

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Johnny Rutherford,	:	
Relator,	:	
v.	:	No. 14AP-591
Rusty's Towing Services and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
Respondents.	:	
	:	

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DECISION

Rendered on June 30, 2015

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*Kennedy & Colasurd, and Michael D. Colasurd, for relator.*

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

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ON OBJECTIONS TO THE MAGISTRATE'S DECISION

HORTON, J.

{¶ 1} Johnny Rutherford filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to grant him working wage loss ("WWL") compensation.

{¶ 2} In accord with Loc.R. 13(M), the case was referred to a magistrate to conduct appropriate proceedings.

{¶ 3} The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶ 4} Counsel for Johnny Rutherford has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 5} Rutherford suffered a serious injury in 2007. His industrial claim has been recognized for "closed fracture right distal radius; open wound right side of face; right medial nerve lesion; total loss of use of right hand." As a result of his injuries, he cannot return to his former job without significant accommodations. He was laid off from that job in 2010.

{¶ 6} Rather than pursue a new employer, Rutherford chose to become self-employed as a trucker who owns his own truck. He filed an application for WWL compensation, alleging that his income had been significantly diminished as a result of his injuries, especially the loss of use of his right hand. Before starting his own business, he drew unemployment compensation for two years – up until late February 2012.

{¶ 7} In applying for WWL, Rutherford sought payment for periods of time he was receiving unemployment benefits. He provided tax return information for the tax years 2010 and 2011. He also provided some information about his income as a self-employed trucker, but not a great deal.

{¶ 8} The case was ultimately heard by a deputy with the commission, who denied the compensation after finding that she could not determine what, if any, actual loss in income had been suffered.

{¶ 9} Upon reviewing the evidence before the commission, we cannot conclude that Rutherford established that he actually had a working wage loss. We therefore overrule the objections to the magistrate's decision.

{¶ 10} We adopt the findings of fact and conclusions of law contained in the magistrate's decision. We therefore deny the request for a writ of mandamus.

*Writ of mandamus denied.*

TYACK and KLATT, JJ., concur.

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**APPENDIX****IN THE COURT OF APPEALS OF OHIO****TENTH APPELLATE DISTRICT**

State ex rel. Johnny Rutherford,	:	
	:	
Relator,	:	
	:	
v.	:	Case No. 14AP-591
	:	
Rusty's Towing Services and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

**MAGISTRATE'S DECISION**

Rendered on February 23, 2015

*Kennedy & Colasurd, and Michael D. Colasurd, for relator.*

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

**IN MANDAMUS**

{¶ 11} Relator, Johnny Rutherford, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied his application for working wage loss ("WWL") compensation and ordering the commission to find that he is entitled to that compensation.

**Findings of Fact:**

{¶ 12} 1. Relator sustained a work-related injury on April 11, 2007, and his workers' compensation claim has been allowed for the following conditions:

Closed fracture right distal radius; open wound right side of face; right medial nerve lesion; total loss of use of right hand.

{¶ 13} 2. It is undisputed that relator cannot return to his former position of employment due to the allowed conditions in his claim, most notably the total loss of use of his right hand.

{¶ 14} 3. On February 17, 2012, in support of his motion, relator submitted the following documents: his personal statement, C94-A wage statement forms, and his 2010 tax return.

{¶ 15} 4. In an order mailed April 9, 2012, the Administrator of the Ohio Bureau of Workers' Compensation ("BWC") referred the claim to the commission for consideration. The administrator recommended the denial of the motion for the following reasons:

There is no proof of medical restrictions on file that are a direct result of the allowed conditions in the claim. The last medical restrictions on file were for the period 9/1/08 to 11/1/08 which was a Medco-14 from Dr. Wells filed 6-23-08. There were no restrictions submitted around 3/1/10, the start date of wage loss being requested of 3/1/10 which was 2 years ago. Updated restrictions are required every 90 days for temporary restrictions and every 180 days for permanent restrictions.

There is no proof on file that employment was sought with the employer of record at the initial period of wage loss being requested.

