[Cite as *State ex rel. Cleveland v. Indus. Comm.*, 2015-Ohio-2165.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. City of Cleveland,	:	
Relator,	:	
v.	:	No. 13AP-1069
Industrial Commission of Ohio and Jacqueline Johnson,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 4, 2015

Barbara Langhenry, City of Cleveland Director of Law, Linda M. Appelbaum and *Jose M. Gonzalez,* for relator.

Michael DeWine, Attorney General, and *Colleen C. Erdman,* for respondent Industrial Commission of Ohio.

Shapiro, Marnecheck & Palnik, and *Matthew Palnik,* for respondent Jacqueline Johnson.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, City of Cleveland ("relator"), filed this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent Jacqueline Johnson ("Johnson") working wage loss compensation, and to enter an order denying Johnson's application for wage loss compensation.

{¶ 2} Pursuant to Civ.R. 53(D) and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate, who issued a decision, including

findings of fact and conclusions of law, which is appended hereto. The magistrate recommends that this court deny the requested writ of mandamus.

{¶ 3} Relator sets forth two objections to the magistrate's decision:

> I. The magistrate erred in holding that a causal connection between claimant's industrial injuries and her placement into a new position of employment satisfies the causal connection requirement for a[n] R.C. 4123.56 working wage loss award.
>
> II. The magistrate erred in holding that the City's long-standing policy of prohibiting overtime for restricted duty positions creates a causal connection for claimant's working wage loss, as there was no evidence that claimant was singled out because of her injuries.

{¶ 4} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." None of the parties have objected to the magistrate's findings of fact, and we adopt them as our own.

{¶ 5} As explained in the magistrate's decision, relator employed Johnson as a police officer. On January 19, 2010, Johnson suffered injuries as a result of slipping on ice and falling to the ground, and an industrial claim was later allowed for those injuries. Johnson's physician restricted her to light-duty work with certain physical limitations; however, the medical restrictions did not limit the number of hours Johnson could work. When she returned to work, Johnson was placed on restricted duty, and she signed a form acknowledging that, while on restricted duty, she was prohibited from working overtime. Johnson later filed a claim for working wage loss compensation, which the commission ultimately granted, concluding that Johnson sustained a wage loss as a result of the allowed conditions in her claim.

{¶ 6} The magistrate concluded that there was a causal relationship between Johnson's injuries and her loss in wages due to lost overtime pay. Relator argues that the magistrate erred by finding a causal relationship, asserting that a general police order prohibiting overtime for employees in restricted duty positions was the cause of the wage loss, rather than Johnson's injuries.

{¶ 7} An employee is eligible for wage loss compensation if the employee has an allowed claim and "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." R.C. 4123.56(B)(1). "A claim for wage loss compensation has two components—actual wage loss and causal relationship between the allowed condition and the wage loss." *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118, 121 (1993). There is no dispute that Johnson experienced actual wage loss. Therefore, our analysis turns on whether there was a causal relationship between her allowed conditions and the wage loss.

{¶ 8} The Supreme Court of Ohio addressed the issue of causation in *State ex rel. Jordan v. Indus. Comm.*, 102 Ohio St.3d 153, 2004-Ohio-2115. The claimant in that case suffered an industrial injury and subsequently took a light-duty position at the same hourly wage as his earlier job. *Id.* at ¶ 1. Although the claimant was not subject to medical limitations on the number of hours he could work, he received substantially less overtime in the light-duty position. *Id.* He filed for wage loss compensation, which the commission denied. *Id.* at ¶ 2. On appeal, the Supreme Court noted that the claimant's pre-injury pattern of routinely performing overtime suggested that he would have been willing to accept overtime after returning to work. *Jordan* at ¶ 9. The court concluded that, because the record was unclear as to whether the claimant had been offered the opportunity to work overtime, two key questions remained:

> First, was overtime offered? If it was and was declined, claimant's refusal—unless supported by medical restrictions on the number of hours claimant could work—would break the requisite causal connection. Second, if it was not offered, then why not? If, for example, overtime was rescinded on a plantwide basis for economic reasons, then again there would be no causal connection. If, however, the employer singled out claimant because of his injury, a causal relationship between injury and wage loss could be present.

