NOT DESIGNATED FOR PUBLICATION

ERIC ALPHONSO AND CHARLENE ALPHONSO, INDIVIDUALLY AND AS NATURAL TUTORS OF THEIR MINOR CHILDREN, ERIC ALPHONSO, JR., MARIA ALPHONSO AND KRISTEN ALPHONSO	*	**NO. 2001-CA-0616**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
VERSUS		
	*	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, WRAYE DAWKINS, ENOCH DAWKINS AND ZURICH-AMERICAN INSURANCE COMPANY	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-13527, DIVISION "A"
Honorable Carolyn Gill-Jefferson, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge Max N. Tobias, Jr.)

John Van Robichaux, Jr.
Michael A. Gorbaty
1007 West St. Bernard Highway
Chalmette, LA 70043
COUNSEL FOR PLAINTIFFS/APPELLANTS

David Shaw
NEAL, STEPHENS & GRACE
3900 North Causeway Boulevard
Lakeway One, Suite 1060

Metairie, LA 70002
COUNSEL FOR DEFENDANT/APPELLEE
(ZURICH INSURANCE COMPANY)

AFFIRMED

Plaintiffs, Mr. and Mrs. Eric Alphonso and their children, appeal the trial court's judgment awarding them damages for personal injuries Mr. Alphonso received in an automobile accident. For the reasons that follow, we affirm.

FACTS AND PROCEEDINGS BELOW

On or about August 6, 1997, Mr. Alphonso, who was driving a vehicle owned by his employer, McQuay International, was injured in a collision with another vehicle, which was being driven by Ms. Wraye Dawkins. The McQuay vehicle was insured by Zurich Insurance Company. Mr. Alphonso filed suit against Ms. Dawkins, State Farm (the insurer of the Dawkins vehicle), and Zurich (uninsured/underinsured motorist coverage). Prior to trial, Mr. Alphonso settled with State Farm for $93,000, and released State Farm and Ms. Dawkins.

At the time of the accident, Eric Alphonso was working for McQuay as an air conditioning/ heating technician, repairing and servicing

institutional units in large buildings, such as the Louisiana Superdome. He had started with the company in 1991 as an entry-level service technician making approximately $13.00 per hour, and had been promoted to mid-level technician by 1997. Following the August 1997 accident, he continued to work for several months while being treated by first a chiropractor, then an orthopedist, for back and neck pain. On October 28, he consulted a neurosurgeon, Dr. Roger Smith. Dr. Smith diagnosed Mr. Alphonso as having a herniated cervical disk and a lumbar sprain. He did not recommend surgery, but prescribed pain medication and physical therapy. Dr. Smith believed Mr. Alphonso was incapable of working at the time of his initial examination. Mr. Alphonso stayed home on medical leave from October 28, 1997 until January 12, 1998. On January 12, he was released to light duty work, and he returned to McQuay International in a new position as a supervisor of technicians. From the time he returned to work through the date of trial, Mr. Alphonso saw Dr. Smith four times: January 22, 1998; June 1, 1998; November 30, 1998; and May 11, 2000. At the time of trial in November, 2000, Mr. Alphonso was working as the supervisor of McQuay's New Orleans office, a job he had held continuously since January 12, 1998,

and was earning approximately $24.00 an hour. He was taking over-the-counter medication (Aleve) for recurring neck pain and headaches.

On November 16-17, 2000, the matter was tried to a jury against Zurich, the sole remaining defendant, on the issue of quantum only; the parties stipulated to liability. Witnesses at trial included Mr. and Mrs. Alphonso, Dr. Smith, Steven Horney (personnel manager of McQuay International), Bobby Roberts (vocational evaluation specialist presented by the plaintiffs) and Ashley Byers (vocational rehabilitation counselor presented by the defendant). In addition, the conclusions of plaintiffs' economist, Dr. Melville Wolfson, and defendant's economist, Dr. Dan Cliff, were stipulated to and read to the jury. The trial judge also informed the jury that any amount they awarded Mr. Alphonso would be reduced by $100,000 to reflect the limits of the State Farm policy because of the prior settlement. After deliberating for approximately three hours, the jury returned a verdict for plaintiffs in the amount of $140, 083, which included $20,083 for past medical expenses; 119,000 for past and future pain and suffering; and $1,000 for loss of consortium to Mrs. Alphonso. Judgment was signed accordingly. The trial court denied plaintiffs' motion for new

trial, and plaintiffs now appeal.

