

SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE February 28, 2011 Session

**PARRIS ROOFING & SHEET METAL CO., INC. ET AL. v. TIMOTHY
SPURLING**

**Appeal from the Chancery Court for McMinn County
No. 2010-CV-145 Jerri S. Bryant, Chancellor**

No. E2010-01530-WC-R3-WC -FILED-JULY 13, 2011

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The employee and his employer filed separate workers' compensation complaints on the same day at different times, in different courts, and in different counties. The employer filed its cause of action in McMinn County Chancery Court on April 29, 2010, at 3:53 p.m. The employee's action was filed in Polk County Circuit Court on the same day, but the time of filing was not noted by the court clerk. The employee moved to dismiss the employer's action on the basis of prior suit pending. The employee's motion was supported by an affidavit from his attorney's assistant stating that the employee's suit was filed before 3:03 p.m. on April 29, 2010 and therefore prior to the time the employer filed suit as designated by the court clerk in McMinn County. The trial court granted the employee's motion and dismissed the employer's action. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court
Affirmed**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J. and E. RILEY ANDERSON, SP. J., joined.

M. George Waters and James Allen Callison, Lawrenceville, Georgia, for the appellants, Parris Roofing & Sheet Metal Co., Inc. and Gallagher Bassett Services.

R. Jerome Shepherd, Cleveland, Tennessee, for the appellee, Timothy Spurling.

MEMORANDUM OPINION

Factual and Procedural Background

Timothy Spurling (“Employee”) alleged that he sustained a compensable injury, and on April 29, 2010, Employee and Parris Roofing & Sheet Metal, Inc. (“Employer”), participated in a Benefit Review Conference (“BRC”). The BRC did not result in a settlement, and an impasse was declared on that date at 1:55 p.m. Later that afternoon, Employer filed suit to determine the rights of the parties in the Chancery Court of McMinn County, and the Clerk and Master of that court noted on the complaint that it was filed at 3:53 p.m. On the same day, Employee also filed a cause of action regarding the matter in the Circuit Court of Polk County, and the clerk of the that court recorded the date, but not the time, of the filing on Employee’s complaint. Venue was proper in either county.

Employee filed a motion to dismiss the McMinn County action pursuant to the doctrine of prior suit pending. The motion was supported by an affidavit from Amanda Lee, legal secretary for Employee’s attorney. In her affidavit, Ms. Lee stated, “I filed [Employee’s] case with [the] clerk of the Polk County Circuit Court before 3:03 p.m. on April 29, 2010 because I called [Employee’s attorney] at 3:03 p.m. immediately after filing same with the Clerk.”

The trial court granted Employee’s motion and dismissed this action, stating, “the Affidavit supplied by [Employee’s] attorney creates a presumption even without the clerk’s notation that his case was filed first and thus became pending prior to [Employer’s] case in this court.” Employer appeals.

Analysis

The issue we address in this appeal is whether the trial court erred by considering extrinsic evidence to determine the time of day the employee’s suit was filed. Since there can only be one suit for recovery of workers’ compensation benefits arising out of the employee’s alleged injury, the trial court had to determine which suit was filed first. The doctrine of prior suit pending provides that where two courts have concurrent jurisdiction over a matter, the first of the two to acquire jurisdiction takes exclusive jurisdiction. Estate of McFerren v. Infinity Transp., LLC, 197 S.W.3d 743, 746 (Tenn. Workers Comp. Panel 2006). The prerequisites to invocation of the doctrine are that the two cases involve 1) identical subject matter; 2) suits between the same parties and 3) that the former suit be pending in a court of this state having subject matter jurisdiction and jurisdiction over the parties. Id. It is undisputed that these prerequisites have been met in the instant matter. This appeal does not involve any disputed issues of fact, and therefore presents only a question

of law. We review the trial court’s conclusions of law de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009); Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

The Tennessee Supreme Court has held that for purposes of the prior suit pending doctrine, the pendency of an action begins with the filing of a complaint. West v. Vought Aircraft Indus., Inc., 256 S.W.3d 618, 624-25 (Tenn. 2008).¹ Tennessee Rule of Civil Procedure 5.06 requires trial court clerks to “endorse upon every pleading and other papers filed with the clerk in an action the date and hour of the filing.” Typically, the clerk’s stamp showing the date and time of filing on the complaint itself will provide proof of when the complaint was filed. The clerk of the Polk County Circuit Court, however, failed to comply with Rule 5.06. In the absence of evidence to the contrary, we would presume that the McMinn County Clerk and Master’s specific notation of the time of filing on the Employer’s complaint mandates a finding that the McMinn County action was filed first. However, Employee presented evidence, in the form of Ms. Lee’s affidavit, that the Polk County action was filed first, notwithstanding the absence of any notation by the court clerk to that effect. Employer argues that the trial court erred by considering this evidence.

In West, the Court recognized that because the court clerk is “uniquely well-situated to memorialize important occurrences in the course of a lawsuit,” the clerk constitutes an appropriate source of information in determining when a case was filed, noting the clerk’s status as a public officer having a statutory duty to perform court clerical functions pursuant to Tennessee Code Annotated sections 18-1-101, 104 (1994),² the clerk’s duty under Tennessee Rule of Civil Procedure 5.06 to endorse the time and date upon all filed pleadings, and the clerk’s maintenance of offices equally accessible to both parties. West, 256 S.W.3d at 624. While these observations support the conclusion that it is appropriate to rely on the records of the clerk in determining when a suit was filed, they do not preclude the consideration of other evidence where, as in the instant matter, the records of the clerk are deficient because the clerk failed to adhere to procedural mandates.

Trial courts’ decisions concerning the admission or exclusion of evidence “are generally accorded a wide degree of latitude and will only be overturned on appeal where

there is a showing of abuse of discretion.” Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). Neither the Rules of Civil Procedure, the Rules of Evidence, nor any case law explicitly prohibits a trial court from considering extrinsic evidence to correct or clarify an error or omission by a court clerk. We therefore conclude that the trial court did not

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The issue in West was whether the pendency of a case begins with the filing of the complaint or rather with service of process.

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Tennessee Code Annotated section 18-1-101 (2009) provides: “Each of the courts has a clerk, elected or appointed for a term of years, whose duty it is to attend the court and perform all the clerical functions of the court.” Tennessee Code Annotated section 18-1-104 (2009) provides: “Each deputy clerk shall take the oath appointed for the qualification of public officers, and an oath faithfully to discharge the duties of the office to the best of the deputy clerk’s skill and ability.”

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abuse its discretion by accepting and considering Ms. Lee's affidavit in determining when the Polk County action was filed. Ms. Lee's affidavit constituted evidence that Employer's complaint was filed first, and other evidence does not preponderate to the contrary.

Employee asserts that this appeal is frivolous and requests an award of damages pursuant to Tennessee Code Annotated section 50-6-225(h)(2008). We find that the appeal raised substantial legal issues and therefore deny Employee's request.

Conclusion

The judgment of the trial court is affirmed. The case is remanded for entry of an order consistent with this opinion. Costs are taxed to Parris Roofing & Sheet Metal Co., Inc. and Gallagher Bassett Services, and their surety, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

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**Chancery Court for McMinn County
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ORDER

This case is before the Court upon the motion for review filed on behalf of Parris Roofing & Sheet Metal Co., Inc. and Gallagher Bassett Services pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Parris Roofing & Sheet Metal Co., Inc. and Gallagher Bassett Services, and their surety, for which execution may issue, if necessary.

PER CURIAM

Sharon G. Lee, J., not participating