[Cite as *State ex rel. McIntosh v. Freeman Mfg. & Supply Co.*, 2012-Ohio-5519.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robert J. McIntosh,	:	
Relator,	:	
v.	:	No. 11AP-1071
Freeman Manufacturing and Supply Company and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 29, 2012

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

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Robert J. McIntosh, filed an original action in mandamus, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator's application for working wage loss compensation and ordering the commission to find that he is entitled to that compensation.

{¶ 2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ.

{¶ 3} As detailed in the magistrate's decision, the commission denied relator's request for working wage loss compensation because (1) relator failed to show that his reduction in wages was causally related to the allowed conditions in his claim, and (2) relator failed to submit persuasive evidence that his restrictions impacted his ability to work. The magistrate concluded that the commission did not abuse its discretion by doing so. Relator has raised four objections to the magistrate's decision, and we address his objections, in turn.

{¶ 4} First, relator contends that the magistrate exceeded her scope of review by including in her decision an overly broad discussion of the requirements for receiving working wage loss compensation, indicating that she reached her decision based on a rationale different from the commission's rationale. We disagree with relator's characterization of the magistrate's decision. There is no indication that the magistrate considered factors not at issue or that she exceeded her scope of review. We overrule relator's first objection.

{¶ 5} Second, relator contends that the magistrate should not have concluded that the commission properly relied on *State ex rel. Haddox v. Indus. Comm.*, 88 Ohio St.3d 279 (2000), and he reiterates his contention that the absence of weekly wage statements from a claimant who is not paid on a weekly basis is not fatal to a working wage loss compensation application. We agree with relator that the Ohio Administrative Code addresses other income scenarios within its definition of " 'Present earnings,' " including variable income based on commissions and bonuses and also self-employment. *See* Ohio Adm.Code 4125-1-01(A)(16). Nevertheless, the code provisions require the submission of evidence that would allow the commission to calculate a "claimant's actual weekly earnings" for purposes of awarding payment. Ohio Adm.Code 4125-1-01(A)(16). For self-employed claimants, for example, Ohio Adm.Code 4125-1-01(A)(16) provides: "Income derived from self-employment shall be reported on at least

a quarterly basis." Here, relator provided only his annual income, as reflected in his 2009 tax return, which he filed jointly with his wife. He failed to provide evidence sufficient to calculate his actual weekly earnings, and the commission did not abuse its discretion by so concluding. We overrule relator's second objection.

{¶ 6} Third, relator contends that the magistrate provided a rationale for the denial of relator's application that the commission itself did not provide. Specifically, relator contends that the commission erroneously stated that the only restrictions on file were from the March 26, 2001 report of Shakil Khan, M.D. The magistrate acknowledged the existence of office notes by Dr. Robert Kalb, but nevertheless concluded that they did not support an award either. We agree with the magistrate's analysis of this issue. Before this court, relator must show that he has a legal right to the relief requested. He cannot make that showing here, even with consideration of Dr. Kalb's notes, because he failed to provide evidence that his allowed conditions caused a reduction in earnings. We overrule his third objection.

{¶ 7} Finally, relator contends that the magistrate failed to address his argument that the commission placed an improper burden upon him by requiring him to prove that his wage loss was not caused by economic conditions affecting the real estate market. While the magistrate did not address this argument explicitly, she thoroughly addressed relator's burden of proof and determined that he had not met it. Neither she nor the commission placed an improper burden on him. We overrule relator's fourth objection.

{¶ 8} Having overruled relator's objections, and having conducted an independent review, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied.

TYACK and SADLER, JJ., concur.

A P P E N D I X

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Relator,	:	
v.	:	No. 11AP-1071
Freeman Manufacturing and Supply Company and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on July 23, 2012

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

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 9} Relator, Robert J. McIntosh, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's application for working wage loss compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 10} 1. Relator is the claimant in a workers' compensation claim which had previously been allowed for the following conditions:

> Interstitial lung disease; aseptic necrosis femur-right; osteoporosis; enthesopathy right hip.

