OPINION ENTERED: April 17, 2012

CLAIM NO. 200600207

UNINSURED EMPLOYERS' FUND PETITIONER

VS. **APPEAL FROM HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE**

STEPHEN R. COLLINS
GRIMES ENTERPRISES, II, LLC
GENE R. TOMLIN TRUCKING
AND BROKERAGE, INC.
MAVERICK TUBE CORPORATION
PEOPLEASE CORPORATION
and HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

and

GENE R. TOMLIN TRUCKING
AND BROKERAGE, INC. CROSS-PETITIONER

VS.

UNINSURED EMPLOYERS' FUND
STEPHEN R. COLLINS
GRIMES ENTERPRISES, II, LLC
MAVERICK TUBE CORPORATION
PEOPLEASE CORPORATION
and HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE CROSS-RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
VACATING IN PART, AND REMANDING

* * * * * *

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

STIVERS, Member. The Uninsured Employers' Fund ("UEF") appeals from the February 4, 2010, "Opinion and Order on Bifurcated Issue," the orders ruling on petitions for reconsideration dated April 1, 2010, June 28, 2010, August 10, 2010, and September 21, 2010, and the November 18, 2011, "Final Opinion and Order" rendered by Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ"). Gene R. Tomlin Trucking and Brokerage, Inc. ("Tomlin") filed a protective cross-appeal.

Stephen R. Collins' ("Collins") Form 101 alleges Collins sustained a February 16, 2004, injury while driving a truck for Grimes Enterprises, LLC. ("Grimes").[1] Because Grimes could not produce proof of workers' compensation coverage in Kentucky, the UEF moved, pursuant to KRS 342.610(2), to join Tomlin of Hayti, Missouri and Maverick Tube Corporation ("Maverick") of Union, Missouri. Thereafter, Tomlin filed a motion to join PeopLease Corporation ("PeopLease") as a party to the action alleging it may have up-the-ladder liability pursuant to KRS

[1] A May 8, 2008, order was entered by the ALJ joining Grimes Enterprises, II, LLC as a party. In a June 4, 2008, order, the ALJ permitted the amendment of Collins' Form 101 to reflect Collins' actual employer was Grimes Enterprises, II, LLC. We will also refer to Grimes II as ("Grimes").

342.610(2) and maintained workers' compensation coverage for the alleged injury. Although we find no order in the record joining PeopLease as a party, counsel for PeopLease, as insured by Providence Property and Casualty Insurance Company ("Providence), entered an appearance, filed a Form 111, and participated in the litigation.

Because the issue on appeal does not relate to Collins' injury and the award, no medical testimony will be discussed herein.

A June 4, 2008, order was entered reflecting the parties agreed the claim would be bifurcated for the ALJ to resolve the issue of which parties have liability pursuant to KRS 342.610(2). A subsequent agreed order dated October 13, 2009, signed by counsel for all parties, reflects the sole issue to be decided "at this level" is "the responsible party for [sic] pursuant to KRS 342.610." The record reflects Collins filed a workers' compensation claim in West Virginia and received an award of medical and income benefits. Voluminous documents were introduced in the record reflecting the temporary total disability ("TTD") benefits, rehabilitation benefits, and permanent partial disability ("PPD") benefits Collins received and was awarded by virtue of his West Virginia worker's compensation claim. The parties also filed the November 3,

2005, award from the West Virginia Workers' Compensation Commission reflecting Collins' award is based on a thirty-one percent partial disability, and the total PPD benefits awarded are $41,333.54.

Collins testified at August 15, 2006, and March 23, 2009, depositions, and at the September 19, 2011, hearing. Collins testified he was employed by Grimes as an over-the-road truck driver. He received twenty-five percent of whatever the truck made. Before the injury, Collins was in Memphis, Tennessee, delivering a load of dry kiln lumber. He was then dispatched to Armorel, Arkansas to pick up a load at Maverick. On February 16, 2004, a load of steel pipes was loaded onto Collins' truck at Maverick to be delivered to Indiana, Pennsylvania. While on the Western Kentucky Parkway, Collins pulled off the road to help another Grimes driver. While standing on the side of the road, Collins was hit and pinned against his truck, and both of his legs were broken. He was transported to the hospital in Leithfield and then to the University of Louisville Hospital where he stayed for two and half weeks. Collins was subsequently transported to West Virginia University Hospital in Morgantown, West Virginia, and then to a rehabilitation center in Morgantown.

Stephen Warner ("Warner"), safety coordinator for Grimes, was deposed on April 2, 2008. Warner testified Grimes had workers' compensation coverage in West Virginia on the date of the accident. He stated Grimes primarily operated in West Virginia but also in Virginia, Maryland, and occasionally in other states. Warner testified Grimes II was the trucking part of Grimes Enterprises, and it mostly transported wood products. Introduced as an exhibit to Warner's deposition was the "Carrier Agreement" entered into between Grimes and Tomlin.[2] Introduced as an exhibit to Warner's deposition was the "Certificate of Coverage" issued by the West Virginia Workers' Compensation Commission reflecting Grimes had workers' compensation coverage under West Virginia workers' compensation law. Also introduced as an exhibit was the "Rate Confirmation" for the load which Collins was to transport from Maverick to Indiana, Pennsylvania. Warner testified Grimes was the carrier, the shipper was Maverick, and the consignee was McJunkin Appalachian. The "Bill of Lading" was also introduced which showed Tomlin as the carrier, and the cargo was to be transported from Maverick in Armorel, Arkansas to Dominion Exploration and Production, Inc., c/o

[2] The exhibits introduced at Warner's deposition were introduced as "Collective Exhibit 1."

McJunkin Appalachian in Indiana, Pennsylvania. The bill from Grimes to Tomlin was also introduced as an exhibit. Regarding the relationship between Tomlin, Maverick, Grimes, and McJunkin, Warner testified as follows:

> Q: Okay, so you were, if I'm understanding, hired – or contracted by Tomlin to get this load from Maverick and deliver it to McJunkin Appalachian?
>
> A: Yes. Tomlin would have been the primary carrier on it, and they [sic] subcontracted it to us.

Warner testified he understood Tomlin was a broker that "contracts with various shippers for freight and then subcontracts that out to different carriers." He did not know whether Tomlin had a fleet of trucks. Warner testified he did not speak with Maverick about this claim. Grimes II contracted with Tomlin and was paid by Tomlin for this particular job.

The January 28, 2009, deposition of Mike Taft ("Taft"), "Senior Analyst, transportation and logistics" at Tenaris was introduced. Taft testified he is employed by Tenaris, a pipe manufacturer, and Maverick is a subsidiary of Tenaris. Taft had been previously employed by Maverick. His current job with Tenaris involves negotiating rates for shipments. Maverick has approximately eight plants spread throughout the United States. Maverick is a manufacturer

of steel pipes, and at the time of Collins' injury, it did not own any trucks nor transport its finished products. Transportation of its finished products was not a regular and recurrent part of Maverick's business. Maverick used truck, rail, or barge for the transportation of its steel pipes. Maverick uses a "Miles web site" which shows the loads Maverick has available to be picked up. Taft testified Tomlin had been a regular carrier "in the nineties and early two thousands." Taft stated Tomlin was a carrier and brokerage firm in 2004. Maverick had an agreement with Tomlin regarding indemnification and insurance which Taft described as follows:

> Q: And what was required of Tomlin Trucking whenever they brokered for a load from Maverick?
>
> A: They had to sign – they had to agree to the Miles web site, which a prerequisite was [sic] current operating authority and insurance.
>
> Q: Okay. Would that include bodily injury and property damage insurance?
>
> A: Yes.
>
> Q: Would that include workers' compensation insurance?
>
> A: Yes.
>
> Q: And did – I'm sorry. Did Tomlin Trucking produce to Maverick proof of worker's compensation and liability or

> bodily injury, property damage insurance?
>
> A: Yes.
>
> Q: Now, I am showing you a document identified with the heading Tomlin Trucking and Brokerage, Inc. It's a carrier agreement dated January 19th—I'm sorry – January 8, 2002. Are you familiar with that document?
>
> A: Yes.
>
> Q: Was that something that was provided to you by Tomlin Trucking and Brokerage?
>
> A: Yes.
>
> Q: Okay. And what does this mean to you and to Maverick?
>
> A: This is required – this is required by us in order for us to offer loads to Tomlin Trucking.

Taft acknowledged Maverick is unaware of the carrier hauling its load until the carrier's truck arrives at its plant. Maverick was not aware Collins, an employee of Grimes, would be picking up the load on February 16, 2004. Once the steel pipes were loaded on the truck and the truck left, Maverick's responsibility ended. Further, Maverick had no control over the hauler's delivery route.

