[Cite as *State ex rel. Lake Hosp. Sys., Inc., v. Indus. Comm.*, 2012-Ohio-665.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Lake Hospital System, Inc.,	:	
Relator,	:	No. 10AP-731
v.	:	(REGULAR CALENDAR)
Renee Kania, and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on February 16, 2012

David R. Cook, for relator.

Lallo & Feldman Co., L.P.A., *Matthew A. Lallo*, and *Michael J. Feldman*, for respondent Renee Kania.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶1} Relator, Lake Hospital System, Inc., has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding R.C. 4123.56(B) wage-loss

compensation and R.C. 4123.56(A) temporary total disability ("TTD") compensation to respondent, Renee Kania ("claimant"), and to enter orders denying compensation.

{¶2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law, recommending that this court deny relator's request for a writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶3} In its first objection, relator contests the magistrate's finding that there existed some evidence to support the award of wage-loss compensation under Ohio Adm.Code 4125-1. Relator first argues that the magistrate erred when he found claimant performed a good-faith search for comparably paying work through June 19, 2009, because the magistrate relied upon events that transpired after that date. Specifically, relator contends the magistrate improperly considered the facts and evidence submitted to support the period of wage loss from June 20 to September 11, 2009, to support the period of wage loss up to June 19, 2009. In this regard, the magistrate found that, although the commission's October 9, 2009 order regarding wage loss from May 5 to June 19, 2009, did not address whether claimant searched for comparably paying work, the commission's March 26, 2010 order regarding wage loss from June 20 to September 11, 2009, demonstrated that claimant was not required to search for comparably paying work for the entire period from May to September 2009 because there were few jobs available within claimant's very restrictive medical conditions and claimant was progressing in her job.

{¶4} Ohio Adm.Code 4125-1-01(D)(1) provides, in pertinent part:

> The claimant is solely responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation. Unless the claimant meets this burden, wage loss compensation shall be denied. A party who asserts, as a defense to the payment of wage loss compensation, that the claimant has failed to meet his burden of producing evidence regarding his or her entitlement to wage loss compensation is not required to produce evidence to support that assertion. However, any party asserting other defenses to the payment of wage loss compensation, through motion, appeal, or otherwise is solely responsible for and bears the burden of producing evidence to support those defenses. If

> there is insufficient evidence to support a defense to the payment of wage loss compensation, that defense shall not be used as a grounds to deny such compensation. In no case shall this rule be construed as placing on the industrial commission any burden to produce evidence.
>
> In considering a claimant's eligibility for compensation for wage loss, the adjudicator shall give consideration to, and base the determinations on, evidence in the file, or presented at hearing, relating to:
>
> (1) The claimant's search for suitable employment.
>
> * * *
>
> (b) A claimant may first search for suitable employment which is within his or her skills, prior employment history, and educational background. If within sixty days from the commencement of the claimant's job search, he or she is unable to find such employment, the claimant shall expand his or her job search to include entry level and/or unskilled employment opportunities.
>
> (c) A good faith effort to search for suitable employment which is comparably paying work is required of those seeking non-working wage loss and of those seeking working-wage loss who have not returned to suitable employment which is comparably paying work * * *.

{¶5} We agree with the magistrate that it is appropriate to view both the October 9, 2009 order and the March 26, 2010 order together to determine whether claimant searched for comparably paying work during the period at issue in the October 9, 2009 order because both orders adjudicate a continuous period of wage loss. The second order made clear that claimant should have been excused from searching for comparably paying work during the period at issue in the first order because her online teaching job was one of the few jobs within her strict medical restrictions, and it became clear by the time of the second order that her first teaching job had progressed into more classes and more income. As the magistrate noted, the first and second orders addressed a continuous period of wage loss from May to September 2009, and the first order indicated that relator, a self-insured employer, should consider further wage-loss compensation. Therefore, these two orders were linked factually, and it is logical to review

them together. Also, we are mindful that our standard of review is whether there exists "some evidence in the record to support the commission's stated basis for its decision." *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987), syllabus. When the record contains some evidence to support the commission's factual findings, a court may not disturb the commission's findings in mandamus. *State ex rel. Fiber-Lite v. Indus. Comm.*, 36 Ohio St.3d 202 (1988), syllabus. In the present case, there did exist some evidence in the record to support the commission's findings in the first order. Under the circumstances of this case, we can find no error.

