

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
IN AND FOR THE COUNTY OF JACKSON

FILED  
(SEP 20, 1996)

**FILED**  
**September 20, 1996**  
**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

THE STATE OF MISSISSIPPI, )  
 )  
Plaintiff-Appellee, )  
 )  
vs. )  
 )  
THE STATE OF MISSISSIPPI, )  
THE JACKSON POLICE DEPARTMENT, )  
THE JACKSON FIRE DEPARTMENT, )  
THE JACKSON SANITATION DEPARTMENT, )  
 )  
Defendants-Appellees. )

Case No. 96-1007  
Sept. 20, 1996

For Appellees:

For Appellants:

Robert J. Wilkins  
Clinton, Tennessee

Raymond J. Fowler  
Memphis, Tennessee

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Clerk of Court

For Appellate Judges:

Henry B. White, Associate Justice, Supreme Court  
John V. Ryan, Senior Judge  
Joe C. Lewis, Jr., Special Judge

\_\_\_\_\_  
Clerk

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Clerk

This order's cooperation appeal has been referred to the Special  
Cooperation Appeals Panel of the Supreme Court in accordance with Court  
Code Ann. section 11-6-113(a)(3) for hearing and reporting of findings of fact and

conclusions of law. In this appeal, the claimant employer, Kaiser, questions the trial court's order awarding post-accident partial disability benefits.

At the original trial of this case, in June of 1994, the claimant was awarded post-accident partial disability benefits on the basis of eighty-five percent to the body as a whole. The award was largely based on the claimant's own testimony that he could no longer, including post-accident work, because of severe pain, lift or push periodically as a result.

The employer's insurer then photographed the claimant on videotape several times from December of 1994 through May of 1995. The video, which was later reviewed, revealed the claimant performing farm work without any apparent disability. He was fully able to lift apparently heavy objects, stand, walk, stoop and bend at the waist without difficulty.

The employer applied to the court for a judgment in favor of C.A.C. 10, 11, 12, 13, 14 and Tenn. Code Ann. section 44-6-111. The trial judge, after an extended hearing, found the claimant's disability had decreased and, based on that finding, terminated post-accident partial disability benefits. Appellate review, in the course of the record of the trial court, was precluded by a presumption of correctness of the findings of fact, when the preponderance of the evidence is otherwise. Tenn. Code Ann. section 44-6-111(e)(1).

When an award of benefits is payable periodically for a time that expires, either side may apply to the court for a modification based on an increase or decrease, as the case may be, of an employer's liability due solely to the injury. Tenn. Code Ann. section 44-6-111 (1994 Supl.). The evidence fails to preponderate against the trial court's finding that the claimant's disability due to the injury had decreased.

The claimant further contends the application to modify under Rule 60 is procedurally improper and that, in order to give the court jurisdiction, the employer should have over a writ of certiorari. We respectfully disagree. A court retains jurisdiction in a worker's compensation case until a periodic payment provided in the original award has been made and the judge is fully satisfied. Walker v. Carlin Coal Co., 114 Tenn. 111, 113 S.W. 2d 111 and 112 S.W. 2d 111 (1937). Moreover, Tenn. C.A.C. 10, 11 expressly provides, inter alia, that an application to the court for an order shall be by motion. Since the original judge's award was on that thing by itself, the Rule 60 motion was an appropriate way to invoke the court's present jurisdiction.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the plaintiff-appellant.

COCKE:

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John A. Dixon, Jr., Judge

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Henry L. White, Associate Justice

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John A. Dixon, Judge

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|----------------------------|---|---------------------|
| IIIII I, IIIIII,           | ) | IIIII IIIII         |
| Plaintiff-appellant        | ) | Defendant           |
| vs.                        | ) | IIIIII-III-III-III  |
|                            | ) | For Cause of Death, |
|                            | ) | Judge               |
| IIIII, III, III, III, III, | ) | IIIII               |
| IIIII, III, III, III, III, | ) |                     |
| IIIII, III, III, III,      | ) |                     |
| IIIII                      | ) |                     |
| Defendant-appellee.        | ) |                     |

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This case is before the Court upon the entire record, including the order of referral.

In the Special Order's Comprehensive Appeals Panel, and the Panel's Consensus Opinion

setting forth its findings of fact and conclusions of law, which are incorporated herein by

reference;

Whereupon, it appears to the Court that the Consensus Opinion of the Panel

should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are

accepted and affirmed, and the decision of the Panel is and shall be the judgment of the Court.

Costs on appeal are fixed to the plaintiff-appellant, Floyd Fisher, and Lopez

W. Fisher, jointly, for which execution may issue if necessary.

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