

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

BRIEF OF APPELLANTS

**APPEALED FROM THE
CIRCUIT COURT OF MADISON COUNTY,
MISSISSIPPI**

ORAL ARGUMENT REQUESTED

Prepared by:

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

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

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 Court may evaluate possible disqualification or recusal.

1. Knight Properties, Inc.
2. Builders & Contractors Association of Mississippi.
3. Kenny Sanders, Individually; Kenny Sanders, a Sole Proprietorship.
4. FirstComp Insurance Company.


H. WESLEY WILLIAMS, III.

H. Wesley Williams, III. - MS [REDACTED]
Markow Walker, P.A.
P.O. Box 13669
Jackson, MS 39236 – 3633
Telephone: (601) 853 – 1911
Facsimile: (601) 853-8284

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Course of Proceedings and Disposition in the Court Below	1
1. Workers' Compensation Proceeding	1
2. Circuit Court Proceeding	3
SUMMARY OF THE ARGUMENT	5
STANDARD OF REVIEW	6
ARGUMENT	8
A. The <i>Collins</i> case is binding precedent; therefore, the circuit courts retain jurisdiction to decide coverage, reimbursement, and/or indemnity disputes between carriers	8
B. The plain language of the statute requires an order from the Commission requiring the disputing parties to pay immediately and equally before authority is given to the Commission to decide coverage disputes between carriers.	12
C. Findings of the Special Master regarding the Plaintiffs' entitlement to indemnification were not manifestly wrong and should have been adopted by the Circuit Court.	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<i>Bose Corp. v. Consumers Union of United States, Inc.</i> , 466 U.S. 485 (1984)	6
<i>Bullock v. Roadway Express, Inc.</i> , 548 So. 2d 1306 (Miss. 1989)	10
<i>Bush v. City of Laurel</i> , 215 So.2d 256 (Miss. 1968)	17
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	8
<i>Duffy Brothers Constr. Co. v. Pistone Builders, Inc.</i> , 299 N.W.2d 170 (Neb. 1980)	19
<i>Edwards v. Booker</i> , 796 So. 2d 991 (Miss. 2001)	6
<i>Fid. & Deposit Co. of Md. v. Ralph McKnight & Son Constr.</i> , 28 So. 3d 1282 (Miss. 2010) ..	7
<i>Galloway et al. v. The Travelers Insurance Co., et al.</i> , 515 So. 2d 678 (Miss. 1987)	8
<i>Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.</i> , 519 So. 2d 413 (Miss. 1988)	8
<i>Hartford Cas. Ins. Co. v. Halliburton Co.</i> , 826 So. 2d 1206 (Miss. 2001)	7, 17
<i>Labor Board v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1 (1937)	15
<i>Mississippi Loggers Self Insured Fund, Inc. v. Andy Kaiser Logging</i> , 992 So. 2d 649 (Miss. Ct. App. 2008)	9, 13, 15
<i>Montclair v. Ramsdell</i> , 107 U.S. 147 (U.S. 1883)	16
<i>Morgan v. City of Ruleville</i> , 627 So. 2d 275 (Miss. 1993)	7
<i>Palmer v. Biloxi Regional Medical Center, Inc.</i> , 564 So. 2d 1346 (Miss. 1990)	7
<i>Patagonia Corp. v. Board of Governors of Federal Reserve System</i> , 517 F.2d 803 (9th Cir.1975)	15
<i>Travelers Prop. and Cas. Co. v. City of Greenwood Fire Dep't</i> , 441 F.Supp.2d 776, 776 (N.D. Miss. 2006).	11
<i>United States v. Fisher</i> , 6 U.S. 358 (U.S. 1805)	12

<i>USF&G v. Collins</i> , 95 So. 2d 456 (Miss. 1957)	1, 9
<i>Warren v. Mississippi Workers' Compensation Comm'n</i> , 700 So. 2d 608 (Miss. 1997)	9
<i>Washington v. Tem's Junior, Inc.</i> , 981 So. 2d 1047 (Miss. Ct. App. 2008)	17

STATUTES

MISS. CODE ANN. § 71-3-37(13) (Rev. 2007)	1, 5, 6, 12, 13
MISS. CODE ANN. § 71-3-7 (Rev. 1990).	16

RULES

MISS. R. CIV. P. 53	16
MISS. R. CIV. P. 56(c)	7

TREATISES

82 AM. JUR. 2D <i>Workers' Compensation</i> §459	19
LARSON'S WORKERS' COMPENSATION LAW §70.02	19
RESTATEMENT THIRD OF TORTS §22	19

STATEMENT OF THE ISSUE

Under Mississippi Code Annotated § 71-3-37(13), the trial court erroneously concluded that it lacked subject matter jurisdiction based on a determination that the statute abrogated the Supreme Court's holding in *USF&G v. Collins*, 95 So. 2d 456 (Miss. 1957), which held, *inter alia*, that the Mississippi Workers' Compensation Commission does not have authority to resolve disputes between workers compensation carriers.

