

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-01009 COA**

**MAREC CONSTRUCTION AND INTERNATIONAL
BUSINESS BENEFITS, INC.**

APPELLANTS

v.

CLARENCE BRYANT

APPELLEE

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

DATE OF JUDGMENT:	08/16/96
TRIAL JUDGE:	HON. ROBERT H. WALKER
COURT FROM WHICH APPEALED:	HANCOCK COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	MARK D. HERBERT LINDSAY C. PATTERSON
ATTORNEY FOR APPELLEE:	MARK WARDEN DAVIS
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	ORDER OF MISSISSIPPI WORKERS' COMPENSATION COMMISSION AFFIRMED.
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

KING, J., FOR THE COURT:

Marec Construction and its workers' compensation carrier, International Benefits, Inc., (collectively referred to as "Marec"), have appealed from the judgment of the Circuit Court of Hancock County, affirming an order of the Mississippi Workers' Compensation Commission, which awarded Clarence Bryant permanent, partial disability benefits and determined his average weekly wage to be \$715. Marec has assigned the following as error on appeal:

- 1. The Commission erred in awarding permanent, partial disability benefits to Bryant based upon a 50 percent industrial loss of use of his right leg; and,**
- 2. The Commission erred in determining Bryant's average weekly wage to be \$715.**

Finding no error, we affirm.

FACTS

On February 11, 1993, Clarence Bryant fell and injured his knee while employed by Marec as a positional welder. At the time of this injury, Bryant had been on the job only four days. Treatment of this injury included arthroscopic surgery and physical therapy. Marec provided weekly compensation to Bryant during the period of temporary total disability and paid all medical expenses incurred during the course of his treatment. Having obtained maximum medical recovery, Bryant was released by his treating physician with no restrictions on June 18, 1993. Bryant was assigned a five percent permanent impairment rating to his right lower extremity.

After being released by his doctor, Bryant began a higher paying job as a positional welder/trouble-shooter. Positional welding requires that one position or contort his body in such a way to reach the work area, which requires flexible knees. Bryant experienced significant pain while in a bending, kneeling or squatting position for more than a few seconds at a time. Approximately four weeks later, Bryant was laid off from that job due to a reduction in force. Thereafter, Bryant secured employment which did not require bending, kneeling or squatting, but offered a lower rate of pay. Bryant has held this employment continuously for more than two years.

On February 21, 1995, the administrative judge conducted a hearing in this matter. The only evidence offered at the hearing was Bryant's testimony and his medical records. The Administrative judge found Bryant to have sustained a 50 percent loss of industrial use of his right leg and ordered Marec to pay him permanent, partial disability benefits in the amount of \$235.84 a week beginning June 9, 1993 and continuing for 87.5 weeks. The findings of the administrative judge were affirmed by the Commission. Marec appealed the Commission's order to the Hancock County Circuit Court, which affirmed.

I.

DID THE TRIAL COURT ERR IN AWARDING BRYANT PERMANENT, PARTIAL DISABILITY BENEFITS BASED UPON 50 PERCENT INDUSTRIAL LOSS OF USE OF HIS RIGHT LEG?

This Court's review of workers' compensation cases is limited to a determination of whether there is substantial evidence to support the findings of the Workers' Compensation Commission. The Commission's findings may be reversed by an appellate court only when clearly erroneous and contrary to the overwhelming weight of the evidence. *Morris v. Lansdell's Frame Co.*, 547 So.2d 782, 784 (Miss. 1989), (quoting *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss. 1988)). As stated in *Morris*, substantial evidence is that evidence which is not contradicted by positive testimony or circumstances and is not otherwise deemed unreliable or untrustworthy. Marec argues that the administrative judge's translation of the five percent impairment rating to a 50 percent loss of industrial use was arbitrary and capricious in light of the fact that Bryant's accounts of pain and inability to perform the job of positional welder were not corroborated by other evidence. It is of no consequence that the evidence relied upon by the Commission arises from a witness that is an interested party and unless uncontradicted evidence is shown to be untrustworthy, it is considered conclusive and binding. *Morris*, 547 So. 2d at 785; *see also*, *Dunn, Mississippi Workers'*

Compensation, 271 (3d ed. 1982). Under the Mississippi Workers' Compensation Act, doubtful cases are to be resolved in favor of compensation so that the purpose and spirit of the act may be carried out. *See Robinson v. Packard Elec. Div., General Motors Corp.*, 523 So. 2d 329 (Miss. 1988); *see also Barham v. Klumb Forest Prod. Ctr., Inc.*, 453 So. 2d 1300 (Miss. 1984).

