

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Garry K. McBee,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-239
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Blue Ribbon Rentals, Inc.,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on November 16, 2010

John F. Potts, for relator.

Richard Cordray, Attorney General, and *Sandra E. Pinkerton*,
for respondent Industrial Commission of Ohio.

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S. Mezinko*, for respondent Blue Ribbon Rentals, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Garry K. McBee ("claimant"), 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 he was overpaid temporary total disability ("TTD") compensation from October 30, 2004 through March 9,

2006, terminating TTD compensation as of October 30, 2004, and determining that the compensation was fraudulently obtained, and to enter an order reinstating TTD compensation.

{¶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, which is appended to this decision including findings of fact and conclusions of law, and recommended that this court issue a writ of mandamus. The commission has filed objections to the magistrate's decision.

{¶3} The commission presents two objections. In the first objection, the commission argues that the magistrate erred when he omitted any fact that claimant and his wife attended and testified at the January 16, 2008 fraud hearing or that the staff hearing officer ("SHO") had the opportunity to observe their behavior. The commission urges that the SHO's ability to observe the claimant is part and parcel to the commission's role as fact finder. However, we can find no error on the part of the magistrate for failing to include this detail in his decision. The commission presents no evidence that the magistrate was unaware that claimant and his wife testified at the fraud hearing, and our own reading of the magistrate's decision does not suggest such. To the contrary, the magistrate quoted nearly the entire SHO's decision from the January 16, 2008 hearing, and the introductory portion of the SHO's decision indicates that claimant and his wife were present. Therefore, given the magistrate's extensive treatment of the SHO's decision, we presume the magistrate read the entirety of the decision, including the SHO's indication that claimant and his wife were present. We find no error in the magistrate's decision in this respect and overrule the first objection.

{¶4} In its second objection, the commission argues that the magistrate erred when he found that the inference of fraud was based solely on the May 5, 2005 warning letter from the Bureau of Workers' Compensation ("BWC") and the C-84 applications, and failed to consider that the hearing officer had the opportunity to observe claimant and hear his testimony at least twice and was free to draw inferences from such. The commission contends that claimant himself made statements at multiple hearings that failed to mention that he was involved in work activity with McBee Auto Sales. The commission asserts the SHO was in the best position to judge claimant's credibility and infer that he had knowledge of the falsity of his statements.

{¶5} The magistrate found that the commission, in finding claimant committed fraud and knew that his activities constituted "work," wrongly presumed that the May 10, 2005 BWC warning letter and the query on the C-84s clearly conveyed to claimant what activities constituted work that bars TTD compensation. The commission's contention herein is that the magistrate should have also considered claimant's testimony at the hearings, as well as claimant's statements to the examining physician and the bureau's Special Investigation Unit ("SIU") investigator, in which he failed to mention he was involved in work activity with McBee Auto Sales. However, neither claimant's testimony nor his statements to the examining physician and SIU investigator demonstrate that claimant knew he was "working" for purposes of TTD compensation. There was no other evidence cited by the commission to support the knowledge and intent elements of fraud, and we fail to find any evidence in the record strong enough to support an inference that claimant clearly had knowledge he was engaged in "work" or that he ever denied he was working with the intent to mislead.

{¶6} After an examination of the magistrate's decision, an independent review of the evidence pursuant to Civ.R. 53, and due consideration of the commission's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law and issue a writ of mandamus ordering the commission to amend its SHO's order of January 16, 2008 by deleting the finding that compensation was fraudulently obtained, and by entering a finding that the evidence fails to show that the compensation was fraudulently obtained.

Objections overruled; writ of mandamus granted.

BRYANT, J., concurs.
McGRATH, J., concurs in part and dissents in part.

McGRATH, J., concurring in part and dissenting in part.

{¶7} I concur with the majority's decision to adopt the magistrate's decision upholding the commission's having declared an overpayment of TTD compensation because of relator's activities on behalf of McBee Sales.

{¶8} However, I cannot agree with the magistrate's or the majority's determination that the commission abused its discretion in determining that the compensation was fraudulently obtained. Our role in review includes the restriction that we defer to the commission's fact-finding, and my reading of the evidence causes me to conclude that there is some evidence, with reasonable inferences thereof, to support the commission's determination of fraud. Relator and his wife both appeared before the hearing officer who was in the position to judge demeanor and credibility. Relator had been in the same business as McBee Motors was in for nine years before it went out of business, and he was doing the same work for McBee. There was evidence that he was

the only one doing the buying and selling and was listed as General Manager of the business. He disclosed none of this to his doctor or the Bureau of Workers' Compensation, although he had received multiple warnings on the C-94 applications and entitlement letters. For that reason, I respectfully dissent, would not adopt that portion of the majority's decision, and would accordingly deny the requested writ of mandamus.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Garry K. McBee,	:	
Relator,	:	
v.	:	No. 09AP-239
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Blue Ribbon Rentals, Inc.,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on April 23, 2010

John F. Potts, for relator.

