IN THE SUPREME COURT OF MISSISSIPPI

KNIGHT PROPERTIES, INC. AND BUILDERS & CONTRACTORS ASSOCIATION OF MISSISSIPPI — APPELLANTS

VS — CAUSE NO. 2010-CA-000404

KENNY SANDERS, INDIVIDUALLY;
KENNY SANDERS, A SOLE PROPRIETORSHIP;
FIRSTCOMP INSURANCE COMPANY; AND
JOHN DOES I-VI — APPELLEES

REPLY BRIEF

APPEALED FROM THE
CIRCUIT COURT OF MADISON COUNTY,
MISSISSIPPI

ORAL ARGUMENT REQUESTED

Prepared by:

H. WESLEY WILLIAMS, III
MARKOW WALKER, P.A.
P.O. BOX 13669
JACKSON, MISSISSIPPI 39236-3669
(601) 853-1191
ATTORNEYS FOR APPELLANTS

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INTRODUCTION.

After reviewing the brief of Kenny Sanders and FirstComp Insurance Company, one is left wondering whether the parties are talking about the same statute. Sanders and FirstComp repeatedly assure the reader that the grant of plenary authority for the commission to adjudicate compensation payment disputes between carriers is clear from the plain language of the statute. **BRIEF OF APPELLEE**, at 11, 35. The paragraph from Section 71-3-37 that is at issue is extremely short, yet Sanders and FirstComp wax eloquent for a stunning 35 out of 47 pages on what the statute means. Respectfully, if it were as clear as the Appellees suggest, it should not have taken that many pages to explain it. As will be shown below, the length of the brief filed by Sanders and FirstComp is the result of a very creative reading of the statute that creates the type of legal fiction that ought to make John Grisham proud.

WHAT SECTION 71-3-37(13) PLAINLY STATES

Since 1957, the well-established law in this State has been that the Mississippi Workers' Compensation Commission (MWCC) did not have jurisdiction to adjudicate reimbursement disputes between workers' compensation carriers.[1] ***See USF&G v. Collins***, 95 So. 2d 456 (Miss. 1957). Vardaman S. Dunn authored a well-respected treatise on Mississippi Workers' Compensation Law. In Section 332, he stated:

> The Act contains no provision for apportionment or contribution between carriers where there is duplicate coverage and no provision is made whereby the commission may order one carrier to reimburse another in case of erroneous payments, and the rights must be determined in an action at law. The same rule applies to prevent the commission for [sic] adjusting equities as between successive carriers for the same employer in reference to disability claims.

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[1] Contrary to the suggestion of Sanders and FirstComp, BCAM has never suggested that 71-3-37(13) would apply to health insurers, or any other type of insurance carrier other than workers' compensation carriers. **BRIEF OF APPELLEE**, at 26.

V. Dunn, MISSISSIPPI WORKMEN'S COMPENSATION § 332, at 419 (3d ed. 1982) (***citing Collins***). Without question, this was the state of the law through March 15, 2007, when Section 71-3-37 was amended. An examination of the Subsection 13 does not reveal any express language that would support the argument espoused by Sanders and FirstComp that the MWCC now has plenary authority to adjudicate reimbursement disputes between workers' compensation carriers. Subsection 13 states:

> 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) (Rev. 2007).

Although it is a lengthy one, Subsection 13 consists of only one sentence. Yet, through a series of gyrations and contortions, Sanders and FirstComp create two separate clauses that apparently exist independently of one another: the discretionary clause and the liability/reimbursement clause. **BRIEF OF APPELLEE**, at 2-3, 11, 15-16. According to Sanders and FirstComp, the following clause, self-proclaimed to be the "liability/reimbursement clause" constitutes a plenary grant of legislative authority to adjudicate all disputes between carriers involving the payment of workers' compensation benefits to an injured employee:

> [U]ntil 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) (Rev. 2007). This phrase is the key to the entire analysis

proffered by Sanders and FirstComp. We are told that this clause represents such a plenary grant of authority that it effectively overruled **Collins**.[2] Mindful of the rules of the rules of statutory construction that were discussed in BCAM's principal brief, if the Mississippi Legislature had intended to grant plenary authority to the Mississippi Workers' Compensation Commission (MWCC) to resolve all compensation payment disputes between carriers, how difficult would it have been to simply state that?

Borrowing from a technique taught in preparatory school, diagraming this particular sentence sheds some light on the true meaning. Subsection 13 begins with the term "whenever," which is a subordinating conjunction. Edward A. Dornan, Charles W. Dawe, THE BRIEF ENGLISH HANDBOOK, at 93-94 (2d ed. 1987). The purpose of a subordinating conjunction is to join a subordinate (or dependent) clause with a main clause. Robin L. Simmons, *The Subordinate Clause*, at http://www.chompchomp.com/terms/subordinateclause.htm. In Subsection 13, the subordinate clause contains two phrases that are joined by the conjunction "and."

