[Cite as *State ex rel. Fugate v. Indus. Comm.* , 2009-Ohio-324.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Timothy J. Fugate,	:	
Relator,	:	
v.	:	No. 08AP-325
Industrial Commission of Ohio and D & D Mechanical Sheet Metal, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on January 27, 2009

E.S. Gallon & Associates, Joseph R. Ebenger, and *Joan B. Brenner*, for relator.

Richard Cordray, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

BROWN, J.

{¶1} Relator, Timothy J. Fugate, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order finding relator had been overpaid temporary total disability compensation from the period of September 2, 2002 to June 16, 2006, on the basis that relator had worked during that time. Relator also requests that this court vacate the commission's additional finding that relator committed civil fraud by concealing

from physicians, as well as the Ohio Bureau of Workers' Compensation, the fact that he was working during the relevant time period.

{¶2} This matter was referred to a magistrate of this court, pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, recommending that this court deny relator's request for a writ of mandamus. (Attached as Appendix A.) No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's recommendation, relator's requested writ of mandamus is denied.

Writ of mandamus denied.

BRYANT and SADLER, JJ., concur.

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[Cite as *State ex rel. Fugate v. Indus. Comm.* , 2009-Ohio-324.]

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Timothy J. Fugate,	:	
Relator,	:	
v.	:	No. 08AP-325
Industrial Commission of Ohio and D & D Mechanical Sheet Metal, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered September 23, 2008

E.S. Gallon and Associates, Joseph R. Ebenger and *Joan B. Brenner*, for relator.

Nancy H. Rogers, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} Relator, Timothy J. Fugate, 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 finding that relator had been overpaid temporary total disability ("TTD") compensation for the period September 2, 2002 to June 16, 2006 on the

basis that relator had worked during that time period. The commission also made a finding of civil fraud on the basis that relator had concealed the fact that he was working from his doctor and other doctors who examined him as well as from the Ohio Bureau of Workers' Compensation ("BWC"). Relator requests that this court also vacate the commission's finding of fraud.

Findings of Fact:

{¶5} 1. Claimant sustained a work-related injury on March 10, 2000, and his claim was originally allowed for "lumbosacral sprain." Between 2002 and 2005, relator's claim was additionally allowed for the following conditions: "major depressive disorder; pain disorder; aggravation of pre-existing arthritis of the lumbar spine; lumbosacral spondylosis, degenerative disc disease L4-5 and L5-S1."

{¶6} 2. From the date of injury through 2005, relator was paid TTD compensation and/or living maintenance payments for different time periods. At times, those payments were terminated when relator's currently allowed conditions reached maximum medical improvement; however, as new conditions were allowed, TTD compensation was reinstated.

{¶7} 3. Relator did not return to employment at the job he had on the date he was injured.

{¶8} 4. In March 2007, the BWC's Special Investigations Unit ("SIU") filed a motion requesting that there be a finding of civil fraud and that an overpayment of TTD compensation be declared for the period June 8 through October 20, 2002, and from October 25, 2002 through June 16, 2006. The basis for the request was the allegation

that relator had been working while receiving TTD compensation during the periods at issue.

{¶9} 5. The SIU submitted the following evidence in support of the allegation that relator had been working: (a) the SIU presented copies of checks made payable to claimant's wife Candy, including four checks from Alternative Heating and Cooling ("Alternative H&C"). Check number 1117 in the amount of $300 was issued to Candy Fugate on July 3, 2003; check number 1119 in the amount of $400 was issued to Candy Fugate on July 4, 2003 and the memorandum line indicated the check was for accounting work; check number 1127 in the amount of $280 was issued to Candy Fugate on July 12, 2003 and the memorandum line indicated the payment was for bookwork; and check number 1129 in the amount of $680 was issued to Candy Fugate on July 17, 2003 and the memorandum line indicated that the payment was for bookkeeping. (b) Agents from the SIU interviewed Mark Gagnon, the owner of Alternative H&C in November 2004. At first, Gagnon indicated that relator had not performed any work for him, but that his wife, Candy, had performed some work for him during the summer. (c) However, Gagnon later recanted and indicated the following: he approached relator during the summer 2003 to subcontract jobs for Alternative H&C; he did not know that relator had a claim with the BWC; he paid relator $20 per hour for each job he worked; relator asked Gagnon to make the checks out to his wife so that his disability payments would not be affected; relator worked approximately two-to-three months in the spring/summer 2003 for a total of 140 hours and was paid approximately $2,800; relator installed duct-work, small hanging pipes, and did some brazing on copper pipes; and relator did not perform any heavy jobs because Gagnon knew relator had a bad back. Gagnon further stated that relator's wife,

