

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000825-WC

AISIN AUTOMOTIVE CASTINGS

APPELLANT

v. PETITION FOR A REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-00607

ROBERTA ROSE;
HON. PHYLLIS L. ROBINSON;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

KELLER, JUDGE: Aisin Automotive Castings (Aisin) petitions this Court for review of the opinion of the Workers' Compensation Board (the Board) dismissing its appeal for failure to name an indispensable party. In its appeal before us, as it did before the Board,

Aisin raises the following issues: 1) Rose did not file sufficient evidence to meet her burden of proof before the ALJ, and 2) because Aisin's medical fee dispute was supported by probative evidence, the ALJ abused his discretion by awarding Rose attorney fees and costs. Additionally, before us, Aisin argues that its failure to name Rose's attorney as a respondent did not warrant a dismissal of its appeal to the Board, and that the Board failed to address the merits of Aisin's burden of proof argument. For the reasons set forth below, we affirm the Board's dismissal of that portion of Aisin's appeal involving the ALJ's award of attorney fees. However, because the Board failed to address that portion of Aisin's appeal involving its burden of proof/sufficiency of the evidence argument, we reverse and remand as to that issue.

FACTS

As noted above, the Board did not address that portion of Aisin's appeal involving its burden of proof/sufficiency of the evidence argument. Therefore, we will not address that issue, and our review of the facts will be limited to those facts relevant to the attorney fee issue.

Rose filed a claim for benefits alleging injuries to multiple body parts. Following the presentation of proof, the parties settled that claim. In the settlement agreement, the parties listed Rose's injuries, including one to her right shoulder. However, the parties stipulated that compensability of Rose's right shoulder injury was being contested. In consideration of the lump sum payment, Rose agreed to waive any claim for medical expenses related to her right shoulder injury that she incurred through

April 17, 2004. The parties further agreed that Rose could submit to Aisin and/or its workers' compensation carrier any medical expenses related to treatment of the right shoulder injury incurred after April 17, 2004. Aisin and/or its workers' compensation carrier retained all defenses permitted under KRS Chapter 342 and related regulations with regard to any such medical expenses.

Approximately eighteen months after reaching a settlement, Aisin filed a motion to reopen and medical fee dispute contesting the work-relatedness of Rose's right shoulder surgery and ongoing psychological treatment. Aisin noted in its medical fee dispute that the work-relatedness of the right shoulder injury had been contested at the time of settlement and that Rose's psychological treatment was related to alcohol and family problems, not to the work injury.

Following litigation of the reopening, the ALJ issued an opinion and order finding that Aisin was liable for the contested medical expenses and that Aisin had unreasonably prosecuted the medical fee dispute. Based on the latter finding, the ALJ ordered Aisin to pay Rose's attorney fees and costs.

Aisin filed a timely petition for reconsideration, which the ALJ denied noting that the petition simply re-argued the merits of the case. Aisin then timely filed a notice of appeal to the Board; however, Aisin failed to name Rose's attorney, Phyllis Robinson, as a party to the appeal. Approximately one month later, Aisin filed a motion to amend its appeal to add attorney Robinson as a party. Rose then filed a motion to dismiss Aisin's appeal for failure to name an indispensable party, her attorney. The

Board passed the motions to amend and to dismiss to the merits and ultimately dismissed Aisin's appeal based on Aisin's failure to timely name Rose's attorney as a party. In its summary order dismissing, the Board did not address Aisin's burden of proof/sufficiency of the evidence argument. It is from the Board's order dismissing that Aisin appeals.

STANDARD OF REVIEW

The Board's dismissal of Aisin's appeal due to Aisin's failure to timely name Rose's attorney as a party to the appeal is a question of law and, as such, is subject to *de novo* review. See *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky.App. 1999).

ANALYSIS

At the outset, we note that the award of attorney fees is within the discretion of the trier of fact. *King v. Grecco*, 111 S.W.3d 877, 883 (Ky.App. 2002); *Dingus v. FADA Service Co., Inc.*, 856 S.W.2d 45, 50 (Ky.App. 1993). Having reviewed the evidence filed by the parties during both the initial and reopening litigation, we do not believe that the ALJ abused his discretion.

