

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Oneida A. Clay,	:	
Relator,	:	
v.	:	No. 11AP-941
The Industrial Commission of Ohio and Summit County, Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on October 16, 2012

Zicarelli & Martello, and Mark E. Kremser, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*,
for respondent Industrial Commission of Ohio.

Sherri Bevan Walsh, Summit County Prosecuting Attorney,
and *Marvin Evans*, for respondent Summit County, Ohio.

IN MANDAMUS

TYACK, J.

{¶ 1} Oneida A. Clay filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order terminating her temporary total disability compensation.

{¶ 2} In accord with Loc.R. 13, her case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued the appended magistrate's decision which contains detailed

findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the requested relief.

{¶ 3} No party has filed objections to the magistrate's decision. The case is now before the court for review.

{¶ 4} No error of law or fact is present on the face of the magistrate's decision. We therefore adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

Writ of mandamus denied.

BROWN, P.J., and SADLER, J., concur.

APPENDIX

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Relator,	:	
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v.	:	No. 11AP-941
	:	
The Industrial Commission of Ohio and Summit County, 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 26, 2012

Zicarelli & Martello, and Mark E. Kremser, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*,
for respondent Industrial Commission of Ohio.

Sherri Bevan Walsh, Summit County Prosecuting Attorney,
and *Marvin Evans*, for respondent Summit County, Ohio.

IN MANDAMUS

{¶ 5} Relator, Oneida A. Clay, 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 terminating her temporary total disability ("TTD") compensation and declaring an overpayment after finding that relator's activities in a charitable organization were inconsistent with the functional capacity described by her

psychological providers and examiners and ordering the commission to reinstate her TTD compensation.

Findings of Fact:

{¶ 6} 1. While working for Summit County as a data operator, relator developed "tenosynovitis, right hand; bilateral carpal tunnel syndrome." The date of diagnosis was April 3, 2001.

{¶ 7} 2. Relator received TTD compensation until April 10, 2002, when a district hearing officer ("DHO") found that her allowed physical conditions had reached maximum medical improvement ("MMI").

{¶ 8} 3. In June 2003, relator filed a C-86 motion requesting that her claim be additionally allowed for "[m]ajor depressive disorder, single episode, secondary to wrok-[sic] related injury." Relator's motion was supported by the April 7, 2003 report of Anil M. Parikh, M.D., who noted as follows:

Due to her pain her social, vocation, and recreation life is restricted.

[S]he has been feeling depressed and anxious, has insomnia, increased appetite, weight gain, crying spells, low energy, social isolation, feelings of guilt, feeling irritable, decreased desire for sex, poor concentration, feeling nervous and anxious, low motivation.

{¶ 9} 4. Beginning in April 2003, relator received psychological counseling from Kristine Jordan, LSW. In her treatment notes, beginning April 15, 2003, Jordan noted that relator was depressed, anxious, withdrawn, and that she had feelings of guilt due to her inability to function. In her April 29, 2003 treatment note, Jordan noted that relator was frustrated and coped by social withdrawal and isolating herself. In the May 20, 2003 treatment note, Jordan noted that relator "[c]ontinued extreme social withdraw, not going out of the house unless she has an appointment with a doctor. We discussed moving from the house to porch as a possibility." The June 6, 2003 treatment note indicates that relator's depression had worsened. In the June 10, 2003 treatment note, Jordan noted:

She is feeling some improvement as she is employing cognitive behavioral strategies to counteract some of the depressive and anxiety symptoms. She is trying to break things into small manageable tasks, such as housework or going to the grocery store. She is also asking for help from family and friends on a limited basis, and finding positive results from that. Still struggles with inability to concentrate and focus and think things through thoroughly.

In the June 17, 2003 treatment note, Jordan noted:

She still struggles to work with her children, to push out of her comfort zone, to interact with them, even if it is for 10 or 15 minutes at a time, to look at her day and try to plan one task.

In the June 24, 2003 treatment note, Jordan noted:

Patient continues to have bouts of irritability, anger outbursts, frustration, depression, social isolation. Has difficulty with daily functions and is unable to express emotional concerns with family members or close friends.

The August 14, 2003 treatment note indicates that relator was feeling better and she was trying to engage more with her family and reduce her social isolation.