STATEMENT OF THE CASE

A. Nature of the Case

The issue on appeal asks whether the trial court erroneously concluded that the enactment of Mississippi Code Annotated § 71-3-37(13) abrogated *Collins*, and therefore gave the Mississippi Workers' Compensation Commission (hereinafter "Commission") the authority to resolve disputes between workers' compensation carriers in all cases. The Defendants contend that pursuant to § 71-3-37(13), the Commission has the full and exclusive authority to decide claims for reimbursement and/or indemnity for claims paid. The Plaintiffs ask this Court to reverse the lower court's ruling and find that § 71-3-37(13) did not abrogate *Collins*, but laid out a specific and narrow factual situation where the Commission is granted the authority to decide issues of reimbursement and/or indemnity; and that the facts of this case do not fall into the boundaries of the statute.

B. Course of Proceedings and Disposition in the Court Below

1. Workers' Compensation Proceeding.

On or about October 20, 2004, Jerry Cremeen filed a Petition to Controvert with the

Commission, alleging that his employer, Defendant, Kenny Sanders, did not have coverage and Plaintiff, Knight Properties, was therefore his statutory employer. R. at 33.

As the employee of a subcontractor who did not pay indemnity and medical expenses for a compensable injury under the Mississippi Workers Compensation Act (hereinafter “MWCA”), Knight was deemed to be the statutory employer of Cremeen by virtue of MISS. CODE ANN. § 71-3-7. *Id.* Knight was a member of the Builders & Contractors of Mississippi Self Insured Fund, which satisfied the obligations of its members under the Mississippi Workers’ Compensation Act. In light of the fact that Knight was deemed to be the statutory employer of Cremeen, BCAM provided compensation and medical benefits. *Id.*

On or about March 19, 2007, a hearing was conducted before the Administrative Law Judge (hereinafter “ALJ”) for the Commission. R. at 3. The ALJ found that FirstComp, Defendant’s insurer, failed to follow the notice requirements set forth in Section 71-3-77 when it attempted to cancel its policy for nonpayment of premiums. *Id.*

As a result, the ALJ determined that First Comp’s policy was still in force and that there was coverage for the injury sustained by Cremeen on March 22, 2004. *Id.* The ALJ ordered that Sanders and FirstComp were liable for payment of workers’ compensation benefits to Cremeen from and after March 19, 2007. *Id.* The order of the ALJ was dated March 26, 2007. *Id.* Furthermore, the ALJ specifically found that the Commission did not have subject matter jurisdiction to determine the “issue of whether FirstComp should be required to reimburse Knight Properties, Inc. and BCAM for payments made in connection with the workers’ compensation claim of Mr. Cremeen.” R. at 280. No party appealed the determination of the ALJ. R. at 34.

2. Circuit Court Proceeding.

On or about March 20, 2007, the Plaintiffs filed a Complaint in the Circuit Court of Madison County, asserting that the Defendants are liable to the Plaintiffs for workers' compensation benefits paid to and on behalf of Jerry Cremeen as the result of an injury sustained by Cremeen on or about March 22, 2004. R. at 12. A motion for summary judgment was filed by the Plaintiffs and a motion to dismiss was filed by the Defendants. The circuit court referred these motions to a special master for further consideration. R. 405-09.

In his report and recommendation, the special master found that Section 71-3-37(13) did "not abrogate the Collins decision, but creates concurrent jurisdiction for the indemnity claim which may be pursued before the MWCC or the Circuit Court." R. at 415. Additionally, the special master recommended that the circuit court grant summary judgement for Knight and BCAM and enter a judgment requiring Sanders and FirstComp to pay Knight and BCAM the amount of workers' compensation benefits paid to Cremeen and attorney's fees and expenses, with interest at the legal rate. R. at 418.

On January 29, 2010, the circuit court did not follow the recommendation of the special master and granted the Defendant's Motion to Dismiss for lack of subject matter jurisdiction, finding that § 71-3-37(13) provides the Commission with exclusive subject matter jurisdiction to adjudicate issues of liability and/or reimbursement between two or more parties for the payment of workers' compensations benefits. R. at 633.