> 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

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[2] BCAM cited ***Warren v. Mississippi Workers' Compensation Comm'n***, 700 So.2d 608, 618 (Miss. 1997) and ***Bullock v. Roadway Express, Inc.***, 548 So. 2d 1306 (Miss. 1989) in its principal brief. Both decision were decided by the Mississippi Supreme Court after the amendment to Section 71-3-37. Both discussed the principles set forth in Collins, yet in neither case did the Court note that **Collins** had been abrogated due to the passage of Section 71-3-37(13).

fact that the injury arose out of and in the course of the employment . . .

Under the traditional rules of grammar, a subordinate clause cannot stand alone because it does not provide a complete thought. ***Id.*** That is true here because we are told that if two conditions exist (dispute between two (2) or more carriers as to which party is liable for payment of workers' compensation benefits **and** no genuine issue concerning 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), then something else is to occur.

The "rest of the story" is found in the main clause of the sentence: "the commission may require the disputing parties involved . . . ." Here, "the commission" is the subject, "may require" is the predicate, and "disputing parties" is a direct object. The main clause is modified by a series of prepositional phrases:

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.

Each of these prepositional phrases are being used as adverbs because they modify the verb "may require" and tell the reader "what" may be required by the commission. In this case, the commission may require (1) immediate payment **and** (2) equal sharing. The prepositional phrase

that begins with "until" is also an adverb that modifies the very "may require" because it informs the reader "how long" the commission can require such payment and sharing. The point of this exercise is to illustrate that Subsection 13 is not comprised of separate clauses that exist independently of each other, as suggested by Sanders and FirstComp. The word "whenever" inextricably ties the sentence together by introducing a subordinating clause with a main clause. You cannot have the subordinate clause existing independently of the main clause.

Throughout the brief submitted by Sanders and First Comp, there is consistent reference to only two clauses, the discretionary clause and the liability/reimbursement clause. According to the appellees, the discretionary clause states that "the commission may require the disputing parties involved to pay benefits immediately to the employee and to share equally in the payment of the those benefits." **BRIEF OF APPELLEE**, at 2-3, 15. The liability/reimbursement clause, according appellees, immediately follows the discretionary clause and concludes the paragraph. ***Id.*** Yet, Sanders and FirstComp have failed to explain or identify what BCAM has referred to as the subordinate clause that begins with "whenever." Does it also exist independently of the "discretionary" clause and the "liability reimbursement" clause? Perhaps under the rationale of Sanders and FirstComp, the subordinate clause could be aptly named the "forgotten" clause, as it apparently serves no purpose in their analysis. The interpretative spin put on Subsection 13 not only defies the plain language of the statute and principles of statutory construction, it also defies grammatical analysis.

THE NOTION OF CONCURRENT JURISDICTION

BCAM does not agree with the finding of the special master that the circuit court and the

MWCC are given concurrent jurisdiction under Section 71-3-37(13). For some unexplained reason, Sanders and FirstComp proceed under the misguided notion that this was an argument proposed by BCAM. **BRIEF OF APPELLEE**, at 34. It was not, and the only time concurrent jurisdiction was ever mentioned in BCAM's principal brief was on page three (3) during the statement of the case. Absent those circumstances set forth in Section 71-3-37(13), the MWCC lacks the authority to adjudicate payment or reimbursement disputes between workers' compensation carriers.[3]

Sanders and FirstComp present two case studies in their brief. In the first case study, the hypothetical presented a fact scenario involving a subcontractor and a general contractor. We are asked to assume that the contractor agreed to provide workers' compensation coverage for the project, even though the subcontractor had its own workers' compensation coverage. The main difference between the first and second case studies was that in the second, there was no genuine issue as to the employee's employment, his average weekly wage, the occurrence or the extent of injury, and the fact that it arose in the course and scope of the employment. Given those two scenarios, the MWCC would not have statutory authority in the first case study to "require" the disputing parties to pay benefits immediately and share equally in the payment. Since the statute, on its very face, would not apply to the first case study, there would be no statutory authority for the MWCC to adjudicate a claim for reimbursement between the employers/carriers.

