[Cite as *State ex rel. Whirlpool Corp. v. Indus. Comm.*, 2010-Ohio-255.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Whirlpool Corporation,	:	
Relator,	:	
v.	:	No. 09AP-380
Industrial Commission of Ohio and Edward L. DeMars,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on January 28, 2010

Bricker & Maxfield, LLC, and *Douglas M. Bricker*, for relator.

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

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman*, for respondent Edward L. DeMars.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Whirlpool Corporation ("Whirlpool"), 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 that granted working wage-loss compensation to respondent Edward L. DeMars ("claimant"), and ordering the commission to find that claimant is not entitled to that compensation as he did not engage in a good-faith effort to secure suitable employment that is comparably paying work.

{¶2} This matter was referred to a court-appointed magistrate 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, which is appended to this decision, and recommended that this court deny Whirlpool's request for a writ of mandamus. Whirlpool has filed an objection to the magistrate's decision, asserting the following objection: The magistrate erred when she found the commission did not abuse its discretion when it ordered Whirlpool to pay claimant working wage loss after claimant failed to produce evidence of a good-faith job search for comparably paying work during the disputed time period.

{¶3} Whirlpool's objection largely raises issues already addressed by the magistrate. Whirlpool first asserts that a claimant is unconditionally required to demonstrate a good-faith effort to search for suitable employment that is comparably paying work before being entitled to receive working wage-loss compensation. Whirlpool cites several regulations in support. Whirlpool relies heavily upon Ohio Adm.Code 4125-1-01(D)(1)(a), which provides that, as a prerequisite to receiving wage-loss compensation for any period during which compensation is requested, the claimant "shall" demonstrate that he or she has begun or continued a job search. Whirlpool also cites Ohio Adm.Code 4125-1-01(C)(5) for the proposition that an application for wage-loss compensation must contain evidence describing the applicant's continued job search. In addition, Whirlpool

cites Ohio Adm.Code 4125-1-01(D)(1)(c), which provides that a good-faith effort to search for employment is required of those seeking working wage-loss compensation.

{¶4} Relying upon these provisions, Whirlpool's underlying contention seems to be that a claimant is always, without exception, required to perform a good-faith job search before receiving working wage-loss benefits. However, the Ohio Supreme Court has explicitly found that a good-faith job search is not always required to receive working wage-loss compensation. As this court explained in a case involving working wage loss, "[t]hrough case law, the Supreme Court of Ohio has set forth a broad-based analysis for determining whether to excuse a claimant's failure to search for another job when the job the claimant found creates a wage differential with respect to the former position of employment." *State ex rel. Internatl. Truck & Engine Corp. v. Indus. Comm.*, 10th Dist. No. 05AP-1337, 2006-Ohio-6255, ¶30. Thus, "under certain limited circumstances a claimant may be excused from the obligation to conduct a good faith job search and retain eligibility for wage loss compensation." Id. at ¶3. Most notably, the Supreme Court of Ohio expressed this sentiment in *State ex rel. Timken Co. v. Kovach*, 99 Ohio St.3d 21, 2003-Ohio-2450, and *State ex rel. Ooten v. Siegel Interior Specialists Co.*, 84 Ohio St.3d 255, 256, 1998-Ohio-534. In *Ooten*, the Supreme Court explicitly found that a job search is "not universally required" for wage-loss compensation. Id. at 256. Thus, it is well-established that there are circumstances under which a claimant will not be required to conduct a job search in order to receive working wage-loss compensation.

{¶5} Also, although the court in *Timken* at ¶23 cautioned that working wage loss in situations involving self-employment is subject to "enhanced scrutiny" to ensure that wage-loss compensation is not subsidizing speculative business ventures or lifestyle

choices, the commission in the present case was within its discretion to find that claimant's self-employment was not too speculative a business venture or a lifestyle choice. The fact that claimant's self-employment was full time, in which some cases he worked 100 hours per week, "lessens" the concerns expressed in *Timken.* Id. at ¶24 (full-time employment lessens the chance that the wage loss was the result of a lifestyle choice). The reasonableness of the commission's determination was also buttressed by the fact that claimant had spent nearly two years searching for other employment. Claimant's extensive, but fruitless, job search before becoming self-employed further lessened the possibility that claimant's starting his own business was merely a lifestyle choice. The district hearing officer agreed, finding that claimant's self-employment was a consequence of his restrictions in the claim and not a lifestyle choice.

