IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT NASHVILLE
November 30, 2000 Session

COLONIAL BAKING COMPANY v. CLAYTON BARRETT

Direct Appeal from the Chancery Court for Davidson County
No. 96-921-III Ellen Hobbs Lyle, Chancellor

No. M1999-02276-WC-R3-CV - Mailed - February 16, 2001

Filed - March 19, 2001

This Workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. A court-approved settlement limited the employee to authorized, reasonable and necessary medical expenses resulting from the employee's injuries for a period of two years from the settlement. The employee appeals the trial court's denial of his Motion for Relief from Order seeking relief from the order approving the settlement, pursuant to Rule 60.02, of the Tennessee Rules of Civil Procedure. We affirm the trial court and dismiss the appeal.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court Affirmed.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and JOE C. LOSER, JR., SP.J., joined.

Michael R. Jennings, Lebanon, Tennessee, for the Appellant Clayton Barrett.

Daniel C. Todd, Nashville, Tennessee, for the Appellee, Colonial Baking Company.

MEMORANDUM OPINION

On April 27, 1995, Clayton Barrett (Barrett) was injured in a motor vehicle accident in the course and scope of his employment with Colonial Baking Company (Colonial). On March 12, 1997, the trial court approved a settlement of Barrett's workers' compensation claim for the sum of $36,000. The Order provided:

> "That the employee's authorized, reasonable and necessary medical expenses incurred by the employee prior to the date of this settlement and relating to this injury have all been paid by the employer and insurer, in accord with the Workers' Compensation Law of the State of Tennessee, and the employer and its insurer have agreed to continue to pay authorized, reasonable and necessary medical expenses proximately resulting from the employee's injuries of April 27, 1995 as required by T.C.A. § 50-6-204 for a period of two years from the date of this settlement but the employer and insurer will not be liable for any other medical expenses, past or future, incurred by or on behalf of the employee."

On March 12, 1999 (two years after entry of the order approving the settlement), Barrett filed a Motion for Relief from Order alleging that he had attempted to obtain further medical treatment for his injury through his own efforts and that of his counsel but Colonial had failed to authorize medical treatment. He asked, pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure, for modification of the order to allow Barrett to obtain the medical treatment contemplated in the order, and for attorney fees and costs pursuant to Tenn. Code Ann. § 50-6-204. Barrett also asked the Court to treat the motion as an independent action to relieve him from the provisions of the final order. Colonial filed a response to the motion asserting that Barrett failed to prove any reasonable and necessary medical expenses and complained only that he was not allowed to seek additional medical opinions, and therefore, that the motion failed to show any grounds or authority for the relief sought.

On November 22, 1999, the trial court entered its order finding that the "employee's motion is not well grounded and employee has failed to introduce evidence sufficient to justify relief under Tennessee Rule of Civil Procedure 60. After entry of this order, Barrett attempted to file a statement of the evidence or proceedings on the motion. The trial court, by order, declined to permit the statement because Barrett "did not submit to the Court any evidence, by affidavit or otherwise, and did not seek to introduce oral testimony at the hearing conducted on November 12, 1999. The only evidence before the Court were facts contained in the Motion for Relief from Order which motion was verified by the respondent-employee. The Court heard oral argument from the attorneys for both parties and ruled on the motion from the bench." Barrett complains that the trial

court should have allowed his "Statement of the Evidence" relating to the hearing on the Motion for Relief from Order. He attaches a copy of his statement of the evidence to his brief and urges this court to consider it. Rule 24(e) of the Tennessee Rules of Appellate Procedure provides that the trial court has the ultimate responsibility to determine whether any matter is omitted, improperly included or misstated in the record, and that "absent extraordinary circumstances, the determination of the trial court is conclusive." Thus, the trial court is the final arbiter of the transcript or statement of the evidence. Artrip v. Crilley, 688 S.W.2d 451 (Tenn. App. 1985). We note that Barrett's brief recites: "The statement does not contain anything that was not submitted in previous documents which are part of the record of this Court, nor does it contain any matters other than those considered by Chancellor Lyle." Our review includes everything appearing in the record of the trial court; therefore, the statement of the evidence would add no new facts for our consideration. Nothing in the record before us demonstrates extraordinary circumstances that would justify our consideration of Barrett's statement of the evidence.

II.

"A motion for relief based on Rule 60.02 grounds addresses itself to the sound discretion of the trial judge. The scope of review of an appellate court is to determine if the discretion was abused." Underwood v. Zurich Ins. Co., 854 S.W.2d 94 (Tenn. 1993) (citing Banks v. Dement Const. Co. Inc., 817 S.W.2d 16 (Tenn. 1991) and Toney v. Mueller Co., 810 S.W.2d 145 (Tenn. 1991)). Under Rule 60.02, "the burden is upon the movant to prove that he is entitled to relief, and there must be proof of the basis on which relief is sought." Banks, 817 S.W.2d at 18. Barrett was aware that the employer would be liable for future medical expenses for only a two-year period after entry of the judgment approving the settlement. He had ample opportunity to ask the trial court to enforce the terms of the settlement during that period. Also, he had the option of obtaining reasonable and necessary medical treatment and then asking the trial court to require the employer to pay for it. We do not find facts showing the "extraordinary circumstances or extreme hardship" necessary to justify relief pursuant to Rule 60.02(5). Gaines v. Gaines, 599 S.W.2d 561 (Tenn. App. 1980); Tyler v. Tyler, 671 S.W.2d 492 (Tenn. App. 1984).

Barrett asked, alternatively, that the Rule 60.02 motion be treated as an independent action to set aside, or relieve him, from the judgment. In Jerkins v. McKinney, 533 S.W.2d 275 (Tenn. 1976), it is stated that such an action must show "a recognized ground, such as fraud, accident, mistake or the like, for equitable relief and that there is no other available or adequate remedy. It must also appear that the situation in which the party seeking relief finds himself is not due to his own fault, neglect or carelessness. . . The granting of relief in this unusual type of proceeding lies largely within the discretion of the trial judge." The opportunities, noted above, prevent a finding that Barrett had no available or adequate remedy.

Assuming all the facts stated in Barrett's motion to be true we do not find the trial judge abused her discretion in denying the motion. The appeal is dismissed with costs assessed to the Appellant.

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Howell N. Peoples

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum 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 Memorandum 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 adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the Appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM