

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Thomas L. Bumpus,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-573
	:	
City of Dayton and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on June 3, 2010

Wright & VanNoy, LPA, Inc., and Anthony S. VanNoy, for relator.

John J. Danish, City Attorney, and *Norma M. Dickens*, for respondent City of Dayton.

Richard Cordray, Attorney General, and *Joseph C. Mastrangelo*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Thomas L. Bumpus, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its

order declaring an overpayment of temporary total disability compensation for the period December 7, 2006 through June 27, 2007, and finding that the compensation was fraudulently obtained, and to enter an order reinstating temporary total disability compensation.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In his decision, the magistrate first noted that the orders of both the district hearing officer and staff hearing officer "suggest that an incorrect standard was applied" when both orders indicate 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.' " (Emphasis added.) (Magistrate's Decision, ¶41.) As the magistrate properly noted, "that relator may have demonstrated an *ability* to perform employment activities cannot be the basis for terminating [temporary total disability] compensation or declaring an overpayment of [temporary total disability] compensation." (Emphasis added.) (Magistrate's Decision, ¶41.)

{¶3} The magistrate next noted "there is no evidence in the record that relator's activities ever generated income or even that a sale was made." (Magistrate's Decision ¶42.) Applying the standard set forth in *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98 Ohio St.3d 20, 2002-Ohio-7038, the magistrate concluded "there is no evidence in the record upon which the commission could have relied to support a determination to

terminate [temporary total disability] compensation or declare an overpayment of [temporary total disability] compensation." (Magistrate's Decision, ¶43.)

II. Commission's Objection

{¶4} The commission objected to the magistrate's conclusion that "there is no evidence in the record upon which the commission could have relied to support a determination to terminate TTD compensation." (Commission's objection, 1.)

{¶5} The commission's objection largely reargues the matters adequately addressed in the magistrate's decision. More specifically, the commission's memorandum in support of its objection suggests the magistrate improperly focused on whether relator received any compensation as result of his efforts in connection with the retail handbag store described in the magistrate's decision. According to the commission, the evidence that he worked in the store, regardless of whether he received compensation for his efforts, is sufficient to preclude payment of temporary total disability compensation and to require that relator repay the temporary total disability compensation he received while his handbag business was in operation.

{¶6} The magistrate directly addressed the commission's contention when he set forth the Supreme Court's standard for terminating temporary total disability compensation in circumstances like those present here. In *Ford*, the Supreme Court of Ohio stated that any remunerative activity outside the former position of employment precludes temporary total disability compensation. Alternatively, the court held that activities medically inconsistent with the alleged inability to return to the former position of employment bar temporary total disability compensation, regardless of whether the

claimant is paid. More significant to the issues before us, the Supreme Court further stated that "activities that are not medically inconsistent, however, bar [temporary total disability compensation] *only when a claimant is remunerated for them.*" (Emphasis added.) (Magistrate's Decision, ¶37, citing *Ford* at ¶19.)

{¶7} As the magistrate properly observed, the evidence does not indicate relator received any compensation whatsoever for any effort he expended in attempting to sell handbags. Nor does the evidence suggest the activity in which he engaged was medically inconsistent with his inability to return to his former position of employment. Absent evidence that relator received remuneration for his efforts, or that his efforts were medically inconsistent with his inability to return to his former position of employment, the commission's decision lacks the necessary evidence to support it. The magistrate properly determined a writ should issue; the commission's objection is overruled.

{¶8} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we issue a writ of mandamus ordering the commission to vacate its staff hearing officer's order of January 15, 2009, and to enter an order denying the bureau's April 2, 2008 motion.

*Objection overruled;
writ granted.*

BROWN and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Thomas L. Bumpus,	:	
Relator,	:	
v.	:	No. 09AP-573
City of Dayton and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 19, 2010

Wright & VanNoy, LPA, Inc., and Anthony S. VanNoy, for relator.

John J. Danish, City Attorney, and Norma M. Dickens, for respondent City of Dayton.