{¶6} Relator also argues that there was no evidence to support the second order, which awarded wage-loss compensation from June 20 to September 11, 2009. The commission found that claimant was excused from seeking comparably paying employment based on her medical restrictions for this period of wage loss. Relator complains that there was no evidence to support the commission's conclusion that there were few jobs available within her restrictions given her skills and background. However, as the expert on the non-medical factors, it was within the commission's fact-finding discretion to determine that there were "few" jobs within relator's physical restrictions. *See State ex rel. Osborne v. Indus. Comm.*, 10th Dist. No. 06AP-966, 2007-Ohio-3991, ¶ 25; *State ex rel. DaimlerChrysler Corp. v. Indus. Comm.*, 10th Dist. No. 01AP-1354, 2002-Ohio-4309, ¶ 37 (the commission's conclusion that that there were no jobs available to claimant that he could perform within the doctor's physical restrictions was within the province of the commission to decide, given the ultimate decision as to disability is within the province of the commission to determine with or without the aid of vocational reports).

{¶7} Relator also argues that the record is unclear as to what claimant earned as an online teacher, as she references a $30-per-credit hour position but fails to explain the total weekly wage into which this would translate. We agree that the commission did not specifically indicate in its order how it converted this rate of pay into a weekly wage. However, such ambiguity does not affect the commission's ultimate decision that claimant was not required to seek comparably paying employment due to her obtaining a teaching job with steadily increasing pay and the few jobs available within her physical restrictions.

Therefore, we find this argument without merit. For these reasons, relator's first objection is overruled.

{¶8} Relator argues in its second objection that the magistrate and commission erred when they granted TTD compensation commencing November 2, 2009, without first determining whether relator had stopped working due to her related injuries as of that date. Relator contends that the treatment summary and C-84 submitted by Dr. Marian Chatterjee were dated November 16, 2009; thus, although claimant may not have been working as of the date of the treatment summary, she may have been working sometime between November 2 and November 15, 2009.

{¶9} We are not certain why relator believes the treatment summary and C-84 were dated November 16, 2009. Dr. Chatterjee's C-84 clearly indicates it was completed on November 2, 2009. Although the treatment summary does not specifically indicate the date on which it was completed, in Dr. Chatterjee's C-84, she references her "tx summary 11-2-09," and, in turn, Dr. Chatterjee states in the treatment summary that she is "submitting a C[-]84." Thus, it is apparent that both the treatment summary and C-84 were completed on November 2, 2009, and Dr. Chatterjee implies in the treatment summary that claimant had stopped working as a teacher and for her father's business as of that date. Therefore, relator's argument is without merit, and we overrule its second objection.

{¶10} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of relator'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 we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

TYACK and DORRIAN, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Lake Hospital System, Inc.,	:	
Relator,	:	
v.	:	No. 10AP-731
Renee Kania 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 August 24, 2011

David R. Cook, for relator.

Lallo & Feldman Co., L.P.A., and *Michael J. Feldman*, for respondent Renee Kania.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} In this original action, relator, Lake Hospital System, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its orders awarding R.C. 4123.56(B) wage loss compensation and R.C. 4123.56(A) temporary total disability ("TTD") compensation to respondent Renee Kania ("claimant"), and to enter orders denying the compensation.

Findings of Fact:

{¶12} 1. On September 15, 2006, claimant sustained an industrial injury while employed as a registered nurse with relator, a self-insured employer under Ohio's workers' compensation laws.

{¶13} 2. Initially, relator certified the industrial claim (No. 06-865852) for "acute lumbar strain, bilateral elbow contusion, bilateral knee contusion." Later, relator certified the claim for "herniated disc L4-5, L5-S1."

{¶14} 3. On October 15, 2007, claimant moved for the allowance of an additional condition in the claim.

{¶15} 4. Following a March 3, 2008 hearing, a district hearing officer ("DHO") additionally allowed the claim for "depressive disorder." Relator administratively appealed the DHO's order of March 3, 2008.