{¶ 10} 5. A psychological evaluation was conducted by Robert F. Dallara, Jr., Ph.D.

In his June 27, 2003 report, Dr. Dallara specifically noted the following:

In describing her daily routine she states that she gets up sometime before 10:00 A.M. She states that she will often sit around and watch television. She states that she does not have any particular time that she will have dinner but she states that her daughter generally prepares the food. She could not state a specific bed time. She denies that she has hobbies or memberships to clubs or organizations but states she does attend church. Oneida states she does not do cooking or cleaning but will assist [with] laundry and shopping.

* * *

In terms of her mood, Oneida states that she is depressed and that she is sad nearly every day stating that she began to have difficulties with depression when it became necessary for her to stop working. She also states she gets angry easily because

she "cannot do things and part of me is missing". She states she also feels guilty because "I could have made a better job choice". She states she was having frequent crying spells, but this has been improved since she began taking an antidepressant medication prescribed by Dr. Parikh. Again she did not know the name of the medication. She admits to some loss of interest and energy but indicates that this too has begun to improve. * * * [S]he states she does worry frequently about the finances and she is often upset because "I can't even help my kids".

He concluded that she did suffer from a major depressive disorder as a direct and proximate result of her injuries. Noting that relator had already indicated that she had experienced significant improvement, Dr. Dallara recommended that her status be revisited after another two months of treatment.

{¶ 11} 6. Another psychological report was prepared by Jerry E. Flexman, Ph.D. In his October 1, 2003 report, Dr. Flexman noted the following:

She states that her relationship with other people is fair. She does feel somewhat uncomfortable around other[s] because she is not able to be as active as she had in the past. She does socialize with family and has a few friends. She states that emotionally she is not doing very well, she is angry a lot and frustrated because of her inability to function as she has in the past. Her temper is fairly well control[led] although she get irritable.

When the claimant needs to be some place she will drive herself. She prepares food throughout the day and does the dishes, laundry, cleaning, and general straightening up around the house. Her husband takes care of the outside chores. She goes to the local carryout, grocery store, drug store and to the doctor's. She goes to church and denies belonging to any clubs or groups. She denies having any hobbies currently. She eats out and goes to the movies. She watches TV and listens to the radio. She visits and talks with friends and visits and talks with family. She volunteers at the church.

{¶ 12} 7. In an order mailed July 9, 2003, the Ohio Bureau of Workers' Compensation ("BWC") additionally allowed relator's claim for depressive psychosis,

unspecified. The BWC order was based on the June 27, 2003 medical evaluation of Dr. Dallara, who stated as follows:

She does appear to be suffering from depression and it also appears she has been experiencing significant improvement within the past month.

It is this examiner's opinion that Oneida is experiencing a Major Depressive Disorder. Based on information available to this examiner it appears that she does meet the DSM IV TR classification criteria for Major Depressive Disorder Single Episode.

* * *

It does appear that Oneida's depression is a direct and proximate result of her injuries. There does not appear to be any evidence to suggest that she had previously suffered from depression prior to her injuries and she denies having experienced significant depression in the past.

* * *

Treatment should include psychiatric/psychological treatment to treat her Major Depressive Disorder. Oneida is currently receiving outpatient psychiatric treatment from a well respected local psychiatrist. This examiner would estimate that Oneida would benefit from treatment at least two times per week over the next two months. Oneida has already indicated she experienced significant improvement and the bureau may wish to revisit her status following another two months of treatment.

[I]t does not appear that Oneida has yet reached maximum medical improvement. It does appear that her current treatment is reasonable and necessary for her psychological condition. It does not appear that her psychological condition alone prevents her from returning to her former position of employment.

{¶ 13} 8. Relator filed a motion for TTD compensation supported by the C-84 of Dr. Parikh who opined that she was temporarily totally disabled from April 7, 2003 to an estimated return-to-work date of January 30, 2004.

{¶ 14} 9. In an order mailed October 10, 2003, the BWC granted the motion and awarded relator TTD compensation beginning April 7, 2003.