Candy, had never worked for his company in any capacity. (d) The SIU also presented checks made out to relator's wife Candy, from various individuals. William Estep paid relator $51.64 and $90 for furnace and plumbing work. Estep recommended relator to Rosiland Morris to do some furnace repair work. Morris paid relator $100. John Ritter paid relator $130 to fix the brakes on his car (this included $120 to cover the cost of the parts). (e) The SIU also presented four checks payable to relator's wife Candy, from Smith Heating and Cooling ("Smith H&C"). Those checks were in the amounts of $135 (June 8, 2002), $800 (September 2, 2002), $130.09 (September 13, 2002), and $250 (February 2, 2004). (f) Agents from the SIU interviewed relator in June 2005. According to the SIU report, relator admitted he did some work for which he received payment during the period in which he was receiving TTD compensation. Specifically, relator admitted he had been employed by both Alternative H&C and Smith H&C, that he completed work for Estep, Morris and Ritter, and that he had been employed by Burns Security while attending rehabilitation. Concerning his work for Smith H&C, relator indicated that he worked there for approximately one month as a foreman supervising three employees. Relator indicated he oversaw the installation of residential heating and cooling units and admitted that the owner, Ron Darrin, gave him two checks in the amount of $500 and $800, which he cashed in Tennessee during a trip for a funeral.

{¶10} 6. Relator submitted the affidavit of Ron Darrin, the owner of Smith H&C. Darrin explained that check number 2390, dated June 8, 2002 and written to relator's wife, was to reimburse her for food purchased for a company picnic. Darrin further indicated that check number 2538, dated September 2, 2002 and written to relator's wife in the amount of $800, was a loan to enable relator to attend a funeral in Tennessee.

Darrin further indicated that check number 2573, dated September 13, 2002, in the amount of $130.09 and payable to relator's wife, was to reimburse her for parts she picked up for Darrin at AutoZone. Darrin also indicated that check number 3352, dated February 2, 2004, in the amount of $250 and made out to relator's wife, was to compensate relator for the time relator spent accompanying Darrin to Athens, Ohio, where Darrin was going to perform some work for Domino's Pizza. Darrin also addressed the supervisory work relator performed for him. Darrin indicated that he requested that relator oversee some renovation work at a sports bar/restaurant Darrin owned in Kettering, Ohio. Darrin indicated that relator was not to be paid; however, he was to receive a percent interest in Smith H&C. Lastly, Darrin identified an invoice dated October 11, 2005, for work performed at Daymont Insurance in Dayton, Ohio. Darrin indicated that the employees of Daymont Insurance who indicated that relator had performed furnace work were mistaken. Darrin opined that those women mistakenly identified relator as performing the work.

{¶11} 7. The BWC's motion was heard before a district hearing officer ("DHO") on April 18, 2007. The DHO determined that the BWC sustained its burden of proving by a preponderance of the evidence that relator knowingly used deception to obtain TTD compensation. Specifically, the DHO's order provides:

> * * * [T]he injured worker's counsel conceded that the injured worker had worked and received Temporary Total Disability Compensation for the time period of 03/31/2003 to 11/26/2003. During that time period the injured worker was employed with Alternative Heating and Cooling. The injured worker was paid by check. However, those checks were made out to his wife, Candy. In addition the 1099 issued for 2003 was also made out to the injured worker's wife, Candy.

