IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI LOGGERS SELF INSURED FUND, INC. APPELLANT

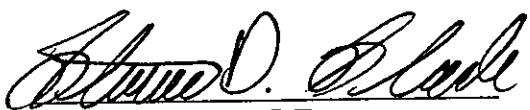
versus NUMBER 2007-WC-00554

HOWARD McDONALD, Claimant
ANDY KAISER LOGGING, Employer
TRI-LAKE TIMBER CO./MISSISSIPPI-PACIFIC CO.,
KCS LUMBER COMPANY,
COLUMBUS LUMBER CO., LLC. APPELLEES

BRIEF OF APPELLANT

Oral Argument Requested

Appeal from: The Circuit Court of Lawrence County



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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Mississippi Loggers Self-Insured Fund, Inc., Appellant;

2. Steven D. Slade, Esq. - Attorney for Appellant;

3. Tri-Lake Timber Co./Mississippi-Pacific Co.[1] - Appellee[s];

4. Grain Dealers Mutual Insurance Company - Compensation Carrier for Tri-Lake (See fn. 1);

5. Suzanne N. Saunders, Esq. - Attorney for Tri-Lake/Grain Dealers Mutual Ins. Co.;

6. Andy Kaiser Logging, a sole proprietorship, William Andy Kaiser, proprietor, Employer;

7. Christopher E. Kelley, Esq., Gwin, Lewis & Punches, LLP - Attorneys for Andy

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[1] In the earlier part of these proceedings, these entities were substituted by Agreed Order (C.R., pp. 139-140), with the purpose being that the actual "named insured" of Grain Dealers Mutual Insurance Company was "Mississippi-Pacific Co." Corporate counsel for these entities, Mr. M. Lee Graves, Esq., had previously acknowledged that the entities were merely alter egos of one another. There being no dispute, the parties were substituted. However, for simplicity's sake, these "entities" have been collectively referred to throughout these proceedings simply as "Tri-Lake". Appellants will continue to do so for the purposes of this appeal and brief.

Kaiser Logging;

8. KCS Lumber Company, Inc. - [alleged] Employer;

9. Indiana Lumbermen's Mutual Insurance Company - Compensation Carrier for KCS Lumber Company, Inc.;

10. Clifford B. Ammons, Esq., Watkins & Eager, PLLC - Attorneys for KCS Lumber Company, Inc./Indiana Lumbermen's Mutual Insurance Company;

11. Columbus Lumber Company, LLC - [alleged] Employer;

12. American Federated Insurance Company - Compensation Carrier for Columbus Lumber Company, LLC;

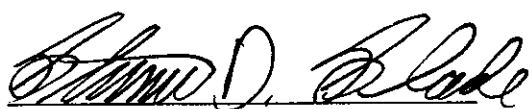
13. Richard M. Edmonson, Jr., Markow Walker, P.A. - Attorneys for Columbus Lumber Company, LLC/American Federated Insurance Company;

14. Howard McDonald - Claimant;

15. John T. Ball, Esq. - Attorney for Howard McDonald;

16. Honorable R. I. Prichard, III - Circuit Court Judge, Lawrence County;

17. Mississippi Workers' Compensation Commission, Phyllis Clark - Secretary.



STEVEN D. SLADE

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STATEMENT OF THE ISSUES

1. The Mississippi Workers' Compensation Commission (and the Circuit Court) erred by misinterpreting and misapplying §71-3-37(13).

2. The Circuit Court's error in affirming the Commission's misinterpretation and misapplication of §71-3-37(13) was committed by affirming the Commission's factual findings upon evidence that was not substantially credible.

STATEMENT OF THE CASE

On April 3, 1996, Howard McDonald ("McDonald") was injured while in the course and scope of his employment with Andy Kaiser Logging ("Kaiser"). The Mississippi Loggers Self-Insured Fund, Inc. ("the Fund") is a self-insured group organized under the Mississippi Workers' Compensation Act (Miss.Code Ann. §§71-3-1, *et seq*). Prior to 1996, Kaiser had coverage through the Fund. But on December 25, 1995, Kaiser's coverage lapsed pursuant to the terms of Miss.Code Ann. (1972) §71-3-77, and General Rule 5 of the Commission's administrative rules (C.R., pp. 16 - 17). After McDonald's injury, Kaiser pleaded with the Fund to extend his coverage. When the Fund denied his requests, Kaiser (through his attorney) sent a self-calculated sum (in the form of a check) with a document resembling an invoice like that issued by the Fund's former Third Party Administrator[2]. Under this and threats of "bad faith", the Fund paid McDonald's benefits under reservation of rights. The Fund then researched its cancellation of Kaiser's policy and "other coverage" issues.

