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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000996-WC

REED & DAMRON TRUCKING CO., INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-88094

ROCKY BARNETT; HONORABLE JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Reed & Damron Trucking Co., Inc. ("Reed & Damron") petitions for a review the May 19, 2017, decision of the Workers' Compensation Board ("Board") vacating and remanding a decision of the

Administrative Law Judge ("ALJ"), which had resolved a dispute over medical fees in its favor.

The Board held that no basis exists to dismiss this appeal because of the failure to name the medical providers as indispensable parties. Further, the Board held that the concept of *res judicata* barred the re-litigation of a previously adjudicated matter, and consequently, the ALJ was bound by the previous decision.

On appeal, Reed & Damron maintains that the Board erred by not dismissing the appeal for failure to name indispensable parties. In addition, the trucking company counters that the Board exceeded its scope of review and substituted its opinion as to the weight of the evidence for the ALJ's findings.

For the reasons set forth below, we affirm the Board.

BACKGROUND

On November 30, 2003, Barnett filed a Form 101 alleging that he was injured in a work accident on April 5, 2003, while performing mechanical work on a truck. A hearing was held on May 23, 2006, where Barnett testified as well as several physicians. Dr. Joseph Rapier, an orthopedic specialist gave Barnett a 23% AMA whole person functional impairment rating for a lumbar spine strain, which aggravated pre-existing dormant degenerative disc disease. This injury was treated by a lumbar interbody fusion. Another physician, Dr. Phillip Tibbs, a neurosurgeon, diagnosed a herniated disc with mechanical instability and awarded

a 23% AMA whole person functional impairment rating. Lastly, Dr. Russell Travis, a neurosurgeon, examined Barnett and awarded Barnett a 20% impairment rating based on the lumbar spine injury and surgery. Following the testimony, on July 13, 2006, the Hon. W. Bruce Cowden, the ALJ, found that Barnett had sustained a work-related low back injury and awarded permanent total occupational disability benefits and medical benefits.

Almost ten years later, on December 17, 2015, Reed & Damron filed a motion to reopen and a Form 112 contending that Lyrica, Zolpidem, Tizanidine, Ranitidine, Oxycodone/APAP, Diclofenac, Trazodone, Avodart, a Gaymar Tpad Machine, and, office visits to Dr. Lela Maynard (now Johnson), who prescribed the medications, were not reasonable and necessary for the treatment of Barnett's work injury. Reed & Damron attached to the motion the utilization review ("UR") report of Dr. Michael Chunn, a board-certified family practitioner, and the report of the Independent Medical Examination ("IME") of Dr. David Jenkinson, a board-certified orthopedic surgeon. The doctors concluded that the contested treatment was unnecessary and unreasonable for the treatment of Barnett's work injury. During the pendency of the dispute, Reed & Damron provided additional reports by Dr. Chunn.

Various records of Dr. Johnson were also introduced. But because Dr. Johnson left East Kentucky Medical Group ("EKMG"), Reed & Damron filed a

motion to add Barnett's new doctor, Dr. Crystal Compton, as a party. The ALJ granted this motion. Dr. Compton's medical records were then introduced as well as a letter explaining her opinion that the questioned medications were reasonable and necessary to treat Barnett's work injury.

The ALJ, Hon. Jonathan R. Weatherby, found that Reed & Damron had made *prima facie* showing for reopening. At the Benefit Review Conference, the parties stipulated that Barnett sustained a work-related injury on April 5, 2003, as determined by ALJ Cowden on July 13, 2006. The contested issues were the necessity for the prescriptions, the Gaymar Tpad machine, and the office visits to prescribe the medications and the medical equipment. The parties waived a hearing.

On September 6, 2016, the ALJ entered an opinion and order resolving the medical fee dispute in favor of Reed & Damron. He found the opinion of Dr. Jenkinson persuasive. Dr. Jenkinson believed that the imaging studies revealed no significant abnormality in the lumbar spine and that since the inception of the matter, Barnett had only had subjective complaints. Therefore, the ALJ determined that the medications, Gaymar Tpad machine, and office visits were not reasonable and necessary for the treatment of Barnett's work injury, and thus, not compensable.