C. Statement of the Facts

On or about March 22, 2004, Kenny Sanders operated a residential construction business

and specifically performed trim carpentry services for new residential construction in Reunion Subdivision. R. at 11. On said date, Kenny Sanders employed five or more employees in his business operation. *Id.* One of these employees was Jerry Cremeen. *Id.*

In early 2004, Knight Properties, Inc. was the general contractor on a residential construction project in Reunion Subdivision. *Id.* Knight Properties, Inc. hired Kenny Sanders to perform a portion of the overall construction project that consisted specifically of trim carpentry services. *Id.* On or about March 22, 2004, Kenny Sanders was a subcontractor performing work for Knight Properties, Inc. *Id.*

As a condition precedent to performing any work, Knight Properties, Inc. required that Kenny Sanders provide proof of insurance. *Id.* This specifically included, but was not limited to, proof that Sanders had procured workers' compensation coverage for his employees. *Id.* Kenny Sanders represented that he had workers' compensation insurance coverage in place. *Id.*

Kenny Sanders had procured an insurance policy from FirstComp providing coverage for benefits owed under the MWCA. R. at 32. The effective dates of the policy were from November 5, 2003 to November 5, 2004. R. at 33.

When no further premium payments were received, FirstComp attempted to cancel the policy it issued to Sanders by sending a notice to Sanders via registered mail indicating that the policy would be cancelled effective March 10, 2004. *Id.* On or about March 22, 2004, Cremeen was injured in the course and scope of his employment with Kenny Sanders while carrying a table saw. The injury sustained by Cremeen was compensable under the MWCA. *Id.*

Neither Kenny Sanders, nor FirstComp, paid compensation or medical benefits to, or on behalf of, Jerry Cremeen as a result of his March 22, 2004 injury. *Id.* The failure of Kenny

Sanders and FirstComp to pay indemnity and medical benefits owed under the MWCA was tantamount to a denial of said benefits. *Id.*

On or about October 20, 2004, Cremeen filed his Petition to Controvert with the Mississippi Workers' Compensation Commission, alleging that his employer, Kenny Sanders, did not have coverage and Knight Properties was therefore his statutory employer. *Id.* As the employee of a subcontractor who did not pay indemnity and medical expenses for a compensable injury under the MWCA, Knight was deemed to be the statutory employer of Cremeen by virtue of MISS. CODE ANN. § 71-3-7. *Id.* Pursuant to said statute, Knight and BCAM paid to or on behalf of, Cremeen workers' compensation benefits totaling \$205,772.08 as of March 19, 2007. R. at 34.

In addition, Plaintiffs have incurred defense costs in defending a petition to controvert that was filed by Cremeen with the Commission. *Id.*

SUMMARY OF THE ARGUMENT

The question for decision in this appeal is clear cut and straightforward: Does the Mississippi Workers' Compensation Commission have the authority to resolve disputes between workers' compensation carriers in any and all cases? The answer is no. As an administrative agency, the Commission can only act pursuant to statutory authority granted to it by the Legislature. The only provision in the MWCA that addresses adjudication of disputes between carriers is Section 71-3-37(13), which is a narrow provision enabling swift recovery for an injured worker who is entitled to certain benefits but is not being paid due to the presence of a dispute between two or more carriers over the liability for payment. A plain reading of the

statute indicates that an order from the Commission requiring the disputing carriers to immediately pay benefits in equal shares is a prerequisite to the Commission's authority to decide reimbursement and/or indemnity issues between carriers.

Cremeen, the injured worker, was already being paid his benefits by the Plaintiffs long before a coverage dispute arose. The Commission never entered an order requiring the disputing parties to pay benefits in equal shares, mainly because the employee was not being denied compensation and medical benefits. The facts of this case do not even present the situation that Section 71-3-37(13) was intended to address, nor have all of the statutory prerequisites been met.

Because the circuit court properly had subject matter jurisdiction, the substantive legal findings and recommendations of the special master should have been adopted. Summary judgment on the Plaintiffs' claim for indemnification was proper because there were no genuine issues of material fact. Therefore, this Court should reverse the circuit court's conclusion that it lacked subject matter jurisdiction, render judgment in favor of the Plaintiffs on the claim of indemnification, and remand the case back to the circuit court for the sole purpose of determining the extent of damages, interest, and attorneys fees.