{¶16} 5. Following a May 2, 2008 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of March 3, 2008.

{¶17} 6. On May 28, 2008, another SHO mailed an order refusing relator's appeal from the SHO's order of May 2, 2008.

{¶18} 7. On March 18, 2009, claimant's physician of record, Amardeep S. Chauhan, D.O., completed a Physicians Report of Work Ability (MEDCO-14) on which he certified that claimant may return to work with restrictions and that the restrictions are permanent. On the form, Dr. Chauhan also indicated that claimant cannot lift or carry over ten pounds and that she can only occasionally lift or carry up to ten pounds. She cannot bend or reach below knee level at all.

{¶19} On the form, in response to a specific query, Dr. Chauhan indicated that the allowed physical conditions of the claim had reached maximum medical improvement.

{¶20} 8. By letter dated March 19, 2009, relator's third-party administrator, KKSG & Associates, Inc., informed claimant that her TTD benefits were being terminated effective March 18, 2009.

{¶21} 9. The Ohio Bureau of Workers' Compensation ("bureau") provides a form, C-140, captioned "Initial Application for Wage Loss Compensation." The record contains a C-140 dated March 31, 2009 that was completed and signed by claimant. This C-140 requests non-working wage loss compensation beginning March 18, 2009. It is not clear from the record when this C-140 was filed.

{¶22} 10. The bureau also provides a form, C-141, captioned "Wage Loss Statement for Job Search."

{¶23} 11. On July 20, 2009, claimant submitted numerous C-141s that she had completed and signed. The C-141s cover a period of a job search beginning in March through June 2009.

{¶24} 12. Following a July 20, 2009 hearing, a DHO issued an order denying a request for wage loss compensation. The DHO's order explains:

> The Injured Worker's request for the payment of working and non-working wage loss commencing 05/08/2009 through 06/19/2009 is denied. The District Hearing Officer finds first of all that there is no C-140 Application on file requesting the payment of wage loss compensation. In support of the wage loss compensation is a MEDCO-14 dated 03/18/2009 from Dr. Annouchi. [sic] The District Hearing Officer further finds that the job search documentation submitted in conjunction with the C-141 forms is insufficient to support a good faith job search as set forth in Ohio Administrative Code 4125-1-01.

{¶25} 13. Claimant administratively appealed the DHO's order of July 20, 2009.

{¶26} 14. The record also contains a C-140 application completed by claimant on July 31, 2009, after the hearing before the DHO. This C-140 requests working wage loss compensation from May 5 to June 1, 2009.

{¶27} 15. Following an October 9, 2009 hearing, an SHO issued an order that vacates the DHO's order of July 20, 2009, and awards wage loss compensation. The SHO's order of October 9, 2009 explains:

> The Staff Hearing Officer awards working wage loss from date of last payment through 06/19/2009 closed period. During this period the Injured Worker was working part time and also looking for work including making applications for work activities that have resulted in her now teaching at Northcoast Curriculum. The medical evidence indicates that the Injured Worker is unable to return to her former position of employment as the result of the allowed injury in this claim and that she has serious medical restrictions. The Employer argued that some of the jobs that she applies [sic] for are for positions that are not within her present restrictions, however many of these positions tend to be with what appears to be fairly large Employers that may have jobs within her restrictions that are not listed in the newspaper.

{¶28} 16. On November 4, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 9, 2009.

{¶29} 17. Earlier, on October 20, 2009, relator filed a motion stating that relator "objects" to the payment of wage loss compensation after June 19, 2009. (Oddly, the motion also objects to the payment of wage loss compensation for the period before June 20, 2009.)

{¶30} 18. On November 2, 2009, psychologist Marian Chatterjee, Ph.D., completed a C-84 certifying TTD beginning November 2, 2009 to an estimated return-to-work date of February 3, 2010.

{¶31} 19. On January 5, 2010, a DHO heard relator's October 20, 2009 motion and claimant's C-84 request for TTD compensation.