Id. at ¶ 10. The court then remanded the case to the commission for further proceedings. *Id.* at ¶ 11.

{¶ 9} This court applied *Jordan* to conclude that the commission should have denied wage loss compensation in *State ex rel. DaimlerChrysler v. Indus. Comm.*, 10th Dist. No. 06AP-895, 2007-Ohio-5093. The claimant in *DaimlerChrysler* was employed as a mechanic when he suffered an industrial accident. *Id.* at ¶ 4. After surgery to treat his injury, the claimant returned to work under permanent work restrictions issued by his

physician. The restrictions did not limit the number of hours he could work per day. *Id.* The claimant asserted that he could not return to his former position due to his medical restrictions; on the day of his return, he bid for a new position in the sanitation department and was subsequently transferred to that department. *Id.* at ¶ 5. The claimant ultimately filed for wage loss compensation based on his reduced wages in the sanitation position. The commission granted his claim, concluding that, even though his hourly wages were approximately the same in the two positions, the claimant received fewer overtime hours in the new position and, therefore, had suffered lost wages. *Id.* at ¶ 6-7. The employer sought a writ of mandamus from this court ordering the commission to vacate its order. Addressing the questions set forth in *Jordan*, the court found that the claimant could and did work the overtime hours available to him. With respect to the hours of overtime not available in the new position, the court found that "the evidence indicates that it was simply a matter of the fluctuation in hours available in different departments." *Id.* at ¶ 10. There was no evidence that the employer singled out the claimant for loss of overtime or that his ability to work overtime in the sanitation position was directly related to his injury or work restrictions. *Id.* Therefore, the court concluded that there was no direct causal relationship between the claimant's injury and his reduced overtime, and he was not entitled to wage loss compensation. *Id.* at ¶ 13-14.

{¶ 10} In this case, Johnson was not medically prohibited from working overtime. Because relator did not offer Johnson the opportunity to work overtime, we turn to the second question presented in *Jordan*—why was overtime not offered? As explained in the magistrate's decision, the prohibition on overtime for employees on restricted duty arose from a general police order prohibiting occupationally and non-occupationally injured or ill police officers from working overtime while on restricted duty. Relator argues that this order was the reason Johnson was not offered overtime, rather than her injuries.

{¶ 11} We conclude that the magistrate did not err by concluding that there was a causal connection between Johnson's injuries and her loss of overtime. When Johnson returned to work, she was placed on restricted duty because of her injuries. Relator then denied Johnson the opportunity to work overtime, despite the fact that her medical restrictions did not limit the number of hours she could work because she was on restricted duty. Relator argues that the prohibition on restricted duty employees working

overtime is based on a policy of reserving its limited overtime budget for active-duty police officers. Thus, relator effectively argues that this is the same type of neutral, economically motivated limitation that existed in the *DaimlerChrysler* case, where the claimant experienced reduced overtime because of a fluctuation in hours available to different departments.

{¶ 12} This case is distinguishable from *DaimlerChrysler*, however. Although relator argues that it is necessary to limit overtime eligibility to employees performing active duties, such as patrol officers and investigating detectives, the general police order at issue makes the prohibition on overtime contingent on an employee's medical status. Unlike the scenario in *DaimlerChrysler*, this is not a case where employees in certain departments receive less overtime than those in other departments based on each department's particular duties without respect to the reason the employees are in that department. Rather, under this general police order, relator places employees on restricted duty and prohibits them from working overtime because of their medical status. Relator has not demonstrated that non-restricted duty police department employees who are not performing active patrol or investigatory duties, if any, are subject to a similar prohibition on overtime. Thus, the limitation of overtime in this case is different from the limitation present in *DaimlerChrysler*.

