[Cite as *State ex rel. Vinson v. Indus. Comm.*, 2015-Ohio-3006.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Mary L. Vinson,	:	
Relator,	:	
v.	:	No. 14AP-450
Industrial Commission of Ohio and Central Ohio Transit Authority,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on July 28, 2015

The Bainbridge Firm, LLC, Andrew J. Bainbridge, Christopher J. Yeager, Carol L. Herdman and *Zachary L. Tidaback*, for relator.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Kegler, Brown, Hill & Ritter Co., LPA, David M. McCarty, Randall W. Mikes and *Katja Garvey*, for respondent Central Ohio Transit Authority.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, Mary L. Vinson ("relator"), filed this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her application for wage loss compensation and to enter an order granting her 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 one objection to the magistrate's decision:

> The Magistrate erred by failing to consider all of the *Brinkman* factors with regard to the instant matter.

{¶ 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} To obtain a writ of mandamus, relator must demonstrate that she has a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541, ¶ 14. A clear legal right exists when the relator establishes that the commission abused its discretion by entering an order that is not supported by any evidence in the record. *State ex rel. Brown v. Indus. Comm.*, 13 Ohio App.3d 178 (10th Dist.1983). " 'Where a commission order is adequately explained and based on some evidence, even evidence that may be persuasively contradicted by other evidence of record, the order will not be disturbed as manifesting an abuse of discretion.' " *State ex rel. Avalon Precision Casting Co. v. Indus. Comm.*, 109 Ohio St.3d 237, 2006-Ohio-2287, ¶ 9, quoting *State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St.3d 579, 584 (1997), ¶ 9.

{¶ 6} The magistrate concluded that relator failed to demonstrate that the commission abused its discretion. Relator argued that her case is analogous to *State ex rel. Brinkman v. Indus. Comm.*, 87 Ohio St.3d 171 (1999), but the magistrate concluded that *Brinkman* was factually distinguishable. Thus, the magistrate in effect concluded that the facts that made relator's case distinguishable from *Brinkman* constituted some evidence in support of the commission's decision.

{¶ 7} In her objection, relator asserts that the magistrate erred by failing to consider *other* factors that she asserts make this case analogous to *Brinkman*. However, as noted above, where some evidence supports a commission decision, it will not be overturned as an abuse of discretion despite the presence of other evidence that would support a contrary decision. *Avalon Precision Casting* at ¶ 9. *See also State ex rel. Pass v.*

C.S.T. Extraction Co., 74 Ohio St.3d 373, 376 (1996) ("An order that is supported by 'some evidence' will be upheld. It is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's."). After a careful and independent review, we do not find merit to relator's objection.

{¶ 8} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objection, we find that the magistrate has properly determined the pertinent facts and applied the appropriate law. We therefore overrule relator's objection 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.

Objection overruled; writ denied.

LUPER SCHUSTER and BRUNNER, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Mary L. Vinson,	:	
Relator,	:	
v.	:	No. 14AP-450
Industrial Commission of Ohio and Central Ohio Transit Authority,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on February 23, 2015

The Bainbridge Firm, LLC, Andrew J. Bainbridge, Christopher J. Yeager, Carol L. Herdman and *Zachary L. Tidaback*, for relator.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Kegler, Brown, Hill & Ritter Co., LPA, David M. McCarty, Randall W. Mikes and *Katja Garvey*, for respondent Central Ohio Transit Authority.

IN MANDAMUS

{¶ 9} Relator, Mary L. Vinson, 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 her application for wage loss compensation, and ordering the commission to find that she is entitled to that award.

Findings of Fact:

{¶ 10} 1. Relator sustained a work-related injury on June 1, 2006, and her workers' compensation claim was allowed for the following conditions:

> Left leg thigh muscle strain; left knee sprain/strain; tear medial meniscus left knee; tear lateral meniscus left knee; aggravation of pre-existing joint disease left knee.

{¶ 11} 2. It is undisputed that relator is unable to return to her former position of employment with respondent Central Ohio Transit Authority ("COTA").

{¶ 12} 3. On March 13, 2012, relator filed a C-86 motion for wage-loss compensation beginning November 4, 2011 and continuing.

{¶ 13} 4. According to her application, relator began working at JCPenney Outlet ("JCPenney") as a cashier on November 4, 2011. Relator initially earned $7.50 per hour and, as of June 2012, was earning $7.95 per hour. While employed with COTA, relator earned $21.74 per hour.

{¶ 14} Relator also submitted medical evidence from her treating physician Christopher C. Kaeding, M.D., who noted at different times that she could only occasionally reach, was prohibited from using her hands repetitively to push and pull arm controls and that, in an eight-hour day, she could only sit, stand, and walk for one hour each.

{¶ 15} 5. The matter was heard before a district hearing officer ("DHO") on June 22, 2012. At the hearing, relator testified that, as a cashier she would stand for two hours at a time, take a 15-minute break, then stand for another 2 hours. She testified further that, many weeks she did not work 20 hours per week because there was no work available, and she did not seek any other employment after being hired by JCPenney.