{¶6} Whirlpool also presents several specific contentions that are interrelated to the above argument. Whirlpool first maintains that the commission could not rely upon the fact that claimant was unable to find employment during the prior 92 weeks of non-working wage-loss compensation to support its finding that claimant was not required to conduct a job search during the period of working wage loss. We find no error in this respect. As the commission points out, Whirlpool's many citations to Ohio Adm.Code 4125-1-01(D) fail to point out a critical provision in (D)(1)(c), which provides that "[i]n evaluating whether the claimant has made a good faith effort, attention will be given to the evidence regarding *all relevant factors* including, but *not limited to*." (Emphasis added.) Ohio Adm.Code 4125-1-01(D)(1)(c). Thus, the commission possessed the discretion to consider any factor, including whether claimant's 92 weeks of futile job searches excused a further job search once he started his own business.

{¶7} Whirlpool further argues that the commission erred by finding that claimant was not required to conduct a job search during the period of working wage loss because he was working full time in his business. It is clear that whether a claimant is working full time may be a factor considered by the commission in determining if claimant was required to continue to conduct a job search. In *Timken*, the Ohio Supreme Court explained that only in "some" situations the commission may require a claimant with full time employment to continue looking for comparably paying work. Id. at 24, citing *State ex rel. Yates v. Abbott Laboratories, Inc.*, 95 Ohio St.3d 142, 2002-Ohio-2003, ¶38. Although claimant's full-time self-employment endeavors did not automatically eliminate his responsibility to search for comparably paying work, under the circumstances here, claimant's full-time employment was a factor that could negate the usual obligation of a good-faith job search.

{¶8} Further, Whirlpool claims claimant did not comply with the requirements of Ohio Adm.Code 4125-1-01(D)(1)(c)(xii), in that claimant did not produce evidence of his efforts to produce self-employment income on a "weekly basis," but only described his efforts to produce self-employment income on a monthly basis. Ohio Adm.Code 4125-1-01(D)(1)(c)(xii) provides, in determining whether a good-faith job search was conducted, the commission should give attention to "[t]he self-employed claimant's documentation of efforts undertaken on a weekly basis to produce self-employment income[.]" However, claimant testified that he works an average of 40-60 hours per week annually, working 40 hours per week during the winter and 100 hours per week during the summer. This was sufficient evidence for the commission to consider under Ohio Adm.Code 4125-1-01(D)(1)(c)(xii).

{¶9} As this court has stated: "[T]he 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 the overriding concern is to ensure that a lower-paying position, regardless of hours, is necessitated by the disability and not motivated by a lifestyle choice. *State ex rel. Jackson v. Indus. Comm.*, 10th Dist. No. 08AP-498, 2009-Ohio-1045, ¶7. Here, the commission's determination that claimant was not required to conduct a good-faith job search to receive working wage-loss compensation was supported by the circumstances and evidence in this case.

{¶10} Lastly, we note that Whirlpool makes the argument that the commission's order was inconsistent. Whirlpool points out that, in ordering that the wage-loss award be reduced by what claimant would have earned had he taken a minimum-wage job, the staff hearing officer cited Ohio Adm.Code 4125-1-01(F)(b), which applies only when a claimant has voluntarily limited the number of hours he or she is working, yet, the staff hearing officer also found claimant was working full time. Initially, there exists no provision numbered Ohio Adm.Code 4125-1-01(F)(b). Presumably, the staff hearing officer and Whirlpool meant to cite Ohio Adm.Code 4125-1-01(F)(3)(b). Notwithstanding, it appears that, if Whirlpool is correct that the commission should not have relied upon Ohio Adm.Code 4125-1-01(F)(3)(b), the result would be that the commission should have ordered even more working wage-loss compensation. It is axiomatic that the complaining party must demonstrate that it has been prejudiced by the judgment of the lower tribunal. See *Haendiges v. Haendiges* (1992), 82 Ohio App.3d 720, 723. Whirlpool has failed to explain how the commission's determination was prejudicial to it in this respect. For all the above reasons, Whirlpool's objection is overruled.

{¶11} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of Whirlpool's objection, we overrule Whirlpool's objection and adopt the magistrate's findings of fact and conclusions of law as our own. Accordingly, we deny Whirlpool's request for a writ of mandamus.

Objection overruled; writ of mandamus denied.

FRENCH and CONNOR, JJ., concur.

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[Cite as *State ex rel. Whirlpool Corp. v. Indus. Comm.*, 2010-Ohio-255.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Whirlpool Corporation,	:	
Relator,	:	
v.	:	No. 09AP-380
Industrial Commission of Ohio and Edward L. DeMars,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on September 22, 2009

Bricker & Maxfield, LLC, and *Douglas M. Bricker*, for relator.

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

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman*, for respondent Edward L. DeMars.

IN MANDAMUS

{¶12} Relator, Whirlpool Corporation, 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 granted working wage loss compensation to

respondent Edward L. DeMars ("claimant"), and ordering the commission to find that claimant is not entitled to that compensation as he did not engage in a good-faith effort to secure suitable employment which is comparably paying work.