{¶ 13} We note that relator also asserts that, although the overtime limitation at issue is not part of the collective bargaining agreement between relator and its police officers, the police union has acquiesced in the policy under the doctrine of past practice and/or management rights. Relator argues that Johnson should not be permitted to individually avoid this policy when the union has effectively agreed to it. However, R.C. 4123.80 provides that, with limited exceptions, "[n]o agreement by an employee to waive an employee's rights to [workers'] compensation * * * is valid." Thus, Johnson could not waive her right to wage loss compensation individually or through union acquiescence in relator's practice of denying overtime to restricted duty employees. *See State ex rel. General Mills, Inc. v. Indus. Comm.*, 10th Dist. No. 02AP-127, 2002-Ohio-4727, ¶ 39 (noting that provision of collective bargaining agreement that waived employee's right to receive temporary total disability compensation would be invalid as a matter of law).

{¶ 14} Relator further argues that the magistrate improperly concluded that relator impermissibly singled out a group of employees and denied them overtime based on their injuries. Relator asserts that, under *Jordan*, a causal relationship may exist where an employer singles out a specific claimant, not a class of employees, and that there is no evidence relator specifically singled out Johnson for loss of overtime because of her injuries. The *Jordan* decision indicated a causal relationship may exist if a specific individual claimant is singled out and denied overtime because of an injury. *Jordan* at ¶ 10. However, the rationale underlying the *Jordan* decision applies with equal force to this case, where relator created a separate class of employees by placing all ill and injured employees on restricted duty status and then denying overtime to members of this separate class of employees.

{¶ 15} Accordingly, relator's objections to the magistrate's decision lack merit and are overruled.

{¶ 16} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find that the magistrate has properly determined the pertinent facts and applied the appropriate law. We therefore overrule relator's objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. The requested writ of mandamus is hereby denied.

Objections overruled; writ denied.

SADLER and T. BRYANT, JJ., concur.

T. BRYANT, J., retired, of the Third Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. City of Cleveland,	:	
Relator,	:	
v.	:	No. 13AP-1069
Industrial Commission of Ohio and Jacqueline Johnson,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on October 31, 2014

Barbara Langhenry, City of Cleveland Director of Law, Linda M. Appelbaum and *Jose M. Gonzalez,* for relator.

Michael DeWine, Attorney General, and *Colleen C. Erdman,* for respondent Industrial Commission of Ohio.

Shapiro, Marnecheck & Palnik, and *Matthew Palnik,* for respondent Jacqueline Johnson.

IN MANDAMUS

{¶ 17} In this original action, relator, City of Cleveland ("city" or "relator") requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its September 5, 2013 order awarding respondent Jacqueline Johnson ("claimant") R.C. 4123.56(B) working wage loss compensation when the difference between claimant's average weekly wage ("AWW") and her "present earnings" is

attributable to the mandatory loss of overtime while employed in the city's transitional light-duty program.

Findings of Fact:

{¶ 18} 1. On January 19, 2010, while employed as a police officer for the city, claimant was injured when she slipped and fell on ice. The industrial claim (No. 10-801843) is allowed for:

> Contusion of back, contusion left hip; cervicothoracic strain; lumbosacral spine strain; right hand sprain; traumatic left trochanteric bursitis; left hip sprain.

{¶ 19} 2. Following a February 17, 2011 examination, attending physician W. Kent Soderstrum, M.D., restricted claimant to light-duty work. Restrictions included the limitation that claimant not lift or carry over 20 pounds. Claimant was also restricted to sitting up to five hours, standing up to three hours, and walking up to two hours in a day.

{¶ 20} 3. Following the injury, claimant received wage continuation benefits in lieu of temporary total disability compensation.

{¶ 21} 4. Claimant was able to return to employment with the city in a transitional light-duty position from June 14 to July 27, 2010, and again from November 17, 2010 to September 19, 2011.