In the second case study, the hypothetical assumes that the conditions set forth in the

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[3] Because jurisdiction over a payment/reimbursement dispute is either vested with the MWCC or a court of law, and not both, there is no danger of forum shopping, as suggested by Sanders and FirstComp. **BRIEF OF APPELLEE**, at 31.

subordinating clause are met. However, the administrative judge in the hypothetical opted not to require the carriers to pay immediately and share equally in the payment. Given the express language of the statute, which states that the commission "may require," this clearly is in the prerogative of the commission, or the ALJ. If the commission does not "require" the disputing parties to pay immediately and share equally in the payment, then there is no statutory authority to order the non-paying carrier to reimburse the paying carrier. In this instance, as in the case sub judice, ***Collins*** controls and the remedy would be in a court of law.

Sanders and FirstComp suggest that by applying BCAM's analysis, which represents nothing more than a facial application of the text of the statute, it becomes a "novel interpretation [that] leaves too many questions unanswered." **BRIEF OF APPELLEE**, at 31. Respectfully, there is nothing novel about interpreting the plain language of a statute. If the statute is not ambiguous, and there is no suggestion by the appellees that it is, then it matters not how many questions remained unanswered. The rules of statutory construction require that the statute be applied, within constitutional boundaries, as written. If such an application "leaves too many questions unanswered," then that is a matter for the Legislature to address, not the judiciary. While the appellees urge on page 33 of their brief that granting the commission "exclusive jurisdiction" over any payment/reimbursement dispute between workers' compensation carriers would create a "bright line rule," it would also require this Court to re-write the statute. ***See Culberson v. State***, 612 So. 2d 342, 346 (Miss. 1992)("To adopt Culberson's argument would require us to rewrite the statute. We are unwilling to engage in such blatant judicial legislation.").

Sanders and FirstComp also take issue with the notion that there must be an order from the commission requiring the disputing parties to pay immediately and to share equally in the

payment. **BRIEF OF APPELLEE**, at 31. It is true that Section 71-3-37(13) does not include the word "order." The statute states that "the commission **may require** the disputing parties" to pay immediately and to share equally in the payment. The appellees ask: "What exactly constitutes an 'order' being entered." **BRIEF OF APPELLEE**, at 31. The answer is not difficult, as it is made plain from the statute. First, a court or administrative agency can only act through an order or judgment. So if the commission, or any court for that matter, was going to require any party under its jurisdiction to do something, it would be through an order or judgment. But in this context, the order would have to make a finding of fact that the conditions set forth in the subordinating clause were met and that the disputing parties were being required to pay immediately and share equally in the payment.

"SHARE EQUALLY IN THE PAYMENT OF THOSE BENEFITS"

In the brief submitted by Sanders and FirstComp, they assert that the ALJ ordered BCAM and FirstComp "to split payments for several unpaid workers' compensation bills." **BRIEF OF APPELLEE**, at 31. The appellees state: "Specifically, the ALJ required BCAM to pay any outstanding bills prior to February 2007, and FirstComp to pay any outstanding bills after February of 2007." ***Id.*** ***See also*** **BRIEF OF APPELLEE**, at 5. FirstComp argues that this was the type of order contemplated by Section 71-3-37(13) to trigger reimbursement. Similar to how Sanders and FirstComp creatively interpret the statute, they utilize the same creativity when interpreting the facts reflected in the record. Their apparent goal is to transform the proceeding into at the MWCC into the type of situation contemplated by Section 71-3-37(13).[4]

[4] On page 35 of their brief, Sanders and FirstComp argue that each of the conditions in the subordinate clause of Subsection 13 were actually met and that the ALJ had issued an ore tenus order "directing BCAM and FirstComp to split payments for the outstanding compensation bills." Once again, this is pure fiction. First of all, the statute never uses the term "split." Secondly, there was never any finding of fact made by the ALJ as to the

The purpose of § 71-3-37(13) was to provide a remedy for an employee who has a right to benefits, and yet is not being paid because carriers are pointing fingers at one another. ***Mississippi Loggers Self Insured Fund, Inc. v. Andy Kaiser Logging,*** 992 So. 2d 649, 657-58 (Miss. Ct. App. 2008). Contrary to the suggestions of Sanders and FirstComp, the injured employee had been paid by BCAM. As of April 17, 2007, BCAM had paid $53,564.85 in indemnity and $155,773.59 in medical expenses. R at 73. So clearly, this was not a situation where the claimant was not being paid because of a dispute between two carriers.[5] Rather, an issue had arose with regard to compensating the injured employee's spouse, who took off work to take her husband to his medical exams. This was the subject of a November 2006 order. R at 316-17. The judge ordered that BCAM pay this amount and then said "you'll get it back from FirstComp, but this was owed in November." R at 318. She then added that if the expenses were incurred after February, "it will be FirstComp." R at 319.