Richard Cordray, Attorney General, and *Sandra E. Pinkerton*,
for respondent Industrial Commission of Ohio.

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S. Mezinko*,
for respondent Blue Ribbon Rentals, Inc.

IN MANDAMUS

{¶9} In this original action, relator, Garry K. McBee, 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 October 30, 2004 through March 9, 2006, terminating TTD compensation as of October 30, 2004, and determining that the compensation was fraudulently obtained, and to enter an order reinstating TTD compensation. In the alternative, relator requests that the writ order the commission to amend its order so that it is found that the compensation was not fraudulently obtained.

Findings of Fact:

{¶10} 1. On October 27, 2004, relator sustained an industrial injury while employed with respondent Blue Ribbon Rentals, Inc. ("employer"), a state-fund employer. On that date, relator sprained his right shoulder while moving a furniture entertainment cabinet on a hand dolly.

{¶11} 2. On October 28, 2004, relator completed a workers' compensation claim form ("FROI-1") that was filed October 29, 2004. Apparently, the employer refused to certify the industrial claim (No. 04419232).

{¶12} 3. On a C-84 dated November 19, 2004, attending physician Moshir Khalil, M.D., certified TTD from November 4, 2004, to an estimated return-to-work date of December 27, 2004, based upon the shoulder sprain.

{¶13} 4. On November 26, 2004, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order allowing the claim for a right shoulder/arm sprain, and awarding TTD compensation beginning October 30, 2004.

{¶14} 5. The employer administratively appealed the bureau's November 26, 2004 order.

{¶15} 6. Following a January 6, 2005 hearing, at which relator was present, a district hearing officer ("DHO") issued an order affirming the bureau's November 26, 2004

order. The DHO's order allowed the claim for "sprain right shoulder" and awarded TTD compensation from October 28, 2004 to January 17, 2005, based upon records from Toledo Hospital dated October 28, 2004 and Dr. Khalil's C-84.

{¶16} 7. The employer administratively appealed the DHO's order of January 6, 2005.

{¶17} 8. Following an April 25, 2005 hearing, at which relator was present, a staff hearing officer ("SHO") issued an order affirming the DHO's order of January 6, 2005. The DHO's order was mailed May 3, 2005.

{¶18} 9. On May 10, 2005, the bureau mailed to relator a letter, warning:

The Ohio Bureau of Workers' Compensation (BWC) has issued an order to award you temporary total disability benefits.

According to workers' compensation law, the Ohio Revised Code, you may continue to receive these benefits as long as medical evidence supports temporary total disability due to your work-related injury.

Also, according to workers' compensation law, you are not entitled to temporary total benefits if:

- (1) You return to any type of work including full-time, part-time, self-employment, and commission work with any employer. This includes employers other than the one you worked for when you were injured,
- (2) Your treating physician says you are ready to go back to your former job,
- (3) Your former employer or another employer offers you a new job within your physical capabilities,
- (4) You have reached maximum medical improvement.

{¶19} 10. In September 2005, the bureau's Toledo Special Investigations Unit ("SIU") opened an investigation following allegations from relator's employer that, during

his receipt of TTD compensation, relator had been working for a company doing business as McBee Sales.

{¶20} 11. On March 30, 2007, some 18 months after opening its investigation, SIU issued a written report and moved the commission for retroactive termination of TTD compensation to October 30, 2004, for a declaration of an overpayment, and for a determination that the compensation was fraudulently obtained.

{¶21} 12. SIU obtained records from Montpelier Auto Auction of Ohio ("Montpelier Auction") located in Montpelier, Ohio. One of the records is a "Dealer Registration Application" ("DRA") dated March 29, 2004, signed by relator's spouse, Sandra J. McBee, as the owner of McBee Sales. The DRA is a Montpelier Auction form requiring the applicant to provide requested information.

{¶22} On the March 29, 2004 DRA, McBee Sales is listed as the dealer with a business address in Monroe, Michigan.

{¶23} According to the DRA, Sandra J. McBee is the owner of McBee Sales and Garry K. McBee is the "Gen[eral] Manager." McBee Sales opened for business in November 2003. Under the heading "Additional Authorized Employees (Will Buy/Sell At Auction)," relator's name is the only name listed.

{¶24} 13. SIU obtained a Montpelier Auction "Agent Authorization Form" dated March 29, 2004, from McBee Sales. Relator and his wife signed the form as agents of McBee Sales. The form provides in part:

McBee Sales (Dealership) wishes to register the following person(s) as an "Authorized Agent (s)" to buy and sell automobiles, and to execute checks and to sign on your behalf, the bills of sale, odometer mileage statements, assignments of titles on behalf of the above listed dealership. * * *

{¶25} 14. SIU also obtained a Montpelier Auction "Agent Authorization Form" dated December 8, 2004, for McBee Sales. This form is also signed by relator and his wife as agents of McBee Sales.