Richard Cordray, Attorney General, and Joseph C. Mastrangelo, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶9} In this original action, relator, Thomas L. Bumpus, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order declaring an overpayment of temporary total disability ("TTD") compensation for the period December 7, 2006 through June 27, 2007, and finding that the compensation was fraudulently obtained, and to enter an order reinstating TTD compensation.

Findings of Fact:

{¶10} 1. On August 29, 2002, relator sustained an industrial injury while employed as a laborer in the water department for respondent City of Dayton. On that date, while using a jackhammer, relator injured his right knee and right shoulder. The industrial claim (No. 02-848672) is allowed for:

Right knee & leg sprain; chondromalacia patellae right knee; tear right medial meniscus; synovitis right knee; tear cruciate ligament right knee; major depressive disorder; psychogenic pain; right shoulder acute joint sprain; right shoulder acromioclavicular joint sprain; right knee traumatic degenerative joint disease.

{¶11} 2. Relator returned to work at the water department following his August 29, 2002 injury. However, relator has not worked since his first arthroscopic right knee surgery in August 2003. He underwent a second arthroscopic surgery to his right knee in 2006.

{¶12} 3. On December 1, 2006, orthopedic surgeon and attending physician Jonathan J. Paley, M.D., wrote:

The patient returns today for follow-up evaluation of his right knee, due to a work injury from 08/20/2002. He also complains of ongoing right shoulder pain from a fall status post his right knee videoarthroscopy. He has a hearing coming up on 12/04/06 to address these issues. He

continues to do his home therapy. He states that the right knee is fairly painful for him still. He uses a cane to walk. He is currently not working.

Upon examination, he demonstrates an antalgic gait favoring the right lower extremity. He is ambulatory with a cane. There is tenderness to palpation over the medial and lateral joint lines. There is mild crepitation with active range of motion. There is 4/5 strength with flexion and extension of the right knee when compared with the left.

Examination of the right shoulder reveals guarded active range of motion due to pain. There is tremendous pain with cross-over maneuver and tenderness over the AC joint. There is also tenderness over the anterior and lateral aspects of the right shoulder. Impingement maneuver is painful for him. Neurovascular status of the right upper extremity is intact.

Disposition and Plans: At this time, we are awaiting for additional allowances involving the right knee and the right shoulder. Once these are allowed, we will be able to proceed with treatment for the right shoulder and also the patient is a candidate for Supartz injections for the right knee, which I feel he would benefit from. We will see him back in a few weeks time; earlier if needed. I have given him a prescription for Vicodin, 5/500 #30 with no refills.

{¶13} 4. On five C84s dated respectively December 7, 2006, January 9, February 5, March 15, and April 2007, Dr. Paley certified TTD from November 20, 2006 through an estimated return-to-work date of June 4, 2007.

{¶14} On the first page of the C-84s, the following query is posed: "Have you worked, in any capacity, (include full-time, part-time, self-employment or commission work) during the disability period shown above?" In response, relator marked the "No" box on each C-84.

{¶15} 5. The record indicates that the Ohio Bureau of Workers' Compensation ("bureau") paid to relator by warrant drawn upon the treasurer of the state of Ohio TTD compensation for the periods covered by the C-84s.

{¶16} Relator endorsed the backside of each warrant below the following warning:

NOTICE – READ BEFORE SIGNING

WARNING – If this warrant is to compensate you for permanent total disability, temporary total disability, living maintenance or wage loss not working benefits, you are not entitled to it if you are working. Therefore, you should return this warrant to the BWC immediately or risk criminal felony prosecution.

{¶17} 6. Earlier, on January 26, 2007, relator applied for and obtained a vendor's license at the office of the Montgomery County Auditor. On the application, relator listed his "Trade Name or DBA" as "Tee's Handbag." Relator listed his business location as "5607 N Dixie Dr Dayton OH 45414." Under "nature of business activity," relator wrote "General Merchandise."

{¶18} 7. In early February 2007, the bureau's special investigations unit ("SIU") was informed that relator had obtained a vendor's license while receiving TTD compensation. Receipt of the information prompted an SIU investigation into relator's activities.

