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

DOROTHY TUCKER, Plaintiff/Appellant v. ERCL, INC., and LIBERTY MUTUAL CASUALTY COMPANY, and SUE ANN HEAD, DIRECTOR, SECOND INJURY FUND, Defendants/Appellees	)	SEVIER CIRCUIT NO. 03S01-9603-CV-00025 Hon. Rex Henry Ogle Circuit Judge

For the Appellant:

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For the Appellees:

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M E M O R A N D U M O P I N I O N

Members of Panel:

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

REVERSED
and REMANDED

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, Dorothy Tucker, has appealed from the action of the trial court in dismissing her complaint and refusing to reconsider the issue of whether disputed material issues of fact exist.

Defendant employer, ERCL, Inc., and defendant insurance carrier, Lumbermen's Mutual Casualty Company, have filed a motion to dismiss the appeal on the ground a notice of appeal was not timely filed within thirty days after the entry of an order sustaining a motion for summary judgment in favor of the defendants.

The motion for summary judgment was filed on January 13, 1995, and was supported by a deposition from plaintiff's treating doctor stating that there was no permanent impairment as a result of plaintiff's injury. Temporary total disability benefits as well as existing authorized medical expenses had been paid. Plaintiff did not file an opposing affidavit or deposition and an order was eventually entered on March 22, 1995, sustaining the motion and dismissing the case.

On April 20, 1995, plaintiff filed a motion pursuant to Rule 59, T.R.Civ.P., requesting the court to reconsider, vacate the order of dismissal and set the case for trial. The motion was styled "Motion for Reconsideration" and was supported by an affidavit from Dr. Scott L. Parson, a chiropractor, stating his examination of plaintiff indicated she had a l% impairment due to the injury of her elbow. The trial court denied the motion stating the affidavit came too late. This order was entered on January 5, 1996, and a notice of appeal was filed on January 10, 1996, reciting the appeal was being taken from the entry of the two orders of the trial court.

Defendants contend it is well established a motion to reconsider will not toll the thirty day period after entry of a final judgment and cite the cases of *Anthony v. Kelly Foods Inc.,* 704 S.W.2d 305 (Tenn. 1986) and *Daugherty v. Lumbermen's Underwriting Alliance,* 798 S.W.2d 754 (Tenn. 1990). In the *Anthony* case, a

workers' compensation case, there had been a trial on the merits after which the court dismissed the case finding plaintiff did not establish the claim by a preponderance of the evidence. Plaintiff filed a "motion to reconsider" or alternatively to allow the presentation of psychiatric evidence. The Supreme Court held motions to reconsider were not authorized and did not operate in that case as to extend the time for appellate proceedings. A similar issue and ruling was involved in the *Daugherty* case.

We find some differences in the issues and rulings of these cases from the case before us for review. Although styled as a "motion to reconsider," the motion expressly recited it was being filed pursuant to Rule 59 and sought a reversal of the trial court's decision. Rule 59.02 (motion for a new trial) and Rule 59.04 (motion to alter or amend the judgment) expressly extend the time for taking steps in the regular appellate process. See also Rule 4(b), T.R.A.P.

While we believe the motion was not properly styled, we find the substance of the motion should be construed under the circumstances as requesting relief under Rule 59.04 to alter or amend the judgment from which order a timely notice of appeal was filed. Thus, we find the appeal should not be dismissed upon defendants' motion.

The trial court properly sustained the pending motion for summary judgment relief as the supporting deposition recited plaintiff did not have any permanent impairment and plaintiff failed to respond to the motion.

The primary question in the case is whether the trial court was in error in failing to set aside the order of dismissal and examine plaintiff's opposing affidavit to see if a genuine issue of fact existed for a trial on the merits.

Ordinarily, 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).

Plaintiff cites and relies on the holdings of two cases. In *Schaefer by Schaefer v. Larsen,* 688 S.W.2d 433 (Tenn. App. 1984), the Court of Appeals considered a similar question. In a medical malpractice action, a motion for summary judgment was sustained in favor of the defendants after a hearing where the court considered affidavits from both parties. Prior to the order becoming final, plaintiff filed a motion to amend or alter the judgment and submitted an affidavit from another doctor. In reversing the trial court's failure to reconsider the matter the Court of Appeals stated:

> We are of the opinion that when a summary judgment has been granted because the case at that point presents no facts upon which a plaintiff can recover but prior to that judgment becoming final, the plaintiff is able to produce by motion facts which are material and are in dispute, the motion to alter or amend the judgment should be looked upon with favor, as the purpose of the summary judgment procedure is not to abate the trial docket of the Trial Court, but only to weed out cases for trial in which there is no genuine issue of fact."

The Court of Appeals further stated that in matters of reconsideration of the granting of a summary judgment motion, the plaintiff was only seeking that which the party was basically entitled to - a first trial, and that the rules involving post trial motions are different and carry different burdens of proof. The case of *Richland Cty. Club. v. CRC Equities, Inc.,* 832 S.W.2d 554 (Tenn. Ap. 1991) is also in accord with this disposition of the issue.

For these reasons we are of the opinion the trial court was in error in not reconsidering the issue before the court upon the filing of plaintiff's affidavit which was timely filed before the order of dismissal became final.

This disposition of the issue should not encourage parties to ignore the Rules of Civil Procedure pertaining to hearings on motions for summary judgment. In the present case, there is some evidence counsel for plaintiff had misplaced reliance on portions of the treating doctor's deposition that the court could construe as indicating some permanent impairment existed.

The judgment of the trial court is reversed and the case is remanded for further proceedings. Costs of the appeal are taxed to Defendants 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

DOROTHY TUCKER	)	Sevier Circuit
	)	No. 92-215
Plaintiff/Appellant,	)	
vs.	)	Hon. Rex Henry Ogle
	)	Judge
ERCL, INC.and LIBERTY MUTUAL	)	
CASUALTY COMPANY, and	)	
SUE ANN HEAD, DIRECTOR,	)	
SECOND INJURY FUND,	)	
	)	03S01-9603-CV-00025
Defendants/Appellees	)	
	)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation 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 defendants/appellees, for which execution may issue if necessary.

07/14/97

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 the plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

al to the Special Worker' Compensation 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 act 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 plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

06/03//97

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 defendant/appellant, Baptist Hospital of East Tennessees and Barry K. Maxwell, surety, for which execution may issue if necessary.

07/11/97

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 the plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

al to the Special Worker' Compensation 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 act 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 plaintiff-appellant, Vernon Harris and

Gilbert and Faulkner. surety, for which execution may issue if necessary.

06/03//97