Taft testified Tomlin is required to provide Maverick with a certificate of liability insurance. Exhibit 2 to Taft's deposition, styled "Certificate of

Liability Insurance," reflects the insurer is Providence Property and Casualty Insurance Company of Dallas, Texas.[3] The document lists the following as insured: "PeopLease Corporation/PLC Services, Inc. 1321 Chuck Dawley Boulevard, Ste 102, Mount Pleasant, S.C. 29464 L/C/F Tomlin Trucking and Brokerage, Inc." The certificate holder is listed as Maverick Tube, P.O. Box 248, Armorel, AR 72310. Under the heading "Description of Operations/Locations/Vehicles/ Exclusions Added By Endorsement/Special Provisions" is the following:

> Workers' Compensation coverage is provided by contract to all employees of PeopLease Corporation/PLC Services, Inc. & Tomlin Trucking and Brokerage, Inc. Any employees working under the directive of the mentioned companies are covered by the referenced policy effective 07/01/03.

Taft explained this certificate meant the carrier is authorized to "contract freight with Maverick," and in the event "anything should happen," the carrier has "insurance to cover it." In this instance, Maverick expected Tomlin to indemnify Maverick relative to Collins' accident. Taft testified that at the time of the accident, Grimes was not an approved carrier. When shown the bill of lading, Taft

[3] Also introduced as Exhibit 1 to Taft's deposition is the "Carrier Agreement," executed by Grimes and Tomlin.

acknowledged it was a “non-negotiable freight bill of lading” which was generated at Maverick’s Arkansas plant. Taft testified the load was awarded to Tomlin, and it is “transparent to [Maverick] who [Tomlin] sent in” to pick up and deliver the load. Taft testified Maverick “does not associate with brokers,” however, it will allow the motor carriers to “broker for convenience.” Taft acknowledged shipping its product to the customer is an essential part of Maverick’s regular business. Shipments go out on a daily basis. No certificate of liability insurance was provided to Maverick by Grimes since everything went through Tomlin. Taft testified Tomlin does or did have trucks, and when Tomlin accepts one of its loads, Maverick is not sure whether Tomlin will send one of its trucks or if it will broker the load.

At his March 23, 2009, deposition, Collins testified Grimes received loads from different companies. Collins is familiar with Tomlin because he has seen its trucks on the road and its name on documents when Grimes “would get the load off of Tomlin.” As far as Collins knew, Tomlin has its own trucks. Prior to his accident in 2004, Collins was not familiar with and had no prior dealings with Maverick. He had no knowledge of PeopLease.

Collins acknowledged it was up to him to determine the delivery route.

Collins testified West Virginia paid his workers' compensation benefits which included TTD benefits, medical benefits, and vocational rehabilitation benefits. Collins testified he was awarded the sum of $41,333.54 for a partial disability to be paid monthly in the amount of $1,438.32. Collins acknowledged he settled with the driver of the vehicle that hit him for $50,000.00. Collins also testified he received $100,000.00 from his insurance carrier and $50,000.00 from Grimes' insurance carrier.

The June 12, 2009, deposition of Monica Speer ("Speer"), corporate counsel for PeopLease, was introduced. Speer testified she is located in Mount Pleasant, South Carolina. She indicated the correct name of the business is PeopLease Corporation. PeopLease is a "professional employer organization." Speer described PeopLease's business as follows:

> A: We take -– we specialize in the transportation industry, so we take small to medium size trucking companies, we become the employer of record for any of their drivers, office, mechanics, anyone who is related to the field, then we provide payroll administration, workers' compensation claims administration, human resource, benefits, assistance, garnishments, taxes. We do the

> unemployment, all unemployment. We actually become the employers and then lease back the services of these employees to the small to medium size trucking companies for actual use in the driving of their vehicles.

Speer testified PeopLease leases employees to companies in thirty-four states including Kentucky. PeopLease does not have an office in Kentucky but partners with eight businesses in Kentucky. PeopLease has been doing business in Kentucky since 1999, and in 2004 it had leased employees in Kentucky. PeopLease had a Kentucky workers' compensation insurance policy in 2004 through Providence Property and Casualty Insurance Company, a copy of which was introduced as Exhibit 1. That policy reflects workers' compensation coverage is provided for the following classifications of employees:

> Trucking: Local Hauling Only-All Employees & Drivers
> Trucking: Long Distance Hauling-All Employees & Drivers
> Drivers/Chauffeurs & Their Helpers Noc-Commerical
> Lumberyard New Materials Only: All Other Emp. & Yard, Warehouse, Drivers
> Storage Warehouse-Noc
> Auto Service Or Repair Center & Drivers
> Salesperson, Collectors, Or Messengers-Outside
> Clerical Ofc. Employees Noc

Speer testified that in 2004, Tomlin was a client of PeopLease which she explained meant:

> A: That they had contracted our services to help with the employment practices of their businesses. Again, the same thing that -– as I described before, where we did their payroll administration for any drivers, office workers, mechanics that they had. So we issued the paychecks, did the taxes, paid the taxes, did any garnishments, and provided workers' compensation for those employees that we leased back to them.

Speer indicated her understanding of Tomlin was that it was a "transportation company that also has a brokerage division." She understood a brokerage division to be an entity that obtains freight and attempts to get contracts with various trucking companies to move that freight. Speer acknowledged in 2004, PeopLease was fully aware of the nature of Tomlin's business.

In February 2004, PeopLease provided twenty-one employees to Tomlin which included four over-the-road truck drivers, three local truck drivers, three mechanics, and eleven clerical personnel. All of those employees were employees of PeopLease. Speer described the nature of the agreement between PeopLease and Tomlin as follows:

> A: The terms of the agreement are that we are in a co-employment relationship with Tomlin acting as a supervisor. And so we, again –- let's see. According to the contract, it's an ongoing contract where it's an exchange for payment weekly. We provide the payroll out. We're responsible for the

> payroll taxes, the workers' compensation insurance to those leased employees that we have been notified of. The -– we have the right of direction and control over safety, where they have the responsibility to maintain the safety standards that we have requested to put on them. The – we have the right to hire and fire anyone that we believe's [sic] in the best interest of Tomlinson [sic], though Tomlinson [sic] would have the ability to make recommendations as to what they thought.
>
> Q: You've indicated Tomlinson. It's Tomlin, correct?
>
> A: Tomlin. Oh, I'm sorry. Was I misspeaking?
>
> Q: I just want to make sure we're talking about the same people.
>
> A: Yes. No. Tomlin, sorry. They have – if Tomlin involved themselves in any sort of wrong doing, discrimination, OSHA violations, things like that, those are all the responsibility, not the responsibility of PeopLease's and they would have to reimburse us for any wrongdoing. We are responsible for the withholding taxes. The customer was responsible for per diem, if they offered such to their employees for the correct calculation on the number of days per the DOT regulations. ...
>
> . . .

Speer was unaware of any employees working for Tomlin that were not PeopLease employees. Based upon the agreement, there should not have been anyone working for Tomlin who was not employed by PeopLease. Speer testified

one of PeopLease's employees most likely brokered Collins' load. PeopLease's certificate of liability insurance was attached to Speer's deposition as Exhibit 2. Speer explained PeopLease Corporation and PLC Services, Inc. are both shown as insured on the certificate and are two separate entities. PLC Services, Inc. is an employee leasing company that deals specifically with union employees as well as states like Michigan that "require employee leasing versus professional employer organizations." Concerning the certificate of liability insurance referencing Tomlin as an insured, Speer explained as follows:

> Q: Understood. And what – underneath the insured, it has L/C/F Tomlin Trucking and Brokerage, Incorporated; is that correct?
>
> A: Correct.
>
> Q: What does that mean to you, Ms. Speer, in your position?
>
> A: It means that at the time of this certificate of insurance was issued, that Tomlin Trucking and Brokerage was a client of ours and therefore is also an insured under this policy.

The policy covered the period from July 1, 2003, through July 1, 2004. A certificate of liability insurance was also introduced as Exhibit 3 to Speer's deposition which reflects Tomlin is the certificate holder. That

certificate relates to the “all states policy” Speer described in her deposition which included Kentucky. Both certificates of insurance reflect the same policy number of WC0100010. On Exhibit 2, Maverick is shown as the certificate holder, and on Exhibit 3, Tomlin is shown as the certificate holder. Speer indicated the significance of Maverick being listed as the certificate holder is that Maverick had requested evidence that Tomlin had proof of insurance. Speer denied Maverick was listed as an additional insured on the policy. Regarding the existence of other additional insureds, Speer testified as follows:

> Q: Okay. We’ll mark that as Defense Exhibit Number 3 or Maverick’s Exhibit Number 3. Were there any other additional insureds, to your knowledge, on the policy that we’ve been discussing today?
>
> A: No, there are not.
>
> Q: Okay. So it would just be PeopLease Corporation, PLC Services, Incorporated, and Tomlin Trucking and Brokerage, Incorporated, correct?
>
> A: Well, all right, no. I misspoken [sic]. All of our clients at this time would have been also additional insureds, but they’re not – it was a – none of them were officially listed per amendment to the policy as additional insured. That’s not how this particular policy was written? [sic]
>
> Q: Okay. How was it written to your understanding?