{¶19} 8. Following a November 16, 2007 hearing, a staff hearing officer ("SHO") issued an order terminating TTD compensation effective June 26, 2007, based upon a finding that the industrial injury had reached maximum medical improvement ("MMI").

{¶20} 9. About one year after SIU received the above-noted information, SIU completed a report dated February 27, 2008.

{¶21} 10. On April 2, 2008, the bureau moved for a declaration of overpayment and for a finding of fraud. In support of its motion, the bureau submitted its February 27, 2008 report with attachments.

{¶22} 11. According to the SIU report:

On February 26, 2007, SA [special agent] Edwards conducted a pre-surveillance at 5607 N. Dixie Dr. Dayton, OH in an attempt to observe BUMPUS. The advertisement sign located above the store read, "Designer Bags & Lingerie". BUMPUS was observed looking out the window of the store.

On March 6, 2007, SA Edwards conducted pre-surveillance at Designer Bags & Lingerie in an attempt to observe BUMPUS. The building was empty and the lights were off. Edwards walked into Caribbean Sun, the business next door to Designer Bags & Lingerie in an attempt to find out if the owners knew BUMPUS. Edwards spoke with John Parker, who was the owner of the entire complex. Parker informed Edwards that BUMPUS rented the space from January 1, 2007 until the end of February 2007. Parker stated that BUMPUS informed him that he had to close down because he was not making any money. Parker also informed Edwards that BUMPUS had rented a booth at the Old Roberds Flea Market in West Carrollton. Edwards asked Parker if BUMPUS was the person working, and Parker replied, yes.

On March 13, 2007, SA Edwards received a call from Parker informing that he can be interviewed. Parker informed Edwards that he could not find BUMPUS' lease papers, and that BUMPUS paid his rent in cash. Parker stated BUMPUS put down a \$900 deposit and paid \$900 dollars for the months of January and February. Edwards asked Parker if he had the receipts, and Parker stated, yes.

On March 16, 2007, SA Edwards traveled to Caribbean Sun Tanning Salon in Dayton, Ohio, and interviewed John Parker in regards to BUMPUS renting space for his business. Parker informed Edwards that he is the president of Edward Investment and that he owns the building that BUMPUS was

renting space from. Parker stated BUMPUS asked about renting space from him at 5607 N. Dixie Dr. Dayton, OH. 45414. Parker stated rent was \$1000.00 but he accepted \$900.00 per month. Parker stated BUMPUS made a \$900.00 deposit on December 26, 2006 and rented the space from January 1, 2007 through February 28, 2007. Parker stated that BUMPUS paid his rent in cash, and provided Edwards with copies of the receipts which revealed that payments were made in cash.

Parker explained to SA Edwards, BUMPUS, invited him to see his operation at the Olde [sic] Roberds Flea Market in West Carrollton, OH. Parker stated he met a younger male at the flea market who introduced himself as BUMPUS'S partner. According to Parker, he has been over to BUMPUS'S store several times and stated BUMPUS was the only person observed working in the store. Parker stated on February 28, 2007, when he returned from out of town, he observed BUMPUS and a few other males moving merchandise out of the store. According to Parker, BUMPUS informed him that he was closing down because he was making no money. Parker stated BUMPUS was supposed to come back on March 5, 2007 to remove a piece of wood that he nailed in the store but never returned.

On March 19, 2007, SA Edwards traveled [to] Mr. Bubbles Laundromat located at 5606 N. Dixie Dr. Dayton, OH 45414, and interviewed Cyndi Wallen, the manager, in regards to BUMPUS' handbag business next door to her business. Wallen informed Edwards that she has been inside BUMPUS' store and viewed all of the merchandise. According to Wallen, BUMPUS stated he would give her a good price on all of his merchandise. Wallen stated that she refused to purchase anything because the prices were too high and for the fact that she would not pay those prices just because of the name on the merchandise. Wallen stated that BUMPUS sold handbags and clothes with such names as Gucci, Coach, Steve & Barry, Starter, and Fubu. Wallen stated she introduced several of her customers from Mr. Bubbles Laundromat to BUMPUS to help him generate more business, but no one was willing to pay the high prices that BUMPUS was charging. According to Wallen, there was no schedule posted on the front door or window which revealed the days and hours that BUMPUS was open for business.