{¶26} 15. SIU obtained from the Michigan Department of State a copy of an "Original Vehicle Dealer Application" signed on October 13, 2003 by Sandra J. McBee as owner of McBee Sales. Sandra J. McBee also applied for renewals of the vehicle dealer license on December 30, 2003, October 4, 2004, and December 8, 2005.

{¶27} 16. On September 18, 2006, SIU Special Agent Mitchey and Assistant Special Agent Fox interviewed relator at his home. According to the SIU report:

* * * [Agents Mitchey and Fox] showed their identification to MCBEE and MCBEE invited the agents inside. Business cards were provided to MCBEE. MCBEE was advised that his cooperation was voluntary and that he could ask the agents to leave at any time. MCBEE acknowledged he understood. MCBEE then invited the agents over to the kitchen table. SA Mitchey asked MCBEE whether he understood that he could not work in any capacity while receiving Temporary Total disability benefits and MCBEE stated that he understood. MCBEE stated that he had not worked since his injury in October 2004, and that the only money he has received was from BWC. MCBEE inquired about the investigations on the business cards and it was explained to MCBEE that an allegation was received that he was working at McBee Sales while receiving disability benefits. MCBEE wanted to know who was the source of the allegation and indicated that he drove vehicles for his wife, who owns the business, but that "means nothing". MCBEE stated that he did not have a dealer's license and that the business was in his wife's name. MCBEE indicated that he was waiting for his surgery to get approved so that he could have surgery and return to work. MCBEE stated that he was not an employee of McBee Sales and that it was his wife's business. MCBEE then indicated that he drove vehicles for his wife prior to his injury. * * * Fox asked MCBEE whether his wife would have to hire an employee if MCBEE did not drive the vehicles for her and MCBEE stated that he did not understand what * * * Fox was

asking. * * * Fox re-phrased/explained the question and MCBEE stated that the agents were "twisting everything around". MCBEE informed that McBee Sales was inactive. * * * Fox advised MCBEE several times that the interview was voluntary and MCBEE stated that although he did nothing wrong and did not need an attorney, he was not comfortable talking any further with the agents.

{¶28} 17. On September 20, 2006, SIU Special Agent Mitchey interviewed Robert Burton, the former general manager of Montpelier Auction. Thereafter, Burton signed the following interview summary written by Special Agent Mitchey:

I was the general manager for Montpelier Auto Auction, Montpelier, Ohio from 2003 until September 16, 2006. During that time, I dealt with Garry McBee of McBee Sales at the numerous auctions McBee attended between March 31, 2004 and February 8, 2006 (refer to records obtained from Montpelier Auto Auction). Typically McBee would drive the vehicles to the auction on the Monday or Tuesday prior to the auction on Wednesday and his wife would drive him home. I would meet McBee at the gate and he would drop the vehicle(s) off. On the days of the auctions, McBee was always present and was the one who represented the vehicles when they were on the block and being auctioned off. McBee would tell the auctioneer the amount/minimum bid he was expecting to receive and decided whether to accept the final bid. McBee would bring vehicles he had purchased from Manheim's Detroit Auto Auction and sell them at Montpelier Auto Auction. I dealt with McBee and not his wife regarding McBee Sales and the activities at the auction. * * *

{¶29} 18. On June 1, 2007, SIU submitted additional evidence in support of its motion. Special Agent Mitchey and fraud analyst Stein signed the following "Addendum Report of Investigation" on May 31, 2007. The addendum report states:

* * * [T]he [SIU] obtained Garry McBee's (MCBEE) bank records from Fifth Third Bank including signature cards, statements, and copies of deposits during the period MCBEE received Temporary Total disability benefits * * *. MCBEE had a joint checking account with his wife, Sandra McBee, along with a business account for McBee Sales, wherein MCBEE

and Sandra were authorized signers on both accounts. The account for McBee Sales was opened in November 2003 and closed in December 2006. Based on these records, * * * Mitchey completed an excel spreadsheet summarizing the total deposits made into both accounts * * *.

{¶30} The SIU excel spreadsheet discloses that, during December 2004, four checks from Montpelier Auction were deposited into the McBee Sales business checking account. Those checks were for the amounts of \$19,780, \$120, \$2,285, and \$1,745.

{¶31} During January 2005, one check from Montpelier Auction was deposited in the McBee Sales business account. That check was for the amount of \$11,625.

{¶32} During February 2005, a check from Montpelier Auction in the amount of \$5,115 was deposited.

{¶33} During March 2005, five checks from Montpelier Auction were deposited in the McBee Sales business account. Those checks were for the amounts of \$4,970, \$3,017.50, \$7,160, \$15,260, and \$8,473.

{¶34} The SIU excel spreadsheet shows significant deposits from Montpelier Auction into the McBee Sales business account through November 2005.