Plaintiffs argue that the trial court committed legal error by refusing to allow testimony by which plaintiffs' counsel sought to establish bias on the part of a defense witness, and secondly, that the factfinder committed manifest error by failing to award any damages for Mr. Alphonso's future economic loss, future medical expenses, or loss of enjoyment of life, or the loss of consortium to the three Alphonso children. We address each argument in turn.

EXCLUDED EVIDENCE

Plaintiffs proffered cross-examination testimony by Steven Horney, Director of Human Resources for McQuay, regarding the deductible on the Zurich insurance policy and its applicability to the Alphonso claim. Plaintiffs contend the trial court erred by refusing to admit such testimony because, according to plaintiffs, Mr. Horney's belief that his employer, McQuay, would have to pay the first $100,000 of any judgment made him a biased witness.

We reject the plaintiffs' argument that the trial court committed legal error. Mr. Horney was called by the defendant to testify as to Mr.

Alphonso's employment history at McQuay, particularly his job performance, evaluations, and earnings as a supervisor. Mr. Horney testified he had no firsthand knowledge concerning the Zurich insurance policy or its terms; therefore, he was not qualified to testify as to those facts. Moreover, the testimony was not relevant because there was no disputed issue with regard to the insurance coverage, to which the parties had stipulated. The trial judge correctly declined to admit the testimony on these grounds.

Out of an abundance of caution, however, we have reviewed the proffered testimony and have concluded that it does not reveal any inherent bias on the part of the witness. As a part of the proffer, Mr. Horney testified that he was not aware of how the deductible worked or when it would go into effect. His testimony in this regard reveals no more "bias" than did his earlier testimony, which the jury heard, that he believed Mr. Alphonso was actually suing his employer, McQuay. We therefore find no legal error on the part of the trial court.

QUANTUM

Plaintiffs contend the jury's failure to award Mr. Alphonso damages

for future economic loss, future medical expenses, loss of personal services/enjoyment of life, or loss of consortium to his children is manifestly erroneous and constitutes an abuse of the broad discretion afforded the factfinder in determining quantum. We disagree.

With regard to future economic loss, plaintiffs cite *Konnecker v. Sewerage & Water Board of New Orleans*, 96-2197 (La. App. 4 Cir. 11/19/97), 703 So.2d 1341, in which this court held that damages for loss of earning capacity are based upon the loss of the ability to earn, and therefore are not calculated solely by comparison of the plaintiff's earnings before and after his injury. *Id*. at p. 20, 703 So.2d at 1351 (citing *Folse v. Fakouri*, 371 So.2d 1120, 1124 (La. 1979)). Instead, the appropriate inquiry is what the claimant would have been able to earn had he not been injured, compared to what he is able to earn despite the injury. *Id*. (citing *Harvey v. Traylor,* 96-1321, p.12 (La. App. 4 Cir. 2/5/97), 688 So.2d 1324, 1332). In *Konnecker*, this court affirmed the trial court's award of damages for loss of earning capacity to a plumber whose injury had caused a permanent 10% functional impairment of his back and neck. This court noted that the award was reasonable in light of the evidence which showed the plaintiff had also

suffered a loss of stamina which had caused him to reduce his work day from 10-12 hours to a maximum of 5-6 hours, even though he had at the same time developed a commercial client base which was more lucrative than his former residential plumbing work. This court concluded that the evidence reasonably supported the factfinder's conclusion that Mr. Konnecker's injuries would cause a reduction of $5,000 to $10,000 in his annual net income because he could not take as many jobs and/or would have to pay someone else to do the manual labor on the jobs he took. We find *Konnecker* to be distinguishable from the instant case.

