

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 1998 SESSION

FILED

March 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

MICHAEL BINGHAM,)	
)	
Plaintiff/Appellee,)	Shelby Circuit No. 71090 T.D.
)	
v.)	No. 02S01-9804-CV-00040
)	
KIMBERLY-CLARK, INC.,)	Honorable James F. Russell, Judge
)	
Defendant/Appellant.)	

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

Justice Janice M. Holder
Senior Judge John K. Byers
Senior Judge F. Lloyd Tatum

APPEAL DISMISSED

TATUM, Senior Judge

O P I N I O N

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 defendant/employer, KimberlyClark, Inc., presents this appeal pursuant to Rule 3, Tennessee Rules of Appellate Procedure, and has assigned two issues:

- I. Whether the trial court erred in finding the defendant liable for the injuries caused to plaintiff. The scope of review is de novo.
- II. Whether the trial court erred in ordering defendant to pay plaintiff's medical expenses for treatment rendered and suggested by unauthorized physician, Dr. John Lindermuth, and discretionary costs for related deposition fees and court reporter.

The first judgment appealed from, entered May 8, 1997, is as follows:

This cause came on to be heard upon the Complaint filed by the Plaintiff, the Answer of the Defendant, the testimony of the Plaintiff in open Court and the testimony of John Lindermuth, M.D., by deposition, the exhibits, and the argument of counsel, from all of which it appears to the Court that the Plaintiff suffered a compensable injury to his back on or about August 23, 1994, and that the Plaintiff and Defendant were both subject to the Tennessee Workers' Compensation Act. It further appears to the Court that based upon the deposition of John Lindermuth, M.D., a repeat myelogram is reasonable medical treatment under the Tennessee Workers' Compensation Act for which the Defendant shall be responsible and if the myelogram is negative, the Defendant shall be responsible for all medical expenses associated with lumbar epidural blocks as recommended by Dr. Lindermuth. The Court will retain jurisdiction of this matter to determine if Plaintiff is entitled to additional workers' compensation benefits.

On May 23, 1997, the trial court granted a motion by plaintiff to assess discretionary costs pursuant to Rule 54, Tennessee Rules of Civil Procedure, and Tenn. Code Ann. § 50-6-226. The trial court granted costs for filing fee, medical records, deposition fees, and medical depositions in the total sum of \$995.50. The record reveals that the defendant paid and satisfied this judgment on October 31, 1997.

On March 18, 1998, the court entered an order in which he reviewed the testimony of medical witnesses and the plaintiff in great detail. The court ordered:

The Court concludes therefore that the employee, Michael Bingham, suffered a herniated disc as a result of the injury which arose out of and in the course and scope of the employment on August 23, 1994. The Court, therefore, is of the opinion that Bingham is entitled to full medical benefits at the hands of Kimberly Clark Corporation pursuant to the requirements of the Worker's Compensation Act of Tennessee.

On April 16, 1998, the appellant filed its notice of appeal in the trial court, with copy to plaintiff's attorney. After the filing of the notice of appeal, on April 20, 1998 the trial court entered an order on motion of the plaintiff to amend the judgment. This order amending the judgment is as follows:

This cause came on to be heard upon the Plaintiff's Motion to Amend Judgment, and it appearing to the Court, based on the argument of counsel, and the entire record in this cause, that fairness dictates that John Lindermuth, M.D., shall be the treating physician to the completion of this case and that Plaintiff's Motion is well taken and should otherwise be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion to Amend Judgment be and hereby is, granted. The Court specifically orders its "Memorandum Opinion and Order Awarding Additional Benefits" entered in this cause on March 18, 1998 shall be amended, pursuant to Rule 59 of the Tennessee Rules of Civil Procedure, to designate John Lindermuth, M.D. as the treating physician in this cause, to the completion of the case. Defendant is further ordered to pay for the medical treatment ordered by John Lindermuth, M.D., pursuant to the Court's previous Order of March 18, 1998 entered in this case.

IT IS, FURTHER, ORDERED, ADJUDGED AND DECREED that while this Court retains jurisdiction of this matter to determine whether Plaintiff is entitled to any future workers' compensation benefits related to his injury of August 23, 1994, such as the payment of other medical expenses, the payment of temporary total expenses or the payment of any permanent disability, the Court directs entry of this Order, as well as the Order of March 18, 1998, as final judgments in favor of the Plaintiff against the Defendant, in accordance with Rule 54.02 of the Tennessee Rules of Civil Procedure, as of the date of the entry of this Order.

At the time of the entry of the order of April 20, 1998, there was still before the court the issue of medical expenses other than those stated in the several orders entered by the court. The adjudication of temporary total disability benefits and permanent disability benefits was and is still pending.

On April 20, 1998, another order was entered adjudging costs in favor of plaintiff and against the defendant in the sum of \$1,317.00. This order states that it is final, but

does not state that there is no just reason to delay an appeal.

No attempt was made to obtain an interlocutory appeal or an extraordinary appeal pursuant to Rules 9 or 10, Tennessee Rules of Appellate Procedure. This case is not appealable pursuant to Rule 3, Tennessee Rules of Appellate Procedure. Rule 3(a) provides:

In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in Rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

This appeal cannot be entertained pursuant to Rule 54.02, Tennessee Rules of Civil Procedure. This Rule provides:

When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

In Fox v. Fox, 657 S.W.2d 747, 749 (Tenn. 1983), the Supreme Court, speaking through Justice Drowota, stated:

Rule 54.02 requires as an absolute prerequisite to an appeal the certification by the trial judge, first, that the court has directed the entry of a final judgment as to one or more but fewer than all of the claims, and, second, make an express determination that there is no just reason for delay. Such certification by the trial judge creates a final judgment appealable as of right under Rule 3 T.R.A.P. In the absence of such direction and determination by the trial judge, the order is interlocutory and can be revised at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all parties. Stidham v. Fickle Heirs, 643 S.W.2d 324, 325 (Tenn. 1982).

No express determination was made by the trial court at any time that there is no

just reason for delay. Without such determination, this Court has no jurisdiction under Rule 54.02. See Huntington Nat. Bank v. Hooker, 840 S.W.2d 916, 922 (Tenn. Ct. App. 1991).

All of the interlocutory orders entered by the trial court can be revised at any time before the entry of the judgment adjudicating all the claims and rights and liabilities of all the parties. For the foregoing reasons, this appeal cannot be entertained pursuant to Rules 3, 9, or 10, Tennessee Rules of Appellate Procedure, or Rule 54.02, Tennessee Rules of Civil Procedure.

It results that the appeal must be dismissed and the case is remanded to the trial court for final adjudication.

Costs are adjudged against defendant/appellant.

F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

JANICE M. HOLDER, JUSTICE

JOHN K. BYERS, SENIOR JUDGE

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AT JACKSON

MICHAEL BINGHAM,

Plaintiff/Appellee,

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) SHELBY CIRCUIT
) NO. 71090 T.D.

) Hon. James F. Russell,
) Judge

) NO. 02S01-9804-CV-00040

) APPEAL DISMISSED.

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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 29th day of March, 1999.

PER CURIAM

