

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

FILED

June 23, 1997

Cecil W. Crowson
Appellate Court Clerk

DAVID H. CRENSHAW, SR.)	
)	DAVIDSON CHANCERY
Plaintiff/Appellee)	
)	01S01-9701-CH-00018
v.)	
)	ROBERT S. BRANDT,
ATS SOUTHEAST, INC.,)	CHANCELLOR
)	
Defendant/Appellant)	

For the Appellant:

Fred C. Dance
Dance, Dance & Lane
3200 West End Ave., Ste. 101
Nashville, TN 37203

For the Appellee:

Charles Abbott
Abbott & Burlison
6263 Poplar Ave., Ste. 1130
Memphis, TN 38119

MEMORANDUM OPINION

Members of Panel:

Chief Justice Adolpho A. Birch, Jr.
Senior Judge John K. Byers
Special Judge Joe C. Loser, Jr.

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.

This is an appeal by the employer from an order of the trial court setting aside a previously issued order of dismissal for failure to prosecute a workers' compensation case within one year under the local rules of court for Davidson County. The trial court set aside the dismissal order under Rule 60.02, TENN. R. CIV. P.

The complaint for workers' compensation benefits was filed October 14, 1994. The defendant filed an answer on November 17, 1994. The trial court, *sua sponte*, dismissed the complaint on November 6, 1995 under the local rule for failure to prosecute.

The record before us, which consists of the pleadings, orders and an affidavit of the employee's counsel in support of his Rule 60 motion, show the notice of dismissal was filed on counsel for the plaintiff on November 14, 1995. On January 22, 1996, plaintiff filed a Rule 60 motion to have the order dismissed or set aside.

On February 26, 1996, the trial judge found "Plaintiff [had] not made out a sufficient showing of mistake, inadvertence, surprise, or excusable neglect to justify relief under Rule 60, Tennessee Rules of Civil Procedure," however "because this matter is a workers' compensation action, the Order of Dismissal will be set aside and this case shall be put back on the Court's active docket."

Unless otherwise set out in the order of dismissal, such order operates as an adjudication upon the merits. Rule 41.02(3), TENN. R. CIV. P.

Rule 59.04, TENN. R. CIV. P., provides for a motion to amend or alter a judgment. Such motions must be filed and served on the opposite party within 30 days of the entry of the judgment in question.

A judgment becomes final in 30 days and cannot be reviewed after that time. *Algee v. State Farm General Ins. Co.*, 890 S.W.2d 445, 447 (Tenn. Ct. App. 1994).

The order of dismissal in this case became final 30 days after entry thereof,

i.e., December 6, 1995. No Rule 59 motion was filed by the plaintiff.

After the judgment becomes final, the only avenue to have the judgment set aside was by way of a motion in accordance with Rule 60, TENN. R. CIV. P. That Rule provides:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

The plaintiff's motion Rule 60 did not set out with particularity what provision of Rule 60 he relied upon to have the judgment set aside. From the record and pleadings, neither reason (2) fraud, nor reason (3) the judgment was void, nor (4) satisfaction of judgment was relied on by the plaintiff for having the judgment set aside.

If relief could be granted under Rule 60, it would have to be on grounds(1) mistake, inadvertence, surprise or excusable neglect or (5) any other reason justifying relief from the operation of the judgment.

The standard of review of a ruling by a trial court on a Rule 60.02 motion is whether the trial court abused its discretion in reaching its conclusion.

We agree with the defendant that setting aside the order of dismissal merely because the case being dismissed is a workers' compensation case is not a sufficient basis for setting aside the order under Rule 60.02. However, we are of the view the reviewing court may examine the whole record to see if there is a basis for such action evident therein which satisfies the requirements of Rule 60.02 and justified the action of the trial court.

The plaintiff's motion and his counsel's affidavit aver the defendant's workers' compensation carrier did not accept the plaintiff's claim as compensable until suit

was filed.

Further, plaintiff's counsel averred that the carrier commenced workers' compensation payments to the plaintiff after the suit was filed. The defendant did not refute this claim.

The plaintiff averred that further prosecution of the case was "tabled" upon commencement of payments until it was determined that efforts to settle the issue of permanent partial disability failed to prove productive.

Although the record before us is not clear on the nature of the payment of compensation, it appears these payments were for temporary total disability.

The plaintiff takes the position that he could not prosecute the case until he had reached maximum medical recovery or unless the carrier ceased payments of benefits. A Workers' Compensation case may not be prosecuted or determined until the injured worker has reached maximum medical impairment. The question now becomes whether this fact justifies granting the plaintiff relief under Rule 60.02.

In *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991), the Court held:

Rule 60.02 is meant to be used only in those few cases that meet one or more of the criteria stated. As recently stated by this Court, "Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality embedded in our procedural rules." *Thompson v. Fireman's Fund Ins. Co.*, 789 S.W.2d 235, 238 (Tenn. 1990). Because of the importance of this "principle of finality," the "escape valve" should not be easily opened. When a party seeks the extraordinary relief permitted by Rule 60.02(1), "the burden is upon the movant to set forth in a motion or petition, or in affidavits in support thereof, facts explaining why movant was justified in failing to avoid mistake, inadvertence or surprise." *Hopkins v. Hopkins*, 572 S.W.2d 639, 640 (Tenn. 1978).

Although the failure of plaintiff to file a Rule 59 motion is inexplicable, we are not prepared to hold his failure to do so is the controlling element in this matter.

We believe that in this case the holding of the Court in *Toney v. Mueller Co.*, *supra*, is controlling, i.e., that Rule 60.02 should be used to escape what could otherwise work a possible inequity if the order of dismissal is held to be final.

Although counsel in his motion did not aver his failure to prosecute this case was due to excusable neglect, the sense of his avement that the payment of

benefits by the defendant 's carrier and his correct contention that he could not prosecute the case until the plaintiff had reached maximum medical impairment is an averment which fits the excusable neglect requirement.

Although setting aside the judgment because the action was a workers' compensation case would not fit the requirements of Rule 60.02, we may affirm the action if the record shows the action was justified by a valid reason evident therein even though the trial judge found another and erroneous reason for setting the judgment aside.

We affirm the judgment of the trial court and assess the costs to the defendant/appellant.

John K. Byers, Senior Judge

CONCUR:

Adolpho A. Birch, Jr., Chief Justice

Joe C. Loser, Jr., Special Judge

THE STATE OF TEXAS,)
)

Appellee,)

v.)

THE UNIVERSITY OF TEXAS,)
)

Appellant.)

FILED)

June 23, 1997)

Cecil W. Crowson,)
Clerk)

By _____)

_____)

FILED

June 23, 1997

**Cecil W. Crowson
Appellate Court Clerk**

CONCLUSION

This case is before the Court upon a motion for reconsideration of the Court's decision in *The State of Texas v. The University of Texas*, 953 S.W.2d 101 (Tex. 1997), the entire record, including the order of remand to the Special Master's Compensation Appeals Panel, and the Panel's Decision on Appeal setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Therefore, it appears to the Court that the motion for reconsideration is not well-taken and should be denied; 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 on appeal are assessed to the appellant.

IT IS SO ORDERED this 23rd day of June, 1997.

_____)

_____) Clerk, U.S. District Court.