Wallen stated that the store was never open when BUMPUS was not there. Wallen also informed that BUMPUS was the only person observed working his handbag and clothing business. Wallen explained that BUMPUS was not in business for long. According to Wallen, BUMPUS was in business from January of 2007 through the end of February 2007.

On March 19, 2007, SA Edwards traveled to the Caribbean Sun Tanning Salon located at 5609 N. Dixie Dr. Dayton, OH, and interviewed Carol William[s], the manager, in regards to BUMPUS' business selling handbags and lingerie. Williams informed Edwards that she observed BUMPUS moving his merchandise into the space next door around late December 2006 or early January 2007. According to Williams, BUMPUS used a U-Haul type truck and there were four (4) other males helping move the merchandise into the rental space. Williams stated that BUMPUS hired a sign company who came and hung the sign in front of BUMPUS' store. The name of BUMPUS' store was Designer Handbags & Lingerie. Williams stated she could not recall the name of the sign company. Williams informed Edwards that she was in the store on a few different times to drop off[f] his mail. Williams stated while in the store dropping off BUMPUS' mail, she never purchased anything. Williams stated that BUMPUS' prices were too high. According to Williams, BUMPUS hardly had any business. Williams stated that BUMPUS was always in the store when it was open. According to Williams, BUMPUS informed her that he was leaving because he was receiving no business. Williams stated BUMPUS moved out in late February 2007.

On March 27, 2007, SA Edwards traveled to Old Roberds Emporium located at 1100 E. Central Ave. W. Carrollton, OH in an attempt to locate BUMPUS' booth where he sells handbags and lingerie. Edwards observed booth 24 which read, Designer Handbags. Edward spoke with Judy at the front desk to inquire who rented booth 24. Judy stated BUMPUS was renting booth 24. Judy stated BUMPUS was logged into their system on March 11, 2007, but could have been at booth 24 longer. Judy stated that the facility is owned by Richard Brown.

On April 12, 2007, SA Edwards and SA Beth Parker conducted an undercover operation at Old Roberts [sic] Emporium. At approximately 9:10am, SA Parker entered Old Roberds Emporium and informed Edwards that the case where the Designer Handbags sign is located was empty. At approximately 11:00am, Edwards entered Old Roberds Emporium and did not observe BUMPUS' booth. Edwards proceeded to the front desk and spoke with the owner, Richard Brown[,] who informed that BUMPUS has not been seen in about 3 weeks. Brown stated that someone by the name of Lance moved BUMPUS' merchandise last week. Brown stated BUMPUS currently owes renters fees. Edwards asked Brown if he could provide him with any paperwork regarding BUMPUS. Brown stated he would get together what he has. Edwards asked Brown if he could provide a statement. Brown informed Edwards to come back tomorrow at 10:30am and he would provide a statement and hand over any paperwork.

On April 13, 2007, SA Edwards interviewed Brown in regards to BUMPUS renting a booth to sell designer handbags. Brown informed Edward that BUMPUS used to work at the Keowee St. flea market. Brown stated when he opened Old Roberds Emporium several vendors from the Keowee Street flea market opened up booths at the emporium. Brown explained BUMPUS first rented booths from him in December of 2006. Brown stated BUMPUS rented three (3) booth spaces and combined them into one (1) large booth. Brown stated BUMPUS was charged \$50 dollars per booth per week making his weekly payment \$150 dollars. According to Brown, BUMPUS initially paid \$450 dollars which would have covered his renter's fees for three weeks. Brown stated BUMPUS was observed several times in his booth with another male (Lance) conducting business as usual. Brown informed BUMPUS worked from Thursday through Sunday 9am to 5pm. Brown explained BUMPUS was not getting a lot of business. Brown stated that BUMPUS came to him and informed that he was moving his operation to a location on N. Dixie Drive due to the lack of business. Brown stated a few of his employees and Lance help[ed] BUMPUS move his merchandise into the N. Dixie Dr. location. Brown stated the move happened in late December of 2006. Brown stated BUMPUS called him in late February of 2007 and asked if any booth space was for rent.

