

**IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
(November 15, 1999 Session)**

<b>SHIRLEY CLARK,</b>	)	
	)	
<b>Plaintiff/Appellee,</b>	)	
	)	<b>GIBSON COUNTY CHANCERY</b>
<b>v.</b>	)	
	)	<b>NO. 02S01-9903-CH-00029</b>
<b>HUMBOLDT HEALTHCARE, INC.,</b>	)	
<b>d/b/a PARKVIEW NURSING AND</b>	)	
<b>REHABILITATION CENTER,</b>	)	<b>HONORABLE GEORGE R. ELLIS,</b>
	)	<b>CHANCELLOR</b>
<b>Defendant/Appellant.</b>	)	

**Decided May 1, 2000**

**For the Appellee:** \_\_\_\_\_

**For the Appellant:**

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**MEMORANDUM OPINION**

**MEMBERS OF PANEL:**

**JUSTICE JANICE M. HOLDER  
SENIOR JUDGE F. LLOYD TATUM  
SPECIAL JUDGE J. STEVEN STAFFORD**

**REVERSED IN PART,  
AFFIRMED IN PART,  
AND REMANDED**

**STAFFORD, SPECIAL JUDGE**

## OPINION

This worker's 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) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The issues presented by the defendant for our review are as follows:

1. Whether the trial court erred in awarding the plaintiff interest on a judgment for benefits not yet accrued where the award was not reduced to a lump sum award; and
2. Whether the trial court erred in awarding discretionary costs for the deposition of Dr. R.J. Barnett, for obtaining medical records, and for a filing fee and service fee.

In response, the plaintiff asserts that the defendant's appeal should be dismissed because the defendant failed to comply with Rule 27(g) and (h) of the Tennessee Rules of Appellate Procedure. A review of the defendant's brief clearly reveals the accuracy of the plaintiff's assertion. While the Panel considers these deficiencies to be serious violations of the Rules of Appellate Procedure, we have chosen, in our discretion, to consider the issues raised by the defendant. See *Word v. Word*, 937 S.W.2d 931 (Tenn.App. 1996) (permission to appeal denied by the Supreme Court on June 6, 1997). The plaintiff has also asserted that the defendant should be precluded from raising these issues on appeal because it did not first litigate them in the trial court.

For the reasons set out below, we hold that the trial court erred in allowing interest to be calculated on the total amount of the worker's compensation award. We also hold that the trial court erred in allowing the plaintiff to recover costs for medical records, a filing fee and service fee as discretionary costs. In all other respects, we affirm the judgment of the trial court.

## FACTS

Although the issues in this case are limited to the award of discretionary costs and prejudgment interest, some background information is helpful to a resolution of these issues. This case was filed on December 5, 1996. It was heard on November 17, 1998, at which time the trial judge found that the plaintiff had suffered a 50% permanent partial disability to the whole body. The court also determined that the plaintiff was entitled to 32 weeks of temporary total disability. A final judgment was entered on December 16, 1998. On January 4, 1999, the plaintiff filed a motion and affidavit requesting discretionary costs of \$2,148.15. The motion included the expense for Dr. R.J.

Barnett's deposition of \$400.00, the court reporter expense for Dr. Barnett's deposition of \$292.00, a charge for medical records of \$30.00 and a filing fee and service fee of \$90.50.

On January 25, 1999, the defendant filed a motion to quash the hearing on the plaintiff's motion for discretionary costs. In the motion, the defendant alleged that the hearing was set for January 29, 1999, and that defendant's counsel would be unavailable for a hearing on that date due to her giving birth to her second child.

On January 27, 1999, the plaintiff filed a motion for post-judgment interest. On January 28, 1999, the plaintiff filed a response to the defendant's motion to quash asserting that the hearing was scheduled for February 26, 1999, and not January 29, 1999. Additionally, plaintiff's counsel asserted that the hearing had been scheduled by agreement with another attorney in defense counsel's firm.

