[Cite as *State ex rel. Marrero v. Indus. Comm.*, 2009-Ohio-4382.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Maria Marrero,	:	
Relator,	:	
v.	:	No. 08AP-922
The Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 27, 2009

Shapiro, Shapiro & Shapiro Co. LPA, *Daniel L. Shapiro*, and *Leah P. VanderKaay*, for relator.

Richard Cordray, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

Buckingham, Doolittle & Burroughs, LLP, and *Deborah Sesek*, for respondent Life Care Centers of America, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, P.J.

{¶1} Relator, Maria Marrero, filed this original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of

Ohio ("commission"), to vacate its order, which denied relator's application for wage-loss compensation, and ordering the commission to grant her that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court grant a writ of mandamus ordering the commission to vacate its previous order denying compensation and issue a new order, either granting or denying the requested compensation, after exploring the reasons why relator was not working full-time and how that impacted her ability to seek other employment.

{¶3} The commission and relator's employer, Life Care Centers of America, Inc. (collectively, "respondents"), objected to the conclusions of law contained in the magistrate's decision. Respondents argue that relator had the burden to prove her entitlement to working-wage-loss compensation. Absent evidence of a good-faith job search, or evidence supporting her argument that a job search was unnecessary under the circumstances, the commission did not abuse its discretion in denying that compensation. We agree.

{¶4} A claimant seeking working-wage loss who has not returned to suitable employment with comparable pay must demonstrate "[a] good faith effort to search for suitable employment which is comparably paying work." Ohio Adm.Code 4125-1-01(D)(1)(c). For these purposes, "[a] good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate

the wage loss." Id. The commission will consider a number of factors in evaluating the claimant's effort, including her "skills, prior employment history, and educational background." Ohio Adm.Code 4125-1-01(D)(1)(c)(i). These factors include both qualitative and quantitative indicators of a claimant's efforts.

{¶5} In some cases, this court and the Supreme Court of Ohio have excused a claimant's failure to conduct a job search. In *State ex rel. Timken Co. v. Kovach*, 99 Ohio St.3d 21, 2003-Ohio-2450, for example, the court excused the required job search where the claimant continued to hold a position with his original employer, with whom he had worked for a long time, had accumulated years toward a pension, and qualified for additional vacation and personal days. See also *State ex rel. Brinkman v. Indus. Comm.*, 87 Ohio St.3d 171, 1999-Ohio-320 (holding that it was inappropriate to require a claimant to leave a lucrative position with long-term potential solely to make more money in the short term); *State ex rel. Jackson v. Indus. Comm.*, 10th Dist. No. 08AP-498, 2009-Ohio-1045, ¶14 (holding that the claimant's "specific circumstances relieved her of her duty to continue" her job search).

{¶6} We conclude that the commission's order denying compensation to relator is not inconsistent with this precedent. Ohio Adm.Code 4125-1-01(D) provides that a "claimant is solely responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation. Unless the claimant meets this burden, wage loss compensation shall be denied."

{¶7} Here, the district hearing officer ("DHO") stated that relator had "failed to submit the requisite proof as enumerated by OAC Section 4125-1-01 for calculation of

the requested working wage loss." The DHO also found "no evidence of the required good faith job search pursuant to OAC 4125-[1-01] to supplement the request for working wage loss based upon reduced hours of work. * * * [The DHO] again finds claimant has failed to search for any other suitable employment of comparable pay which was confirmed by testimony at hearing. [DHO], accordingly, finds the evidence on file fails to substantiate the request for working wage loss which is denied in its entirety."

{¶8} The staff hearing officer ("SHO") acknowledged that claimant had suffered a wage loss because she was not offered the same number of hours as she had been working prior to her injury. Nevertheless, the SHO denied relator's request for wage-loss compensation "for the reason that there is no evidence that the Injured Worker engaged in a good faith job search for alternate work consistent with her physical restrictions in order to mitigate her wage loss. All proof on file was reviewed and considered."

{¶9} Our review of the record before us similarly reveals a complete absence of evidence that relator searched for comparably paying work or that relator should be excused from that requirement. In her brief before the magistrate (relator did not respond to respondents' objections), relator argued that her situation was unique, and her labor market limited, because (1) she worked the third shift, 10:30 p.m. to 6:30 a.m., (2) she could only perform left-handed work, and (3) her schedule with her employer was highly unpredictable. As for her working the third shift, however, relator also stated that she worked this shift because "she has three small children at home – ages 6, 8

and 13 – whom she cares for during the day and assist[s] with schooling [o]bligations. As such, taking a position with daytime working hours was not an option for her." While admirable, relator's decision to work a schedule that allows her to be home during the day with her children is a lifestyle choice, which the commission properly may consider as a factor favoring denial of compensation. Compare *State ex rel. Bishop v. Indus. Comm.*, 10th Dist. No. 04AP-747, 2005-Ohio-4548, ¶17 (concluding that denial of wage-loss compensation was an abuse of discretion, in part because there was no evidence that the claimant accepted employment as a car salesman as a personal lifestyle choice).