{¶ 22} 5. On November 4, 2010, at the request of the city, claimant was examined by R. Scott Krupkin, M.D. In his six-page narrative report, Dr. Krupkin opined:

> [C]laimant is not capable of performing all activities required of a police officer. Due to the safety sensitive nature of her vocation, it is my opinion that the claimant would not be able to actively participate in pursuit or arrest of suspects, or perform on-street policing activities on a reliable basis.
>
> * * *
>
> It is my opinion that the claimant has not reached maximum medical improvement, but is approaching MMI. Current restrictions would include limiting her lifting to no more than 20 pounds on occasion. She may lift a negligible amount of weight or up to 10 pounds frequently. Other restrictions for light duty work capacity are reasonable.

{¶ 23} 6. In a memorandum dated June 11, 2010, the city's medical bureau coordinator authorized restricted duty from June 14 through July 16, 2010. One of the

listed restrictions was "indoor duty." A subsequent memorandum authorized restricted duty from November 17 through December 15, 2010.

{¶ 24} 7. On June 11, 2010 and again on November 15, 2010, claimant signed a form captioned: "Terms of Restricted Duty Assignment." By signing the form, claimant "agree[d] that while on restricted duty I am prohibited from working overtime."

{¶ 25} 8. Apparently, the provision prohibiting overtime that claimant agreed to stemmed from a General Police Order, the current version of which was implemented in 2006. The provision regarding overtime is not addressed in the collective bargaining agreement between the city and the union. General Police Orders are written policies, the creation of which involves the command staff and the union.

{¶ 26} 9. The General Police Order at issue bars occupationally and non-occupationally injured or ill police officers from working overtime while in transitional light-duty status. For example, a police officer undergoing chemotherapy for cancer can be put on restricted duty and barred from working overtime.

{¶ 27} 10. Before claimant's January 19, 2010 industrial injury, claimant regularly worked overtime and her overtime pay was included in the calculation of her AWW, which was set at $1,147.07 by the Ohio Bureau of Workers' Compensation ("bureau").

{¶ 28} 11. On October 22, 2012, following claimant's filing of a wage loss application (Form C-140), the bureau issued an order awarding R.C. 4123.56(B) wage loss compensation beginning June 14, 2010. The bureau's order explained:

> Injured Worker did [return to work] with Restrictions and was paid full base salary by the City of Cleveland. Injured Worker was not able to work Overtime while working Restricted Duty, this created a Wage Loss between her base pay and AWW due to no Overtime wages being earned between the requested dates of 6/14/10 [to] 7/27/10 and 11/17/10 to 9/19/11.

{¶ 29} 12. The city administratively appealed the October 22, 2012 order of the bureau.

{¶ 30} 13. Following a December 4, 2012 hearing, a district hearing officer ("DHO") issued an order that vacates the bureau's order. Nevertheless, in awarding wage loss compensation, the DHO explained:

> Upon review and consideration of the evidence in the claim file and statements at hearing, the Injured Worker shall be paid working wage loss compensation for the closed periods of 06/14/2010 through 07/27/2010; and from 11/17/2010 through 09/19/2011.
>
> During the aforementioned periods, the Injured Worker was working transitional-duty. A comparison of the earnings of the Injured Worker during this time period and the average weekly wage indicate that the Injured Worker was experiencing a wage loss during the aforementioned period of transitional work duty. The Injured Worker indicated at hearing that in her job working on Patrol she would receive overtime. This overtime is reflected in her average weekly wage. While working transitional-duty she was not able to receive overtime pay.
>
> Therefore, it is reasonable to conclude as a result of the work restrictions associated with the allowed conditions in this claim, the Injured Worker did in fact sustain a wage loss during the aforementioned time periods.
>
> This order is based upon the statements of the Injured Worker at hearing, the work restrictions as outline by Dr. Soderstrum, dated 02/17/2011, and his medical records, and the wage records contained in the claim file.

{¶ 31} 14. The city administratively appealed the DHO's order of December 4, 2012.

{¶ 32} 15. Following a January 24, 2013 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order of December 4, 2012. In denying the wage loss application, the SHO explains:

> The Staff Hearing Officer denies the request for working wage loss compensation from 06/14/2010 through 07/27/2010 and from 11/17/2010 through 09/19/2011.
>
> In essence, the Injured Worker's request for working wage loss is derived from the fact that while she has now returned to work full time with medical restrictions in a transitional duty status, she is not working overtime due to the Union contract excluding overtime for people in such a position (transitional duty status).