STANDARD OF REVIEW

Whether a circuit court has jurisdiction to hear a particular matter is a question of law which is reviewed de novo. *Edwards v. Booker*, 796 So. 2d 991, 994 (Miss. 2001). The U.S. Supreme Court has stated that the difference between a rule of deference and the duty to exercise independent review is "much more than a mere matter of degree," and "when de novo review is compelled, no form of appellate deference is acceptable." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984). When reviewing a dismissal for lack of subject

matter jurisdiction, "the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Fid. & Deposit Co. of Md. v. Ralph McKnight & Son Constr.*, 28 So. 3d 1282, 1284 (Miss. 2010).

Assuming that the Court finds the circuit court properly possessed subject matter jurisdiction, the standard of review for the grant or denial of summary judgment is relevant. A summary judgment shall be rendered forthwith the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to summary judgment as a matter of law. MISS. R. CIV. P. 56(c). The party moving for summary judgment has the job of persuading the court, first, that there is no genuine issue of material fact and, second, that on the basis of the facts established, he is entitled to judgment as a matter of law. *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206 (Miss. 2001) (citing *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 198 (Miss. 1988)).

Evidentiary matters are viewed in a light most favorable to the nonmoving party. *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993); *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346, 1354 (Miss. 1990). Once a party files a motion for summary judgment, the party opposing the motion may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *Hartford*, 826 So. 2d 1206 (Miss. 1988)(quoting *MST Inc. v. Mississippi Chem. Corp.*, 610 So. 2d 299, 304 (Miss. 1992)).

However, where the party opposing the motion for summary judgment on a claim or

defense upon which it bears the burden of proof at trial, and the moving party can show a complete failure of proof on an essential element of the claim or defense, other issues become immaterial and the moving party is entitled to summary judgment as a matter of law. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413, 416 (Miss. 1988); *Galloway et al. v. The Travelers Insurance Co., et al.*, 515 So. 2d 678 (Miss. 1987); *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-24 (1986).

ARGUMENT

This Court should find that Mississippi Code Annotated § 71-3-37(13) did not abrogate *Collins*, but carved out a very specific and narrow situation in which the Commission has authority to decide a coverage dispute between two carriers. The plain language of the statute lays out several requirements that must be met before the Commission is granted the authority to decide coverage disputes; therefore, interpreting this statute as granting plenary authority to the Commission to adjudicate any reimbursement dispute between carriers renders much of the language of the statute as superfluous. Looking past the plain language of the statute to the legislative intent, this case does not fall within the class of cases that § 71-3-37(13) was intended to apply to because the employee's benefits were never compromised.

A. The *Collins* case is binding precedent; therefore, the circuit courts retain jurisdiction to decide coverage, reimbursement, and/or indemnity disputes between carriers.

Prior to the enactment of § 71-3-37(13), this Court held in *Collins* that there was no express or implied statutory authority empowering the Commission to order one insurance company to reimburse another insurance company for compensation benefits mistakenly paid to

the employee. 95 So. 2d 456, 463 (Miss. 1957). The Defendants argue that the enactment of § 71-3-37(13), in 1987, abrogated *Collins* and gave the Commission plenary authority to decide reimbursement disputes between carriers. R. at 145. A plain reading of the statute indicates otherwise, and reinforces the point that Section 71-3-37(13) did not in fact abrogate *Collins*, but only provided jurisdiction in a very limited instance. At the time of the Administrative Judge's findings, the trial court's findings, and still today, the holding in *Collins* constitutes valid and binding legal precedent. The Mississippi Court of Appeals has further held that "[n]o Mississippi appellate court has addressed the extent to which section 71-3-37(13) has enlarged the powers of the Commission." *Mississippi Loggers Self Insured Fund, Inc. v. Andy Kaiser Logging*, 992 So. 2d 649, 658 (Miss. Ct. App. 2008). As of the date of this brief, no Mississippi appellate decision has overruled the holding in *Collins*.

In *Warren v. Mississippi Workers' Compensation Comm'n*, a case decided after the enactment of § 71-3-37(13), this court found that "certain issues, such as challenges to the constitutionality of the acts of the legislature or the ultimate decision on questions of law are for the courts alone to determine." 700 So.2d 608, 618 (Miss. 1997) The plaintiffs sought to have the workers' compensation scheme declared unconstitutional. *Id.* The Commission argued that the plaintiffs could not bring these claims before the Court because they failed to exhaust their administrative remedies by not bringing this action to the Commission. *Id.* This Court cited *Collins*, stating "a compensation commission is an administrative agency exercising only powers which are specifically granted to it by statute. *Id.* That does not authorize a commission to try equitable and legal issues involved We think that these principles apply also to the Mississippi Workmen's Compensation Commission." *Id.* quoting *Collins*, 231 Miss. 319, 95 So.