{¶35} 19. Following a July 16, 2007 hearing, a DHO issued an order granting in part and denying in part the bureau's March 30, 2007 motion. The DHO's order explains:

The injured worker is found to have been engaged in work activities while receiving temporary total disability from 10/30/04 through 3/9/06. Therefore, this period of temporary total is found to be overpaid. Specifically, injured worker attended auto auctions to assist his wife's business. He actively participated in these auctions by providing the amounts of minimum bids to the auctioneer. The BWC provided records in the Special Investigations Unit (SIU) file from 10/30/04 through 3/9/06. There were no records provided from 3/10/06 through 8/27/06. Therefore, this period remains properly paid.

The request for a finding of fraud is DENIED. The Bureau failed to establish intent to deceive on the part of the injured worker. The injured worker testified credibly that he went along to the auctions for something to do. He did not consider this work. The overpayment is therefore to be collected in the same manner as an overpayment, pursuant to O.R.C. 4123.511(J).

(Emphasis sic.)

{¶36} 20. Both relator and the bureau administratively appealed the DHO's order of July 16, 2007.

{¶37} 21. In August 2007, the bureau filed another "Addendum Report of Investigation." Dated August 22, 2007, the addendum is signed by Special Agent Mitchey and fraud analyst Stein. The addendum states:

* * * [T]he [SIU] has obtained employment records from Friendly Ford regarding Sandra McBee (Sandra). Specifically Sandra's weekly time sheets listing dates and hours worked. Sandra was employed full time (standard work hours Monday – Friday 8am to 5pm) as a title clerk/car biller from February 3, 2003 until she quit on October 31, 2005. During the time frame that Garry McBee (MCBEE) was receiving Temporary Total (TT) disability benefits and Sandra was employed at Friendly Ford, Sandra was working at Friendly Ford on ninety percent (36 out of 40) of the days wherein the auctions were attended and/or vehicles were bought/sold at the auctions. Per the auto auctions, auctions were held every Wednesday at 9:30 am at Montpelier Auto Auction and every Thursday at 9:00 am at Manheim Metro Detroit Auto Auction. Therefore, indicating that Sandra was not present at those auctions as she testified at the District Hearing and that it was necessary for MCBEE to handle the activities at the auctions and not merely attend for something to do. * * *

The [SIU] also obtained a response from Robert Kalb, M.D. wherein he indicated that he released MCBEE to full duty work with no restrictions on January 5, 2007. * * *

In conclusion, the additional evidence submitted by the * * * SIU has shown that Sandra's work activities would preclude

her attendance at the auctions thereby requiring MCBEE to take on an active role at the auctions on behalf of McBee Sales. Based on the evidence that MCBEE has demonstrated his ability to return to work and Dr. Kalb's response indicating that MCBEE was released to return to full duty work as of January 5, 2007, the evidence supports the SIU's motion for fraud and termination of TT benefits.

{¶38} 22. Following the DHO's order of July 16, 2007, relator submitted additional evidence in defense of the bureau's motion. This evidence is apparently in response to SIU's addendum report of August 22, 2007. Relator submitted a sheet captioned "Auctions attended by Sandra J. McBee on days not at work and/or evening auctions." The sheet indicates that Sandra McBee attended three auctions at "Montpelier" on December 8, 2004, March 23, and November 2, 2005. She also attended 20 auctions at "Parma" between December 22, 2004 and August 17, 2005.

{¶39} 23. Relator submitted a sheet captioned "Auctions attended by Garry McBee without Sandra McBee." The sheet indicates that relator attended 22 auctions at "Montpelier Auto Auction" between December 15, 2004 and October 26, 2005. Relator attended auctions at other auction sites. The total auctions relator attended without his wife are 36, as listed on the sheet.

{¶40} 24. Relator also submitted a written statement from Louis Magyar dated October 1, 2007, stating:

From November of 2004 through October of 2005, I worked for McBee Sales transporting (driving) vehicles to and from auctions. I drove vehicles to auctions for McBee Sales on approximately 35 occasions. On approximately 30 occasions when I would drive a vehicle to one of the auctions, Gary McBee would ride with me. Mr. McBee was unable to drive himself because of the medication that he was taking.

{¶41} 25. Following a January 16, 2008 hearing, an SHO issued an order that vacates the DHO's order of July 16, 2007. The SHO's order of January 16, 2008 grants the bureau's March 30, 2007 motion, and explains:

The injured worker is found to have been engaged in work activities while receiving receiving [sic] temporary total disability compensation from October 30, 2004 through March 9, 2006. Therefore, this period of temporary total is found to be overpaid.

Further, the Hearing Officer finds injured worker committed fraud and orders temporary total benefits TERMINATED as of October 30, 2004.

The Hearing Officer finds that injured worker was performing work activity of buying and selling vehicles at auto auctions for the company McBee Sales for the period of October 30, 2004 to March 9, 2006. March 9, 2006 is the last date that the Bureau of Workers' Compensation has provided proof that a vehicle was bought at an auction that injured worker attended.