According to Brown, BUMPUS stated he was making no money and he heard that business had picked up at the emporium. Brown stated he informed BUMPUS he had one (1) booth he could rent.

When BUMPUS returned to Old Roberts [sic] Emporium around March 8, 2007, he was assigned booth 24. Brown stated that Lance helped BUMPUS move his merchandise in and was seen alongside BUMPUS in the booth. Brown stated BUMPUS had not paid his renter's fees since his return in early March and owes a total of \$300. BUMPUS contacted him around the 6th of April 2007 stating he was having heart and knee problems and informed he was moving his merchandise out. Brown explained BUMPUS informed he would settle up the bill, but he never did. Edwards asked Brown if he knew where BUMPUS took his merchandise. Brown stated a few of the vendors informed BUMPUS was moving his operation to either Turtle Creek Flea Market or Traders' World.

* * *

On September 19, 2007, SA Edwards obtained a statement from BUMPUS' physician of record, Dr. Jonathan Paley. Dr. Paley stated he was not aware that BUMPUS was engaged in any type of work activity. Dr. Paley stated he would not have continued to certify TT benefits and based on the information provided; BUMPUS is not considered to be temporarily and totally disabled. Therefore, Dr. Paley considered BUMPUS maximum medically improved (MMI) as of December 7, 2006 based on his voluntary return to self-employment as a salesman.

* * *

On February 19, 2008, SA Edwards received a call from BUMPUS inquiring. SA Edwards asked BUMPUS if he would be willing to come into the office for an interview. BUMPUS stated he has no representation; therefore, he will not be interviewed. Edwards thanked him for his time, and then terminated the call.

Conclusion

On December 7, 2006, BUMPUS re-entered the workforce by renting space from John Parker to sell his handbags. Several witness statements have been obtained proving BUMPUS was the individual working and selling his handbags at different locations. BUMPUS applied for and obtained his vendor's license on January 26, 2007 which reveals the nature of his business. It appeared BUMPUS went out of business due to the lack of business. BUMPUS has demonstrated the ability to sustain remunerative employment as he voluntarily re-entered himself back into the workforce without notifying his physician of record, Dr. Paley or the BWC.

{¶23} 12. Attached to the SIU report is a March 19, 2007 handwritten statement from Cynthia Wallen:

* * * I brought several customers to him in an attempt to help him out, but he was not a business friendly person. Bumpus informed me that he was spending all of his retirement money to stay in business, but he was making no money.
* * *

{¶24} 13. Attached to the SIU report is a March 19, 2007 handwritten statement from Carol Williams:

* * * I was in his store on a few different occasions dropping off his mail. I never purchased any of his merchandise. There was hardly any business there. Bumpus was always sitting at the computer due to the lack of business. * * *

{¶25} 14. Attached to the SIU report is an April 13, 2007 handwritten statement from Richard Brown: "I observed Bumpus on several occasion[s] conducting business at his booth like every other vendor at Old Roberds Emporium."

{¶26} 15. Attached to the SIU report is a June 26, 2007 handwritten statement from Dr. Paley:

Despite all treatment – consisting of Supartz injections, videoarthroscopy and therapy he still does have [right] knee

pain. Obviously, despite his pain he can tend to gainful employment. He has evidence of sever DJD of [right] knee which was also visualized on the photos from surgery. Ultimately[,] he will require a knee replacement.

{¶27} 16. The record contains the June 6, 2008 affidavit of Terrill Bumpus:

I Terrill Bumpus was one of owner of Tee's Handbags. Along with Lance to my knowledge there was no lease agreement everything was done by cash transaction.

Thomas Bumpus wasn't an employee he simply a spectator all payment to 607 N Dixie was pay out of me an Lance pocket and also at the old Roberd Emporium.

The business lic was purchased for Terrill Bumpus, Lance for Tee's Handbags + Thomas Bumpus hasn't recieved any moneys from this bussines or done any work.