2d 456, 463 (1957).

This Court again cited *Collins* in *Bullock v. Roadway Express, Inc.*, 548 So. 2d 1306 (Miss. 1989). In that case, Bullock had obtained workers' compensation benefits after sustaining an on the job injury. *Id.* at 1307. Prior to his realization that his illness was work-related, however, his regular health care insurance provider had been paying his insurance benefits. *Id.* Once his illness was determined to be work-related, his regular insurance provider sought reimbursement of the benefits that it had paid him prior to that determination. *Id.* Bullock sought a declaratory judgment from an administrative law judge of the Workers' Compensation Commission to determine the rights of the parties involved. *Id.* The administrative law judge heard the merits of the case and issued an opinion. *Id.*

The insurer appealed the ALJ's opinion to the Commission, and simultaneously filed suit in the chancery court to determine whether the Commission had jurisdiction to adjudicate the rights at issue. *Id.* The Commission reversed the order of the administrative law judge, finding that it did not have subject matter jurisdiction to adjudicate the insurer's claim for restitution. *Id.* The circuit court affirmed that decision. *Id.* This Court then affirmed the circuit court's judgment, reiterating its prior holding that ". . . a compensation commission is an administrative agency exercising only powers which are specifically granted to it by statute. That does not authorize a commission to try equitable and legal issues involved We think that these principles apply also to the Mississippi Workmen's Compensation Commission." *Id.* at 1308, quoting *Collins*, 231 Miss. 319, 95 (1957).

The Defendants contend that under Miss. Code Ann. §71-3-37(13), the Commission has authority to decide issues of reimbursement under factual circumstances similar to the case *sub*

judice. The only support for this proposition is *Travelers Prop. and Cas. Co. v. City of Greenwood Fire Dep't*, and the factual circumstances of *Travelers* are distinguishable. 441 F.Supp.2d 776, 776 (N.D. Miss. 2006).

In *Travelers*, the plaintiffs filed suit in the district court seeking contribution from the City. *Id.* at 777. Finding that there had been no judgment as to the liability, if any, of the City, the district court dismissed the action noting that there is no right of contribution under MISS. CODE ANN. §85-5-7 absent a joint judgment. *Id.* at 778. The district court's decision was based on the fact that a contribution action cannot lie when there has been no determination of liability as to the party against whom contribution is sought. *Id.* The district court found that whether or not the City bore any liability for the firefighter's condition was an issue to be determined by the Commission. *Id.* The plaintiff's alternatively tried to seek indemnity, but the court did not address this issue because the complaint did not allege facts to support an indemnity claim. *Id.* At 789.

While *Travelers* was a case for contribution, this case involves a claim for indemnity. R. at 12. The Plaintiffs paid all the benefits owed to Cremeen, and seek to be indemnified by the Defendants, since they are the true liable parties. *Id.* In this case, the Plaintiffs are not seeking contribution and there is no issue of a joint judgment.

Collins is still good law and binding upon the courts of this State, as evidenced by the *Warren* and *Bullock* cases which cite to and uphold the *Collins*' decision after the enactment of §71-3-37(13). This court should find that *Collins* was not abrogated by §71-3-37(13) and reverse the ruling of the circuit court, as this was the basis of the finding that subject matter jurisdiction was lacking.

B. The plain language of the statute requires an order from the Commission requiring the disputing parties to pay immediately and equally before authority is given to the Commission to decide coverage disputes between carriers.

“Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.” *United States v. Fisher*, 6 U.S. 358 (U.S. 1805).

The plain language of §71-3-37(13) lists several requirements in order for the statute to apply, one of which has not been met by the facts of this case. The statute at issue, § 71-3-37(13), provides:

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).

There are five prerequisites in the statute that must be met before the Commission can require disputing parties to pay benefits immediately and share equally in the payment. The prerequisites are no genuine issue of material fact as to: (1) the employee's employment, (2) his 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. Only if these conditions are met does the Commission have the statutory authority to require disputing parties to share the payment of benefits equally. Notably, the Commission does not have to issue such an order; hence, the use of the term “may” as opposed to “shall.”