Findings of Fact:

{¶13} 1. Claimant sustained a work-related injury on April 10, 2001, and his claim has been allowed for "right wrist sprain/strain; TFC tear right wrist; aggravation of arthritis of the right and left distal radial ulnar joints."

{¶14} 2. It is undisputed that, as a result of the allowed conditions, claimant is unable to return to his former position of employment.

{¶15} 3. Prior to the request for working wage loss compensation which is the subject of this mandamus action, the commission granted claimant's request for nonworking wage loss compensation for the following periods of time: May 26 through June 13, 2004; June 28 through August 6, 2004; October 30 through December 27, 2004; December 26, 2004 through February 13, 2005; April 25 through May 8, 2005; and May 9, 2005 through April 28, 2006. In awarding nonworking wage loss compensation for the aforementioned periods, the commission found that claimant had engaged in a bonafide good-faith search for suitable employment within his restrictions. Specifically, the commission noted that claimant was making at least 15 job contacts per week; had expanded the geographical region of his job search from an average of driving six miles per job search in the beginning to approximately 16 miles per job search as of December 2004; had expanded the quality of his job search to include entry-level jobs; and was seeking any type of work which he could find. In awarding compensation through May 8, 2005, a staff hearing officer ("SHO") stated:

The employer argues that injured worker is ineligible for non-working wage loss because he has not made a good faith job search. Specifically, the employer argues that as injured worker has been unemployed and searching for employment for approximately 1 1/2 years, this is proof of a job search that is not done in good faith. Also, the employer argues that the injured worker was offered vocational rehabilitation assistance in a job search and injured worker denied/refused this assistance.

This Staff Hearing Officer first addresses the employer['s] argument that the fact that injured worker has not found employment is evidence of a bad faith job search. Injured worker has consistently made approximately 15 job contacts per week. He has expanded the types of employment sought, and the distance from his home in which he searches for employment. At this time, injured worker travels more than 30 miles away from his home on his job searches. This Staff Hearing Officer notes that injured worker lives in an area of depressed economy with unemployment rates between 6% or 7% or more. Therefore, this Staff Hearing Officer cannot find that the fact that injured worker has not found employment is indicative of a bad faith job search.

More problematic is the issue of injured worker's "refusal" of job search assistance. The injured worker testified that he had personal interaction issues with the vocational nurse.

During her testimony at the prior District hearing * * *, the vocational specialist was unable to recount the unemployment statistics for the counties around injured worker's residence. Likewise, the vocational specialist * * * was unfamiliar with the injured worker's restrictions.

Based upon this information, the Staff Hearing Officer cannot find that injured worker's refusal to work with this vocational specialist was unwarranted or unreasonable. Therefore, the employer's contention that injured worker refused assistance with job search and this is grounds for finding his current job searches to be in bad faith is not found to be reasonable.

* * *

This Staff Hearing Officer finds that injured worker's job search has been done in good faith. He has made 15 contacts per week looking for employment. Injured worker has

> expanded the types of jobs he was looking for, steadily. Injured worker has increased the distance from his home over which he is searching for employment incrementally.
>
> This Staff Hearing Officer finds no credible evidence that injured worker is searching for jobs outside of his re-strictions.

{¶16} 4. After unsuccessfully attempting to find a job for 92 weeks, claimant opened his own business.

{¶17} 5. Thereafter, claimant sought working wage loss compensation beginning January 1, 2007 through December 18, 2008.

{¶18} 6. The matter was heard before a district hearing officer ("DHO") on February 2, 2009 and was granted. The DHO noted that claimant spent "92 weeks in a fruitless job search * * * then opened his own business, SECOND TIME AROUND, which is a resale business that works out of flea markets." (Emphasis sic.) The DHO noted that claimant "spends 40 to 60 hours per week working on his business which has shown little if any profit." Lastly, the DHO stated:

> * * * This is found to be a consequence of the restrictions in this claim and not a lifestyle choice. Injured Worker did try to find a job in today's job market for 92 weeks and eventually concluded that none was to be had, so he set up his own business. The fact that he has not continued a job search is not found to be a bar to Wage Loss as he made a lengthy trial of searching for employment to no avail. * * *

{¶19} 7. Relator appealed and the matter was heard before an SHO on March 4, 2009. The SHO again rejected relator's argument that claimant was required to perform a supplemental job search as follows:

> The Employer's argument that Injured Worker needs to perform a supplemental job search is also found unpersuasive. The Hearing Officer relies upon Injured Worker's testimony at this hearing as well as the previous

> hearing wherein he indicated that he is working over 40 hours a week in his new job venture. Injured Worker worked approximately 40 hours a week at Whirlpool, therefore the Hearing Officer finds that it would be impractical and not legally necessary for him to perform an additional job search. Additionally, Injured Worker testified that he often works more than 40 hours a week, particularly during the summer when there are more opportunities for him to sell his clothes.
>
> The Employer's contention that the case State ex rel. Ooten v. Siegel Interior Specialist Co. (1998) 84 Ohio St.3d 255, is dispositive in this matter, is also not found persuasive. In the Ooten case, Injured Worker did no job search before deciding to start his own business. The Hearing Officer finds the instant case is distinctly different because the Injured Worker herein performed what has been determined on numerous occasions by the Industrial Commission to be a good faith job search for nearly 100 weeks unsuccessfully before deciding that his best option would be to become self-employed.

