

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

**FILED**

**May 8, 1998**

**Cecil W. Crowson  
Appellate Court Clerk**

MARILYN L. KNIGHT, )  
Plaintiff/Appellant ) No. 01S01-9710-CH-00214  
)  
)  
v. ) DAVIDSON CHANCERY  
)  
LIBERTY MUTUAL INSURANCE GROUP, ) HON. IRVIN H. KILCREASE, JR.,  
Defendant/Appellee ) CHANCELLOR  
\_\_\_\_\_ )

FOR THE APPELLANT:

MICHAEL H. SNEED  
Suite 2121, Parkway Towers  
Nashville, TN 37219

FOR THE APPELLEE:

D. RANDALL MANTOOTH  
GREGORY H. OAKLEY  
LEITNER, WILLIAMS, DOOLEY  
and NAPOLITAN  
2300 First American Center  
Nashville, TN 27238-2300

MEMORANDUM OPINION

MEMBERS OF PANEL

JANICE M. HOLDER, ASSOCIATE JUSTICE, SUPREME COURT  
WILLIAM H. INMAN, SENIOR JUDGE  
WILLIAM S. RUSSELL, SPECIAL JUDGE

REVERSED and REMANDED

RUSSELL, SP. J.

This appeal in a workers' compensation case has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This worker's compensation case was commenced initially by the employer's insurance carrier, Liberty Mutual Insurance Group, by a "Petition for Determination of Workers' Compensation Liabilities" filed in the Circuit Court for Davidson County, "pursuant to Tennessee Code Annotated Section 50-6-225".

The petition in part said: "Petitioner requests a hearing by this court on the issue of the compensability of respondent's alleged injuries and on the nature and extent of respondent's resulting permanent disability, if any, if her injuries are found to be compensable".

The subject employee filed a responsive pleading labeled "Answer to Petition for Determination of Workers' compensation Liability", and closed the pleading with the language:

"Wherefore having fully answered, the Respondent request [sic] that the Court grant a hearing in this matter as soon as its practical and to determine the rights and liabilities of the parties".

The alleged accident date is January 14, 1995.

On October 9, 1996, counsel for Liberty Mutual Insurance Group filed a "Notice of Voluntary Dismissal" under Rule 41.01 of the Tennessee Rules of Civil Procedure, containing the language that said Petitioner "hereby gives notice that this cause is voluntary dismissed without prejudice". A copy was served upon the injured employee's counsel.

The record before us does not include a transcript of what occurred in the Circuit Court regarding this notice of voluntary nonsuit. Based upon what subsequently occurred in the Chancery Court in this case before us on appeal, we can assume that the voluntary dismissal was permitted and that action was not appealed from.

The employee, assuming that the suit could be revived within a year pursuant to Tennessee Code Annotation Section 28-1-101, et seq., filed a new suit on the same cause of action in the Chancery Court for Davidson County on October 22, 1996, thirteen days after the insurance company had voluntarily dismissed the petition that it had filed.

Because the employee's suit in Chancery Court was filed nearly two years after the alleged accident date, the insurance company filed a motion to dismiss the new suit on the ground that it was barred by the statute of limitations. Apparently the employee had obtained a medical anatomical impairment of 6% to the body as a whole and this was communicated to counsel for Liberty Mutual before said insured nonsuited its original action. This

motion to dismiss is not in the record before us. The employee's response to said motion, with exhibits, is in this record. The response was filed on December 16, 1996.

On January 6, 1997, counsel for the employee filed a motion to be allowed to amend the pending complaint "to allege that she is entitled to workers' compensation benefits as a result of an injury subsequent to the injury alleged in the complaint \* \* \* [and] this court's resources would be put to best use if all her claim for workers compensation benefits as against this particular defendant are resolved at the same time".

On January 31, 1997, after a hearing on both pending motions, the Chancellor ruled:

Ordered, Adjudged and Decreed that Plaintiff's claim for a worker's compensation injury which allegedly occurred on January 14, 1995, is hereby dismissed with prejudice pursuant to the savings statute set out at Tennessee Code Annotated Section 28-1-105. It is further Ordered that plaintiff shall be allowed to file an amended complaint setting forth allegations that Plaintiff suffered a different injury than the injury alleged to have occurred on January 14, 1995."

On February 21, 1997, the employee's counsel applied to the trial court for a Rule 9, T.R.A.P., appeal from the dismissal of her suit for benefits growing out of the alleged January 14, 1995 injury. Counsel's premise for the appeal was that Tennessee Code Annotated Section 28-1-101, et seq., would save the employee's cause of action because of the insurance company's original suit and the nonsuit thereof.