The Fund thereafter filed an action for Declaratory Judgment as to its policy cancellation

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Walker, Hunter & Associates, Inc. ("Walker-Hunter") had been the Fund's third party administrator (performing premium-collection and claim-administration duties) until December 31, 1995. However, by the time these alleged invoices were "generated", the contract between the Fund and Walker-Hunter had expired. The documents supplied closely resembled Walker-Hunter invoices in format, style and layout.

in the Circuit Court of Lauderdale County[3]. During this time McDonald filed a Petition to Controvert (C.R., p.1). The Fund "defended"[4] Kaiser under its reservation of rights while continuing McDonald's benefits. Having previously filed an Answer on Kaiser's behalf, Mr. McElhanney filed a "Motion" (*inter alia*, for Summary Judgment)[5] (C.R., pp. 8-17) before the Commission on February 23, 1997, simultaneously seeking withdrawal as counsel and eventual substitution (for the Fund's interests exclusively) by undersigned counsel. Kaiser retained separate counsel[6]. The Fund immediately issued subpoenas (C. R., pp. 53-58) to Kaiser's most recent certificate holders[7] seeking any and all coverage information relating to Kaiser effective April, 1996. The Fund modified its "Motion for Summary Judgment" (April 16th) by filing a Separate and Exclusive Answer of Carrier (C.R., p. 11) along with its Motion to Suspend and Discharge Requirement to Pay Benefits (C.R., pp. 45-64).

Two (2) days after filing its Motion to Suspend and Discharge Requirement to Pay Benefits, the Fund received a response to its subpoena issued to KCS Lumber Company ("KCS"). This came in the form of a letter signed by Kirby Allen along with copies of various cancelled

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[3] This action was later dismissed under jurisdictional grounds.

[4] Defense counsel retained by the Fund for purposes of defending Kaiser was Michael McElhanney of Pascagoula. The case, however, remained on "inactive status for medical reasons" while McDonald received medical treatment.

[5] This was a procedural error in nomenclature, as the Commission has no counterpart to Rule 56, Miss.R.Civ.Pro.

[6] Financed by the Fund under the rule of law announced in *Moeller v. American Guaranty & Liability Insurance Co.*, 707 So.2d 1062 (Miss. 1996).

[7] For the 1995 calendar year, the only certificate holder for Kaiser was "Tri-Lake Land and Timber Co., Inc." Other certificate holders from the 1994 calendar year, and before, also received subpoenas. This included KCS Lumber Co., International Paper Co., Columbus Lumber Co., LLC, and Georgia Pacific Co. McDonald later filed Petitions to Controvert against Tri-Lake, KCS and Columbus Lumber (C.R., pp. 117-119).

checks (C. R., p.71; R.E., p. 17). Most notable to the Fund, the letter stated

> In regards to workers comp, we had a verbal agreement with Monty Sanders (601-886-3322) with Tri-Lake that Tri-Lake would be responsible for the workers comp on the entire logging activities for Andy Kaiser.

At the time this letter was drafted, KCS was neither a party to this action nor did Allen have any reason to be aware of Kaiser's coverage dispute with the Fund.

After paying $157,213.19 in benefits and having a hearing on its Motion, the Fund received an order of the Administrative Judge dated August 18, 1997 (C. R., pp. 100A-100L) granting its discharge. Kaiser was required to pay McDonald's benefits until the "solely liable party" issue (Miss. Code Ann. §71-3-37(13)) could be resolved. The Fund's lien languished along with McDonald's claim. The Fund then filed its Motion for Reimbursement of Lien and Determination of Solely Liable Party (See, C.R., pp. 124-127; pp. 147-164; pp. 247-267). Both the Administrative Judge (C.R., pp. 229-233) and the Full Commission (C.R., pp. 276-277) denied the Fund's request. The denial was then appealed to the Circuit Court of Lawrence County (C.R., pp. 278-279). In its remand Order, the Circuit Court found that the Commission erred in misapplying a "statutory employer" analysis under §71-3-7[8] as a substitute for performing a thorough "solely liable party" determination under §71-3-37(13)[9] with instructions that the Commission do the latter (C.C.R., pp. 78-86; R.E. pp. 8-16).

