OPINION ENTERED: October 12, 2012

CLAIM NO. 200801113

KELLY GRIFFITH PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

TY COLWELL;
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE;
RONALD LAMB d/b/a RON'S ELECTRIC;
and UNINSURED EMPLOYERS' FUND RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Kelly Griffith ("Griffith"), the owner of Auto Connections, appeals from the opinions rendered April 13, 2010, and May 29, 2012 by Hon. Chris Davis, Administrative Law Judge ("ALJ") finding him to be the statutory employer of Ty Colwell ("Colwell"). In the first

opinion, the ALJ determined Colwell was an employee of Ron Lamb d/b/a Ron's Electric, or Ron's Residential Services ("Ron Lamb"), who had no workers' compensation insurance in effect on September 20, 2007, the date of injury. The ALJ determined Griffith was a general contractor on the building project for which he hired Ron Lamb as the electrical subcontractor. Because Ron Lamb had no workers' compensation coverage in effect at the time of the injury, the ALJ found Griffith was Colwell's statutory or third party employer. The ALJ further determined Colwell was entitled to medical treatment, inclusive of surgery, and temporary total disability ("TTD") benefits subsequent to the surgery. Griffith did not file a petition for reconsideration after that determination. Rather, he filed an appeal which was dismissed by this Board in an opinion entered August 5, 2010 when it was determined the ALJ's decision was interlocutory. Griffith also appeals from the ALJ's July 3, 2012 order denying his petition for reconsideration.

On appeal, Griffith argues Ron Lamb was an independent contractor. Griffith also argues the ALJ erred in finding him to be a statutory employer pursuant to KRS 342.610(2) or KRS 342.700(2). We affirm.

Colwell testified by deposition on December 2, 2008 and at the hearings held February 24, 2010, and April 18, 2012. Colwell is a resident of Lancaster, Kentucky. He was born on September 2, 1975, and is a high school graduate with no additional schooling or vocational training. His work history includes working as a farm laborer, factory laborer, machine operator, electrician's helper, and satellite dish installer. He currently works for a satellite dish installation company managing several installers.

Colwell began working for Ron Lamb in mid to late July 2007. He described his work there as consisting of installing wall plugs, wall switches, ceiling fans, and lighting. In addition to working as an electrician's helper, he also occasionally performed some farm labor for Ron Lamb. According to Colwell, Ron Lamb provided the job, paid him by the hour, and provided virtually all of the tools.

On September 20, 2007, Colwell was working at a jobsite in Junction City, Kentucky, where Ron Lamb was finishing a wiring job for a building Griffith was constructing to house a car lot known as Auto Connections. As he was climbing an extension ladder to pull wire from a panel box in the attic, the ladder slipped, causing him to

fall. As he fell, he grabbed a piece of metal which punctured both wrists and the middle finger of the left hand cutting the flexor tendon. As a result of this accident, he can no longer flex his left middle finger.

At the time of the accident, he was working with Jason Lamb, Ron Lamb's son. He and Jason Lamb tied their shirts around his wrists in an attempt to stop the bleeding. Jason Lamb then drove him to the emergency room in Danville, Kentucky. At the emergency room, Ron Lamb advised Colwell he had no workers' compensation insurance, but he would take care of the bills. Based upon this assurance, Colwell initially advised the medical providers he had been injured at home. Ron Lamb's wife drove Colwell to several medical appointments, and paid for some office visits.

Colwell underwent surgeries to the left middle finger on September 24, 2007 and October 15, 2007, both performed by Dr. Warren Breidenbach, with Kleinert & Kutz. A third surgery was recommended prior to the April 13, 2010 opinion, but Colwell could not afford to have it performed. After the ALJ rendered the opinion ordering the Uninsured Employers Fund ("UEF") to pay medical benefits, three additional surgeries were performed by Dr. Breidenbach, and Dr. Tuna Ozyurekoglu, also with Kleinert & Kutz. Colwell

stated he still has no function in the left middle finger despite these additional surgeries.

Subsequent to the second surgery, Colwell returned to work for Ron Lamb until February 28, 2008. After leaving his employment with Ron Lamb, Colwell worked briefly as a foreman for a remodeling contractor, and later began installing satellite dishes. Since the additional surgeries, Colwell is unable to climb ladders, install satellite dishes or work as an electrician's helper due to his finger being fused rendering it immobile.

Ron Lamb testified by deposition on February 23, 2009, and at both hearings. He resides in Hustonville, Kentucky, where he operates Ron's Residential Services providing electrician services. This entity is an unincorporated sole-proprietorship. Ron Lamb stated he hired Colwell in August 2007 to perform farm labor, and to occasionally assist with electrical work as needed. He paid Colwell ten dollars per hour for his work. Sometimes Colwell was paid in cash. On other occasions, he was paid by check from either the farm account, the personal account, or the residential services account, depending upon which had the greater balance. Ron Lamb acknowledged Colwell returned to work in early November, 2007, and continued to work for him until February 28, 2008.