{¶32} 20. Following the January 5, 2010 hearing, the DHO issued an order awarding further wage loss compensation and also awarding TTD compensation beginning November 2, 2009. The DHO's order of January 5, 2010 explains:

> The District Hearing Officer awards working wage loss compensation from 06/20/2009 through 09/11/2009, closed period. The District Hearing Officer relied on the C-140 Application for Wage Loss Compensation and medical records dated 10/20/2009, 10/08/2009, and 09/17/2009.
>
> The District Hearing Officer notes the following per Injured Worker's testimony[:] that the Injured Worker was formerly a nurse working in a hospital. Because of her medical restrictions, the Injured Worker has now moved into the teaching field. The Injured Worker teaches nursing classes online. She is paid approximately $30.00 per credit hour. The Injured Worker testified and the records support the fact that the Inured Worker spent approximately ten or fifteen hours of class time along with ten or fifteen hours of prep time per week. The Injured Worker started with one class, as this was the limitation from that employer. Upon successful completion of teaching one class, she was then granted an increase in the amount of work to two classes, and then three classes. The Injured Worker is looking forward to a full-time job as an online nursing teacher. Over this time, the Injured Worker did little or no job searches. However, the record does reflect that she sent out resumes. This was confirmed in a 01/04/2010 report by Dr. Kaplan where she sent out thirty resumes.
>
> The District Hearing Officer notes the allowed conditions and the medical restrictions are very restrictive. Thus, the Injured Worker is not able to find suitable employment simply because there are so few jobs available within her strict medical restrictions. The District Hearing Officer finds that the job of working as a teacher online, including class time and prep time was sufficient as was her effort to find some other employment as outlined on the C-140 Application and the attached journal.

> Notwithstanding her teaching job, the Injured Worker also worked for her father as a bookkeeper and earned approximately $200.00 certain weeks as outlined by the employer, SIS Industrial Sales. The Injured Worker testified that this was part-time work for a small employer and that work eventually ceased to exist.
>
> The District Hearing Officer notes that the Injured Worker was previously found to be at a level of maximum medical improvement for all the allowed physical conditions.
>
> This claim, however, is also allowed for a psychological condition noted above. The District Hearing Officer awards temporary total disability compensation from 11/02/2009 through 01/05/2010 and to continue upon submission of medical evidence. The District Hearing Officer relied on the 11/02/2009 and 11/16/2009 medical records from Dr. Chatterjee.

{¶33} 21. Relator administratively appealed the DHO's order of January 5, 2010.

{¶34} 22. Following a March 26, 2010 hearing, an SHO issued an order that affirms the DHO's order of January 5, 2010. The SHO's order explains:

> It is the order of the Staff Hearing Officer that the Employer's C-86 filed 10/20/2009 is granted to the extent of this order and that the Injured Worker's C-84 filed 11/05/2009 is granted to the extent of this order.
>
> The Staff Hearing Officer affirms the District Hearing Officer order which awarded working wage loss compensation from 06/20/2009 through 09/11/2009, closed period. This decision is based on the Injured Worker's C-140 application and the 07/01/2009, 07/29/2009 and 07/30/2009 reports of Dr. Chauhan.
>
> As noted by the District Hearing Officer, the Injured Worker formerly worked as a nurse and due to her medical restrictions moved into an online teaching position for which she was paid approximately $30.00 per credit hour. She has indicated that this position involved ten to fifteen hours of class time along with ten to fifteen hours of preparatory work. She gradually increased her teaching load and saw this position as full-time opportunity. She did little job searching during this time although she continued to send out

> resumes. The Staff Hearing Officer concurs with the District Hearing Officer that the job of teaching online coupled with her medical restrictions establish her eligibility for working wage loss compensation.
>
> The Staff Hearing Officer also concurs with the District Hearing Officer finding that she be paid temporary total compensation from 11/02/2009 through 01/05/2010 and to continue upon submission of medical evidence. This finding is based on the 11/02/2009 and 11/16/2009 reports of Dr. Chatterjee.
>
> All evidence on file was reviewed and considered.

{¶35} 23. On April 24, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of March 26, 2010.

{¶36} 24. On August 3, 2010, relator, Lake Hospital System, Inc., filed this mandamus action.

Conclusions of Law:

{¶37} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶38} As earlier noted, relator challenges the awards of R.C. 4123.56(B) wage loss compensation and R.C. 4123.56(A)TTD compensation.