The last portion of the statute is the key to understanding the scope of the Commission's

authority to order reimbursement. If the Commission opts to order disputing parties to share equally in the payment of benefits, those parties are required to do so “**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.” *Id.* (Emphasis added). Given the clear language of the statute, disputing parties are required to share equally the obligation of paying benefits “until” it is determined by the Commission which party is “solely liable.” The use of the phrase “at which time” by the Legislature is telling. It is in obvious reference to the point in time when the Commission determines who is solely liable, a determination that must be made where the Commission orders disputing parties to share equally in the obligation to pay benefits.

From a different perspective, disputing parties are not required to share equally the payment of benefits to an injured employee absent an order from the Commission. It stands to reason that the disputing parties are free to litigate their differences over the liability for payment of benefits before the Commission. But the Legislature understood that in such a scenario where there was no genuine issue as to the existence of the five (5) prerequisites, an injured employee with a legitimate claim stands on the sidelines, without receiving compensation or medical benefits, waiting for the dispute to be resolved. In fact, the purpose of § 71-3-37(13) was not to do away with common law rights, but instead to provide an injured employee with benefits in a situation where liability among carriers was contested. The legislature intended 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).

The notion of a claimant not receiving benefits is key to understanding the purpose of the legislation. Why would it be necessary for disputing parties to pay the claimant benefits and share

the obligation equally unless the claimant was not being paid in the first place? The Legislature understandably viewed this situation as untenable because it would defeat one of the central purposes of the MWCA, which is to provide immediate relief to the claimant. Therefore, the Commission was granted the authority to require disputing carriers to share the obligation to pay benefits equally. Having granted such authority, it is only appropriate that the Commission be given further authority to order the party determined to be solely liable to reimburse the others.

The authority to order disputing parties to share benefits equally is limited because it can only be done where the five (5) prerequisites exist. If the proposition is correct that the authority to order reimbursement is necessarily tied to the authority to order disputing parties to share equally the obligation to pay benefits, then the authority to order reimbursement is likewise limited to those same set of narrow circumstances that warrants an order from the Commission to share equally in the payment of benefits. There is nothing in Section 71-3-37(13) that suggests that the authority to order reimbursement between disputing parties went beyond this specified circumstance.

In this case, there was no dispute between two carriers when benefits were initially paid to Mr. Cremeen. The injured employee was being paid benefits by operation of the statutory employer rule and the good faith belief of the Plaintiffs that Mr. Cremeen's employer did not have workers' compensation coverage. Because there was no dispute and because benefits were being paid, there was no reason for the injured employee to petition the Commission and it follows that there was no reason for the Commission to issue the type of order contemplated by Section 71-3-37(13). The record in this case clearly reveals that the Commission in fact never entered an order requiring disputing parties to pay benefits immediately to the employee in equal shares. R. at 281. In *Mississippi Loggers*, albeit in dicta, the Mississippi Court of Appeals stated that "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." 992 So. 2d 649, 655 (Miss. Ct. App. 2008). The court chose not to address the issue because it was not before the court on appeal. *Id.*

The trial court found that § 71-3-37(13) left it without jurisdiction to hear the case stating: "This is a matter which the Legislature has determined that the Workers' Compensation Commission has the authority relative to reimbursement between carriers, whether or not one of them has paid a portion and seeks a portion of that return from the other carrier, or paid all of it and seeks all of it from the other carrier." R. at 633. Such a broad interpretation renders superfluous the following emphasized language: "**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 . . ." "The cardinal principle of statutory construction is to save and not to destroy." *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). "Interpretations that nullify statutory provisions or render them superfluous are, and should be, disfavored." *Patagonia Corp. v. Board of Governors of Federal Reserve System*, 517 F.2d 803, 814 (9th Cir.1975).

Under the circuit court's interpretation, "at which time" means "any time" there is a dispute between carriers. It is not limited to that point in time where the Commission determines who is "solely liable" and it is likewise not limited to those instances where disputing parties have been ordered to "share equally." The circuit court's interpretation does not even require an "unpaid claimant," which is what is contemplated by the statute when it requires the disputing carriers to "pay benefits immediately to the employee." Finally, such a broad interpretation does not even require a dispute between the parties that led to the "unpaid claimant." If Section 71-3-37(13) provides a broad

grant of authority to the Commission to adjudicate reimbursement disputes between carriers, it would abrogate the holding in *Collins*, but it also render much of the statute completely meaningless. It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed. *Montclair v. Ramsdell*, 107 U.S. 147 (U.S. 1883). If the legislature did not intend for the statute to be limited only to specific cases where an order was issued requiring the parties to pay immediately and share equally, why would they put the language in the statute? The legislature could have bestowed that the Commission now has the authority to decide issues of coverage, indemnity and/or reimbursement between carriers; but it clearly chose not to do so.