The injured worker had also received money from Ron Darrin, owner of Smith's Heating and Cooling. Mr. Darrin gave the injured worker two checks; one for $500 and one for $800. During an interview the injured worker stated that he quit working for Smith's Heating and Cooling because it simply did not work out. The first check from Smith's Heating and Cooling dates back to 09/02/2002.

The Hearing Officer finds that the injured worker was employed in the same occupation he was at the time of the injury from 09/02/2002 through 11/26/2003 and then worked again on 10/11/2005 for Smith's Heating and Cooling while simultaneously receiving Temporary Total Disability Compensation. During this time period the injured worker had continuously informed his physicians, Dr. Donnini, Dr. Bromby, Dr. Cunningham and Dr. Farrell, that he was not working. The injured worker's physician of record did not have the knowledge that the injured worker had been working and in the same position he was in when he was injured. The Hearing Officer finds that the injured worker's employment in the heating and cooling industry serves as a representation of a falsehood that the injured worker was claiming to be unable to work over the same period of time in which he was apparently able to work. The Hearing Officer finds that the injured worker's ability to perform employment activities is a material fact in the Workers' Compensation disability certification process. The Hearing Officer finds that the injured worker knowingly signed at least five C-84 motions requesting Temporary Total Disability Compensation with the intent of misleading those examining it to believe and rely upon the misrepresentation that he was unable to work and the facts contained in said motions were correct and valid. The District Hearing Officer finds that the Bureau of Workers' Compensation justifiably relied upon the injured worker's representation of his inability to work as there was no evidence before it to the contrary. Finally, the District Hearing Officer finds that the Bureau of Workers' Compensation suffered an injury in the form of economic loss for compensation paid in the claim, proximately caused by the reliance on the injured worker's assertion that he was unable to work during a period of time in which it was later discovered he was employed with Alternative Heating and Cooling and Smith's Heating and Cooling.

> The Hearing Officer finds that the injured worker's argument that he had not worked after 11/26/2003 and therefore should be entitled to Temporary Total Disability Compensation after that date to be unpersuasive. The Hearing Officer finds that the injured worker did not inform his treating physicians that he had been working and had been working at the same job that he had prior to his injury. The injured worker told all of his treating physicians as well as independent medical examiners that he was unable to work.
>
> * * *
>
> This order is based on the C-84s submitted and signed by the injured worker, the injured worker's statements regarding his employment with Alternative Heating and Cooling and Smith's Heating and Cooling, copies of the cancelled checks from Smith's Heating and Cooling and the reports of Dr. Donnini dated 09/22/2003, Dr. Bromby dated 06/03/2003, Dr. Cunningham dated 08/25/2004, Dr. Farrell dated 08/30/2004, all stating the injured worker had informed them that he was not working and not capable of work.

{¶12} 8. Relator appealed the DHO's order and the matter was heard before a staff hearing officer ("SHO") on May 29, 2007. The SHO affirmed the prior DHO's order and granted the BWC's motion. The SHO's order is essentially identical to the DHO's order with one exception—near the end of the SHO's order, the SHO addressed the arguments relator made in support of his appeal. In that regard, the SHO stated:

> The Staff Hearing Officer does not find persuasive the inconsistent statements made by Ron Darrin that the injured worker was not in fact employed by him. Further, the Staff Hearing Officer does not find persuasive the injured worker's submission of evidence showing that certain checks were in fact cashed after the district hearing. The Hearing Officer does not find persuasive the injured worker's submission of receipts that were also created after the last hearing. The Staff Hearing Officer finds this evidence to be nothing more than a subterfuge designed to avoid liability in this claim. The Hearing Officer does not find them to be persuasive evidence that fraud was not committed by the injured worker.

{¶13} 9. Relator's subsequent appeal was denied by order of the commission mailed June 28, 2007.