{¶39} With respect to the wage loss award, the main issue is whether the commission appropriately addressed the requirement of Ohio Adm.Code 4125-1-01(D)(1)(c) that the wage loss claimant show a good faith effort to search for suitable employment which is comparably paying work. The magistrate finds that the commission appropriately addressed the requirement.

{¶40} Ohio Adm.Code 4125-1-01 sets forth the commission's rules applicable to the adjudication of applications for wage loss compensation.

Ohio Adm.Code 4125-1-01(A) provides the following definitions:

> (7) "Suitable employment" means work which is within the claimant's physical capabilities, and which may be performed by the claimant subject to all physical, psychiatric, mental, and vocational limitations to which the claimant is subject at the time of the injury which resulted in the allowed conditions in the claim or, in occupational disease claims, on the date of the disability which resulted from the allowed conditions in the claim.
>
> (8) "Comparably paying work" means suitable employment in which the claimant's weekly rate of pay is equal to or greater than the average weekly wage received by the claimant in his or her former position of employment.
>
> (9) "Working wage loss" means the dollar amount of the diminishment in wages sustained by a claimant who has returned to employment which is not his or her former position of employment. However, the extent of the diminishment must be the direct result of physical and/or psychiatric restriction(s) caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123. of the Revised Code.

Ohio Adm.Code 4125-1-01(D) provides:

> In considering a claimant's eligibility for compensation for wage loss, the adjudicator shall give consideration to, and base the determinations on, evidence in the file, or presented at hearing, relating to:
>
> (1) The claimant's search for suitable employment.
>
> * * *
>
> (b) A claimant may first search for suitable employment which is within his or her skills, prior employment history, and educational background. If within sixty days from the commencement of the claimant's job search, he or she is unable to find such employment, the claimant shall expand his or her job search to include entry level and/or unskilled employment opportunities.

> (c) A good faith effort to search for suitable employment which is comparably paying work is required of those seeking non-working wage loss and of those seeking working-wage loss who have not returned to suitable employment which is comparably paying work[.] * * * A good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss. * * *

{¶41} Through 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. That broad-based analysis and the case law from which it is derived is succinctly set forth in *State ex rel. Timken Co. v. Kovach*, 99 Ohio St.3d 21, 2003-Ohio-2450, ¶19-28:

{¶42} The purpose of wage-loss compensation is to return to work those claimants who cannot return to their former position of employment but can do other work. Ideally, that other work generates pay comparable to the claimant's former position. Where it does not, wage-loss compensation covers the difference.

> Receipt of such compensation hinges on whether there is a causal relationship between injury and reduced earnings, more specifically, on a finding that "claimant's job choice was motivated by an injury-induced unavailability of other work and was not simply a lifestyle choice." *State ex rel. Jones v. Kaiser Found. Hosp. Cleveland* (1999), 84 Ohio St.3d 405, 407, 704 N.E.2d 570.
>
> The requirement of a causal relationship is often satisfied by evidence of an unsuccessful search for other employment at the preinjury rate of pay. *State ex rel. Ooten v. Siegel Interior Specialists Co.* (1998), 84 Ohio St.3d 255, 256, 703 N.E.2d 306. Because claimant allegedly refused a comparably paying position at Timken and did not search for another job, Timken asserts that claimant is ineligible for wage-loss compensation. Timken's position is untenable.

Relying on the Ohio Administrative Code, Timken asserts that a job search is mandatory. We have said otherwise. In *Ooten,* we indicated that a job search is "not universally required." Id. And in *State ex rel. Brinkman v. Indus. Comm.* (1999), 87 Ohio St.3d 171, 718 N.E.2d 897, we excused the claimant's lack of a job search when he had secured lucrative, albeit part-time, employment with a realistic possibility that it would change to full-time.

Brinkman and *Ooten* respectively involved part-time employment and self-employment-two categories of employment subject to enhanced scrutiny "to ensure that wage-loss compensation is not subsidizing speculative business ventures or life-style choices." *Brinkman,* 87 Ohio St.3d at 173, 718 N.E.2d 897.

