IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE FEBRUARY 1997 SESSION

S. SCOTT ATWELL,	)	KNOX CIRCUIT
	)	
Plaintiff/Appellant	)	NO. 03S01-9609-CV-00090
	)	
v.	)	HON. HAROLD WIMBERLY,
	)	JUDGE
COLONIAL FREIGHT SYSTEMS, INC.,	)	
	)	
	)	
Defendant/Appellee	)	

For the Appellant:
Douglas R. Beier
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P. O. Box 1754
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For the Appellee:
Richard L. Hollow
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MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED **THAYER, Special 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.

Plaintiff, S. Scott Atwell, has appealed from the trial court's action in modifying a portion of a judgment which provided for a structured settlement of a workers' compensation claim.

Originally the parties to this action entered a judgment on September 17, 1993, finding plaintiff to be totally (100%) disabled and providing the award would be payable as follows:

a. Lump sum payment of $55,235. upon the entry of judgment.

b. Payment of $588. every two weeks for a one year period.

c. Lump sum payment of $14,034. on August 30, 1994.

d. Lump sum payment of $14,034. on February 28, 1995.

e. Lump sum payment of $15,037. on February 28, 1996.

Upon learning plaintiff was engaged in certain work activities, the defendant, Colonial Freight Systems, Inc., filed a motion on March 8, 1995, to modify the last two annual payments upon the ground the evidence indicated the employee was not totally disabled. This motion was filed pursuant to the provisions of T. C. A. § 50-6-231 and Rule 60, T. R. Civ. P.

After conducting a hearing, the trial court found there had been a "change of circumstances" and entered an order relieving the employer of the responsibility of paying the last two annual payments. The order did not state whether relief was granted pursuant to the statute or Rule 60 or both. This ruling was based upon evidence the employee had been working at a construction site in South Carolina over a certain period of time. Evidence of this nature was produced at the hearing by a private investigator who had observed the employee and a video made at the construction site.

On appeal the employee argues the payments which the court abated were classified as lump sum payments and were not subject to modification under the statutory language and further that the evidence did not justify relief under Rule 60.

The employer contends the last two annual installments must be classified as "periodic payments" and thus subject to modification as the statute provides.

The case is to be reviewed on appeal *de novo* accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T. C. A. § 50-6-225(e)(2).

However, the *de novo* review does not carry a presumption of correctness to a trial court's conclusions of law but is confined to factual findings. *Union Carbide v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993).

Tenn. Code Ann. § 50-6-231 provides:

> All amounts paid by employer and received by the employee or the employee's dependents, by lump sum payments, shall be final, but the amount of any award payable periodically for more than six (6) months may be modified as follows:
>
> (1) At any time by agreement of the parties and approval by the court; or
>
> (2) If the parties cannot agree, then at any time after six (6) months from the date of the award an application may be made to the courts by either party, on the ground of increase or decrease of incapacity due solely to the injury. In such cases the same procedure shall be followed as in 50-6-225 in case of a disputed claim for compensation.

In the case of *H. Lee Britton v. Combustion Engineering, Inc.,* Special Workers' Compensation Appeals Panel at Knoxville, No. 03S01-9409-CH-00080, opinion filed February 14, 1995, adopted and affirmed March 17, 1995, this same Panel, in examining this statute, quoted from a definition of the word "periodic" as defined in the American Heritage Dictionary, New College Edition, 1978. The word "periodic" was defined as "(1) having periods or repeated cycles (2) happening or appearing at regular intervals."

In applying the definition in the *Britton* case, the Panel ruled that a general provision in a workers' compensation final judgment providing for the payment of future medical expenses was not an award "payable periodically" and the judgment was not subject to modification.

In the present case, the facts are very different. The judgment provided for a lump sum payment upon entry of the order which apparently has been paid and received; for a series of payments every two weeks for one year; and the payment of three annual installments.

In carefully reviewing the language of the statute, we are unable to agree with the employee's construction of its provisions. In our opinion the statute simply

provides that lump sum payments paid by the employer and received by the employee are final and not subject to modification. Then it continues on to state the amount of any award payable periodically for more than six months may be modified.

We find that the provisions of the final judgment directing the payment of lump sum amounts by three annual installments constitute awards "payable periodically" and under the statutory language would be subject to modification as the awards are payable for more than six months.

As to the application of Rule 60, T. R. Civ. P., we doubt the facts of the case justify relief under this rule. *See Underwood v. Zurich Insur. Co.,* 854 S.W.2d 94 (Tenn. 1993) where the Supreme Court found there were no exceptional circumstances in a case with similar issues to the present controversy.

Finally, the employee contends that if the award was subject to modification, the employer did not establish a decrease of incapacity by expert testimony. We find this contention to be without merit. While causation of an injury and permanency of an injury must as a general rule be established by expert testimony, the extent of the disability can be determined by the court from all of the testimony, both lay and expert. *Bond v. American Air Filter,* 692 S.W.2d 638 (Tenn. 1985).

The trial court modified the final judgment by abating approximately 23% of the total award. The evidence heard by the court was relevant to the issue of whether there had been a decrease of incapacity on the part of the employee. The evidence does not preponderate against the court's conclusion.

The judgment entered below is affirmed. Costs of the appeal are taxed to plaintiff-employee and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

S. SCOTT ATWELL,	)	KNOX CIRCUIT
	)	NO. 2-767-92
PLAINTIFF/APPELLANT,	)	
	)	HON. HAROLD WIMBERLY,
v.	)	JUDGE
	)	
COLONIAL FREIGHT SYSTEMS, INC.,	)	S. CT. NO. 03S01-9609-CV-00090
	)	
DEFENDANT/APPELLEE.	)	AFFIRMED

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review 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 will be paid by plaintiff/appellant and sureties, for which execution may issue if necessary.

It is so ordered this _____ day of _____, 1997.

PER CURIAM