{¶10} As for her physical restrictions, we agree with relator that her restriction to left-handed work is a relevant factor for determining whether she made a good-faith effort at finding comparably paying work. See Ohio Adm.Code 4125-1-01(D)(1)(c)(ix) (identifying a "claimant's physical capabilities" as a relevant factor). Here, while it makes sense that relator might have difficulty in finding a job restricted to left-handed work, our record contains no evidence that no left-handed work is available to her or that she tried, but failed, to find left-handed work. We note, too, that her lifestyle choices have made a potential search even more difficult because she has limited herself to finding "a position that required left-handed only work that was available during the midnight shift."

{¶11} Finally, relator argued to the magistrate that her employer promised her full-time work, but regularly took her off the schedule or sent her home early. This unpredictability, relator argued, made it impossible for her to commit to a second

position with another employer. Based on these arguments, the magistrate concluded that the commission failed to analyze the impact of relator's reduced hours upon her ability to search for other employment. We disagree.

{¶12} In considering a claimant's eligibility for compensation, the commission must consider, "and base the determinations on, evidence in the file, or presented at hearing." Ohio Adm.Code 4125-1-01(D). Both the DHO and the SHO stated that they each had considered the entire record, which apparently included hearing testimony, and they each acknowledged that relator worked fewer hours. Faced with different evidence, they might have engaged in a discussion of relator's hours and perhaps considered the number of hours she had worked previously, her current work schedule, and the hours she spent searching for comparably paying work. See Ohio Adm.Code 4125-1-01(D)(1)(c)(iv) (identifying as relevant factors the amount of time devoted to making prospective employment contacts and the amount of time spent working, and allowing the adjudicator to consider, but not deem dispositive, "this comparison in reaching a determination of whether there was a good faith job search"). But the record before us does not compel that discussion. Relator may have testified that her unpredictable schedule kept her from searching for another job, but our record does not include that testimony. Nor does our record contain any evidence that relator made any effort, of any kind, to conduct any job search at all. Under these circumstances, we cannot conclude that the commission abused its discretion by denying wage-loss compensation.

{¶13} In conclusion, we agree with respondents that relator had the burden to prove her entitlement to working-wage-loss compensation. Absent evidence of a good-faith job search, or evidence supporting her argument that a job search was unnecessary under the circumstances, the commission did not abuse its discretion in denying that compensation. Therefore, we sustain respondents' objections.

{¶14} Based on our independent review, we adopt the findings of fact contained in the magistrate's decision, but decline to adopt the magistrate's conclusions of law. The requested writ of mandamus is denied.

Objections sustained,
writ of mandamus denied.

BROWN and KLATT, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Maria Marrero,	:	
Relator,	:	
v.	:	No. 08AP-922
The Industrial Commission of Ohio and Life Care Centers of America, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on April 29, 2009

Shapiro, Shapiro & Shapiro Co. LPA, Daniel L. Shapiro and *Leah P. VanderKaay*, for relator.

Richard Cordray, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

Buckingham, Doolittle & Burroughs, LLP, and *Deborah Sesek*, for respondent Life Care Centers of America, Inc.

IN MANDAMUS

{¶15} Relator, Maria Marrero, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its order which denied relator's application for wage loss compensation and ordering the commission to grant her that compensation.

Findings of Fact:

{¶16} 1. Relator sustained a work-related injury on December 9, 2006, and her workers' compensation claim has been allowed for "sprain shoulder/right upper arm."

{¶17} 2. Relator was off work from December 10, 2006 through January 3, 2007.

{¶18} 3. Relator's treating physician released her to return to work in a light-duty capacity provided that she not use her right arm and not lift over 20 pounds.

{¶19} 4. Relator's employer, respondent Life Care Centers of America, Inc. ("employer"), provided relator with light-duty employment within her restrictions.