{¶ 11} 2. On December 22, 2010, relator filed a motion requesting the following:

> [One] Amend the claim to include the additional diagnosis of Type 2 diabetes mellitus.
>
> [Two] Amend the claim to include the additional diagnosis of obstructive sleep apnea.
>
> [Three] Grant payment of working wage loss January 1, 2009 through December 31, 2009.
>
> [Four] Authorize prescription medication Dihydrochloride and Leveocetirizine.

{¶ 12} 3. In an order mailed February 11, 2011, the Ohio Bureau of Workers' Compensation ("BWC") reviewed relator's motion and referred the matter to the commission requesting that the claim be additionally allowed for Type II diabetes mellitus and that the claim be denied for obstructive sleep apnea. The BWC did not address relator's request seeking reimbursement for prescription medications nor did the BWC address the request for wage loss compensation.

{¶ 13} 4. Following a hearing before a district hearing officer ("DHO") on March 11, 2011, the DHO determined that relator's claim should be allowed for the following conditions: "Type II diabetes mellitus and obstructive sleep apnea." Further, the DHO determined that working wage loss compensation should be paid from January 9 to December 31, 2009 after finding that relator had restrictions that prevented him from returning to his former position of employment as a shipping and receiving clerk. The DHO's order was based on the following reports:

> Dr. Kahn, M.D., dated 08/24/2009, 08/24/2010, and 03/26/2010, and Dr. Vega, M.D., dated 01/05/2010.

{¶ 14} 5. Of the above four identified reports, only the March 26, 2010 report of Dr. Kahn is contained in the record. That report indicates that relator can sit for 6 hours, stand for 4 hours, and walk for 2 hours during the course of an 8-hour day; continuously reach, occasionally climb and bend, but never squat or crawl; continuously lift up to 10 pounds, frequently lift up to 20 pounds, and occasionally lift up to 100 pounds; continuously carry up to ten pounds, occasionally carry up to 25 pounds, but never carry anything above 25 pounds; and relator was restricted in the use of his left hand for repetitive pushing and pulling of arm controls and was restricted in his use of both feet in repetitive movements of leg controls.

{¶ 15} 6. While there is no August 24, 2010 report of Dr. Kahn contained in the record, a statement from Dr. Kahn dated August 24, 2009 is listed as supporting relator's motion; however, that document is not contained in the stipulation of evidence. A separate statement from Dr. Kahn, dated June 24, 2010 is in the stipulation of evidence and indicates that Dr. Kahn limited relator to working five to six hours per day and noted that those restrictions were permanent and effective December 10, 2008.

{¶ 16} 7. The BWC appealed and the matter was heard before a staff hearing officer ("SHO") on April 21, 2011. The SHO affirmed that portion of the DHO order additionally allowing relator's claim for Type II diabetes mellitus, obstructive sleep apnea, but denied the request for working wage loss compensation because the BWC did not have the opportunity to review relator's wage loss information and determine the matter initially. The SHO referred the wage loss issue back to the BWC for further investigation and decision.

{¶ 17} 8. Relator's appeal was refused by order the commission mailed May 25, 2011. Thereafter, relator filed a request for reconsideration.

{¶ 18} 9. In an interlocutory order mailed July 1, 2011, the commission vacated the May 25, 2011 order and determined that relator's request for reconsideration should be set for hearing to determine whether the alleged mistake of law and error by the SHO was sufficient to invoke its continuing jurisdiction. Specifically, relator argued that the SHO mistakenly refused to rule on the wage loss issue.

{¶ 19} 10. The matter was heard before the commission on August 18, 2011. The commission granted relator's request for reconsideration and granted relator's motion in part and denied it in part. Specifically, the commission determined that relator's claim should be additionally allowed for type II diabetes mellitus and obstructive sleep apnea based on the following evidence:

> [T]he opinion from Patricia Vega, M.D., dated 01/05/2010, the review by Vijay Mahajan, M.D., dated 02/07/2011, and the polysomnography performed 05/28/2004.