{¶14} 10. Relator's request for reconsideration was denied by order of the commission mailed August 23, 2007.

{¶15} 11. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶16} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶17} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶18} In order to establish fraud, the BWC needed to establish the following elements: (1) a representation or, where it has a duty to disclose, a concealment of fact;

(2) which is material to the transaction at hand; (3) made falsely with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a result in injury proximally caused by the reliance. *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69.

{¶19} Relator was injured in March 2000 and received an extensive period of TTD compensation. During the relevant time period, relator's treating physicians certified that he was unable to return to his former position of employment due to continued low back pain radiating into both legs. With the exception of one C-84 dated August 29, 2003, relator continually indicated that he had not worked in any capacity during the period of disability. The one time relator indicated that he did work was when he worked for Burns Security. As such, relator's treating physicians had no idea that relator was working. Further, relator likewise did not inform other physicians who performed independent medical exams during the relevant time period that he was working. Relator did not inform his case specialist that he was involved in work activity when plans were updated for him in July and August 2003. Because relator was not permitted to work while receiving TTD compensation and because he was involved in work of a similar nature to the work he had been performing when he was injured, the concealment of the fact that he was working was material to the transaction at hand and both the doctors and the BWC relied on that information in awarding relator TTD compensation.

{¶20} The evidence shows that relator received checks from both Alternative H&C and Smith H&C as well as checks from individuals for work he performed for them.

Relator insisted that all of the checks be made out in his wife's name and not his own. Also, the 1099 form from Alternative H&C was likewise prepared in the name of relator's wife. This is further evidence of relator's intent to conceal the fact that he was engaged in work activity while receiving TTD compensation.

{¶21} As noted previously in the findings of fact, the DHO and SHO orders are virtually identical. Both hearing officers provided the same rationale for the determination that relator was performing work activity during the relevant time period. Specifically, both hearing officers noted that relator's counsel conceded that he had worked and received TTD compensation from March 31 to November 26, 2003, when he was employed with Alternative H&C. Both noted that the checks and the 1099 were all made out in the name of relator's wife. Both noted that relator received two checks from Smith H&C, one for $500 and one for $800 and that the first check dated back to September 2, 2002. Both determined that relator was employed in the same occupation he was at the time of his injury from September 2, 2002 through November 26, 2003, and then again on October 11, 2005 when he worked for Smith H&C. Both noted that during this time, relator continuously informed his physicians, Drs. Donnini, Bromby, Cunningham and Farrell that he was not working. Both noted that relator's treating physician did not have knowledge that he had been working in the same position he was when he was injured. Both hearing officers determined that relator's employment in the heating and cooling industry served as a representation of falsehood that he was claiming to be unable to work when he was apparently able to do so. Both found that relator's ability to perform employment activities was a material fact, that he knowingly signed at least five C-84 forms with the specific intent of misleading those examining him to believe and rely upon

the misrepresentation that he was unable to work, and that the BWC justifiably relied on those representations inasmuch as there was no evidence before the BWC to the contrary. Lastly, both hearing officers concluded that the BWC suffered an injury in the form of economic loss for compensation paid in relator's claim proximally caused by its reliance on relator's assertion that he was unable to work during a period of time in which it was later discovered that he was employed with Alternative H&C and Smith H&C.

{¶22} Upon review of the rationale set out by both the DHO and the SHO, the magistrate finds that the commission did not abuse its discretion in finding that relator was working during the relevant time period and, inasmuch as relator was working in the same industry, he was clearly able to continue working. Further, the commission did not abuse its discretion in making the determination that relator had committed civil fraud.

