Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 26, 2018

CLAIM NO. 201400598

PITTSBURGH LOGISTICS SYSTEM, INC. PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

GARY FIELDS
JABEZ TRANSPORT, LLC
AK STEEL CORPORATION
UNINSURED EMPLOYERS' FUND
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS
* * * * * *

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

STIVERS, Member. Pittsburgh Logistics System, Inc. ("PLS") seeks review of the February 18, 2015, Interlocutory Opinion and Order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), finding PLS and AK Steel Corporation ("AK Steel") have up-the-ladder liability

pursuant to KRS 342.610(2) and ordering them liable for income and medical benefits due Gary Fields ("Fields") in the event Jabez Transport, LLC ("Jabez") fails to pay those benefits. The Order dismissed Uninsured Employers' Fund ("UEF") as a party to the claim and awarded temporary total disability ("TTD") benefits beginning January 14, 2014, and continuing until Fields reached maximum medical improvement ("MMI"). Fields was also awarded medical benefits for the cure and relief of the January 14, 2014, injury. PLS also appeals from the March 25, 2015, Order denying its petition for reconsideration. Significantly, these two orders were made final in the July 26, 2017, Order of the ALJ approving the Form 110 Agreement as to Compensation and the "Agreed Order/Addendum" attached to the Form 110 and in the August 2, 2017, Final Order.

On appeal, PLS seeks reversal of the ALJ's determination it and AK Steel are up-the-ladder contractors pursuant to KRS 342.610(2). PLS also seeks reimbursement from the UEF for all sums it paid to or on behalf of Fields.

Fields was injured on his first day of work for Jabez which, as found by the ALJ, is exclusively a trucking company. Fields had been dispatched to AK Steel's plant in Rockport, Indiana, to haul a load of steel coils to Bootz

Manufacturing in Evansville, Indiana. Fields' Form 101 alleges that while he was on the flatbed trailer chaining down a steel coil, he slipped on ice and fell off the trailer landing on concrete injuring his left and right wrists and left elbow. Surgery was performed on January 16, 2014, by Dr. Jeffrey Been at Hardin Memorial Hospital in Elizabethtown, Kentucky. Dr. Been's post-operative diagnosis was "right distal radius fracture intraarticular three part." The procedure performed was "open reduction internal fixation of a three part intraarticular distal radius fracture." In a February 26, 2014, medical record, Dr. Been diagnosed "right wrist distal radial ORIF and left elbow coronoid fracture, healing."

Fields' Form 101 listed Jabez Transportation LLC, Jason and Jamie Alexander, individually, and the UEF as defendants.[1] Thereafter, the UEF successfully joined AK Steel and PLS as parties to the action asserting they had liability as up-the-ladder contractors as defined in KRS 342.610(2).

The parties agreed to first bifurcate the proceedings for a determination of the relationship between Jabez and Fields. In an Interlocutory Opinion and Order

[1] It was subsequently determined the correct name for Jabez was Jabez Transport, LLC.

dated October 24, 2014, the ALJ found Fields was an employee of Jabez at the time of the work injury.

In a November 13, 2014, Telephonic Status Conference Order and Memorandum, the parties agreed the claim would be further bifurcated for the ALJ to determine whether AK Steel and PLS had up-the-ladder liability as deemed contractors pursuant to KRS 342.610(2).

In his June 13, 2014, deposition, Jason Alexander ("Alexander"), one of the owners of Jabez, testified Jabez was exclusively a trucking company. He explained Jabez would provide the freight service "to move the freight from point A to point B." Jabez did not have a contract with AK Steel. However, in the last couple of years it had primarily hauled steel coils for AK Steel. Concerning PLS's role in Jabez's business transaction with AK Steel, Alexander provided the following testimony:

> Q: . . .
>
> If Jabez doesn't deal directly with AK Steel, there is some company in the middle that Jabez is making the arrangements to haul their steel with?
>
> A: Yes.
>
> Q: Okay. Who is that company?
>
> A: Pittsburgh Logistics.
>
> Q: Is this a company in Pittsburgh, Pennsylvania?

A: Actually, I believe their address is maybe Rochester, but I'm not sure. I would have to –

Q: Pennsylvania?

A: Yes. Yes. It's definitely in Pennsylvania, yes.

Q: Is this the only logistics company that Jabez uses, then?

A: It is now, yes.

Q: And it was on January 14th of 2014?

A: Yes. Yes.

Q: Okay. Do you have a specific contract with Pittsburgh Logistics?

