OPINION ENTERED: March 22, 2013

CLAIM NO. 200699327

UPS AIRLINES, INC. PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

EDWIN COREY WEST
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING
* * * * * *

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

STIVERS, Member. UPS Airlines, Inc. ("UPS") appeals from the November 1, 2012, order on remand rendered by Jonathan R. Weatherby, Administrative Law Judge ("ALJ Weatherby"). On appeal, UPS asserts ALJ Weatherby erred by failing to recognize KRS 342.320(2)(a) controls the payment of attorney's fees and misconstruing Ford Motor Co. v. Stewart, 762 S.W.2d 817 (Ky. 2012). As the issue on appeal

is a narrow one, we will only provide a limited procedural history.

Edwin Corey West ("West"), a pilot with UPS, was injured on July 29, 2003, when he was lifting heavy suitcases. He received loss of license benefits in the amount of $50,936.67 during his time off from flying. The claim was bifurcated in order for Hon. James L. Kerr, Administrative Law Judge ("ALJ Kerr") to decide the issue of UPS' entitlement to a credit for the loss of license benefits paid. ALJ Kerr determined UPS, pursuant to KRS 342.730(6), was entitled to a dollar-for-dollar credit against income benefits for the loss of license benefits.

On appeal, the Board reversed and remanded to ALJ Kerr, determining the first criteria of KRS 342.730(6)- i.e. whether the benefit is exclusively employer funded- was not met, as it was a benefit negotiated through the collective bargaining process. The case was remanded to ALJ Kerr for entry of an amended order finding UPS was not entitled to a dollar-for-dollar credit against West's income benefits for the loss of license payments. The Court of Appeals affirmed the Board. UPS appealed, and the Supreme Court, in UPS Airlines v. West, 366 S.W. 472, 476 (Ky. 2012), affirmed in part, reversed in part, and

remanded the decision of the Court of Appeals holding as follows:

> ...KRS 342.730(6) entitled UPS to credit Loss of License benefits against its liability for benefits otherwise payable under KRS 342.730(1) to the extent that the two benefits overlapped because Loss of License benefits were funded exclusively by the employer; they covered the same disability for which the claimant received benefits under KRS 342.730(1); and they were not offset under the plan based on his receipt of workers' compensation benefits.

By order dated June 19, 2012, this Board remanded the claim to ALJ Weatherby.[1]

By order dated August 13, 2012, ALJ Weatherby entered the following "Order Approving Attorneys Fees":

> This cause having come before the Administrative Law Judge upon motion of counsel for Plaintiff for approval of an attorney's fee, and the Administrative Law Judge having examined the record to determine the nature, scope and quality of the attorney's services, the level of skill and competence required of the attorney rendering the services, the results achieved, the contingent nature of the case, and the experience and skill level of the attorney, the Administrative Law Judge finds that the movant's representation of the claimant in this matter was performed with a very high level of skill and competence, and due to the results and

[1] This claim was reassigned to ALJ Weatherby.

> the contingent nature of the case IT IS HEREBY ORDERED AND ADJUDGED that the movant's request for approval of any attorney's fee is granted and Scott M. Miller is hereby awarded an attorney's fee in the amount of $6,571.33 to be paid in a lump sum and to have each of the weekly benefits equally reduced until the amount of the attorneys fee has been recouped.

In the November 1, 2012, order, ALJ Weatherby determined as follows:

> This matter was decided by Administrative Law Judge James L. Kerr in an Interlocutory Opinion and Order on July 17, 2009 and the remaining issues were decided by an Opinion & Award on January 6, 2010. The claim was then appealed to the Workers Compensation Board and the Board rendered a decision on June 28, 2010 reversing ALJ's Kerr's Opinion and remanding the matter. An appeal from the Board's decision was taken to the Kentucky Court of Appeals and the Court of Appeals affirmed the Board's decision in an Opinion rendered April 22, 2011. An appeal from the Court of Appeals was taken to the Kentucky Supreme Court and the Supreme Court affirmed in part and reversed in part on May 24, 2012. The Board issued a final order remanding this matter to the undersigned ALJ on June 19, 2012 and the claim was forwarded to the ALJ for further determination in accordance with the provisions of the decision of the Supreme Court of Kentucky.
>
> Thereafter, the parties reached an agreement in part and an agreed order was signed by the parties on August 13, 2012 and approved by the undersigned on all issues with the exception of the

attorney fee. The issue to be determined involves whether the Defendant is obligated to pay a portion of the Plaintiff's attorney fee in addition to the benefits awarded in the original Opinion, Order, and Award.

FINDINGS AND ORDER

1. The Kentucky Supreme Court in *Ford Motor Co. v Stewart*, 762 S.W.2d 817 held that:

> Even though a credit against worker's compensation may be allowed because of the payment to the claimant of benefits Other [sic] than worker's compensation, ***this credit may not be applied in such a way as to defeat the attorney's right to a fee or the claimants right to have it paid from his worker's compensation award and not from his own pocket.*** Emphasis added.

2. Defendant-Employer argues that the holding in *Stewart* should apply only in situations where a credit preempts the entire award that a plaintiff would otherwise receive. The ALJ finds that the application of the *Stewart* holding in this manner would produce an arbitrary result and would serve to unjustly reduce the award of the Plaintiff.