It is further found that the elements of fraud have been met by the Bureau of Workers' Compensation. Injured worker made a representation when there was a duty to disclose, and concealed the fact that he had returned to work with McBee Sales. He failed to inform the BWC that he was actively engaged in buying and selling vehicles at auto auctions. His activities were material to the transaction at hand in that if he had informed the BWC of his periods of employment, temporary total benefits would not have been paid. He made the representation falsely with knowledge of its falsity, in that when interviewed on September 18, 2006 injured worker indicated that he had not worked since his injury in October of 2004 and that the only money he received was from the Bureau of Workers' Compensation. At that time, he indicated that he did not have a dealer's license and that the business was in his wife's name. He indicated that he drove vehicles for his wife prior to his injury. The Hearing Officer finds that he had the intent of misleading another into relying upon his representation when he signed C-84 forms between May 21, 2005 and May 21, 2006 wherein he indicated that he had not returned to work in any capacity despite the fraud warning about not working. He also received a temporary total

entitlement letter on May 10, 2005 in which he was notified he was not entitled to receive temporary total benefits if he returned to work. He was also present at the District and Staff level hearings on January 6, 2005 and April 25, 2005 when temporary total was granted from October 28, 2004 to January 17, 2005 and to continue and did not indicate that he was involved in work activity with McBee Sales.

At the Staff Hearing on May 16, 2006 injured worker advised the Hearing Officer that he was in the car business for nine years until March of 2003 when the company went out of business. He did not mention his work activity with McBee Sales.

In the independent medical evaluation (IME) performed on April 28, 2006, injured worker stated that he had not returned to work since the date of his injury and he indicated that he was unable to drive to work because of the potential for drowsiness related to his medications, despite his current activities with McBee Sales.

In his interview with the BWC on September 18, 2006, injured worker denied any work activity since the date of injury and denied having a dealer's license despite evidence that he had a Dealer Application, signed March 29, 2004.

Finally, injured worker signed BWC warrants which also contained a fraud warning indicating that he was not entitled to temporary total benefits if working in any capacity.

The Bureau of Workers' Compensation is found to have justifiably relied upon injured worker's misrepresentation that he had not returned to work and as a result, the injured worker is found to have received temporary total benefits to which he was not entitled. If the BWC had been aware of the injured worker's work activities, temporary total benefits would not have been paid.

The Hearing Officer also finds that a resulting injury was proximately caused by the reliance on injured worker's misrepresentation in that the BWC paid temporary total benefits to which injured worker was not entitled.

The Hearing Officer specifically finds that injured worker was actively engaged in activities that generated income for his business known as McBee Auto Sales. It is found that his

activities were consistent, sustained, ongoing and regular.

Based upon the information presented by the Bureau of Workers' Compensation Fraud Department, the Hearing Officer finds that injured worker attended 46 auctions when 44 vehicles were sold, McBee Sales bought 43 vehicles and consigned 53 vehicles. Injured worker was involved in buying and selling vehicles through Montpelier Auto Auction in Montpelier, Ohio, and at Manheim's Metro Detroit Auto Auction in Flatrock, Michigan.

Injured worker had a Dealer Application, signed March 29, 2004, and an Agent Authorization Form, which allowed him to perform actions on behalf of the company signed December 8, 2004. He performed activities such as signing title forms, stand "on the block" telling the auctioneer what the minimum bid was, and decided when to accept bids.

The Hearing Officer further finds that injured worker attended these auctions during times that injured worker's wife was unable to attend auctions. Injured worker's wife was employed full time from 8:00 a.m. through 5:00 p.m. as a title clerk/car biller from February 3, 2003 until October 31, 2005. She was working at Friendly Ford 90% (36 out of 40) of the days when auctions were attended and vehicles were bought and sold at the auctions.

Therefore, the Hearing Officer finds the injured worker's activity of attending the auctions was beneficial to the company of McBee Auto Sales in that injured worker's wife could not have attended auctions during this same time frame because she was working.

The argument that someone at the auction could have performed the same activity as injured worker in acting as a "proxy" is not found persuasive. There is no indication that someone from the auction house was ever used as a proxy and the Hearing Officer also finds that there would have been a charge to use someone from the auction house. Therefore, there was a financial benefit to injured worker being present and performing the activities.

The fact that the company, McBee Auto Sales, operated at a "loss" as evidenced by the 1040s is found to be inconsequential. There is no need to find that the company operated at a profit. Rather, the Hearing Officer finds that it is only

necessary that injured worker's activities could be performed for pay. The activity of buying and selling cars is found to be the only activity of the company, McBee Auto Sales, that generated any income.

The Hearing Officer relies upon the case law of Meade vs. Indus. Comm. 2005 Ohio 6206 in finding that although injured worker did not receive "wages" for his activities, his activities generated income for the business. (In the Mead case the injured worker ran a pizza business where he took orders, prepared food, served customers, worked the cash register, and delivered pizzas. Even though he did not receive wages, his activities were "hands on" and generated income for the business).

