# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: January 25, 2019**

CLAIM NO. 201173136

SENTRY LEASING - HILLDRUP COMPANIES PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

JAMES MOTKOWSKI and
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION AND ORDER**
**DISMISSING**

* * * * * *

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

**ALVEY, Chairman.** Sentry Leasing-Hilldrup Companies, as insured by PMA Insurance (Sentry-PMA) appeals from the November 27, 2017 Opinion and Order, and the February 19, 2018 order on reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The decision was rendered in a consolidated claim for claim numbers 2013-01213 and 2011-73136.

The 2011-73136 claim involves a left upper extremity injury sustained by James Motkowski ("Motkowski"), on April 23, 2011 while working for Sentry Leasing-Hilldrup Companies, which at the time was insured by PMA Insurance. The 2013-01213 claim involves a left upper extremity injury Motkowski sustained while still employed by Sentry Leasing-Hilldrup Companies on July 25, 2012. On the date of the second injury, Sentry Leasing-Hilldrup Companies was insured by Vanliner Insurance ("Sentry-Vanliner"). In the November 27, 2017 opinion, the ALJ noted the parties had settled the claim, except for the issue of apportionment between the insurers. The ALJ found Sentry-PMA liable for 64% of the settlement, and Sentry-Vanliner responsible for the remaining 36%. Sentry-PMA filed a petition for reconsideration, noting it did not disagree with the apportionment for the lump sum settlement, but argued Sentry-Vanliner was responsible for 100% of the temporary total disability ("TTD") benefits and medical benefits to which Motkowski was entitled from July 25, 2012 until he reached maximum medical improvement. In the February 19, 2018 order on reconsideration, the ALJ found Sentry-PMA responsible for 64% of the TTD benefits and medical benefits at issue, and found Sentry-Vanliner responsible for the remaining 36%.

Sentry-PMA filed a Notice of Appeal from the ALJ's decision, and the order on reconsideration of February 19, 2018. The caption from the notice lists Motkowski and the ALJ as the respondents to the appeal. The notice itself does not specifically denote in the body the parties against whom the appeal is taken, as required by 803 KAR 25:010 Section 22 (2)(c)2. However, giving Sentry-PMA the benefit of the doubt, the caption of the appeal notes it was taken against Motkowski

and the ALJ. We acknowledge the certificate of service reflects a copy of the notice was served upon Sentry-Vanliner.

Subsequent to the filing of the appeal, a Form 110-I settlement agreement, signed by Motkowski, his attorney, the attorney for Sentry-Vanliner, and Sentry-PMA was tendered. A motion was filed to abate and remand the appeal to the ALJ to approve the settlement agreement. On July 11, 2018, this Board entered an order placing the appeal in abeyance, and remanding to the ALJ to consider approval of the settlement agreement. On July 17, 2018, the ALJ noted the settlement involved two injuries with separate claim numbers. She ordered the parties to submit separate settlement agreements.

On November 12, 2018, Sentry-Vanliner submitted a settlement agreement for approval. The agreement reflected a settlement between it and Motkowski for a lump sum payment of $48,964. The ALJ initially approved the settlement on November 21, 2018, but on November 27, 2018, she set aside the approval because she had not signed the agreement. On that date, the ALJ signed and approved the agreement. She also issued an order on that date deconsolidating claim number 2013-01213 from claim number 2011-73136. The ALJ also ordered Sentry-PMA to submit a settlement agreement within thirty days.

On November 28, 2018, this Board issued an order dismissing any appeal stemming from claim number 2013-01213. Sentry-PMA filed a motion requesting the appeal against Sentry-Vanliner be reinstated. In an order dated December 19, 2018, this Board specifically noted Sentry-Vanliner was not named in

the appeal. The motion to reinstate was denied. Sentry-PMA was given fifteen days to show cause why this appeal should not be dismissed.

On December 21, 2018, Sentry-PMA filed a response to the show cause order. It argues that since Sentry-Vanliner was listed in the certificate of service it was effectively a party on appeal. In the alternative, it argues that since Sentry-Vanliner was not involved in claim number 2011-73136, it cannot be considered as an indispensable party on appeal. Finally, it requested the opportunity to amend the notice of appeal.