(Sic passim.)

{¶28} 17. The record contains the June 16, 2008 affidavit of Lance Jones:

My Name is lance Jones Sr and Terrill and I Started a buisness Called Tees Hanbags I was a owner and Terrill was a owner No one got paid but me and Terrill. Thomas bumpus was not a employee nor did he ever recieve any money or compensation. Thomas bumpus is Terrill Uncle and my Friend. We told Thomas we wanted to start a buissness and we asked him for his advice and he offerd to help get us started but wouldn't take any money becauce he was doing this ask a favor and he said he like that we were trying to do somthing postive with our lives. At every location Thomas show[ed] up and gave advice but did no work If terry was not there I would tell Thomas to give information to Terrill. Terrill and I thought it would be a good Idea to have Thomas help up with Negotiations because he was older and wiser and we thought they might take him more serious which was true and it helped me an Terrill out alot.

(Sic passim.)

{¶29} 18. Following a September 8, 2008 hearing, a district hearing officer ("DHO") issued an order granting the bureau's April 2, 2008 motion. The DHO's order explains:

It is the finding of the District Hearing Officer that the Injured Worker committed fraud in this claim. It is the finding of the District Hearing Officer that the Bureau of Workers' Compensation sustained its burden of proving by a preponderance of the evidence that the injured worker knowingly used deception to obtain Workers' Compensation benefits. The District Hearing Officer finds that the Bureau of Workers' Compensation established the following mandatory prima facie elements of fraud: (1) a representation, or where there is a duty to disclose, concealment of fact; (2) which is material to the transaction at hand; (3) made falsely, with the 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 resulting injury proximately caused by the reliance.

The District Hearing Officer finds that the Bureau of Workers' Compensation has provided reliable, probative and substantial evidence of fraud in this claim. The Industrial Commission finds that the injured worker was self-employed selling handbags and clothing items while simultaneously receiving temporary total disability compensation. The District Hearing Officer finds that the injured worker's self-employment serves as a representation of a falsehood as 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 District 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 District Hearing Officer finds that the injured worker knowingly signed at least three 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 that 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 that he was self-employed selling handbags and clothing items.

The District Hearing Officer finds the injured worker's argument that he was not working, but rather, acting as a liaison and business consultant to be unpersuasive.

Based upon the foregoing, the District Hearing Officer orders that the injured worker's request for temporary total disability compensation in this claim be denied and the Bureau of Workers' Compensation's motion requesting the exercise of continuing jurisdiction, a finding of fraud and a declaration of an overpayment be granted. The District Hearing Officer orders that temporary total disability compensation be specifically denied for the period from 12/07/2006 to 06/27/2007. The District Hearing Officer finds that the injured worker was not temporarily totally disabled for the above noted period of time as evidenced by his self-employment selling handbags and clothing items. The District Hearing Officer orders that the injured worker be found overpaid compensation for the period from 12/07/2006 to 06/26/2007 and that said overpayment be recouped pursuant to the fraud provisions of O.R.C. 4123.511(K).

The District Hearing Officer relies upon the Special Investigations Unit Investigation Report dated 02/27/2008 and Attachments in support of this decision.

{¶30} 19. Relator administratively appealed the DHO's order of September 8, 2008.

{¶31} 20. Following a January 15, 2009 hearing, an SHO issued an order affirming the DHO's order of September 8, 2008. The SHO's order explains:

It is the finding of the Staff Hearing Officer that the Injured Worker committed fraud in this claim. It is the finding of the Staff Hearing Officer that the Bureau of Workers' Compensation sustained its burden of proving by a preponderance of the evidence that the Injured Worker knowingly used deception to obtain Workers' Compensation benefits. The Staff Hearing Officer finds that the Bureau of Workers' Compensation established the following prima facie [sic] elements of fraud: 1) a representation or where there is a duty to disclose, concealment of fact; 2) which is material to the transaction at hand; 3) made falsely with the 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 misrepresentation or concealment; and 6) a resulting injury proximately caused by the reliance.