{¶ 20} 11. Thereafter, the commission denied relator's request for working wage loss compensation finding that relator failed to establish that his reduction of wages was causally related to the allowed conditions in his claim. Specifically, the commission indicated that relator's request was based solely on his 2009 tax forms and noted that relator had not filed any weekly statements of earnings. Further, the commission determined that relator failed to submit persuasive evidence that his restrictions in any way impacted his ability to perform work. This portion of the commission's order specifically provides:

> It is the further order of the Commission that working wage loss compensation is denied from 01/09/2009 to 12/31/2009. The Commission finds the Injured Worker's reduction in wages is not causally related to the allowed conditions in the claim. The Injured Worker supported his request for working wage loss compensation with the medical report from Shakil Khan, M.D., dated 03/26/2010.
>
> The Injured Worker's allegation of a reduction in wages is based upon his 2009 tax forms, which document a net yearly profit of $20,232.00 from employment as a realtor. The Injured Worker did not submit weekly statements of earnings. Wage loss compensation is calculated on a week-by-week basis, State ex rel. Haddox v. Indus. Comm. (2000), 88 Ohio St.3d 279. By supplying only his 2009 tax forms, the Injured Worker precluded a weekly analysis of his entitlement to wage loss compensation.
>
> The Injured Worker also failed to persuasively establish that his reduction in wages was the result of restrictions stemming from the allowed conditions instead of the poor

> economy and housing market. The Commission notes that the Injured Worker failed to submit persuasive evidence that the claim-related restrictions in any way impacted his ability to perform work as a realtor. Further, the Injured Worker did not submit evidence of restrictions for the requested period of 01/09/2009 to 12/31/2009, as the only restrictions on file are from Dr. Kahn's medical report, dated 03/26/2010.
>
> Lacking evidence of restrictions in effect for the year 2009 and weekly statements of earnings, the Injured Worker's request for working wage loss compensation from 01/09/2009 to 12/31/2009 is accordingly denied.

{¶ 21} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 22} Relator contends that the commission abused its discretion by denying him working wage loss compensation. For the reasons that follow, the magistrate disagrees.

{¶ 23} 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 * * *.

{¶ 24} 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.*, 67 Ohio St.3d 452 (1993). This principle is equally applicable to claims for wage loss compensation. *State ex rel. The Andersons v. Indus. Comm.*, 64 Ohio St.3d 539 (1992). As noted by the court in *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118 (1993), a wage loss claim has

two components: a reduction in wages and a causal relationship between the allowed condition and the wage loss.

{¶ 25} In considering a claimant's eligibility for wage loss compensation, the commission is required to give consideration to, and base the determination on, evidence relating to certain factors including 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 and working wage loss compensation. *State ex rel. Pepsi-Cola Bottling Co. v. Morse*, 72 Ohio St.3d 210 (1995); *State ex rel. Reamer v. Indus. Comm.*, 77 Ohio St.3d 450 (1997); and *State ex rel. Rizer v. Indus. Comm.*, 88 Ohio St.3d 1 (2000). A good-faith effort necessitates a claimant's consistent, sincere, and best attempt to obtain suitable employment that will eliminate the wage loss.

{¶ 26} In the present case, because relator was unable to return to his former position of employment, he was required to search for work within his physical, psychiatric, mental, and vocational limitations earning as much if not more than he earned at his former position of employment. Here, in seeking an award of working wage loss compensation, relator was required to demonstrate that the work he was performing as a real estate agent was suitable employment (within his limitations), that he continued to seek suitable employment that was comparably paying work or that he should be excused from continuing to search and, that his earnings were less than the earnings he received in his former position of employment.

{¶ 27} In *State ex rel. Haddox v. Indus. Comm.*, 88 Ohio St.3d 279 (2000), the Ohio Supreme Court stated that, in order to prove a loss or decrease in wages, an injured worker must submit evidence of present earnings which can be analyzed on a weekly basis. Recognizing that not all employees are paid on a weekly basis, Oho Adm.Code 4125-1-01(A)(16) provides three definitions for present earnings and identifies the evidence necessary to permit the adjudicator to conduct the requisite week-by-week analysis.

