IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROY WHITE and KEVIN WHITE,
d/b/a R & K TIMBER — APPELLANTS

VERSUS — NO. 2007-WC-01209-COA

JOE JORDAN — APPELLEE

BRIEF OF APPELLANTS

Oral Argument Requested

Appeal from: The Circuit Court of Newton 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 Judiciary may evaluate possible disqualification or recusal.

1. Roy White and Kevin White, Appellants
2. Steven D. Slade, Esq. - Attorney for Appellants
3. George Lee Dukes - Appellee
4. Thomas L. Tullos, Esq. - Attorney for Appellee
5. Honorable Marcus D. Gordon - Circuit Court Judge, Newton County
6. Mississippi Workers' Compensation Commission, Phyllis Clark, Secretary

STEVEN D. SLADE

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STATEMENT OF THE ISSUES

1. **The ruling on appeal applied an erroneous legal standard, was not supported by substantial evidence, and was contrary to the overwhelming weight of the evidence.**

2. **The ruling on appeal held R & K to a higher coverage standard than that required by §71-3-5 and that of the Commission's own criteria for applying for compensation coverage.**

3. **The ruling on appeal erred in dismissing Linden Lumber Company prematurely in view of its subsequent findings; and by not construing the acceptance of the benefits paid under the AIG policy as either/or an election of remedy or a credit for payments made in lieu of compensation.**

STATEMENT OF THE FACTS AND CASE

This case is being appealed from the Circuit Court of Newton County's affirmation (R.E. p. 20) of the Mississippi Workers' Compensation Commission's Order dated November 9, 2006 (R.E. p. 16), which affirmed the Order of Administrative Judge dated May 11, 2006 (R.E. p. 9).

Joe Jordan (Jordan) and George Lee Dukes (Dukes) were employed as saw-hands by R & K Timber (R & K) when both were injured in a common accident on July 16, 2003. At that time, R & K did not yet have workers' compensation coverage. R & K first started its timber harvesting just a few weeks earlier (June 23, 2003). It worked that entire week ending on June 27th. Records for July illustrate work ensuing again on Monday, July 14th, and ending on the 16th. By then, R & K had accumulated only eight (8) full days of actual business operations. By the end of July, R & K had developed enough information to complete a compensation insurance application.

Upon the filing of the Petitions to Controvert (C.R. p. 1), R & K did not immediately retain counsel. Instead, it relied upon benefits that were being paid to the Appellees from an AIG Occupational Accident Policy. AIG issues such "gap coverage" policies only to those in the timber harvesting industry who are not yet eligible for compensation coverage. Appearing *pro*

se at a hearing on the Appellees' Motion for An Emergency Temporary Hearing (C.R. p. 2), Kevin White illustrated that benefits were being paid under this policy.

R & K first asserted the impossibility for it to have secured bona fide compensation coverage by the time of this accident when it immediately filed its Motion to Dismiss (C.R. p. 21). Discovery ensued and depositions were taken of both Roy and Kevin White, along with their contract foreman and driver. Appellees' counsel spent two days photocopying all of R &K's business records, cancelled checks, and checking account statements including personal accounts. But none of these records were ever introduced to support the Appellees' "regular employment" claims.

After accumulating these documents, Appellees filed motions (C. R. p. 67) to name Linden Lumber Company (Linden) as a potential statutory employer. On April 4, 2005, the Administrative Judge casually dismissed (See tt., pp. 12 -13) R &K's Motion to Bifurcate (C.R. p. 214) and conducted a final hearing on the merits[1]. At that time, R & K was unprepared to proceed. R & K's Motion to Dismiss was also - ostensibly - dismissed. All objections to R & K's questions regarding "regular" employment were granted.

The Administrative Judge granted the Appellees' Motion to Strike an affidavit setting forth benefits received from the AIG Policy (C. R. p. 224). All fact findings and legal conclusions were made in the Appellees' favor (C. R. p. 230). The Commission and Circuit Court affirmed (C. R. p. 239; R.E. p. 16; C.C.R.p. 150; R.E. p. 20, respectively).

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[1] Unknown to R & K, Linden had been "quietly" dismissed because but no representative appeared for the hearing on April 4th. The Order dismissing Linden (C.R. p. 219) did not appear until June 1, 2005.

SUMMARY OF THE ARGUMENT

The Legislature has not defined "regularly" as it used in §71-3-5 as the mandatory coverage threshold for employers having five (5) or more employees. The "definitions" statute of the Act (§71-3-3) likewise provides none[2]. But *Black's Law Dictionary* (5th ed.), defines "regularly" as follows:

> At *fixed* and *certain intervals*, regular in *point of time*. In accordance with some *consistent* or *periodical rule* or *practice*.

Black's Law Dictionary 1156 (5th ed. 1983) (emphasis added). And, *Black's* also defines the term "regular course of business" as follows:

> The phrase within worker's compensation acts excluding from their benefits persons whose employment is not in regular course of occupation that party is engaged in with view of winning livelihood or some gain, *excluding incidental or occasional operations arising out of that business*; to normal operations which constitute business.

Black's Law Dictionary 1156 (5th ed. 1983) (emphasis added). Both definitions involve periodicity and the elapsing of time. No Mississippi case defines how quickly the word "regularly" means, within the context of §71-3-5, requiring a new employers to secure coverage.

Because a statutory penalty (§71-3-83) attaches to a violation of §71-3-5, general rules of administrative law require facts to be viewed in a manner most favorable to the party against whom that penalty will be imposed. Considering that the Commission's own criteria require an examination of multiple payroll cycles before an application can be completed, R & K was not "clearly and convincingly" subject to the Act when held to an "immediate" coverage standard.

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2 Other States' Legislatures have adopted specific minimum payroll periods for use in determining an employer's eligibility for coverage. Mississippi's Legislature has yet to expressly establish any such minimum payroll period via statute.

Notwithstanding the Commission's ruling, the "Basic Manual" (Addendum) requires "remuneration" information in conjunction with "Class codes" describing the employer's "operation" in order to underwrite coverage[3]. Thus, an employer must have sufficient comparative payroll data in order to apply for coverage. The market for AIG's policy exists because of this known delay. These application forms are for "voluntary" coverage.[4] But the Commission's criteria for applying for the "Assigned Risk" pool requires the applicant to "State developing *highest* payroll." At the time of this injury R&K had but one (1) completed payroll cycle. Using the required criteria, insufficient time had elapsed for R & K to have completed either application. These criteria are entirely consistent with §71-3-5's exemption for new employers not yet "regularly" employing five (5) workers. The Commission failed to consider this criteria by ruling that R & K should have had coverage prior to July 16th.

The Commission procedurally erred in failing to bifurcate the evidentiary hearing from the jurisdictional contest; by hastily dismissing a potential statutory employer; and by holding that the AIG's occupational accident benefits were not creditable as payments made "in lieu of compensation" or an election of remedy.