Barnett petitioned for reconsideration wherein he noted that the ALJ in his original case gave no credibility to the doctor Dr. Chunn relied upon for his opinion in the medical fee dispute. Barnett argued that his work injury merited a substantially high impairment rating and cannot not be transformed into a back strain. Furthermore, Barnett pointed out that Dr. Jenkinson ignored that Barnett had undergone surgery. Dr. Jenkinson's opinions contradict ALJ Cowden's findings, and thus, the doctors' findings are not relevant since they are *res judicata.* The ALJ denied the petition to reconsider.

Next, Barnett sought review by the Board. The Board vacated and remanded the ALJ's opinion and order. Reed & Damron now appeal this decision.

STANDARD OF REVIEW

The well-established standard of review for the appellate courts of a workers' compensation decision "is to correct the [Workers' Compensation] Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *See Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

This requires a review of the ALJ's decision. "[W]here the party with the burden of proof was successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion[.]" *Whittaker v. Rowland*,

998 S.W.2d 479, 481 (Ky. 1999). Substantial evidence is defined as evidence of relevant consequence which would induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

But when reviewing questions of law, an appellate court is bound neither by the decisions of an ALJ nor the Board regarding proper interpretation of the law or its application to the facts, and in such matters, the standard of review is *de novo*. *Bowerman v. Black Equipment Company*, 297 S.W.3d 858, 866 (Ky. App. 2009).

ANALYSIS

Medical Fee Dispute

An employer is required to pay for reasonable and necessary medical treatment resulting from the effects of a work-related injury. Kentucky Revised Statute (KRS) 342.020(1).[1] However, an employer may move to reopen an award and contest whether medical treatment is reasonable or necessary or whether the need for the treatment is related to the work injury. *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 319 (Ky. 2007). The employer has the burden in challenging the medical expenses and must file a timely motion to reopen the matter. *Crawford & Co. v. Wright*, 284 S.W.3d 136, 140 (Ky. 2009) (citing *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky. 1993)). Hence, Reed & Damron have

[1] This Statute has been amended effective July 15, 2018. However, our citation is in reference to the statute in effect at the time of this action.

the burden of proof to show that Barnett's treatment was unreasonable and not work-related.

1. *Failure to join an indispensable party*

Reed & Damron argue that the Board should have dismissed Barnett's appeal because he did not name the medical providers as parties. The trucking company proposes that the relevant administrative regulations, civil rules, and case law mandate the naming of the medical providers as parties to the appeal and the failure to do so is a fatal jurisdictional defect warranting dismissal of the appeal.

We begin with a review of the administrative rules, which the trucking company claims require the joinder of medical providers as parties in cases involving medical fee disputes. It cites the following portion of 803 Kentucky Administrative Regulations (KAR) 25:012 §1(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.
> . . .
>
> (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.

We disagree with Reed & Damron's conclusion that this language mandates naming the medical providers as indispensable parties in the medical fee dispute.

The language mandates providing notice, but joinder is permissive – "if appropriate." Second, this language references the re-opening of the matter but does not reference appeals after the ALJ has entered the opinion.

The above administrative regulations deal with a workers' compensation action wherein a final order has been entered, as is the case here. Nevertheless, when an application for adjustment is pending, 803 KAR 25:012 §1(5) requires the moving party to a fee dispute to join the medical provider as a party to the dispute. That was not the case here. Additionally, when appealing an ALJ's decision, 803 KAR 25:010 §22(2)(c) requires that the notice of appeal shall "denote all parties against whom the appeal is taken as respondents." In sum, while the regulations require that the medical providers be joined when an adjustment decision has not been made, in adjudicated matters joinder is permissive both at the hearing level and at the appeal level.