{¶ 28} First, the Ohio Adm.Code provides a definition of present earnings for those receiving wages on a routine basis without any substantial variations in the wages received:

> "Present earnings" means the claimant's actual weekly earnings which are generated by gainful employment unless the claimant has substantial variations in earnings.

{¶ 29} Ohio Adm.Code 4125-1-01(A)(16) defines present earnings for those claimants earnings vary substantially and instructs claimants regarding the necessary evidence:

> Where the claimant has substantial variations in earnings, the adjudicator shall apportion the earnings over such period of time that reasonably reflects the claimant's efforts to earn such amount. Earnings generated from commission sales, bonuses, gratuities, and all other forms of compensation for personal services customarily received by a claimant in the courts of his or her employment and accounted for by the claimant to his or her employer will be included in present earnings for the purposes of computing the wage loss award. In instances where sales commission, bonuses, gratuities, or other compensation are not paid on a weekly or biweekly basis, their receipt will be apportioned prospectively over the number of weeks it is determined were required to initiate and consummate the sale or earn the bonus, gratuity, or other compensation.

{¶ 30} Lastly, Ohio Adm.Code 4125-1-01(A)(16) defines present earnings for those claimants who are self-employed and instructs the claimant's regarding the presentation of that evidence:

> In the case of a claimant engaged in self-employment, "present earnings" means gross income minus expenses. For purposes of calculating present earnings, there shall be a rebuttable presumption that a claimant engaged in self-employment has a gross income of at least one hundred dollars per week or such other compensation that the bureau of workers' compensation shall impute to self-employed persons for purposes of determining premium payments. Income derived from self-employment shall be reported on at least a quarterly basis.

{¶ 31} Because wage loss determinations are analyzed on a week-by-week basis, claimants are generally required to complete wage loss statements for every week during which wage loss compensation is sought. These statements are to be submitted every four weeks and must include the address of each employer contacted, the employer's telephone number, the position sought, a reasonable identification by name or position of the person contacted, the method of contact, and the result of the contact. *See* Ohio Adm.Code 4125-1-01(C)(5)(a)(d).

{¶ 32} Because claimants, including relator, are required to make their best efforts to eliminate the wage loss, as a general rule, even those claimants who have found employment which does not eliminate the wage loss are still required to continue to search for suitable employment. However, there have been some situations in which the Supreme Court of Ohio and this court have excused a claimant from continuing to seek suitable employment after they have secured other employment.

{¶ 33} For example, in *State ex rel. Brinkman v. Indus. Comm.*, 87 Ohio St.3d 171 (1999), William Brinkman had been employed as a Columbus Police Officer when he sustained injuries which precluded him from returning to his former position of employment. Brinkman obtained a part-time job and was informed by his new employer that part-time employees were given preference for full-time positions as they became available. Brinkman filed an application for working wage loss compensation which the commission denied after finding that his anticipation of becoming a full-time employee could not be used as a basis for his failure to make a good-faith search for suitable full-time employment.

{¶ 34} Ultimately, Brinkman's case was heard before the Supreme Court of Ohio. In finding that Brinkman was entitled to wage loss compensation, the court specifically noted that Brinkman had secured several part-time jobs with various organizations before he obtained the job at Anheuser-Busch. The court also noted that his job with Anheuser-Busch, making $20.00 per hour, would most likely exceed the pay he would receive if he obtained a 40-hour job at minimum wage. Further, the court noted that Brinkman testified that part-time workers were given preference when full-time positions became available. Under those facts, the court determined that the

commission had abused its discretion by finding that Brinkman had voluntarily limited his income and that the facts did not establish such a limitation or life-style-motivated job selection. Those are the two concerns which have prompted close examination of part-time work.