> A: It is only employees of PeopLease Corporation and PLC Services.
>
> Q: Okay.
>
> A: And so no specific clients are listed on the policy at all.
>
> Q: Okay. And then based on your testimony earlier, all employees of Tomlin Trucking and Brokerage, Incorporated, as well as all other clients of PeopLease, are – their employees are PeopLease employees, correct?
>
> A: Correct.
>
> Q: And you're providing workers' compensation insurance, correct?
>
> A: Correct.

Speer testified prior to entering into an agreement, PeopLease investigated Tomlin's operation. Speer testified PeopLease is registered with the Kentucky Department of Workers' Claims as an employee leasing company. Introduced as Exhibit 4 to her deposition was the service agreement entered into between PeopLease and Tomlin. Speer testified one of the benefits of entering into a service agreement with PeopLease is there is no need for Tomlin to maintain a separate workers' compensation policy. Pursuant to the agreement, PeopLease is required to purchase and maintain a workers' compensation policy.

Concerning the employment status of the employees working for Tomlin, Speer testified as follows:

> Q: Okay. And the deposition of Carla Bridges was taken from Tomlin. She testified at the time in 2004 that she was a PeopLease employee and in fact all of the employees of Tomlin were PeopLease employees. Does that sound--[4]
>
> A: Uh-huh. Yes.

Speer defined "assigned employees" under the service agreement as employees of PeopLease that are assigned to the worksite. In this particular case, Tomlin. In the event Tomlin hired an employee without forwarding the employment application to PeopLease, that employee would not be covered under the PeopLease policy. Speer testified PeopLease is not a trucking company but essentially a long-term employment agency. PeopLease does not have a fleet of trucks and "auto liability." Speer testified PeopLease leased over-the-road truck drivers to Tomlin. Speer explained any Tomlin employee injured while providing brokerage service or driving a Tomlin truck would be covered by the workers' compensation policy obtained by PeopLease.

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[4] Although the deposition of Carla Bridges is referenced in Speer's deposition and in briefs to the ALJ, the deposition of Carla Bridges was not filed in the record. Further, in the February 4, 2010, Opinion and Order on Bifurcated Issue there is no reference to the deposition of Carla Bridges.

In the February 4, 2010, Opinion and Order on Bifurcated Issue, the ALJ entered the following findings of facts and conclusions of law:

> **Which party defendant, if any, is liable to the plaintiff under KRS 342.610(2)**? The UEF asserts that each of the other defendants is liable for the plaintiff's workers' compensation benefits as up-the-ladder contractors. Tomlin argues that as merely a broker, it bears no responsibility. Maverick argues that as merely the maker of pipes, it bears no responsibility. Peoplease argues that as the lessor of uninvolved employees to the broker, it bears no responsibility. None of the defendants have offices in Kentucky. Peoplease leases employees to uninvolved businesses in Kentucky. The connection to the Commonwealth is that the plaintiff was operating his truck for Grimes in Kentucky when he was injured.
>
> At first look, the law of the case appears to be KRS 342.610(2), which reads,
>
>> 'A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for payment of such compensation has secured the payment of compensation as provided for in this chapter.'
>
> The UEF suggests that Tomlin, as staffed by Peoplease, is the contractor

who has subcontracted the contract (Maverick) to Grimes, resulting in the injury to the employee (plaintiff). Under that interpretation, neither the contractor nor the contract has any connection to Kentucky. Peoplease had no involvement in the transaction at all. I am entirely persuaded that Peoplease was not mandated to insure employees other than those who worked for Tomlin.

Tomlin argues that Maverick has up-the-ladder liability pursuant to Tom Ballard Company v. Blevins, 614 S.W.2d 247 (Ky. App. 1980). In that case, a coal company was held to have up-the-ladder liability and was required to provide compensation to the injured worker of a company subcontracted to haul coal for it. This argument operates more convincingly against Tomlin, however, since Maverick made its deal with Tomlin and believed that Tomlin would be hauling its pipe. Again, neither Tomlin nor Maverick has any connection to Kentucky.

After much thought, study, and consideration, I believe the most relevant part of KRS 342.610(2) is the last clause quoted above:

> 'unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter.'

Chapter 342 allows for provision at KRS 342.670. In the present case, although the subcontractor (Grimes) did not have Workers' Compensation insurance in Kentucky, it did have full coverage in West Virginia.

KRS 342.670(3) states,

. . .

The purpose of KRS 342.670(2) and other subrogation elements of KRS 342 are to prevent duplication of benefits simply because an employer is liable for compensation in another state as well as Kentucky. Custard Insurance Adjusters, Inc. v. Aldridge, 57 S.W.3d 284, 288 (Ky. 2001). In Aldridge, the Supreme Court held that the Workers' Compensation Board did not have subject matter jurisdiction where the dispute concerned only which insurer was responsible for paying the plaintiff's claim. In that case, an Indiana insurer had erroneously paid a Kentucky claim, and the Supreme Court held that jurisdiction over a dispute between insurance companies rested in Circuit Court. In the course of that holding, the Court indicated the importance of not duplicating benefits.

In the present case, there may yet be questions of disability, so this ALJ will not dismiss on the basis of jurisdiction. Based on an understanding of Aldridge and the subrogation statutes cited therein, however, defendant Grimes' insurer, the State of West Virginia, will be credited by subrogation in every appropriate way.

The proof thus far indicates that the plaintiff has recovered more than $200,000 through the West Virginia Department of Workers' Claims and through civil proceedings, and his medical expenses are fully covered for the indefinite future. Grimes may proceed as if insured and will not be liable to any extent greater than in West Virginia.

> I find, therefore, that the controlling law is KRS 342.670(3); that Grimes' insurer, the State of West Virginia, is for purposes of this case 'deemed an insurer;' and Grimes is therefore 'deemed insured.' Therefore, no up-the-ladder liability pursuit is necessary.
>
> The ALJ then ordered as follows:
>
> In view of the above stated findings of fact and conclusions of law, and this ALJ being otherwise sufficiently advised;
>
> **IT IS HEREBY ORDERED AND ADJUDGED** as follows:
>
> 1. Grimes shall file the appropriate certificate under KRS 342.670(3);
>
> 2. Gene R. Tomlin Trucking, Maverick Tube Corporation, the Uninsured Employers' Fund, Peoplease Corporation, and Providence Property and Casualty Insurance Company are dismissed as parties to this action;
>
> . . .

Collins filed a petition for reconsideration asserting the ALJ erroneously concluded Collins was only entitled to West Virginia worker's compensation benefits, "regardless [sic] whether Kentucky law provides greater protection for injured workers." Collins asserted the ALJ's opinion and order exceeded the scope of the October 13, 2009, "bifurcation order" and is contrary to the mandate of KRS 342.670 "which sets Kentucky benefits as the

baseline for worker's [sic] injured within the state." Collins asserted his benefits are not controlled by West Virginia law and Grimes is uninsured; thus, the UEF was improperly dismissed. Collins requested the ALJ reconsider his decision and vacate the February 4, 2010, Opinion and Order on Bifurcated Issue dismissing the UEF and the up-the-ladder defendants. Collins also requested the ALJ to confine his order to the potential up-the-ladder liability of the contractors pursuant to KRS 342.610(2).

No other petitions for reconsideration were filed. The ALJ entered an April 1, 2010, order stating as follows:

> . . .
>
> The plaintiff first asserts that the Order exceeds the scope of the October 13, 2009 bifurcated order. That order stated, 'The issue to be decided at this level will be the responsible party for pursuant to KRS 342.610.' The UEF responds, correctly, that the plaintiff did not brief that issue. The defendants each did. The ALJ determined that none of the joined parties was [sic] responsible because KRS 342.670 permitted defendant Grimes to be considered 'deemed insured' and the State of West Virginia to be the 'deemed insurer.' The plaintiff asserts that the ALJ misapplied KRS 342.670 and erroneously dismissed the UEF.
>
> The plaintiff asserts that the Commissioner of the Kentucky Department

> of Workers Claims and the Chief Administrative Law Judge have determined that defendant Grimes was uninsured. However this administrative [sic] judge notes that the findings at that level are prima facie [sic] and rebuttable in nature. This administrative law judge is the arbiter of fact, however, and I have found that defendant Grimes is 'deemed insured.' I am persuaded upon further review, however, that the State of West Virginia is not liable to the plaintiff for benefits payable under Kentucky law. Under no [sic] circumstances it was therefore error to dismiss the UEF at this point.
>
> The UEF further asserts that the plaintiff has failed to prove that he has in any way been 'shorted' by the payment of West Virginia benefits, so there is no liability to be imposed. I find that because the claim was bifurcated for decision on the single preliminary issue, I cannot yet make a determination on this argument.