Having a trigger date as to when FirstComp would be officially liable for future expenses on Cremeen's workers' compensation claim is not "splitting" or equally sharing the payment, as suggested by the Appellees. The statute provides that "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 . . . ." MISS. CODE ANN. § 71-

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conditions set forth in the subordinate clause. Moreover, the ALJ did not order any payments to be shared equally. She required FirstComp to assume the payment of the claim effective March 19, 2007. So after that date, how is it that BCAM is sharing anything equally with FirstComp? How about before that date? Has FirstComp paid paid any portion of those expenses? Of course not.

[5] FirstComp states that "Cremeen was not receiving workers' compensation payments due to the liability and/or reimbursement dispute between BCAM and FirstComp. R 296, 299)." **BRIEF OF APPELLEE** at 10. The truth is that the claimant had not been paid since March 5, which was the date of a hearing conducted by the ALJ where she dismissed BCAM from the litigation and substituted FirstComp. R at 296. Moreover, the ALJ resolved the issue of who was liable for the workers' compensation payments to Mr. Cremeen on March 19, 2007. She ordered FirstComp to assume that obligation on that very date. R at 320-21.

3-37(13) (Rev. 2007). At no time did the ALJ require BCAM and FirstComp to make a joint and equal payment of benefits to Cremeen. She merely stated that prior to a date certain, the obligation would belong to BCAM, and after that date it would be the responsibility of FirstComp. The ALJ determined that FirstComp was liable for compensation benefits since the inception of the claim, but because she concluded that she did not have jurisdiction to order reimbursement, the only thing she could do was to order FirstComp to pick up the payment of benefits from a certain date.

Additionally, the ALJ issued her bench ruling on March 19, 2007. The indemnity and medical that accrued prior to that date and which were paid by BCAM was in excess of $209,000. This amount was not paid pursuant to an order requiring BCAM and FirstComp to pay immediately and share equally in the payment. Even if an order was entered in 2007 that required equal payment by both carriers (which there was not), how can that order be used to bootstrap subject matter jurisdiction for the bulk of the payments that were made **before** such an order was entered?

THE TOENBERG DECISION.

Sanders and FirstComp cite to the Minnesota Supreme Court's decision in ***Toenberg v. Harvey***, 49 N.W.2d 578 (Minn. 1951). As addressed in their brief, Minnesota has a statute similar to Section 71-3-37(13). **BRIEF OF APPELLEE**, at 21. Sanders and FirstComp argue that the *Toenberg* decision supports their conclusion that Section 71-3-37(13) grants full authority to an administrative agency to adjudicate all payment disputes between workers' compensation carriers. **BRIEF OF APPELLEE**, at 21. This is not the case. While the court held that the industrial commission could have ordered one carrier to reimburse the other, it was not based

upon the language found in the Minnesota statute. The court acknowledged that the facts presented in ***Toenberg*** were "quite different from those set out in the statute." ***Toenberg***, 49 N.W.2d at 583.

The court reasoned that the commission could have ordered the non-paying carrier to pay all compensation and expenses arising out of the injury to the employee, but in so doing, it would have created a double recovery since the injured employee had already been paid by the other carrier. "However, if the commission had made an award holding [the non-paying carrier] liable for all compensation and expenses to which Toenberg would have been entitled, there is no reason, in our opinion, why it could not have directed to whom it should be paid, thus by this method reimbursing [the carrier that paid initially]." ***Id.*** The conclusion reached by the Minnesota Supreme Court had more to do with pragmatism than it did with the language of the statute.

The ***Toenberg*** decision was discussed by the Mississippi Supreme Court in ***Collins***. Essentially, the holding in ***Toenberg*** was rejected. "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." ***Collins***, 95 So. 2d at 463 (emphasis added). If the Minnesota statute had expressly given the commission this authority, as urged by Sanders and FirstComp, there would have been no reason to resort to implication. Although the Mississippi statute is expressly more limited in its application than the Minnesota statute,[6] Sanders and FirstComp argue that the plain reading of Section 71-3-37(13) grants the

[6] The Minnesota statute discussed in Toenberg provided: "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." ***Toenberg***, 49 N.W.2d at 583 (emphasis

commission the authority to require reimbursement even in the absence of an order by the commission.