{¶ 16} 5. The matter was heard before a district hearing officer ("DHO") on May 22, 2012. Relator appeared with his attorney, and the DHO denied the request finding that relator had failed to provide a detailed medical report addressing his restrictions for the relevant time period as required by Ohio Adm.Code 4125-1-15(C)(2). Specifically, the DHO stated:

The District Hearing Officer finds that the Injured Worker has failed to meet his burden of establishing entitlement to working wage loss compensation from 03/01/2010 through 12/30/2011 (last date of earnings information presently in the record). This determination is based exclusively on the fact that a medical report detailing the Injured Worker's restrictions associated with the allowed conditions in the

claim has not been filed as required by O.A.C. 4125-1-15(C)(2). A review of the wage loss rule indicates that a medical report documenting restrictions shall accompany the application for wage loss compensation. While the District Hearing Officer is cognizant that the Injured Worker has been awarded a total loss of use of the right hand under R.C. 4123.57(B) based on 2009 reports from Drs. Rohner and Cunningham, the record does not contain any medical report documenting restrictions or providing the information required by the above cited administrative code rule. Accordingly, the District Hearing Officer concludes the Injured Worker has failed to meet his burden of establishing entitlement to receive working wage loss compensation for the period from 03/01/2010 through 12/03/2011.

(Emphasis sic.)

{¶ 17} 6. Relator appealed and submitted the May 30, 2012 Physician's Report of Work Ability signed by Paige S. Gutheil, D.O., who noted that, as of May 29, 2012, relator could return to work with indefinite permanent restrictions involving his right hand and specifically limiting him to use his right hand for stabilization activities only, and no activities that require gripping.

{¶ 18} 7. Dr. Gutheil would complete a second Physician's Report of Work Ability dated July 13, 2012 returning relator to work as of March 23, 2010 with the same indefinite work restrictions.

{¶ 19} 8. Relator would also submit additional wage statements for 2011 and several, but not all, of the pages for his 2011 Federal Income Tax Return.

{¶ 20} 9. Relator's appeal was heard before a staff hearing officer ("SHO") on July 16, 2012. The SHO affirmed the prior DHO order and denied the request for WWL compensation. The SHO noted that relator had now submitted medical restrictions from Dr. Gutheil and, as such, had satisfied the requirement to supply a medical report documenting the restrictions justifying his request for WWL. Further, the SHO acknowledged that relator had been awarded a total loss of use of his right hand. After noting that relator was requesting wage loss beginning March 24, 2010 and was currently working, the SHO denied his request for WWL compensation because relator had not shown that the medical restrictions affected his income. Specifically, the SHO stated:

On 03/23/2010, a Staff Hearing Officer hearing was held which awarded a total loss of use of the right hand.

Consequently, the Injured Worker is now requesting wage loss starting 03/24/2010. He is NOT looking for work anywhere. He has purchased a truck and is in business for himself now as a trucker. He testified that he does not do any of the loading or unloading. He also testified that he can drive the truck because it has an automatic transmission.

The Staff Hearing Officer DENIES payment of wage loss because the Injured Worker has not shown that his medical restrictions from his injury affect the income he makes from this truck.

With the statements made at the hearing explaining that the truck is so easy to drive and that he does not have to do any loading or unloading, it would appear that his business is not affected by this injury. It could be that the Injured Worker's business is suffering due to the economy and perhaps the wrong business choices being made by the Injured Worker.

His schedule C for his 1040 shows a net loss for the truck in 2011.

The Injured Worker has not met his burden of proof.

(Emphasis sic.)

{¶ 21} 10. Relator's further appeal was heard before a commission deputy on August 30, 2012. The deputy vacated the prior SHO order, but still denied the request for WWL compensation beginning March 23, 2010, finding that relator had failed to establish entitlement to the compensation.

{¶ 22} First, the deputy had found that relator had now submitted sufficient medical restrictions:

Since the District Hearing Officer hearing on 05/22/2012, the Injured Worker submitted medical restrictions from his physician, Paige Gutheil, D.O., on a MEDCO-14 dated 05/30/2012 and 07/13/2012. The MEDCO-14, dated 07/13/2012, certifies a return to work with restrictions from 03/23/2010 through 12/30/2011. Therefore, medical restrictions are now on file from Dr. Gutheil. These restrictions are that the Injured Worker is unable to perform

any work involving repetitive activities, no gripping and limited use of the right hand for stabilization.

