SUPREME COURT OF LOUISIANA

97-C-1225

OLIDA CHAISSON

versus

CAJUN BAG AND SUPPLY CO., ET AL.

KNOLL, J., concurring in part and dissenting in part.

I agree with the majority opinion that the double hearsay evidence at issue in this case was not competent evidence and that the hearing officer was clearly wrong in relying upon such evidence in her reasons for judgment. I additionally agree that this clear error by the hearing officer necessitates a *de novo* review of the record on the issues of the claimant's entitlement to worker's compensation benefits.

Nevertheless, I disagree with the majority opinion's statement that the relaxed evidentiary standard provided by the legislature for worker's compensation administrative hearings contemplates the admission of incompetent evidence into the record. While I recognize that a hearing officer may allow evidence into the record that might not be admissible under the Louisiana Code of Evidence, I disagree that the hearing officer may allow even incompetent evidence into the record, only to later disregard such evidence when arriving at his or her factual findings. In my view, the hearing officer should evaluate the evidence for competence *before* admitting it into the record. Any evidence deemed incompetent should not be allowed, and the party seeking to introduce such evidence should be given an opportunity to make a proffer.

The standard laid down by the majority in the instant case is no standard at all. Under the majority's standard, any and all evidence may be admitted into the record,

as long as the hearing officer does not clearly rely on incompetent evidence in arriving at his or her findings of fact. Such a standard obviates the need for evidentiary objections. In contrast, I find that incompetent evidence should not be admitted into the record, and that any incompetent evidence actually admitted should be subjected to "harmless error" analysis, regardless of whether such evidence was actually relied on or noted in the hearing officer's findings of fact. This review is similar to the appellate review of a district court judgment when the court has admitted evidence which is inadmissible under the Louisiana Code of Evidence. See *Archon v. Union Pacific R.R., Inc.*, 94-C-2728 (La.6/30/95), 657 So.2d 987.

Turning to the merits of the case, I disagree with the majority's finding that the plaintiff is not entitled to supplemental earnings benefits. After disregarding the inadmissible and incompetent double hearsay evidence, it is clear to me that the claimant has proved her entitlement to SEB. The record evidence clearly reflects that Mrs. Chaisson was injured in the course and scope of her employment. Although Dr. Budden noted that her condition was degenerative, she was asymptomatic prior to her workplace accident on January 17,1991. Subsequent to the accident, her degenerative condition became acutely and consistently symptomatic. Furthermore, a subsequent MRI revealed two herniated discs at L4-5 and L5-S1. Where, as here, the employee suffered from a pre-existing medical condition, she may still prevail if she proves that the accident "aggravated, accelerated, or combined with the disease or infirmity to produce death or disability for which compensation is claimed." *Walton v. Normandy Village Homes Ass'n, Inc.* 475 So.2d 320 (La.1985); *Peveto v. WHC Contractors*, 93-C-1402 (La.1/13/94), 630 So.2d 689. Clearly, Mrs. Chaisson is entitled to the presumption in *Walton*, that her subsequent injuries were caused by her workplace accident.

> 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 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).

Seal v. Gaylord Container Corp., 97-C-0688 (La.12/02/97), ___ So.2d ___.

After reviewing the results of the MRI and after examining Mrs. Chaisson on August 10, 1992, Dr. Budden advised Mrs. Chaisson to refrain from work for two weeks. When Mrs. Chaisson returned for a follow up visit on August 24, 1992, Dr. Budden again advised her not to return to work. Shortly after being apprised of the results of the August 24, 1992, examination, Cajun Bag informed Mrs. Chaisson it would no longer pay for her medical examinations. As a result, Mrs. Chaisson was unable to follow up with Dr. Budden, and she was never subsequently released to return to work by any physician.

In my view, the majority opinion unfairly places the burden for a dispute between Cajun Bag and its insurer, INA, squarely upon the shoulders of Mrs. Chaisson. While Cajun Bag and INA quarreled about coverage for Mrs. Chaisson's injuries, Mrs. Chaisson was unable to receive necessary medical treatment and examination. Cajun Bag and INA should not now reap the benefit of their arbitrary failure to provide a medical examination which they allege would have proved Mrs. Chaisson's ability to work. Put simply, Mrs. Chaisson proved she had a workplace injury and that as of August 24, 1992, she was unable to resume her employment at Cajun Bag. She has proved *prima facie* entitlement to SEB. Although Dr. Budden had not ruled out Mrs.

Chaisson's return to work at either her old job or a light duty position, he wisely withheld any recommendation until his next examination of Mrs. Chaisson. Dr. Budden's speculation that she might try her old job or a new light duty position is insufficient to rebut the non-speculative reports he issued as a result of his most recent examination of Mrs. Chaisson and her MRI film.

I also find Cajun Bag's assertion that it offered Mrs. Chaisson a suitable light duty position unpersuasive. The record indicates that Cajun Bag offered the accessory position to Mrs. Chaisson during the two week period during which she had been instructed by Dr. Budden to refrain from work altogether. Although the majority attaches no significance to this fact, I find that it is crucial. Although pay may have been a factor in her decision to decline the accessory position, Mrs. Chaisson consistently maintained throughout her testimony that the reason that she did not take the accessory position was that she was hurt. The majority opinion fails to take Mrs. Chaisson's acts in the context that she was under doctor's instruction to refrain from work at the time the accessory position was offered. At the time the position was offered, it was not within the physical abilities of Mrs. Chaisson to perform . Plainly, she could not reasonably be expected to accept a position, even one providing an identical wage, while there existed the serious risk of further aggravating her condition.

I would therefore find that Mrs. Chaisson is entitled to supplemental earnings benefits. I find that the majority opinion, instead of liberally construing the Worker's Compensation Act in favor of coverage, has rewarded the employer's arbitrary failure to provide medical examination by presuming that the withheld examination would reveal that the employee could earn 90% of her pre-accident wages. Plainly, this is not a policy that this court should encourage with respect to worker's compensation. For

the foregoing reasons, I respectfully concur in part and dissent in part.