{¶ 35} *State ex rel. Ameen v. Indus. Comm.*, 100 Ohio St.3d 161, 2003-Ohio-5362, Jane Ameen was working as a nurse when she sustained injuries which precluded her from returning to employment as a nurse. Ameen sought counseling from the Ohio Bureau of Vocational Rehabilitation and the Private Industry Council and was advised to explore different employment options. Ameen eventually returned to college and obtained a teaching degree.

{¶ 36} Ameen's teaching job paid slightly less than her nursing job and she sought an award of working wage loss compensation. The commission denied her request after finding that she had voluntarily limited her income. This court agreed, finding that her job search was inadequate.

{¶ 37} Ultimately, the Supreme Court of Ohio determined that Ameen was entitled to wage loss compensation. After reiterating that full-time employment does not necessarily relieve a claimant of continuing to seek other employment, the court found that requiring Ameen to continue looking for work with the expectation that she would leave her teaching job was inappropriate. Specifically, the *Ameen* court stated:

> [I]t is equally inappropriate to have expected claimant to decline the teaching job or to continue seeking other work. As previously stated, claimant has a future with the school district. Again, there is job security, the prospect of salary increases, and advancement possibility. And there are other considerations that militate against the commission's determination. Claimant's position is presumably contractual and forecloses the option of leaving for another position on short notice. Equally important are the intangibles. Teaching entails commitment. It is a disservice to the claimant and the administration, faculty, and students who rely upon her to expect her to leave midterm should a better position surface.

Id. at 20.

{¶ 38} In *State ex rel. Bishop v. Indus. Comm.*, 10th Dist. No. 04AP-747, 2005-Ohio-4548. Jarrod C. Bishop sustained a work-related injury while employed as a production associate for Honda. When his condition had reached maximum medical improvement and he was able to return to light-duty work, Honda informed him that it was unable to meet his medical restrictions. Bishop registered with the Ohio Bureau of Employment Services (now Ohio Department of Job and Family Services) and ultimately became employed as a car salesman for Nelson Auto Group.

{¶ 39} Because he was not satisfied with the commissions that he was earning at Nelson Auto Group, Bishop resigned and began employment as a car salesman at Steve Austin Automotive. At the same time, Bishop applied to and was accepted by The Ohio State University where he intended to major in business administration.

{¶ 40} The commission denied wage loss compensation to Bishop because there was no evidence that he engaged in any job search and the commission found that the *Brinkman* and *Ameen* cases did not support Bishop's claim for compensation.

{¶ 41} Bishop filed a mandamus action. This court granted a writ of mandamus ordering the commission to grant him wage loss compensation. Specifically, this court noted as follows:

> Additionally, it is undisputed that relator had only a high school diploma at the time of his injury, the extent of which precluded his return to the type of work he had previously performed. Thus, the scope and quality of jobs available to relator were limited. Despite this, relator still found employment in just over a month with Nelson Auto. Once employed, he worked in excess of 40 hours per week and took advantage of any opportunity to improve his skills. Moreover, contrary to the notion that relator utterly failed to search for more comparably paying work, he actively sought employment at a second dealership in the hope of increasing his earnings. A short time later, relator returned to Nelson Auto. There, through continued experience, training and hard work, relator eliminated his wage loss from June 20, 2003 through the end of the year. In the end, that is the very essence of why a good-faith job search is required: "to obtain suitable employment that will eliminate the wage loss." Ohio Adm.Cod 4125-1-01(D)(1)(c)

> Under the facts of this case, we conclude that the commission's decision required relator to "leave a good thing" by abandoning his gainful employment as a car salesman, which became more profitable with experience, motivation, time and training, to seek the possibility of more instant comparably paying work.

Id. at 18-19.