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Acord forms 130 and 133, respectively (See Addendum). Also, as of January 1, 2007, the "Required Critical Threshold Items" checklist will require "[t]otal annual payroll or other appropriate remuneration for each class code" for employers seeking coverage under Mississippi's compensation "Assigned Risk Plan" (See Addendum). Like coverage provided in the "voluntary" (as opposed to "residual") market, an employer's premium quote must be based upon highest payroll data, class code, and number of employees to complete an application for coverage. This is an impossibility in the absence of multiple payroll cycles. As of July 16, 2003, R & K had completed only one week involving payroll in which checks were issued on June 27th. The facts show that no additional work was performed until the week of Appellees' injury, beginning on July 14th and ending on the date of injury, July 16th. Still, payroll information was required a.) in order to prove any "regular" employment; and, 2.) so as to provide any insurance carrier sufficient payroll information to calculate a premium.

[4] Coverage issued "voluntarily" by carriers; i.e., to "low risk" employers.

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 is appropriate for judicial review. *Central Elec. Power Ass'n v. Hicks*, 110 So.2d 351, 356 (Miss. 1959). Also, a Court of law will reverse "when the findings [of fact] of the Commission are based on a mere scintilla of evidence that goes against the overwhelming weight of evidence." *DiGrazia v. Park Place Entertainment*, 914, So.2d 1232, 1236 (Miss.Ct.App. 2005), citing *Johnson v. Ferguson*, 435 So.2d 1191, 1194-95 (Miss. 1983).

B. The ruling on appeal applied an erroneous legal standard, was not supported by substantial evidence, and was contrary to the overwhelming weight of the evidence.

1. The appropriate legal standard to a properly conducted §71-3-5 analysis governs the "substantial credibility" of the evidence supporting the ruling reached.

The section of the Workers' Compensation Act governing the gravamen of this appeal is §71-3-5 which defines "Employers subject to statute" as follows:

> The following shall constitute employers subject to the provisions of this chapter:
>
> Every person, firm and private corporation, including any public service corporation but excluding, however, all nonprofit charitable, fraternal, cultural, or religious corporations or associations, **that have in service five (5) or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied**.

Miss. Code Ann. §71-3-5 (1972) (emphasis added). The section clearly encompasses employers having five (5) or more employees on a "regular" basis. But it likewise excludes"small" employers having fewer than five employees or those not yet having "*regular*" employment. *Id.* (emphasis added). R & K's first assignment of error illustrates how the Commission's use of the wrong evidentiary standard resulted in it relying upon evidence lacking "substantial credibility" for a properly-conducted §71-3-5 analysis.

A reviewing Court's analysis of the record in search of "substantial credibility" supporting an administrative ruling properly requires an examination of the *quality* of the evidence supporting that conclusion. "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.*, 958 So.2d 247 (Miss.Ct.App. 2007), citing *Miss. Sierra Club, Inc. v. Miss.Dep't of Envt. Quality*, 819 So.2d 515, 519 (¶ 15) (Miss. 2002). The question is therefore not whether *any evidence* exists within the record to support the ruling reached, but instead whether the evidence relied upon possesses sufficient credence, quality and character to provide a justifiable foundation for the ruling.

No case-law exists defining what is meant by "five (5) or more workmen or operatives regularly in the same business" sufficient to trigger the coverage mandate. The legislature has not provided such a time-frame. Accordingly, other factors must be examined in order to determine how an analysis of §71-3-5 should be conducted, and in addition, the character of the evidence worthy of consideration in conducting that analysis. Clearly, §71-3-5 is the gateway statute to the

Act. In order to resolve this question of whether an employer has crossed this threshold, the evidentiary standard to be used is governed by the consequences of failing to comply. Specifically, when read *in pari materia* with §71-3-83, it is clear that §71-3-5 carries with it a penal component. Specifically,

> (1) Any employer required to secure the payment of compensation under this chapter who fails to secure such compensation is guilty of a misdemeanor and, upon conviction thereof, shall be punished by the fine of not more than One Thousand Dollars ($1,000.00), or by imprisonment for not more than one (1) year, or by both such fine and imprisonment.

Miss. Code Ann. §71-3-83 (1972). Thus, the consequences for failing to comply with §71-3-5 are not merely penal, but indeed criminal.

The Supreme Court has provided the legal standard which must apply to an analysis in such situations. Whereas "[w]orkers' compensation law is liberally and broadly construed, resolving doubtful cases in favor of compensation so that the beneficent purposes of the Act may be accomplished" (*Marshall Durbin Companies v. Warren*, 633 So.2d 1006, 1010 (Miss. 1994); *General Electric Co. v. McKinnon,* 507 So.2d 363, 367 (Miss. 1987); and *Barham v. Klumb Forest Products Center, Inc.*, 453 So.2d 1300, 1304 (Miss. 1984)), a different standard is applied when penalties are involved. Specifically, Mississippi's general administrative law requires application of the "clear and convincing" evidentiary standard (i.e., construing facts in a manner most favorable to the "would be" penalized party) when statutory violations are penal. This was addressed in a case involving medical licensure. "Because the licensure statutes and regulations at issue in this case are penal in nature, the Board is required to prove its case against Dr. McFadden by clear and convincing evidence, and the statutes and regulations must be strictly

construed in favor of Dr. McFadden." *McFadden v. Mississippi State Bd.of Medical Licensure*, 735 So.2d 145, 152 (Miss. 1999), citing *Hogan v. Mississippi Bd. Of Nursing*, 457 So.2d 931, 934 (Miss. 1984). Thus, in conducting an analysis of whether R&K was subject to the Act, the facts must be viewed in a manner most favorable to R & K. But R & K 's position of being held to an impossible coverage standard has not once been given a favorable consideration.

This heightened evidentiary standard was first applied in the workers' compensation context in the case of *Southern Engineering & Electric Co. v. Chester* (226 Miss. 136, 83 So.2d 811) (1955), but was perhaps best explained in the case of *Miss. Transp. Comm'n v. Deweese*, 691 So.2d 1007, 1016 (Miss.1997), holding:

> The rule requiring liberal construction of the Act generally does not apply to provisions for the imposition of penalties. Such provisions, on the contrary are to be strictly construed. The presumptions are against one claiming a statutory penalty and all questions of doubt are resolved in favor of one against whom the penalty is sought to be imposed.

Id., citing V. Dunn, *Mississippi Workmen's Compensation*, §305 (3d. ed. 1982). "Moreover, provisions for penalties are strictly construed. Doubtful questions as to them are resolved in favor of the one against whom the penalty is sought." *Delchamps, Inc. v. Baygents*, 578 So.2d 620, 624 (Miss. 1991), citing *J. H. Moon & Sons v. Hood*, 244 Miss. 564, 572, 144 So.2d 782, 784 (1962). Because §71-3-5 carries with it §71-3-83's criminal (as opposed to mere monetary) penalties, it is abundantly clear that the employer-favorable standard should have been applied.

