SUPREME COURT OF LOUISIANA

No. 97-C-0688

SILMON O. SEAL

VERSUS

GAYLORD CONTAINER CORPORATION

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
FIRST CIRCUIT

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PASCAL F. CALOGERO, JR.

CHIEF JUSTICE

TRAYLOR, J., not on panel. Rule IV, Part 2, § 3.

In this workers' compensation case, the hearing officer awarded the claimant supplemental earnings benefits, finding that the claimant had contracted an occupational disease that prevented him from earning ninety percent (90%) or more of his pre-injury wages. The hearing officer also awarded the claimant penalties, interest, and attorney fees, finding that the employer's failure to pay compensation was arbitrary and capricious. Although the court of appeal upheld the hearing officer's finding that claimant suffered an occupational disease, the court reversed the hearing officer's finding that the claimant carried his initial burden of proving his inability to earn ninety percent (90%) of his pre-injury wages by a preponderance of the evidence. We granted claimant's writ to determine whether the court of appeal erred in concluding that the hearing officer's findings were manifestly erroneous on the issue of claimant's entitlement to supplemental earnings benefits. For the reasons that follow, we reverse the court of appeal, amend the hearing officer's judgment, and affirm as amended.

FACTS & PROCEDURAL HISTORY

On May 27, 1957, the claimant, Silmon Seal, at twenty years of age, began working for defendant, Gaylord Container Corporation, in Bogalusa, Louisiana and worked there continuously for thirty-seven years. From 1979 until 1994, Seal worked as a “bogol operator” at Gaylord's paper mill. A bogol operator's duties include mixing various chemicals, such as sulfuric acid and "black liquor," and then "cooking" this mixture with the application of steam. This cooking process, which is performed indoors in an enclosed area, causes the emission of noxious fumes, including the release of hydrogen sulfide fumes. Seal testified that the fumes were

often so powerful in the cooking area that they once caused him to lose consciousness and often required him to leave the building to catch his breath. Another bogol operator testified that, on occasion, the release of these fumes was so strong that it caused temporary shutdowns of the entire mill.

Sometime between 1986 and 1987, Seal developed a chronic cough, shortness of breath, and other related symptoms. These symptoms worsened progressively over time. As a result of these symptoms, Seal stopped working at the mill on August 1, 1994. The following month, he was referred to Dr. Henry Jackson, a board certified physician in the fields of internal medicine and pulmonary diseases, for treatment of his complaints. Under Dr. Jackson's care, Seal underwent a bronchoscope, which revealed severely inflamed airways. Dr. Jackson characterized the inflammation as "very striking" and likened it to that normally found in heavy smokers, but noted that Seal was (and has always been) a non-smoker. Based on these findings, Dr. Jackson diagnosed Seal as having "very severe bronchitis" and opined that this bronchial inflammation was caused by Seal's prolonged, heavy exposure to the chemical fumes at the paper mill.

Dr. Jackson advised Seal that it would be injurious to him were he to return to work in an environment that contained noxious fumes. Dr. Jackson notified Gaylord's workers' compensation insurer of this permanent work restriction in a December 31, 1994 letter. Following Dr. Jackson's instructions, Seal never returned to work at the mill. By mid-1995, Seal's condition had improved considerably to that of "a relatively healthy man." Nonetheless, in a letter to counsel dated June 30, 1995, Dr. Jackson reiterated that Seal should not return to work as a bogol operator, stating: "In my opinion, [Seal] is absolutely unable to work around noxious fumes, which clearly will cause recurrence of his bronchitis."

In March 1995, Seal filed a disputed claim for compensation benefits, alleging that prolonged exposure to chemical fumes at the workplace had caused severe lung damage and that Gaylord had refused to pay benefits after being notified of his condition. The matter came to trial before a workers' compensation hearing officer on October 5, 1995. On November 27, 1995, the hearing officer issued a judgment in favor of Seal, awarding him supplemental earnings benefits of up to 520 weeks beginning August 1, 1994, with a credit for any payments made by Gaylord's insurer, and further awarding him penalties, interest, and attorney fees of $4,500.00 for Gaylord's arbitrary and capricious handling of the claim.

Gaylord appealed the decision of the hearing officer, raising three assignments of error: (1) that the hearing officer committed legal error in determining that Seal sustained an occupational disease within the meaning of LSA-RS 23:1031.1, (2) that the hearing officer committed legal error in determining that Seal was entitled to supplemental earnings benefits pursuant to LSA-RS 23:1221(3), and (3) that the hearing officer committed manifest error in determining that Gaylord had acted arbitrarily and capriciously in the handling of the claim so as to support an award of penalties, interest, and attorney fees.

On the first assignment of error, the court of appeal upheld the hearing officer's finding that Seal had contracted an occupational disease, explaining that "[a]fter a thorough review and evaluation of the record, and primarily based upon the testimony of Seal, Seal's co-workers, and Dr. Jackson, we cannot say the that hearing officer's conclusion that Seal suffered from an occupation disease is clearly wrong or manifestly erroneous." ***Seal v. Gaylord Container Corp.***, 96-0349, pp. 4-5 (La. App. 1st Cir. 2/14/97), 691 So. 2d 114, 117. However, on the second assignment of error, the court of appeal reversed the hearing officer's finding that

Seal was entitled to receive supplemental earnings benefits. The court reasoned that there was insufficient evidence in the record to establish Seal's alleged inability to earn ninety percent (90%) of his pre-injury wages. ***Id.*** at p.6, 691 So. 2d at 117-118. In so concluding, the court of appeal focused exclusively on Seal's testimony that he had "looked around for a job," but did not apply for work anywhere because most of the jobs that were available paid only minimum wage--a far cry from the $17.36 per hour that Seal received as a bogol operator. On the third and final assignment of error, the court also reversed the hearing officer's granting of penalties, interest, and attorney fees. ***Id.*** at p. 7, 691 So. 2d at 118.

Seal sought this Court's review of the court of appeal's judgment. As noted above, we granted certiorari to determine whether the court of appeal erred in concluding that the hearing officer's findings were manifestly erroneous on the issue of claimant's entitlement to supplemental earnings benefits.

DISCUSSION

Factual findings in workers' compensation cases are subject to the manifest error or clearly wrong standard of appellate review. ***Banks v. Industrial Roofing & Sheet Metal Works***, 96-2840, p. 7 (La. 7/1/97), 696 So. 2d 551, 556; ***Smith v. Louisiana Dep't of Corrections***, 93-1305, p. 4 (La. 2/28/94), 633 So. 2d 129, 132; ***Freeman v. Poulan/Weed Eater***, 93-1530, pp. 4-5 (La. 1/14/94), 630 So. 2d 733, 737-38. In applying the manifest error-clearly wrong standard, the appellate court must determine not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. ***Banks***, 96-2840 at pp. 7-8, 696 So. 2d at 556; ***Freeman***, 93-1530 at p. 5, 630 So. 2d at 737-38; ***Stobart v. State***, 617 So. 2d 880, 882 (La. 1993). Where there are two permissible views of the evidence, a factfinder's choice between them can never be manifestly erroneous or

clearly wrong. ***Banks***, 96-2840 at p.8, 696 So. 2d at 556; ***Stobart***, 617 So. 2d at 882. "Thus, ‹if the [factfinder's] findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" Banks, 96-2840 at p. 8, 696 So. 2d at 556 (quoting ***Sistler v. Liberty Mut. Ins. Co.***, 558 So. 2d 1106, 1112 (La. 1990)).

Occupational Disease

In the instant case, the hearing officer found that Seal met his burden of proving that he had contracted an occupational disease. ***Seal v. Gaylord Container Corp***., 95-01701 (District 6 11/27/95) (reasons for judgment). The court of appeal concluded that this finding was supported by sufficient evidence in the record and, thus, was not manifestly erroneous. ***Seal***, 96-0349 at pp. 4-5, 691 So. 2d at 117. For the reasons that follow, we agree with the lower courts, finding that Seal established the existence of an occupational disease by a reasonable probability.

LSA-RS 23:1031.1(A) entitles every employee who is disabled because of the contraction of an occupational disease to receive compensation benefits, provided that the employee's illness arises out of and in the course and scope of his employment. LA. REV. STAT. ANN. 23:1031.1(A) (West 1985). LSA-RS 23:1031.1(B) defines an "occupational disease" as "that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such a disease." LA. REV. STAT. ANN. 23:1031.1(B) (West Supp. 1997). This causal link between the employee's illness and work-related duties must be established by a reasonable probability. ***Coats v. American Tel. & Tel. Co.***, 95-2670, p. 7 (La.

