

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 8, 2019

CLAIM NO. 201893052

JOSEPH RIFFE

PETITIONER

VS.

APPEAL FROM HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE

MADISON COUNTY EMS;
DEPARTMENT OF WORKERS' CLAIMS; and
HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION & ORDER
DISMISSING

* * * * *

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

ALVEY, Chairman. Joseph Riffe (“Riffe”) appeals from the July 29, 2019 Order approving a fee for his attorney, Frank M. Jenkins, III (“Attorney Jenkins”), in the amount of \$855.14 issued by Hon. Tanya Pullin, Administrative Law Judge (“ALJ”).

On February 2, 2018, Riffe filed a claim against Madison County EMS (“Madison County”). Riffe alleged he and a co-worker were moving a patient on a stretcher in the course of their work for Madison County. The co-worker lost his traction and the stretcher began to roll away. He alleged his prosthesis broke when he attempted to catch the stretcher. Madison County challenged the compensability of the replacement of Riffe’s damaged prosthesis. Madison County filed a Form 112 Medical Dispute on October 12, 2018, challenging a pre-authorization request for replacement of Riffe’s prosthesis.

In the Benefit Review Conference (“BRC”) Order and Memorandum dated February 13, 2019, the issues preserved for determination by the ALJ included Riffe’s entitlement to temporary total disability (“TTD”) benefits, credit for unemployment benefits, and “Medical benefits; which artificial appliance is appropriate/reasonable/necessary; extent of liability of Defendant Employer for replacement artificial appliance; whether Plaintiff’s attorney’s fee over and above the cost of the artificial appliance is appropriate; credit for overpayment of TTD”.

A hearing was held on February 28, 2019. The ALJ entered an order outlining the evidence filed in the claim. At the hearing, the ALJ outlined the issues listed at the BRC. No additional issues were raised at the hearing.

The ALJ rendered a decision on April 24, 2019 awarding TTD benefits at the rate of \$600.40 per week from February 9, 2018 through June 25, 2019, and granted Madison County credit for unemployment benefits paid to Riffe. The ALJ resolved the medical dispute in Riffe’s favor, and found Madison County responsible for medical expenses, including replacement of the prosthesis. The ALJ

also found the issue regarding the compensability of the prosthesis was appropriately contested, and properly before her; therefore, she declined to issue sanctions against Madison County. The ALJ ordered the parties to file any motions for approval of attorney fees within thirty (30) days of the decision. No petition for reconsideration was filed, and no appeal was taken from the ALJ's decision.

Madison County filed a motion for approval of attorney fee on May 31, 2019, and it was approved on the same day. Riffe did not file his motion for approval of attorney fee until June 18, 2019. He argued that his attorney was entitled to a maximum attorney fee of \$12,000.00, of which \$855.14 should be paid from the TTD benefits awarded, and the remainder from Madison County for wrongfully contesting the compensability of the prosthesis. We note that Attorney Jenkins was not listed in the motion for approval of the attorney fee, nor does the motion reflect that it was served on Riffe. The ALJ issued an order on July 29, 2019 awarding an attorney fee in the amount of \$855.14. The ALJ denied the remainder of the requested fee, and noted sanctions pursuant to KRS 342.310 were not preserved as an issue for her determination.

Riffe filed an appeal of the ALJ's attorney fee award on August 6, 2019. Interestingly, an incorrect claim number was listed on the notice. We also note Riffe, not his attorney, was listed as the Petitioner. Attorney Jenkins was not listed as a party, and the motion was not served on Riffe.

This Board issued an order on August 21, 2019 requesting the petitioner to show cause why the appeal should not be dismissed. The petitioner responded on September 4, 2019. In the response to the show cause order, the name

of the petitioner was changed from Riffe to Attorney Jenkins. Riffe was listed as a respondent. We note that no motion to amend the Notice of Appeal was ever filed.

We initially note KRS 342.320 governs the approval of attorney fees. KRS 342.320(2) sets forth the maximum limitations of attorney fee awards, and clearly establishes that the award shall be based upon and paid from the award of benefits. 803 KAR 25:010 §6(7) outlines the appropriate procedure for seeking the allowance of an attorney fee as follows:

(7) A motion for allowance of a plaintiff's attorney fee shall:

(a) Be made within thirty (30) days following the finality of the award, settlement, or agreed resolution upon which the fee request is based;

(b) Be served upon the adverse parties and the attorney's client;

(c) Set forth the fee requested and mathematical computations establishing that the request is within the limits set forth in KRS 342.320; and

(d) Be accompanied by:

1. An affidavit of counsel detailing the extent of the services rendered;

2. A signed and dated Form 109 as required by KRS 342.320(5); and

3. A copy of the signed and dated contingency fee contract.

(Emphasis added).

In the appeal to this Board, the attorney, Attorney Jenkins, was the real party in interest on appeal. He failed to list himself, and failed to list Riffe as a respondent. Likewise, the Notice of Appeal does not reflect that Riffe was served

with a copy, nor does it appear the attorney fee motion before the ALJ was served on Riffe. In the response to the show cause order, Attorney Jenkins substituted his name for Riffe's as petitioner, and listed Riffe as a respondent. However, he did not move to amend the Notice of Appeal, and the response was not filed until more than thirty days after the appeal was filed.

CR 73.03(1) states, "The notice of appeal shall specify by name all appellants and all appellees ("et al." and "etc." are not proper designation of parties)" Based upon the above, we find Attorney Jenkins failed to join an indispensable party to this appeal.

803 KAR 25:010 Section 2(3)(a) requires all persons shall be joined as defendants against whom the ultimate right to relief pursuant to the Act may exist, whether jointly, severally, or in the alternative in adjustments of claims. Within thirty days of a final award, order or decision rendered by an ALJ, any aggrieved party may file a notice of appeal to the Board. 803 KAR 25:010 §22(2)(c) mandates the notice of appeal denote the following information:

(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.)

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.* Even if a party is indispensable at a trial, pursuant to CR 19.02, it is not necessarily indispensable to the appeal. Nelson County Bd. of Educ. v. Forte, 337 S.W.3d at 624. The failure to name an indispensable party in the notice of appeal is “a jurisdictional defect that cannot be remedied.” *Id.* at 626 (*quoting* City of Devondale v. Stallings, 795 S.W.2d 954, 957 (Ky. 1990)).

Since this appeal is an attempt for Attorney Jenkins to be awarded an attorney fee, he is an indispensable party to the appeal as petitioner, not Riffe. Riffe is a respondent. Failure to appropriately name the parties to this appeal is a fatal jurisdictional defect, Commonwealth of Kentucky, Department of Finance, Division of Printing v. Drury, 846 S.W.2d 702 (Ky. 1993), and therefore necessitates dismissal. Kentucky courts of justice have consistently held that on appeal, if an

attorney fee is at issue, the attorney seeking the fee is an indispensable party. Peabody Coal v. Goforth, Ky., 857 S.W.2d 167 (1993). This requirement extends to situations involving not only disputes as to the amount of the fee, but to challenges made by a party to the constitutionality of the statute and regulations governing the fee. *Cf.* City of Louisville v. Slack, 39 S.W.3d 809 (Ky. 2001); City of Murray v. Billington, No. 2003-SC-0840-WC, 2004 WL 2128722, (rendered September 23, 2004 and designated not to be published). The failure to name an indispensable party is a jurisdictional defect. Consequently, the failure to name the attorney as a party in the notice of appeal is fatal to any issue on appeal directed toward the question of an attorney fee. This Board has repeatedly followed that ruling, and must do so here.

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

ALL CONCUR.

MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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