A hearing was conducted on August 26, 2005 for purposes of the remand Order (C. t.t.,

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A "statutory employer" analysis may not always achieve the purposes of §71-3-37(13), as this statute was passed long after the enactment of §71-3-7.

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As will be illustrated *infra*, §71-3-37(13) is primarily an "insurance" statute in purpose, even though these purposes can be satisfied in a variety of ways.

pp. 24-91). The Order of Administrative Judge (C.R., pp. 317-328; R.E., pp. 18-29) gave rise to the Fund's subsequent appeal to the Circuit Court (C.R., pp. 337-338). The Commission's analysis of the case within the margins of §71-3-7 was affirmed upon the second appeal on evidence which was not "substantially credible" (C.C.R., pp. 156-159; R.E., pp. 32-35). Appeal was then taken to this Court (C.C.R., pp. 161-162).

SUMMARY OF THE ARGUMENT

The first issue on appeal is a matter of first impression. Specifically, §71-3-37(13) has never been interpreted by this Court. An analysis of its statutory language, in addition to a factually similar Supreme Court case in 1957 well-prior to the addition of subparagraph "13" to the statute, reveal its undeniable insurance-related purpose. The Circuit Court[10] initially recognized that the Commission's ruling relied exclusively upon the 1957 case, and did not acknowledge the statute's amendment. But that Court nonetheless affirmed the same error upon the second appeal. Thus, both the Commission's and Circuit Court's analysis of this statute constitutes legal error giving rise to *de novo* review. The Fund's request that its lien be satisfied via evidence of another insurance arrangement was ignored by both the Commission and the Circuit Court. By limiting the scope to a "statutory employer" analysis, both the Commission and Circuit Court misapprehended the broader scope and margins of §71-3-37(13).

The second issue involves the Circuit Court's review of the record for evidence supporting the Commission's findings. While the Circuit Court appropriately scoured the record to find evidence supporting those findings, it failed to properly analyze that evidence's "substantial

[10] in its initial remand Order

credibility." Specifically, in upholding the Commission's ruling, the Circuit Court relied upon irrelevant commentary of a corporate representative regarding the insurance arrangement some ten (10) years after that agreement was revealed. The representative was not a party to that agreement. At the underlying hearing, Kirby Allen's letter was entered into the record, and properly identified and authenticated. Its contents were never challenged by Tri-Lake or any other party. Objections were later sustained to the Fund's questions regarding the agreement's terms, but the letter itself remains the only evidence of any nature addressing the §71-3-37(13) issue. The corporate representative's testimony fails to satisfy any "substantial credibility" test. Therefore, this evidence constituted an erroneous basis for upholding the Commission's overall findings.

ARGUMENT

A. Standard of Review

Mississippi employs a *de novo* standard of review when the Commission applies an incorrect legal standard on matters of law. *J.R. Logging v. Halford,* 765 So.2d 580 (Miss.Ct.App. 2000); *Spann v. Wal Mart Stores*, 700 So.2d 308 (Miss. 1997); and *Scott v. Brookhaven Well Serv.*, 150 So.2d 508 (Miss. 1963). The Commission's misapplication of law (legislation) to fact are appropriate for judicial review. *Central Elec. Power Ass'n v. Hicks*, 110 So.2d 351, 356 (Miss. 1959). A Court of law will reverse "when the findings of the Commission are based on a mere scintilla of evidence that goes against the overwhelming weight of evidence." *Johnson v. Ferguson*, 435 So.2d 1191, 1194-95 (Miss. 1983).

B. The Mississippi Workers' Compensation Commission (and the Circuit Court) erred by misinterpreting and misapplying §71-3-37(13).

Upon the first appeal, the Circuit Court correctly found that the legislative intent of §71-3-

37(13) was to correct the void within the Act noted by the 1957 case of *U.S.F.& G. v. Collins* (231 Miss. 319, 95 So.2d 456 (1957)). The Commission had previously found *Collins* "dispositive" in denying the Fund's request for reimbursement (C.R., p. 229-233). The Circuit Court initially held that the subsequent amendment to the statute authorized the Commission to order one insurance carrier to reimburse another if the latter employer/carrier constituted the "solely liable party" (C.C.R., pp. 78-86; R.E., pp. 8-16). The Supreme Court has never directly interpreted §71-3-37(13). But in *Collins*, the Court interpreted Minnesota's counterpart (and almost identically-worded) statute in a manner entirely consistent with the Fund's argument herein.