The case of Cassano vs. Indus. Comm. 2006 Ohio App. Lexis 3020 is also found dispositive. (Injured worker was found to be engaged in activities that generated income, such as performing mechanic work on cars and attending auto auctions. The Court in that case also found fraud in that similar to when injured worker was contacted by the Bureau of Workers' Compensation, he said he had not worked since the injury and his business was on hold). Here, when injured worker was interviewed by the BWC, he also denied performing any work.

Finally, Couch vs. Indus. Comm. 2006 Ohio 3147 is relied upon in reaching this decision. (Injured worker's activities of managing and dispatching a fleet of trucks and drivers and conducting day to day business out of his home constituted work activities inconsistent with receipt of temporary total compensation. The Court distinguished that "Where a person is actively involved in operating a business, the Ohio Industrial Commission may conclude that his or her activities are inconsistent with receipt of temporary total disability. Involvement such as making sales or assisting in day to day operation of a shop may be viewed as employment incompatible with disability, as opposed to mere ownership or managing one's personal finances). The Hearing Officer finds that here, the number of auctions injured worker attended supports the finding that he was actively engaged [i]n furthering the business.

Therefore, because [sic] Hearing Officer finds the injured worker performed income generating activity, for McBee Auto Sales, for the period October 30, 2004, through March 9,

2006, and orders temporary total compensation TERMINATED as of October 30, 2004, and makes a finding of fraud.

No finding is made for the period from 3/10/06 through 8/26/06. No records were provided for that period.

This finding is based upon the SIU report in file, as well as the addendum, dated August 22, 2007, the memoranda of interviews with injured worker and Robert Burton, former general manager at Montpelier Auto Auction.

(Emphasis sic.)

{¶42} 26. On March 1, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of January 16, 2008.

{¶43} 27. Relator moved for reconsideration of the March 1, 2008 SHO's refusal order. In support of reconsideration, relator submitted his own affidavit executed March 17, 2008, stating:

1. I am the Claimant herein, and I am married to Sandra McBee.
2. My wife, Sandra McBee, began working in the used car business in 1968. My wife, Sandra, owned and operated a used car business known as McBee Sales from November 2003 until it ceased operating in March, 2006 and closed in December of 2006. I was not an owner of this business. I worked in my wife's business until I became employed at Blue Ribbon Rentals in August of 2004. I never worked for McBee Sales after I became employed at Blue Ribbon Rentals.
3. During my period of disability, I was on prescription medication that prevented me from operating a motor vehicle.
4. I live in Monroe, Michigan, and my treating physicians maintain their office in Toledo, Ohio, approximately 25 miles from my home.
5. When I needed to go to a doctor's appointment, I would stop taking my medications that day so I would be able to drive.

6. Since I was not able to work and not able to drive, I became bored sitting around my house, and so I accompanied the drivers my wife hired to deliver cars to used car auctions.

7. I only drove vehicles to the auctions myself on six (6) occasions when the regular drivers were unavailable. On those occasions I stopped taking my medication for the day, in the same manner as when I had to go to a doctor's appointment.

8. I was paid no compensation for going to the used car auctions and, except for the 6 times I drove myself, my wife saved no money by having me go to the auctions because she had to pay a driver anyway.

9. The drivers who would regularly work for my wife were Louis Magyar and my son, Kevin McBee.

10. I never considered going along for the ride to used car auctions to be employment.

{¶44} 28. On April 18, 2008, a three-member commission mailed an order refusing relator's motion for reconsideration.

{¶45} 29. On March 9, 2009, relator, Garry K. McBee, filed this mandamus action.

Conclusions of Law:

{¶46} Two issues are presented: (1) whether the commission abused its discretion in declaring an overpayment of TTD compensation because of relator's activities on behalf of McBee Sales, and (2) whether the commission abused its discretion in finding that the compensation was fraudulently obtained.

{¶47} The magistrate finds: (1) the commission did not abuse its discretion in declaring an overpayment of TTD compensation, and (2) the commission did abuse its discretion in finding that the compensation was fraudulently obtained.

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

{¶49} The focus of the overpayment issue is on the concept of remuneration.

{¶50} To appropriately review the SHO's order of January 16, 2008 at issue here, it is helpful to contrast the standard for terminating TTD compensation against the standard for terminating permanent total disability ("PTD") compensation.

{¶51} 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.

{¶52} 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.

{¶53} 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.