The ALJ ordered the February 4, 2010, Opinion and Order on Bifurcated Issue be amended in the following manner:

> 1. The UEF is not dismissed and remains a party defendant.
>
> 2. Defendant Grimes is uninsured for purposes of Kentucky Workers' Claims liability.
>
> 3. Section V, paragraph 258 page 5 of the interlocutory opinion and order is stricken as it goes beyond the scope of the specific contested issues:

> ‘The proof thus far indicates that the plaintiff has recovered more than $200,000 through the West Virginia Department of Workers’ Claims and through civil proceedings, and his medical expenses are fully covered for the indefinite future. Grimes may proceed as if insured and will not be liable to any extent greater than in West Virginia.’
>
> . . .
>
> 5. All other provisions of the Opinion, Order, and Award dated February 4, 2010 not inconsistent with the above remain in full force and effect.

The UEF filed a petition for reconsideration asserting the ALJ essentially re-wrote his February 4, 2010, Opinion and Order on Bifurcated Issue, and it requested additional findings of fact regarding up-the-ladder liability of the other defendants. It also took issue with the ALJ’s finding PeopLease did not have any involvement in the transaction in question, and requested additional findings regarding PeopLease’s involvement. It maintained the ALJ should find PeopLease has up-the-ladder liability. The UEF asserted the ALJ’s April 1, 2010, order was not served upon Tomlin, PeopLease, and Maverick even though the February 4, 2010, Opinion and Order on Bifurcated Issue was interlocutory. It asserted those

parties should remain on the certificate of service until such time as a final and appealable order is entered. The UEF asked the ALJ to reinstate his original findings since the changes in his findings of fact were impermissible. In response, the ALJ rendered a June 28, 2010, order stating as follows:

> . . .
>
> The UEF asserts as error the failure to serve all parties and maintain them in the certificate of service until the conclusion of proceedings. This error will be corrected.
>
> The UEF also asserts as error that the ALJ seems to have based his dismissals in part on the fact that '[n]one of the defendants have offices in Kentucky.' (Quoting Slip Op. at p. 7) The ALJ only noted the fact that none of the defendants had offices in Kentucky in summarizing the facts. The basis for dismissing the other parties, as stated in the Opinion, was [sic] KRS 342.670.
>
> The UEF also asserts as error the Opinion's findings that 'PeopLease had no involvement in the transaction between Tomlin Trucking and Grimes Trucking and Enterprises II at all' and that 'PeopLease was not mandated to insure employees other than those who worked for Tomlin.' The UEF asserts that the ALJ overlooked the testimony of Monica Speers [sic] that if the contract for the goods hauled by the plaintiff was brokered by a Tomlin employee, that employee was also a PeopLease employee.

The ALJ did not overlook Ms. Speers' [sic] testimony. As stated in the Opinion, PeopLease was not mandated to insure employees other than those who worked for Tomlin, and the plaintiff did not work for Tomlin. PeopLease had no duty to insure the plaintiff. On this point I find no error.

Finally the UEF asks for additional Findings of Fact, since the ALJ has 'essentially re-written his Opinion and Order on Bifurcated Issue.' As the April 1, 2010 Order on Reconsideration does reverse the outcome as to the UEF, the ALJ will explain additional findings of fact upon which the decision would have been based, had the ALJ relied on KRS 342.610(2) rather than KRS 342.670.

Absent the application of KRS 342.670, Tomlin Trucking and Brokerage would have up-the-ladder liability under KRS 342.610(2). Tomlin fit the statutory definition of contractor, and Tomlin engaged Grimes as a subcontractor to carry the goods. Witnesses testified that at the time of the accident Tomlin regularly engaged in both brokerage and interstate trucking. Thus, interstate trucking was 'a regular or recurrent part of the work of the trade, business, occupation, or profession.' (KRS 342.610(2)(b)) of Tomlin. Therefore, absent the application of KRS 342.670 Tomlin would have had up-the-ladder liability.

Maverick, however, would not be liable up the ladder. Although Maverick's goods had to be transported for Maverick to stay in business, Maverick owned no means of transport and always contracted with carriers to

> transport its goods. Maverick had no retail outlets. Maverick was in the business of manufacturing, no [sic] transporting. Maverick's closest business correlate [sic] would be arranging transport [sic]. Maverick had a department for arranging transport [sic] and could not have done business without that. Interstate trucking was not 'a regular or recurrent part of the work of the trade, business, occupation, or profession.' (KRS 342.610(2)(b)) of Maverick. Therefore Maverick had no up-the-ladder liability.
>
> Finally as to PeopLease, this ALJ recognizes that UEF places great weight on the fact that an employee of PeopLease brokered the deal for the goods the plaintiff was hauling on the day of the accident. However, the employees of Tomlin were the employees of PeopLease. Tomlin and PeopLease were not interchangeable entities. PeopLease was engaged in the business of leasing employees, albeit almost exclusively to interstate transportation companies. The employee at issue, however, was the plaintiff. PeopLease had no duty to insure him either under its Service Agreement with Tomlin or under KRS 342.615. Therefore PeopLease had no up-the-ladder liability.

The ALJ ordered that his February 4, 2010, Opinion and Order on Bifurcated Issue be amended as follows:

> 1. The above-stated additional Findings of Fact are added, in summary: absent the application of KRS 342.670, Tomlin Trucking would have up-the-ladder liability; Maverick Tube would not have up-the-ladder liability; and

> PeopLease would not have up-the-ladder liability.
>
> 2. The dismissed parties are added back to the Certificate of Service until the final disposition of the claim; and
>
> 3. All other provisions of the Opinion, Order, and Award dated February 4, 2010 not inconsistent with the above remain in full force and effect.

The UEF and Tomlin filed petitions for reconsideration. The UEF pointed out the April 1, 2010, order effectively abandoned the ALJ's reliance upon KRS 342.670(3), found Grimes to be uninsured and reinstated Collins' claim solely against the UEF. The UEF asserted the ALJ forgot his April 1, 2010, order previously found KRS 342.670 has no application. The UEF urged that once the ALJ corrects the patent error concerning the non-application of KRS 342.670, he must reinstate Collins' up-the-ladder claim against Tomlin. It asserted because the ALJ decided Tomlin has up-the-ladder liability but for the application of KRS 342.670, "it stands to reason" that without the application of KRS 342.670, Tomlin is liable for Collins' benefits. The UEF posited should the ALJ reinstate Collins' up-the-ladder claim against Tomlin and impose liability upon Tomlin, the ALJ should determine

whether Tomlin is covered by the policy provided by Providence. The UEF requested a finding Tomlin is a named insured on the insurance policy issued by Providence and the policy covers Collins' injury without regard to PeopLease's liability.

In its petition for reconsideration, Tomlin asserted it was error for the ALJ to find it fit "the statutory definition of contractor." Tomlin argued it "served solely as a broker matching Maverick with Grimes," and the ALJ erred in finding it regularly engaged in interstate trucking. Tomlin maintained it had no Kentucky employees and no worker's compensation insurance in Kentucky; therefore, "it is not subject to the requirements of the Kentucky Workers' Compensation Act." It asserted employees assigned to work for Tomlin are all employees of PeopLease. It maintained there is no up-the-ladder liability based on the fact Grimes is insured through the state of West Virginia.

The ALJ entered an August 10, 2010, order stating as follows:

> This matter comes before the Administrative Law Judge on the petitions for reconsideration of the Order rendered in his claim on June 28, 2010 by the Uninsured Employers' Fund (UEF) and by defendant, Tomlin Trucking Company ('Tomlin') and responses

thereto. The UEF asserts that in the April 1, 2010 Order on Reconsideration, the ALJ 'abandoned his reliance upon KRS 342.670(3), found Grimes Enterprises II to be uninsured, and reinstated the plaintiff's claim solely against the UEF.' In a petition to reconsider that Order, the UEF sought clarification of what the up-the-ladder liabilities would be, absent the application of KRS 342.670(3).

