IN THE SUPREME OF TENNESSEE

AT NASHVILLE

BERT HANEY	}	*DAVIDSON CHANCERY*
	}	*No. Below 96-48-III*
Plaintiff/Appellant	}	
	}	*Hon. Ellen Hobbs Lyle*
vs.	}	
	}	
	}	*No. M1998-00143-WC-R3-CV*
FIRST AMERICAN NATIONAL BANK	}	
	}	
Defendant/Appellee	}	*AFFIRMED*

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 plaintiff/appellant, for which execution may issue if necessary.

IT IS SO ORDERED on December 20, 1999.

PER CURIAM

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

BERT HANEY,	)	**M1998-00143-WC-R3-CV**
	)	**DAVIDSON COUNTY**
	)	
Plaintiff/Appellant,	)	**Hon. Ellen Hobbs Lyle**
	)	
vs.	)	**No. 96-48-III**
	)	
FIRST AMERICAN NATIONAL BANK,	)	
	)	
Defendant/Appellee.	)	

FOR THE APPELLANT:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., JUSTICE
LLOYD TATUM, SENIOR JUDGE
CAROL L. MCCOY, SPECIAL JUDGE

AFFIRMED

CAROL L. MCCOY
Special Judge

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

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The sole issue for review is the trial court's determination that the Appellant was not an employee at the time he injured his back because he was a gratuitous volunteer. As discussed below, the panel has concluded the judgment should be affirmed.

Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code. Ann. §50-6-225(e)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant, Bert Haney, 66 years old at the time of the injury, was employed in the audio-visual department of First American National Bank for approximately seven years. On June 30, 1995, the Bank eliminated various positions, including his, and his employment was terminated.

Several weeks later, in mid-July of 1995, Mr. Haney was contacted by Ashley Webster with the public relations firm for the Bank and asked if he was available to help with audio-visual services for a four day United Way function sponsored by the Bank. Mr. Haney agreed to help, but refused to charge for his services. He told Ms. Webster that he would work for free. At trial, Mr. Haney testified that at no time during the four day event did he have any intention to charge for his services. Mr. Haney did provide services during the four day period. On the fourth day, he injured

his back. Three weeks later, his ruptured disc was removed by Dr. Gaines who assigned him an 11% impairment rating to the body as a whole.

On July 27, 1995, Mr. Haney wrote the president of the public relations firm a letter complaining that no one had expressed appreciation for his effort. He reiterated that he had done the work "free of charge."

After receipt of the letter, the public relations firm responded with a letter of appreciation and a gratuitous payment of $250, which payment was made by check through First American National Bank. The check, in the amount of $388.51, show deductions for federal taxes and social security withholding, which resulted in a net payment of $250.

The trial court found that Mr. Haney did not expect the payment of $250 and that Mr. Haney testified that the Bank was not obligated to forward the money to him. Further, after the four day event, the exchange of correspondence between Mr. Haney and the public relations firm clearly stated that Mr. Haney's services had been volunteered, both in the letter written by Mr. Haney and the letter sent by the public relations firm. Accordingly, the trial court denied coverage under the workers' compensation act, holding that Mr. Haney was a gratuitous worker or volunteer and not an employee at the time of his injury.

On July 13, 1998, Mr. Haney appealed on the grounds that the trial court failed to liberally construe the Workers' Compensation Act by excluding the claimant from coverage. The Bank contends that the trial court correctly held that Mr. Haney was properly excluded from coverage as a gratuitous volunteer.

We affirm the judgment in this case.

The testimony of Mr. Haney and the witnesses all indicate that Mr.

Haney performed the work without expectation of payment and that he volunteered his services. Mr. Haney was motivated to perform these services in hopes of being rehired and by demonstrating his value to the Bank.

Mr. Haney argues that the payment of $250 shows the requisite employment relationship, particularly in light of the withholdings that were made. This argument is in contradiction to his own testimony and his own letter of July 27, 1995. Further, Ms. Webster testified that Mr. Haney said he would do the work as a favor and "it would be a job for free," which testimony was never contradicted.

Liability under Tennessee workers' compensation law is based upon the existence of an employment relationship. Only employees in the service of an employer under a "contract of hire or apprenticeship, written or implied" are covered. T.C.A. §50-6-102(a)(3)(A).

The issue of a "contract for hire" was examined in Hill v. King. 663 S.W.2d 435 (Tenn. App. 1983), in which a retired truck driver and former salaried deputy sheriff, assisting in transporting a prisoner, was killed while riding in the sheriff's airplane when it crashed. Mr. Hill was held not to be an employee as defined by the Workers' Compensation Law because he did not receive valuable consideration for his services. Relying on Larson's Workmen's Compensation Law treatise, the Court explained

> ... [t]he word 'hire' connotes payment of some kind. By contrast with the common law of master and servant, which recognized the possibility of having a gratuitous servant, the compensation decisions uniformly exclude from the definition of 'employee' *workers who neither receive nor expect to receive* any kind of pay for their services.... The element of payment, to satisfy the requirement of a contract of hire, need not be in money, but may be in anything of value.... On the other hand, mere gratuities or gifts, unless understood by the parties to constitute the equivalent of wages, are not considered payment under a contract of hire.... Thus, the generally accepted view appears to be that gratuitous workers are not employees, since the

element of "hire" is lacking.... (emphasis added) __

Hill at 440-442.

In this instance, it is clear that no employment relationship existed at the time of the injury. Mr. Haney did not intend nor expect to receive any payment for his services. Indeed, the payment sent to him clearly stated that is was a token of appreciation in response to his letter that he had not received a note of appreciation or a “thank you,” not a payment for services. Mr. Haney had the burden to show that he was an employee of the Bank under a contract for hire at the time of his injury and this he failed to do.

Based upon the principles set out above, we do not find that the evidence preponderates against the findings of the trial court. The judgment is affirmed. Costs on appeal are taxed to the plaintiff-appellant.

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Carol L. McCoy, Special Judge

CONCUR:

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Adolpho A. Birch, Associate Justice

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Lloyd Tatum, Senior Judge