OPINION ENTERED: July 10, 2012

CLAIM NO. 200395427

PINNACLE ENVIRONMENTAL &
DESIGN SERVICES, INC. PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

DONALD MORRIS
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING
* * * * * *

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

STIVERS, Member. Pinnacle Environmental Design Services, Inc. ("Pinnacle") seeks review of the January 13, 2012, opinion and order of Hon. R. Scott Borders, Administrative Law Judge ("ALJ Borders") overruling its motion to reopen which challenged the reasonableness, necessity, and work-relatedness of proposed epidural steroid injections.

Pinnacle also appeals from the February 17, 2012, order overruling its petition for reconsideration. Because we do not have jurisdiction to decide Pinnacle's appeal, we *sua sponte* dismiss the appeal. We will only discuss the contents of the Form 110- settlement agreement, approved by Hon. Sheila Lowther, Administrative Law Judge ("ALJ Lowther") on August 31, 2004, and the pleadings and events occurring subsequent to approval of the settlement agreement.

The Form 110, Agreement As To Compensation, reflects Donald Morris ("Morris") sustained an injury on January 29, 2003, when a "transit fell on his head." As a result, Morris sustained a disc herniation at C5-C6. The Form 111 reflects ACF surgery was performed by Dr. Sean P. McDonald and he assessed a 25% permanent impairment. The parties agreed to a lump sum settlement of $51,208.25 based on the 25% impairment. The settlement did not include a waiver of future medical benefits.

On October 4, 2010, Pinnacle filed a motion to reopen stating Dr. McDonald had "requested an ACF at C6-C7 and an exploration of C5-C6." Pinnacle asserted utilization review determined the proposed treatment was not medically reasonable or necessary. Attached to the motion to reopen was the Form 112 - medical fee dispute

indicating the basis for the medical fee dispute was as stated in the motion to reopen. The Form 112 listed Dr. McDonald as the medical provider and certified the Form 112 was served on Dr. McDonald. Also attached is the Utilization Review Notice of Denial, the July 27, 2010, report of Dr. McDonald, and a copy of the Form 110 approved by ALJ Lowther.

In his report, Dr. McDonald indicates Morris had a previous ACF and LC fracture. He noted Morris had "increasing complaints in C7 distribution on the left side as well as increasing mechanical and myofascial type neck pain." The MRI revealed Morris had difficulty with nerve root compression on the left side at C6-C7 which caused distortion of the sac and a "rather significant compression of the nerve root on the left side." He noted Morris continued to be symptomatic from his condition. Morris had "left-sided radicular symptoms into the upper extremity on the left side primarily and posterior neck pain as well as pain on motion and some weakness sensations into the left upper extremity." Dr. McDonald noted Morris has had this for quite a long period of time and it interferes with Morris' normal activities. He noted Morris stated that "it is a degree worse than what his previous radicular complaints were." Dr. McDonald's assessment was C7

radiculopathy of the nerve root. He noted Morris wishes to proceed with surgical intervention. Dr. McDonald recommended “the ACF at C6-C7 [and] exploration of C5-C6.”

On October 13, 2010, Hon. Caroline Pitt Clark, Administrative Law Judge (“ALJ Clark”), entered an order joining Dr. McDonald as a party to the medical fee dispute in order to give him the opportunity to present proof regarding the compensability of the contested medical expenses or proposed procedure. ALJ Clark also granted Morris and Dr. McDonald twenty days from the date of the order to file a response to Pinnacle’s motion and Form 112. The order advised the parties that failure to file a written response may result in the dispute being summarily resolved based upon the pleadings in the record.

On October 29, 2010, Hon. J. Landon Overfield, Chief Administrative Law Judge (“CALJ Overfield) entered an order noting the October 13, 2010, order was not correctly addressed to Dr. McDonald and granting Morris and Dr. McDonald twenty days from the date of the order to file a response to Pinnacle’s motion to reopen.

On November 9, 2010, Morris filed a response and attached Dr. McDonald’s medical report which Pinnacle had attached to its Form 112 and motion to reopen.

On November 24, 2010, CALJ Overfield sustained Pinnacle's motion to reopen to the extent that the matter was referred to an ALJ for final adjudication.

A December 15, 2010, letter from the Department of Workers' Claims addressed to Morris, Dr. McDonald, and Pinnacle advised the claim was assigned to ALJ Borders, set a proof schedule, and scheduled a Benefit Review Conference ("BRC") for April 12, 2011.

On April 13, 2011, Pinnacle filed the April 6, 2011, medical records review by Dr. Russell L. Travis.