The Staff Hearing Officer finds that the Bureau of Workers' Compensation has provided reliable, probative, and substantial evidence of fraud in this claim. The Staff Hearing Officer finds that the Injured Worker was self employed in a business named "T's Handbags," selling handbags and clothing items while simultaneously receiving temporary total disability compensation benefits. The Staff Hearing Officer finds that the Injured Worker's self-employment serves as a misrepresentation of a fact as 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 Staff 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 Staff Hearing Officer finds that the Injured Worker knowingly signed at least three C-84 requests for temporary total disability compensation with the intent of misleading those examining them to believe and rely upon the misrepresentation that the Injured Worker was unable to work and that the facts contained on the C-84 request forms were correct and valid.

The Staff Hearing Officer finds that the Bureau of Workers' Compensation justifiably relied upon the Injured Worker's misrepresentation of his inability to work as there was no evidence before it to the contrary. Finally, the Staff 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 that the Injured Worker was self-employed selling handbags and clothing items.

The Staff Hearing Officer finds that the Injured Worker's argument that he was not working, but rather was acting as a liaison and business consultant is an unpersuasive argument.

Based upon the foregoing, the Staff Hearing Officer orders that the Injured Worker's request for temporary total disability compensation in this claim be denied and the Bureau of Workers' Compensation motion requesting the exercise of continuing jurisdiction, a finding of fraud, and a declaration of and [sic] overpayment be granted. The Staff Hearing Officer orders that temporary total disability compensation be denied for the period 12/07/2006 through 06/27/2007. The Staff Hearing Officer finds that the Injured Worker was not temporarily and totally disabled for the above cited period of time as proven by the Injured Worker's self-employment selling handbags and clothing items. The Staff Hearing Officer orders that the Injured Worker be found to have been overpaid temporary total disability compensation for the period from 12/07/2006 through 06/27/2007. Said overpayment shall be recouped pursuant to the fraud provisions of ORC 4123.511 (K). The Staff Hearing Officer bases this order upon the Special Investigation Report, dated 02/27/2008, with its included attachments.

{¶32} 21. On February 24, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of January 15, 2009.

{¶33} 22. On June 12, 2009, relator, Thomas L. Bumpus, filed this mandamus action.

Conclusions of Law:

{¶34} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶35} To appropriately review the SHO's order of January 15, 2009 at issue here, it is necessary to contrast the standard for terminating TTD compensation against the standard for terminating permanent total disability ("PTD") compensation.

{¶36} The TTD standard is set forth succinctly in *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98 Ohio St.3d 20, 2002-Ohio-7038. The PTD standard is succinctly set forth in *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086.

{¶37} In *Ford* at ¶18-19, the court states:

TTC [temporary total disability compensation] is prohibited to one who has returned to work. R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 23 O.O.3d 518, 433 N.E.2d 586. * * *

Work is not defined for workers' compensation purposes. We have held, however, that any remunerative activity outside the former position of employment precludes TTC. *State ex rel. Nye v. Indus. Comm.* (1986), 22 Ohio St.3d 75, 78, 22 OBR 91, 488 N.E.2d 867. We have also held that activities medically inconsistent with the alleged inability to return to the former position of employment bar TTC, regardless of whether the claimant is paid. *State ex rel. Parma Community Gen. Hosp. v. Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336, 767 N.E.2d 1143, ¶ 15. Activities that are not medically inconsistent, however, bar TTC only when a claimant is remunerated for them. *Id.* at ¶ 14-15, 767 N.E.2d 1143. Work, moreover, does not have to be full-time or even regular part-time to foreclose TTC; even sporadic employment can bar benefits. *State ex rel. Blabac v. Indus. Comm.* (1999), 87 Ohio St.3d 113, 717 N.E.2d 336.