The insurance company filed an answer to the Rule 9 appeal

application. It contained statements indicating that the Motion to Dismiss had been granted because the employee had not filed a "counterclaim" to the insurance company's original petition. It also asserts that the employee had remaining causes of action against the insurance company for a separate injury, and that the most efficient method of handling the litigation would be to wait until the remaining cause of action is litigated, and then pursue the appeal sought under Rule 9. The Rule 9 appeal was denied.

No amendment setting out a new cause of action was ever filed by counsel for the employee. Consequently, on May 2, 1997, counsel for Liberty Mutual filed a motion to dismiss for failure to prosecute.

On May 15, 1997, counsel for the employee filed this notice:

"Pursuant to Rule 41 of the Tennessee Rules of Civil Procedure, plaintiff hereby gives her Notice of the Voluntary Dismissal of the above referenced lawsuit, without prejudice."

An order granting the dismissal was filed May 21, 1997.

On June 20, 1997, the employee filed notice that she "hereby appeals to the Supreme Court of Tennessee from the final judgment entered in this action on the 21st day of May, 1997". Facially, this became an appeal by the plaintiff from an order of voluntary nonsuit obtained by the plaintiff.

#### ISSUES RAISED ON APPEAL

\_\_\_\_\_The plaintiff/appellant raises the single issue that she had sought to appeal via Rule 9; contending that she had a year in which to bring suit after Liberty Mutual voluntarily dismissed its

suit.

The appellee, Liberty Mutual Insurance Group, contends (1) that this appeal is not properly before this court, and (2) the trial court did not err in dismissing the suit as being time barred.

#### CONCLUSIONS

\_\_\_\_\_Unfortunately, we do not know what transpired when Liberty Mutual Insurance Group was allowed to nonsuit the petition that it initially filed after a year had passed post injury, and after their counsel had been advised that the injured employee had been diagnosed with a permanent impairment from the injury. To permit a legitimate claim to become time barred in this fashion is contrary to the intent of the statute which allows the employer/insurer to file suit.

The language of Tennessee Code Annotated Section 50-6-225 is both controlling and enlightening. Either party to a workers' compensation dispute "may submit the entire matter for determination". The insurance company in the case at bar asked in its petition that the court determine the compensability of the employee's alleged injuries. The employee, in her Answer, asked the Court to determine the rights and liabilities of the parties. There can be no doubt that a judgment in favor of the employee could have been returned in that case under those pleadings. The appellee's argument that no counterclaim was involved is without merit.

We do not know, from this record whether or not the employee assented to the dismissal. We hold that the saving statute, Tennessee Code Annotated Section 28-1-105, applied to this nonsuit by Liberty Mutual Insurance Group to the benefit of the injured employee.

Reaching this issue in the procedural posture of this case is not without difficulty. The last order in the case was the employee's voluntary nonsuit. Normally, one does not appeal from their own voluntary dismissal. What has actually occurred is that the employee sought first via Rule 9 to appeal the dismissal of her suit based upon the alleged injury of January 14, 1995. This was denied, probably because the Court had allowed for an amendment to the complaint which would have generated an entirely separate claim. This amendment never materialized. Counsel for the appellant/employee could not appeal without permission the prior dismissal until there was a final judgment in the instant case. Tenn. R. Civ. P. 54.02. The procedural problem thus existing had its genesis in the trial court's allowing an amendment to a dismissed complaint that would add a new cause of action. The new cause of action was never generated, and the nonsuit effectively closed the case pending in the trial court.

This court has held in certain instances that an appeal can follow a voluntary nonsuit. Panzer v. King, 743 S.W. 2d 612 (Tenn. 1988).

In the case at bar the employee was denied a Rule 9 appeal of obvious merit when her pending case had been finally disposed of.

We note the broad power of the court set out in T.R.A.P. Rule 36 to grant the relief that a party is entitled to.

\_\_\_\_\_We hold that in the interest of justice this appeal from a voluntary nonsuit is before the court.

We hold that this suit was timely filed. It is remanded to the trial court for consideration upon its merits.

Costs on appeal are assessed to the Appellee.

\_\_\_\_\_  
WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

\_\_\_\_\_  
JANICE M. HOLDER, ASSOCIATE JUSTICE

\_\_\_\_\_  
WILLIAM H. INMAN, SENIOR JUDGE



IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

**FILED**  
May 8, 1998  
Cecil W. Crowson  
Appellate Court Clerk

MARILYN L. KNIGHT,	}	DAVIDSON CHANCERY
	}	No. 96-3302-III(T) Below
Plaintiff/Appellant	}	
	}	Hon. Irvin Kilcrease, Jr.,
vs.	}	Chancellor
	}	
LIBERTY MUTUAL INSURANCE	}	
GROUP,	}	No. 01S01-9710-CH-00214
	}	
Defendant/Appellee	}	REVERSED AND REMANDED.

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 Appellee, Liberty Mutual Insurance Group, for which execution may issue if necessary.

IT IS SO ORDERED on May 8, 1998.

PER CURIAM