{¶23} In this mandamus action, relator attacks that portion of the SHO's order which differed from the DHO's order. Specifically, the SHO addressed evidence and assertions purportedly made by relator after the DHO hearing. Specifically, the SHO's order provides:

> The Staff Hearing Officer does not find persuasive the inconsistent statements made by Ron Darrin that the injured worker was not in fact employed by him. Further, the Staff Hearing Officer does not find persuasive the injured worker's submission of evidence showing that certain checks were in fact cashed after the district hearing. The Hearing Officer does not find persuasive the injured worker's submission of receipts that were also created after the last hearing. The Staff Hearing Officer finds this evidence to be nothing more than a subterfuge designed to avoid liability in this claim. The Hearing Officer does not find them to be persuasive evidence that fraud was not committed by the injured worker.

{¶24} In challenging this paragraph, relator essentially makes two arguments. First, in rejecting relator's evidence, the SHO found that the affidavit of Ron Darrin was inconsistent and unpersuasive without identifying the specific inconsistencies. Second, relator argues that the SHO cited and relied on specific documents which did not exist in the record. Specifically, the SHO noted the $500 check from Darrin as payment for services, copies of checks cashed after the April 18, 2007 DHO's hearing, and copies of receipts created after the April 18, 2007 DHO's hearing. Because the SHO failed to identify the inconsistencies in Darrin's affidavit, and because the SHO cited and relied on specific documents which relator argues do not exist in the record, relator seeks a writ of mandamus from this court ordering the commission to vacate its finding of fraud and ordering the commission to find that he had not been overpaid TTD compensation. For the reasons that follow, the magistrate rejects relator's arguments.

{¶25} First, this additional paragraph found in the SHO's order does not change the fact that both the SHO and DHO set out detailed explanations concerning the evidence submitted by the BWC in support of its motion. As noted previously, the commission did not abuse its discretion in declaring an overpayment of TTD compensation and further finding fraud in this case. This paragraph is superfluous and does not, in any way, affect the findings and conclusions made by the SHO which precede it. As noted previously, the paragraph relator challenges addressed evidence and arguments relator purportedly made at the SHO's hearing which he did not make at the DHO's hearing.

{¶26} Second, with regard to the affidavit of Ron Darrin, it is clearly inconsistent with all the other evidence in the record as well as the statements Darrin made to the SIU

agents when they interviewed him. During that interview, Darrin specifically stated that relator worked for him and that he *paid* relator with two checks, one for $500 and one for $800. In his affidavit, Darrin indicated that the checks he made out to relator's wife had nothing to do with any work relator had performed for his company. In fact, in his affidavit, Darrin indicated that part of the money was a loan which Darrin never expected to be repaid. The statements in his affidavit are inconsistent with the statements he made in the interview, statements made by relator to the SIU agents that Darrin had paid him two checks, one for $500 and one for $800, as well as the other evidence in the record. The SHO could have specifically noted the inconsistencies; however, the magistrate finds that the SHO's failure to do so does not affect the SHO's determination that relator had worked while receiving TTD compensation, committed fraud, and was overpaid that compensation.

{¶27} With regards to the specific documents relator contends are not in the record, the magistrate specifically notes that while there is a copy of the $800 check in the record, there is no copy of the $500 check. However, during their interviews with the SIU agents, both relator and Darrin stated that Darrin had paid relator with two checks; one for $800 and one for $500. There is some evidence in the record within the report from the BWC's SIU that the $500 check existed and, the fact that a copy of this check was not scanned into the file is immaterial. Lastly, relator argues that he did not present any copies of checks cashed after the DHO's hearing, nor copies of any receipts created after the DHO's hearing. In spite of the fact that relator argues that neither the check for $500, nor the checks cashed after the DHO's hearing, nor the receipts created after the DHO's hearing were submitted into evidence, neither relator nor his counsel have submitted

affidavits either to the commission during the appeal from the SHO's order, nor to this court in this mandamus action. The attorney general has submitted an affidavit indicating that both she and her paralegal were unable to find copies of these referenced documents during a search of the BWC's online Dolphin files. There is no transcript from the SHO's hearing and the magistrate specifically notes that the attorney who represented relator at that hearing is the same attorney who is representing him in this mandamus action. The magistrate finds that the fact that those items were not scanned into the Dolphin system does not establish that they were not submitted at the SHO's hearing.