C. Findings of the Special Master regarding the Plaintiffs' entitlement to indemnification were not manifestly wrong and should have been adopted by the Circuit Court.

Rule 53 of the Mississippi Rules of Civil Procedure governs "Masters, Referees, and Commissioners." Subsection (g)(3) provides: "The court shall accept the master's findings unless manifestly wrong." In this case, the findings of the special master with respect to indemnification were not manifestly wrong. The special master found that the Plaintiffs were entitled to indemnity from the Defendants. If the Court agrees that the circuit court did in fact have subject matter jurisdiction and reverses on that point, it should go one step further and render judgment in favor of the Plaintiffs on the indemnification claim.

"In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment." MISS. CODE ANN. § 71-3-7. Knight Properties, Inc. was deemed to be the statutory employer of Jerry Cremeen and pursuant to that obligation, BCAM paid indemnity and

medical expenses to, and on behalf of, Cremeen. R. at 33. Unlike many states, the MWCA does not contain a provision providing that a general contractor, deemed to be a statutory employer, is entitled to reimbursement from the subcontractor. However, Mississippi courts have consistently recognized a common law right of indemnity.

“An obligation to indemnify may arise from a contractual relation, from an implied contractual relation, or out of liability imposed by law. When one person is required to pay money which another in all fairness should pay, then the former may recover indemnity from the latter in the amount which he paid, provided the person making the payment has not conducted himself in a wrongful manner so as to bar his recovery.” *Bush v. City of Laurel*, 215 So.2d 256, 259-60 (Miss. 1968). “[T]wo ‘critical’ prerequisites of noncontractual implied indemnity in Mississippi are: (1) The damages which the claimant seeks to shift are imposed upon him as a result of some legal obligation to the injured person; and (2) it must appear that the claimant did not actively or affirmatively participate in the wrong. ... In order for [the plaintiff] to prevail on its indemnity claim it must allege and prove that (1) it was legally liable to an injured third party, (2) it paid under compulsion, and (3) the amount it paid was reasonable.” *Hartford Casualty Ins. Co. v. Halliburton Co.*, 826 So.2d 1206, 1216 (Miss. 2002)(internal citations omitted). The three (3) elements necessary to prove Plaintiffs’ indemnity claim are all established by the MWCA. As Cremeen’s statutory employer, Plaintiffs’ were legally obligated to pay benefits to and/or on behalf of Cremeen. “Under section 71-3-7 of the Mississippi Workers' Compensation Act, a statutory employer ‘shall be liable for and shall secure the payment to his employees of the compensation payable under [the Act's] provisions.’” *Washington v. Tem's Junior, Inc.*, 981 So. 2d 1047, 1050 (Miss. Ct. App. 2008)(emphasis added).

At the time of his injury, it is undisputed that Cremeen was an employee of Sanders. R. at 11.

It is also undisputed that at the time of Cremeen's injury, Sanders had workers' compensation coverage through FirstComp since the ALJ determined that FirstComp had not validly cancelled its policy of workers' compensation insurance. The Act provides that "[c]ompensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment, *without regard to fault* as to the cause of the injury or occupational disease." MISS. CODE ANN. §71-3-7 (emphasis added). Pursuant to the Act, Sanders and FirstComp, as its workers' compensation carrier, were liable for the payment of benefits as a result of the injuries Cremeen sustained. R. at 33. However, benefits were not immediately paid by Sanders or FirstComp on the mistaken belief that FirstComp's coverage was not effective at the time of Cremeen's injury. *Id.*

On or about October 20, 2004, Cremeen filed his Petition to Controvert with the Mississippi Workers' Compensation Commission against the Plaintiffs, alleging that his employer, Sanders, "did not have coverage at the time of injury. *Id.* Therefore, Knight Properties, the general contractor became statutory employer..." *Id.* Upon Cremeen's demand for benefits under the MWCA, Plaintiffs became legally obligated to make payments to Cremeen, regardless of fault. Plaintiffs' payment of said benefits was not voluntary, but instead compelled by the MWCA. By operation of the MWCA, the Defendants' responsibility to pay benefits to and/or on behalf of Cremeen was shifted to the Plaintiffs. As such, the Plaintiffs are entitled to indemnity from the Defendants.