10/25/96), 681 So. 2d 1243, 1247. Once the employee has established the existence of an occupational disease, for his illness to be compensable, the employee must further establish that the illness is disabling. ***Id.*** (citing ***Miller v. Roger Miller Sand, Inc***., 94-1151 (La. 11/30/94), 646 So. 2d 330). In other words, after the employee has established the existence of an occupational disease, then he must further establish that he meets the criteria for one or more of the statutory disabilities, that is (1) temporary total disability, (2) permanent total disability, (3) supplemental earnings benefits, or (4) permanent partial disability. ***See*** LA. REV. STAT. ANN. 23:1221 (West 1985 & Supp. 1997).

In the case under consideration, the record contains ample evidence to support the hearing officer's finding that Seal's illness arose out of and in the course and scope of his employment. The most compelling evidence in this regard is found in the deposition testimony of Dr. Jackson, Seal's treating physician. After ruling out other causes for Seal's very severe bronchial inflammation, such as asthma, allergic disease, or smoking, Dr. Jackson concluded that his illness was caused by Seal's prolonged, heavy exposure to chemical fumes at the paper mill. Dr. Jackson's conclusion is bolstered by the fact that Seal's physical condition improved dramatically after he ceased working in that environment. In addition to Dr. Jackson's testimony, Seal and two of his former co-workers testified as to the effect of the fumes upon Seal. The testimony related that, when exposed to the fumes, Seal would often cough to the point of losing his breath, causing him to expel a yellow mucus and requiring him to leave the building, and that, on one occasion, the fumes caused him to lose consciousness. We conclude that this record evidence is sufficient to support the hearing officer's finding that Seal had contracted an occupational disease. We must now determine whether there exists

sufficient evidence in the record to establish that Seal's occupational disease caused him to suffer a statutory disability.[1]

Supplemental Earnings Benefits

After finding that Seal had contracted an occupational disease that was not total and permanent, the hearing officer awarded Seal supplemental earnings benefits (SEBs) for up to 520 weeks, retroactive to August 1, 1994 in an amount based upon the difference between average monthly wages for a position paying minimum wage and the average monthly wages that Seal earned as a bogol operator. ***Seal***, 95-01701 (reasons for judgment). The court of appeal reversed on this issue, finding insufficient evidence in the record to establish Seal's alleged inability to earn ninety percent (90%) of his pre-injury wages. ***Seal***, 96-0349 at p.6, 691 So. 2d at 117. For the reasons that follow, we conclude that the court of appeal erred in reversing the hearing officer's findings on this issue.

Under the provisions of LSA-RS 23:1221(3)(A), an employee is entitled to receive SEBs if he sustains a work-related injury that results in his inability to earn ninety percent (90%) or more of his average pre-injury wage. LA. REV. STAT. ANN. § 23:1221(3)(a) (West Supp. 1997). Initially, the employee bears the burden of proving, by a preponderance of the evidence, that the injury resulted in his

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[1]Gaylord urged in brief and at oral arguments that, under this Court's decision in ***Parks v. Insurance Co. of North America***, 340 So. 2d 276 (La. 1976), Seal is not disabled. We disagree. The ***Parks*** case involved a plaintiff who sustained a work-related accident when she inhaled fabric lint at a garment factory, which aggravated her predisposition toward respiratory difficulties and which contributed to her contracting acute bronchitis. Plaintiff never returned to work in the garment factory, and, eventually, she fully recovered from her injuries. Notwithstanding that her physician advised her not to return to work in the factory, this Court held that plaintiff was not totally and permanently disabled. ***Id.*** at 282. We find the ***Parks*** case to be distinguishable from this case in several respects. First, the ***Parks*** plaintiff was seeking total and permanent disability benefits, whereas Seal is seeking only supplemental earnings benefits for loss of earning capacity. Second, the testimony established that the ***Parks*** plaintiff was predisposed to respiratory difficulties, whereas the testimony in the instant case shows that Seal had enjoyed perfect health prior to his employment as a bogol operator. Finally, the evidence in the ***Parks*** case suggested other possible causes for plaintiff's respiratory ailments, such as her smoking, whereas the medical and lay testimony in the case before us reveals no other cause for Seal's illness. For these reasons, we find the ***Parks*** case to be inapplicable to the instant case.

inability to earn that amount under the facts and circumstances of the individual case. ***Freeman***, 93-1530 at p. 7, 630 So. 2d at 739. "Th[is] analysis is necessarily a facts and circumstances one in which the court is mindful of the jurisprudential tenet that workers' compensation is to be liberally construed in favor of coverage." ***Daigle v. Sherwin-Williams Co.***, 545 So. 2d 1005, 1007 (La. 1989).