The facts of *Collins* and the case *sub judice* are remarkably similar. Collins (the claimant) was injured while working for his uninsured employer, Shewmake. Shewmake had arranged for coverage, however, through a verbal agreement with Box, his partner, during the performance of a joint subcontract. U.S.F.& G was Box's insurer. The prime contractor's insurer (American Casualty Company) mistakenly paid the benefits assuming its insured was the "statutory employer." Like the Fund, American Casualty sought its mistakenly-paid benefits from U.S.F.& G. once it became aware of the agreement between Box and Shewmake. But at the time, the Commission had no authority to order American Casualty reimbursed. If Mississippi's Act had contained a statute like Minnesota's, the *Collins* opinion expressly held[11] that the opposite result would have been reached. *Id.*, at 463. The Court plainly held that Minnesota's statute existed

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Such a finding is extraordinarily applicable to this case. In the first place, the prime contractor would have been Collins' "statutory" or *de jure* employer by operation of §71-3-7 were it not for the fact that Shewmake was insured via his partnership, and thus his partner's carrier, U.S.F.& G. Secondly, verbal agreements such as the one Kirby Allen's letter reflects were viewed in *Collins* as enforceable, thus eliminating an element of the "statutory employer" definition. No "statutory employer" exists if the *de facto* employer possesses coverage. Allen's letter reflects an arrangement no different than that entered into between Shumake and Box.

for *insurance reimbursement* purposes. In that regard, *Collins* was not a "statutory employer" case, but instead, an insurance reimbursement case.

In *Collins*, American Casualty based its argument upon the Minnesota Supreme Court's ruling in *Toenberg v. Harvey*, 49 N.W.2d 578 (Minn. 1951). In *Toenberg*, it was held that M.S.A §176.255 authorized Minnesota's commission to adjudicate competing rights between insurance carriers when one carrier had mistakenly paid benefits which were later found to be the true legal obligation of another. Mississippi's Court, in reviewing the Commission's denial of American Casualty's application, found that while Minnesota's Act contained that authority (M.S.A. §176.255), Mississippi's Act did not.

Most importantly for this case, however, the *Collins* Court examined the language of M.S.A. §176.255. Quoted from the *Toenberg* opinion, the statute reads as follows:

> Where benefits are payable under the provisions of this chapter, and a dispute arises between two or more employers or insurers as to which of the employers or insurers is liable for payment thereof, the commission may direct the payment of the benefits by one or more of the employers or insurers pending the determination of liability. Upon determination of liability the commission shall order the party liable for the benefits to reimburse any other party for payments made with interest at the rate of five per cent per annum. The commission may also forward reasonable attorney fees in favor of the claimant and against the party held liable for the benefits.

Toenberg, at 70 (citing M.S.A. §176.255). In commenting on the vacancy of such a provision within Mississippi's Act, the *Collins* Court stated the following:

> Perhaps a provision of that sort is desirable, but the Mississippi Act contains none. At any rate, the Minnesota Court apparently felt warranted in implying from that provision the closely related power of directing reimbursement in the absence of an express order of its commission. Hence, the Mississippi Commission was correct in holding it had no power to direct appellant, U.S.F.& G. to

> reimburse Appellee, American Casualty Company, for compensation payments erroneously made by American Casualty Company.

Collins, at 340. Clearly, this statement constituted a strong suggestion to Mississippi's Legislature that such a provision would be a welcomed addition to Mississippi's Act.

Later, but well-prior to the facts giving rise to the case *sub judice*, the following language was added to Mississippi's §71-3-37:

> (13) Whenever a dispute arises between two (2) or more parties as to which party is liable for the payment of workers' compensation benefits to an injured employee and there is no genuine issue of material fact as to the employee's employment, his average weekly wage, the occurrence of an injury, the extent of the injury and the fact that the injury arose out of and in the course of the employment, the commission may require the disputing parties involved to pay benefits immediately to the employee and to share equally in the payment of those benefits until it is determined which party is solely liable, at which time the liable party must reimburse all other parties for the benefits they have paid to the employee with interest at the legal rate.

Miss.Code Ann. §71-3-37(13). It is undeniable, if not patently obvious, that the purpose of this statute is completely indistinguishable from the Minnesota statute as it existed in 1957. Clearly, by enacting §71-3-37(13), Mississippi's Legislature has finally authorized the Commission to do that which it could not do in 1957, which was to adjudicate competing issues between insurance carriers (i.e., which of two or more is in fact "solely liable" to pay benefits).

As the objections raised at the August 25th hearing (and the rulings thereon) confirm, the analysis paid no attention to insurance-related evidence, but was limited to a "statutory employer" analysis conducted under Miss.Code Ann. §71-3-7 (1972, as amended). The second time around, the Circuit Court affirmed this "statutory employer" analysis as a synonymous exercise with that

envisioned by §71-3-37(13). But it is clear from reading *Collins* that it is not enough to resolve the issues for which statutes like §71-3-37(13) and M.S.A. §176.255 were enacted simply by performing a "statutory employer" test. In fact, had a mere "statutory employer" test been sufficient, then the *Collins* Court would have merely pointed to §71-3-7 (which existed in the Act in 1957) as the appropriate statute for resolving the issue[12]. The conclusion is therefore inescapable that the Commission cannot simply perform an analysis under §71-3-7 (i.e., answering the "statutory employer" question) to accomplish the full purposes of §71-3-37(13). This is especially so when uncontested evidence exists within the record that another valid and alternative insurance arrangement had been made prior to the subject injury. Nevertheless, as is obvious from reading of the rulings on appeal, this lone evidence regarding alternative compensation insurance was altogether disregarded by the Commission (and/or the Circuit Court) as being either irrelevant or non-existent.

The Fund's present request for reimbursement under §71-3-37(13) is entirely analogous to American Casualty's in *Collins*. The Fund's current application for reimbursement, however, enjoys the benefit of having §71-3-37(13), whereas in 1957, that luxury did not exist for American Casualty. The only issue is the existence *vel non* of an alternative insurance arrangement. But the Legislature would have had no purpose in enacting §71-3-37(13) if, in fact, those purposes were identical to performing a mere §71-3-7 "statutory employer" analysis.

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It cannot be forgotten that American Casualty's insured *was* Collins' statutory employer if, indeed, Shewmake had no coverage. But because Shewmake did indeed have coverage via Box, then no "statutory employer" situation existed. By definition, since Tri-Lake had agreed to incorporate Kaiser's activities within its envelope of compensation coverage, Kaiser had coverage just as Shewmake had coverage in *Collins*. Thus, the questions plaguing the *Collins* decision had little to do with "statutory employer." Instead, the issue was whether Mississippi law entitled American Casualty to reimbursement from Shewmake's intended carrier, U.S.F.& G.

C. **The Circuit Court's error in affirming the Commission's misinterpretation and misapplication of §71-3-37(13) was committed by affirming the Commission's factual findings upon evidence that was not substantially credible.**

A Court's review in appeals from rulings of administrative agencies is limited to the contents of the record. *Mississippi Comm'n on Environmental Quality v. Chickasaw Co. Bd. Of Supervisors*, 621 So.2d 1211 (Miss. 1993). "The order of an administrative agency will only be overturned where this Court determines that it '1) was unsupported by substantial evidence, 2) was arbitrary or capricious, 3) was beyond the power of the administrative agency to make, or 4) violated some statutory or constitutional right of the complaining party.'" *Thomas v. Five County Child Development Program, Inc.*, - - - So.2d - - - 2007 WL 1532113 (Miss.Ct.App. May 29, 2007), citing *Miss. Sierra Club, Inc. v. Miss.Dep't of Envt. Quality*, 819 So.2d 515, 519 (¶ 15) (Miss. 2002). Also, however, "[i]f uncontradicted evidence exists which is neither improbable nor incomplete nor which the credibility of the testimony is inadequate, such evidence cannot be ignored but must be accepted as true." *Denson v. George*, 642 So.2d 909, 914 (Miss. 1994), citing *Hearin-Miller Transporters, Inc. v. Currie*, 248 So.2d 451, 454 (Miss. 1971). See also *Public Employees' Retirement Sys. V. McClure*, - - - So.2d - - - , 2007 WL 1413088 (¶ 22) (Miss.Ct.App. May 14, 2007) (agency cannot ignore the only evidence addressing an issue).

In its proper search of the record for evidence supporting the Commission's findings, the Circuit Court seized upon the testimony of Robert Parker who identified himself as "pretty much the Southern Division Manager or Southern Vice-President of Tri-Lake, and then I was the manager of Mississippi Pacific for Tri-Lake" in April of 1996 (C.t.t. p. 58). On direct examination, Parker was allowed to address Kaiser's workers' compensation coverage to the extent

of his direct knowledge (C.t.t., pp. 61 - 62) regarding certificates of insurance[13]. Parker identified Monty Sanders (the individual with whom Kirby Allen had entered into the compensation agreement) as an employee of Tri-Lake and the method by which Sanders would have confirmed Kaiser's coverage (C.t.t., p. 63).