This ALJ answered, in the Order rendered June 28, 2010, that [A]bsent the application of KRS 342.670(3), Tomlin Trucking and Brokerage would have up-the-ladder liability…' (Order at 3). The UEF asserts that because the ALJ has decided not to apply KRS 342.670(3), the plaintiff's up-the-ladder claim against Tomlin must be reinstated. The UEF asserts that no [sic] so doing constituted patent error. Tomlin asserts that finding up-the-ladder liability on its part constitutes patent error.

The June 28, 2010 order made it clear that this ALJ did not abandon reliance on KRS 342.670(3). The purpose of the additional findings of fact in that order was to explain up-the-ladder liability but [sic] -- for KRS 342.670(3). The finding on April 1, 2010 was that the state of West Virginia could not be required to pay additional benefits to the plaintiff. Under KRS 342.670(3), the defendant-employer is still deemed insured, but by an insurer who cannot be required to pay. The defendant-employer is therefore effectively uninsured, making the UEF a necessary party.

The UEF asks for additional finding of fact which the UEF asserts is necessary if Tomlin is an up-the-

> ladder party. Having found that Tomlin is not, no additional findings of fact are necessary.
>
> Tomlin's petition for reconsideration is OVERRULED as beyond the scope of a petition for reconsideration, presenting only a restatement of evidence already considered.
>
> In summary, for clarification, the order rendered April 1, 2010 is amended to reflect the finding that while KRS 342.670(3) does apply, it is recognized that the state of West Virginia is not liable to the plaintiff for Kentucky benefits. Therefore, the defendant, although deemed insured, is effectively uninsured, making the UEF a necessary party defendant.
>
> **AMENDED ORDER**
>
> Therefore, having examined the petitions for reconsideration and responses thereto and being otherwise fully advised, IT IS ORDERED that the April 1, 2010 [sic] is amended as follows:
>
> 1. Para. 2, page 3, is amended to read, 'for the reasons stated above, Defendant Grimes, although deemed insured, is effectively uninsured, making the UEF a necessary party defendant.
>
> 2. All other provisions of the Orders dated April 1, 2010 and June 28, 2010 not inconsistent with the above remain in full force and effect.

The UEF filed a third petition for reconsideration asserting the ALJ's ruling in the August

10, 2010, order "absolutely requires him to rejoin Tomlin Trucking & Brokerage per KRS 342.610(2)." The UEF asserted because Grimes did not secure Kentucky worker's compensation coverage, Tomlin has up-the-ladder liability. The ALJ entered a September 1, 2010, order overruling the UEF's petition for reconsideration.

After conducting a hearing on September 19, 2011, the ALJ entered the November 18, 2011, Final Opinion and Order determining the extent of Collins' occupational disability and awarding PPD benefits. The ALJ stated Collins testified he received from West Virginia a "lump sum PPD" of $41,333.54. Collins also received "$44,168.60 in TTD." Further, the ALJ stated West Virginia "has paid and will continue to pay for [Collins'] medical needs and expenses." The ALJ incorporated by reference the February 4, 2010, Opinion and Order on Bifurcated Issue. The ALJ determined Collins' disability and awarded Collins a weekly benefit of $518.16 for 425 weeks.[5] The ALJ then stated as follows:

> 2. The defendant is entitled to a dollar for dollar credit for PPD paid

[5] Without explanation, in paragraph one of the award, the ALJ erroneously began the award of PPD benefits on May 9, 2003, instead of February 16, 2004, the date of injury. Further, no explanation is provided why Collins shall receive PPD benefits of $184.91 per week beginning September 5, 2005, for a period of 123.66 weeks and thereafter $519.16 per week for 301.34 weeks.

> to the plaintiff under the West Virginia Workers' Compensation settlement, $41,333.54. Therefore, the plaintiff shall receive from the defendant $184.91 per week beginning September 2, 2005 and continuing 123.66 weeks. Thereafter he shall receive $519.16 per week for the remaining 301.34 weeks.
>
> 3. The plaintiff shall be entitled to recover 12% on any due and unpaid benefits thereof.
>
> 4. Defendant/employer shall be entitled to a credit for any such payments heretofore paid.
>
> 5. That the Defendant shall be responsible for the plaintiff's medical expenses pursuant to KRS 342.020 in the event that the State of West Virginia ceases paying.

Significantly, there is no award of TTD benefits, and the award of medical benefits is not in conformity with the statute. Further, the ALJ does not specifically identify by name any defendant that is liable for Collins' benefits. The award merely grants the defendant/employer a credit "for any such payments heretofore paid." No petitions for reconsideration were filed after the November 18, 2011, Final Opinion and Order.

On appeal, the UEF challenges the ALJ's decision on three grounds. First, it asserts KRS 342.670(3) has no application in the case *sub judice*. The UEF maintains since Grimes did not comply with KRS 342.670(3), there was

no reason for the ALJ to discuss KRS 342.670(3). Second, the UEF asserts since KRS 342.670(3) has no application, the ALJ's finding in the June 28, 2010, order ruling on its petition for reconsideration establishes Tomlin has up-the-ladder liability pursuant to KRS 342.610(2). The UEF asserts the August 10, 2010, order, ruling on its petition for reconsideration, found Grimes is effectively uninsured, thus making the UEF a necessary party. It argues since Grimes is uninsured, this is a textbook case of up-the-ladder liability. Third, the UEF asserts PeopLease has up-the-ladder liability arguing as follows:

> Moreover, it really doesn't matter if 'Tomlin and PeopLease were not interchangeable entities', all that really matters is that PeopLease's 'all states' workers' compensation policy covered Tomlin Trucking as per KRS 342.615(4). It may be nothing more than semantics, but given the business relationship between them ('co-employment'), Respondent PeopLease has just as much 'up-the-ladder' liability in this instance as Respondent Tomlin Trucking.

In its "protective cross-appeal," Tomlin asserts the ALJ's finding it would have up-the-ladder liability absent the application of KRS 342.670 is an unnecessary finding. Tomlin asserts the February 4, 2010, Opinion and Order on Bifurcated Issue dismissed it as a party and all other orders did not affect its dismissal. Tomlin also

maintains the ALJ's October 10, 2010, order specifically found it "was not an up-the-ladder party." Since it was found not to be an up-the-ladder party and was dismissed as a party, Tomlin posits it has no grounds to appeal. Therefore, the only issue on appeal is whether the ALJ correctly applied KRS 342.670(3).

Tomlin asserts if the Board disagrees with its position, the claim should be remanded to the ALJ for additional findings on the issue of up-the-ladder liability of the dismissed defendants. Tomlin posits on remand, should any liability be imposed upon any of the dismissed defendants, they should have "full appeal rights." Tomlin also maintains the dismissed defendants cannot be bound by the ALJ's November 18, 2011, award to Collins as they were not parties to that part of the litigation and the issue must be relitigated.

Next, Tomlin asserts it cannot be liable pursuant to KRS 342.610(2) because Kentucky does not have personal jurisdiction over Tomlin. It argues Kentucky's long-arm statute, KRS 454.210(2), does not confer personal jurisdiction over Tomlin. Tomlin maintains it is a Missouri corporation with no Kentucky employees which had no connection to or business in Kentucky. Further, Collins is a West Virginia resident who worked for Grimes, a West

Virginia company. The only connection to Kentucky is that the accident occurred in Kentucky. Therefore, Tomlin "does not fall within the Kentucky long-arm statute."

Tomlin asserts it is not covered by the Kentucky Workers' Compensation Act. Tomlin cites KRS 342.630(1) which defines what constitutes an employer that must comply with the provisions of the Kentucky Workers' Compensation Act. Since it is located in Missouri and has no employees, let alone employees within the state of Kentucky, Tomlin insists it is not a Kentucky employer. Therefore, Tomlin is not subject to the requirements of the Kentucky Workers' Compensation Act.

Tomlin also argues it did not contract to have work performed of a kind which is a regular or recurrent part of its business. Tomlin asserts "it served as an Interstate Commerce Commission regulated property broker for the delivery in question." It maintains Grimes was an "Interstate Commerce Commission regulated motor carrier," and brokers and motor carriers fit into "distinctly different categories with different operating authorities and different right [sic] and duties consistent with those authorities." Tomlin asserts it was not engaged in "motor carrier freight-transportation operations" for deliveries it brokered. Accordingly, Tomlin was not contractually

obligated to Maverick "for the freight-transportation work being performed by Grimes." Tomlin asserts it did not perform the work necessary in order to impose liability pursuant to KRS 342.610(2). It argues it served as a middleman in the "transportation transaction" between Maverick and Grimes.

Tomlin maintains Grimes was fully insured by the state of West Virginia. It argues since Grimes maintained a certificate of coverage, Tomlin did not contract with an uninsured company.

Finally, Tomlin argues since it had no Kentucky employees, was not subject to the Kentucky Workers' Compensation Act, and did not procure worker's compensation insurance in Kentucky, finding it liable under KRS 342.610(2) would serve no purpose since it is uninsured.