A: I don't know how to answer that because we get what they call "contract rates." You know, they – we bid on lanes from point A – from AK Steel mill to another facility and they'll send us a contract rate, but it – there's no – in their details on how many loads you'll get. There's no details on when you'll get those loads. It's just, if they come available, this is what you'll haul them for.

So there is no contract tying us to Pittsburgh Logistics other than a contract rate that tells us that's what we'll haul the load for, if we choose to haul it. We don't have to haul it. It's just, if it comes available, they offer it to us, and we choose whether to take it or not.

Q: Does this transaction happen all over the computer or only on the computer?

A: Yes.

Q: You're not calling anybody at Pittsburgh Logistics?

A: Very rarely. Most of it's done on the internet or over the computer, but there are – we have numbers to call, you know, if we have an issue with a load, or if, you know, I'm away from the computer, I can call.

. . .

Q: So would Pittsburgh Logistics, as an example, maybe offer lots of loads that your transport company or other transport companies could go in and grab?

Is that how it works?

A: Yes.

Q: Okay. So your job, then, at Jabez would be to go grab whichever ones that your drivers could complete?

A: Yes.

Q: And I assume it would be a pickup or drop-off at AK Steel?

A: Pickup at AK Steel, drop off somewhere else, but, yes.

Q: Okay. Now, when I mentioned a contract, I meant specifically a written contract that you have signed and somebody from Pittsburgh Logistics has signed.

You don't have anything like that, it appears?

A: No. No.

Q: Okay. I assume you have some kind of contracted rate on – an agreement on how much your company will be paid when your drivers are hauling product?

A: Yes.

Q: Okay. Now, does Pittsburgh Logistics do hauling for companies other than AK Steel?

A: I'm not sure on that because, obviously, that's, you know, I guess their business, so to speak. I don't know.

Well, I take that back. Yes, because we've picked up at mills other than AK Steel through Pittsburgh Logistics.

Q: I was curious – and I think that answered the question.

But I was curious if maybe Pittsburgh Logistics is a company owned by AK Steel.

A: No. Pittsburgh Logistics is a third-party logistics company or what, in the trucking industry, we call a "broker," and that's their job, is to – they are paid to move loads by trucking companies for AK Steel or other steel industries, steel mills.

Q: Okay. How would – let's take an example of a one load that you go in and pick it up for one of your drivers.

A: Uh-huh.

Q: One of your drivers then goes to AK Steel, picks up the steel coils, and delivers them somewhere.

A: Uh-huh.

Q: How would Jabez Transportation go about and get paid for that?

A: Once the driver turns in all his paperwork, we process – we bill the

> invoices, and then email or upload to their …
>
> Q: Their?
>
> A: System.
>
> Q: Whose?
>
> A: Oh, I'm sorry.
>
> Q: Pittsburgh's?
>
> A: Pittsburgh Logistics, yes.
>
> Q: All right.
>
> A: We, Jabez Transport, use a factoring company which is – they pay us which is totally separate from AK Steel, totally separate from Pittsburgh Logistics. It's called Comdata or, actually, now it's called Crestmark, C-R-E-S-T-M-A-R-K.
>
> They assume the risk because places like – AK Steel pays Pittsburgh Logistics, but it's usually thirty to sixty days out. Pittsburgh Logistics would pay us in that same time frame, but for us not to have to wait for our money, Crestmark, we send them the paperwork. They pay us now for a fee of 5 percent. Crestmark then bills Pittsburgh Logistics.

Alexander explained that PLS has a website which he characterized as a load board to which Jabez would log in to determine available loads.

The Logistics Service Agreement entered into between AK Steel and PLS was introduced as an exhibit, and it indicates PLS negotiated directly with AK Steel to

contract with carriers to fulfill AK Steel's transportation requirements as set forth in the agreement. AK Steel was to provide office space at its sites for PLS personnel to provide the services required by the contract.

The December 15, 2014, deposition of Thomas Clay Finney ("Finney") was introduced. Finney, the general manager of customer service for PLS, works at AK Steel's corporate headquarters at West Chester, Ohio. Finney explained PLS' business operation as follows:

> Q: Can you explain to the administrative law judge what type of business PLS is?
>
> A: PLS is strictly a broker that is the – for instance, on AK Steel's site we're the conduit between AK Steel and the motor carriers that we tender loads out to to meet the requirements of AK Steel's delivery performance.

Finney's job is to coordinate shipments between AK Steel and other motor carriers. PLS does not employ over-the-road truck drivers nor does it train or educate truck drivers. PLS does not own, operate, or lease any trucks or tractor-trailers. Further, PLS is not capable of performing over-the-road transportation services. Finney testified PLS did not ever maintain, own, operate, or lease trucks or tractor-trailers nor did it provide trucks or tractor-trailers to third parties. PLS does not own

equipment which would be used to facilitate over-the-road transportation services.