The hearing on the motions for discretionary costs and prejudgment interest was held on February 26, 1999. On March 12, 1999, an order on default judgment was entered awarding the plaintiff discretionary costs of \$2,148.15 and post-judgment interest of \$1,912.50. The order stated that the defendant was given proper notice of the hearing and that the defendant did not file a response or appear for the hearing. On March 22, 1999, the defendant filed a notice of appeal as to the final judgment entered on December 16, 1998. On March 23, 1999, the defendant filed a motion with the trial court requesting relief from the final judgment entered on December 16, 1998. On March 26, 1999, the plaintiff filed a motion requesting the trial court to convert her award to a lump sum award. On March 29, 1999, the plaintiff filed a response to the defendant's motion for relief from the judgment.

On May 18, 1999, the parties entered an agreed order denying the defendant's motion for relief from the judgment. On that same day, the parties entered an agreed order staying the plaintiff's motion to convert the award to a lump sum award pending the resolution of the defendant's appeal. On July 13, 1999, the Supreme Court entered a *per curiam* order dismissing the portion of the defendant's appeal that pertained to the final judgment entered on December 16, 1998. The order also denied the plaintiff's motion to assess frivolous appeal sanctions.

The issues we are requested to review result solely from the hearing held on February 26, 1999, and memorialized in an order entered on March 12, 1999. No transcript of the hearing or statement of the evidence has been presented for our review. See Rule 24(b), (c) and (d) of the

Tennessee Rules of Appellate Procedure. Although the defendant filed a motion for relief from judgment on March 23, 1999, it did not address any issues involved in the February 26, 1999, hearing. This appeal is the first time that the defendant has appeared and opposed the plaintiff's request for post-judgment interest and discretionary costs.

The trial court entered a default judgment against the defendant as the result of its failure to appear for the February 26, 1999, hearing. The plaintiff asserts that because the defendant did not appear in the trial court and litigate the issues, we should consider them waived. See *Simpson v. Frontier Community Credit Union*, 810 S.W.2d 147 (Tenn. 1991). In *Nickas v. Capadalis*, 954 S.W.2d 735, 739-740 (Tenn.App. 1997) (permission to appeal denied by the Supreme Court on September 8, 1997), the Court of Appeals discussed appellate review of a default judgment and stated that:

“By permitting a default judgment to be entered against him, a defendant ‘impliedly confesses all of the material allegations of fact contained in [the] complaint, except the amount of the plaintiff's unliquidated damages.’ As a general rule, therefore, the defendant against whom a default judgment has been entered is thereafter precluded from litigating any substantive issues in the lawsuit, except for the establishment of the amount of damages. In accordance with this principle, appellate review of a default judgment or decree is ‘quite limited.’

Nevertheless, appellate courts may review default judgments for fundamental error, i.e., error ‘apparent on the face of the record and going to the very foundation of the action.’ Thus, on appeal from a default judgment or decree, an appellate court may consider the issue of subject matter jurisdiction, as well as ‘the sufficiency of the bill or the complaint to sustain the decree of judgment’.” (Citations omitted.)

With this limited mandate, we are required to review the record to determine if the defendant is entitled to the relief requested.

We are unaware of any factual disputes since no transcript of the hearing or statement of the evidence has been filed. See T.C.A. § 50-6-225(e). However, we are required to review questions of law *de novo* upon the record without limitation. T.C.A. § 50-6-225(e)(2); *Spencer v. Towson Moving & Storage, Inc.*, 922 S.W.2d 508 (Tenn. 1996). For purposes of this appeal, we limit our review of the record to the following:

1. the plaintiff's motion for discretionary costs;
2. the affidavit of costs filed by the plaintiff's attorney;
3. the plaintiff's motion for post-judgment interest;

4. the defendant's motion to quash the hearing;
5. the plaintiff's response to the defendant's motion to quash the hearing; and
6. the order entered by the court on March 12, 1999.