Reed & Damron maintains that 803 KAR 25:010 §22 is the administrative counterpart to Kentucky Rules of Civil Procedure (CR), 73.02(1)(a) and CR 73.03(1). These civil rules provide that a notice of appeal shall be filed within 30 days and shall specify the name of all appellants and all appellees. CR 73.02(1)(a) and CR 73.03(1). These rules, however, are applicable to the inclusion of parties to an appeal.

To conclude, Reed & Damron recites no explicit language from the administrative regulations nor the civil rules that in an appeal of workers' compensation medical dispute, medical providers must be named parties.

Reed & Damron buttresses its argument that the appeal should have been dismissed for failure to name an indispensable party by citing other civil rules. It notes the absence of an indispensable party to an appeal prevents the tribunal from granting relief to the parties listed. *See* CR 19.01 and CR 19.02. But like the administrative regulations, 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 617, 624 (Ky. 2011).

Next, we examine case law proffered by Reed & Damron to support that this appeal must be dismissed for failure to name indispensable parties. Reed & Damron believe that case law also supports that the Board should have dismissed Barnett's appeal because he failed to name the medical providers, Dr. Compton and EKMG, to the appeal. The trucking company reiterates that these parties are indispensable, and the failure to name them is a jurisdictional flaw, which is fatal to the appeal. Nonetheless, the trucking company gave no specific case law mandating that, on appeal, medical providers are indispensable parties to a medical fee dispute and must be named.

The issue of an indispensable party is different for appellate cases than for proceedings in the trial courts. In a trial court, a failure to name an indispensable party may be remedied by a timely amendment to the complaint. But, '"under the appellate civil rules, failure to name an indispensable party in the notice of appeal is 'a jurisdictional defect that cannot be remedied[,]'" after time for filing a notice of appeal has run. *Browning v. Preece*, 392 S.W.3d 388, 391 (Ky. 2013); *citing* CR 73.02.

Reed & Damron cited several cases for the proposition that strict compliance is required regarding the naming of indispensable parties. *See Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994); *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990); and *Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918 (Ky. App. 1998). While these cases primarily dealt with the timing of an appeal and dismissal, the Court in *Johnson* stated that "[e]xcepting for tardy appeals and the naming of indispensable parties, we follow a rule of substantial compliance." *Johnson*, 885 S.W.2d at 950.

Consequently, as pointed out by Reed & Damron, it is indisputable that "under the appellate civil rules, failure to name an indispensable party in the notice of appeal is 'a jurisdictional defect that cannot be remedied.'" *Nelson County Bd. of Educ.*, 337 S.W.3d at 626 (quoting *City of Devondale*, 795 S.W.2d

at 957). But Reed & Damron completely ignore the analysis necessary to ascertain whether a party is indispensable to an appeal.

The case, *Braden v. Republic–Vanguard Life Insurance Company*, 657 S.W.2d 241, 243 (Ky. 1983) (citing *Levin v. Ferrer*, 535 S.W.2d 79 (Ky. 1975), clarified that a "[f]ailure to specify any party whose absence prevents the appellate court from granting complete relief among those already parties would be fatal to the appeal." Therein, the Court explained that an indispensable party must be a party whose absence would prevent the other parties from getting complete relief. So, it is necessary to determine whether the absence of the medical providers as parties prevented the Board from granting complete relief to Barnett or Reed & Damron.

In *Braden*, the widow of a deceased mortgagor sought to recover the remaining mortgage payments from the credit life insurer. The trial court ordered the mortgage holder, Baldwin-United, to be joined as a party to the action. The trial court then sustained the credit life insurer's motion for summary judgment as to the merits of the claim. The widow appealed but did not name Baldwin-United as a party to the appeal. The Supreme Court held that Baldwin-United, despite being a party at the trial level, was not an indispensable party to the appeal. *Id*.