{¶ 15} 10. On November 5, 2003, the Akron Special Investigations Unit ("SIU") received an allegation regarding relator's activities involving a charitable organization in which she and her husband were both involved. The report portion of the SIU's investigation is contained at pages one through six of the stipulation of evidence. The report is significant in that the SIU presented evidence that, at a time when relator maintained that she was socially withdrawn from people, left her home only when necessary, struggled to perform little tasks and interacting with her children, as well as feelings of guilt due to her inability to function, relator was, in fact, involved with and interacting with people. An article in the Akron Beacon Journal dated November 4, 2003, indicated that approximately six months earlier, relator, her husband, and some friends rented a building from which they performed community outreach. The name of their group is TROOPP, which is an acronym for their mission: "To Reach Others Outside Popular Parameters." Relator does not deny that she was involved; instead, she argues that many of the activities occurred before her claim was additionally allowed for a psychological condition and before she filed a motion requesting TTD compensation based solely on her allowed psychological condition. Pursuant to the report, relator was listed as an assistant secretary for TROOPP, wrote numerous checks on TROOPP's behalf with her husband and daughters, spent a significant amount of time at TROOPP, completed grant applications and was heavily involved in the "Especially For Me" mentoring project. The SIU report contains a summary comparing Dr. Parikh's office notes with the actions relator performed which were inconsistent with her statements to the doctor and a copy of that table is attached hereto as Appendix A.

{¶ 16} 11. The SIU sent relator's records to Rajnikant Kothari, M.D., for review. In his October 25, 2004 report, Dr. Kothari opined that relator's activities were contrary to the information she was providing to her physicians. Specifically, Dr. Kothari's report states:

Thank you for the information dated 10-18-04. I have reviewed the complete records on Oneida Clay. The records from her psychiatrist, counselor, and evidence of injured workers activities, were reviewed. Based on the evidence presented, the answers to the questions will be as follows:

[One]. This patient could not have run a Community Outreach Program, with having all the symptoms she described to her physician.

[Two]. On 6-27-03 her psychological evaluation which was conducted by Dr. Delara [sic], the patient did not mention being involved with any type of Community Outreach Program or any other organization.

[Three]. In reviewing the doctor and counselor notes on each session, as well as, the evidence presented by Workers' Compensation, I agree the patient was performing duties that were contrary to what she was telling her physician.

{¶ 17} 12. The BWC's motion was heard before a DHO on March 10, 2005. The DHO determined that relator had engaged in activities that were incompatible with her being temporarily and totally disabled and found that she had been overpaid TTD compensation beginning April 7, 2003. However, the DHO denied the BWC's request to make a finding of fraud.

{¶ 18} 13. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on May 4, 2005. The SHO affirmed the prior DHO order in all respects finding that relator had been involved in activities which were inconsistent with the restrictions caused by her psychological condition and agreed that the BWC had failed to meet its burden of proving fraud. With regard to relator's activities, the SHO noted the following:

In April of 2003, the claimant and three other individuals rented a building in Akron, Ohio. The building was used to begin a community outreach program called TROOPP. The name is an acronym for the mission – To Reach Others Outside Popular Parameters. The claimant is named as the Assistant Secretary on the Articles of Incorporation for the outreach program.

The claimant was an active participant in the outreach program.

The claimant participated in the Summer of 2003 in a special TROOPP project named "Especially For Me".

This program was geared for pre-teenage girls.

Evidence in file establishes that the claimant sought grants from the City of Akron for the "Especially For Me" program.

Ms. Helen Tomic, City Planner for the City of Akron, testified that she met with the claimant on at least three occasions regarding a grant.

Ms. Tomic indicated the claimant had two in-person meetings with Ms. Tomic and that the claimant was ultimately successful in obtaining a grant.

Ms. Tomic also testified she made a site visit to the outreach program and the claimant was present. Documentation between the City of Akron and the outreach program lists the claimant as the contract person. The surveillance conducted by the BWC is also consistent with Ms. Tomic's testimony regarding claimant's role in the outreach program.

The surveillance reveals the claimant was present at the outreach program building.

The claimant opened the door of the building and worked with the girls making crafts and socializing.

Also, per the bank statements from the outreach business account, the claimant wrote numerous checks on behalf on the program.

The receipts from the outreach program also establish the claimant made purchases on behalf of the program.