Once the employee's burden is met, the burden shifts to the employer who, in order to defeat the employee's claim for SEBs or establish the employee's earning capacity, must prove, by a preponderance of the evidence, that the employee is physically able to perform a certain job and that the job was offered to the employee or that the job was available to the employee in his or the employer's community or reasonable geographic region. LA. REV. STAT. ANN. § 23:1221(3)(c)(i) (West Supp.1997); ***Daigle***, 545 So. 2d at 1009. Actual job placement is not required. ***Banks***, 96-2840 at p.9, 696 So. 2d at 556. The amount of an award of SEBs is based upon the difference between the claimant's pre-injury average monthly wage and the claimant's proven post-injury monthly earning capacity. LA REV. STAT. ANN. § 23:1221(3)(a) (West Supp. 1997).

In determining whether a hearing officer's finding that an employee has met his initial burden of proving entitlement to SEBs is manifestly erroneous, a reviewing court must examine the record for ***all*** evidence that bears upon the employee's inability to earn 90% or more of his pre-injury wages. ***Pinkins v. Cardinal Wholesale Supply***, 619 So. 2d 52, 56 (La. 1993) ("Our courts should look to the totality of factors related to a realistic appraisal of access to employment."). In the instant case, we find that the court of appeal erred in narrowing its review of this issue to Seal's testimony that although he had searched for a job, he did not apply for work anywhere because most of the jobs that were

available paid only minimum wage, which was only one-third of the amount that he had earned as a bogol operator. ***Seal***, 96-0349 at p.6, 691 So. 2d at 117-118. Judge Carter, in dissent, properly conducted a review of all the relevant evidence in the record, summarizing the supporting evidence as follows:

> The medical and lay testimony presented at the hearing established that Seal suffered from an occupational disease which prevented him from returning to his $17.36 an hour job as a bogol operator at Gaylord. . . . Seal testified that he ha[d] a high school diploma and began working at the Gaylord facility when he was twenty years old. At the time of the hearing, Seal was fifty-eight years old and had been employed at the facility for more than thirty-eight years, the last fifteen of which had been as a bogol operator. This testimony establishes that Seal has spent his entire work life at his job at the paper mill and has no other discernible skills to utilize to earn a living. Seal testified that he left his employment with Gaylord in 1994 because of his severe bronchial condition. The medical testimony corroborated Seal's testimony. Clearly, Seal cannot earn his pre-injury wages because he cannot return to his job and because he had no skills other than that of a paper mill worker. Seal testified that he looked for alternative work but was unable to find a job which paid more than minimum wage. Seal acknowledged that "[i]t looks like I'm going to have to go to that."

Seal, 96-0349 at p. 3, 691 So. 2d at 120 (Carter, J. dissenting). Considering the tenet requiring liberal construction in favor of workers' compensation coverage, Judge Carter concluded that the above-quoted evidence is sufficient to establish Seal's initial burden of proving that he is unable to earn 90% of his pre-injury wages. ***Id.*** We agree.

The medical and lay testimony established that Seal could not return to his former job as a bogol operator--a job at which he was able to earn $17.36 per hour, more than three times the minimum wage. In his testimony, Seal concedes that he is able to earn minimum wage, and the hearing officer's award of SEBs reflects this concession. In addition, we find that Seal's age, limited education, and specialized work history are additional factors that mitigate in favor of the hearing officer's conclusion that Seal is unable to earn ninety percent (90%) or more of his pre-injury

wages. Thus, we conclude that because there was sufficient evidence in the record, the court of appeal erred its determination that the hearing officer's findings on this issue were manifestly erroneous.

Having concluded that Seal satisfied his initial burden of proving entitlement to SEBs, we now consider whether Gaylord carried its burden of proving that there were jobs available to Seal within his work restriction and geographic region that would enable him to earn ninety percent (90%) or more of his pre-injury wages.