On page 68 of the trial transcript, Tri-Lake's counsel asked Parker about his knowledge of the contents of Allen's letter of April 1997. Parker provided no answer to this question, but generically stated that "[w]e were never responsible for anyone's workman's compensation, other than to the employees of Mississippi Pacific Corporation or Tri-Lake." (C.t.t., p. 68). On cross-examination, Parker testified that Tri-Lake was ostensibly depending on the expired certificate issued by the Fund as regards Kaiser's coverage (C.t.t., p. 74)[14]. Parker admitted that in the absence of such a valid certificate, Tri-Lake would be exposed (C.t.t., p. 75). The best Mr. Parker could testify to, in regards to Allen's letter, was "doubt" as to whether Mr. Sanders "would have ever assumed any responsibility verbally or otherwise." (C.t.t., pp. 76 - 77).

The Fund then called Monty Sanders for direct examination. But objections were sustained as to questions regarding the contents of Allen's letter (C.t.t., pp. 85 - 88). Had Tri-Lake possessed any design to have Sanders refute Allen's statements, this was its opportunity. But by objecting, and having those objections sustained, Tri-Lake waived its opportunity. As the record now completely stands, Allen's letter (and the contents contained therein) remains completely un-

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It should be noted that the Fund's last certificate issued to anyone regarding Kaiser was to Tri-Lake for the 1995 calendar year, which expired, by its terms, at the end of 1995. No subsequent certificates were ever issued to any certificate holder regarding Kaiser from and after this lone certificate.

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It is critical to note that, in response to both discovery and to the initial subpoenas of 1997, Tri-Lake has produced copies of no certificates issued by the Fund as regards Kaiser beyond the final validity date of 1995.

refuted. The letter, and its contents, had already been authenticated as part of the record.

Upon entertaining the Fund's second appeal, the Circuit Court found support for the Commission's decision exclusively within the context of Robert Parker's testimony. While the Circuit Court found Parker's testimony consistent with its own "skepticism" as to Tri-Lake's assumption of coverage (C.C.R., p. 159), a Court cannot apply its own skepticism as part of the record in an effort to find evidence "substantially credible." This is especially so if that testimony or evidence - in the absence of the reviewing Court's own "consistent skepticism" - is otherwise irrelevant[15]. With the record not showing that Parker had any substantive knowledge of the agreement Allen depicts, and without any other evidence whatsoever contradicting or refuting the letter, the Circuit Court was bound to review the record as it existed. "Substantial evidence means more than a scintilla or a suspicion." *American Legion Post #134 v. Miss. Gaming Comm'n*, 798 So.2d 445, 450 (¶ 26) (Miss. 2001), citing *Mississippi State Dep't of Health v. Natchez Community Hosp.*, 743 So.2d 973, 977 (Miss. 1999), quoting *Mississippi Real Estate Comm'n v. Anding*, 732 So.2d 192, 196 (Miss. 1999). This particularly applies to the analysis of Parker's "substantial credibility" on the existence of the agreement, to which there existed nothing to support his knowledge whatsoever - apart from the Circuit Court's own "skepticism" or "suspicion." *Id.*

The Court of Appeals has recently dealt with the issue of "substantial credibility" of such non-witness testimony in the case of *Gibbes v. Hinds County Board of Supervisors*, 952 So.2d 1011 (Miss. App. 2007). In *Gibbes*, the testimony of two (2) county supervisors tasked with

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[15] This, in fact, violates a reviewing Court's duty not to serve as "fact finder" in any capacity.

investigating an easement-by-necessity over the property of the appellants was determined not to be sufficiently or "substantially credible" in view of a prior easement being negotiated several years before with the involvement of attorneys and real estate agents. *Gibbes* provides an excellent analysis of how testimony supporting an administrative decision does not necessarily mean that the testimony is, *ipso facto*, "substantially credible" to the issue *sub judice*.