{¶20} 5. The record is clear that, for the next several months, relator worked intermittently. As documented in a letter dated June 5, 2007 from Thomas A. Walden, the employer's director of human resources, relator worked as follows:

> Off work December 10th - January 3rd
> Worked one day January 4th
> Off work January 5th - 14th
> Worked January 15th
> Off work January 16th - 25th
> Worked January 26th - March 1st
> Off work March 2nd - March 12th
> Worked March 13th - 28th
> Off work March 29th - April 26th
> Worked April 27th – present

{¶21} 6. In September 2007, relator sought working wage loss compensation beginning January 27, 2007. Relator attached thereto her records regarding days

worked. Her record keeping essentially mirrors the record keeping the employer provided in its June 5, 2007 letter with certain notable exceptions. Specifically, relator's records indicate that on March 2 and 5, 2007, sent home; March 6, 7, 9, 10 and 12, 2007, taken off schedule; April 1 through 25, 2007, not scheduled; July 2007 worked full time light-duty work; July 31, 2007, sent home; August 7, 2007, sent home; first week of August 2007, worked five days; second week of August 2007, worked four days; third week of August 2007, worked five days; fourth week of August 2007, worked two days; "[s]tarted cutting my hours no longer giving me full time 5 days a week schedule"; first week of September 2007, worked four days; second week of September 2007, worked two days; third week of September 2007, worked four days; fourth week of September 2007, worked two days; "[c]ut schedule more."

{¶22} 7. The record also contains forms/records for the period July 19 through October 10, 2007. On these forms are the names of 18 employees, including relator. The form indicates that an "R" indicates a "requested day off" and a "V" indicates a "vacation day." Neither "R" nor "V" is used to designate any days for relator. Instead, the only letter designations are "N" and "X." No explanation is provided for these two letters. These records appear to indicate that relator did not request any days off or vacation days during this time period.

{¶23} 8. Relator did not submit any evidence which would indicate that she sought other employment during the relevant time period.

{¶24} 9. Relator's request for wage loss compensation was granted by order of the Ohio Bureau of Workers' Compensation ("BWC") dated February 28, 2008. That order specifically states:

> Injured worker request working wage loss from 1-27-07 through the present and to continue with supporting documentation. Administrator grants request minus any period of time the injured worker was off work receiving temporary total compensation.
>
> This decision is based on:
> Return to work information. The injured worker will be granted working wage loss beginning 1-27-07 to 2-28-07. Injured worker returned to work on 3-1-07. Working wage loss will resume again for period 4-28-07 and continue with documentation.

{¶25} 10. The employer appealed and the matter was heard before a district hearing officer ("DHO") on April 8, 2008. The DHO vacated the prior BWC order and denied relator wage loss compensation on grounds that she failed to submit the requisite proof as enumerated in Ohio Adm.Code 4125-1-01 for calculating the requested working wage loss and failed to submit evidence of the required good-faith job search to supplement the request for working wage loss based upon reduced hours of work. Specifically, the DHO also stated:

> District Hearing Officer finds claimant was released to return to work with restrictions by Dr. Strimbu as of 01/27/2007 and returned to work light duty with the employer of record.
>
> District Hearing Officer finds the physician of record did not restrict the number of hours worked and did release claimant to continue working eight hours per day. District Hearing Officer finds the claimant returned to work light duty at the same rate of pay but apparently was not scheduled for 40 hours per week per testimony at hearing.

{¶26} 11. Relator's appeal was heard before a staff hearing officer ("SHO") on June 11, 2008. The SHO affirmed the prior DHO's order and denied relator's request for wage loss compensation:

> The Injured Worker's representative clarified that working wage loss compensation is being requested for the periods of 01/27/2007 through 03/28/2007 and 04/27/2007 through 04/08/2008. The request is denied. The Staff Hearing Officer finds that the Injured Worker returned to work on 01/27/2007 in a position other than her former position of employment due to physical restrictions caused by the allowed conditions. This finding is based on the records of Dr. Victor Strimbu. The Injured Worker did suffer a wage loss as she was not offered the same number of work hours that she had been working prior to the date of the injury. Wage loss compensation, however, is denied for the reason that there is no evidence that the Injured Worker engaged in a good faith job search for alternate work consistent with her physical restrictions in order to mitigate her wage loss. All proof on file was reviewed and considered.

{¶27} 12. Relator's appeal was refused by order of the commission mailed July 1, 2008.

{¶28} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶29} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶30} Relator contends that the commission abused its discretion by denying her wage loss compensation based solely upon her failure to conduct a job search without considering the circumstances surrounding her employment situation. For the reasons that follow, this magistrate agrees.

{¶31} Entitlement to wage loss compensation is governed by R.C. 4123.56(B)(1) which provides:

> If an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment due to an injury * * *, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of two hundred weeks[.] * * *

{¶32} In considering a claimant's eligibility for wage loss compensation, the commission is required to give consideration to, and base the determination on, evidence relating to certain factors, including a claimant's search for suitable employment, a claimant's failure to accept a good-faith offer of suitable employment, and other actions of a claimant that constitute voluntarily limiting income from employment. The Supreme Court of Ohio has held that a claimant is required to demonstrate a good-faith effort to search for suitable employment which is comparably paying work before a claimant is entitled to both nonworking wage loss and working wage loss compensation. *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210; *State ex rel. Reamer v. Indus. Comm.* (1997), 77 Ohio St.3d 450; and *State ex rel. Rizer v. Indus. Comm.* (2000), 88 Ohio St.3d 1. A good-faith effort

necessitates a claimant's consistent, sincere, and best attempt to obtain suitable employment that will eliminate the wage loss.