The claimant wrote checks to:

Ohio Edison
Dominion East Ohio
American Family Insurance
Ace Security
Sign-A-Rama
City of Akron Treasury
Akron Public Utilities Bureau
Action Sign
Mountain of the Lord Fellowship

The Claimant also signed numerous volunteer sheets documenting the hours she spent participating in the outreach program.

The Hearing Officer notes the claimant also signed a volunteer pledge sheet wherein she pledged to commit one-hundred hours of her time.

The Akron Community Foundation Neighborhood Partnership Program grant application lists the claimant as a trustee and contact person for the outreach program.

Given claimant's level of activity in the Outreach Program, the Hearing Officer finds the claimant's activity from 04/07/2003 through 03/10/2005 is inconsistent with the receipt of temporary total compensation.

Accordingly, temporary total compensation paid from 04/07/2003 through 03/10/2005 is found to be overpaid.

{¶ 19} 14. In an order mailed May 24, 2005, the commission refused relator's appeal.

{¶ 20} 15. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 21} Relator argues that the commission abused its discretion when it terminated her TTD compensation and declared an overpayment of TTD compensation for the period beginning April 7, 2003.

{¶ 22} As stated previously, relator acknowledges that she performed the activities noted in the SIU report. However, relator contends that, because the majority of those activities were performed before her claim was additionally allowed for a psychological condition and before she filed a motion for TTD compensation, it was an abuse of discretion for the commission to have found that she had been overpaid TTD compensation. For the reasons that follow, this magistrate disagrees.

{¶ 23} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 24} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached maximum medical improvement ("MMI"). See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

{¶ 25} Work is not defined for workers' compensation purposes. However, the Supreme Court of Ohio has held that any remunerative activity outside the former position of employment precluded TTD compensation. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118 (1987). The court has also held that activities which are medically inconsistent with the alleged inability to return to the former position of employment bar the payment of TTD compensation regardless of whether the claimant is paid. *State ex rel. Parma Community Gen. Hosp. v. Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336. However, activities that are not medically inconsistent bar the payment of TTD compensation only when a claimant is remunerated for them. Further, work does not have to be full-time or even regular part-time to foreclose the payment of TTD compensation; even sporadic employment can bar benefits. *State ex rel. Blabac v. Indus. Comm.*, 87 Ohio St.3d 113 (1999).

{¶ 26} In the present case, there is no evidence that relator was paid for any of the activities she performed on behalf of TROOPP.

{¶ 27} Relator's TTD compensation, originally granted based on her allowed physical conditions, was terminated after the commission determined that her allowed physical conditions had been found to have reached MMI and she was no longer receiving

TTD compensation based on those allowed physical conditions. Thereafter, relator sought additional TTD compensation arguing that she was unable to return to her former position of employment due to her allowed psychological condition. The medical evidence presented described relator as being socially withdrawn, unable to interact with people, unable to leave her home on a regular basis, and unable to concentrate well enough to complete tasks.

{¶ 28} The SIU report presents a different picture of relator's abilities immediately prior to and while she was attempting to have her claim additionally allowed for the psychological condition. Further, the activities described contradict the statements she made to Dr. Parikh upon which he relied in eventually certifying a period of TTD compensation beginning April 7, 2003. Specifically, relator was observed at TROOPP on numerous occasions; therefore, the evidence did not support her statement that she had difficulties leaving the house on a regular basis. The evidence submitted showed relator routinely interacting with people in spite of her assertions to Dr. Parikh that she was coping with her depression by withdrawing from people. The evidence submitted shows that relator was able to pay bills, apply for grants, and run the "Especially For Me" program despite the fact that she indicated that she was unable to concentrate well enough to complete tasks. The BWC presented evidence that relator had not accurately described her condition and abilities to her physician of record and other physicians who examined her. Based on her statements that she was unable to interact with people, unable to complete tasks, and unable to leave her home, Dr. Parikh certified that she was temporarily and totally disabled and the commission awarded her TTD compensation based on his certification. However, as the record reflects, the evidence upon which Dr. Parikh relied and upon which the commission relied was false. While relator argues that these activities are immaterial because they occurred before her claim was allowed for the psychological condition and before she filed an application for TTD compensation does not render the activities immaterial. Instead, these activities contradict the "evidence" upon which TTD compensation was granted.