3. The ALJ therefore **ORDERS** that the Defendant-Employer and/or its insurance carrier is hereby responsible for the portion of the Plaintiff's attorney's fee that corresponds with the credit applied herein in the amount of $3,285.66.

No petition for reconsideration was filed.

On appeal, UPS asserts ALJ Weatherby misconstrued Ford Motor Co. v. Stewart, supra, and failed to consider KRS 342.320(2)(a). UPS asserts as follows:

> [I]f it is ordered to pay a pro rata portion of the Plaintiff's attorney's fee corresponding to the amount of the credit it received it would be tantamount to the Defendant being deprived of the full credit.

In his brief, West asserts UPS should pay a proportionate share of an injured worker's attorney fee in the event it obtains a credit. West also asserts UPS failed to name an indispensable party to the appeal, West's attorney. West also cites to UPS' failure to file a petition for reconsideration.

In its reply brief, UPS argues West's attorney is not an indispensable party in this appeal, as he "has nothing whatsoever to lose in the resolution of this remaining issue." UPS asserts as follows:

> Respondent's attorney is due this entire fee and the only question is whether the entire fee will be paid from his client's award or whether a portion of the fee will be paid by the Petitioner/Defendant-Employer and a portion by his client.

A review of UPS' Notice of Appeal, filed November 29, 2012, indicates three named parties to this appeal:

UPS, West, and ALJ Weatherby. UPS's failure to name West's attorney as an indispensable party is an error fatal to this appeal. The Supreme Court of Kentucky, in Peabody Coal Co. v. Goforth, 857 S.W.2d 167, 170 (Ky. 1993), opined as follows regarding whether a claimant's counsel was a necessary party to the appeal:

> The parties have not raised, and we do not reach the issue of whether KRS 342.320 prohibits the award of an attorney's fee for representing a worker in any but the two enumerated instances. We only recognize that such a question exists. We do believe, however, that, regardless of whether a fee may otherwise be awarded, in those instances where KRS 342.310 has been applied, it is in keeping with the purpose of the provision and of the Workers' Compensation Act to require payment of a reasonable fee to the worker's attorney. We also believe that in a case such as this where an attorney's fee has been awarded pursuant to KRS 342.310 and where there is an additional, underlying issue of whether, absent the application of KRS 342.310, the award of an attorney's fee is authorized, the attorney is a necessary party to an appeal concerning whether the application of KRS 342.310 was proper.

While the appeal in Peabody Coal Co. v. Goforth, supra, relates to KRS 342.310, we believe the same logic must be extended to the circumstances in the litigation at hand. Here, an attorney's fee in the amount of $6,571.33

was calculated pursuant to KRS 342.320(2)(a). In the November 1, 2012, order on remand, ALJ Weatherby determined UPS is responsible for fifty percent of the total attorney's fee or $3,285.66, and UPS has appealed this decision. It defies logic for UPS to assert West's attorney has nothing to lose in this appeal. *The sole issue on appeal is the apportionment of the attorney's fee for West's attorney*. We can think of no more relevant and indispensable party to this appeal than the attorney whose fee is at issue. The Court of Appeals of Kentucky, in the case of Levin v. Ferrer, 535 S.W.2d 79, 81 (Ky. 1976), citing to Shields v. Barrow, 58 U.S. 129 (1854), defined an "indispensable party" as:

> (the single quotation marks need to stay in)'Parties who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience...'

In this litigation, West's attorney, whose fee is the sole issue on appeal, is an indispensable party as a final order cannot be entered resolving this dispute without his interests being affected. We believe the attorney must be permitted input in determining the party

or parties responsible for his fee and the amount each party should pay. This is particularly true in this case. Here, the attorney fee has been approved, thus it is now the property of the attorney which gives him a vested interest in any dispute regarding the payment of his fee. In this appeal, UPS is seeking reversal of an order directing it to pay one half of the fee and advocates the client is responsible for the entire fee. An attorney is an indispensible party when a party is seeking to avoid paying all or a portion of his court ordered fee and is seeking to shift responsibility for paying the fee to the other party. Further, workers' compensation cases add an additional twist as the money available to a client from an award diminishes as each week passes. In any such circumstance the attorney is an indispensible party in order to provide him or her the opportunity to ensure funds are available to pay his or her fee.

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. 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, 846 S.W.2d 702 (Ky. 1992); Peabody Coal Co. v. Goforth, supra; *Cf.* City of Murray v. Billington, No. 2003-SC-0840-WC, 2004 WL 2128722 (Ky. 2004). The case law clearly establishes strict, not substantial compliance is required with regard to naming all indispensable 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.

The absence of West's attorney as a party to this appeal prevents the Board, which lacks jurisdiction, from granting any relief, and we are obligated to dismiss the appeal.

Accordingly, it is **ORDERED** UPS' appeal is **DISMISSED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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HON. FRANKLIN A. STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON LANCE O YEAGER
10503 TIMBERWOOD CIRCLE #213
LOUISVILLE KY 40223

COUNSEL FOR RESPONDENT:

HON SCOTT M MILLER
429 W MUHAMMAD ALI BLVD STE 800
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DR
LEXINGTON KY 40511