reconsideration as a re-argument of the merits of the claim.

On appeal, Oakmont argues the ALJ's finding of work-relatedness is not supported by substantial evidence.

It contends the reports of Drs. Jenkinson and Carnel are the only medical evidence concerning the reason for the emergency room visits. They explained the reason for her pain was a compression fracture at L1. According to Oakmont, the ALJ was required to provide a reason for rejecting this specific evidence. Oakmont asserts the causal relationship of the treatment to the work injury is not readily apparent, so medical opinion is necessary. It was not sufficient for the ALJ to merely state the records of Dr. Bansal show a course of treatment, as he did not address the issue of whether the specific treatment in question is due to the work injury.

In a post-award medical dispute, the burden of proof regarding work-relatedness lies with the employee, while the employer bears the burden of challenging reasonableness and necessity.[1] Mitee Enterprises v. Yates, 865 S.W.2d 654 (Ky. 1993). Because Baldridge successfully established causation, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf

[1] It appears debate currently exists as to the burden of proof in post-award medical fee disputes, and the weight to be afforded the unpublished decision of the Kentucky Supreme Court in C&T of Hazard v. Stallings, 2013 WL 5777077 (Ky. 2013). *See* Sumitomo Elec. Wiring v. Kingery, 2014 WL 2916965 (Ky. App. 2014). On appeal of that case, the Supreme Court did not reach the question of which party had the burden of proof. Kingery v. Sumitomo Electric Wiring, 481 S.W.3d 492 (Ky. 2016). In this case, we have stated the law as it presently stands under final and published authority. Furthermore, we do not believe it alters our holding herein, as our ultimate determination is that the ALJ's decision is based on substantial evidence.

Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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).

Upon review of the totality of the evidence, we cannot conclude the ALJ's conclusions are so unreasonable as to require reversal. Dr. Bansal's notes reflect continuous treatment for virtually the same complaints over the course of Baldridge's treatment. On numerous occasions, he noted the chronic nature of the problem dating back more than twenty years. Significantly, Dr. Bansal had maintained Baldridge on prescriptions for OxyContin or Oxycodone and Percocet or Lorcet until December 13, 2013. On multiple occasions prior to the contested treatment, he noted the effects of increased pain and high blood pressure resulting in emergency room visits if Baldridge did not take her medication. On several occasions, he specifically stated the ongoing treatment was related to the work injury. Although Oakmont points to the compression fracture at L1 as the cause for the pain that resulted in the visits to the emergency room, Dr. Bansal opined that fracture must have occurred around January 28, 2015. Thus, even if Oakmont's position were accepted, only

one contested visit occurred after the occurrence of the fracture. In April 2015, Dr. Bansal minimized the importance of the fracture in his treatment, noting prior to the fracture Baldridge "was having lower back pain with pain in the left leg all the time anyhow." In each of the contested visits, Baldridge reported a chronic pain problem in excess of twenty years. The records for the emergency room visits make no reference to new injuries. Baldridge's complaints at the time of the contested visits are essentially the same complaints she has made consistently over the course of her treatment reflected in Dr. Bansal's records.

Upon review of the totality of the evidence, we conclude the ALJ could reasonably believe the contested expenses are related to the work injury. When the evidence is conflicting, the ALJ is afforded wide discretion to determine the weight, credibility and substance of the proof. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The Board is without authority to usurp this role and find in Oakmont's favor. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

In her brief to the Board, Baldridge notes Oakmont failed to name King's Daughters Medical Center and Greenup County EMS as respondents in its notice of appeal.

Baldridge argues they are necessary parties, and the failure to join them in the appeal requires dismissal. Additionally, she contends Oakmont did not timely contest the treatment. In its reply brief, Oakmont counters that the providers asserted no claim before the ALJ, filed no pleadings and did not appear at the benefit review conference, so it is unnecessary to join them in the appeal. Further, it asserts the issue of timeliness was not raised as an issue at the benefit review conference and was thus waived.

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, King's Daughters Medical Center and Greenup County EMS are in a similar position to Baldwin-United in Braden. Neither provider has taken an active role in the litigation of this medical fee dispute before the ALJ. Like Baldwin-United, the interest of the providers is collateral: there is no dispute as to the providers' right to compensation for services rendered. The dispute is between Baldridge and Oakmont as to who is responsible for payment. Any decision by this Board would affect only Oakmont's responsibility for payment to the providers. As a final circumstance informing our decision, we note the providers were served with the notice of appeal and both parties' briefs before this Board. For these reasons,

under the particular circumstances of this case, we conclude the providers are not indispensible parties to this appeal. As such, there is no basis to dismiss this appeal.

Regarding the timeliness issue, 803 KAR 25:010, Section 13(14) provides "Only contested issues shall be the subject of further proceedings." Any objection to the timeliness of the contest was waived by the failure to raise the issue and is moot since we determine substantial evidence supports the ALJ's finding the contested expenses are compensable.

Accordingly, the October 19, 2015 Medical Fee Opinion and Order and the December 9, 2015 Order on Reconsideration rendered by Hon. Jane R. Williams, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS WITH THIS RESULT AND FURNISHES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I agree with the result reached by the majority in this case. However, I believe the medical providers in a medical dispute are indispensable parties. The proper practice would be for the Petitioner to list them actually as parties against whom the appeal is taken in the body of the Notice of Appeal and in all subsequent

pleadings. However, in this instance, I do note the medical providers were indeed served with both a copy of the Notice of Appeal, as well as subsequent pleadings and briefs. Therefore, since the entire purpose of ensuring all parties are joined in the appeal is to provide appropriate notice, I agree with the outcome reached by the majority on this issue.

COUNSEL FOR PETITIONER:

HON WILLIAM P EMRICK
PO BOX 24564
LEXINGTON, KY 40524

COUNSEL FOR RESPONDENT:

HON WILLIAM C.O. REAVES
PO BOX 2557
ASHLAND, KY 41105

ADMINISTRATIVE LAW JUDGE:

HON JANE R. WILLIAMS
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601