Similar to Mississippi, Nebraska's workers' compensation law does not contain an express provision providing that a general contractor is entitled to reimbursement from a subcontractor for payments made to an injured employee as a statutory employer. However, Nebraska has recognized that under common law indemnity, the general contractor/statutory employer is entitled to

reimbursement from the subcontractor for “all sums which the former has paid in good faith upon a matured obligation or has been forced to pay in satisfaction of a compensation award.” *Duffy Brothers Constr. Co. v. Pistone Builders, Inc.*, 299 N.W.2d 170, 174 (Neb. 1980). Further, the right of a general contractor, who has made benefits payments to the employee of a subcontractor pursuant to its obligation as statutory employer, to indemnification from the subcontractor is widely recognized. “Under most statutes, the general contractor who has been required to pay compensation in these circumstances can obtain reimbursement from the subcontractor, unless they have altered this normal pattern by specific agreement.” LARSON’S WORKERS’ COMPENSATION LAW §70.02 Additionally, 82 AM. JUR. 2D *Workers’ Compensation* §459 provides that “[w]here a general contractor is made statutorily liable for the payment of workers’ compensation to an employee of a subcontractor, the general contractor may seek reimbursement from the subcontractor for any benefits paid pursuant to such statutory obligation.” Restatement Third of Torts §22 further provides:

- (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:
 - (1) the indemnitor has agreed by contract to indemnify the indemnitee, or
 - (2) *the indemnitee (i) was not liable except vicariously for the tort of the indemnitor, or (ii) was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.*
- (b) A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff.

(emphasis added). There is no genuine issue of material fact as to whether or not (1) On March 22, 2004, Cremeen sustained compensable work related injuries; (2) Cremeen was an employee of Sanders at the time of his injuries, (3) FirstComp’s workers’ compensation policy issued to Sanders

was effective at the time of Cremeen's injury, and (4) Plaintiffs made payments to Cremeen for said injuries pursuant Miss. Code Ann. §71-3-7 as the statutory employer of Cremeen. By operation of the statutory employer rule, Knight was held vicariously liable for compensation and medical benefits. R. at 33-34. Accordingly, the Court should render judgment in favor of the Plaintiffs on the claim for indemnification and remand the case to the circuit court for a determination as to the amount of damages, interest, and attorneys fees.

CONCLUSION

The lower court erred in granting the Defendants Motion to Dismiss due to lack of subject matter jurisdiction. The plain language and the legislative intent of § 71-3-37(13) establish that this statute does not give the Commission plenary authority to decide reimbursement disputes between carriers. Instead, it grants the Commission this authority in a very limited and specific circumstance involving a dispute between two or more parties as to who is liable for payment of compensation benefits to the injured employee. Provided the criteria of the statute are met, the Commission can order disputing parties to pay compensation benefits and share equally in the expense until such time as the party solely liable is determined. At that time, the Commission can order the solely liable party to reimburse the others. The facts of this case do not meet the outlined requirements in the text of the statute, nor does this case fall into the boundaries contemplated by the legislative intent. This court should continue to follow the binding precedent of *Collins*, the plain language of the statute and the legislative intent and reverse the lower court's ruling that it does not have jurisdiction to decide reimbursement issues between workers' compensation carriers.

In addition to reversing the determination of no subject matter jurisdiction, the Court should render judgment in favor of the Plaintiffs on the indemnification claim. The findings of the special

master were not manifestly wrong and furthermore, there was no genuine issue of material fact. If the Court renders judgment on the issue of indemnification, it should then remand the case to the circuit court for the sole purpose of determining the amount of the damages, interest, and attorneys fees.

RESPECTFULLY SUBMITTED, this the 6 day of July, 2010.

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

BY:


H. WESLEY WILLIAMS, III

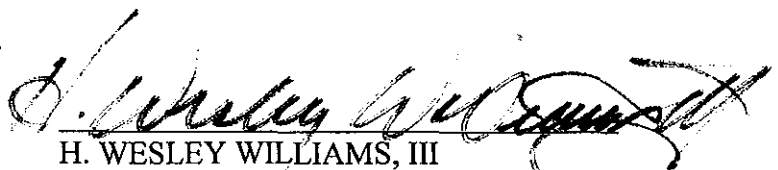
CERTIFICATE OF SERVICE

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 *Brief of Appellant* 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 6 day of July, 2010.


H. WESLEY WILLIAMS, III