The employment at issue herein is full-time, not part-time, which lessens-but does not eliminate-these concerns. Indeed, "in *some* situations, the commission may require a claimant with full-time employment to nevertheless continue looking for 'comparably paying work.' " *State ex rel. Yates v. Abbott Laboratories, Inc.,* 95 Ohio St.3d 142, 2002-Ohio-2003, 766 N.E.2d 956, ¶ 38. For regardless of the character of the work, "the overriding concern in all of these cases-as it has been since the seminal case of *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, 648 N.E.2d 827-is the desire to ensure that a lower-paying position-regardless of hours-is necessitated by the disability and not motivated by lifestyle choice. And this is a concern that applies equally to regular full-time employment." Id. at ¶ 37. In determining whether to excuse a claimant's failure to search for another job, we use a broad-based analysis that looks beyond mere wage loss. This approach was triggered by our recognition that "[w]age-loss compensation is not forever. It ends after two hundred weeks. R.C. 4123.56(B). Thus, when a claimant seeks new post-injury employment, contemplation must extend beyond the short term. The job that a claimant takes may have to support that claimant for the rest of his or her life-long after wage-loss compensation has expired." *Brinkman,* 87 Ohio St.3d at 174, 718 N.E.2d 897.

In *Brinkman,* a job search was deemed unnecessary where the claimant secured a part-time job with a high hourly wage and a realistic possibility of being offered a full-time position. Conversely, in *Yates,* evidence of a good-faith job search

> *was* required of a claimant with full-time employment who was making drastically reduced postinjury wages. We stressed in *Yates* that the claimant had voluntarily relocated to a place with a high rate of unemployment and was grossly underutilizing her college degree and real estate license.
>
> In the case before us, our broad-based analysis allows us to consider the fact that claimant's current employment is with Timken-the same company at which he was injured. This militates against requiring a job search because claimant has some time invested with Timken. He has years towards a company pension. Moreover, his longevity may have qualified him for additional weeks of vacation or personal days. Much of this could be compromised if claimant were to leave Timken for a job elsewhere.
>
> *Brinkman* held that it was inappropriate to ask a claimant to "leave a good thing" solely to narrow a wage differential. Given claimant's years of service with Timken, the benefits he receives there outweigh a higher-paying position he might be able to get at a new company. Thus, we apply *Brinkman*'*s* rationale and preserve claimant's eligibility for wage-loss compensation.

{¶43} Analysis begins with the observation that the wage loss award at issue involves two final commission orders that together award wage loss compensation for a continuous period from May through September 11, 2009.

{¶44} The first final order is the SHO's order of October 9, 2009 that awarded wage loss compensation through June 19, 2009, and indicated to the self-insured employer that it consider further wage loss compensation. (Relator objected to further wage loss compensation.)

{¶45} The second final order is the SHO's order of March 26, 2010 that affirmed the DHO's order of January 5, 2010 and awarded further wage loss compensation from June 20 through September 11, 2009.

{¶46} If the first final order were to be viewed in isolation from the second final order, one could argue that the first final order is defective for its failure to address the requirement of Ohio Adm.Code 4125-1-01(D)(1)(c) that the claimant show a good faith effort to search for suitable employment which is comparably paying work.

{¶47} The first final order simply acknowledges that claimant was working part-time and also looking for work and that the job search resulted in a teaching job with Northcoast Curriculum. Whether or not claimant ever searched for comparably paying work is not addressed. Here, it can be argued that the SHO's order of October 9, 2009 (first final order) is problematic.

{¶48} In the magistrate's view, the first final order cannot be viewed in isolation from the second final order because they both adjudicate a continuous period of wage loss. Obviously, the second final order views the factual scenario with the hindsight that the first final order did not have.