2. The evidence supporting the ruling against R & K is not "substantially credible" in application of the appropriate legal standard, especially when overwhelming evidence to the contrary to was present within the record.

The Commission's casual and dismissive treatment of facts subjecting R & K to the

requirements of the Act make it obvious that the erroneous *Marshall Durbin* "liberal construction" standard was applied. As can be expected, all litigants caught within a §71-3-5 controversy will likely sponsor competing verbal testimony regarding the number, regularity and duration of those actually employed at the time of an injury. But the quality, character and credence of such testimony begins to diminish if documentary evidence exists to the contrary. And if the correct legal standard is applied, the Commission cannot ignore such documents simply because they favor the position of an employer.

In order for the Commission to have ruled as it did, it is inescapable that the Appellees' uncorroborated testimony had to be accepted as true while copious documentation to the contrary was simultaneously disregarded. Such testimony consisted of phantom employees being paid in cash for their services along with various other unanswered questions as to why payroll checks were issued during the same period of time (tt. pp. 115 - 131). On the other hand, and if applying the appropriate legal standard, no imagination is needed to find corroboration for R &K's position. In fact, ample documentation in the record supports R&K's position, most of which was prepared prior to the subject accident and well-before these cases were filed.

The documentation plainly shows no "regular employment" prior to this accident. By then, the payroll and employment data establishes that R & K had only eight days of actual employment for the entire 2003 calendar year[5]. Additional documents show that Jordan had drawn unemployment benefits during the last quarter of 2002 and first quarter of 2003 (tt., See E/C's Exhibit 5). Exhibit 5 to the trial transcript shows that Jordan drew these benefits for one week in

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Commission coverage records plainly show that Mr. Roy White had previously operated "Hickory Timber Company", owned by his wife Sylvia, but chose to retire and sell off his equipment by the end of 2002.

each of these quarters. But objections to R & K's questions as to Jordan's place of employment prior to late June were sustained by the Administrative Judge (tt. pp. 111 - 112). Dukes drew unemployment benefits through the end of June (tt., See E/C's Exhibit 13). Exhibit 13 to the Commission's trial transcript shows that Dukes drew these benefits for five weeks in the first quarter of 2003, and also for the full 12 weeks of the second quarter ending June 30, 2003. The "credibility" of the Appellees' testimony of being "regularly employed" by R&K prior to the end of June cannot be considered "substantial" while simultaneously receiving these benefits.

A detailed examination of other documents is even more persuasive in R &K's favor. R & K opened its checking account in June (See, generally, tt., E/C's Exhibits 6 and 14). Checks show that entirely new equipment was bought in June to re-enter the timber harvesting industry. These documents corroborate the testimony that the first payroll was issued on Friday, June 27th for the initial week of work (tt. p. 50). R & K's payroll data (See tt. E/C Exhibit 6) shows that a sum total of five (5) employees were indeed employed that week. But when examined, the amount of the pay of each such check differs, clearly illustrating that these five (5) workers were rarely (if at all) on the job at concurrent times. Two of the five considered themselves self-employed independent contractors (tt. pp. 34-35). Of these five (5) only one (1)[6] but not more than four (4) worked for the full five (5) days (if the rate was $90.00). And even if the rate was $100.00 per day, then only one (See fn. 6) worked the full five days and only three (3)[7] worked

[6] This was Earlee Jones; see check #1014

[7] These were George Dukes, Joe Jordan, and Tony Buckley; see checks # 1015, 1016, and 1017, respectively.

for four and one-half (4 ½) days. One (1)[8] worked for three and one-half (3 ½) to four days (See tt., E/C Exhibit 6). The ultimate point is that for the entire first half of 2003 (a term elapsing between January 1, 2003 and June 30, 2003), R & K did not exceed, but merely met, the statutory minimum number of five (5) employees for a maximum of only three and one-half (3 ½) days. It is absolutely impossible to construe these facts in R & K's favor, and simultaneously reach the conclusion that any of these five employees, including the Appellees, had been "regularly employed" by R & K by the end of business on Friday, June 27, 2003.

The payroll data for July is virtually non-existent (See, tt. E/C Exhibit 7). Tony Buckley was paid for (approximately) one day's work on Monday, July 7th, via check number 1024 in the amount of $90.00. Another check (number 1026) was written to Employers' Underwriters on July 21st. Joe Jordan received two checks (numbers 1030 and 1031) in the respective (gross) amounts of $270.00 and $150.00. It is undisputed[9] that Jordan did not work past July 16th. Due to the hospitalization of Mr. Roy White during that week (tt. pp. 37), no paychecks were written. At best, this documentary evidence reflects a total of 2.7 days worked by R&K during July with a total of only two or (at most) three employees. No other paychecks exist for work done in July apart from another check written to Jordan (number 1035) in the amount of $150.00, and to Tony Buckley on August 1, 2003, in the amount of $270.00 (See, tt. E/C Exhibit 9).

It is completely impossible to construe the Appellees' testimony of having been "regularly

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[8] This was Arvis Gibbs; see check #1020

[9] It is also undisputed that George Dukes worked the same period of time that week as did Jordan. However, according to Mr. White, Dukes was not paid because he did not see Mr. Dukes for over two months following the incident (tt. pp. 38-39).

employed" by R &K as "clear and convincing" in view of such documentation. Yet these documents plainly corroborate the position and testimony of R & K that no "regular employment" existed prior to July 16, 2003. The impossibility mounts as the appropriate "strict construction" standard requires that this evidence be viewed in a manner most favorable to R & K.

C. The ruling on appeal held R & K to a higher coverage standard than that required by§71-3-5 and that of the Commission's own criteria for applying for compensation coverage.

The most bizarre and striking factor regarding the Commission's ruling is that its own rules and criteria for securing initial coverage were ignored when it held R & K to what is, in practicality, an "immediate" coverage standard. No such requirement exists in any applicable law. The Commission, through the Administrative Judge, ruled *inter alia* that R & K *should have already secured workers' compensation insurance* by the time of the Appellees' injuries. But if the Commission's own criteria to apply for such coverage is examined, it becomes clear that this ruling ignored the impossibility of holding R & K to that standard. Sufficient payroll information must be "developed" in order to complete an application for coverage. This "development" period is not directly specified but is nonetheless entirely consistent with §71-3-5's "regular employment" language. The development of such information requires time to elapse, to an equal degree as it must for employment to be considered "regular."

An applicant must first complete a form, an "Acord form 130", a copy of which is attached in the Addendum. This form is used in all States. The bottom third of this form requires "rating information", from which calculations are performed to arrive at a premium "quote." The formula involves factors such as "estimated annual remuneration" (payroll) for each "classification" of employee. Each classification code determines the rate assigned to each

employee, the sum of which constitutes the total quoted premium. Such data is not available on the eve of the first day of business.

