

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

January 25, 2001 Session

**TAMMY LYNNE PRUETT v. SERVICE MERCHANDISE COMPANY,
ETC.**

**Direct Appeal from the Chancery Court for Davidson County
No. 98-2276-II Carol L. McCoy, Chancellor**

**No. M2000-00636-WC-R3-CV - Mailed - March 2, 2001
Filed - April 4, 2001**

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. In this appeal, the appellant insists the trial court erred in disallowing her Tenn. R. Civ. P. 60 motion for relief from a final judgment. As discussed below, the panel has concluded the judgment should be affirmed.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J., and JOHN K. BYERS, SP. J., joined.

Henry R. Allison, III, Nashville, Tennessee, for the appellant, Tammy Lynne Pruett.

Michael A. Geraciotti and Dale Tibbs, Levine, Mattson, Orr & Geraciotti, Nashville, Tennessee, for the appellee, Service Merchandise Company d/b/a Pargh Company.

MEMORANDUM OPINION

The employee or claimant, Pruett, initially commenced this civil action for workers' compensation benefits on July 28, 1998, alleging a date of injury of August 1, 1997. A "not to be found" return was made by the sheriff of Davidson County on July 30, 1998. There were affidavits before the trial court that an alias summons was filed on December 16, 1998, but there is no evidence that it was ever issued.

On August 10, 1999, the trial court dismissed the case "without prejudice" for failure to prosecute. The order bears a certificate which states, "A copy of this order has been served by U.

S. Mail upon all parties or their counsel named above," is signed by D. Womack and is dated 8-12-99. On January 10, 2000, approximately five months later, the plaintiff's attorney filed a motion to set aside the dismissal order because the plaintiff did not know the order had been filed until her attorney received a bill for costs. The motion was accompanied by an affidavit of the attorney stating that he learned of the dismissal and received a bill of costs on October 12, 1999 but took no action for more than 90 days before filing the Rule 60 motion because "since the order of dismissal was already final and no clock was running, this matter was put behind other time-sensitive matters," and because of his son's wedding and a trip to Los Angeles. A supporting affidavit was submitted by the attorney's assistant. The motion does not state the particular subsection of Rule 60 on which the plaintiff relies.

The trial court disallowed the motion. The appellant contends it was an abuse of discretion because her attorney's delay constituted excusable neglect. A motion for relief under Tenn. R. Civ. 60 addresses itself to the sound discretion of the trial judge. Review in this court is to determine whether that discretion was abused. Underwood v. Zurich Ins. Co., 854 S.W.2d 94 (Tenn. 1993). Upon the above facts and circumstances, which are undisputed, we cannot say the trial court abused its discretion. The party seeking relief under Tenn. R. Civ. P. 60 bears a heavy burden of demonstrating that she is entitled to relief and it is generally held that neglect of counsel is not excusable neglect within the meaning of Rule 60. See First National Bank of Polk County v. Gross, 912 S.W.2d147 (Tenn. App. 1995).

The appellee, on the other hand, contends the above issue is moot because the claim is time-barred. Since the trial court did not address the appellee's issue, there is nothing for this tribunal to review. There is also nothing to prevent the appellee from raising the issue in the trial court if the civil action is recommenced.

For the above reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant.

JOE C. LOSER, JR.

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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