The Deputy finds that the Injured Worker has been awarded a total loss of use of the right hand, based on the report of Drs. Ralph Rohner, M.D., dated 10/14/2009, and John Cunningham, M.D., dated 07/01/2009, pursuant to Staff Hearing Officer order on file dated 03/23/2010. The Deputy finds this fact to be prima facie evidence that the Injured Worker has permanent restrictions of no use of the right hand. In addition, Dr. Gutheil's MEDCO-14's listing permanent restrictions and the fact that Dr. Gutheil saw the Injured Worker in office visits on 12/23/2009, 08/03/2010, 11/20/2010 and 10/29/2011 also supports that the Injured Worker has restrictions due to the allowed industrial injury. On this basis, the Deputy finds that the Injured Worker has also satisfied the requirement to supply a medical report documenting the restrictions that the Injured Worker believes justify his wage loss request, pursuant to Ohio Adm.Code 4125-1-01(C)(2).

{¶ 23} The deputy then explained that she was unable to determine what wage loss, if any, relator suffered based on the evidence he presented. The deputy also explained that she gave both relator and his attorney the opportunity to help her determine, what, if any, wage loss there was, but both were unable. Specifically, the deputy stated:

The Injured Worker testified that he is not looking for work anywhere. He has purchased a truck and is in business for himself now as a trucker. His affidavit states that he does not do any of the loading or unloading and that he is able to drive the truck, despite his inability to use his right hand, because it has an automatic transmission. He testified that he is currently working 56 to 60 hours per week. He testified that he abides by the federal trucking laws which limit working no more than 14 hours per day, with no more than 11 hours of driving per day and which limit hours worked to "on 60, off 34." He continued to work for the Employer of record following the injury, until he was laid off 05/15/2009. Per his affidavit, he collected unemployment checks through the end of February 2010, and his 02/27/2012 statement in conjunction with the affidavit submitted with this request indicates that he is self-employed driving a truck as of 03/01/2010.

The wage loss rules under Ohio Adm. Code 4125-1-01(F) deal with computation of wage loss benefits, and state that wage loss shall be calculated as sixty-six and two-thirds percent of the difference between the Injured Worker's average weekly wage and the Injured Worker's present earnings.

The Deputy finds that the Injured Worker has not presented sufficient evidence in order for the Deputy to determine what, if any, wage loss that the Injured Worker has suffered as a result of his permanent restrictions. The Injured Worker has presented C-94A Wage Statements dated 01/04/2011, 05/10/2011, and 02/27/2012, respectively, which cover pay period ending from 03/04/2010 through 12/30/2011, which are consistent with the period of time that working wage loss compensation is requested in this case. He also attaches his 1040 tax returns from 2010 and 2011. The Injured Worker argues that the documents combined establish that he has suffered a wage loss as a result of the permanent restrictions he has due to the allowed industrial injury.

The Deputy was unable to make this calculation based on the tax returns and wage statements submitted by the Injured Worker, and is unable to determine whether, if any, wage loss was suffered by the Injured Worker over the various weeks during the closed period of time from 03/23/2010 through 12/30/2011. This is because the Deputy has no idea what the Injured Worker's present earnings are. The Deputy requested that the Injured Worker's attorney make this calculation. The Injured Worker's attorney indicated that he is also unable to make this calculation, and could not even throw out a "ball park" figure on what the Injured Worker's wage loss is on a weekly basis over this closed period of time. He requested that the matter be referred back to the Bureau of Workers' Compensation in order to make this determination. He presumes that a wage loss exists based on the Injured Worker's presumed "business loss."

The Deputy, in reviewing the documents submitted to the file, finds based simply on the fact that the Injured Worker is now working approximately 60 hours a week where as his prior position of employment entailed working 40 hours per week and averaged \$796.37, that in all likelihood, the Injured Worker has not suffered a wage loss. Nonetheless, the Deputy finds that the Injured Worker has not presented sufficient evidence to even determine what the Injured Worker's present earnings are and denies both the working wage loss request and the request to refer the matter back to



the Bureau of Workers' Compensation to make that determination.

{¶ 24} 11. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 25} In challenging the commission's denial of his application for WWL compensation, relator focuses on the fact that the reason for the denial changed between the time the DHO denied the motion and the time the deputy denied the motion. Relator asserts that, although he did not provide sufficient medical evidence initially, ultimately, he did so and should have been awarded WWL compensation. Further, to the extent that his evidence was inadequate, relator contends that the commission should have referred the matter back to the BWC for a new evaluation.