Regarding the work at Auto Connections, Ron Lamb had been contacted by Griffith to complete a wiring job which had been initiated by another electrician. The job required hanging lights, installing plugs and switches, finishing panel boxes, and running service wire. Griffith did not hire a general contractor, so Ron Lamb reported directly to him.

Ron Lamb was not present at the worksite at the time of the accident, but he did not dispute the occurrence of the injury. He was called by his son, Jason Lamb who provided the details. He then met Jason Lamb and Colwell at the hospital. He advised Colwell he had no workers' compensation insurance coverage. He stated Colwell returned to work around the first of November 2007. He provided neither a 1099 nor a W-2 to Colwell for the work he performed.

Ron Lamb stated he notified Griffith of the accident. He further stated his contract with Griffith was oral, not written.

Griffith testified by deposition on September 21, 2009, and at the two hearings. He owns and operates a used car lot known as Auto Connections, located in Junction City, Kentucky. He built a new building for his dealership in 2007. Rather than hiring a general contractor, he hired

various contractors to perform different tasks necessary for the construction of the building in order to save ten to fifteen percent in construction costs. The building was constructed for his business purpose, not on behalf of another individual or entity.

During the construction process, Griffith hired an electrical contractor to perform the electrical work, who was unable to complete the job. Griffith then hired Ron Lamb to finish the job. He provided no direct supervision of the job. Likewise, he did not provide any tools or ladders. After Colwell's accident, Auto Connections filed the necessary paperwork to become a limited liability company. At the time of the accident, Auto Connections was not incorporated or organized in any formal business structure.

Ron Lamb notified Griffith of Colwell's injury, and advised he would take care of everything. Griffith did not follow up because he felt he had no responsibility. Griffith did not require any of the contractors he hired to provide proof of workers' compensation insurance coverage.

In the opinion rendered April 13, 2010, the ALJ found Colwell was Ron Lamb's employee, and the only issue preserved for appeal then, as now, pertained to whether Griffith bears any responsibility for payment of the claim

as a statutory or up-the-ladder employer. The ALJ specifically found as follows:

> FINDINGS OF FACT AND CONCLUSIONS OF LAW
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> 4. The issues to be decided are extent and duration; application of the multipliers; up-the-ladder employer; coverage; medical expenses; underpayment of temporary total disability benefits, as to dates; failure to follow medical advice; failure to meet the definition of an employee; and average weekly wage. As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc., v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985).
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> The Administrative Law Judge has carefully reviewed the evidence, statutes, and applicable case law, as well as the parties' arguments. To begin with, the medical evidence is clear and uncontradicted. Namely the Plaintiff requires a further surgery. Both Dr. Breidenbach and Dr. Sajadi have recommended the surgery. The Plaintiff has made it clear that he wishes to have the surgery, if it can be paid for. By operation of this decision it will be paid for and thus he will have the surgery, if he does not change his mind. He will also be awarded TTD from the date of the surgery through the date he reaches

maximum medical improvement or returns to work. The claim will be placed in abeyance until such time as he reaches maximum medical improvement.

The Plaintiff was working for Ron Lamb on the date of injury. He was working as an electrician's helper. The Act makes no distinction based on the average number of weekly hours an employee works nor if he is more customarily employed in agriculture nor if his employer previously informed him he was [sic] did not have workers' compensation coverage. The Plaintiff is clearly covered by the Act and meets the definition of an employee. KRS 342.650(6) can not be interpreted to include a constructive opt-out. It must be proactive and freely given.

The only real issue which bears closer examination in this claim is whether or not Kelly Griffith qualifies as an up-the-ladder employer. The undersigned will first note that liability for general contractors when an employee of an uninsured sub-contractor is injured is statutory. If Kelly Griffith is determined to be a general contractor and Ron Lamb, d/b/a Ron's Electric, is determined to be a sub-contractor of Kelly Griffith for the purposes of this claim it is not otherwise necessary to prove that the Plaintiff was the legal or effective employee of Griffith, nor is it necessary to show Griffith's customary work was neither [sic] electrical nor building.

In this claim Griffith, by his own uncontradicted testimony, was in the process of constructing his own building and place of business to sell cars. To that end he intentionally chose to not retain or hire a general

contractor. By his own admission he chose to act as his own general contractor. (Hearing Transcript, 78-79) He did this in order to save the 10-15% surcharge that he believed a separate general contractor would charge. To further this end he contacted multiple sub-contractors and had them perform work for him in furtherance of the construction of his building.