Clearly, no newly-established business can possibly submit this data prior to experiencing successive (certainly two) payroll intervals. When one seeking coverage "in good faith [is] *entitled* to insurance under this chapter but which, because of unusual conditions or circumstances, is unable to obtain such insurance," that entity is obligated to apply for coverage under the Commission's "Assigned Risk" Compensation insurance plan. Miss. Code Ann. §71-3-111 (amended 1992). This involves completing an "Acord form 133" (See Addendum) which is submitted along with an Acord form 130. The first element of the "133"requires the applicant to "State *developing highest* payroll." Clearly, the word "highest" suggests the need for multiple payroll cycles. And, the application contemplates time having passed to be offered or refused other insurance. Specifically, to complete this portion of the form, the applicant must list "the number of insurance companies which have refused the applicant coverage in the last 60 days." Whether this notation contemplates a 60-day time period for uninsured operations is unclear. But nevertheless, some time interval (based upon payroll cycles) is contemplated to elapse before any prospective applicant can be expected to fully complete the hardship "assigned risk" form.

In the case *sub judice*, the Commission expected R & K to have secured coverage prior to developing any payroll data. Notable also is that simultaneous to entering this ruling, the Commission expanded this necessary payroll criteria for Assigned Risk applicants to "annual" payroll data (See Addendum, "*Required Critical Threshold Items for MS Workers Compensation Assigned Risk Applications*", Effective January 1, 2007).

The record patently shows that once comparable payroll information became available to

R & K, it rapidly (July 28th) submitted an Acord form 130 to "PSI" along with a check (See tt. E/C's Exhibit 7, specifically check number 1033). It is inconceivable what the Commission expected R & K to do before this time. But if the Commission expects new businesses to secure coverage prior to developing this necessary payroll data, then it needs to re-write and reconsider its own criteria before holding new employers such as R & K to a statutory penal (§71-3-83) standard.

While this portion of the brief focuses upon matters not entirely within the record, it does focus upon Commission-adopted procedures for obtaining coverage which occupy the gaps created by the absence of a "regularly employed" statutory definition. These application criteria thus illustrate how the Commission's decision is "arbitrary and capricious." After all, the Commission should know its own criteria, and how these criteria interact with the "regular employment" exemption. But these were clearly disregarded for the purposes of this case.

What is within the record, however, are valid documents illustrating R & K's diligent attempt to obtain some sort of coverage to protect its employees. Check number 1012 was written to Employers' Underwriters, Inc. on Monday, June 23rd - the date initial work began - in the amount of $756.50 for purposes of procuring the AIG policy (tt., E/C Exhibit 6). On July 28th, check number 1033 (discussed above) was written to "PSI" in the amount of $2,500.00 in application for "wc", with reference to workers' compensation. By this time, sufficient payroll information had developed (June 23rd through June 27th) by which R & K could fill out an Acord form 130 application. Once this coverage was issued, R & K executed yet another check in the amount of $2,536.00 for "wc", or workers' compensation coverage (tt. E/C Exhibit 9, specifically, check number 1034). By its own terms, the AIG occupational accident policy lapsed

the moment this latter coverage became effective. Clearly, R & K did all that was feasible, and reasonable, to protect its employees (the AIG policy) until compensation coverage became available. This accident unfortunately occurred during the interim, but each Appellee nonetheless received substantial benefits through the AIG policy (C.R. pp. 205 - 218). Notably, R & K was under no legal obligation to purchase this "gap" coverage.

D. The ruling on appeal erred in dismissing Linden Lumber Company prematurely in view of its subsequent findings; and by not construing the acceptance of the benefits paid under the AIG policy as either/or an election of remedy or a credit for payments made in lieu of compensation.

1. Though not appealed in a timely basis, the dismissal of Linden as a potential statutory employer was premature and erroneous in view of the Administrative Judge's subsequent findings.

It is undisputed that R & K did not have a workers' compensation policy in effect at the time these injuries. But if indeed the Act applies, then a "statutory employer" situation might exist if R & K could be construed a "subcontractor." Since the Commission was apparently intent upon applying the *Marshall Durbin* standard (resolving all doubtful cases in favor of compensation), then it certainly failed the Appellees by dismissing Linden as quickly as it did. Just as each Appellees' Motion to include Linden suggests (C. R. p.67), ample evidence exists within the record to conclude that a prime-/sub-contractor relationship existed between R & K and Linden. Mr. Kevin White testified at the hearing that the work being done was at the behest of Linden who exercised control over the job site in Roy White's absence (tt. p.83-85). He testified that the timber was purchased by Linden for harvesting; that the harvesting was subcontracted to him by Linden; and that he would not have re-entered the logging business had it not been for Linden's request. Regardless, prior to entertaining any evidence as to this relationship, the

Administrative Judge prematurely dismissed Linden as a potential statutory employer(C.R. pp. 219-223).

Since the Administrative Judge later appeared intent upon applying the *Marshall Durbin* standard, it was obviously error to prematurely dismiss Linden prior to receiving any evidence which might inure to the Appellees' benefit. After all, since R & K was admittedly uninsured, the *Marshall Durbin* standard (if it governed) would have demanded that the Commission examine its relationship with Linden for the injured workers' benefit. But even the Appellees failed to demonstrate much concern, as no appeal was timely taken from this ruling.

The newly-added language to §71-3-5 that a mere "timber buyer" cannot be a statutory employer "if such purchaser is not liable for unemployment tax on the person harvesting and delivering the timber as provided by United States Code Annotated, Title 26, Section 3306, as amended", if nothing else, begs thorough factual development. It raises a multitude of questions of whether a "would-be" statutory employer buying timber *would be* responsible for those taxes if the *de facto* employer defaulted. Oddly, this "pro-employer" analysis standard applied by the Administrative Judge (C.R. pp. 221 - 223) would have served to exclude R & K just as it did Linden. But mysteriously, it was only applied to Linden and not R & K. Whereas R & K's employment and tax records were sufficient for purposes of examining Linden's request for dismissal under §71-3-5, neither these nor any other business records were examined for R & K's identically-requested purpose. This type of "standard shopping" is patently inappropriate.

2. Even if R & K was subject to the Act, the Appellees nevertheless elected their common law remedy by accepting the Occupational Accident benefits; or otherwise, R& K should receive a compensation credit for the benefits paid thereunder.

After the Order of Administrative Judge was appealed, the Full Commission entered its

own Order affirming the decision, but went further in a bizarre and downright strange application of compensation principals with respect to the AIG occupational accident policy, as well as the Act's third party subrogation statute (C.R., pp. 239 - 242). The details and purposes of this policy and the intent for its coverage are identified in a true and correct copy of the policy found within the Commission's record of 2007-WC-01212 at pages 12 through 22. Each Appellee's Motion to Strike the affidavit of the AIG agent issuing the policy was granted. This affidavit illustrated each Appellee's receipt of benefits (C.R. pp. 205 - 218).