{¶ 26} The commission asserts that, despite the fact that relator did supply medical evidence of restrictions, the commission did not abuse its discretion in finding that the evidence he provided concerning his finances was not sufficient for the commission to determine what, if any, wage loss he suffered.

{¶ 27} For the reasons that follow, it is the magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 28} 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).

{¶ 29} Ohio Adm.Code 4125-1-01 provides in pertinent part:

(A) Definitions:

The following definitions shall apply to the adjudication of applications for wage loss compensation:

\* \* \*

(9) "Present earnings" means the injured worker's actual weekly earnings which are generated by gainful employment

\* \* \*.

(b) In the case of an injured worker engaged in self-employment, “present earnings” means gross income minus business-related expenses. \* \* \* Income derived from self-employment shall be reported on at least a quarterly basis.

\* \* \*

(15) “Working wage loss” means the dollar amount of the diminishment in wages sustained by an injured worker 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.

\* \* \*

(E) \* \* \* The injured worker is responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation.

{¶ 30} In order to receive workers' compensation, a claimant must show not only that a work-related injury arose out of and in the course of employment, but, also, that a direct and proximate causal relationship exists between the injury and the harm or disability. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). This principle is equally applicable to claims for wage loss compensation. *State ex rel. The Andersons v. Indus. Comm.*, 64 Ohio St.3d 539 (1992). As noted by the court in *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118 (1993), a wage loss claim has two components: a reduction in wages and a causal relationship between the allowed condition and the wage loss.

{¶ 31} In the present case, it is undisputed that relator cannot return to the former position of employment due to the allowed conditions in his claim, specifically, his total loss of use of his right hand. The DHO initially denied his application because relator had failed to provide a medical report detailing the restrictions associated with the allowed conditions as required by Ohio Adm.Code 4125-1-15(C)(2). Relator does not deny that, initially, he had failed to meet this burden of presenting this medical evidence. Prior to the hearing before the SHO, relator did submit evidence of his medical restrictions, and

the SHO acknowledged that he did so. However, relator was also required to demonstrate that he had suffered an actual loss of wages. Relator contends that, by submitting the wage statements and copies of his tax returns, he demonstrated that he sustained a loss of wages.

{¶ 32} As noted by the commission, relator's wage loss statements demonstrate that he worked as few as two and as many as seven days a week. According to those wage statements, in weeks where he only worked two days, relator made as little as \$306.90 and as much as \$946.85. Weeks where he worked five days, relator made as little as \$584.70 and as much as \$3,902.73. The records indicate that he worked seven days twice, the first time he earned \$1,355.70, and the second time he made an amount which is illegible.

{¶ 33} Relator filed 13 pages of his tax return for 2010, but only 5 pages of his tax return for 2011.<sup>1</sup> As such, just as the deputy stated, she was unable to calculate relator's wage loss. A person is entitled to receive sixty-six and two-thirds percent of the difference between their average weekly wage and present earnings. Here, the commission did not abuse its discretion in denying his request for WWL compensation because the commission could not determine what, if any, difference there was.

{¶ 34} Seeming to acknowledge that the commission could not make that determination, relator asks this court to order the commission to refer the matter back to the BWC for re-determination. However, it was the BWC that initially referred the matter to the commission for determination because the issue was in dispute. Relator had the opportunity at hearings before the DHO, the SHO, and the deputy to present supportive documentation or testimony; however, relator did not do so. There are no provisions, and relator directs this court's attention to none that would permit the commission to return the matter to the BWC for a determination.

{¶ 35} Based on the forgoing, the magistrate finds that the commission did not abuse its discretion by finding that relator failed to support his motion for WWL compensation with sufficient evidence which would have permitted the commission to

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<sup>1</sup> For 2010, relator attached pages one and two of Form 1040, Schedule A (Itemized Deductions), Schedule C (Profit or Loss from Business), Schedule SE (Self-Employment Tax), Form 8829 (Expenses for Business Use of Your Home), Form 4562 (Depreciation and Amortization), Schedule M (Making Work Pay Credit), Ohio Form 1040, and City of Columbus Form IR-22. For 2011, relator attached pages one and two of Form 1040 and Schedule C.

determine whether or not he suffered a wage loss and, if so, what that wage loss was, and this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE  
STEPHANIE BISCA

### **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).