> Therefore, the Staff Hearing Officer finds that the working wage loss the Injured Worker has sustained is related to the Union contract and not the medical restrictions in this claim file. The Staff Hearing Officer finds there is no medical records on file that specifically indicates the Injured Worker is only able to work 40 hours a week. Therefore, absent such a medical record, the Staff Hearing Officer cannot construe the wage loss being related to the work limitation by a physician when, in fact, it is due to the Union contract limitation. Therefore, working wage loss request is denied.

{¶ 33} 16. Claimant administratively appealed the SHO's order of January 24, 2013.

{¶ 34} 17. On February 20, 2013, another SHO mailed an order refusing claimant's administrative appeal.

{¶ 35} 18. On March 5, 2013, claimant moved for the commission's exercise of continuing jurisdiction over the SHO's order of January 24, 2013.

{¶ 36} 19. On June 8, 2013, the three-member commission mailed an interlocutory order that identified an alleged clear mistake of law in the SHO's order of January 24, 2013. The order states: "Specifically, it is alleged that the injury is the only reason for the reduction in overtime."

{¶ 37} 20. On September 5, 2013, the three-member commission heard claimant's March 5, 2013 motion. The hearing was recorded and transcribed for the record.

{¶ 38} 21. During the hearing, Deputy Chief Executive Officer of the Cleveland Division of Police, Timothy Hennessy, testified on behalf of the city. On direct examination, counsel for the city asked Hennessy to explain the rationale for the city's overtime policy:

> A. We work on a line item budget. Our fiscal year is the same as the calendar year. And we have a strict budget for overtime every year. This current fiscal year, 2013, it's 10.75 million, which seems like a lot of money, but we have over 1,500 police officers in the city of Cleveland. And the overtime budget is -- well, the overtime budget is used for the officers working patrol to handle emergencies.
>
> Often an officer on patrol may get a call near the end of the shift. And if somebody's handling a serious accident or the victim of an assault, we don't want to change officers. We

> want the officers that initially get the call to finish it, so they might have to work overtime.
>
> We also need overtime for some detectives. The homicide unit is a place where they're on call, they have to come out in the middle of the night. They may get a lead at off hours. Or if they get a lead at the end of the officer's shift, they have to stay with it.
>
> That's the reason we keep the overtime for the people working regular patrol, regular detectives.
>
> Q. The budget for overtime, is it limited, unlimited?
>
> A. No. It's very limited. It's a very strict number provided to us every year when we create the budget. If we get to -- like this year we have 27 pays, because 2013 is a calendar anomaly. But if we get near December and the overtime budget is spent, the Chief must go to the finance director, get money moved around in the budget, because we can't not pay people. If they work, we have to pay them. What will happen is if we spend more money on overtime than budgeted, we're going to lose something somewhere else.
>
> * * *
>
> Q. What would be the effect of being ordered to pay some overtime money to transitional duty officers not working overtime?
>
> A. Well, the total economic package is what it is, so if we have to pay overtime for people that aren't working overtime, we are going to have to take the money from somewhere else, change a different program.
>
> Q. Try to keep the overtime for the patrol officers out on patrol?
>
> A. Yes.

(Tr. 18-20.)

{¶ 39} 22. Following the September 5, 2013 hearing, the commission issued an order that finds that the SHO's order of January 24, 2013 contains a clear mistake of law

and, thus, the SHO's order of January 24, 2013 is vacated. In awarding wage loss compensation, the commission's September 5, 2013 order explains:

> The C-140, Initial Application for Wage Loss Compensation, filed 05/04/2012, is granted to the extent of this order. The evidence presented at hearing and contained in the record indicates that on 01/19/2010, while working as a police detective for the Employer of record, the Injured Worker slipped on ice and fell. Following her injury, the Injured Worker was placed on transitional-light duty work for two closed periods, from 06/14/2010 through 07/27/2010 and from 11/17/2010 through 09/19/2011. Prior to the 01/19/2010 industrial injury, the Injured Worker regularly worked overtime while on patrol. This overtime is included in the Injured Worker's Average Weekly [W]age.
>
> The evidence further establishes that while the Injured Worker was working in the Employer's transitional-light duty program, she was not permitted to work any overtime. The Commission notes that the Injured Worker was not singled out from receiving overtime and finds instead, based upon testimony of Mr. Hennessy, Deputy Chief of Police, that all employees participating in the transitional-light duty program were not permitted to work overtime. The Commission finds that the Collective Bargaining Agreement between the City of Cleveland and the patrol officers did not specifically exclude overtime while a patrol officer is participating in a transitional-light duty work program.
>
> Since 2006, however, there has been an agreement (General Police Order) between the Employer and the patrol officers union which prevents a patrol officer from working overtime while participating in a transitional-light duty work program. The Employer argues that the Injured Worker's wage loss is related to the General Police Order and not the allowed conditions in the claim. The Injured Worker argues that her working wage loss is related to the allowed conditions in the claim and that a comparison of her earnings while participating in the transitional-light duty program to her Average Weekly Wage establis[h]es that she sustained a wage loss for the two closed periods at issue.
>
> The Commission is not persuaded by the Employer's argument that the Injured Worker's wage loss is related to the General Police Order which prevents patrol officers from working overtime while participating in the transitional-light

> duty program. The Commission finds the uncontroverted medical evidence establishes that the Injured Worker was unable to return to her former position of employment, had significant physical restrictions, and was prevented from working overtime as a result of the allowed conditions in the claim.
>
> The Commission finds that the Injured Worker has met her burden of proving her entitlement to wage loss compensation, as required by Ohio Adm.Code 4125-1-01(D). The Commission finds that as a result of the allowed conditions in the claim, the Injured Worker has sustained a wage loss, as defined in R.C. 4123.56(B). Specifically, the Commission finds the Injured Worker was prevented from returning to her former position of employment as a police detective due to restrictions involving her ability to sit, stand, walk, lift, and carry not more than 20 pounds. These restrictions are outlined by W. Kent Soderstrum, M.D., in the 02/17/2011 C-140 Report.
>
> In addition, the Commission notes that the Independent Medical Examination report from R. Scott Krupkin, M.D., dated 11/04/2010, documents significant physical restrictions related to the allowed conditions in the claim. Dr. Krupkin found the Injured Worker "...would not be able to actively participate in pursuit or arrest of suspects, or perform on-street policing activities on a reliable basis" and restricted the Injured Worker from lifting no more than 20 pounds on occasion and lifting no more than 10 pounds frequently. More importantly, however, Dr. Krupkin found that the Injured Worker should be placed in a light duty work capacity. Therefore, working wage loss is awarded and shall be paid at the rate of 66 2/3 percent of the difference between the Injured Worker's Average Weekly Wage and her actual weekly earnings for the periods 06/14/2010 through 07/27/2010 and from 11/17/2010 through 09/19/2011.

{¶ 40} 23. On December 23, 2013, relator, the City of Cleveland, filed this mandamus action.

Conclusions of Law:

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

{¶ 42} Much of the law pertinent to this action is set forth in *State ex rel. Jordan v. Indus. Comm.*, 102 Ohio St.3d 153, 2004-Ohio-2115, and this court's decision in *State ex*

rel. DaimlerChrysler Corp. v. Indus. Comm., 10th Dist. No. 06AP-895, 2007-Ohio-5093, that applied *Jordan*.