{¶33} A return to full-time employment does not automatically eliminate a claimant's duty to search for comparably paying work. *State ex rel. Yates v. Abbott Laboratories, Inc.,* 95 Ohio St.3d 142, 2002-Ohio-2003. However, it is equally true that the Supreme Court has held that the job search is not mandatory. *State ex rel. Timken Co. v. Kovach*, 99 Ohio St.3d 21, 2003-Ohio-2450. Rather, under certain circumstances, a claimant's failure to continue to seek employment will be excused. The overriding concern is to ensure that a lower paying position, regardless of the number of hours worked, is necessitated by the disability and is not motivated by a claimant's lifestyle choice. *Timken*; *Yates*.

{¶34} As such, in examining a claimant's failure to search for another job, the court must use a broad analysis that goes beyond mere wage loss. *Timken*, at ¶25. This broader analysis was first emphasized in *State ex rel. Brinkman v. Indus. Comm.* (1999), 87 Ohio St.3d 171, where the Supreme Court first recognized that, under some situations, it would be inappropriate to ask a claimant to leave a good thing solely to reduce a wage differential. As the court stated in *Brinkman*, a broad analysis is necessary in light of the temporary nature of wage loss compensation which ends after 200 weeks.

{¶35} Recently, this court released *State ex rel. Jackson v. Indus. Comm.*, 10th Dist. No. 08AP-498, 2009-Ohio-1045. In that case, the commission had denied the claimant's application for working wage loss compensation on grounds that the claimant

had failed to conduct the required ongoing good-faith job search. In this court, the claimant argued that she was not required to continue to look for comparably paying work because she was working an average of 45.8 hours per week in her new employment. Also, the claimant argued that her longevity in her former employment was the main basis for her high pre-injury earnings and not because she had unique skills or knowledge that could produce comparably paying work.

{¶36} This court granted a writ of mandamus and ordered the commission to pay the claimant wage loss compensation. This court stated "the analysis of whether a claimant should be excused for failing to search for comparably paying work must be flexible and broad, and is subject to review on a case-by-case basis," and that the overriding concern is to ensure that a lower-paying position, regardless of hours, is necessitated by the disability and not motivated by the lifestyle choice. Id. at ¶7.

{¶37} This case is unusual in one major respect—claimant is working for the same employer for which she worked at the time of her injury. Ordinarily, in cases involving wage loss compensation, the claimant is no longer working for their original employer but is now working for a different employer, often performing work which is vastly different from the work performed at the time they were injured. In this particular case, the magistrate finds this to be very significant.

{¶38} Here, it is undisputed that relator has not sought other employment besides the job she is currently performing for her employer. Further, based upon the evidence relator submitted, it is equally clear that relator made the argument that her employer had been limiting her hours. There is also evidence in the record that relator

did not request any days off during a certain period of time. If it is true that her employer has been limiting the number of hours that relator is scheduled to work, then there might be some merit to relator's argument that she was unable to search for other work because, while she expected to be working full time, her employer was not providing her with full-time employment and, on several occasions, her employer sent her home after she reported to work. Also, at oral argument, relator's counsel argued that perhaps the employer had not really made a good-faith offer of modified work. The employer did not fire relator, but instead limited the hours she was scheduled to work.

{¶39} The Supreme Court has held claimants accountable for voluntarily limiting their income. Conversely, this magistrate finds it appropriate that an employer who rehires one of their own injured workers and purposefully limits the number of hours of work given that claimant to work, should likewise be held accountable for their responsibility in causing the claimant to suffer a wage loss. It appears that relator is making this argument here.

{¶40} In the present case, it is clear that relator's evidence raised the issue of whether or not her employer was limiting her hours in such a way that relator's ability to search for other employment was compromised.

{¶41} Here, the commission merely cited the rule. The commission failed to provide any analysis. Because the commission did not explore the circumstances surrounding relator's failure to seek other employment and because the record before this court substantiates relator's argument that the hours she was working for her

employer were varied by the employer and not because of any request may by relator or a lifestyle choice, this magistrate finds that the commission did abuse its discretion.

{¶42} Accordingly, it is this magistrate's conclusion that this court should issue a writ of mandamus ordering the commission to vacate its order which denied relator wage loss compensation and order the commission to issue a new order, either granting or denying the requested compensation, after exploring the reasons why relator was not working full time and how that impacted on her ability to seek other employment.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).