In ***Banks v. Industrial Roofing & Sheet Metal Works***, this Court set forth a minimum standard that an employer must meet in order to defeat an employee's claim for SEBs by proving job availability. 96-2840, pp. 10-11 (La. 7/1/97), 696 So. 2d 551, 557. To prove job availability, an employer must establish, by competent evidence, the following:

> (1) the existence of a suitable job within claimant's physical capabilities and within claimant's or the employer's community or reasonable geographic region;
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> (2) the amount of wages that an employee with claimant's experience and training can be expected to earn in that job; and
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> (3) an actual position available for that particular job at the time that the claimant received notification of the job's existence.

Id. Applying this minimum standard to this case, we conclude that the hearing officer was not manifestly erroneous or clearly wrong in finding that Gaylord failed to present sufficient competent evidence to carry its burden.

The only evidence that Gaylord presented to establish job availability was the testimony of B.H. Barker, its human resource supervisor. At first, Barker opined that there were several jobs that were available to Seal at the mill, which would not involve working directly around sulfuric acid fumes. However, on cross

examination, Barker conceded that these jobs might not be appropriate for Seal, considering that there is exposure to some extent everywhere around the mill.[2] Even assuming that there were jobs available at the mill that would not expose Seal to chemical fumes, Barker's testimony did not establish that any of these jobs would pay ninety percent (90%) or more of Seal's pre-injury wage. Barker testified that the range of salaries for the available jobs went from a low of $10.21 to a high of $10.61 per hour with the potential to ***eventually*** progress to the $16.00 to $17.00 per hour range. Barker gave absolutely no indication of how long this progression would take. As noted above, Seal had been earning $17.36 per hour as a bogol operator. The most compelling shortfall in Gaylord's evidence, however, is that no one at the mill notified Seal or his counsel that there were ***any*** jobs available within Seal's work restriction--that is, work that did not involve exposure to chemical fumes. Barker explained that Gaylord was unable to offer Seal another position because a provision in a labor agreement required that all available positions be posted for employees to bid on. However, Barker did not identify any provision in the labor agreement that would have prevented Gaylord from ***notifying*** Seal or his counsel of the existence of suitable jobs that were available for Seal to bid upon. Considering the above, we conclude that Barker's generalized testimony, concerning the posting of "some" available jobs that might fall within Seal's work restriction with starting wages far below ninety percent (90%) of Seal's pre-injury wage falls short of the minimum standard of proof required in ***Banks***. For these

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[2]Note the following colloquy between plaintiff's counsel and Barker on cross examination:

> Q. . . . And you — like you said, you're not aware of the restrictions put on by Dr. Jackson so you can't say that Mr. Seal can do any jobs at that paper mill given the fact that there is exposure to some extent everywhere around that mill.
>
> A. I cannot truthfully testify to that.

reasons, we find that the hearing officer correctly concluded that Seal was entitled to an award of SEBs for up to 520 weeks, retroactive to August 1, 1994 in an amount based upon the difference between average monthly wages for a position paying minimum wage and the average monthly wages that Seal earned as a bogol operator.

Attorney Fees & Penalties

We now address the issue of whether Seal is entitled to recover attorney fees and penalties. For the reasons that follow, we find that the hearing officer's award of attorney fees and penalties is unsupported under the facts presented in this difficult case.

LSA-RS 23:1201(F) provides the basis for an award of attorney fees and penalties. LA. REV. STAT. ANN. 23:1201(F) (West Supp. 1997). This provision, however, is inapplicable if the claim is reasonably controverted. ***Id.*** § 1201(F)(1). As discussed above, Gaylord contested Seal's claim for benefits based upon its belief that, under this Court's decision in ***Parks v. Insurance Co. of North America***, 340 So. 2d 276 (La. 1976), Seal was not disabled. ***See supra*** note 1 (distinguishing ***Parks*** from the case before us). Although we ultimately concluded that Gaylord's argument on this point lacked merit, we cannot say that Gaylord's refusal to pay benefits based upon its belief that ***Parks*** was applicable was arbitrary and capricious. Thus, we find that the hearing officer's award of attorney fees and penalties to have been clearly wrong.

DECREE

For the foregoing reasons, we reverse the judgment of the court of appeal. Further, we amend the judgment of the hearing officer to strike the award for attorney fees and penalties and reinstate the hearing officer's judgment as so

amended.

REVERSED; HEARING OFFICER'S JUDGMENT REINSTATED AS AMENDED.