{¶ 43} This court's decision in *DaimlerChrysler* succinctly set forth the *Jordan* case in determining the overtime issue before this court in *DaimlerChrysler*. Accordingly, the magistrate sets forth paragraphs 4 through 14 of *DaimlerChrysler*:

> On June 2, 2002, claimant suffered an industrial injury while employed as a mechanic for relator. He underwent surgery, and his doctor imposed permanent work restrictions. These restrictions did not limit the number of hours claimant could work in a day.
>
> On September 4, 2003, claimant returned to work. While relator argues that claimant returned to his former position as a mechanic, claimant argues that he was not able to perform that position within his restrictions and, therefore, did not "return" to that position. On the day of his return, claimant bid on a new position in the sanitation department, and his transfer to that department became effective October 20, 2003.
>
> On May 3, 2005, claimant filed his first application for wage-loss compensation, beginning September 8, 2003, based on his alleged reduced wages in the sanitation position. As detailed in the magistrate's decision, relator raised a number of issues regarding claimant's application, and the commission issued multiple decisions on the application. In order to address the objections most efficiently, we limit our discussion to the full commission's decision based on the January 5, 2006 hearing and, specifically, the following conclusion regarding the impact of claimant's reduced overtime in the sanitation position:
>
> The Commission finds that the injured worker returned to work and suffered a wage loss for the weeks noted above as the result of the conditions allowed in this claim. * * * Due to a fluctuation in the number of overtime hours available, the injured worker periodically earned less per week than his average week wage. The Commission finds that during those weeks, the injured worker suffered a wage loss as the result of the allowed conditions in this claim.
>
> In essence, the commission concluded that claimant suffered a compensable wage loss, even though his hourly wages were roughly the same in the two positions, because claimant had

fewer overtime hours in the sanitation position-a position his injury forced him to take. While he was able to work overtime, and did work some overtime in the sanitation position, his weekly wages were sometimes lower in the new position simply because the sanitation department offered less overtime. Because his injury caused him to take the sanitation position, there was a causal connection between his injury and his loss in wages.

The magistrate found that the commission's conclusion in this respect was inconsistent with *Jordan*. We agree.

In *Jordan,* as the magistrate explains, the claimant suffered an injury, took a new position within his work restrictions, and received a lower weekly wage because he worked less overtime in the new position. The record contained no evidence, however, as to the reason for his reduced overtime. The Supreme Court of Ohio stated:

* * * Two key questions thus remain unaddressed. First, was overtime offered? If it was and was declined, claimant's refusal-unless supported by medical restrictions on the number of hours claimant could work-would break the requisite causal connection. Second, if it was not offered, then why not? If, for example, overtime was rescinded on a plantwide basis for economic reasons, then again there would be no causal connection. If, however, the employer singled out claimant because of his injury, a causal relationship between injury and wage loss could be present.

Jordan at ¶ 10. Because the evidence did not address these questions, the court found that "further consideration of the question of causal relationship is warranted." *Id.* at ¶ 11.

Here, we know the answers to the questions the Supreme Court raised in *Jordan*. As to whether overtime was offered and declined for medical reasons in the new position, we know that claimant could and did work the overtime hours available to him. As to those hours of overtime not available to him in the new position, the evidence indicates that it was simply a matter of the fluctuation in hours available in different departments. Claimant offers no evidence that the employer singled him out in any way or that his ability to work overtime in the new position was directly related to his injury or work restrictions.

> We acknowledge respondents' assertion that, once the commission determines that an industrial injury has forced a claimant to find a new position, applicable wage-loss compensation rules should require only a straightforward week-by-week comparison of a claimant's former weekly wage to his present earnings. That is not the approach the Supreme Court took in *Jordan,* however.
>
> Importantly, in *Jordan,* the Supreme Court did not rely on a straightforward comparison between the claimant's former weekly wage (with substantial overtime) and his present earnings (with less overtime). Instead, the court returned the case to the commission for "further consideration of the question of causal relationship." *Id.* at ¶ 11. And as to that further consideration, the court indicated its belief that an employer's limitation of overtime for economic reasons, as opposed to reasons specific to a claimant, was sufficient to break the causal connection between a claimant's injury and his loss of wages based on reduced overtime.
>
> Applying *Jordan* here, because the evidence shows no direct causal relationship between claimant's injury and his reduced overtime, we need no additional evidence or further consideration to determine that the commission should have denied compensation on these grounds. Accordingly, we overrule respondents' objections.
>
> Having conducted an independent review of the evidence in this matter, and finding no error of law or other defect on the face of the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we grant a writ of mandamus ordering the commission to vacate its orders granting R.C. 4123.56(B) wage-loss compensation and to enter orders denying said compensation.