Alternatively, Tomlin argues if it is found to be an up-the-ladder contractor, PeopLease and its workers' compensation insurance carrier are responsible for the benefits owed to Collins. Tomlin maintains as an employee leasing company, PeopLease's business operations fall under the provisions of KRS 342.615. As a broker, Tomlin obtained all of its work force from PeopLease through an employee leasing arrangement. Tomlin posits KRS 342.615(4) permits Tomlin, as a lessee, to fulfill its responsibility

to obtain a workers' compensation policy by contracting with an employee leasing company to purchase and maintain the required insurance. Tomlin argues pursuant to its agreement with PeopLease, PeopLease is required to obtain and pay for a policy providing workers' compensation insurance and is responsible for managing workers' compensation claims. Pursuant to the agreement, PeopLease provided a policy of workers' compensation insurance which was issued by Providence and listed Tomlin as the insured. Based on its contract with PeopLease and the insurance policy PeopLease obtained, Tomlin asserts PeopLease and Providence are liable for the benefits owed to Collins. Tomlin maintains the policy issued by Providence requires Providence to pay, on behalf of Tomlin, any benefits due Collins.

In addition, citing Tom Ballard Company v. Blevins, 614 S.W.2d 247 (Ky. App. 1980), Tomlin argues Maverick has up-the-ladder liability pursuant to KRS 342.610(2) as it is in the same position as Tom Ballard Company. In this case, instead of shipping coal, Maverick was required to ship steel pipe. Since Maverick acknowledged shipping its product to customers is an essential and regular part of its business and it would go out of business if its product was not shipped, Maverick

clearly is an up-the-ladder contractor and liable for Collins' worker's compensation benefits.

Because we agree with the UEF, we reverse the decision of the ALJ and remand.

KRS 342.670(3) reads, in relevant part, as follows:

> (3) If any employee is entitled to the benefits of this chapter by reason of an injury sustained in this state in employment by an employer who is domiciled in another state and who has not secured the payment of compensation as required by this chapter; the employer or his carrier may file with the executive director a certificate, issued by the commission or agency of the other state having jurisdiction over workers' compensation claims, certifying that the employer has secured the payment of compensation under the workers' compensation law of the other state and that with respect to the injury the employee is entitled to the benefits provided under that law, and that the benefits to which the employee or his dependents is entitled are at least as great as those to which he would be entitled if the injury occurred and was processed under Kentucky law, under Kentucky coverage. In this event:
>
> (a) The filing of the certificate shall constitute an appointment by the employer or his carrier of the commissioner as his or her agent for acceptance of the service of process in any proceeding brought by the employee or his or her dependents to enforce his, her, or their rights under this chapter on account of the injury;

(b) The commissioner shall send to the employer or carrier, by certified mail to the address shown on the certificate, a true copy of any notice of claim or other process served on the commissioner by the employee or his or her dependents in any proceeding brought to enforce his, her, or their rights under this chapter;

. . .

2. If the employer's liability under the workers' compensation law of the other state is insured, the employer's carrier, as to the employee or his or her dependents only, shall be deemed to be an insurer authorized to write insurance under and be subject to this chapter; however, unless its contract with the employer requires it to pay an amount equivalent to the compensation benefits provided by this chapter, its liability for income benefits or medical and related benefits shall not exceed the amounts of the benefits for which the insurer would have been liable under the workers' compensation law of the other state;

(d) If the total amount for which the employer's insurance is liable under (c) above is less than the total of the compensation benefits to which the employee is entitled under this chapter, the commissioner may, if he or she deems it necessary, require the employer to file security, satisfactory to the commissioner, to secure the payment of benefits due the employee or his or her dependents under this chapter; and

(e) Upon compliance with the preceding requirements of this subsection (3), the employer, as to the employee only, shall be deemed to have secured the payment of compensation under this chapter.

At no time during the pendency of this claim did Grimes comply with KRS 342.670(3). Significantly, after the February 4, 2010, Opinion and Order on Bifurcated Issue, wherein the ALJ, *sua sponte*, ordered Grimes "to file the appropriate certificate under KRS 342.670(3)," no such filing was made by any party. In order to comply with KRS 342.630(3), Grimes must have filed with the executive director a certificate issued by West Virginia Workers' Compensation Commission establishing Collins is entitled to benefits pursuant to the workers' compensation law of West Virginia **and** that the benefits to which Collins is entitled pursuant to West Virginia law are at least as great as those to which he would be entitled pursuant to Kentucky law under Kentucky coverage. There is no such filing. More importantly, no proof was introduced indicating the benefits Collins received in West Virginia are equal to or greater than the Kentucky workers' compensation benefits to which he is entitled. Thus, the ALJ's conclusion KRS 342.670(3) is applicable is clearly erroneous as there is absolutely no evidence supporting such a conclusion.

The February 4, 2010, Opinion and Order on Bifurcated Issue and the subsequent orders ruling on the petitions for reconsideration are confusing and contradictory. Had KRS 342.670(3) been applicable, there

was no reason for the ALJ, in his April 1, 2010, order ruling on the petition for reconsideration, to reverse his previous decision dismissing the UEF as a party. The fact the UEF remained as a party establishes Grimes was an uninsured employer in the state of Kentucky, and KRS 342.670(3) is not applicable. This is further buttressed by the ALJ's finding in the August 10, 2010, order that Grimes, "although deemed insured, is effectively uninsured," which the ALJ determined made the UEF a necessary party defendant. The ALJ's April 1, 2010, and August 10, 2010, orders, in essence, found Grimes to be uninsured in Kentucky. Indeed, in paragraph 2 of the November 18, 2011, Final Opinion and Order, the ALJ ordered "the defendant" is entitled to a credit for the benefits paid by the West Virginia Workers' Compensation Commission. When additional benefits are due pursuant to Kentucky law and a credit is awarded for the benefits paid pursuant to West Virginia law, KRS 342.670(3) is not applicable since the West Virginia benefits are not as great as the Kentucky benefits. Had KRS 342.670(3) applied, Grimes would not be liable for any additional benefits other than those paid by the West Virginia Workers' Compensation Commission and all defendants except Grimes would be dismissed.

We find significant the fact that during these proceedings, none of the parties argued KRS 342.670(3) is applicable. The ALJ should have concluded since Grimes was unable to make the appropriate filing pursuant to KRS 342.670(3), Grimes is an uninsured employer.

Paul Evans v. Kirk Trucking Company, Claim No. 1992-27575, rendered May 21, 1993, lends support to our holding in this case. There, this Board stated as follows:

> Our legislature is acutely aware of the potential for jurisdictional conflict such as arises in the claim sub judice. Legislative policy is revealed in KRS 342.670(3) et seq., which sets forth an elaborate frame work to assure that the employee receives the higher of the benefits as between the two states affording coverage.

In the case *sub judice*, the ALJ's opinion establishes benefits due pursuant to Kentucky workers' compensation law exceed those payable pursuant to West Virginia workers' compensation law; therefore, KRS 342.670(3) does not apply and Grimes is an uninsured employer. Grimes is either a deemed insured or an uninsured employer. It cannot be both. In this case, the record compels a finding Grimes, for the purposes of Kentucky workers' compensation law, is an uninsured employer. Therefore, the dismissal of Tomlin, PeopLease, and Providence is clearly erroneous.

We find ourselves in agreement with the UEF's assertion Tomlin has up-the-ladder liability pursuant to KRS 342.610(2). On page 3 of the June 28, 2010, order, the ALJ set forth the factual basis for his determination Tomlin would have up-the-ladder liability. The testimony from Stevens, Taft, and Speer, as well as the insurance policy purchased by PeopLease, establish long-haul trucking was a regular and recurrent part of Tomlin's business. Significantly, the bill of lading generated by Maverick establishes Tomlin was the contractual carrier of the load hauled by Grimes. The testimony of Taft, Speer, and Collins establishes Tomlin had long-haul trucks, and was a carrier engaged in hauling freight long distances. The policy of insurance purchased by PeopLease, listing Tomlin as an insured, sets forth a portion of the premium was based on "Long Distance Hauling, All Employees and Drivers." The agreement entered into by Tomlin and PeopLease requires PeopLease to obtain a worker's compensation policy covering Tomlin. Further, Speer testified PeopLease leased over-the-road truck drivers to Tomlin. Significantly, Taft testified Maverick only deals with carriers. Consistent with PeopLease's business practices, Speer testified that the drivers who drove for Tomlin were the employees of PeopLease. Tomlin did not

introduce any evidence rebutting the testimony of Taft, Speer, and Collins, or the documentary evidence; therefore, we conclude the evidence in the record compels a finding Tomlin was a long-haul carrier engaged in the hauling of freight which was a regular and recurrent part of its business. Thus, Tomlin has up-the-ladder liability.