{¶ 29} As above noted, relator cites several cases in support of her argument. Relator first cites *Parma Community*. In that case, Cheryl A. Jankowski injured her right arm while working as a nurse. She had physical restrictions which precluded her from

returning to her former position of employment. While receiving TTD compensation, Jankowski had, at various times, answered telephones and advised clients at Child Support Advocates ("CSA"). Jankowski testified that she occasionally helped out at CSA's office in order to assist her brother, who was experiencing personal problems at the time. She also testified that she hoped the experience would compliment her recently completed paralegal training, inasmuch as her doctor had told her she would never return to nursing. The commission denied Jankowski's employer's motion to terminate her TTD compensation and the employer sought a writ of mandamus.

{¶ 30} The Supreme Court of Ohio indicated that there were three key facts which were undisputed: (1) to some degree, Jankowski answered phones and advised clients at CSA; (2) the activities she performed were not inconsistent with her assertion that she was medically unable to return to her former position of employment; and (3) there was no evidence that Jankowski was paid.

{¶ 31} The court upheld the commission's denial of the employer's motion to terminate Jankowski's TTD compensation after finding that she was not being paid and the duties she was performing were not medically inconsistent with her claim that she could not perform her former position of employment.

{¶ 32} In citing this case, relator asserts that she, like Jankowski, was not receiving any wages for her activities at TROOPP. However, relator ignores the fact that Jankowski's activities were not medically inconsistent with her assertion that she was temporarily and totally disabled. By comparison, here, relator's activities are medically inconsistent with her assertion that she is unable to return to her former position of employment. As such, the *Parma Community* case is distinguishable.

{¶ 33} Relator also cites *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98 Ohio St.3d 20, 2002-Ohio-7038. In that case, Christopher D. Posey held two jobs concurrently: one with Ford Motor Company ("FMC") and the other was his own lawn care business. Posey injured his neck at his job with FMC and began receiving TTD compensation. The injury also forced him to stop his physical participation in his lawn care business and Posey was forced to hire three more employees. Posey admitted that he owned the landscaping business but, because he hired others to perform the work after he became disabled, Posey denied that he was working at the business.

{¶ 34} The evidence indicated that, approximately once per week, Posey put gas in the lawnmowers, signed checks, and issued cash for his employees' wages. On one occasion, Posey pushed his self-propelled mower into the garage and stored other landscaping equipment at his residence as he had done before he became disabled. The commission denied Ford's motion to terminate TTD compensation and the court agreed specifically noting that Posey had performed nearly all of the general labor for his business before he was injured. Ford had argued that *Blabac* applied. However, the Supreme Court of Ohio disagreed, specifically noting that the claimant in *Blabac* never disputed that his actions constituted work; instead, he had argued that he had not worked enough to prevent the payment of TTD compensation. The court also noted that Posey's activities did not, in and of themselves, generate income.

{¶ 35} In *Ford Motor Co.*, only a few of Posey's activities could have been said to be outside his physical restrictions. The record demonstrated that Posey hired additional employees to perform virtually all the manual labor which he himself had performed prior to his injury. As such, the vast majority of his activities were within his restrictions. By comparison, all of the detailed activities of relator were outside her restrictions. Again, regardless of whether or not she was compensated, the ability to perform activities which are medically inconsistent preclude the payment TTD compensation. The *Ford Motor Co.* case is not analogous.

{¶ 36} Relator also cites *State ex rel. Honda of Am. Mfg. Co. v. Indus. Comm.*, 113 Ohio St.3d 5, 2007-Ohio-969. Edith K. Anderson sustained an injury while working for Honda and was receiving TTD compensation at the time her husband died. Anderson took the insurance money and invested it in a small scrapbooking business. Anderson's son and two daughters worked there in addition to a manager and other employees.

{¶ 37} The evidence Honda submitted showed relator at the store five times within a three-month period. On three of those occasions, Anderson assisted no customers. On the other two occasions, Anderson answered a customer's questions and used the cash register for some unknown purpose.