Finney testified that over-the-road transportation of goods and items is not a regular, customary, and recurrent activity performed by PLS. Rather, PLS arranges for the hauling of AK Steel's product. Finney estimated there may be six to seven hundred loads of AK Steel product requiring daily transportation. This is accomplished in PLS's main office in Pennsylvania. AK Steel specifies the delivery time but does not designate the type of truck or equipment to be used. PLS does not determine how the cargo is to be loaded or the route to be utilized. It has no contact with the driver. At the time of Fields' injury, PLS was incapable of picking up and delivering the load in question. Finney explained that PLS' sole function is to assist AK Steel in the movement of finished and semi-finished product. Neither PLS nor AK Steel are carriers of a finished product. Rather, third-party carriers provide trucks, trailers, and drivers to haul AK Steel's product. The third-party carrier trains the drivers and provides the equipment to secure and move cargo. PLS and AK Steel provide none of the above. Finney acknowledged AK Steel does not own or operate over-the-road

tractor-trailers to move its product or have drivers to haul its product.

Finney testified that if Jabez had transported the load Fields was dispatched to pick-up and deliver, it would have paid Jabez upon receipt of a bill of lading, and PLS would then submit an invoice to AK Steel. The names of PLS and AK Steel do not appear on the side of any of the carrier's trucks. Finney concluded with the following explanation of PLS's business operations:

> A: Well, PLS is in the logistics business. I wouldn't really classify them in the transportation business such as we're in the logistics. Again, we exist because we have shippers and motor carriers out there that do two different things. PLS is the conduit between that route. The purpose of a broker is to get the network a lot of different motor carriers and different accounts where we can cut down on the line haul and rates of the motor carriers. So that's that whole picture, is the reason why the brokers exist today, is their network capability and relationship of the shippers and motor carriers.

The December 2, 2014, deposition of Larry Sutthoff ("Sutthoff"), the manager of corporate transportation for AK Steel, was introduced. He explained that AK Steel is a supplier of flat load steel. AK Steel's plant in Rockport, Indiana, where Fields was injured, is a finishing mill which receives products from other

manufacturing facilities which produce semi-finished product. Transportation out of the Rockport facility is accomplished either by rail or truck. Sutthoff testified AK Steel owns no tractor-trailer units and does not employ qualified drivers. AK Steel does not move its product using truck drivers in its employ. Sutthoff acknowledged AK Steel has to move its product which is usually steel coil, as a part of its business operation. However, AK Steel has never owned the equipment or employed drivers to transport the product. PLS, a third-party logistics company, obtains the trucking services to move AK Steel's product to another location. Sutthoff testified AK Steel has always used a broker to transport its product unless a customer sends someone to haul the product from AK Steel's plant. Further, AK Steel is not a trucking company in any aspect and does not load, secure, or determine the routes to be used in transporting its product.

The UEF did not offer any testimony in contradiction of the deposition testimony of Alexander, Finney, or Sutthoff. Further, the UEF did not contest the ALJ's finding in her October 24, 2015, Order that Jabez "is engaged in nothing but the trucking business."

In the February 18, 2015, Interlocutory Opinion and Order, after summarizing the testimony of Finney and

Sutthoff, the ALJ entered the following findings of fact and conclusions of law:

> 2. **Findings of fact and conclusions of law.**
>
> Pittsburg [sic] Logistics Systems, Inc. followed by A.K. Steel have "up the ladder" liability pursuant to KRS 342.610(2).
>
> 3. **Evidentiary basis and analysis.**
>
> Moving and shipping goods is a regular and recurrent part of the business of A.K. Steel and PLS. The arrangements used – A.K. Steel Contracting with PLS who in turn provides the jobs to Jabez Transportation – appear to be just the arrangements for which the statute is designed to provide protection to employees since, as stated above, the purpose of up-the-ladder workers' compensation liability is ". . . to discourage a contractor from subcontracting work that is a regular or recurrent part of its business to an irresponsible subcontractor in an attempt to avoid the expense of workers' compensation benefits …" *General Electric Co. v. Cain*, at 585, 587. (citing Elkhorn-Hazard Coal Land Corp. v. Taylor, 539 SW2d 101, 103-04 (Ky. 1976)). PLS and A.K. Steel may not perform the actual truck driving, but it is a job which is a regular and recurrent in the trade. As in *Fireman's Fund*, *supra*, where it was found the work was not ordinarily performed by the up-the-ladder employer but was subcontracted, that PLS and A.K. Steel contract out to others the transportation aspect is of no significance since it is a regular and recurrent part of their businesses.