{¶28} Because relator has not established actual error on the part of the SHO, and because the magistrate finds that this one paragraph allegedly addressing additional evidence relator had not presented to the DHO, does not constitute grounds for this court to find that the commission abused its discretion in finding that relator had been working while receiving TTD compensation, that he committed fraud in order to receive those payments, and declaring an overpayment for the entire amount because relator's work activities demonstrated that he was able to perform work outside of the physical restrictions which had been placed upon him.

{¶29} At oral argument, relator's counsel conceded that relator did work and was guilty of fraud for the period March 31, 2003 through November 23, 2003 only. Relator contends that he did not work either before or after this small period of time and that he is entitled to all of the TTD compensation paid to him both before and after this period. Further, relator agues that there is no evidence upon which the commission could rely in

finding an overpayment specifically beginning September 2, 2002 and no evidence he worked after November 23, 2003. The magistrate disagrees.

{¶30} The commission found an overpayment beginning September 2, 2002 because this date represented the earliest date on the checks relator received from Smith H&C. Although relator contends that this $800 check was not work related, given statements made to the SIU investigators and relator's repeated deception, apparently the commission did not find his explanation credible.

{¶31} With regards to the overpayment found beyond November 23, 2003, the record contains evidence that relator performed heating and cooling work at Daymont Insurance in October 2005. Employees at Daymont Insurance identified relator as one of the men performing the work after viewing a copy of relator's driver's license. The fact that relator submitted an affidavit from Darrin stating that these employees were mistaken does not change the fact that there was some evidence relator was the person who actually performed the work.

{¶32} Relator uses the above argument to say that he is entitled to receive TTD compensation after November 23, 2003 because: (1) the commission never actually proved he worked after November 23, 2003, and (2) working one day in October 2005 should not render him ineligible for TTD compensation. This magistrate disagrees.

{¶33} Unlike other cases this court has reviewed where claimants performed some remunerative work activity while receiving TTD compensation, relator herein was performing the same work he had performed at the time of his injury. As such, from a physical exertional level, relator was capable of returning to his former position of employment. Relator's activities were clearly outside the restrictions of the doctors.

Because of this, all of relator's medical evidence certifying that he continued to be temporarily and totally disabled after November 23, 2003 lacks credibility—relator was performing his former work activity. TTD compensation pays a claimant when they cannot perform their former job. The record indicates that relator could actually perform his former job and the commission did not abuse its discretion by finding the entire period to be an overpayment.

{¶34} Further, relator's citation to *State ex rel. Griffith v. Indus. Comm.*, 109 Ohio St.3d 479, 2006-Ohio-2992, does not require a different finding. In *Griffith*, while receiving TTD compensation, the claimant was involved in "work activity" that involved answering phones, running errands, driving cars, and putting away tools. In finding that this activity did not bar the receipt of TTD compensation, the Supreme Court of Ohio specifically noted that the claimant's *ability* to engage in work activity was relevant to the date after which the claimant had last actually worked *only* if the activity conflicted with the claimant's medical restrictions and his purported ability to return to his former job. In the *Griffith* case, the commission never made that finding; however, in the present case, the commission specifically found that relator was engaged in work activity outside his medical restrictions and similar to that which he performed at his former position of employment indicating he was capable of continuing to perform those activities. This distinction is critical and distinguishes the facts of this case from the facts of the *Griffith* case.

{¶35} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in finding that he performed work activity outside of his purported medical restrictions while receiving TTD compensation

and that he received that compensation fraudulently by concealing his work activities from his treating physician and other examining physicians, by having the checks made out in the name of his wife, and by signing the C-84 forms which indicated that he had not worked in any capacity during the time certified on the application. Because the commission did not abuse its discretion in finding fraud, the declaration of an overpayment for the entire period of TTD compensation likewise does not constitute an abuse of discretion. As such, it is this magistrate's conclusion that this court should deny relator's request for a writ of mandamus.

/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).