

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-CC-00444 COA**

**KENNETH L. DOTY**

**APPELLANT**

**v.**

**B E & K CONSTRUCTION COMPANY AND  
LUMBERMENS MUTUAL CASUALTY COMPANY**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	03/22/96
TRIAL JUDGE:	HON. ROBERT H. WALKER
COURT FROM WHICH APPEALED:	HANCOCK COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES KENNETH WETZEL
ATTORNEY FOR APPELLEES:	WALTER EADES
NATURE OF THE CASE:	CIVIL - WORKER'S COMPENSATION
TRIAL COURT DISPOSITION:	COMPENSATION DENIED.
DISPOSITION:	AFFIRMED - 11/4/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/25/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

KING, J., FOR THE COURT:

Kenneth Doty alleges that he sustained a back injury arising out of and in the course of his employment at B.E. & K. Construction Company. The administrative law judge, the Workers' Compensation Commission and the circuit court denied Doty's claim due to his failure to give notice within thirty days of injury and failure to prove a compensable injury. Doty appeals the denial of compensation to this Court.

**FACTS**

Doty was employed by B.E. & K. Construction Company for approximately one year as an electrician's assistant. On January 22, 1991, Doty alleges he sustained a back injury while threading a piece of pipe through a tripod vice. While tightening the vice and walking backward, he tripped over one of the legs of the vice and injured his lower back. Doty alleges he felt pain in his chest but did not seek assistance from the first-aid station because the pain was not severe. There were no witnesses to this accident.

Doty's lower back did not begin to hurt until later in the evening. He testified that he experienced

back pain throughout that night, and the next morning he called Johnny Miller, B.E. & K.'s office manager, informing him of his absence from work that day. Doty was seen primarily by two physicians, Dr. Peden, his family physician, and Dr. Danielson, a neurologist. Dr. Peden testified that he first examined Doty for low back injuries sustained when picking up an electric pipe threader in 1988. At the January 1991 visit, Dr. Peden testified that Doty's immediate medical history was "simply complaining of low back pain for six days" with no mention that his injury was connected to the workplace.

Doty saw Dr. Danielson in February of 1991. During this visit he filled out a patient history form but failed to state on the form that his injuries resulted from any incident connected with B.E. & K. Doty stated that his injuries started in "1983 [at] Fort Campbell, Kentucky". Doty further stated that "I was competing on an obstacle course and fell from an obstacle." Dr. Danielson performed lower back surgery in April of 1991, and Doty filed a health claim with his private insurance provider, Metropolitan Life. Dr. Danielson testified that he indeed filed all of his medical claims with Metropolitan Life. However, the medical claims should have been filed with a workers' compensation insurance provider because Dr. Danielson recalled Doty stating to him that his injury happened in the workplace.

Contrary to Doty's allegations, Miller testified that he never received notice of injury. Paul Johns, superintendent of Doty's department, testified that he was not aware of any injury. Bruce Hall, the safety superintendent, finally received notice of the injury in May of 1991.

Based on the entirety of the evidence, the administrative law judge denied Doty's claims finding that he failed to give B.E. & K. proper notice of injury and did not sustain his burden of proof regarding a compensable injury. Doty appealed to the Full Commission and subsequently the circuit court. The Commission and circuit court both affirmed the finding of no compensable injury. Doty now appeals to this Court.

## ANALYSIS OF THE LAW AND ISSUES

### I. THE WORKERS' COMPENSATION COMMISSION ERRED BY TOTALLY DISREGARDING THE CLAIMANT'S TESTIMONY, WITHOUT STATING SO DIRECTLY, AND FINDING AS A MATTER OF LAW THAT THE CLAIMANT FAILED TO GIVE THE EMPLOYER/CARRIER THE PROPER 30-DAY NOTICE OF THE ALLEGED INJURY AS REQUIRED BY MISSISSIPPI CODE ANNOTATED, SECTION 71-3-35 (Rev.1995).

The record indicates that Doty gave notice of injury in May of 1991, four months beyond the thirty day notice requirement. Doty contends, however, that an exception to the notice requirement should be given because the "absence of notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employee's failure to give notice". § 71-3-35(1) Miss.Code Ann. (Rev.1995). The Commission determined that B.E. & K. did not have knowledge of Doty's injury prior to the date that Doty submitted his claim to B.E. & K. Doty testified that he told Miller about the accident, but Miller testified that Doty did not report the injury to him. The record further indicates that B.E. & K. managers and employees were not aware of Doty's accident. The Workers' Compensation Commission is the trier of fact and any question of fact decided by it is conclusive on appeal if it is supported by substantial evidence. *Parker v. United Gas Corp.*, 240 Miss.

351, 356, 127 So.2d 438, 439 (1961)(quoting *Malley v. Over the Top, Inc.*, 229 Miss. 347, 90 So.2d 678, 681 (1956)). Finding that substantial evidence supports the commission's finding that notice was not timely given, we affirm the commission's decision.

**II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW AFFIRMING THE FULL WORKERS' COMPENSATION COMMISSION DECISION IN REQUIRING MR. DOTY TO PROVE NOT ONLY THAT THE CLAIMANT WAS INJURED WHILE IN THE COURSE AND SCOPE OF HIS EMPLOYMENT BY A PREPONDERANCE OF THE EVIDENCE, BUT ALSO REQUIRED THE CLAIMANT TO PROVE THAT HE NOTIFIED HIS EMPLOYER OF HIS ACCIDENTAL INJURY, BY CORROBORATED EVIDENCE WHICH IS NOT REQUIRED OF THE CLAIMANT UNDER THE MISSISSIPPI WORKERS' COMPENSATION ACT.**

"Whether the evidence is sufficient is the only factual determination appellate courts have the right to decide." *Hamilton Mfg. Co. and Employers' Mutual Liability Ins. Co. v. Kern*, 242 So.2d 441, 444 (Miss.1970). "The Circuit Court shall review all questions of law and fact. If no prejudicial error be found, the matter shall be affirmed and remanded to the commission for enforcement. If prejudicial error be found, the same shall be reversed and the circuit court shall enter judgment or award as the commission should have entered." Mississippi Code Annotated § 71-3-51 (Rev.1995). The Workers' Compensation Commission is the trier of fact, and the circuit court must defer to the findings of the Commission when supported by substantial evidence. Doty contends that "evidence which is uncontradicted or undisputed should ordinarily be taken as true by the trier of fact, and if it is not inherently improbable or unreasonable . . . . [i]t can't be arbitrarily disregarded."

The record reveals that testimony was given by several B.E. & K. managers and employees, two physicians, and Doty. "[T]he circuit court exceeds its jurisdiction when it invades the province of the Commission and decides which witnesses the Commission should or should not believe." *Hamilton Mfg. Co.*, 242 So. 2d at 444. Therefore, in light of all the testimony, we find that Doty's testimony was not arbitrarily disregarded. Substantial evidence supports the Commission's decision. We affirm.

**THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY IS AFFIRMED WITH COSTS OF THIS APPEAL ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.**