The Full Commission has completely misconstrued what constitutes benefits "paid in lieu of compensation" by ruling that AIG policy's benefits do not qualify for this classification (C.R. pp. 239 - 242). Its Order affirming the Order of Administrative Judge (C.R. pp. 239 - 242) insinuates that no benefit paid to an employee is eligible for this credit unless that payment is a bona fide "workers' compensation benefit." To this extent, the Full Commission completely failed to comprehend the purpose of the AIG policy. Specifically, the policy - to be sure - is drafted in such a manner so that it should not be confused with a true §71-3-1, *et seq.*, "Compensation" policy. Instead, it is intended only as "gap coverage" for employers who are not yet eligible for compensation coverage. Its effectiveness is mutually exclusive to workers' compensation. The Commission merely overruled AIG's underwriting department, holding that AIG should have never underwritten the policy because R & K should have already had compensation insurance instead.

The credit provisions of the Act are not subject to a "separate common law liability claim that has been filed against the Employer" (C.R. p. 240). "Creditable payments" are also not limited to those intended by the maker to be pure workers' compensation benefits. Credits are

instead allowed when payments are made to an employee who is due compensation benefits from a carrier, but are merely paid in advance by another (examples would be salary continuation or a medical bill paid by a group carrier). The fact that AIG should have never issued its policy to R&K because of the latter's "entitlement to compensation coverage" (in the apparent opinion of the Commission) somewhat confirms that the benefits paid by AIG were a "substitute" for compensation benefits. If the Commission is going to take the position that the benefits paid by AIG should have been paid by, perhaps, a compensation carrier, then the underwriting "mistake" by AIG in issuing the policy does not render the benefits paid non-creditable to R & K.

The Commission analogizes AIG's benefits with the death benefits payable from a life insurance policy in the case of *Riddell v. Cagle's Estate*, 85 so.2d 926 (Miss. 1956), and/or the "sick pay" benefits in the case of *Pet, Inc., Dairy Division v. Roberson*, 329 So.2d 516 (Miss. 1976). The difference, of course, is that with-or-without being eligible for compensation benefits, these other benefits (death and sick pay) were still due the claimants in both of these cases. This is not so with AIG's policy. Had R & K been eligible for compensation coverage, then the AIG policy would have immediately lapsed by its own terms. In such a situation, neither Jordan nor Dukes would have been eligible for the AIG benefits. Unlike the Commission, however, AIG's underwriters and claims staff considered the Appellees yet ineligible for workers' compensation benefits, because they knew R & K was not yet eligible for compensation coverage. In short, the AIG policy only exists, and is only effective, "in lieu of compensation."

Finally, the Full Commission's interpretation of §71-3-71 within the contexts of this case is also quite bizarre (C.R. p. 240). Section 71-3-71 constitutes nothing more than a "subrogation" statute. It exists to vest a compensation insurer with a lien (for benefits paid) against any third

party's liability. There are no "third parties" in this case. The Commission's strange interpretation of this statute, in conjunction with the case of *Sawyer v. Head, Dependents of*, 510 So.2d 472 (Miss. 1987), appears to interpret the statute as one which requires "a separate common-law liability claim that has been filed against the Employer." By definition, however, even if a common law action is filed against an employer, that employer still cannot constitute a "third party" within the subrogation contexts of §71-3-71. The statute, along with the theory, is simply misplaced.

CONCLUSION

It is unknown how quickly the Legislature intended new employers to secure coverage with use of the term "regularly employed", but it is clear that the term does not mean "immediately" and the criteria to complete a coverage application requires time for multiple payroll periods to elapse. R & K was thus held to an impossible coverage standard. For the reasons depicted hereinabove, the rulings against R & K by the Workers' Compensation Commission and the Circuit Court should be overruled and the compensation claims of the Appellees dismissed.

Respectfully submitted, this the 15th day of November, 2007.

Roy White and Kevin White, d/b/a R & K TIMBER, Employer

BY: _____
STEVEN D. SLADE, their attorney

CERTIFICATE OF SERVICE

I, Steven D. Slade, attorney for the stated Appellants, do hereby certify that I have delivered by U.S. Mail, postage prepaid, the foregoing Brief of Appellants to:

Thomas L. Tullos, Esq.
Post Office Drawer 567
Bay Springs, Mississippi 39422
(Attorney for the Appellees)

This the 15th day of November, 2007.

STEVEN D. SLADE

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MERIDIAN, MISSISSIPPI 39303-3490
(601) 483-1281 (phone)
(601 483-1282 (fax)
[redacted]

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROY WHITE and KEVIN WHITE,
d/b/a R & K TIMBER — APPELLANTS

VERSUS — NO. 2007-WC-01209-COA

JOE JORDAN — APPELLEE

ADDENDUM

ACORD WORKERS COMPENSATION APPLICATION

DATE (MM/DD/YYYY)

AGENCY	COMPANY	UNDERWRITER
	APPLICANT NAME	
PHONE (A/C, No, Ext): FAX (A/C, No): MAIL ADDRESS:	MAILING ADDRESS (Including ZIP code)	E-MAIL ADDRESS
	YRS IN BUS / SIC / ☐ INDIVIDUAL ☐ PARTNERSHIP / ☐ CORPORATION ☐ SUBCHAPTER "S" CORP / ☐ LLC ☐ OTHER:	
CODE: SUB CODE:	CREDIT BUREAU NAME:	ID NUMBER:
AGENCY CUSTOMER ID	FEDERAL EMPLOYER ID NUMBER / NCCI ID NUMBER	OTHER RATING BUREAU ID OR STATE EMPLOYER REGISTRATION NUMBER

STATUS OF SUBMISSION

☐ QUOTE ☐ ISSUE POLICY
☐ BOUND (Give date and/or attach copy)
☐ ASSIGNED RISK (Attach ACORD 133)

BILLING/AUDIT INFORMATION

BILLING PLAN: ☐ AGENCY BILL ☐ DIRECT BILL

PAYMENT PLAN: ☐ ANNUAL ☐ OTHER: ☐ SEMI-ANNUAL ☐ QUARTERLY % DOWN:

AUDIT: ☐ AT EXPIRATION ☐ MONTHLY ☐ SEMI-ANNUAL ☐ OTHER: ☐ QUARTERLY

LOCATIONS

LOC #	STREET, CITY, COUNTY, STATE, ZIP CODE

POLICY INFORMATION

PROPOSED EFF DATE	PROPOSED EXP DATE	NORMAL ANNIVERSARY RATING DATE	☐ PARTICIPATING ☐ NON-PARTICIPATING	RETRO PLAN

PART 1 - WORKERS COMPENSATION (States)	PART 2 - EMPLOYER'S LIABILITY	PART 3 - OTHER STATES INS	DEDUCTIBLES	AMOUNT/%	OTHER COVERAGES
	$ EACH ACCIDENT		☐ MEDICAL		☐ U.S.L. & H. ☐ MANAGED CARE OPTION
	$ DISEASE-POLICY LIMIT		☐ INDEMNITY		☐ VOLUNTARY COMP ☐
	$ DISEASE-EACH EMPLOYEE		☐		☐ FOREIGN COV ☐