The ALJ ordered PLS was first liable as a direct up-the-ladder contractor followed by AK Steel. As previously noted, the UEF was dismissed as a party and Fields was awarded TTD benefits and medical benefits. The claim was placed in abeyance while Fields underwent treatment.

In response to the petitions for reconsideration, the ALJ entered a March 25, 2015, Order denying the petitions for reconsideration stating:

> . . .
>
> The next issue is based on the request of Pittsburg [sic] Logistics Systems to convert the interlocutory order to a final and appealable order. There is no basis for such a request; furthermore, the Workers' Compensation Board would not consider the appeal in this case until all issues have been decided at the ALJ level.
>
> The last issue to be addressed in this order is the argument of Pittsburg [sic] Logistics Systems that Plaintiff has not proven his case for interlocutory relief. This claim is also without merit as the parties have never disputed whether Plaintiff was injured. As the issues related to liability have been determined, Plaintiff is now entitled to interlocutory relief in the form of medical and income benefits. Other issues such as extent and duration will be determined following the date Plaintiff reaches MMI.

> The remaining arguments in the Petitions are impermissible rearguments of the merits of the case.

Both PLS and AK Steel appealed from the February 18, 2015, Interlocutory Opinion and Order and the March 25, 2015, Order. Their appeals were dismissed by this Board on May 15, 2015, as an impermissible appeal from an interlocutory order. Subsequent appeals to the Kentucky Court of Appeals and Kentucky Supreme Court were also dismissed.

The claim was remanded to the ALJ by Order dated July 27, 2016.

Fields' August 31, 2016, deposition was introduced. Subsequent orders were entered scheduling telephonic conferences. A June 5, 2017, Order states the parties were to circulate a proposed partial settlement signed by all the parties on or before June 5, 2017. The record reflects the parties tendered an Agreement as to Compensation between Fields, PLS, and it's insurance carrier. That agreement reflects medical expenses were paid of $8,544.21. It set forth the impairment ratings provided by two different doctors. The agreement indicates TTD benefits were paid from January 14, 2014, to July 20, 2016, in a weekly amount of $400.00 for a total of $58,578.55. In addition to the payment of TTD benefits,

the agreement states Fields was settling his claim for a lump sum of $26,250.00. The agreement contains the following provision:

> In return for a single lump sum payment of $26,250.00, the Plaintiff does hereby dismiss and forever waive all rights, claims and benefits he has under the Kentucky Workers' Compensation Act relative to his January 14, 2014 work accident and resulting injuries, with the exception that the Plaintiff is hereby relieved of any personal liability for the payment of his past work-related medical expenses incurred through the date of settlement. The liability for the payment of those past incurred work-related medical expenses shall lie solely with that party ultimately adjudicated legally responsible for the payment of the Plaintiff's workers' compensation claim and benefits.

The agreement reflects the consideration for a waiver or buyout of income/occupation disability benefits was $20,000.00. Fields further received $2,250.00 for the waiver and buyout of future medical benefits, $2,000.00 for a waiver of vocational rehabilitation, and $2,000.00 for a waiver of his right to reopen. Under "Other Information" dealing with the right to reopen, vocational rehabilitation, future medical expenses only, Medicare conditional payments, and income benefits/occupational disability, the Agreement indicates Fields agreed the consideration was fair and adequate to compensate him for

the waivers and he was giving up all rights, claims, and benefits against PLS and its carrier. Further, Fields understood that by accepting the consideration he agreed to "DISMISS ALL RIGHTS, CLAIMS, AND BENEFITS WITH PREJUDICE." Thus, after the approval of the Settlement Agreement Fields would retain no right, claims or benefits against PLS and its workers' compensation insurance carrier. Under the heading "other responsible parties against whom further proceedings are reserved," is the following:

> Upon the formal approval and entry of this Settlement Agreement, the February 18, 2015 Interlocutory Opinion and Order and the March 25, 2015 Order on Petition for Reconsideration entered by Hon. Jane Rice Williams will become final and appealable, thereby permitting Pittsburgh Logistics System, Inc. to appeal to the Workers' Compensation Board Judge Williams' finding that is [sic] has up-the-ladder statutory liability for the Plaintiff's workers' compensation claim and benefits pursuant to KRS §342.610(2). Pittsburgh Logistics System, Inc. anticipates naming as Respondents to that appeal the following: (1) Uninsured Employers' Fund; (2) Jabez Transport, Inc.; and (3) Hon. Jane Rice Williams, ALJ. The Plaintiff will not be named as a Respondent because his claim has been resolved with finality and thus he has no interest or stake in the outcome of the appeal. AK Steel Corp. will not be named as a Respondent because Pittsburgh Logistics System, Inc. has agreed to both defense and indemnify it relative to Plaintiff's claim and thus AK Steel Corp. has no

> interest or stake in the outcome of the appeal.

