

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

December 14, 2000 Session

MITCHELL HALL v. CRACKER BARREL OLD COUNTRY STORE

**Direct Appeal from the Chancery Court for Hamilton County
No. 96-0115 W. Frank Brown, III, Chancellor**

**No. E2000-00470-WC-R3-CV - Mailed - February 8, 2001
Filed: March 13, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The plaintiff brought this workers' compensation claim in which he alleges a drawer fell on his foot while he was working for the defendant. The trial judge found the plaintiff failed to show an injury by accident arising in the scope and course of his employment and dismissed the case. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J. and JOSEPH M. TIPTON, J., joined.

Ronald J. Berke, Chattanooga, Tennessee, for the appellant, Mitchell Hall.

C. Douglas Dooley and Michael D. Newton, Chattanooga, Tennessee, for the appellee, Cracker Barrel Old Country Store.

OPINION

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers'

compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

We have few facts to set out in this case because the trial judge found the plaintiff failed to prove his allegation that a drawer, which fell on his foot on October 16, 1995, caused him personal injury.

Medical Evidence

Considerable medical evidence exists in the record by way of a deposition and records. It appears the plaintiff has a problem with his left foot and his right foot. Unlike most cases, however, we see no need to set out in detail the medical evidence because, as noted by the trial judge, the validity of the medical evidence in relation to the plaintiff's work-related injury depends upon the plaintiff's credibility in reporting the history of injury to a physician. The trial judge's finding regarding the plaintiff's lack of credibility renders the medical information insignificant for purposes of our finding. The findings of the trial court, in pertinent part, are set out below:

In this case the court does not find that the employee has met his burden of proof. There are too many inconsistencies and unanswered questions to make Mr. Hall's story credible. One, I would have thought that Mr. Hall would have remembered the name of the manager who was within ten (10) feet of him at the time the alleged incident occurred. Evidently this person was not deposed or otherwise identified. Two, if the drawer (which weighed between 30 and 66 pounds, the weight varied [according to] with whom Mr. Hall was talking) had fell [sic] on Mr. Hall's foot as described, one wonders how he could have stayed at work. Immediate medical attention would have been required. Three, there is no medical record that Mr. Hall testified he told anyone at East Ridge Hospital on 10/18/95 that a drawer had fallen on his foot even though Mr. Hall said he told the doctor on both occasions. Four, it appears inconsistent for Mr. Hall to open this drawer to get product for Steve, as Mr. Hall testified, if the drawer had only ice, fish and steak. Five, one would expect that a drawer, weighing 30 to 66 pounds, would have made some injury to Mr. Hall's foot or toes that would have been revealed by an x-ray. One would have thought that some bone would have been broken. All x-rays were normal. Six, Dr. Catlin's report of July 3, 1997 [shows he] question[ed] Mr. Hall's credibility. Dr. Catlin notes medical examination and physical inconsistencies between Mr. Hall's complaints compared to Dr. Catlin's observation and examination. Seven, Mr. Morris testified to Mr. Hall's different behavior, depending on whether he was going to the club or the doctor's office. Eight, no rebuttal evidence was offered to Mr.

Morris' testimony. Nine, no corroborative evidence was offered by the Plaintiff (except for Dr. King's deposition), which was based upon the "history" given by Mr. Hall. Ten, Dr. King admitted that Mr. Hall did not have some of the classic symptoms associated with reflex sympathetic dystrophy. Other than some redness and swelling, Plaintiff had no other objective symptoms of injury. Eleven, there are many inconsistencies in Mr. Hall's statements to the various medical providers. These inconsistencies also weaken Mr. Hall's credibility. Finally, the impairment rating does not appear to be given in accordance with the requirements of T. C. A. 50-6-20-204(d)(3).

In summary, when all of the evidence is examined, the court concludes that Mr. Hall has not met his burden of proof that he suffered an injury by accident in the course and scope of his employment. *Mr. Hall's credibility was seriously compromised by the medical and lay evidence and Mr. Hall's failure to rebut such and/or offer other evidence in support of his position is fatal to his case.* (emphasis added).

T/R, pages 81-82

Discussion

The findings of the trial court as herein set out are supported in the record.

The trial judge saw and observed the testimony of the witnesses who testified in person—i.e. the plaintiff, a private detective, and one of the defendant's supervisors.

The judgment of the credibility of the witnesses lies exclusively within the purview of the trial court, for good reason. The trial judge may observe the demeanor, tone, inflections of voice, etcetera of the witnesses and evaluate their credibility by personal observation as well as by weighing any inconsistencies in their statements. The findings of the trial judge on the credibility of witnesses who testify in person establish their credibility or lack thereof on appeal.

On appeal, while we may find discrepancies in the recorded testimony of the witness, we are unable to observe the witness' demeanor or hear his tone of voice or inflections in speaking, etcetera when testifying.

The record shows and the trial judge states that the plaintiff did not tell anyone during his first visit to the hospital about a drawer falling on his foot. The record does show the plaintiff reported that he had stepped on a nail with his left foot some six weeks before.

This case uniquely sets out the role of the trial judge in weighing credibility of witnesses. If the trial judge had found the plaintiff to be credible and found he had proven his case by a

preponderance of the evidence, we would find no reason on the record to reverse the finding. So it is that the fate of this case turns on the credibility determination made by the trial judge.

The plaintiff claims the trial judge's finding that the plaintiff failed to prove his case was due to the trial judge's incorrect drawing of an inference against him because he did not call an employee of the defendant to testify. The plaintiff claims the trial court applied the missing witness rule to raise an inference against him.

The plaintiff asserts control of the defendant's witness was with the defendant and therefore is a missing witness under the holding of *Delk v. State*, 590 S.W.2d 435 (Tenn. 1979) and *Raines v. Shelby Williams Indus. Inc.*, 814 S.W.2d 346 (Tenn. 1991) a workers' compensation case.

Raines, which we consider to be most germane to this case, held that when the question of notice of injury was at issue, the testimony of the plaintiff that she gave notice of the injury to the employer's nurse triggered the missing witness rule when the employer failed to call the nurse to testify.

In this case, the court did not directly or by inference apply a missing witness rule against the plaintiff. The most the trial court did was remark that one would have thought the plaintiff would have remembered the name of the manager who he said was within ten feet of him when the alleged accident occurred. We do not find the trial judge invoked a missing witness rule to discredit the plaintiff.

We affirm the judgment of the trial court. The costs of this appeal are taxed to the plaintiff.

JOHN K. BYERS, SENIOR JUDGE

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JUDGMENT

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 facts 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 appellant, Mitchell Hall and surety Ronald J. Berke, for which execution may issue if necessary.

03/13/01