The Supreme Court clarified in *Braden* that although CR 73.03 requires that a "notice of appeal" specify all appellants and appellees, naming the

mortgage holder was not necessary to the appeal. The only relief the appellant (the widow) sought in the appeal was reversal of the summary judgment; and hence, Baldwin-United was not an indispensable party to the appeal since if the widow prevailed at the appellate level, the matter would be remanded, and Baldwin-United would still be a party. *Id*. To conclude, a party to the underlying trial proceedings is not always an indispensable party to an appeal.

A purview of the history of the litigation is enlightening. First, in the original motion to reopen, Reed & Damron did not name EKMG as a party to the medical fee dispute. And when Reed & Damron later filed a motion to amend Form 112 to add Dr. Compton, as Barnett's current medical provider, it again did not move to join her employer, EKMG, as a party to the medical fee dispute. The reason underlying Reed & Damron's motion to amend Form 112 was that Barnett's original physician, Dr. Johnson, had left EKMG, and Dr. Compton took her place. Consequently, the order only joined Dr. Compton to the proceedings. Therefore, the truck company's allegation that Barnett's appeal to the Board must be dismissed for failure to name medical providers is disingenuous since it did not name EKMG to the underlying action either.

In the case at bar, the Board disagreed with Reed & Damron's belief that Dr. Compton and EKMG were indispensable parties to the appeal. First, regarding the necessity to name Dr. Compton as an indispensable party, it observed

that the doctor did not take an active role in the underlying medical fee dispute before the ALJ. The Board noted that EKMG was the billing agency and the recipient of the funds. The Board surmised that Dr. Compton's interest in this matter is collateral because no dispute exists as to Dr. Compton's compensation for the services rendered. *See Braden*, 657 S.W.2d at 241. Indeed, the Board observed that no dispute existed as to whether Dr. Compton or EKMG is entitled to compensation.

Thus, the Board clarified that neither medical provider is an indispensable party to the action since neither has a stake in the litigation. The real dispute is whether Barnett or Reed & Damron must pay the medical fees. Accordingly, the crux of the dispute is between Reed & Damron and Barnett as to who is responsible for the payment, and the failure to name the medical providers to the appeal does not prevent the parties from getting complete relief. Accordingly, the Board held that no basis exists to dismiss this appeal because of the failure to name the medical providers. We agree.

Here, the primary issue is not strict compliance with the jurisdictional requirement to name all indispensable parties but whether the medical providers were indispensable. We hold that the Board did not err when it determined that the medical providers were not indispensable parties to the appeal and declined to dismiss the appeal. The Board properly considered the status of the medical

providers and ascertained that they were not indispensable since all necessary relief could be afforded to the named parties without their inclusion.

2. *Exceeding Scope of Review*

Reed & Damron also maintain that the Board exceeded its scope of review. It argues that the Board made independent findings of fact about the probative value of its physicians' medical reports delineating that the medical fees were unreasonable and unnecessary.

No question exists as to the nature of the Board's scope of review on appeal. It is well-established that "[t]he board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact . . . ." KRS 342.285(2). However, Reed & Damron fail to address that the Board, rather than making findings, instead pointed out that ALJ Cowden's original decision as to the nature and extent of Barnett's injury was *res judicata*.

Here, the ALJ decided that Dr. Jenkinson's opinion constituted probative evidence that the medical treatment for Barnett was not reasonable and necessary. Reed & Damron contends that the issue is a conflict in the evaluation of the evidence and jumps to the suggestion that when medical evidence is conflicting, it is the domain of the ALJ to make findings of fact. *Square D. Co. v. Tipton*, 862 S.W.2d 308, 310 (Ky. 1993). But, given the earlier 2006 decision, the matter is not that simple.

Because the Board's opinion presented a thorough and complete synopsis of the medical evidence in the original workers' compensation matter wherein ALJ Cowden ascertained that Barnett sustained a work-related low back injury that is a compensable work injury, it is not necessary for us to repeat their excellent summary. At the conclusion of the matter, the ALJ found that Barnett had a work-related injury and awarded permanent total disability benefits and medical benefits.