### **POST-JUDGMENT INTEREST**

The order entered on March 12, 1999, awarded the plaintiff post-judgment interest from December 17, 1998, to February 26, 1999, in the amount of \$1,912.50. The plaintiff's motion for post-judgment interest contains the calculations made by the plaintiff in arriving at the figure of \$1,912.50. The calculations clearly reveal that the figure of \$1,912.50 was determined by calculating interest on the total amount of temporary total disability and permanent partial disability awarded by the court. The judgment for permanent partial disability was never commuted to a lump sum award. Accordingly, the interest was calculated on all periodic payments, including payments due in the future.

In *West American Insurance Company v. Montgomery*, 861 S.W.2d 230, 232 (Tenn. 1993), the Supreme Court addressed this same issue. Justice O'Brien stated that:

“Where an employee in a workers' compensation case is awarded a money judgment against the employer or his insurance carrier and any part of the judgment is payable in future installments the judgment recipient is not entitled to interest on that part of the award represented by installment payments until the date the first installment is due. If the installments are not paid in full when due the employee is entitled to interest on that amount at the rate set forth in T.C.A. § 50-6-225(h). Anything else would not be in consonance with the purpose and intent of the Workers Compensation Act and would result in unjust enrichment to the employee.”

Applying this principle, the plaintiff is entitled to interest only on the accrued unpaid portion of the award. Accordingly, we find that the trial court erred in awarding interest on the total amount of the worker's compensation award, both accrued and unaccrued.

### **DISCRETIONARY COSTS**

The defendant asserts that the trial court erred in awarding as discretionary costs Dr. Barnett's deposition fee of \$400.00, the court reporter expense for Dr. Barnett's deposition of \$292.00, a fee for medical records of \$30.00 and a filing fee and service fee of \$90.50.

An award of discretionary costs is governed by Rule 54.04(2) of the Tennessee Rules of Civil Procedure. The rule states in pertinent part that:

“Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, and guardian ad litem fees. . .”

The award of costs is within the discretion of the trial court. See *Lock v. National Union Fire Insurance Company*, 809 S.W.2d 483 (Tenn. 1991) and *Seals v. England/Corsair Upholstery Manufacturing*, 984 S.W.2d 912 (Tenn. 1999).

The Panel has been unable to find any authority upon which it may award the cost for medical records of \$30.00 and for a filing fee and service fee of \$90.50 as discretionary costs. We express no opinion as to whether these expenses may be awarded as costs pursuant to Rule 54.04(1) of the Tennessee Rules of Civil Procedure. Accordingly, the award of \$30.00 for medical records and \$90.50 for a filing fee and service fee as discretionary costs under Rule 54.04(2) of the Tennessee Rules of Civil Procedure is reversed.

However, it is obvious that the trial court has the authority to award the costs of Dr. Barnett's deposition and the court reporter expense for his deposition in the total amount of \$692.00. See *Williams v. Tecumseh Products Co.*, 978 S.W.2d 932 (Tenn. 1998), Rule 54.04(2) of the Tennessee Rules of Civil Procedure and T.C.A. 50-6-226(c)(1). This portion of the award is affirmed.

### **CONCLUSION**

The order entered by the trial court awarding the plaintiff \$1,912.50 in post-judgment interest is reversed with this case being remanded to the trial court for the proper calculation of post-judgment interest. The award of discretionary costs of \$30.00 for medical records and \$90.50 for filing fee and service fee is also reversed. The judgment entered by the trial court is affirmed in all other respects with this case being remanded to the trial court for implementation of this order. The costs of this appeal are taxed to the defendant.

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**J. STEVEN STAFFORD, SPECIAL JUDGE**

**CONCUR:**

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**JANICE M. HOLDER, JUSTICE**

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**F. LLOYD TATUM, SENIOR JUDGE**

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**IN THE SUPREME COURT OF TENNESSEE  
AT JACKSON**

**SHIRLEY CLARK v. HUMBOLDT HEALTHCARE, INC., d/b/a  
PARKVIEW NURSING AND REHABILITATION CENTER**

**Chancery Court for Gibson County  
No. 3749**

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**No. W1999-02680-WC-R3-CV**

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**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 on appeal are taxed to the Appellant.**

**IT IS SO ORDERED this 1<sup>st</sup> day of May, 2000.**

**PER CURIAM**