{¶ 44} The issue here is one of causation. Is there a proximate causal relationship between the industrial injury and the loss of overtime pay? Relator argues that causal relationship fails because of two undisputed facts: (1) claimant was not medically restricted by her doctor from overtime work, and (2) the General Police Order prohibits overtime to injured police officers who participate in the transitional light-duty program.

{¶ 45} On the other hand, the commission and claimant argue that causal relationship between the industrial injury and the loss of overtime pay does not fail for the

lack of medical restrictions as to overtime or the General Police Order that bars overtime to injured police officers who participate in the transitional light-duty program. As the commission puts it, "Johnson would not be working light-duty, but for her work injury, and she would receive overtime pay but for her restriction to light-duty work." (Respondent's Brief, 16-17.)

{¶ 46} In Jordan, as in the instant case, the claimant was not medically restricted from working overtime. *Jordan,* at ¶ 1. Yet, the *Jordan* court returned the cause to the commission for further proceedings and an amended order on the question of causal relationship. Obviously, the *Jordan* court did not believe that a wage loss based on lack of overtime pay was only compensable when the claimant is medically restricted from working overtime. Accordingly, the magistrate rejects relator's suggestion that causal relationship between the industrial injury and the loss of overtime pay fails because claimant is medically able to work overtime. Rather the causal connection is established by the medical restriction that prevents a return to the former position of employment and, thus, places claimant into the transitional light-duty program.

{¶ 47} The commission presents an argument premised on the *Jordan* court's statement: "If, however, the employer singled out claimant because of his injury, a causal relationship between injury and wage loss could be present." *Id.*, at ¶ 10. The commission argues:

> Contrary to the city's argument, a company-wide or city-wide reduction or bar to overtime work, applicable to *all employees,* is vastly different than the city's bar to overtime work to *all ill and occupationally and non-occupational injured police officers.* In the latter instance, the causal link remains intact because a police officer's present earnings are diminished precisely because the police officer is injured or ill.

(Emphasis sic.) (Commission's Brief, 12-13.)

{¶ 48} That is to say, the commission, in effect, argues that claimant and the class of transitional light-duty program participants to which claimant belongs are actually singled out by the General Police Order because of the injuries sustained by the participants. Thus, claimant's loss of overtime is not the result of economic reasons applied across the board to all police officers, but is specific to the class of injured police

officers who participate in the transitional light-duty program. Moreover, unlike the situation in *DaimlerChrysler*, in which this court issued a full writ for denial of wage loss compensation, the loss of overtime is not "simply a matter of the fluctuation in hours available in different departments." *Id.* at ¶ 10.

{¶ 49} The magistrate finds helpful this court's decision in *State ex rel. Webb v. Indus. Comm.*, 76 Ohio App.3d 701 (10th Dist.1991). In *Webb,* this court extensively discussed the concept of dual causation. "[T]here is no doubt that two causes can each directly and proximately contribute to an injury." *Id.*, at 704. "The causal relationship must be a direct one but it need not be the sole causal relationship." *Id.*

{¶ 50} Based on *Webb,* it is insufficient to argue that the General Police Order is a cause of the loss of overtime and, thus, there is no causal connection between the industrial injury and the loss of overtime pay. That flawed reasoning is found in the January 24, 2013 order of the SHO who found (att. 5) "she is not working overtime due to the Union contract excluding overtime for people in such a position (transitional duty status)."

{¶ 51} Thus, under a *Webb* analysis, it can be held that there is a proximate causal relationship between the loss of overtime pay and the injury that put claimant into a transitional light-duty position even though the General Police Order is indeed a causal factor.

{¶ 52} 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/ MAGISTRATE
KENNETH W. MACKE

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).