

NOT DESIGNATED FOR PUBLICATION

LINDA LEE	*	NO. 2010-CA-1711
VERSUS	*	COURT OF APPEAL
NEW HAMPSHIRE	*	FOURTH CIRCUIT
INSURANCE COMPANY,	*	
PRIMERO SERVICES, INC.,	*	STATE OF LOUISIANA
D/B/A SERVICE MASTER	*****	

APPEAL FROM
THE OFFICE OF WORKERS' COMPENSATION
NO. 09-914, DISTRICT "EIGHT"
Honorable Robert Varnado, Workers' Compensation Judge

Charles R. Jones
Judge

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Charles R. Jones,
and Judge Dennis R. Bagneris, Sr.)

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June 1, 2011

AFFIRMED

NOT DESIGNATED FOR PUBLICATION

The Appellant, Linda Lee, seeks review of the judgment of the Office of Workers' Compensation which denied her claim for disability and medical benefits. Finding that the Office of Workers' Compensation did not abuse its discretion, we affirm.

For eight years, Ms. Lee was employed by Primero Services, Inc. d/b/a as Service Master, as a janitor. While working at an Entergy Plant in St. Bernard Parish, Ms. Lee, at the age of 51, injured herself when she exited a trailer on the plant site and attempted to descend a small set of steps. Ms. Lee fell to the ground and suffered severe injuries to her neck, back and pelvis. Lumbar MRIs showed that she suffered from herniation and bulging discs at multiple levels with nerve root compression, and she currently has trouble ambulating.

The parties are not in agreement as to what caused the accident. Ms. Lee testified that the step platform was shaking when she ascended the steps to enter a trailer she was going to clean. She further testified that when she exited the trailer, the platform shook when she stepped onto it causing her to lose her

balance and for the platform to fall over her. Ms. Lee argues that the trailer steps were neither secured to the trailer nor the ground, and that a leg of the trailer steps was bent. However, Primero argues that Ms. Lee staged the accident.

In February of 2009, Ms. Lee filed a Form 1009 Disputed Claim for Compensation wherein she alleged that she was entitled to disability benefits and medical benefits as a result of an alleged fall while she was employed with Primero. Primero and its workers' compensation insurer — New Hampshire Insurance Company— denied the claim. In July 2010, a trial was held in the Office of Workers' Compensation ("OWC") to determine if Ms. Lee was entitled to workers' compensation benefits. The OWC denied the disability and medical benefits claims of Ms. Lee in September 2010. Ms. Lee timely appealed the judgment of the OWC.

In her sole assignment of error, Ms. Lee raises the issue of whether the OWC erred in solely relying on the testimony Christopher Jones, a security guard on the Entergy site, in denying her workers' compensation benefits. She argues that the judgment of the OWC should be reversed under the clearly wrong and manifest error standard of review, pursuant to *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989), because the statements of Mr. Jones are inconsistent and implausible on their face.

Ms. Lee argues that her solid work history speaks for itself, and that she only had one prior work related accident, after which she returned to work

within three (3) weeks. Ms. Lee argues that the testimony of Mr. Jones is so internally inconsistent our Court may well find manifest error, despite the credibility determination made by the OWC. She points out that a comparison of the testimony of Mr. Jones and the incident report reveal that his location at the time of the accident is unclear. In the accident report that Mr. Jones prepared, he noted that he was completing his patrol when he witnessed the accident, but Ms. Lee argues that Mr. Jones later testified that he was inside a building when he heard the stairs fall. She also argues that Mr. Jones failed to inform the police, who reported to the scene of the incident, that the accident was staged.

She further argues that the testimony of Mr. Jones is implausible on its face because he testified that at the time of the accident he heard the staircase fall prior to getting up and looking out the window to see the staircase fall. She maintains that he could not possibly *hear* the staircase fall, “boom”, and then *see* the staircase fall. Lastly, she argues that the objective evidence demonstrates that the subject staircase had a bent leg and was not bolted to the trailer or the ground at the time of the accident, and that the staircase had been moved just prior to the accident. She argues that the condition of the staircase could certainly have led to the staircase rocking and falling, just as she testified it did. She argues that her multiple disc herniations and the possible fracture of the L4 facet joint and sacrum cannot be staged, considering that such injuries are consistent with a fall.

In response, Primero and New Hampshire Insurance Company (hereinafter collectively referred to as “Primero”) argue that Ms. Lee has not presented any proof that the steps in question were defective aside from her own testimony and the allegedly flawed testimony of Ms. St. Charles. Primero further argues that Ms. Lee submitted into evidence a picture of the steps; however, the picture allegedly does not show a defect, nor does it evidence how the steps allegedly collapsed.

Regarding Mr. Jones, Primero argues that he is a disinterested witness who has no reason to lie about witnessing Ms. Lee stage the accident. Primero argues that Mr. Jones was an employee of Securitas Security, a company that provides security for the Entergy plant that was the site of the subject accident, and, as such, he had no reason to lie about Ms. Lee staging this accident for the benefit of Entergy or Primero. Primero further argues that the discrepancies as to where Mr. Jones was and what he was doing when the accident occurred are irrelevant because his testimony was consistent regarding observing Ms. Lee stage this accident.

Lastly, Primero argues that Ms. Lee used the testimony of her supervisor at the time of the accident, Adrienne St. Charles, to rebut that of Mr. Jones. Ms. St. Charles testified that she had a conversation with Mr. Jones after the accident wherein he did not inform her that he saw Ms. Lee stage the accident. Primero argues that Ms. St. Charles was neither on duty when the accident occurred, nor did she see the accident occur. Primero further argues that Ms. St.

Charles has a vendetta against Primero because she was terminated for insufficient job performance.

Under the manifest error standard of review, pursuant to *Rosell*, “where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable.” 549 So. 2d at 844. “This is because only the finder of fact can be aware of the variations in the demeanor and tone of voice of the witnesses that bear so heavily on the listener's understanding of and belief in what is said.” *Griggs v. Harrah's Casino*, 2005-0321, pp. 16-17 (La. App. 4 Cir. 3/22/06), 929 So. 2d 204, 214, *writ denied*, 2006-0916 (La. 6/16/06), 929 So. 2d 1288 (*citing Rosell*, 549 So.2d at 844). “Finally, where there are two permissible views of the evidence, the trial court's or jury's choice between them cannot be manifestly erroneous or clearly wrong.” *Id.* (*citing Rosell*, 549 So.2d at 844).

In the matter *sub judice*, we cannot substitute our factual findings for that of the finder of fact, who in the instant matter had the opportunity to witness the live testimony of Ms. Lee and her supervisor Adrienne St. Charles at trial, and review the deposition of Mr. Jones. The testimony of Mr. Jones was consistent in that he observed Ms. Lee pulling the trailer steps and rolling on the ground prior to calling for help. Thus, albeit that there were discrepancies within the testimony of Mr. Jones as to where he was when this accident occurred, we cannot say that it was manifest error for the OWC to rely on those portions of

the testimony of Mr. Jones that were consistent. While another trier of fact may have determined that the testimony of Mr. Jones was unreliable, we do not find that the OWC committed manifest error in relying on the testimony of Mr. Jones. Thus, we find that this assignment of error is without merit.

DECREE

For the foregoing reasons, the judgment of the Office of Workers' Compensation is affirmed.

AFFIRMED