{¶54} Having contrasted the standards for terminating TTD and PTD compensation, it is also helpful to note that the Supreme Court of Ohio again succinctly set forth the criteria for termination of TTD compensation in *State ex rel. Honda of Am. Mfg. Co. v. Indus. Comm.*, 113 Ohio St.3d 5, 2007-Ohio-969, ¶18:

Temporary total disability compensation cannot be paid to a claimant who is actually working—i.e., exchanging labor for pay—or to one who is medically capable of returning to the former position of employment. R.C. 4123.56(A); *State ex rel. Griffith v. Indus. Comm.*, 109 Ohio St.3d 479, 2006-Ohio-2992, 849 N.E.2d 28, ¶ 10. Consequently, activities that are medically inconsistent with the alleged inability of a claimant to return to the former position of employment bar temporary total disability compensation even if done for free. *State ex rel. Parma Community Gen. Hosp. v. Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336, 767 N.E.2d 1143. Conversely, activities done for pay, even activities consistent with medical restrictions, also foreclose temporary total disability compensation. *Id.*

{¶55} Both the *Ford* and *Honda* cases justify further discussion here.

{¶56} In *Ford*, the claimant, Christopher Posey, held a full-time job at Ford Motor Company and also owned a lawn care business. Following his injury at Ford, Posey began receiving TTD compensation. His injury also affected his ability to do lawn work,

forcing him to hire more employees to cover his fair share of the work load. Posey signed his four workers' pay checks and, on few occasions, fueled and drove riding lawnmowers onto a truck. Posey did no landscaping work in connection with his business while receiving TTD compensation. In *Ford*, the court found that Posey's activities did not in and of themselves generate income. Posey's activities produced money only secondarily. However, the *Ford* court concluded on a cautionary note:

Obviously, application of this rationale must be applied on a case-by-case basis and only when a claimant's activities are minimal. A claimant should not be able to erect a façade of third-party labor to hide the fact that he or she is working. In this case, however, claimant's activities were truly minimal and only indirectly related to generating income. * * *

Id. at ¶24.

{¶57} In *Honda*, the claimant, Edith K. Anderson, while receiving TTD compensation, opened a scrapbooking shop with proceeds from her husband's life insurance. Over a three-month period, she was observed in the shop five times. Her employer alleged that her store-related activities constituted work, precluding TTD compensation.

{¶58} The *Honda* court held that TTD compensation was not barred, explaining:

Applying *Ford* to these facts, we begin by examining Anderson's activities and the commission's determination that they were minimal. The commission emphasized that over a three-month period, Anderson was viewed just five times. On three of those occasions, she assisted no customers. On the other two, she apparently helped a single customer by answering questions and pointing out displays and once used the cash register for an unknown purpose. This was the sum total of her observed activities at My Crop Shop.

Honda challenges this conclusion, asserting that if Anderson was involved with My Crop Shop on each day of surveillance,

she was probably involved with the store on the days she was not observed. This assertion fails for two reasons. First, Anderson's mere presence at the store is not itself disqualifying. Moreover, even if she arguably was engaged in some business activity every time she was seen, the commission—as sole evaluator of evidentiary weight and credibility—was not compelled to conclude that she was doing the same thing when not observed. Accordingly, the commission's determination that Anderson's activities were minimal will not be disturbed.

Ford also questions whether Anderson's activities generated income directly. 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.

Id. at ¶27-29.

{¶59} In declaring an overpayment of TTD compensation in the instant case, the SHO cited this court's decision in *State ex rel. Meade v. Indus. Comm.*, 10th Dist. No. 04AP-1184, 2005-Ohio-6206. In *Meade*, the claimant, Steven L. Meade, collected TTD compensation while engaging in activities at a pizza shop. In November 2000, Meade had incorporated Ron's Pizza Enterprises, Inc., which does business as "Ron's Pizza." Meade was the president and statutory agent of the business. Finding that Meade's activities were incompatible with receipt of TTD compensation, this court explained:

* * * [R]elator need not receive "wages" for his activities to have a preclusive effect on TTD compensation. Rather, the issue here is whether his activities generated income directly for the business. * * * While relator argues that he did not replace any employee, there can be no question that his activities—taking orders, preparing food, serving customers, working the cash register, and delivering pizzas—generated income for the business.

Id. at ¶7.

{¶60} The SHO here also cited to this court's decision in *State ex rel. Couch v.*

Indus. Comm., 10th Dist. No. 05AP-652, 2006-Ohio-3147. In *Couch*, this court states:

In *Ford*, the Supreme Court of Ohio held that mere ownership of a business, without more, is not incompatible with receiving disability compensation. Of particular importance in *Ford* was the fact that the claimant's activities in that case did not directly generate income; they only secondarily produced income for the business. In *State ex rel. Campbell v. Indus. Comm.*, 10th Dist. No. 02AP-1253, 2003-Ohio-4824, this court discussed the application of *Ford*. We observed, at ¶ 55, that:

* * * some entrepreneurial activities and some investment activities may be sufficiently extensive to be deemed employment. Where a person is actively involved in operating a business, the commission may conclude that his or her activities are inconsistent with receipt of total disability compensation. Involvement such as making sales or assisting in day-to-day operations of a shop may be viewed as employment incompatible with disability, as opposed to mere ownership or managing one's personal finances.