We believe the evidence also compels a finding PeopLease has up-the-ladder liability for Collins' benefits. Although PeopLease is an employee leasing company, Speer characterized the relationship between PeopLease and Tomlin as a co-employment relationship with Tomlin acting as the supervisor. Thus, PeopLease as Tomlin's partner is an up-the-ladder contractor and liable for the workers' compensation benefits owed to Collins. Speer's testimony establishes PeopLease had full knowledge of Tomlin's transportation and brokerage business, and it specialized in doing business with entities in the transportation industry, specifically small to medium-sized trucking companies. Speer's testimony establishes when PeopLease enters into an agreement with a trucking company, it actually becomes the employer and "lease back the services of these employees to the small to medium size trucking companies for actual use in the driving of their vehicles." PeopLease is the employer of record, obtains

workers' compensation insurance, and issues all checks payable. By virtue of its agreement with Tomlin, PeopLease was a partner with Tomlin in long-distance hauling of freight; therefore, it also has up-the-ladder liability.

In addition, since Providence provided workers' compensation coverage to Tomlin in Kentucky, it is liable for all Kentucky workers' compensation benefits awarded to Collins not paid by the West Virginia Workers' Compensation Commission. Providence is liable for the Kentucky workers' compensation benefits due Collins over and above the West Virginia workers' compensation benefits, even if PeopLease did not have up-the-ladder liability. The record clearly establishes Tomlin, as an up-the-ladder contractor, had workers' compensation coverage provided by Providence for all of Tomlin's employees and business activities. The policy states "[Providence] will pay promptly when due the benefits required of [you (Tomlin)] by the workers' compensation law." Even though Collins was not an employee of Tomlin, by virtue of being an up-the-ladder contractor pursuant to KRS 342.610(2), Tomlin is liable for Collins' workers' compensation benefits since Grimes was an uninsured employer in Kentucky. Therefore, regardless of PeopLease's status as an up-the-ladder contractor,

Providence is liable for the Kentucky worker's compensation benefits awarded to Collins which are owed by Tomlin.

Concerning Tomlin's cross-appeal, we find no merit in its assertion it is not an up-the-ladder contractor. Since the ALJ erroneously concluded KRS 342.670(3) is applicable, we find no reason to remand to the ALJ for additional findings regarding Tomlin's status as an up-the-ladder contractor. We believe the ALJ's finding in the June 28, 2010, order that but for the provisions of KRS 342.670(3), Tomlin would have up-the-ladder liability sufficiently explains the basis for his determination "Tomlin fit the statutory definition of contractor." Since we find KRS 342.670(3) is not applicable, the ALJ's finding in the June 28, 2010, order that Tomlin fits the definition of a contractor as set forth in KRS 342.610(2) and the reasons provided for that finding therein are supported by substantial evidence.

Concerning Tomlin's assertion that should any liability be imposed upon the dismissed defendants those defendants would have the right to appeal, we agree all parties have the right to appeal our decision. We disagree with Tomlin's assertion the dismissed defendants are not bound by the November 18, 2011, award. However, we emphasize that by law the award must be amended. We point

out the UEF attempted to appeal the February 4, 2010, Opinion and Order on Bifurcated Issue as well as all the orders of the ALJ ruling on the various petitions for reconsideration. Tomlin filed a motion to dismiss maintaining the February 4, 2010, Opinion and Order on Bifurcated Issue and all subsequent orders ruling on the petitions for reconsideration were interlocutory and not final. In a December 7, 2010, Opinion and Order Dismissing, we agreed with Tomlin and dismissed the UEF's appeal. The parties were aware the February 4, 2010, Opinion and Order on Bifurcated Issue was interlocutory, and the ALJ's decision was not final. All parties chose not to participate in the proceedings after being dismissed even though they knew the February 4, 2010, Opinion and Order on Bifurcated Issue was interlocutory and not a final and appealable order. Tomlin has not demonstrated why the extent of Collins' occupational disability must be relitigated.

Likewise, we find no merit in Tomlin's assertion Kentucky does not have personal jurisdiction over it. Although Tomlin asserts it had no employees within the state of Kentucky, the record establishes by virtue of the agreement Tomlin entered into with Grimes for the transportation of "commodities," Grimes had an employee

working in Kentucky on Tomlin's behalf hauling steel pipes from Armorel, Arkansas to Indiana, Pennsylvania. For purposes of KRS 342.610(2), Tomlin is the employer of Grimes' employees in that it caused Grimes, an uninsured employer within the state of Kentucky, to have its employee drive through the state of Kentucky pursuant to an agreement Tomlin entered in with Grimes. Further, we note pursuant to its agreement with Tomlin, PeopLease obtained an insurance policy providing Kentucky workers' compensation insurance which listed Tomlin as an insured. KRS 342.630(1) reads, in relevant part, as follows:

> The following shall constitute employers mandatorily subject to, and required to comply with, the provisions of this chapter:
>
> (1) Any person, other than one engaged solely in agriculture, that has in this state one (1) or more employees subject to this chapter.

We believe the fact that PeopLease obtained Kentucky workers' compensation insurance which listed Tomlin as an insured establishes both parties clearly understood they had potential liability pursuant to Kentucky worker's compensation laws.

Further, we believe Tomlin waived its right to assert Kentucky does not have personal jurisdiction pursuant to the long arm statute, KRS 454.210.

In its Form 111, Tomlin did not assert Kentucky lacked personal jurisdiction and lack of personal jurisdiction is not set forth as an issue in the June 4, 2008, order in which the ALJ listed the stipulations and the issue to be resolved upon bifurcation. Although under the heading "Stipulations," the order provided Tomlin and Maverick "are challenging association with the claim and did not agree with the stipulation," there is nothing in the order indicating Tomlin was asserting the lack of personal jurisdiction. Although Tomlin filed a December 17, 2007, motion to dismiss, it was based on procedural grounds and not on jurisdictional grounds. Finally, in its brief to the ALJ, Tomlin did not argue Kentucky's long-arm statute did not confer personal jurisdiction over it. The first time Tomlin raised the lack of personal jurisdiction and "Tomlin did not fall within the Kentucky long-arm statute" was in its brief to this Board. Thus, we conclude Tomlin has waived the defense of lack of personal jurisdiction. That said, upon review of KRS 454.210, we believe KRS 454.210(2)(a)1 and 7 permits the ALJ to exercise personal jurisdiction over Tomlin. KRS 454.210(2)(a)1 and 7 read as follows:

> (2)(a) A court may exercise personal jurisdiction over a person who acts

> directly or by an agent, as to a claim arising from the person's:
>
> 1. Transacting any business in this Commonwealth;
>
> . . .
>
> 7. Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting;

Pursuant to its agreement with Grimes, we believe Tomlin contracted with Grimes to transact business in the Commonwealth of Kentucky in that Grimes, on Tomlin's behalf, was required to travel through Kentucky in transporting steel pipes from Arkansas to Pennsylvania. Pursuant to that written agreement, by transporting a load of steel pipes in the Commonwealth of Kentucky, Tomlin and Grimes were transacting business in Kentucky. In addition, since PeopLease and Tomlin entered into a contract whereby PeopLease obtained workers' compensation insurance insuring Tomlin in Kentucky, KRS 454.210(2)(7) is applicable and confers personal jurisdiction over Tomlin. Tomlin contracted with PeopLease to obtain workers' compensation coverage, and in contemplation of Tomlin transacting business in Kentucky, PeopLease obtained Kentucky workers' compensation insurance for Tomlin. Although this policy covers all of PeopLease's clients, there is no dispute one

of PeopLease's clients was Tomlin. As a result of the agreement entered into between PeopLease and Tomlin, PeopLease secured Kentucky workers' compensation insurance for Tomlin. In addition, Tomlin's partner, PeopLease, an employee leasing company, was authorized to conduct business as such in Kentucky. Therefore, the ALJ was permitted to exercise personal jurisdiction over Tomlin.

Likewise, we believe Tomlin's argument it is not a Kentucky employer and is not covered by Kentucky worker's compensation law must fail. We find Tomlin's statement that it had no employees let alone employees in the state of Kentucky to be rather disingenuous. There is no question PeopLease leased employees to Tomlin, who worked for Tomlin. Further, PeopLease provided Kentucky workers' compensation insurance for Tomlin's employees. That aside, pursuant to its agreement with Tomlin, Grimes dispatched Collins, its employee, to pick up a load in Arkansas and deliver it to Indiana. When Collins was hurt in Kentucky and Grimes had no insurance, for purposes of Kentucky workers' compensation law, Tomlin stands in Grimes' shoes and is liable for the benefits awarded Collins.