Although Sentry-Vanliner was listed in the certificate of service, pursuant to 803 KAR 25:010 Section 22, it was not named in the appeal. The relief sought by Sentry-PMA stems from an argument regarding apportionment between the two insurers. It does not involve benefits owed to Motkowski. However, Sentry-PMA failed to join as a party the only entity from which it arguably seeks any relief. The fact that Sentry-Vanliner's counsel may have been served with a Notice of Appeal is not sufficient to join it as a party to the appeal. We additionally note that 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 Sentry-PMA 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, the party 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 to alter Sentry-Vanliner's financial obligation, it is indispensable to this appeal, and failure to name it as a party 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). Failure to join an indispensable party, in this instance Sentry-Vanliner, therefore necessitates dismissal.

Accordingly, for the reasons stated herein, **IT IS HEREBY ORDERED AND ADJUDGED** the appeal filed by Sentry-PMA is **DISMISSED**.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

**RECHTER, Member.** Because I believe dismissal is wholly inappropriate under the circumstances of this appeal, I dissent. The majority opinion fails to recognize that Kentucky's civil rules and appellate courts have adopted a policy of substantial compliance in the filing of a notice of appeal. This policy of substantial compliance is evident in the plain language of CR 73.02 and our regulations. CR 73.02(2)

permits, but does not *require*, dismissal when the format of a notice of appeal is faulty. Our regulations similarly require dismissal *only* for an untimely notice of appeal. 803 KAR 25:010§22(2)(e).

Even in the failure to properly name an indispensable party to an appeal, the Kentucky Supreme Court has examined the notice of appeal through the lens of substantial compliance. *See* Flick v. Estate of Wittich, 396 S.W.3d 816 (Ky. 2013). *See also* Sparkman v. Consol Energy, Inc., 470 S.W.3d 321 (Ky. 2015). The circumstances of this appeal are far more akin to the situations in Sparkman and Flick, than to City of Devondale, cited by the majority. In City of Devondale, the notice of appeal wholly omitted two distinct entities (the City of Louisville and Jefferson County) from the appeal. Similar to the party/decedent's estate in Wittich, the true party in this claim is Sentry Leasing. As the insurer, both PMA and Vanliner are essentially one and the same party as Sentry Leasing. Again, in Sparkman, the Supreme Court determined a party substantially complied with the civil rules by imperfectly naming an incorporated business entity rather than a distinct sole proprietorship. Another important distinction is that, unlike the appealing parties in City of Devondale, PMA used the precise case caption that was utilized throughout the litigation of this claim before the ALJ.

As discussed at length in both Sparkman and Flick, "the principal objective of a pleading is to give fair notice to the opposing party." Flick, 396 S.W.3d at 822. More specifically, "the purpose of naming the appellant/appellee is to provide sufficient notice to the parties of the coming appeal." Sparkman, 470 at

331. The majority opinion engages in no analysis as to whether Vanliner had sufficient notice of the appeal.

There is absolutely no question, in this appeal, that Vanliner was aware of the appeal. PMA filed a notice of appeal on March 1, 2018 and served the notice to Vanliner. A few weeks later, *Vanliner* moved to place the claim in abeyance, obviously considering itself a party to this appeal. On April 11, 2018, this Board issued an order granting the motion to abate the appeal. Importantly, in that order, this Board referred to both Vanliner and PMA as "Petitioners". In five subsequent orders of this Board, Vanliner was included on the certificate of service. The concern about the parties named on the appeal only arose when this Board, on its own motion, dismissed the appeal from Vanliner's 2013 claim. The reason the Board was procedurally able to dismiss the appeal from a single claim is because the ALJ had recently deconsolidated these claims *sua sponte*, for reasons not apparent in the record.

I highlight the procedural history of this claim to emphasize what has been obvious to both PMA and this Board since the notice of appeal was filed ten months ago – Vanliner has been treated as a party to this appeal and was completely aware it existed from its inception. I might also emphasize the fact that Vanliner did not object to PMA's motion to reinstate the appeal, nor did it respond to this Board's show cause order of December 19, 2018.

The policy of substantial compliance seeks to achieve an orderly appellate process, to decide cases on the merits rather than technicalities, and to

honor a party's right to appeal. Ready v. Jamison, 705 S.W.2d 479 (Ky. 1986). I believe PMA substantially complied with the notice of appeal requirements by using the claim caption utilized before the ALJ and by serving Vanliner at all stages of the appellate process. I also believe Vanliner received sufficient notice of the existence of an appeal. For these reasons, I dissent.

**DISTRIBUTION:**

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