On April 26, 2011, ALJ Borders entered a BRC order indicating the final hearing was canceled because the medical fee dispute concerning the proposed neck surgery had been withdrawn as moot since surgery was not currently being considered. The ALJ ordered Pinnacle to advise within ten days as to its position with regard to proposed cervical injections.

On May 23, 2011, Pinnacle filed a Form 112, medical fee dispute, indicating it was contesting the treatment proposed by Dr. Monte Rommelman. The Form 112 listed Dr. Rommelman as the medical provider and certified Dr. Rommelman was served with a copy of the Form 112 and all attachments. In the Form 112, Pinnacle stated Dr. Rommelman had requested cervical epidural steroid

injections at C6-C7. Pinnacle stated pursuant to the attached report of Dr. Travis those services are being denied as non-work-related. Also attached is a document dated April 26, 2011, from Kentucky Employers' Mutual Insurance ("KEMI") styled "Important Notice Concerning Denial of Payment for Medical Services" addressed to Gerri at Paducah Physiatric Partners which states as follows:

> With this notice you are notified that we respectfully deny payment for our injured worker, Donald Morris [text omitted for privacy] to undergo the following;
>
> CERVICAL EPIDURAL STEROID INJECTION XI C6-7 per the recommendation of DR. MONTE ROMMELMAN.
>
> It is our position, per Dr. Travis' report, that the medical services requested are NOT medically necessary for the treatment of our work injury of 01/29/2003. **Please be advised that this matter is currently in litigation and will ultimately be decided by an ALJ (administrative law judge)**.

Significantly, Pinnacle did not file a motion to join Dr. Rommelman as a party to the medical fee dispute. However, in its June 15, 2011, status report, Pinnacle stated a supplemental medical fee dispute has been filed with respect to epidural steroid injections requested by Dr. Rommelman and notice of the dispute was served upon Morris and Dr. Rommelman.

The November 16, 2011, BRC order reflects the contested issues were “unpaid or contested medical expenses” and “reasonableness, necessity, and relatedness of proposed epidural steroid injections at C6-C7.” A hearing was scheduled for November 16, 2011.

Apparently, Dr. Rommelman and Paducah Physiatric Partners, P.S.C. filed a letter composed by Christie Strickland ARNP, as the November 21, 2011, order by ALJ Borders ordered as follows: “the attached statement from Christie Strickland, ARNP be submitted as part of the record.” Consistent with that order the December 16, 2011, hearing order reflects the plaintiff had filed to be considered as evidence the letter of Christie Strickland, ARNP.

In the January 13, 2012, opinion and order, ALJ Borders concluded “the proposed epidural steroid injections at C6-C7 level are reasonable and necessary treatment of Morris’ lumbar [sic] spine condition.” Accordingly, the ALJ overruled Pinnacle’s motion to reopen and directed it to pre-certify and pay for the proposed epidural steroid injections as recommended by Dr. Rommelman pursuant to the Kentucky Workers’ Compensation Medical Fee Schedule.

Pinnacle filed a petition for reconsideration which ALJ Borders overruled by order dated February 17, 2012.

Pinnacle filed a notice of appeal styled as "Pinnacle Environmental & Design Services, Inc. v. Donald Morris and Honorable R. Scott Borders, Administrative Law Judge." Significantly, the body of the notice of appeal merely provided notice that Pinnacle was appealing the January 13, 2012, opinion and order and the February 17, 2012, order overruling its petition for reconsideration. Pursuant to 803 KAR 25:010 Section 21(2)(b)(c)(2), Pinnacle did not denote all parties against whom the appeal is taken as respondents. More importantly, in the caption or body of the notice of appeal, Pinnacle did not designate Dr. Rommelman as a party against whom the appeal was taken. Further, we note that pursuant to 803 KAR 25:012 Section 1(6)(a), upon filing its motion to reopen and Form 112, Pinnacle did not file a motion to join Dr. Rommelman, the medical provider, as a party to the medical fee dispute or secure an order joining Dr. Rommelman as a party to the medical fee dispute.

803 KAR 25:012 Section 1(6)(b) reads as follows:

> (6) Following resolution of a workers' compensation claim by final order, a motion to reopen pursuant to 803 KAR

> 25:010, Section 4(6), shall be filed in addition to the Form 112.
>
> (a)Unless utilization review has been initiated, the motion to reopen and Form 112 shall be filed within thirty (30) days following receipt of a complete statement for services pursuant to 803 KAR 25:096.
>
> (b) The motion to reopen and Form 112 shall be served on the parties, upon the employee, even if represented by counsel, and upon the medical providers whose services or charges are at issue. If appropriate, the pleadings shall also be accompanied by a motion to join the medical provider as a party.

