IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 26, 2001 Session

EMMETT EARL FALCON v. GAYLORD ENTERTAINMENT COMPANY, ET AL

Direct Appeal from the Circuit Court for Davidson County
No. 98C-2436 Carol L. Soloman, Judge

No. M2000-02948-WC-R3-CV - Mailed - September 6, 2001
Filed - December 4, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this case, the employer contends (1) the trial court erred in concluding that the Last Injurious Exposure Rule applied to the facts of this case and (2) the trial court erred in finding the employee was not barred from recovery because of a misrepresentation in the employment application process. In this case, the employee had two successive employers. The trial court found that the employee developed symptoms of bilateral carpal tunnel syndrome while he worked for the first employer but that the employee's condition was aggravated from his work for the second employer. We agree with the trial court that the Last Injurious Exposure Rule applies to this case. As discussed herein, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the Circuit Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J., and HAMILTON V. GAYDEN, JR., SP. J., joined.

Byron Davis, Jr. and M. Scot Ogan, Nashville, Tennessee, for the appellant, Wal-Mart Stores, Inc.

Richard K. Smith, Nashville, Tennessee, for the appellee, Gaylord Entertainment Company.

Steve C. Norris, Nashville, Tennessee, for the appellee, Emmett Earl Falcon.

MEMORANDUM OPINION

The employee or claimant, Emmett Earl Falcon, is forty-nine years of age. His limited

college education pertained specifically to airplane mechanics which requires extensive use of the hands. From June of 1994 to January 9, 1998, the claimant was employed as an oiler engineer on river taxis for Gaylord Entertainment Company. While employed with Gaylord, the claimant began experiencing tingling and numbness in his right arm. On May 22, 1996, Dr. James Wolfe, a neurologist, diagnosed the claimant with a mild generalized peripheral neuropathy. Dr. Wolfe concluded that he could not exclude the possibility of mild left carpal tunnel syndrome. On January 13, 1998, four days following the end of his employment with Gaylord, the claimant was diagnosed with mild to moderate bilateral carpal tunnel syndrome by Dr. Richard Rubinowicz, a neurologist.

On March 2, 1998, the claimant began working at the employer-appellant, Wal-Mart Stores, Inc. At Wal-Mart, the claimant worked as a floor maintenance attendant using vibrating floor cleaning machines, specifically butane buffers. At times, he was required to use the buffers for periods as long as four to five hours. The claimant began wearing hand braces in an attempt to alleviate the increased pain of his carpal tunnel condition. He also took unscheduled breaks at Wal-Mart to "rest his hands" and relieve the pain. The claimant was terminated from his job at Wal-Mart on April 28.

Dr. Thomas E. Tompkins, an orthopedic surgeon, performed carpal tunnel release surgery on the claimant's hands; his left hand on August 12, 1998, and his right hand on September 2, 1998. On October 23, 1998, Dr. Tompkins estimated a five percent permanent impairment in each hand. Dr. Tompkins released the claimant from medical treatment with instructions to avoid repetitive forceful gripping for three months.

On February 23, 1999, Dr. David W. Gaw, an orthopedic surgeon, assigned a ten percent partial permanent impairment to each arm, constituting twelve percent to the body as a whole. Dr. Gaw said that the carpal tunnel syndrome was caused by the claimant's job at Gaylord. However, he acknowledged that if the claimant's symptoms worsened at Wal-Mart, then that would be evidence of an actual aggravation of the condition. Dr. Gaw recommended that the claimant avoid continuous gripping, squeezing or constant manipulation with his hands.

During the application process at Wal-Mart, the claimant indicated that he would be able to perform the physical functions of the job, including repetitive hand grasping and firm hand gripping. Wal-Mart did not inquire about the claimant's physical condition.

From the above summarized evidence, the trial court found that the claimant's carpal tunnel syndrome was aggravated by his employment at Wal-Mart and dismissed the claim against Gaylord. The trial court awarded medical and disability benefits against the second employer, Wal-Mart.

When an employee becomes disabled as a result of an occupational disease, the employer for whom the employee was working when he was last injuriously exposed to the hazards of the disease is responsible for payment of compensation benefits. Tenn. Code Ann. §50-6-304. A similar rule applies when a worker suffers two or more disabling injuries by accident while working for different

employees. Baxter v. Smith, 364 S.W.2d 936, 943 (Tenn. 1962). Where a condition develops gradually over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. See Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). A gradually occurring injury such as the one suffered by Mr. Falcon, normally results from repetitive trauma, just as an occupational disease results from repetitive exposure to the hazards of the disease. We therefore hold the last injurious exposure rule applicable to gradually occurring injuries, as the trial court concluded. The claimant's injury is thus compensable as an injury by accident and the employer for whom he was working at the time he was last injuriously exposed to repetitive trauma is liable for compensation benefits under the Workers' Compensation Law.

The trial court accredited Dr. Gaw's opinion that the claimant's work activities at Wal-Mart advanced or resulted in actual progression of his carpal tunnel syndrome or that the claimant's condition was aggravated by his work at Wal-Mart even though he began experiencing difficulty with his hands while employed at Gaylord. We cannot say the preponderance of the evidence is otherwise.

A false statement in an employee's application for employment will bar recovery of workers' compensation benefits if all three of the following elements exist: first, the employee must have knowingly and willfully made a false representation as to his physical condition; second, the employer must have relied upon the false representation and such reliance must have been a substantial factor in the hiring; and third, there must have been a causal connection between the false representation and the injury. Bane v. Daniel Construction Co., 793 S.W.2d 256, 258 (Tenn. 1990).

The evidence also fails to preponderate against the trial court's finding that the claimant did not intentionally or willfully make a false representation as to his physical condition. Wal-Mart did not ask the claimant if he had carpal tunnel syndrome or any other medical condition. The claimant said that he was not aware at the time of application that he would not be able to perform the duties of a floor maintenance attendant.

The judgment of the trial court is accordingly affirmed. Costs are taxed to the employer, Wal-Mart Stores, Inc.

____

JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EMMETT EARL FALCON v. GAYLORD ENTERTAINMENT COMPANY, ET AL.

Circuit Court for Davidson County
No. 98C-2436

No. M2000-02948-SC-WCM-CV - December 4, 2001

ORDER

This case is before the Court upon motion for review filed on behalf of Wal-Mart Stores, Inc., 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 Wal-Mart Stores, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM