SUPREME COURT OF LOUISIANA

No. 97-C-0688

SILMON O. SEAL

Versus

GAYLORD CONTAINER CORPORATION

VICTORY, J. Dissenting

In my view the majority erred in finding that Seal met his initial burden of proof and that Gaylord did not meet its burden of proof.

I. Employee's burden of proof

To recover supplemental earnings benefits the initial burden of proof is on the employee, who must prove by a preponderance of the evidence that he is unable to earn wages equal to ninety percent or more of what he earned before the accident. ***Daugherty v. Domino's Pizza***, 95-1394 (La. 5/21/96), 674 So.2d 947; ***Smith v. Louisiana Dept. of Corrections***, 93-1305 (La. 2/28/94), 633 So.2d 129. Only when this burden is met does the burden shift to the employer to show, if he wishes to contend that the employee is earning less than he is able to earn so as to defeat or reduce supplemental earnings benefits, 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. ***Smith v. Louisiana Dept. of Corrections***, 93-1305(La. 2/28.94), 633 So.2d 129. The burden does not shift to the employer merely because an employee proves he is unemployed at the time of trial. To find otherwise "would provide a claimant with a strong incentive to remain unnecessarily unemployed." ***Smith v. Hamp Enterprises, Inc.***, 95-2343, p.4 (La.App. 4th Cir.

1996), 673 So.2d 267, 270. Additionally, the "more obviously and severely disabling an injury is, the less extrinsic evidence should be required to establish an initial prima facie case of entitlement to Supplemental Earnings Benefits." ***Id.***

The following testimony is the total offered by Seal to prove his inability to obtain ninety percent of his pre-injury wages:

> Q. Mr. Seal, you haven't worked since August of 1994; is that correct?
>
> A. Right.
>
> Q. Have you applied for work anywhere since then?
>
> A. No, sir. I looked around for a job. *Most of them* that I could get was paying minimum wages and that wasn't near enough, you know. It looks like I'm going to have to go to that.
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> * * * * *
>
> Q. Have you asked anyone at Gaylord Container Corporation if you could work there?
>
> A. No, sir. *I figured they'd contact* [his attorney] being I had to hire him, you know.
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> * * * * *
>
> Q. No one at Gaylord Container Corporation has refused you employment; is that correct?
>
> * * * * *
>
> A. No, sir, they haven't.
>
> [emphasis added]

This evidence is clearly inadequate for Seal to meet his burden of proving his inability to earn ninety percent of his pre-injury wages. Seal did not apply for *any* employment after he stopped working in the bogol plant in August of 1994. This is despite the fact that, absent a return to his old job in the bogol plant, Seal was characterized by his own physician as "a relatively healthy man" as early as mid-

1995. *See* **Majority Opinion** at 2. This case is similar to ***Smith v. Hamp Enterprises, Inc.***, *supra*. In both cases the employees made no real effort to find other employment, and the employees could have worked in many other jobs given the few restrictions their injuries placed upon them. In ***Smith***, the Fourth Circuit found that such an employee did not meet his burden of proving his inability to earn ninety percent of his pre-injury wages. Here, the plaintiff's only restriction is that he should not work around sulfuric acid fumes at the bogol plant due to probable recurrence with his respiratory condition. He is not disabled from *any* other job, and acknowledged "*most*" of the jobs he looked at were minimum wage jobs, clearly indicating some were more than minimum wage. Yet he did not name any jobs he sought, nor did he name a single employer he visited. Surely the plaintiff has to offer more than his unsupported conclusion that he is unable to earn ninety percent of his prior wage in order to carry his burden of proof.

Further, by focusing on factors such as his high school education and limited experience in awarding plaintiff supplemental earnings benefits, the majority ignores the clear language in LSA-RS 23:1221(3)(a), the statute creating the entitlement to supplemental earnings benefits:

> For injury resulting in the employee's inability to earn wages equal to ninety per cent or more of wages at time of injury, supplemental earnings benefits equal to seventy-four percent of the difference between ninety percent of the average monthly wages at time of injury and average monthly wages earned or average monthly wages the employee is able to earn in any month thereafter in any employment or self-employment, whether or not the same or a similar occupation as that in which the employee was customarily engaged when injured and *whether or not an occupation for which the employee at the time of the injury was particularly fitted by reason of education, training, and experience,* such comparison to be made on a monthly basis.
>
> [emphasis added]

The meaning of this statute is clear. Supplemental earnings benefits are available only to those employees who are unable to earn their pre-injury wages because of their physical disability, exclusive of factors such as education, training and experience.

II. Employer's burden of proof

Even assuming that Seal met his burden of proof, the majority erred in concluding that Gaylord did not meet its burden of proving that work was available to the plaintiff at the Gaylord facility.

Seal's own testimony shows that he was able to work in other parts of the mill. The following exchange took place between Gaylord's attorney and Seal at Seal's worker's compensation hearing:

> Q. Has Dr. Jackson advised you that you're not able to work at Gaylord Container Corporation in any other area other than the bogal plant?
>
> A. No, sir, he didn't say that.

Not only was Seal not medically restricted from working at other parts of the plant, he also contemplated working for Gaylord in other parts of the mill but made no effort to obtain a job there. Quoted below is another exchange at the hearing between Seal and Gaylord's attorney:

> Q. Have you asked anyone at Gaylord Container Corporation if you could work there?
>
> A. No, sir. I figured they'd contact [his attorney] being I had to hire him, you know.

Note that Seal did not say that he did not contact Gaylord because he was physically unable to work there. Instead, he says he did not contact them because he thought that Gaylord would contact him about employment. Nothing prevented Seal from working in other parts of the mill. Thus, Gaylord, through B.H. Barker's

testimony, established the existence of jobs in other parts of the mill which did not involve direct exposure to sulfuric fumes.[1] These jobs started at $10.21 to $10.61 per hour, with the potential to eventually increase to $16.00 to $17.00 per hour. **Majority Opinion** at 11.

The employer's burden of proof in supplemental earnings benefits cases is not merely designed to allow him to defeat completely the payment of benefits. It also allows him to reduce the amount of payments to employees entitled to such benefits. This is especially true where an able-bodied employee has an available job where he could make twice the minimum wage, even if these wages are not equal to ninety percent of the employee's pre-injury wages. In this case, B.H. Barker testified that the jobs available at the mill (away from any fumes) had a starting salary of $10.21 to $10.61 per hour. Seal was not medically restricted from performing these jobs. Yet the majority bases its award of benefits to Seal on the difference between his prior salary and *minimum wage*. I cannot agree with such an award under these facts. Gaylord clearly has shown that jobs are available at its mill which Seal can perform starting at $10.21 per hour. At the least, any award to Seal should be based upon the difference between Seal's prior salary and $10.21 per hour.

Yet the majority finds that the "most compelling shortfall" in Gaylord's attempt to meet its burden of proof was its failure to notify Seal or his counsel that there were any jobs available with Seal's work restrictions. I cannot agree. The plaintiff knew his job restrictions were minimal and knew, as a thirty-eight year

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[1] Barker testified that under the labor agreement between Gaylord and its employees, available jobs are bid on by the employees. He testified that these jobs are awarded on the basis of seniority. Given that Seal had worked at Gaylord for 37 years, undoubtedly he would have been hired for any job which he bid upon.

union employee at Gaylord's plant, that numerous jobs were available he could perform at Gaylord that he could have bid on, and would have obtained due to his seniority at the mill. Yet he made no effort to obtain employment there. Of course, now he has little incentive to work at Gaylord or anywhere else. Supplemental earnings benefits were intended to help replace the loss of ability to earn prior wages, not to provide a retirement for a healthy worker who can do *any* job he could do prior to his injury but for working in the bogol plant at the Gaylord mill. I respectfully dissent.