{¶49} In the magistrate's view, the DHO's order of January 5, 2010 that was administratively affirmed by the second final order best explains why claimant is eligible for wage loss compensation even though "the Injured Worker did little or no job searches." Based upon claimant's hearing testimony, the DHO determined:

> * * * [T]hat the Injured Worker was formerly a nurse working in a hospital. Because of her medical restrictions, the Injured Worker has now moved into the teaching field. The Injured Worker teaches nursing classes online. She is paid approximately $30.00 per credit hour. The Injured Worker testified and the records support the fact that the Inured Worker spent approximately ten or fifteen hours of class time along with ten or fifteen hours of prep time per week. The Injured Worker started with one class, as this was the limitation from that employer. Upon successful completion of teaching one class, she was then granted an increase in the amount of work to two classes, and then three classes. The

> Injured Worker is looking forward to a full-time job as an online nursing teacher. Over this time, the Injured Worker did little or no job searches. However, the record does reflect that she sent out resumes. This was confirmed in a 01/04/2010 report by Dr. Kaplan where she sent out thirty resumes.
>
> The District Hearing Officer notes the allowed conditions and the medical restrictions are very restrictive. Thus, the Injured Worker is not able to find suitable employment simply because there are so few jobs available within her strict medical restrictions. The District Hearing Officer finds that the job of working as a teacher online, including class time and prep time was sufficient as was her effort to find some other employment as outlined on the C-140 Application and the attached journal.
>
> Notwithstanding her teaching job, the Injured Worker also worked for her father as a bookkeeper and earned approximately $200.00 certain weeks as outlined by the employer, SIS Industrial Sales. The Injured Worker testified that this was part-time work for a small employer and that work eventually ceased to exist.

{¶50} As the DHO's order suggests, two factors excuse a search for comparably paying work. First, because of claimant's "very restrictive" medical conditions, there are "so few jobs available within her strict medical restrictions." Thus, the online teaching job is a good fit to the medical restrictions. Second, claimant was progressing in her job, starting with just one class, increasing to a second, and then a third.

{¶51} Under the "broad-based analysis" permitted under *Timken*, this magistrate must conclude that the commission appropriately addressed the requirement of Ohio Adm.Code 4125-1-01(D)(1)(c) regarding a search for comparably paying work. That is, claimant was not required to search for comparably paying work under the circumstances here.

{¶52} With respect to the TTD award, the main issue is whether the commission abused its discretion by not making a specific finding that claimant was not working during the period of the TTD award.

{¶53} According to relator, the treatment summery of Dr. Chatterjee suggests that claimant may have been working during the period that Dr. Chatterjee certified TTD which begins November 2, 2009. Relator's argument lacks merit.

{¶54} The record contains a two-page "treatment summary" apparently authored by Dr. Chatterjee. While the "treatment summary" is undated, it does list November 16, 2009 as the "next scheduled session date." The treatment summary states:

> **Progress Since Last Treatment Summary** During this period Renee was in job search and taking online classes[.] She was also working a few hours a day for her father in book keeping[.] Renee has never completely embraced the need for psychological treatment as she has a strong need for control and does not like to admit vulnerabilities[.] She got a job teaching a class in July[.] It was a 40 minute drive each way[.] By September she was teaching three classes per week[.] This was too much for her physically and she had to stop[.] Her right leg was going numb in the car and she was in pain in the days following[.] Renee reports feeling defeated and depressed since she had to stop[.] She managed to work for about four months all together[.] She has continued to take Welbutrin and Ambien prescribed by Dr. Chauhan but reports KKSG stopped paying for it about two-three months ago so she is using private insurance[.] Reports daily crying spells[,] fatigue, excessive sleep (10-11 hours/day), feelings of hopelessness[,] worthlessness and difficulty with decision making[.] Her BDI-II score today was 37 (severe)[.] Some suicidal thoughts without intent[.] Renee is now realizing she can't do it alone and resolves to come to therapy[.] Her level of depression renders her temporarily and totally disabled and I am submitting a C84 and requesting 12 visits over the next 6 months.

{¶55} Thus, the treatment summary indicates that claimant had been working for her father a few hours a day and that she found a teaching job in July 2009. By

September she was teaching three classes per week but had to stop because of numbness in her right leg. She managed to work four months in all.

{¶56} The implication of the treatment summary is that claimant is no longer working as of the date of the treatment summary and cannot do so because of her psychological condition.

{¶57} Clearly, there is no contradiction between Dr. Chatterjee's C-84 certification of TTD and the treatment summary's discussion of claimant's attempt at work.

{¶58} Under the circumstances, it cannot be an abuse of discretion for the commission to rely upon the C-84 without specifically determining that claimant has not worked as of November 2, 2009 and beyond.

{¶59} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

s/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).