{¶ 42} In the present case, the only evidence relator presented concerning his income was a copy of his 2009 U.S. Individual Income Tax Return ("2009 tax return") on which he represented that he is a self-employed sole proprietorship. Relator listed his wages, salary, tips, etc., as $22,343 and his business income as $20,232. Relator also listed one-half of self-employment tax as $1,430 and self-employed SEP, Simple, and qualified plans as $3,760. Relator also listed his self-employment tax as $2,859. Relator attached a schedule C which listed his gross receipts for sales as $92,810. In terms of expenses, relator listed the following: advertising as a $20,000 expense, car and truck expenses in the amount of $16,544, insurance as $584, legal and professional services in the amount of $250, office expenses of $12,000, supplies in the amount of $9,761, deductible meals and entertainment in the amount of $6,050, utilities in the amount of $1,300, and other expenses in the amount of $6,089. Those other expenses included dues, broker fees, payments to the BWC, and a certain amount for house preparation. All total, relator identified total expenses in the amount of $72,578. Taking his gross receipts for sales in the amount of $92,810 and subtracting his total expenses in the amount of $72,578, relator indicated that his net profit was $20,232. That is the dollar amount relator indicated that he earned and submitted with his wage loss application.

{¶ 43} In denying relator's application for wage loss compensation, the commission found that he did not demonstrate that his reduction of wages was casually related to the allowed conditions in his claim. The commission also found that relator failed to present medical evidence concerning his restrictions for the time period wherein wage loss compensation was sought: January 9 through December 31, 2009.

The commission concluded that relator's wage loss information was insufficient to entitle him to an award.

{¶ 44} Arguing to the contrary, relator contends that the March 26 and June 24, 2010 reports of Dr. Kahn satisfy the requirement that he present medical evidence of his restrictions.

{¶ 45} Ohio Adm.Code 4125-1-01(C) required that relator present sufficient medical evidence of restrictions during the relevant time period. Relator contends that the March 26 and June 24, 2010 reports meet those requirements.

{¶ 46} In those reports, Dr. Kahn indicated that he last examined relator on December 16, 2009. Clearly, this date is at the end of the requested period and not the beginning. Further, as indicated in the findings of fact, certain other reports which relator indicated he filed in support of his motion are not contained in the stipulation of evidence and are not available for this court to review. Considering the March 26 and June 24, 2010 reports (the only reports from Dr. Kahn), the magistrate finds that the commission did not abuse its discretion in finding that they were insufficient in spite of the fact that Dr. Kahn indicated that, as of December 10, 2008 relator was limited to working five to six hours per day secondary to the allowed condition of interstitial lung disease.

{¶ 47} Relator did not present contemporaneous medical evidence of restrictions in effect during the relevant time period at issue. Both the March 26 and the June 24, 2010 reports of Dr. Kahn are outside the requested time period and do not meet the requirements of Ohio Adm.Code 4125-1-01(C)(2)(3). Further, to the extent that any restrictions were permanent, Ohio Adm.Code 4125-1-01(C)(3) required relator to file supplemental medical records every 180 days. Relator failed to do so.

{¶ 48} Even if this court accepts that relator did present medical evidence of certain physical restrictions, the magistrate finds that the commission did not abuse its discretion finding that he failed to meet his burden of proving a wage loss caused by his allowed conditions. In reviewing the stipulation of evidence, there are numerous office notes from Robert A. Kalb, M.D., who was treating relator for his right hip pain. Those office notes are from the year 2009, and Dr. Kalb limited relator to working 35 hours per

week. Even if the commission were to find that claimant was restricted to working 35 hours per week, there is nothing in the record from which the commission could have determined whether or not relator was actually working 35 hours per week as a real estate agent. Relator did not attempt to provide monthly or quarterly summaries concerning the number of listings, hours worked, or sales made. There is nothing from which the commission could have determined that relator's restrictions caused his wage loss and that he made a good-faith effort to secure suitable employment which was comparably paying work.

{¶ 49} There is no evidence from which the commission could have determined whether relator made a good-faith effort to eliminate the wage loss. In the absence of such evidence (time-relevant restrictions; number of hours worked per week; number of houses sold; etc. the commission did not abuse its discretion in denying his application.

{¶ 50} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by denying him wage loss compensation and this court should deny his 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).