Although it served a copy of the Form 112 on Dr. Rommelman, because Pinnacle did not file a motion to join Dr. Rommelman, it did not properly perfect its medical fee dispute and was not entitled to any relief. Therefore, ALJ Borders correctly overruled Pinnacle's motion to reopen to contest the proposed epidural steroid injections recommended by Dr. Rommelman. Further, this Board does not have jurisdiction to render a decision in this appeal and therefore cannot grant Pinnacle the relief it requests regarding the epidural steroid injection recommended by Dr. Rommelman.

Further, assuming *arguendo*, service of the Form 112 on Dr. Rommelman and his participation in the medical fee dispute waived any defect in Pinnacle's failure to file

a formal motion to join him as a party and obtain an order joining him as a party, we conclude Pinnacle's failure to name Dr. Rommelman in the notice of appeal as a party to the appeal constitutes a jurisdictional defect which does not confer jurisdiction over this issue raised by Pinnacle on appeal. Our holding in Lexington Fayette Urban County Government v. Scott Kelsey and Hon. James L. Kerr, Administrative Law Judge, Claim No. 201081696, rendered January 17, 2012, is dispositive of this issue. In Lexington Fayette Urban County Government v. Kelsey, supra, we held:

> Consequently, we are without jurisdiction to rule on the merits of the argument raised by Kelsey on appeal. 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 by Kelsey on appeal is a medical dispute concerning treatment administered by Dr. Martin who was 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;
>
> 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, Dr. Martin was an indispensable party, however she was not named in Kelsey's notice of appeal. We conclude the absence of Dr. Martin as a party to this appeal prevents the Board from granting complete relief, and more particularly the relief Kelsey seeks on appeal. Consequently, we are

> obligated to dismiss Kelsey's appeal for lack of jurisdiction.

As in Kelsey, the failure of Pinnacle to join Dr. Rommelman as a party to the medical fee dispute did not permit ALJ Borders to grant Pinnacle any relief in the medical fee dispute and likewise does not grant this Board jurisdiction over the appeal of ALJ Borders' decision in the medical fee dispute.

Clearly, Dr. Rommelman was required by regulation to be named as a party in the medical fee dispute. Assuming *arguendo* that Dr. Rommelman's voluntary participation in the action after being served with a copy of the Form 112 constituted a waiver of the requirement he be joined as a party, then, at the very least, Dr. Rommelman must have been named as a party in the notice of appeal. Dr. Rommelman is clearly an indispensible party to the proceedings. Since he was not joined as a party and Pinnacle did not seek to cure this defect before or after the January 13, 2012, opinion and order of ALJ Borders was rendered this Board does not have jurisdiction over the medical fee dispute filed by Pinnacle and must dismiss Pinnacle's appeal.

Significantly, in its appeal brief, Pinnacle argues the letter from Christie Strickland cannot

constitute substantial evidence in support of ALJ Borders' decision on the causation issue because Strickland is a nurse and not a doctor. Pinnacle explains in great depth why it did not waive its objection to the letter submitted by Christie Strickland on behalf of Dr. Rommelman with Paducah Physiatric Partners, P.S.C. It goes on to argue Dr. Rommelman did not express an opinion as to causation. We also note that when Pinnacle contested the proposed surgery by Dr. McDonald, ALJ Clark ordered Dr. McDonald joined as a party.

Clearly, the injection procedure proposed by Dr. Rommelman at C6-C7 level is the core issue. Dr. Rommelman was served with a copy of the Form 112 and presumably Christie Strickland, his nurse practitioner, provided a letter in response to the Form 112. Since the compensability of Dr. Rommelman's proposed treatment of epidural steroid injections at C6-C7 was the sole issue before ALJ Borders, Dr. Rommelman was an indispensible party and must have been joined as a party in the medical fee dispute and named as a party in the appeal. Therefore, we conclude Pinnacle's failure to make Dr. Rommelman a party in the medical fee dispute and the appeal prevent the Board from granting any relief on appeal. Consequently, we are obligated to dismiss Pinnacle's appeal for lack of

jurisdiction. Further, without jurisdiction we decline to express any opinion regarding the merits of the appeal.

Accordingly, Pinnacle's appeal from the January 13, 2012, opinion and order and the February 17, 2012, order overruling its petition for reconsideration by Hon. R. Scott Borders, Administrative Law Judge, is hereby **DISMISSED**.

ALL CONCUR.

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HON. FRANKLIN A. STIVERS, MEMBER
ADMINISTRATIVE LAW JUDGE

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