DIVIDEND PLAN/SAFETY GROUP	ADDITIONAL COMPANY INFORMATION

RATING INFORMATION

STATE	LOC #	CLASS CODE	DESCR CODE	CATEGORIES, DUTIES, CLASSIFICATIONS	# EMPLOYEES FULL TIME	# EMPLOYEES PART TIME	ESTIMATED ANNUAL REMUNERATION	RATE	ESTIMATED ANNUAL PREMIUM

STATE:	FACTOR	FACTORED PREMIUM
TOTAL		$
INCREASED LIMITS		$
DEDUCTIBLE		$
		$
EXPERIENCE OR MERIT MODIFICATION		$
LOSS CONSTANT	N/A	$
ASSIGNED RISK SURCHARGE		$
ARAP		$
		$
SCHEDULE RATING		$
CCPAP		$
STANDARD PREMIUM		$
PREMIUM DISCOUNT		$

	FACTOR	FACTORED PREMIUM
EXPENSE CONSTANT	N/A	$
TAXES / ASSESSMENTS	N/A	$
		$
ESTIMATED ANNUAL PREMIUM	N/A	$
TOTAL EST ANNUAL PREMIUM	N/A	$
MINIMUM PREMIUM	$	
DEPOSIT PREMIUM	$	

SPECIFY ADDITIONAL COVERAGES / ENDORSEMENTS

DIVIDUALS INCLUDED/EXCLUDED

PARTNERS, OFFICERS, RELATIVES TO BE INCLUDED OR EXCLUDED. (Remuneration to be included must be part of rating information section.)

TATE	LOC #	NAME	DATE OF BIRTH	TITLE/ RELATIONSHIP	OWNER-SHIP %	DUTIES	INC/EXC	CLASS CODE	REMUNERATION

RIOR CARRIER INFORMATION/LOSS HISTORY

OVIDE INFORMATION FOR THE PAST 5 YEARS AND USE THE REMARKS SECTION FOR LOSS DETAILS — LOSS RUN ATTACHED

YEAR	CARRIER & POLICY NUMBER	ANNUAL PREMIUM	MOD	# CLAIMS	AMOUNT PAID	RESERVE
	CO:					
	POL #:					
	CO:					
	POL #:					
	CO:					
	POL #:					
	CO:					
	POL #:					
	CO:					
	POL #:					

NATURE OF BUSINESS/DESCRIPTION OF OPERATIONS

GIVE COMMENTS AND DESCRIPTIONS OF BUSINESS, OPERATIONS AND PRODUCTS: MANUFACTURING-- RAW MATERIALS, PROCESSES, PRODUCT, EQUIPMENT. CONTRACTOR-- TYPE OF WORK, SUB-CONTRACTS. MERCANTILE--MERCHANDISE, CUSTOMERS, DELIVERIES. SERVICE--TYPE, LOCATION. FARM--ACREAGE, ANIMALS, MACHINERY, SUB-CONTRACTS.

GENERAL INFORMATION

EXPLAIN ALL "YES" RESPONSES	YES	NO
1. DOES APPLICANT OWN, OPERATE OR LEASE AIRCRAFT/WATERCRAFT?		
2. DO/HAVE PAST, PRESENT OR DISCONTINUED OPERATIONS INVOLVE(D) STORING, TREATING, DISCHARGING, APPLYING, DISPOSING, OR TRANSPORTING OF HAZARDOUS MATERIAL? (e.g. landfills, wastes, fuel tanks, etc)		
3. ANY WORK PERFORMED UNDERGROUND OR ABOVE 15 FEET?		
4. ANY WORK PERFORMED ON BARGES, VESSELS, DOCKS, BRIDGE OVER WATER?		
5. IS APPLICANT ENGAGED IN ANY OTHER TYPE OF BUSINESS?		
6. ARE SUB-CONTRACTORS USED? (IF YES, GIVE % OF WORK SUBCONTRACTED)		
7. ANY WORK SUBLET WITHOUT CERTIFICATES OF INS.?		
8. IS A WRITTEN SAFETY PROGRAM IN OPERATION?		
9. ANY GROUP TRANSPORTATION PROVIDED?		
10. ANY EMPLOYEES UNDER 16 OR OVER 60 YEARS OF AGE?		
11. ANY SEASONAL EMPLOYEES?		
12. IS THERE ANY VOLUNTEER OR DONATED LABOR?		
13. ANY EMPLOYEES WITH PHYSICAL HANDICAPS?		
14. DO EMPLOYEES TRAVEL OUT OF STATE?		
15. ARE ATHLETIC TEAMS SPONSORED?		
16. ARE PHYSICALS REQUIRED AFTER OFFERS OF EMPLOYMENT ARE MADE?		
17. ANY OTHER INSURANCE WITH THIS INSURER?		

EXPLAIN ALL "YES" RESPONSES	YES	NO
18. ANY PRIOR COVERAGE DECLINED/ CANCELLED/NON-RENEWED (Last 3 years)? NOT APPLICABLE IN MO		
19. ARE EMPLOYEE HEALTH PLANS PROVIDED?		
20. IS THERE A LABOR INTERCHANGE WITH ANY OTHER BUSINESS/SUBSIDIARY?		
21. DO YOU LEASE EMPLOYEES TO OR FROM OTHER EMPLOYERS?		
22. DO ANY EMPLOYEES PREDOMINANTLY WORK AT HOME?		
23. ANY TAX LIENS OR BANKRUPTCY WITHIN THE LAST 5 YEARS?		
24. ANY UNDISPUTED AND UNPAID WORKERS COMPENSATION PREMIUM DUE FROM YOU OR ANY COMMONLY MANAGED OR OWNED ENTERPRISES? IF YES, EXPLAIN INCLUDING ENTITIY NAME(S) AND POLICY NUMBERS(S).		

CONTACT INFORMATION

IN-SPECTION	PHONE:
	NAME:
	E-MAIL:
ACCTNG RECORD	PHONE:
	NAME:
	E-MAIL:
CLAIMS INFO	PHONE:
	NAME:
	E-MAIL:

APPLICABLE IN TENNESSEE: IT IS A CRIME TO KNOWINGLY PROVIDE FALSE, INCOMPLETE OR MISLEADING INFORMATION TO ANY PARTY TO A WORKERS COMPENSATION TRANSACTION FOR THE PURPOSE OF COMMITTING FRAUD. PENALTIES INCLUDE IMPRISONMENT, FINES AND DENIAL OF INSURANCE BENEFITS.

ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR ANOTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND SUBJECTS THE PERSON TO CRIMINAL AND NY: SUBSTANTIAL] CIVIL PENALTIES. (Not applicable in CO, HI, NE, OH, OK, OR, TN or VT; in DC, LA, ME and VA, insurance benefits may also be denied)

REMARKS (Attach additional sheets if more space is required)

APPLICANT'S SIGNATURE	DATE	PRODUCER'S SIGNATURE	NATIONAL PRODUCER NUMBER

ACORD™

WORKERS COMPENSATION INSURANCE PLAN
ASSIGNED RISK SECTION

DATE (MM/DD/YYYY)

THIS FORM ALONG WITH AN ACORD 130 WORKERS COMPENSATION APPLICATION CONSTITUTE AN APPLICATION FOR WORKERS COMPENSATION INSURANCE PLAN (ASSIGNED RISK) COVERAGE. THIS FORM MUST BE ATTACHED TO AN ACORD 130 FOR SUBMISSION. PLEASE REFER TO THE STATE SPECIFIC INSTRUCTIONS PAGE FOR SPECIFIC REQUIREMENTS.

APPLICANT NAME

PROPOSED EFF DATE

SUPPLEMENTAL INFORMATION

PAYROLL OFFICE NAME, ADDRESS AND TELEPHONE NUMBER (A PO BOX ADDRESS ALONE IS NOT ACCEPTABLE. PLEASE PROVIDE DRIVING INSTRUCTIONS IF A ROUTE ADDRESS IS SHOWN.)

STATE DEVELOPING HIGHEST PAYROLL:

EXPLAIN ALL "YES" RESPONSES IN THE REMARKS SECTION	YES	NO
HAS THERE BEEN PREVIOUS WORKERS COMPENSATION COVERAGE:		
IN THIS STATE?	☐	☐
IN ANY OTHER STATE?	☐	☐
- IF NO TO BOTH QUESTIONS, WAS THIS DUE TO:		
☐ NEW BUSINESS ☐ SELF INSURED-GROUP		
☐ SELF INSURED-INDEP ☐ # EMPLOYEES		
2. IS THERE ANY UNPAID WORKERS COMPENSATION PREMIUM DUE OR IN DISPUTE FROM YOU OR ANY COMMONLY MANAGED OR OWNED ENTERPRISES? IF YES, EXPLAIN INCLUDING ENTITY NAME(S) AND POLICY NUMBER(S).		
3. YEAR APPLICANT'S BUSINESS BEGAN:		

EXPLAIN ALL "YES" RESPONSES IN THE REMARKS SECTION	YES	NO
4. HAS THERE BEEN A NAME CHANGE, CONSOLIDATION, MERGER OR OWNERSHIP CHANGE DURING THE PAST FIVE YEARS? IF YES, GIVE PREVIOUS NAME AND DATE OF CHANGE. CONTACT THE PLAN ADMINISTRATOR ABOUT AN ERM-14.		
5. IS APPLICANT RELATED THROUGH COMMON MANAGEMENT OR OWNERSHIP TO ANY ENTITY NOT LISTED HERE, WHETHER COVERAGE IS REQUIRED OR NOT? IF YES, GIVE DETAILED EXPLANATION.		
6. DO YOU LEASE WORKERS FROM A LABOR CONTRACTOR? IF YES, REFER TO WCIP INSTRUCTIONS.		
7. DO YOU LEASE WORKERS TO A CLIENT COMPANY? IF YES, REFER TO WCIP INSTRUCTIONS.		
8. ARE YOU SEEKING TO COVER THE LEASED WORKERS? IF YES, REFER TO WCIP INSTRUCTIONS.		
9. DO YOU PROVIDE TEMPORARY LABOR SERVICES TO OTHER EMPLOYERS?		
10. DO YOU HAVE A FRANCHISE OR LICENSING AGREEMENT? IF YES, PROVIDE DETAILS OF THE AGREEMENT.		
11. DO TRUCKING CLASSIFICATIONS APPLY? IF YES, COMPLETE QUESTIONS 12-14.		

2. DO YOU OR YOUR EMPLOYEES REGULARLY OPERATE FROM A BASE TERMINAL(S) WHICH IS (ARE) USED TO LOAD, UNLOAD, STORE OR TRANSFER FREIGHT? IF YES, PLEASE PROVIDE A LIST OF TERMINAL ADDRESSES:

#	STREET	CITY	COUNTY	ST	ZIP CODE
1					
2					
3					

13. CAN EACH DRIVER'S STATE OF MAJORITY DRIVING TIME BE ESTABLISHED THROUGH VERIFIABLE RECORDS OR LOGS? ☐ ☐

4. PLEASE PROVIDE A LIST OF ALL DRIVERS/HELPERS AND THEIR STATE OF RESIDENCE:

	DRIVER NAME	TERMINAL # (SEE ABOVE)	MAJORITY DRIVING STATE	RESIDENCE STATE
1				
2				
3				

INSURANCE COMPANIES WHO HAVE OFFERED/REFUSED INSURANCE

	YES	NO
1. HAVE YOU RECEIVED ANY OFFERS OF VOLUNTARY COVERAGE? (INCLUDE MULTI-LINE OR RETROSPECTIVE RATING PLAN, IF APPLICABLE) IF YES, PROVIDE FULL DETAILS INCLUDING PLAN TERMS IN THE REMARKS SECTION.		

INDICATE THE NUMBER OF INSURANCE COMPANIES WHICH HAVE REFUSED THE APPLICANT COVERAGE IN THE LAST 60 DAYS (OR IN ACCORDANCE WITH STATE SPECIFIC GUIDELINES): ☐

IN ACCORDANCE WITH PLAN RULES, THE APPLICANT OR ITS REPRESENTATIVE SHALL MAINTAIN ON RECORD FOR THIS POLICY PERIOD THE CARRIER NAME, CONTACT PERSON, ADDRESS, PHONE NUMBER AND DATE OF CONTACT OF THOSE CARRIERS REFUSING COVERAGE AND MAKE SUCH INFORMATION AVAILABLE TO THE PLAN ADMINISTRATOR OR ASSIGNED RISK CARRIER UPON REQUEST.

REMARKS

PLEASE COMPLETE REVERSE SIDE

REMIUM PAYMENT (Refer to WCIP Instruction sheet for state requirements)

PAYMENT METHOD - SELECT ONE:

IS THE PREMIUM FINANCED? ☐ YES ☐ NO

☐ 1. VERBAL CHECK

BANK/ABA # | ACCOUNT # | CHECK # | PREMIUM PAYMENT AMOUNT $ .00

☐ 2. ELECTRONIC FUNDS TRANSFER

BANK/ABA # | ACCOUNT # | PREMIUM PAYMENT AMOUNT $ .00

☐ 3. MAIL-IN CHECK

CHECK # | PREMIUM PAYMENT AMOUNT $ .00

For submission methods 1 and 2:

1. Does the payor require a physical record of this transaction? ☐ YES ☐ NO
2. To ensure accuracy, a voided check or deposit slip (of the payor) should be faxed to NCCI, Inc. upon return of the signed ACORD applications.
3. The undersigned Producer or Applicant certifies that by signing this application he/she authorizes NCCI, Inc. to deduct or has obtained financial information and authorization from the payor to direct NCCI, Inc. to deduct the Premium Payment Amount, and any other monies required to bind coverage, from the bank and the account number as indicated above for purposes of securing workers compensation insurance pursuant to this application.