That being said, this case is controlled by *Peabody Coal Co. v. Goforth*, 857 S.W.2d 167 (Ky. 1993). In *Goforth*, the ALJ determined that Peabody Coal Co. (Peabody) had unreasonably defended Goforth's action to obtain payment of medical expenses. Therefore, the ALJ ordered Peabody to pay Goforth's attorney fees and costs. Peabody did not appeal the ALJ's underlying award of medical expenses, but did appeal the ALJ's award of attorney fees. Peabody named the ALJ, the Board, Goforth, and the

Special Fund as parties to the appeal; however, it failed to name Goforth's attorney. The Supreme Court of Kentucky held that, "where an attorney's fee has been awarded pursuant to KRS 342.310 . . . the attorney is a necessary party to an appeal concerning whether the application of KRS 342.310 was proper." *Goforth*, 857 S.W.2d at 170. Although Aisin recognizes the obvious parallels between this case and *Goforth*, Aisin argues, in essence, that it substantially complied with the regulations and any deficiency should be excused. In support of this argument, Aisin notes that attorney Robinson had notice of the appeal and of the attorney fee issues that Aisin was raising prior to the expiration of the time to file an appeal. Because she had such notice, according to Aisin, attorney Robinson suffered no prejudice and Aisin should have been permitted to amend its notice of appeal.

Aisin cites *Hutchins v. General Elec. Co.*, 190 S.W.3d 333 (Ky. 2006), as being supportive of its position. In *Hutchins*, the appellant failed to name the Board as a party to its appeal to this Court. This Court dismissed the appeal, holding that the Board was an indispensable party. The Supreme Court reversed this Court holding that KRS 342.290, which gives this Court jurisdiction to review opinions of the Board, does not require an appellant to name the Board as a party. In doing so, the Supreme Court held that, although CR 76.25(4)(a) requires an appellant "to designate the Board as an appellee, the rule's function is not to make the Board an indispensable party but to require the appellant to serve the Board with a copy of the petition." *Hutchins*, 190 S.W.3d at 337.

Hutchins is distinguishable from the case herein. The issue in *Hutchins* was whether the Board was an indispensable party not whether a party's attorney was an indispensable attorney. As the Supreme Court held in *Goforth*, an attorney is an indispensable party to any issues regarding the award of attorney fees. Therefore, there is no question that attorney Robinson is an indispensable party.

Having determined that attorney Robinson is an indispensable party, we must determine whether the failure to timely join her to this appeal can be excused. We hold that it cannot. As noted by the court in *Hutchins*, "[a] policy of strict compliance governs the time within which an appellant must invoke the court's jurisdiction, naming all indispensable parties." *Hutchins*, 190 S.W.3d at 337. *See also Johnson v. Smith*, 885 S.W.2d 944, 950 (Ky. 1994); *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990). Because Aisin did not timely join Rose's attorney, an indispensable party, the Board correctly dismissed Aisin's appeal as to any attorney fee issues.

However, Aisin's failure to name Rose's attorney as a party to its appeal is not fatal to the entire appeal. As noted above, Aisin raised two issues on its appeal to the Board. Only the attorney fee issue is dependent on attorney Robinson being named as a party. A determination of whether the ALJ's opinion regarding Rose's entitlement to medical expenses is not dependent on Robinson being a party. Therefore, the Board's summary dismissal of Aisin's appeal in its entirety was in error. Because the Board did not address Aisin's burden of proof/sufficiency of the evidence argument, we remand this matter to the Board for a finding or findings on that issue.

CONCLUSION

The Board correctly dismissed Aisin's appeal regarding the ALJ's award of attorney fees due to Aisin's failure to timely name Rose's attorney as a party to its appeal. However, the Board incorrectly dismissed Aisin's appeal regarding the ALJ's findings with regard to the underlying medical fee dispute. Therefore, we affirm the Board as to any issues regarding the award of attorney fees. However, because the Board failed to address the issues raised by Aisin with regard to the underlying medical fee dispute, we remand with directions for the Board to consider all such issues.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Phyllis L. Robinson
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