{¶ 38} Honda attempted to distinguish Anderson's situation from Posey's situation by arguing that Posey's lawn care business had existed before he was injured while Anderson began her scrapbooking business after her injury. The court indicated that this

distinction was inconsequential. Instead, the court reiterated that the commission is the sole evaluator of evidentiary weight and credibility and, even if Anderson was present at the store on more occasions, it was not an abuse of discretion for the commission to find that her activities were sufficient to preclude the payment of TTD compensation.

{¶ 39} Again, Anderson's situation is not analogous to relator's situation. Anderson's activities were not inconsistent with her restrictions, while relator's activities completely contradict the evidence upon which her doctor and the commission relied to find that she was unable to return to her former position of employment.

{¶ 40} The last two cases relator cites both involved claimants who were receiving permanent total disability ("PTD") compensation. In *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, Donald E. Lawson spent his working career performing heavy labor. At the same time, Lawson served as a council member for his town. Lawson was awarded PTD compensation after the commission concluded that the low-stress sedentary jobs which he could perform were foreclosed to anyone with his lack of skills and education.

{¶ 41} Between 1993 and 2001, Lawson performed a variety of tasks most of which benefited his town. The predominant activity listed was refuges disposal. Other activities included plowing snow, purchasing hardware and gas, unspecified truck and plow maintenance, and hauling gravel. Lawson performed almost all of the work for free.

{¶ 42} The BWC filed a motion arguing that Lawson's PTD compensation be terminated and that the commission make a finding of fraud.

{¶ 43} The Supreme Court of Ohio noted that the case pivoted on a single question: whether Lawson was capable of performing sustained remunerative employment. As noted, the payment of PTD compensation is inappropriate whether as evidence of: (1) actual sustained remunerative employment; (2) the physical ability to perform sustained remunerative employment; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. Ultimately, the court concluded that the evidence did not establish a medical capacity for performing work greater than sedentary and that the documented activities did not establish that Lawson could perform sustained remunerative employment.

{¶ 44} In citing the *Lawson* case, relator focuses on the court's statement that:

One of the most enduring (though not often explicitly stated) misconceptions about PTD is that once it is granted, the recipient must thereafter remain virtually housebound. This is a fallacy. PTD exempts no one from life's daily demands.

* * *

This prohibition against viewing activities out of context applies even more forcefully here.

Id. at ¶ 20, 24.

{¶ 45} After noting that the majority of the activities were within his restrictions, the court concluded that the commission had abused its discretion in terminating Lawson's PTD compensation.

{¶ 46} The same distinction found in the TTD cases applies here: Lawson's activities were not outside his medical restrictions while relator's activities are. Lawson is likewise not applicable here.

{¶ 47} The final case to which relator refers is *State ex rel. AT&T, Inc. v. McGraw*, 120 Ohio St. 3d 1, 2008-Ohio-5246. David McGraw was 78 years of age and was receiving PTD compensation. McGraw's wife ran a shooting range and gun shop. McGraw, who was recognized in the community as an expert in muzzle-loading firearms, spent a considerable amount of time at the shop talking with customers and offering advice. The court compared McGraw's activities with the activities of Anderson, the TTD compensation recipient who opened a scrapbooking shop. The court noted that *Lawson* teaches that tasks that are considered routine life activities must be considered carefully and will not easily be used to preclude PTD compensation and that *Honda* teaches that the mere presence of a person in a store is not inherently suspect. The court also noted that the commission has the exclusive ability to evaluate the evidentiary weight and credibility and is in the best position to determine whether or not the evidence suggests a pattern of regular activity or implies an isolating occurrence.

{¶ 48} Relator's assertion that the above-discussed cases require this court to find that the commission abused its discretion is not borne out by the facts. As noted previously, relator's activities at the time she sought the additional allowance for the psychological condition and during a period of time in which Dr. Parikh opined that she

was disabled contradict the statements relator had been making. The medical evidence upon which the commission relied to award TTD compensation was contradicted by relator's own actions and the commission determined that she had been wrongfully paid TTD compensation and declared an overpayment.

{¶ 49} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in finding that her activities contradicted the medical evidence upon which the award of TTD compensation had been based and in declaring an overpayment and this court should deny relator's request for a writ of mandamus.

/s/Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).