{¶20} 8. Thereafter, finding that claimant's current self-employment is clearly not comparably paying work to his prior employment, the SHO determined that a fair computation of wage loss would be 66⅔ percent of the difference between his average weekly wage and his former position of employment and the rate he would have earned had he taken a minimum wage job.

{¶21} 9. Relator's further appeal was refused by order of the commission mailed April 2, 2009.

{¶22} 10. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶23} 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.

{¶24} Relator's sole argument is that the commission abused its discretion by ordering relator to pay working wage loss compensation to claimant when claimant presented no evidence that he continued to search for suitable employment which is comparably paying work after he opened his own business. For the reasons that follow, this magistrate disagrees.

{¶25} In order to receive workers' compensation, a claimant must show not only that a work-related injury arose out of and in the course of employment, but, also, that a direct and proximate causal relationship exists between the injury and the harm or disability. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. This principle is equally applicable to claims for wage loss compensation. *State ex rel. The Andersons v. Indus. Comm.* (1992), 64 Ohio St.3d 539. As noted by the court in *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, a wage loss claim has two components: a reduction in wages and a causal relationship between the allowed condition and the wage loss.

{¶26} 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 or occupational disease, 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[.] * * *

{¶27} In considering a claimant's eligibility for wage loss compensation, the commission is required to give consideration to, and to base a determination on, evidence relating to certain factors, including claimant's search for suitable 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, and *State ex rel. Rizer v. Indus. Comm.* (2000), 88 Ohio St.3d 1.

{¶28} Ohio Adm.Code 4125-1-01(D)(1)(c) provides certain relevant factors to be considered by the commission in evaluating whether a claimant has made a good-faith effort. Those factors including: the claimant's skills, prior employment history, and educational background; the number, quality, and regularity of contacts made with prospective employers; for a claimant seeking any amount of working wage loss compensation, the amount of time devoted to making prospective employer contacts during the period for which working wage loss is sought, as well as the number of hours spent working, any refusal by the claimant to accept assistance from the Ohio Bureau of

Workers' Compensation in finding employment; any refusal by the claimant to accept the assistance of any public or private employment agency; labor market conditions; the claimant's physical capabilities; any recent activity on the part of the claimant to change their place of residence and the impact such change would have on the reasonable probability of success and the search for employment; the claimant's economic status; the claimant's documentation of efforts to produce self-employment income; any part-time employment engaged in by the claimant and whether that employment constitutes a voluntary limitation on the claimant's present earnings; whether the claimant restricts a search of employment that would require the claimant to work fewer hours per week than worked in the former position of employment; and whether, as a result of physical restrictions, the claimant is enrolled in a rehabilitation program.

{¶29} In the present case, through several commission orders, the commission determined that claimant had engaged in 92 weeks of good-faith job search in order to secure suitable employment which was comparably paying work. The commission also has concluded that, in spite of his efforts, claimant had been unable to find employment. It was at this time that claimant started his own business. Because of the extensive job search undertaken by claimant before he started his own business, the commission found that his situation differed from that of the claimant in *Ooten* who started her own business without ever having made a good-faith effort to seek comparably paying work.

{¶30} Relator contends that claimant's decision to start his own business constitutes a lifestyle choice and destroys his eligibility for working wage loss compensation. Relator is correct to the extent that a return to full-time employment does not automatically eliminate 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 of Ohio has held that the job search is not mandatory. *State ex rel. Ohio Treatment Alliance v. Paasewe*, 99 Ohio St.3d 18, 2003-Ohio-2449, ¶24. Rather, under certain circumstances, a claimant's failure to continue to seek employment will be excused. "[T]he overriding concern * * * is the desire to ensure that a lower-paying position—regardless of hours—is necessitated by the disability and not motivated by lifestyle choice."

{¶31} In the present case, the commission determined that claimant's situation was distinguishable from other cases in which claimants had been required to continue an ongoing job search despite the fact that they had begun self-employment. The commission distinguished the present case based upon claimant's 92 weeks of an unsuccessful job search. Further, the commission noted that claimant testified that he is working over 40 hours per week at his new job. Given the facts of this case, this magistrate cannot say that the commission abused it discretion in finding that claimant was no longer pursuing a job search.

{¶32} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in granting claimant's working wage loss compensation and 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).