The agreement was signed by Fields, his counsel, and counsel for PLS. Attached to the Settlement Agreement is an Agreed Order/Addendum of July 26, 2017. Paragraph one states Jason Alexander and Jamie Alexander were dismissed as parties "as Jabez is the proper Defendant/Employer." Paragraph two alludes to the findings and order contained in the Interlocutory Opinion and Orders of October 27, 2014, and February 18, 2015. The parties executing the agreed order affirmed they "did not intend to raise the Independent Contractor issue on appeal" and agreed to waive any and all appeal rights to that issue acknowledging an employer/employee relationship existed. Paragraph three reads as follows:

> (3) That the Plaintiff, Gary Fields, and the Defendant, Pittsburgh Logistics System, Inc., are entering into a Form 110-I, Agreement as to Compensation, resolving and dismissing the Plaintiff's claims, rights and benefits under the Kentucky Workers Compensation Act, relative to the January 14, 2014 work accident and resulting injuries, with the exception to past work-related medical expenses, for which the Plaintiff is relieved of any personal liability.

This Order signed by the ALJ on July 26, 2017, was also signed by Fields' counsel, the counsel for the UEF, AK Steel, PLS, and Jabez.

Significantly, the ALJ entered an August 2, 2017, Order styled "Final Order" which reads as follows:

> After a brief review of the file, and the ALJ being otherwise sufficiently advised;
>
> **IT IS HEREBY ORDERED** the underlying claim of the Plaintiff, Gary Fields, having now been fully settled by the parties, the February 18, 2015 Interlocutory Opinion and Order and the March 25, 2015 Order on Petition for Reconsideration are hereby styled final and appealable. The contested issue of whether the Defendants, Pittsburgh Logistics System, Inc. and AK Steel Corporation, bear statutory up-the-ladder liability for the Plaintiff's claim pursuant to *KRS §342.610(2)* is preserved for appellate review. This shall include the issue of whether the Defendant, Pittsburgh Logistics System, Inc., is entitled to reimbursement from the Defendant, Uninsured Employers' Fund, for any sums paid either to or on behalf of the Plaintiff for either medical or income benefits.

Consistent with the Agreement, PLS filed its appeal.

On appeal, PLS argues it cannot be held statutorily liable for Fields' claim pursuant to KRS 342.610(2), relying almost exclusively upon the Supreme Court's holding in Com., Uninsured Employers' Fund v.

Ritchie, 2012-SC-00746-WC, rendered March 20, 2014, Designated Not To Be Published. PLS contends the facts in the case *sub judice* are identical to the facts in Ritchie. In Ritchie, the Supreme Court concluded Image Point contracted with Interchez, a freight broker, to deliver a sign it manufactured because Image Point had no means of transporting the sign; consequently, it could not be an up-the-ladder contractor. Interchez was not equipped with the means, tools, or skills necessary to actually engage in interstate over-the-road freight transportation. Interchez was nothing more than a conduit to connect manufacturing with freight carriers. PLS cites to the unrebutted testimony of Finney which describes the exact factual pattern discussed by the Supreme Court in Ritchie.

PLS argues it is a freight broker serving as a liaison conduit between manufacturers such as AK Steel and transportation carriers such as Jabez. PLS asserts it does not own supply trucks or tractor-trailers nor did not employ or train truck drivers. Further, it did not provide ancillary tools or equipment necessary for over-the-road transportation hauling. PLS argues it cannot be an up-the-ladder statutory employer and liable for Fields' workers' compensation benefits. PLS seeks reversal of the ALJ's

finding of up-the-ladder liability and requests full reimbursement from the UEF for all sums it paid.