{¶38} In *Lawson*, the court states at ¶16-21:

PTD pivots on a single question: Is the claimant *capable* of sustained remunerative employment? *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 31

OBR 369, 509 N.E.2d 946. Payment of PTD is inappropriate where there is evidence of (1) actual sustained remunerative employment, *State ex rel. Kirby v. Indus. Comm.*, 97 Ohio St.3d 427, 2002-Ohio-6668, 780 N.E.2d 275; (2) the physical ability to do sustained remunerative employment, *State ex rel. Schultz v. Indus. Comm.*, 96 Ohio St.3d 27, 2002-Ohio-3316, 770 N.E.2d 576; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. See *State ex rel. Timmerman Truss, Inc. v. Indus. Comm.*, 102 Ohio St.3d 244, 2004-Ohio-2589, 809 N.E.2d 15, ¶26.

{¶39} Analysis begins with the concluding paragraph of the SIU report:

On December 7, 2006, BUMPUS re-entered the workforce by renting space from John Parker to sell his handbags. Several witness statements have been obtained proving BUMPUS was the individual working and selling his handbags at different locations. BUMPUS applied for and obtained his vendor's license on January 26, 2007 which reveals the nature of his business. It appeared BUMPUS went out of business due to the lack of business. BUMPUS has demonstrated the ability to sustain remunerative employment as he voluntarily re-entered himself back into the workforce with out notifying his physician of record, Dr. Paley or the BWC.

{¶40} When the SIU report concluded that relator "demonstrated the ability to sustain remunerative employment," it strongly suggested that an incorrect standard for terminating TTD compensation be applied. Clearly, that relator may have demonstrated that he retains the ability to engage in sustained remunerative employment by tending (albeit unsuccessfully) a retail store cannot be a basis for terminating TTD compensation or declaring an overpayment of the compensation.

{¶41} In the orders of both the DHO and SHO, the standard upon which the evidence was evaluated is not directly addressed. However, both orders suggest that an incorrect standard was applied when it is stated that 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." (Emphasis added.) Clearly, that relator may have demonstrated an *ability* to perform employment activities cannot be the basis for terminating TTD compensation or declaring an overpayment of TTD compensation.

{¶42} In the orders, it is repeatedly concluded that relator was "self-employed selling handbags and clothing items." However, there is no evidence in the record that relator's activities ever generated income or even that a sale was made. Thus, it can only be argued that relator was "self-employed" in the sense that he apparently engaged in activities which he hoped might generate income. But engaging in activities that do not generate income does not preclude TTD compensation as long as those activities are not medically inconsistent with an alleged inability to return to the former position of employment. *Ford*. There is no real dispute here that relator's activities did not demonstrate a physical capacity to return to his former position of employment at the water department where use of a jackhammer was one of his duties.

{¶43} Thus, under the TTD standard set forth in *Ford*, there is no evidence in the record upon which the commission could have relied to support a determination to terminate TTD compensation or declare an overpayment of TTD compensation.

{¶44} *State ex rel. Honda of Am. Mfg. Co. v. Indus. Comm.*, 113 Ohio St.3d 5, 2007-Ohio-969, ¶29, is helpful. In that case, Edith K. Anderson opened a scrapbooking shop while on TTD compensation. Over a three-month period, she was observed in the shop five times by investigators hired by Honda. Honda moved to terminate TTD

compensation and for a declaration of overpayment. When the commission denied its motion, Honda petitioned for a writ of mandamus. The *Honda* court states:

* * * The commission found that Anderson's activities—to the extent that they generated any income at all—did so only secondarily because they were geared more towards promoting the goodwill of the business. We again defer to that finding. Most of the disputed activities consisted of answering customer questions. Certainly, Anderson cannot be required to ignore customer inquiries in order to maintain eligibility for compensation. That would indeed destroy the business's goodwill. As to the operation of the cash register, it occurred just once, without any evidence that it was connected to a sale, and does not justify termination of Anderson's temporary total disability compensation. Accordingly, given the lack of evidence that Anderson's business involvement was any more extensive, we uphold the commission's determination. This, in turn, moots any issue of fraud, because compensation was properly paid.

{¶45} Based upon the foregoing analysis, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of January 15, 2009, and to enter an order denying the bureau's April 2, 2008 motion.

/s/ Kenneth W. Macke
KENNETH W. MACKE
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).