The evidence provided by Reed & Damron to contest the necessity of Barnett's medical treatment was the review and reports of Drs. Jenkinson and Chunn. As previously stated, Reed & Damron attached to the motion to reopen and Form 112 the UR of Dr. Chunn and the medical report of Dr. Jenkinson. Both physicians concluded that the contested treatment was not reasonable or necessary.

Dr. Chunn stated that based on his reviews of the medical records that the MRIs do not reveal a lesion requiring surgical intervention. Yet, according to the physicians in the original matter, Barnett did have an injury requiring surgical intervention. Significantly, Barnett underwent such a procedure. Dr. Chunn also opined that his review of the records indicated no necessity for continued treatment even though Barnett continues to complain of pain following his surgery.

Similarly, Dr. Jenkinson's report rejects ALJ Cowden's findings regarding Barnett's work injury. In his Independent Medical Report, Dr.

Jenkinson stated that the MRI scans and the lumbar myelogram/CT demonstrated no significant abnormality other than mild degenerative changes at L4-5. The Board summarizes in depth the findings of both physicians. In general, both medical doctors conclude that no continuing treatment is needed since Barnett had no objective abnormality following the April 5, 2003 incident.

After considering the evidence in both matters, the Board reviewed and highlighted that the decision of ALJ Cowden as to the nature and extent of Barnett's injury. Then, the Board responded to the physicians' reports prepared for Reed & Damron claiming Barnett had no lumbar injury necessitating surgery that because the early decision determined a work-related injury, which required surgery, *res judicata* barred the reconsideration of whether an injury existed. The Board relied on the legal concept of *res judicata* wherein a final judgment on the merits bars further claims by the same parties on the same cause of action. *See BTC Leasing, Inc. v. Martin*, 685 S.W.2d 191, 197 (Ky. App. 1984). The application of *res judicata* requires the existence of a final judgment, identity of the subject matter, and identity of parties. *Id.*

The Board concluded that ALJ Cowden's decision was a final judgment, the subject matter was Barnett's work injury, and the same parties were involved. Consequently, the diagnoses of Barnett's injury by Drs. Jenkinson and Chunn have no probative value since they are not in conformity with ALJ

Cowden's findings. At this stage of this claim, the doctors evaluating Barnett for Reed & Damron are not permitted to litigate whether Barnett suffered a work-related lumbar spine injury. Since the doctors' findings contradict ALJ Cowden's findings, the findings are not probative and are *res judicata.*

We hold that the Board's conclusion is correct and that it did not exceed its scope of review nor did it substitute its findings for those of the ALJ as to the weight of the evidence. The evidence provided by Reed & Damron through their physicians, Jenkinson and Chunn, did not establish that Barnett's treatment was unreasonable but repudiated the original findings of a compensable work injury. ALJ Cowden's opinion and order was a final judgment on the merits, and the doctrine of *res judicata* bars the re-litigation of the previously adjudicated matter involving the same parties.

As explicated by the Board, all parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during the adjudication of the claim. In this case, any opinions about the reasonableness and necessity of medical treatment must be based upon the injury as found in the 2006 opinion and order and that did not happen. The ALJ must consider the evidence on an accurate understanding of the facts. Here, the fact-finder held an erroneous understanding of the relevant evidence in reaching the decision. In such cases, the Courts have authorized remand to the

ALJ for further findings. *Whitaker v. Peabody Coal Company*, 788 S.W.2d 269, 270 (Ky. 1990). The Board's remand for additional findings concerning the medical fees, based upon ALJ Cowden's findings, is proper.

CONCLUSION

Because the Board did not overlook or misconstrue controlling statutes or precedent or commit an error in reviewing the evidence, we affirm the decision of the Board vacating and remanding the ALJ's opinion and order. Further, The Board appropriately remanded for additional findings regarding the reasonable and necessary nature of the medical fees on the basis that such consideration conforms to the work-related low back injury found in the July 31, 2006, opinion by ALJ Cowden.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
W. Barry Lewis Hazard, Kentucky	No brief filed.