It is hardly surprising that Parker would generically testify that Tri-Lake would not (in hindsight) assume such liability ten (10) years after such a letter had surfaced, and ten (10) years after Tri-Lake had become the target for reimbursement. Like the testimony of Supervisors Barbour and Smith in *Gibbes*, there is no doubt that Mr. Robert Parker's testimony is factual to the extent that (in hindsight) his own personal judgment would have dictated against entering into such an insurance agreement. But Parker's hindsight is irrelevant evidence (as was the Supervisors' observations in *Gibbes*) as to whether or not such an agreement had, in fact, been made. Kirby Allen states the agreement was entered into between himself and Monty Sanders. To this, Parker merely expressed "doubts." But just as neither Barbour nor Smith knew of the exact location of the easement in *Gibbes*, neither did Mr. Parker have any personal knowledge of this agreement. Monty Sanders offered nothing to refute the agreement per Tri-Lake's own objections. Accordingly, just as the "bargained for" (¶ 35) easement in *Gibbes* constituted the only substantially credible evidence in that case (deficient though it might have been), so to is Kirby Allen's letter in the case *sub judice*. No "substantially credible" evidence exists in the record to the contrary.

The objections raised at the August 26th hearing to the Fund's questioning of Sanders regarding the terms of Kirby Allen's letter are certainly understandable given the exposure of Tri-

Lake's insurer. But the mere fact that there was incentive to object is evidence of something potential. Indeed, had Tri-Lake not fully appreciated the negative repercussions which answers to those questions would have served in an appropriate §71-3-37(13) analysis, the objections would have never been raised. But in considering that the underlying reasons for conducting a proper §71-3-37(13) analysis is to determine which insurer constitutes the "solely liable party," the record must stand as it exists. As such, Kirby Allen's letter cannot be ignored. *Denson v. George.*

The Circuit Court's "skepticism" over the insurance arrangement is based upon a clear lack of understanding of the timber harvesting industry. The recent Supreme Court case of *Lamar v. Thomas Fowler Trucking, Inc.* (- - - So.2d - - - , 2006 WL 1501038 (Miss. May 24, 2007)) ironically involves the Fund. In that case, the Supreme Court acknowledged the validity of compensation agreements "piggy-backed" upon a prime-contractor's policy for purposes of a sub-contractor's operations. Specifically, the Court noted that Golden Timber, Inc. (Golden Timber), a lumber operation near Senatobia, had agreed to cover its subcontractor, Thomas Fowler Trucking, Inc. (Fowler) who otherwise had no coverage of its own. One of Fowler's employees, Ira Lee Bobo, was killed in the scope of his employment. Because of the compensation agreement between Fowler and Golden Timber, Golden Timber's carrier (the Fund) had no choice other than to provide death benefits to Bobo's heirs as defined by §71-3-25. *Id.* (¶ 18). These agreements are not only commonplace - but mandatory - for the practical operation of the timber harvesting industry. Thus, Kirby Allen's depiction of such an agreement is neither far-fetched nor "improbable" (*Denson v. George*, at 914). The Circuit Court's "skepticism" is therefore not properly founded in fact, or experience. Notably, had Fowler's previous carrier paid by mistake, it would clearly be entitled to reimbursement from the Fund.

D. Conclusion/Request for Relief

The Fund mistakenly paid benefits to McDonald when the true responsibility to do so was that of another carrier. That carrier was sufficiently identified by Kirby Allen for the reimbursement purposes of §71-3-37(13). Though the Fund has lost its sole opportunity to candidly examine the appropriate witnesses regarding the details of the agreement identified by Kirby Allen, his letter nevertheless exists as the only evidence within the record identifying any compensation arrangement for Kaiser's activities. The other parties to this action have taken no steps (and in fact have wilfully and voluntarily waived their opportunities) to contest the truthfulness or validity of the letter's terms. Accordingly, this Court should reverse the prior adjudications giving rise to this appeal and render as to the Fund's entitlement to reimbursement from Tri-Lake's compensation carrier as it existed at the time of injury giving rise to this claim.

Respectfully submitted, this the 12th day of June, 2007.

THE MISSISSIPPI LOGGERS SELF-INSURED FUND, INC.

BY: _____

STEVEN D. SLADE, its attorney

CERTIFICATE OF SERVICE

I, Steven D. Slade, attorney for the Mississippi Loggers Self Insured Fund, Inc., do hereby certify that I have delivered by U.S. Mail, postage prepaid, the foregoing **BRIEF OF APPELLANT** to:

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This the 12th day of June, 2007.

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ADDENDUM

Westlaw.

Miss. Code Ann. § 71-3-37

West's Annotated Mississippi Code Currentness
Title 71. Labor and Industry
Chapter 3. Workers' Compensation
General Provisions (Refs & Annos)

→§ 71-3-37. Compensation payments

(1) Compensation under this chapter shall be paid periodically, promptly, in the usual manner, and directly to the person entitled thereto, without an award except where liability to pay compensation is controverted by the employer.