For the reasons previously discussed, we find no merit in Tomlin's contention that as a broker, it did not contract to have work performed in Kentucky which was a

regular and recurrent part of its business. The testimony of Taft, Speer, and Stevens, as well as the insurance policy and bill of lading establish Tomlin was not merely a broker but also engaged in long-haul trucking and freight-transportation which was a regular and recurrent part of its business. Thus, Grimes performed work of a kind which was a regular and recurrent part of Tomlin's trade or business. Tomlin did not rebut the testimony of Taft, Speer, and Stevens that Tomlin had trucks engaging in long-haul freight-transportation. Tomlin's assertion it was merely a broker and not a motor freight-transportation carrier engaged in freight-transportation operations rings hollow.

For reasons previously stated, we find Tomlin's argument that Grimes complied with KRS 342.610(2) and was fully insured in the state of Kentucky to have no merit. For purposes of this claim, Grimes is an uninsured employer and Tomlin has up-the-ladder liability.

We find no merit in Tomlin's argument that because it had no workers' compensation coverage in Kentucky and is uninsured, no purpose is served by finding it liable. Tomlin would have us hold simply because Tomlin has no Kentucky workers' compensation insurance, it cannot be found liable for Collins' injury pursuant to KRS

342.610(2). We find that to be an absurd premise. In light of Tomlin's argument that PeopLease secured a policy which provided workers' compensation coverage in Kentucky for Tomlin and Providence must pay Collins' Kentucky workers' compensation benefits on its behalf, we find Tomlin's argument to be frivolous and bordering on bad faith.

As we have already determined PeopLease has up-the-ladder liability, we will not address Tomlin's argument PeopLease has up-the-ladder liability.

Finally, we find no merit in Tomlin's argument Maverick has up-the-ladder liability. We do not believe the case of Tom Ballard Company v. Blevins, supra, is applicable. In Blevins, the Court of Appeals determined that not only was Tom Ballard Company involved in the mining of coal but a regular and recurrent part of its business involved hauling coal. In Blevins, the Court of Appeals stated as follows:

> There is strong evidence to support the conclusions that appellant contracted with Yates to have work done which was a regular part of its business. Appellant maintains that its business was mining coal and that the hauling of coal was not a regular or recurrent part of its business. Nevertheless appellant paid all of the cost of hauling the coal. Appellant sold the coal at a price that included

> delivery to the facilities of the purchaser and the hauling or delivery to the customer was appellant's responsibility. There was testimony that the mining business would become extinct if the mining companies could not get their product to market. We do not think it was unreasonable for the Board to conclude that the hauling of coal to the customer was a part of appellant's business.

Id. at 249.

Here, Maverick was only engaged in manufacturing product and not in hauling its product to its customers. Delivering its product was not a regular and recurrent part of its business.

The Supreme Court's decision in General Electric Company v. Cain, 236 S.W.3d 579 (Ky. 2007) compels the conclusion Maverick does not have up-the-ladder liability. In General Electric Company v. Cain, supra, the Supreme Court, after citing Larson's Workers' Compensation Law, § 70.06[3] (2006), stated as follows:

> The treatise notes that, "with a surprising degree of harmony," the courts agree on a general rule of thumb that a statute deeming a contractor to be an employer "covers all situations in which work is accomplished which this employer, or employers in a similar business, would ordinarily do through employees." *Larson's, supra,* at §70.06[1].
>
> Work of a kind that is a "regular or recurrent part of the work of the

> trade, business, occupation, or profession" of an owner does not mean work that is beneficial or incidental to the owner's business or that is necessary to enable the owner to continue in business, improve or expand its business, or remain or become more competitive in the market. *Larson's, supra,* at § 70.06[10]. It is work that is customary, usual, or normal to the particular business (including work assumed by contract or required by law) or work that the business repeats with some degree of regularity, and it is of a kind that the business or similar businesses would normally perform or be expected to perform with employees.

Id. at 588.

The transportation of Maverick's products to its customers was not a regular and recurrent part of Maverick's work, trade, business, occupation, or profession. As pointed out by the Supreme Court, a regular and recurrent part of the work does not include work that is beneficial or instrumental to the owner's business or is necessary to enable the owner to continue in business or improve and expand its business. Although Maverick was involved in shipping its product, it was not involved in the transportation of its products; therefore, it has no up-the-ladder liability since Grimes was not a subcontractor of Maverick.

Although none of the parties have raised the wording of the award contained in the November 18, 2011,

Final Opinion and Order, as an issue, this Board is permitted to *sua sponte* reach such an issue even if unpreserved and is compelled to do so now. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

Because the ALJ's November 18, 2011, award is not in conformity with the Kentucky Workers' Compensation Act, with the exception of paragraphs six and seven on page five and the computations of PPD benefits in paragraph one, all remaining paragraphs in the award must be vacated. To begin with, the ALJ failed to award TTD benefits, and his award of medical benefits does not conform to the statute. In addition, the ALJ erroneously initiated the award of income benefits on May 9, 2003, eight months prior to the work injury which occurred on February 16, 2004. Further, the ALJ provided no explanation for the award of $184.91 per week for 123.66 weeks beginning September 2, 2005. Likewise, there is no explanation for the award of $519.16 per week for the remaining 301.34 weeks. Significantly, the award utterly fails to set forth the most basic and the most critical information regarding which defendant or defendants are liable for Collins' income and medical benefits.

Concerning the UEF's appeal and Tomlin's protective cross-appeal, that portion of the February 4, 2010, Opinion and Order on Bifurcated Issue finding KRS 342.670(3) applies and Grimes is "deemed insured" and West Virginia is "deemed an insurer" is **REVERSED**. Further, the ALJ's finding in the February 4, 2010, Opinion and Order on Bifurcated Issue that there is no up-the-ladder liability pursuant to KRS 342.610(2) and order dismissing Tomlin, PeopLease, and Providence as parties is **REVERSED**. The November 18, 2011, Final Opinion and Order, to the extent it incorporates the above provisions of the February 4, 2010, Opinion and Order on Bifurcated Issue, is also **REVERSED**. Further, the April 1, 2010, June 28, 2010, August 10, 2010, and September 21, 2010, orders are **REVERSED** to the extent the orders relate to and affirm the ALJ's determination KRS 342.670(3) applies, Grimes is deemed insured, West Virginia is deemed an insurer, no up-the-ladder liability exists, and Tomlin, PeopLease, and Providence are dismissed as parties. The ALJ's dismissal of Maverick is **AFFIRMED**.

The award contained in the November 18, 2011, Final Opinion and Order, except for the computation of the PPD benefits contained in paragraph one on page four and paragraphs 6 and 7 on page 5, is **VACATED**. This matter is

REMANDED to the ALJ, as designated by the Chief Administrative Law Judge, for entry of an amended opinion, award, and order finding Grimes is an uninsured employer and is primarily liable for all income and medical benefits awarded subject to a credit for all income and medical benefits paid by West Virginia. The ALJ shall find Tomlin and PeopLease have up-the-ladder liability for Collins' income and medical benefits. Providence Property & Casualty Insurance Company, as the insurance carrier providing workers' compensation coverage for Tomlin and PeopLease in Kentucky, is liable for all income and medical benefits in the event Grimes does not pay the income and medical benefits awarded. These parties shall be granted a credit for all income and medical benefits paid by West Virginia. The amended opinion, award, and order shall also provide that "any contractor or carrier who may become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor." KRS 342.610(2). The ALJ shall also dismiss the UEF as a party to this claim.

Further, in the amended opinion, award, and order the ALJ shall determine the period during which Collins is entitled to TTD benefits and enter the appropriate award of

TTD benefits to be paid by Grimes or Providence on behalf of Tomlin and PeopLease with credit to be given for the TTD benefits paid by West Virginia. Since none of the parties have contested the ALJ's computation of Collins' PPD benefits of $518.16, the ALJ shall then award PPD benefits beginning on February 16, 2004, the date of injury, continuing for a period of 425 weeks which shall be paid by Grimes or Providence on behalf of Tomlin and PeopLease. The 425 week award of PPD benefits shall be suspended during any period TTD benefits are awarded. The award shall provide for a credit for all PPD benefits paid by West Virginia or any other defendant liable for the PPD benefits. The award shall provide that Collins is entitled to 12% interest on any due and unpaid benefits. Further, the award shall order that Grimes or Providence as the insurance carrier providing workers' compensation coverage on behalf of Tomlin and PeopLease, shall be liable for all medical benefits pursuant to KRS 342.020 and shall receive credit for all medical benefits paid by West Virginia.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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