PPLICANT'S STATEMENT

The undersigned applicant hereby certifies that he/she has read and understands the statements in this application. As further consideration of policy issuance, the applicant also certifies that the responses provided in this application are true and furthermore agrees:

To maintain a complete record of all payroll transactions in such form as the insurance company may reasonably require and that such record will be available to the company at the designated address.

To comply substantially with all laws, orders, rules, and regulations in force and effect made by the public authorities relating to the welfare, health, and safety of employees.

To comply with all reasonable recommendations made by the insurance company relating to the welfare, health, and safety of employees.

To take no action in any form to evade the application of experience modification determined in accordance with the experience rating rules, as determined by the Plan Administrator.

The undersigned applicant also certifies he/she has had no difficulties with any producer or company in regard to: (a) payroll records; (b) the amount of premium charged; (c) the payment of premium; (d) the carrying out of any recommendation made for the purpose of safeguarding employees; (e) the handling of any claim or accident report except the following: _____.

Violation of any of these agreements may result in cancelation of a policy of insurance issued under a Workers Compensation Insurance Plan.

The undersigned applicant understands also that coverage is NOT bound until the signed application is received with appropriate premium and eligibility is determined by the administrator. Provided that applicant is determined to be eligible and in good faith entitled to WCIP insurance, based upon the information provided herein or otherwise available, coverage will be bound in accordance with plan rules. See individual state plans for applicable binding rules.

The undersigned applicant understands further that since he/she has been unable to secure workers compensation coverage through any other insurance provider, this coverage is being afforded through a Workers Compensation Insurance Plan, and that the rates charged may be higher than those in the voluntary market.

The following statement is only applicable in jurisdictions where the NCCI, Inc. Loss Sensitive Rating Plan has been approved for use:

By signing below I acknowledge that the NCCI, Inc. Loss Sensitive Rating Plan has been explained to me or that an explanatory notice or brochure has been provided to me and I agree that I shall be bound by the terms of such plan if my estimated annual premium or preliminary physical audit premium meets or exceeds the premium eligibility requirement.

APPLICANT'S NAME AND TITLE (PRINT OR TYPE)	DATE	SIGNATURE (MUST BE AN OWNER OR AN OFFICER)

REMINDER: BOTH THE ACORD 130 AND 133 APPLICATIONS MUST BE SIGNED BY THE APPLICANT AND DESIGNATED PRODUCER.

PRODUCER'S CERTIFICATION

'HE PRODUCER ALSO CERTIFIES THAT HE/SHE HAS BEEN AUTHORIZED TO SUBMIT THE APPLICATION ON BEHALF OF THE APPLICANT AND THAT ALL INFORMATION PROVIDED ON THE ACORD 130 AND ACORD 133 IS TRUE AND ACCURATE TO THE BEST OF HIS/HER KNOWLEDGE AND BELIEF.

AGENCY FEIN	AGENCY PHONE NUMBER (A/C, No, Ext)	AGENCY FAX NUMBER (A/C, No)

ESIDENT LICENSE NUMBER	EXPIRATION DATE	NON-RESIDENT LICENSE NUMBER	EXPIRATION DATE

PRODUCER NAME (PRINT OR TYPE)	DATE	PRODUCER SIGNATURE

E-MAIL ADDRESS:

Required Critical Threshold Items
for MS Workers Compensation Assigned Risk Applications
Effective January 1, 2007

Effective January 1, 2007, specific critical threshold items must be included on Mississippi Workers Compensation Assigned Risk Applications in order to secure a requested effective date and to determine the applicant's eligibility. If all of the required information is not provided, the employer or its representative may not secure an effective date **until the date after receipt of all required information.**

The required critical threshold elements are:

Threshold Criteria

- **Applicant Name**
- **Applicant Mailing Address**
- **Legal Status of Applicant**
- **Proposed Effective Date**
- **FEIN**
- **Location(s)**
- **Rating Information**
- **Individuals Included/Excluded**
- **Nature of Business**

- **Applicant's Name**
  The complete legal name of the applicant(s) to be covered under the policy.

- **Applicant's Mailing Address**
  The mailing address to which the policy and any other information regarding the policy will be mailed.

- **Legal status of applicant**
  The exact status of the employer; for example, sole proprietor, partner, or corporation. The exact legal status should be provided, e.g., joint venture, trust, limited liability corporation, association, etc.

- **Proposed effective date**
  The date that the employer is requesting to have coverage become effective.

- **Federal ID number (or Social Security Number if applicable)**
  The number given to each employer by the federal government for tax purposes. If the applicant does not have a Federal ID number, it may be obtained through the regional Internal Revenue Services facility. ***Only a sole proprietor with no employees may use a social security number in lieu of a Federal ID number.***

- **Locations/address**
  The principal location in which the employer is conducting business. ***A physical address in Mississippi must be provided.*** If an employer has multiple locations in Mississippi, all locations must be listed.

- **Rating information**
  Information in order to ensure that the total estimated annual premium is properly calculated. This information is needed for each location within Mississippi.
  a. State: MS
  b. Location: The location # as listed in the Locations section.
  c. Class Code: The classification code(s) that best describes the operation of the business according to Basic Manual rules.
  d. Remuneration: Total annual payroll or other appropriate remuneration for each class code.

- **Officer's/Partner's/Sole Proprietor's name and coverage**
  The complete name, ownership percentage and title of each of the corporate officers, partners, or the sole proprietor and whether or not the individuals are intended to be covered by the policy. List the duties, class code and remuneration of all included persons.

- **Nature of business/description of operations**
  A complete description of the operations. Do not merely quote the classification phraseology. The description should include enough detail to verify the classification(s) for the operations.

The remaining information on the ACORD 130 and ACORD 133 application forms is required prior to binding and should be obtained prior to the submission. Providing this information at the time of application submission will facilitate the completion of the review process.

Note: Securing a requested effective date does not ensure binding as of that date unless eligibility is determined by the Plan Administrator and all required information and payment are received within the required time frames.

(AMENDED) CERTIFICATE OF SERVICE

I, Steven D. Slade, attorney for the stated Appellants, do hereby certify that I have delivered by U.S. Mail, postage prepaid, the foregoing Brief of Appellants to:

Thomas L. Tullos, Esq.
Post Office Drawer 567
Bay Springs, Mississippi 39422
(Attorney for the Appellee)

Honorable Marcus D. Gordon
Circuit Court Judge - Newton County
Post Office Box 220
Decatur, Mississippi 39327
(Trial Court Judge)

This the 20th day of November, 2007.

STEVEN D. SLADE

STEVEN D. SLADE
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MERIDIAN, MISSISSIPPI 39303-3490
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(601 483-1282 (fax)
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sdsaal@bellsouth.net

(2007-WC-01209-COA)