In other words, and regardless of whether or not this is the first and last time he will ever do such a thing, he did everything that a general contractor would do to construct a building. Further, he knowingly and intentionally was acting in the place of a general contractor as a business decision to reduce his costs. The undersigned can accept that Griffith acted in good faith and knows he strenuously objects to even being involved in this claim. Nonetheless, given the statute and the facts it is clear that Griffith was acting, within the meaning of the Workers' Compensation Act, as a general contractor. He is therefore liable under the Workers' Compensation Act for the benefits payable to the Plaintiff.

. . .

The Plaintiff is covered by the Act. He was an employee of Ron Lamb and Ron Lamb was the sub-contractor for Kelly Griffith. First Ron Lamb, and then Kelly Griffith is responsible for the payment of any and all awarded benefits. If either Ron Lamb or Kelly Griffith does not or can not make payment of awarded benefits the Plaintiff shall file the appropriate motion to Order the UEF to make payment. In all cases in the section "Order" below, the reference to the

> Defendant-Employer shall mean Ron Lamb and/or Kelly Griffith and, if necessary, following the appropriate motion and Order, as above, the UEF.
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> The surgery recommended by Dr. Breidenbach is found to be work-related, reasonable and necessary and compensable. The Defendant shall pay for it. The Plaintiff shall also be entitled to TTD from the date of the surgery through the date either reaches maximum medical improvement or returns to work, at a rate of $246.67. This claim is placed in abeyance. All parties shall file status updates every sixty days. Any party may move to remove this claim from abeyance when the Plaintiff reaches maximum medical improvement or when otherwise appropriate.
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> (Emphasis added)

As noted above, Colwell subsequently underwent three surgeries, none of which provided any additional flexibility of the left index finger. The only medical evidence of record pertaining to permanent impairment is the August 17, 2011 note of Dr. Ozyurekoglu who determined Colwell retains a 5% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

In his opinion rendered May 29, 2012, the ALJ found as follows:

> The Plaintiff has filed a claim alleging an injury to his left hand.

An Interlocutory Opinion was issued on April 13, 2010. Since this claim was removed from abeyance a Benefit Review Conference and a Formal Hearing were held on April 18, 2012. Both parties were represented by counsel.

The issues for adjudication are benefits per KRS 342.730, including temporary total disability benefits; and uncontested/unpaid medical bills. The issues decided by the Interlocutory Opinion are preserved for appellate purposes.

. . .

In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.

Although the parties have listed the contested issue of contested/unpaid medical bills the undersigned is unaware of any unpaid medical bills nor of any medical fee dispute being filed in this claim since the April 13, 2010 Interlocutory Opinion. As such there should not be any contested or unpaid medical bills. It maybe[sic], as the Plaintiff argues, that medical bills incurred prior to the Interlocutory Award are unpaid but those bills are, in fact, compensable. The only reason they were excluded from the Interlocutory Award was due to the non-appealable nature of that award.

On the issue of extent and duration the only evidence of record comes from Dr. Ozyurekoglu. Dr. Ozyurekoglu has assigned a 5% impairment rating and assigned no restrictions and specifically states

that the Plaintiff could return to regular duty. Thus the Plaintiff's permanent disability award shall be based on the 5% rating, without multipliers or enhancements. I note that the Plaintiff has testified that he cannot return to the type of work done on the date of injury. However, especially without medical evidence to support this position, I am not persuaded that this is so.

The final issue to be resolved by this opinion is the issue of past due temporary total disability benefits. At the time of the Interlocutory Award the undersigned did not award past due TTD in recognition of the fact that an Interlocutory Award is non-appealable and should be constructed as narrowly as possible. However, I find that the evidence as a whole overwhelmingly demonstrates that in addition to the TTD the UEF has paid the Plaintiff is entitled to TTD, at a rate of $246.67, from September 20, 2007 through December 1, 2007. However, pursuant to the Plaintiff's testimony he was paid wage continuation at a rate of $200.00 per week, for seven weeks, during this period and the employer shall receive a credit in that amount.

However, I also note that he testified at the most recent hearing that he returned to work in early July, 2011. Therefore, he was overpaid TTD since he was paid through August 5, 2011. As it remains his burden to prove entitlement to TTD his vague testimony that he returned to work in early July, 2011 will be construed as July 1, 2011.

The Plaintiff's permanent partial disability award shall be $370.00 (AWW) x 2/3 (workers' compensation rate) x

> .05 (impairment rating) x .65 (grid factor) = $8.02 per week, for 425 weeks, from September 20, 2007, and excluding all periods of TTD. He is also entitled to all past, present and future work-related and reasonable and necessary medical expenses for the work-related left fingers and hand.

