

OPINION ENTERED: June 12, 2013

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 AND ORDER
VACATING AND DISMISSING**

* * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. The decision of the Court of Appeals in the above-styled claim rendered April 5, 2013, designated not to be published, is now final. Although the Court of Appeals stated the "Board erred *ab initio* by assuming jurisdiction of the matter," it did not vacate or reverse the Board's decision entered April 17, 2012. In that opinion we affirmed in part, reversed in part, vacated in part, and remanded. We directed as follows:

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.

On appeal, the Court of Appeals concluded the primary issue to be determined on appeal did not arise under the Workers' Compensation Act and dismissed the appeal for lack of subject matter jurisdiction. However, the Court of Appeals cited, in part, the following portions of the ALJ's decision:

The purpose of KRS 342.670(2) and other subrogation elements of KRS 342 are [sic]to prevent duplication of benefits simply because an employer is liable for compensation in another state as well as Kentucky. *Custard Insurance Adjuster, 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. [Emphasis added.]

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 there, 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 that Grimes is therefore "deemed insured." Therefore, no up-the-ladder liability pursuit is necessary.

Opinion and Order on Bifurcated Issue at 7-10.

As noted by the Court of Appeals, based on his conclusions the ALJ then ordered Grimes Enterprises to file the appropriate certificate under the provisions of KRS 342.673 and dismissed Gene R. Tomlin Trucking and Brokerage, Inc., Maverick Tube Corporation, PeopLease

Corporation, and the UEF as parties to the proceedings.¹ Collins then filed a petition contending the ALJ misapplied the provisions of KRS 342.673 and erred by dismissing the UEF. In an order rendered April 1, 2012, the ALJ stated:

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 judge notes that the findings at that level are prima facie and rebuttable in nature. This administrative law judge is 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. . . . 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.

Accordingly, the ALJ's opinion and order reinstated the UEF as a party to the proceedings. As noted by the Court of Appeals, the UEF filed a petition for reconsideration contending the ALJ erred by failing to conclude the dismissed defendants did not have up-the-

¹Significantly, no such certificate has ever been filed in the record.

ladder liability. The ALJ denied the petition for reconsideration.

With regard to the second petition for reconsideration filed by the UEF, the Court of Appeals stated as follows:

In its second petition for reconsideration, the UEF stated that the ALJ had "abandoned his reliance upon KRS 342.670(3), found Grimes Enterprises II to be uninsured," and erred by reinstating Collins's claim solely against the UEF. In an order rendered on August 10, 2010, the ALJ noted the reality that Kentucky could not compel the state of West Virginia to make payments. He explained as follows:

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. (Emphasis added.)

Slip Op. at 10-11.

The Court of Appeals noted a subsequent petition for reconsideration filed by the UEF was also overruled.

It also noted the ALJ conducted a hearing on September 19, 2011, and entered a final opinion and award.

After discussing the Board's opinion and the arguments on appeal and cross-appeal, the Court of Appeals stated as follows:

The parties have not disputed that Collins is entitled to workers' compensation benefits in accordance with the provisions of Kentucky's act. There was no dispute before the ALJ concerning the validity of Collins's claims under our workers' compensation statutes, and the parties agreed to the sums to which he was entitled. That part of the award was not contested by any party. The dispute in these proceedings was the extent to which Collins's rights could be enforced against his employer's carrier - in this case, the fund administered by West Virginia's Workers' Compensation Commission. Consequently, the Board erred *ab initio* by assuming jurisdiction of the matter.

The ALJ undertook a thorough review of the facts and circumstances involved in this matter. There is no dispute that Grimes is the employer of Collins and that it is primarily liable for compensation owed to Collins. There also is no dispute that Grimes secured the payment of compensation through the state of West Virginia, a monopolistic state at the time of the injury. Collins was a West Virginia resident and Grimes a West Virginia employer. Grimes, through West Virginia's state fund, paid medicals; temporary total disability benefits; permanent, partial disability benefits; and vocational benefits. It continues to be liable for

continuing medical benefits. Since Grimes properly secured payment for workers' compensation benefits, there can be no up-the-ladder liability pursuant to the provisions of KRS 342.610(2). The ALJ properly framed and characterized the only disputed issue: can Grimes's carrier be ordered by the Commonwealth of Kentucky to compensate Grimes for additional benefits to which he was entitled under our workers' compensation scheme? And, as the ALJ correctly expressed in his initial order and opinion, he lacked jurisdiction under those circumstances to decide any issue apart from the extent and duration of Collins's disability.

The Board erred by accepting the UEF's mischaracterization of the issue as one implicating an up-the-ladder analysis. We conclude that this is not a dispute governed by the provisions of KRS Chapter 342. Instead, jurisdiction lies in the circuit court.

Slip Op. at 13-15.

Because the Court of Appeals stated the Board erred by "assuming jurisdiction" and by "accepting the UEF's mischaracterization of the issue as one implicating an up-the-ladder analysis," and the dispute was not governed by KRS 342 and jurisdiction lies in the circuit court, we reluctantly conclude we must vacate our opinion and dismiss the appeal and cross-appeal.

The opinion of the Court of Appeals does not deal with many aspects of this Board's opinion which has been

set out herein verbatim. We disagree with the Court of Appeals that this Board does not have jurisdiction of this matter as the ALJ awarded income and medical benefits pursuant to KRS 342. Further, the ALJ left open the question of the UEF's liability to Stephen R. Collins. That said, the Court of Appeals' statement the Board erred by accepting jurisdiction cannot be ignored. Accordingly;

IT IS HEREBY ORDERED AND ADJUDGED based on the language in the opinion of the Court of Appeals the opinion of this Board entered April 17, 2012, is **VACATED** and the appeal filed by the UEF and the cross-appeal filed by Gene R. Tomlin Trucking & Brokerage, Inc., are **DISMISSED** for lack of subject matter jurisdiction.

ALVEY, CHAIRMAN, CONCURS.

FRANKLIN STIVERS, MEMBER
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