In response, the UEF argues the claim was settled and no further issues are before the Board. Alternatively, it argues both AK Steel and PLS are up-the-ladder employers since Ritchie is not applicable to the case *sub judice*. It argues it is not bound by the Form 110-I Agreement as to Compensation between Fields and PLS asserting as follows:

> The UEF did not participate in the voluntary settlement agreement between PL Systems and Fields. Therefore, it did not agree that Fields was entitled to the monies paid. PL Systems voluntarily chose to pay without the participation of any other party to the action. Even if this was a viable appeal, it would not be proper for the Board to order the UEF to reimburse PL Systems arbitrary amounts of money. The Board would need to remand Fields' claim to the ALJ for further proceedings, namely an Opinion setting forth what benefits, if any, he is entitled to. Of course, that would be nearly impossible inasmuch as Fields has settled all of his claim.
>
> It should also be noted, that because the UEF did not participate in the settlement, it in no way agreed to let PL Systems seek reimbursement by way of this appeal. UEF liability is only derivative of the responsible employer's obligation to pay. No determination was ever made by ALJ Williams as to how much, if any, liability was attributable to Jabez Transport. The settlement agreement

> precluded that finding from ever having been made.

In the UEF's view, Jabez was liable for the medical and income benefits owed to Fields. The UEF asserts that since Jabez was unwilling or unable to pay Fields' benefits, PLS voluntarily entered a full and final settlement agreement without the participation of Jabez, AK Steel, or the UEF. Since PLS and AK Steel both were liable as direct up-the-ladder employers, the UEF contends it was properly dismissed as a party.

Finally, the UEF argues it only has secondary liability once an employer is adjudged to be responsible for paying a claim and fails to do so. Since that scenario cannot happen due to the settlement between PLS and Fields, the UEF argues it cannot be ordered to pay anything.

We disagree with the UEF's assertion that since the claim was settled there is nothing for this Board to resolve on appeal. First, we note the Form 110 Settlement Agreement signed by the ALJ indicates the February 18, 2015, Interlocutory Opinion and Order and the March 25, 2015, Order on the petition for reconsideration will become final and appealable permitting PLS to appeal. That agreement was not signed by the UEF. However, the Agreed Order/Addendum, signed on the same date as the Form 110,

signed by the UEF, states that with the exception of past work-related medical expenses, the Form 110 Settlement Agreement resolved all of Fields' claims and relieved him of any personal liability for past work-related medical expenses. The Agreed Order/Addendum signed by the parties clearly states that in any appeal the defense of independent contractor is waived by all parties. The parties also agreed liability for the payment of past work-related medical expenses would lie solely with the party ultimately adjudicated to be legally responsible for the payment of the worker's compensation claim and benefits. The Agreed Order/Addendum contemplated the party ultimately responsible for the payment of workers' compensation benefits would be an issue to be resolved on appeal by this Board.

Further buttressing our interpretation of that Agreed Order/Addendum is the August 2, 2017, Final Order wherein the ALJ ordered the February 18, 2015, Interlocutory Opinion and Order and the March 25, 2015, Order ruling on the petition for reconsideration are final and appealable. Just as significant, the ALJ ordered the contested issue of whether PLS and AK Steel bear statutory up-the-ladder liability for Fields' claim is preserved for appellate review. This includes the issue of whether PLS

is entitled to reimbursement from the UEF for any sums either paid to or on behalf of Fields for medical or income benefits. We note the UEF did not appeal from this order nor assert in its brief on appeal that this order is incorrect. Consequently, we find the UEF's assertion to be baseless, as there are issues preserved for appeal to be resolved by this Board.

We further conclude the Supreme Court's holding in Ritchie is dispositive of this issue, and we reverse the ALJ's finding that PLS and AK Steel are up-the-ladder employers/contractors pursuant to KRS 342.610(2).[2] We agree with PLS that the facts in Ritchie are almost identical to the facts in the case *sub judice*. In Ritchie, Image Point had manufactured a sign and contracted with Interchez to arrange for delivery of the sign. The Supreme Court described the roles of Image Point and Interchez as follows:

> Image Point contracted with Interchez to arrange for the delivery of its goods. Interchez does not itself own any trucks or other transportation modes. Instead it found independent shipping companies to haul loads on behalf of its clients. Image Point electronically sent information to Interchez every fifteen seconds about what products it needed shipped and where they needed to be sent. After

[2] *See* CR 76.28(4)(c).

> receiving the information, Interchez organized the data and determined which transportation mode best fit the product to be shipped. Interchez allowed carriers to bid on the specific shipment and then selected the bidder who won the contract to ship the goods. After completion of the shipment, Interchez paid the carrier and then billed Image Point. Prior to contracting with Interchez, Image Point arranged for the transportation of its goods in-house. There is no evidence that Image Point ever owned a delivery truck or employed anyone to deliver its products.

Slip Op. at 1.