In the instant case, the evidence shows that Mr. Alphonso earned significantly more as a supervisor than as a technician. His employment records establish that he earned $42,897 in 1995, $46,070 in 1996, and $40, 217 in 1997 (the year of the accident); in the year 2000, his annual salary as a supervisor was $55,000. Unlike in *Konnecker*, there is no evidence showing that Mr. Alphonso could be earning more if he had remained a technician, nor any evidence that he suffered either a permanent disability or a loss of stamina. In fact, the record shows that Mr. Alphonso continued to work overtime following the accident, that he worked 10% to 20% overtime

as a supervisor, and that he earned more per hour as a supervisor. Mr. Alphonso testified that he was not as comfortable being a supervisor as he was being a technician, that there was more stress in the supervisory job, that he felt he had less job security, and that although his standard of living had improved, he believed his "quality of life" had diminished. While these facts indicate that Mr. Alphonso prefers working as a technician, they do not prove that he has suffered a loss of earning capacity. Moreover, the defendant presented evidence that Mr. Alphonso's concern that he was in danger of losing his job as a supervisor was unfounded. Mr. Horney's testimony, as supported by Mr. Alphonso's employment records, confirms that although he initially had some difficulty in the supervisory position, Mr. Alphonso successfully corrected the problems within the time frame set up by McQuay, and he was performing satisfactorily by the date of trial, having received a merit raise just two months earlier. Both economists, Dr. Wolfson and Dr. Cliff, opined that as long as Mr. Alphonso continued to work, he had no claim for loss of future earning capacity. In addition, vocational rehabilitation counselor Ashley Byers testified that based on Mr. Alphonso's education level (high school diploma plus State certificate for

two years of community college training in air conditioning/ refrigeration), strong work ethic, skills, knowledge and expertise, he would have no difficulty obtaining a similar supervisory position should he lose his current job. Therefore, we find that the jury had ample evidence upon which to reasonably conclude that Mr. Alphonso suffered no future economic loss as a result of the accident.

Plaintiffs also complain about the jury's failure to assess damages for future medical expenses. However, plaintiffs concede that Dr. Smith's opinion was that Mr. Alphonso probably would not need surgery in the future. The record also indicates that Mr. Alphonso was not seeing a physician regularly at the time of trial, but was managing his recurrent pain with over-the-counter medication. Despite plaintiffs' argument that Mr. Alphonso was entitled to future medical expenses because he has a "chronic condition," there is virtually no evidence to support the need for future medical treatment and conversely, there is more than a sufficient basis in the record for the jury's conclusion that no award was warranted.

Finally, plaintiffs contend that the jury should have awarded some amount for Mr. Alphonso's loss of personal services/ enjoyment of life, and

for the loss of consortium to his children. Plaintiffs argue that the failure to make such an award is reversible error because the testimony of Mr. and Mrs. Alphonso in this respect was uncontradicted. Mrs. Alphonso testified that her husband was less active at home than he had been prior to the accident and less able to help with household chores, such as cutting the grass, and the daily care of their three children. According to her testimony, he was unable to be as physically active in playing with the children as before. She also indicated that she and her husband had put their plans to have a fourth child "on hold" as a result of the accident. Mr. Alphonso confirmed that he was more tired when he got home from work and felt he was unable to do much more than eat and sleep.

The jury awarded $1,000 for loss of consortium to Mrs. Alphonso, but made no award in the other two categories claimed by plaintiffs. Such an award is clearly discretionary on the part of the jury. Plaintiffs' argument that the jury was obliged to accept the Alphonsos' testimony because it was unrebutted is unpersuasive. Mr. and Mrs. Alphonso are obviously interested witnesses, and as with any witness, the jury was free to believe or not to believe their testimony. Such credibility judgments are the province of the

factfinder, and we do not find the jury's conclusions in this regard to be so unreasonable as to be an abuse of discretion. We therefore find no error in the trial court's failure to award further damages in this case.

CONCLUSION

Accordingly, for the reasons stated, we affirm the judgment of the trial court.

AFFIRMED