Accordingly, we conclude that the Commission's determination of permanent, partial disability was not in error.

II.

DID THE COMMISSION ERR IN DETERMINING BRYANT'S AVERAGE WEEKLY WAGE TO BE \$715?

Prior to sustaining the subject injury, Bryant earned wages in the amount of \$715. In support of its contention that the Commission erred in determining Bryant's average weekly wage, Marec directs the Court to the following facts:

1. Bryant was injured on his fourth day on the job;
2. Bryant had only worked 50 hours;
3. The job was temporary; and,
4. Bryant's work history consisted entirely of temporary jobs.

Section 71-3-31, Mississippi Code Annotated (Rev. 1995), addresses the determination of wages for employees who have worked less than 52 weeks immediately preceding the date of injury. The statute reads in pertinent part as follows:

When the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results just and fair to both parties will thereby be obtained. Where by reason of the shortness of time during which the employee has been in the employment of his employer, it is impracticable to compute the average weekly wages by the above method of computation, regard shall be had to the average weekly amount which, during the first fifty-two (52) weeks prior to the injury or death, was being earned by a person in the same grade, employed at the same or similar work in the community. . . .(emphasis added)

In the case at bar, the pertinent question is whether the Commission's determination of wages based on Bryant's four days of work is just and fair to both parties. There is no disagreement that pipe welders receive relatively high rates of pay. Further evidence of the level of pay generally earned by pipe welders is the fact that after reaching maximum medical improvement, Bryant secured employment with Godfrey Corporation at \$16.39 per hour, a \$3.39 pay increase. Bryant's current employment as a welder pays approximately \$2.90 per hour less than what he received at Marec.

In determining Bryant's average weekly wage, the only evidence offered at the administrative hearing was Bryant's wage statement for the four days worked at Marec. Marec offered no evidence to demonstrate that the acceptance of Bryant's actual wages as his average weekly wage was unfair. In

this regard, it does not appear from the record that the wage determination was unfair to the parties, and if so, there was no evidence offered of the wages "earned by a person in the same grade, employed at the same or similar work in the community" during the 52 weeks prior to the injury. **Miss. Code. Ann. § 71-3-31 (Rev. 1995); see also, *Hall of Mississippi, Inc. v. Walter Green*, 467 So. 2d 935, 938 (Miss. 1985); *Sullivan v. City of Okolona*, 370 So. 2d 921, 923 (Miss. 1979).** From our review of the record in this matter, the administrative judge based her finding solely on the actual hours worked by Bryant, instead of projected wages for a full work week. This method of computation clearly was to Marec's advantage. Since Bryant had already logged 50 hours of work in four days, ten hours of which were paid at time and a half, the administrative judge might have concluded that his average work week of five days would result in 62.50 hours per week and a weekly wage of \$812.50. For example, in *Hall of Miss., Inc.*, the claimant had only worked four days and the court determined that his weekly wage should be based on a 40 hour work week and not the 32 hours actually worked. ***Hall of Miss., Inc. v. Green*, 467 So. 2d at 938, 939 (Miss. 1984).**

Marec contends that in light of the brevity of Bryant's employment with Marec, the Commission's average weekly wage determination was in error. The appropriate standard is whether this calculation is just and fair to both parties. **Miss. Code Ann. § 71-3-7 (Rev. 1995).** Having failed to demonstrate that this calculation is not just and fair to both parties, Marec's arguments are unpersuasive.

THE JUDGMENT OF THE HANCOCK COUNTY CIRCUIT COURT IS AFFIRMED. A FIFTEEN PERCENT STATUTORY PENALTY AND COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

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