In Ritchie, the ALJ concluded that both Image Point and Interchez had up-the-ladder liability. The Supreme Court quoted the following portion of this Board's opinion reversing the ALJ's decision:

> Image Point and Interchez appealed to the Workers' Compensation Board. The Board rendered a decision affirming Ritchie's workers' compensation award but reversing the ALJ's determination that Image Point and Interchez were up-the-ladder employers. The Board stated:
>
> > [w]e believe the ALJ erred in determining either Interchez or Image Point was subject to statutory liability pursuant to [KRS] 342 .610(2). Interchez merely received electronic information from Image Point when it had a product needing pick-up and delivery. Interchez provided no actual transportation service. Likewise, no

> evidence was introduced establishing Image Point was regularly involved in transportation service as a 'regular and recurrent' part of its business. In *General Electric Company v. Cain,* 236 S.W.3d 579, 586–587 (Ky.2007), the Kentucky Supreme Court defined what is meant by the phrase 'regular or recurrent' as used in KRS 342.610(2)(b). The Court explained, for purposes of KRS 342.610(2) governing workers' compensation liability of contractors, 'regular' means the type of work performed is a 'customary, usual or normal' part of the trade, business, occupation, or profession of the contractor, including work assumed by contract or required by law, and 'recurrent' means the work is repeated, though not with the preciseness of a clock.
>
> Image Point is a manufacturer of goods. There is no evidence it was directly involved in shipping, other than to contact Interchez of (sic) the need for pick-up and delivery of a product it had manufactured. There is no evidence Image Point leased, owned or operated any trucks for use in transportation or was physically responsible for the actual shipping and delivery of goods and merchandise other than through contacting a broker.

Interchez acted as an agent on behalf of Image Point, but was not engaged in the business of transporting products. Further, as is the case with Image Point, there is no evidence Interchez leased, owned or operated any trucks for use in transportation or was physically responsible for the shipping and delivery of products. Similarly, there is no evidence establishing Interchez was subject to any guarantee, warranty, financial or legal liability, to or on behalf of, any of its patrons at any time concerning appointments arranged through its services. Rather, Interchez acted as an electronic and telephonic switchboard for the posting, coordination, scheduling and exchange of information regarding the timetables for an availability of potential hauls by independent truckers and trucking companies, and, as in the case of Image Point, companies needing goods and merchandise transported by truck to other businesses and localities. Interchez also acted as a conduit for price negotiation, payment processing, and money transfers between the seller of goods and the truck drivers and trucking companies who transport those goods.

> Pursuant to the Supreme Court's holding in *Cain, supra,* because Interchez is not equipped with the skilled manpower and tools to perform the actual transportation of goods and merchandise, and does not engage in shipping and delivering of products, as a matter of law it cannot be held liable based on a contractor/ subcontractor relationship with either Image Point or United, and is therefore not a statutory employer or subcontractor for purposes of imposing up-the-ladder liability pursuant to KRS 342.610(2).

Slip Op. at 2.

In affirming this Board and the Court of Appeals, the Supreme Court concluded as follows:

> The UEF argues in its appeal that the Board and Court of Appeals misapplied KRS 342.610(2)(b) and *Cain,* 236 S.W.3d 579, by holding that Image Point and Interchez were not up-the-ladder employers. KRS 342.610(2)(b) states in relevant part:
>
> > A contractor who subcontracts all or any part of a contract and his or her carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his or her carrier who shall

> become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefore. A person who contracts with another:
>
> ....
>
> (b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

As noted in the Board's opinion, *Cain* defines what type of work is regular or recurrent as used in KRS 342.610(2)(b). "Regular" means that the "type of work performed is a 'customary, usual or normal' part of the premises owner's 'trade, business, occupation, or profession,' including work assumed by contract or required by law." 236 S.W.3d at 586–587. "Recurrent" means that the work "is repeated, though not 'with the preciseness of a clock." ' *Id.* at 587 (citing *Daniels v. Louisville Gas & Electric Co.,* 933 S.W.2d 821, 824 (Ky.App.1996)).

Cain further elaborated that:

> [w]ork 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* [ ] 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.
>
> The test is relative, not absolute. Factors relevant to the 'work of the ... business,' include its nature, size, and scope as well as whether it is equipped with the skilled manpower and tools to handle the task the independent contractor is hired to perform. Larson's, [ ] at § 70.06[5].... Stated simply, KRS 342.610(2)(b) refers to work that is customary, usual, normal, or performed repeatedly and that the business or a similar business would perform or be expected to perform with employees.
>
> 236 S.W.3d at 588–589.