THE FEDERAL DISTRICT COURT CASES

Sanders and FirstComp proclaim that the ruling of the trial court "parallels the federal courts' **uniform interpretation** of § 71-3-37(13)." To be precise, there are only two federal court decisions that have ever cited Section 71-3-37(13). As noted in BCAM's principal brief, the discussion of Section 71-3-37(13) in ***Travelers Property & Cas. Co. v. City of Greenwood Fire Dep't***, 441 F. Supp. 776 (N.D. Miss. 2006), was dictum. The district court had already concluded that a claim of contribution could not stand on its own absent a joint judgment. ***Id.*** at 777. Accordingly, the district court granted a motion to dismiss. The discussion concerning Section 71-3-37(13) was gratuitous and not necessary to the primary holding of the case. "The court agrees and concludes that this [MWCC has subject matter jurisdiction] is an **additional** factor supporting dismissal." ***Id.*** at 779 (emphasis added).

Eutaw Constr. Co., Inc. v. North Ark. Wholesale Co., Inc., 1997 U.S. Dist. LEXIS 13486 (N.D. Miss. 1997) involved a case that was removed to federal court from chancery court. The district court was called upon to determine whether removal was proper under 28 U.S.C. § 1445(c). That statute provided that "a civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." The court cited **Collins** and then noted that Section 71-3-37(13) had been enacted in 1987. The court stated: "Because the Mississippi Legislature has granted the

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added). Section 71-3-37(13) is more limited in its application since it applies "whenever" a dispute arises between two or more parties as to which one is liable for the payment of workers' compensation benefits "and" there is no genuine issue as to (1) the employee's employment; (2) the average weekly wage; (3) the occurrence of an injury, (4) the extent of the injury; (5) the fact that the injury arose out of and in the course of employment.

commission with the authority to order reimbursement between carriers, this court finds that this cause of action clearly 'arises under' the workmen's compensation laws of Mississippi." However, the district court did not dismiss the case for lack of subject matter jurisdiction. Instead, it remanded the case back to chancery court. In sum, the district court spent a total of three paragraphs discussing this particular issue. The facts of the case indicate that one of the employers "voluntarily began providing compensation benefits." This implies that there was no order entered by the commission requiring the disputing parties to pay immediately and to share equally in the payment. In fact, it does not appear that the district court even considered the issue.

However, the issue has been acknowledged by the Mississippi Court of Appeals in ***Miss. Loggers Self Insured Fund, Inc. v. Andy Kaiser Logging***, 992 So. 2d 649 (Miss. Ct. App. 2008), where the court stated:

> Mississippi Pacific/Tri-Lake argues that section 71-3-37(13) should not have been applied to this case at all because there was no Commission order requiring the disputing parties to immediately pay benefits to McDonald in equal shares. **While a plain reading of the statute indicates such an order may be a statutory prerequisite to the Commission's ability to order reimbursement between insurance companies**, the circuit court's judgment remanding the case to the Commission for findings under the statute is not before this Court on appeal.

Id. at 655 n.5 (emphasis added). It is clear that this issue was not before the Court of Appeals. However, the Court appears to be left with the same impression as BCAM after giving the statute a plain reading. Neither of the federal court cases even addressed this particular issue.

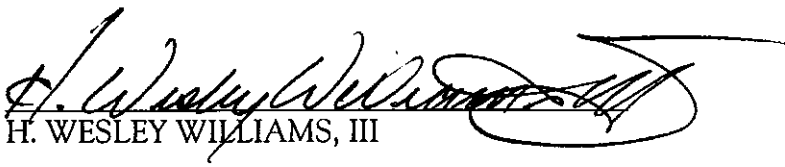
EXHAUSTION OF ADMINISTRATIVE REMEDIES

The resolution of this issue depends on how the appellate court comes down on the issue of subject matter jurisdiction. If BCAM is correct in its analysis that ***Collins*** remains good law,

and that the commission did not have jurisdiction to adjudicate this dispute, then there was nothing further to be done at the commission once the ALJ issued her ruling at the hearing on March 19, 2007. Put differently, if this Court determines that the MWCC did not have subject matter jurisdiction over this claim for reimbursement, then there is no available administrative remedy that must be exhausted.

RESPECTFULLY SUBMITTED, this the 15TH day of November, 2010.

KNIGHT PROPERTIES, INC. AND
BUILDERS & CONTRACTORS
ASSOCIATION OF MISSISSIPPI

BY: 
H. WESLEY WILLIAMS, III

CERTIFICATE OF SERVICE

I, H. Wesley Williams, III, do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing ***Reply Brief*** to:

Alan M. Purdie, Esq.
PURDIE & METZ
P. O. Box 2659
Ridgeland, MS 39158-2659
Counsel for Kenny Sanders, Individually; Kenny Sanders, a Sole Proprietorship; and Firstcomp Insurance Company

Honorable William E. Chapman
Madison County Circuit Court Judge
P. O. Box 1626
Canton, MS 39046

THIS the 15TH day of November, 2010.

H. WESLEY WILLIAMS, III