IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

June 18, 1999

Cecil W. Crowson
Appellate Court Clerk

CHARLES C. JONES,	)	RUTHERFORD CIRCUIT NO. 33965
	)	
PLAINTIFF/APPELLEE,	)	
	)	
v.	)	HON. ROBERT E. CORLEW, JUDGE
	)	
TRIDON, WAUSAU INSURANCE COMPANY, ROYAL INSURANCE COMPANY and LIBERTY MUTUAL INSURANCE COMPANY,	)	S. CT. NO. 01S01-9712-CV-00272
	)	
DEFENDANTS/APPELLANTS.	)	AFFIRMED

JUDGMENT

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 appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

DROWOTA, J. NOT PARTICIPATING

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

(June 29, 1998 Session)

FILED

June 18, 1999

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Appellate Court Clerk

CHARLES C. JONES, Plaintiff/Appellee v. TRIDON, WAUSAU INSURANCE COMPANY, ROYAL INSURANCE COMPANY and LIBERTY MUTUAL INSURANCE COMPANY, Defendants/Appellants	)	RUTHERFORD CIRCUIT NO. 01S01-9712-CV-00272 HON. ROBERT E. CORLEW, JUDGE

For the Appellant:	**For the Appellee:**
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M E M O R A N D U M   O P I N I O N

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge William H. Inman
Special Judge Joe C. Loser, Jr.

AFFIRMED INMAN, Senior Judge

MEMORANDUM OPINION

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.

We are concerned here with a Rule 60 motion to alter or amend a judgment with respect to the employee's average weekly wage. The procedural unniceties compel something of a stretch made necessary if the employee is to be awarded his due.

A judgment was entered resolving all issues including a finding that the employee's average weekly wage was $359.00.

For reasons not entirely clear the employee did not prove his average weekly wage at the trial, being content with the representation of the employer that the information would be furnished to the Court within ten (10) days. This was not done owing to the illness of the "records keeper." The *employee* then submitted a proposed judgment which recited that his average weekly wage was $359.00.

Thereafter, the *employer* submitted a proposed judgment similar to the judgment submitted by the employee except that it found the employee's average weekly wage was $503.84, a difference of $144.24.

The judgment proposed by the employee, and submitted first, was entered by the trial judge.[1]

The employer appealed, contesting all issues except the average weekly wage.[2] The Special Workers' Compensation Panel affirmed on September 29, 1997. The Supreme Court adopted and affirmed the judgment on October 31, 1997.

But in the interim, on October 15, 1997 the employee filed a Rule 60.02 motion to alter or amend the judgment upon discovering that his average weekly wage was therein substantially understated. This motion was resisted by the employer who asserted that the trial court lacked the requisite jurisdiction since the case was then wending through the appellate process.

The trial judge granted the relief sought by an order entered November 21, 1997 which set the average weekly wage at $503.84. The employer presents to this Panel its continuing argument that the trial court had no jurisdiction to entertain a Rule 60 motion.

The employer argues that the motion should be treated as one filed under 60.01 for the correction of clerical mistakes, which, if discovered after an appeal is pending, may be addressed only with leave of the appellate court.

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[1] Who, of course, would have entered the judgment proposed by the employer had it been timely presented.

[2] Keeping in mind that it was the *employee* who submitted the judgment and, *in effect,* determined the issue.

Alternatively, the employer argues that if the motion is treated under Rule 60.02, it fails because there was no mistake, since the judgment was prepared by the employee's counsel, with no surprise or inadvertence or excusable neglect, or fraud, misrepresentation or misconduct by the employer, and was not made within a reasonable time, since ten (10) months elapsed between awareness and action.

A justiciable resolution of this case is made more difficult because the 60.02 motion "mistakenly referred to a clerical error," cognizable under 60.01. The appellant presents its argument in a purist form, arguing that Rules should be enforced which, if so, would require a holding that the erroneous weekly wage amount was merely clerical and hence routinely correctable, which is not the case since the error is not clerical.

We agree that the error cannot be characterized as a clerical one. No reason comes to mind other than it was the result of negligence. Ordinarily such neglect would not be excusable, but the peculiar circumstances surrounding the issue of the average weekly wage are such that we are constrained to remit strict construction. As we have seen, for reasons not clear the employee did not offer satisfactory proof of his average weekly wage, and the parties agreed that the employer would furnish the numbers within ten days, which was not done. After judgment was entered the employer furnished the true amount, but no action was taken to correct the erroneous weekly wage, and the matter was not brought to the attention of the trial judge until the Rule 60.02 motion focused on it. While we struggle with the procedural difficulties, since the motion does not allege excusable neglect, we think the deprivation of substantial benefits owing to the employee attributable to the sequence of events revealed in this record would be a parody, and we choose to treat the motion as alleging excusable neglect, and as one timely filed. Since the motion was not acted upon until remand, we see no jurisdictional incursiveness in granting the relief sought.

Because no abuse of discretion by the trial judge in overruling defendant's motion for relief has been demonstrated,[3] the judgment of the trial court is affirmed. Costs are assessed to the appellant.

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William H. Inman, Senior Judge

CONCUR:

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[3] *Travis v. City of Murfreesboro,* 686 S.W.2d 68 (Tenn. 1985).

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Frank F. Drowota, III, Justice

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Joe C. Loser, Jr., Special Judge