There is sufficient evidence in this matter that the shipment of signs manufactured by Image Point to its purchasers was a regular and recurring part of its business. Image Point

> informed Interchez of its shipping needs every fifteen minutes each business day, indicating that Image Point frequently shipped its products. The shipment of products also was a part of the contracts Image Point entered into with its customers. However, while shipping was regular and recurring, there is no evidence that Image Point, or a similar business, would use or be expected to use its own employees to perform that task. There is nothing in the record to indicate that Image Point ever owned a fleet of delivery trucks or employed individuals to transport its signs. While there is evidence that Image Point used to perform the same tasks inhouse that Interchez now performs, no evidence exists to show that Image Point employees physically transported its goods to purchasers. Further, there is also no evidence that Interchez was ever equipped with the skilled manpower or tools to actually ship products. Interchez is only a conduit to connect manufacturers with shipping companies. We agree with the Court of Appeals that Interchez and Image Point are not Ritchie's up-the-ladder employers.

Slip Op. at 3-4.

With respect to the UEF's liability for income benefits, the Supreme Court held as follows:

> The UEF additionally argues that it was error for the Board to find it solely responsible to pay for Ritchie's workers' compensation benefits. The UEF correctly notes that it only has secondary liability and that the primary benefit obligation rests with United. *Davis v. Goodin,* 639 S.W.2d 381 (Ky. App. 1982). The UEF contends that it only becomes responsible to pay for

> Ritchie's benefits once it has been shown that United is either bankrupt or has not paid the claim within thirty days. However, the record reflects that United does not have workers' compensation insurance, and there is no indication that it has made any payment on Ritchie's claim. Thus, we cannot conclude that the Board erred in holding the UEF liable for the payment of all benefits.

Slip Op. at 4.

The unrebutted testimony of Alexander, Finney, and Stuffhoff, and the agreement between PLS and AK Steel, firmly establish AK Steel and PLS are situated exactly as Image Point and Interchez in Ritchie. Therefore, the ALJ erred in concluding PLS and AK Steel had up-the-ladder liability pursuant to KRS 342.610(2)(b). We note that in her findings of fact, the ALJ did not discuss the facts and holding in Ritchie.

In summary, PLS and AK Steel could not be deemed contractors pursuant to KRS 342.610(2)(b) since the trucking business was not a regular and recurrent part of the work of the trade, business, occupation or profession of AK Steel and PLS. There is no question that neither PLS nor AK Steel engaged in the trucking business which, as found by the ALJ, is the sole business operation of Jabez.

Accordingly, those portions of the ALJ's February 18, 2015, Interlocutory Opinion and Order and the March 25,

2015, Order, made final by the July 26, 2017, and August 2, 2017, Orders, finding AK Steel and PLS are deemed contractors and have up-the-ladder liability pursuant to KRS 342.610(2) are **REVERSED**. In addition, those portions of the February 18, 2015, and March 25, 2015, Orders directing PLS and AK Steel to pay benefits on behalf of Jabez and the Order dismissing the UEF as a party are **REVERSED**. We emphasize that reversal of the ALJ's order directing PLS and AK Steel are liable as up-the-ladder contractors relieves PLS and AK Steel of the responsibility to pay TTD benefits as set forth in numerical paragraph four of the February 18, 2015, Opinion and Order.

With respect to PLS' entitlement to reimbursement from the UEF, we agree PLS is not entitled to be reimbursed for the sums it paid in settlement of Fields' claim against it and others. The UEF was not a party to that agreement. PLS voluntarily entered into the settlement agreement requiring it to pay those income benefits. PLS could have appealed after an award of income and medical benefits rather than settle. PLS was not ordered by the ALJ to pay the settlement benefits. Although the ALJ approved the agreement, PLS agreed to pay those benefits without the benefit of an order from the ALJ.

This claim is **REMANDED** to the ALJ for entry of an order finding AK Steel and PLS are not up-the-ladder contractors as defined in KRS 342.610(2)(b). The ALJ shall direct the UEF is responsible for Fields' past work-related medical expenses and all other medical benefits paid by PLS as required by the February 18, 2015, Interlocutory Opinion and Order. The amounts due can be documented since Fields introduced an itemization of his unpaid bills and documents verifying the unpaid bills. Further, as PLS has paid TTD benefits in the amount of $58,578.54 pursuant to the February 18, 2015, Interlocutory Opinion and Order which awarded TTD benefits to be paid from January 2014 until Fields attained MMI, the UEF shall also reimburse PLS for the TTD benefits it paid as required by the February 18, 2015, Interlocutory Opinion and Order.

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