Griffith filed a petition for reconsideration on June 11, 2012, arguing the ALJ erred in determining he is an employer with up-the-ladder liability pursuant to KRS 342.610(2) and KRS 342.700(2). Griffith also argued the ALJ erred in determining he was a contractor for purposes of the Kentucky Workers' Compensation Act. The petition was overruled by Order entered July 3, 2012.

KRS 342.610(2) states as follows:

> (2) A contractor who subcontracts all or any part of a contract and his or her carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his or her carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:
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> > (a) To have work performed consisting of the removal, excavation, or drilling of soil,

> rock, or mineral, or the cutting or removal of timber from land; or
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> (b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

KRS 342.700(2) states as follows:

(2) A principal contractor, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any one (1) of his intermediate or subcontractors and engaged upon the subject matter of the contract, to the same extent as the immediate employer. Any principal, intermediate, or subcontractor who pays the compensation may recover the amount paid from any subordinate contractor through whom he has been rendered liable under this section. Every claim to compensation under this subsection shall in the first instance be presented to and instituted against the immediate employer, but the proceedings shall not constitute a waiver of the employee's rights to recover compensation under this chapter from the principal or intermediate contractor nor shall the claim be barred by limitations, if the claim is filed against the principal or intermediate contractor within one (1) year after a final unappealed order has been rendered by an administrative law judge determining that immediate employer has insufficient security to pay the full and maximum benefits that

> could be determined to be due him under this chapter. The collection of full compensation from one employer shall bar recovery by the employee against any other. But he shall not collect from all a total compensation in excess of the amount for which his immediate employer is liable. This subsection shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are under his control otherwise or management.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). To that end, an ALJ may even reject unrebutted medical testimony, so long as he adequately sets forth his rationale for doing so. *See* Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540 (Ky. App. 1985); Collins v. Castleton Farms,

Inc., 560 S.W.2d 830 (Ky. App. 1977). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We do not believe the ALJ erred in finding Colwell to be Griffith's statutory employee. It is without dispute Colwell was injured in the course and scope of his employment as an electrician's helper for Ron Lamb on September 20, 2007, at Griffith's construction project. Griffith had opted to serve as his own general contractor on the project. Effectively Griffith was wearing two hats on the date of the accident. First, he sold cars through his business known as Auto Connections. Second, he was a general contractor on a construction project. By undertaking the role of general contractor, albeit for a building he was constructing for himself, Griffith availed himself to both the protections and liabilities of being a statutory or up-the-ladder employer. To rule otherwise would circumvent the purpose of the Kentucky Workers' Compensation Act.

The purpose of KRS 342.610 is "to discourage a contractor from subcontracting work that is a regular or recurrent part of its business to an irresponsible subcontractor in an attempt to avoid the expense of workers' compensation benefits." General Electric Co. v. Cain, 236 SW3d 579, 585 (Ky. 2007). Griffith admitted he made no inquiry as to whether subcontractors on his project maintained the requisite workers' compensation coverage. Therefore no safeguards were in place to ensure workers injured on the project would be provided for in case of injury.

The question of whether a particular contractual relationship satisfies KRS 342.610 requires a case-by-case analysis. The analysis must include an examination as to the specific relationship between the alleged contractor and subcontractor and determining whether, pursuant to that statute, the alleged subcontractor has performed work "of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of the contractor." Id.

In Cain, supra, the Kentucky Supreme Court instructed that factors relevant to making the determination include the contracting business's "nature, size, and scope as well as whether it is equipped with the

skilled manpower and tools to handle the task the independent contractor is hired to perform." Cain at 588. Even if an alleged contractor may never perform the job the subcontractor is hired to do with its own employees, it is still a contractor under KRS 342.610(2)(b) if the job is one that is usually a regular or recurrent part of its trade or occupation. *See* Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 SW2d 459, 462 (Ky. 1986).

While installation of electrical wiring may not be part of the regular and recurrent activity of the selling of cars, it certainly is required of building construction.

KRS 342.610(2)(b) provides a person who contracts with another to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor and such other person a subcontractor. This section was enacted to discourage owners and contractors from hiring financially irresponsible subcontractors and thus, eliminate workers' compensation liability. Tom Ballard Co. v. Blevins, 614 S.W.2d 247 (Ky. App. 1980); Fireman's Fund Ins., supra.

Because Griffith opted to serve as the general contractor on a construction project, we do not believe the ALJ erred in determining he was Colwell's statutory or up-the-ladder employer. The ALJ's finding of up-the-ladder liability is precisely why KRS 342.610(2) was enacted.

Accordingly, the opinions rendered by Hon. Chris Davis, Administrative Law Judge, on April 13, 2010, and May 29, 2012, as well as the order on reconsideration entered July 3, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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