{¶ 16} 6. The DHO denied relator's application for wage loss compensation finding the restrictions on pushing, pulling, and reaching were not related to the allowed conditions and that, based on her own testimony, by standing for two hours at a time, relator was working outside the restrictions Dr. Kaeding placed on her. Further, the DHO found that relator failed to make a job search to find comparably paying work specifically

noting that many weeks relator worked significantly fewer than 20 hours and did not look for work after she was hired.

{¶ 17} 7. Relator filed an appeal from the DHO's order; however, relator, through counsel, dismissed that appeal with prejudice.

{¶ 18} 8. Relator filed her second application for wage loss compensation on November 12, 2013. In support of her motion, relator submitted the following: (a) a C-140 signed by relator on July 21, 2013 indicating she was currently making $8.10 an hour working as a cashier/operator for JCPenney; (b) a C-140 signed by Dr. Kaeding noting she had permanent restrictions including no bending, twisting/turning, pushing/pulling, squatting/kneeling/crawling, and no prolonged walking or standing. During an eight-hour day, Dr. Kaeding opined relator could sit for six to eight hours stand and walk for four to five hours each. She could frequently reach, continuously lift up to 5 pounds, and occasionally lift up to 20 pounds; (c) a form dated October 23, 2013 signed by Dr. Kaeding indicating relator has been under physical limitation from June 22 through July 17, 2013, and that those restrictions had been permanent since she was released to return to work in a modified capacity, and that those limitations included no bending, twisting, turning, pushing, squatting, kneeling and no prolonged walking or standing; (d) a letter from Procura Management, Inc. dated July 11, 2011 and signed by Dr. Kaeding on August 5, 2011 indicating that relator was not capable of performing sedentary work full-time and remained restricted to part-time work; (e) the March 22, 2011 report of Matthew D. Beal from the Ohio State Medical Center indicating:

> This patient has been under my care beginning 10/05/10. The patient needs to be on permanent restrictions that include the following restrictions:
>
> Patient is unable to lift/carry anything from 21-100 pounds at all. She is able to occasionally lift 11-20 pounds and she is able to lift 10 pounds on a continuous basis. Patient is able to occasionally reach below her knee as well as occasionally stand/walk and sit. Patient is unable to bend, twist/turn, push/pull, squat/kneel, and she should not be reaching above her shoulders. Patient needs to change positions every 30 minutes. If you have any questions feel free to contact my office.

(f) a copy of her OhioMeansJobs account statement; (g) a description of her position as a receptionist/operator with JCPenney indicating that her responsibilities included the following:

> Answering incoming calls in a timely manner
> Greeting Associates and Visitors as they enter the Associate Entrance
> Directing incoming calls to the proper parties or departments
> Ensuring the accuracy of the call off log
> Logging markdown guns in and out
> Logging Associate purchases in and out
> Other light tasks as time permits

(h) a letter dated October 25, 2011 indicating that her first date of work was November 4, 2011 and that she would be making $7.50 an hour; and (i) pay stubs and payroll information regarding her work at JCPenney.

{¶ 19} 9. Relator's second application for wage loss compensation was heard before a DHO on January 16, 2014. The DHO denied the request finding that she had not conducted a continued good-faith job search for comparably paying work. The DHO noted relator had made $21.50 per hour as a driver for COTA, she was earning $8.10 at JCPenney, her hours working for JCPenney fluctuated each week, she did not consistently work full-time, she was hired at Tiny Toes Daycare ("Tiny Toes") making $8.00 per hour and was hoping to make $9.50 by the end of 2014. Finding that neither the job with JCPenney nor the job at Tiny Toes was comparably paying work, the DHO found that relator had failed to make a good-faith job search for comparably paying work.

{¶ 20} 10. Relator appealed, and the matter was heard before a staff hearing officer ("SHO") on February 28, 2014. The SHO affirmed the prior DHO order and denied relator's request for wage loss compensation finding that she had failed to make a good-faith job search for comparably paying work and that Dr. Kaeding's restrictions were not consistent with her allowed conditions. Specifically, the SHO stated:

> The Hearing Officer does not find sufficient medical evidence to support payment of working wage loss compensation. The medical restrictions provided are inconsistent with the allowed conditions. The Injured Worker's current job position at Tiny Toes Daycare also does not comport with the

physical restrictions of working only four hours a day for five days a week.

The Hearing Officer also fails to find the Injured Worker made a good faith job search effort to seek employment of comparable pay.

The Injured Worker was working two jobs at the time of the industrial injury.

The Injured Worker continued to work her second job at J.C. Penney Outlet as a phone operator following the industrial injury until J.C. Penney Outlet closed in December 2013. From 06/22/2012 through 12/28/2013 approximately, the Injured Worker worked only at J.C. Penney (worked only one job) earning substantially less money than what she earned while working as a COTA bus driver (her former position of employment). The Injured Worker worked for J.C. Penney earning approximately $7.70 an hour. As a COTA bus driver, the Injured Worker earned approximately $21.74 [p]er hour. The Hearing Officer notes that the Injured Worker sought employment during this period of time however the employment sought was not for comparable pay.

The Hearing Officer notes that J.C. