IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

FILED

March 25, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

PATSY STEDMAN,	)	MADISON CHANCERY
	)	
Plaintiff/Appellee	)	NO. 02S01-9703-CH-00017
	)	
v.	)	HON. JOE C. MORRIS,
	)	CHANCELLOR
HARDAWAY CONSTRUCTION	)	
COMPANY, INC., ET AL,	)	
	)	
Defendants/Appellants	)	

For the Appellants:

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Jackson, TN 38302

For the Appellee:

David Hardee
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213 E. Lafayette
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M E M O R A N D U M O P I N I O N

Members of Panel:

Justice Janice Holder
Senior Judge John K. Byers
Judge Robert L. Childers

AFFIRMED

BYERS, Senior Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The trial court found the plaintiff had sustained a 25 percent permanent partial disability to the body as a whole as the result of an injury she suffered at work.

The defendant has filed an appeal from the judgment. The plaintiff has moved to dismiss the appeal because the defendant failed to timely file a notice of appeal.

We find that the appeal was not timely filed and therefore dismiss the appeal.

The judgment in which the plaintiff was awarded 25 percent disability was entered on November 19, 1996. On December 23, 1996, the defendant filed a motion for relief from the judgment under RULE 60.02(1) and (5), TENN. R. CIV. P. The defendant's only basis for relief under this rule was that the failure to timely file a notice of appeal was inadvertent. Counsel asserted she thought the notice had been filed and was surprised to learn it had not been filed.

On December 27, 1996, the defendant filed a motion to have the trial court enter a final judgment in the case. In that motion, the defendant asserted the trial court's judgment of November 19, 1996 was not final because it disposed of less than all the claims raised by the plaintiff in the original petition.

The defendant's motion asserted that the trial court, in its judgment, had not disposed of the following issues:

> "(1) Whether plaintiff is entitled to temporary disability benefits;
>
> (2) When plaintiff's disability became permanent within the meaning of the Tennessee Workers' Compensation Law;
>
> (3) Whether plaintiff is entitled to reimbursement of medical expenses incurred to date; and
>
> (4) Whether plaintiff is entitled to a lump sum award."

On January 8, 1997, the trial judge entered an Amended Final Judgment.

It is the defendant's contention that under RULE 54.02, TENN. R. CIV. P., the original judgment entered on November 19, 1996 was not final, and until the trial court had entered a final judgment the defendant could not appeal the case under the directive of RULE 3, TENN. R. APP. P. The defendant argues that the time for

filing a notice of appeal began to run on January 8, 1997, the date of the entry of the Amended Final Judgment. On January 23, 1997, the defendant filed a notice of appeal.

We do not find any transcript of any hearing or in-court proceeding in regard to disposition of the motion for entry of a final judgment. We note that counsel for the defendant approved the Amended Final Judgment order for entry, but counsel for plaintiff did not.

From the transcript of the trial of the case on November 5, 1996 in opening remarks, the plaintiff's attorney stated that the only issue to be determined was the amount of any permanent partial disability. The defendant did not dispute this statement or assert there were other issues to be decided.

On November 6, 1996, the trial judge (in what is a local practice) sent a letter to counsel for the plaintiff and the defendant setting out his findings and conclusions based thereon, which stated, in part:

> "In the above cause, the only issue for the Court to determine is whether the plaintiff, Patsy Stedman, has any permanent disability related to a fall on May 19, 1994 at her place of employment."

The judgment entered on November 19, 1996, which incorporated the findings of fact of the November 6, 1996 letter by reference, was approved for entry by counsel for the plaintiff and counsel for the defendant.

An appeal does not lie from a judgment that is not final unless permitted under RULE 9 and RULE 54.02, TENN. R. APP. P. The issue is whether the judgment of November 19, 1996 is a final judgment.

The defendant relies upon the case of *Aetna Casualty and Surety Co. v. Miller,* 491 S.W.2d 85 (Tenn. 1973), which holds that a judgment is final if all the issues between the parties raised in the pleadings have been disposed of. The plaintiff's petition raised six issues. The judgment of November 19, 1996 only disposed of the issue of the extent of the plaintiff's disability.

The determination of whether a judgment is final is not limited to a consideration of the pleadings without consideration of statements, agreements, or stipulations between the litigants as they appear in the record. Assertions in the record by a party, which narrow the issues to be decided and which are acquiesced in by the silence as well as the actions of the other party, can be relied upon by the

trial court in determining which issues raised in the original pleadings remain to be decided in the court's final order.

In the record, there is no claim by the defendant at trial or at entry of the judgment on November 19, 1996 that there are other issues to be resolved between them. The only issue litigated was the degree of the plaintiff's permanent disability. The defendant never asserted to the court at trial that there were other issues to be resolved, and the judge's letter to counsel said the degree of disability was the only issue to be decided. Counsel for the defendant approved the judgment for entry.

After the time for filing a notice of appeal had expired, counsel for the defendant filed a Rule 60 motion seeking relief from the judgment entered on November 19, 1996. In the affidavit attached thereto, counsel avowed it was the intent of the defendant to appeal from the judgment.

It seems patently obvious that the defendant considered the judgment of November 19, 1996 to have decided all the justiciable issues between the parties. Not until December 27, 1996, the date of the motion for final judgment, was there any claim by the defendant that the judgment of November 19, 1996 was less than final.

In this case the transcript shows clearly that the litigants trying the case agreed on the issues to be decided and the trial court tried the case only on those issues; the case was tried on the issue stated by one party to be the only issue to be tried, and the other party, by its actions in the case, impliedly acquiesced in the statement. We are of the opinion that under such circumstances, a finding by the trial judge on the issues litigated and the entry of judgment on the matters litigated, without protest from the other party in the case, resolves all the issues to be litigated between the parties and becomes a final judgment unless there is some showing of mutual mistake, fraud or excusable neglect by a party.

Based upon the actions of the parties in the case, we conclude the judgment of November 19, 1996 was a final judgment and the failure of the defendant to timely file a notice of appeal leaves this Court without jurisdiction to consider the case. [1] We therefore dismiss the appeal with costs assessed to the appellant.

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[1]Although we have no jurisdiction to review the case, we have examined the record and if we were allowed to do so, we would affirm the judgment.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Janice Holder, Justice

_____
Robert L. Childers, Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

PATSY STEDMAN,	)	MADISON CHANCERY
	)	NO. 50481
Plaintiff/Appellee,	)	
	)	Hon. Joe C. Morris,
vs.	)	Chancellor
	)	
HARDAWAY CONSTRUCTION COMPANY, INC., ET AL,	)	NO. 02S01-9703-CH-00017
	)	
	)	
Defendants/Appellants.	)	AFFIRMED.

JUDGMENT ORDER

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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 25th day of March, 1998.

PER CURIAM

(Holder, J., not participating)