This is true regardless whether the claimant's activities for his side business performed while receiving TTD are the same (as here) or different (as in *Ford*) from those in which the claimant was engaged prior to his industrial accident. We so held in the case of *State ex rel. Cassano v. Indus. Comm.*, 10th Dist. No. 03AP-1227, 2005-Ohio-68. In that case, the claimant operated his own car repair business while he was employed as a driver, and continued to operate his business while he received TTD following an industrial injury. The claimant argued that he was merely maintaining his business,

like the claimant in *Ford*, but we found otherwise. Because the evidence revealed that the claimant conducted the opening and closing activities of the business, talked with customers and assisted with mechanical work on vehicles, we concluded that the claimant was engaged actively in business activities that directly generated income.

Id. at ¶5-6.

{¶61} In the instant case, relator contends that there is no evidence that his activities on behalf of McBee Sales were remunerated and, thus, the commission abused its discretion in declaring an overpayment of TTD compensation. The magistrate disagrees.

{¶62} Based upon the case law as reviewed above, the SHO correctly focused on the question of whether relator's activities generated income for McBee Sales. The SHO extensively explained her finding that relator's activities did generate income for McBee Sales and, thus, relator's activities preclude receipt of TTD compensation.

{¶63} As found by the SHO, relator attended 46 auctions when McBee Sales bought and sold vehicles. Relator was actively involved in the auction sales. Without his wife's presence, relator "performed activities such as signing title forms, stand 'on the block' telling the auctioneer what the minimum bid was, and decided when to accept bids," as found by the SHO.

{¶64} The record fully supports, without dispute, that buying and selling cars was the company activity that generated income for McBee Sales. Relator's activities in that regard were, as the SHO found, "consistent, sustained, ongoing and regular."

{¶65} There is indeed some evidence, if not substantial evidence, supporting the commission's findings that relator's activities generated income for McBee Sales.

{¶66} Accordingly, based upon the foregoing analysis, the magistrate finds that the commission did not abuse its discretion in finding the overpayment of TTD compensation and in terminating compensation as of October 30, 2004.

{¶67} As earlier noted, the second issue is whether the commission abused its discretion in finding that the compensation was fraudulently obtained.

{¶68} The elements of fraud are: (1) a representation or, where there is a duty to disclose, concealment of a 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 resulting injury proximately caused by the reliance. *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55.

{¶69} Analysis here begins with scrutiny of the bureau's May 10, 2005 letter to relator: "[A]ccording to workers' compensation law, you are not entitled to temporary total benefits if: (1) You return to any type of work including full-time, part-time, self-employment, and commission work with any employer. This includes employers other than the one you worked for when you were injured."

{¶70} On the C-84s that relator signed in order to obtain TTD compensation, relator was required to answer the following query: "Have you worked, in any capacity, (include full-time, part-time, self-employment or commission work) during the disability period shown above?"

{¶71} As the *Ford* court tells us, work is not statutorily defined for workers' compensation law. However, it has been held that any remunerative activity outside the former position of employment precludes TTD compensation. *Ford* at ¶18-19.

{¶72} It has developed through case law that the remuneration element can be met when the claimant's activities are found to have generated income even in the absence of receipt of wages or direct compensation. The *Ford* court notes that "application of this rationale must be applied on a case-by-case basis and only when a claimant's activities are minimal." *Ford* at ¶24.

{¶73} Two of the elements of fraud seem pertinent here. First, the false representation or concealment of fact must be made with knowledge of the falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred. Secondly, there must be an intent of misleading another into reliance.

{¶74} That is, the claimant must have the knowledge that his activities constitute work that precludes TTD compensation, and he must have the intent to mislead the bureau into paying for compensation to which he is legally not entitled. Knowledge and intent are key components of fraud.

{¶75} Where a claimant receives wages or other direct compensation for activities performed, it is easy to infer that the claimant has knowledge that his activities constitute work. If the claimant conceals his receipt of wages, it is again easy to infer the requisite intent. But the inference to knowledge and intent is not so easy when the claimant receives no wages or direct compensation for activities performed. Where it is determined on a case-by-case basis that the claimant has engaged in activities that

generate income to a business he does not own, and on that basis, work is the conclusion, the inference to knowledge and intent is not so easy.

{¶76} At issue here, is the inference that the May 10, 2005 bureau warning letter or the query on the C-84s clearly conveyed to relator the knowledge that, even in the absence of wages or direct compensation, activities that generate income to his wife's business can be held to be work that bars TTD compensation. In the magistrate's view, the inference is not supported by the record.

{¶77} Given the above analysis, there is no evidence in the record upon which the commission relied to support the requisite elements of knowledge and intent with respect to a finding of fraud.

{¶78} Thus, the magistrate finds that the commission abused its discretion in finding that the compensation was fraudulently obtained.

{¶79} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to amend its SHO's order of January 16, 2008, by deleting the finding that compensation was fraudulently obtained, and by entering a finding that the evidence fails to show that the compensation was fraudulently obtained.

/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).