(2) The first installment of compensation shall become due on the fourteenth day (14th) after the employer has notice, as provided in Section 71-3-35, of the injury or death, on which date all compensation then due shall be paid. Thereafter, compensation shall be paid in installments, every fourteen (14) days, except where the commission determines that payment in installments should be made at some other period.

(3) Upon making the first payment and upon suspension of payment for any cause, the employer shall immediately notify the commission in accordance with a form prescribed by the commission that payment of compensation has begun or has been suspended, as the case may be. No suspension in payments of compensation shall be made for refusing to submit to medical or surgical treatment until the reasonableness of such request or refusal has been determined by the commission, and a written order suspending payment issued.

(4) If the employer controverts the right to compensation he shall file with the commission, on or before the fourteenth (14th) day after he has knowledge of the alleged injury or death, a notice in accordance with a form prescribed by the commission, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted. Failure to file this notice shall not prevent the employer raising any defense where claim is subsequently filed by the employee, nor shall the filing of the notice preclude the employer raising any additional defense.

(5) If any installment of compensation payable without an award is not paid within fourteen (14) days after it becomes due, as provided in subsection (2) of this section, there shall be added to such unpaid installment an amount equal to ten percent (10%) thereof, which shall be paid at the same time as, but in addition to, such installment unless notice is filed under subsection (4) of this section, or unless such nonpayment is excused by the commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(6) If any installment payable under the terms of an award is not paid within fourteen (14) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, such compensation unless review of the compensation order making such award is had.

(7) Within thirty (30) days after the final payment of compensation has been made, the employer shall send to the commission a notice in accordance with a form prescribed by the commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If

the employer fails so to notify the commission within such time, the commission may assess against such employer a civil penalty in an amount not exceeding One Hundred Dollars ($100.00). No case shall be closed nor any penalty be assessed without notice to all parties interested and without giving to all such parties an opportunity to be heard.

(8) The commission (a) may upon its own initiative at any time in a case in which payments are being made without an award, and (b) shall in any case where right to compensation is controverted or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation or from the employer that the right to compensation is controverted or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, hold such hearings, and take such further action as it considers will properly protect the rights of all parties.

(9) Whenever the commission deems it advisable, it may require any self-insurer to make a deposit with the State Treasurer to secure prompt and convenient payment of such compensation; and payments therefrom upon any awards shall be made upon order of the commission.

(10) Whenever the commission determines that it is for the best interests of a person entitled to compensation, the liability of the employer for compensation, or any part thereof as determined by the commission, may be discharged by the payment of a lump sum equal to the present value of future compensation payments commuted, computed at four percent (4%) true discount compounded annually. The probability of the death of the injured employee or other person entitled to compensation shall be determined in accordance with validated actuarial tables or factors as the commission finds equitable and consistent with the purposes of the Workers' Compensation Law, and the probability of the remarriage of the surviving spouse or other person entitled to compensation may be determined in accordance with rules adopted by the commission which shall apply validated actuarial tables or factors as the commission finds equitable and consistent with the purposes of the Workers' Compensation Law. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded. The commission shall be the sole judge as to whether or not a lump-sum payment shall be to the best interest of the injured worker or his dependents.

(11) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(12) An injured employee or, in case of death, his dependents or personal representative shall give receipts for payment of compensation to the employer paying the same; and whenever required, such employer shall produce the same for inspection by the commission.

(13) Whenever a dispute arises between two (2) or more parties as to which party is liable for the payment of workers' compensation benefits to an injured employee and there is no genuine issue of material fact as to the employee's employment, his average weekly wage, the occurrence of an injury, the extent of the injury, and the fact that the injury arose out of and in the course of the employment, the commission may require the disputing parties involved to pay benefits immediately to the employee and to share equally in the payment of those benefits until it is determined which party is solely liable, at which time the liable party must reimburse all other parties for the benefits they have paid to the employee with interest at the legal rate.

CREDIT(S)

Laws 1948, Ch. 354, § 13; Laws 1950, Ch. 412, § 8; Laws 1982, Ch. 473, § 19; Laws 1987, Ch. 361, § 4; Laws 1990, Ch. 405, § 19; Laws 1992, Ch. 577, § 4, eff. from and after passage (approved May 15, 1992); Laws 2007, Ch. 349, § 1, eff. from and after passage (approved March 15, 2007).

HISTORICAL AND STATUTORY NOTES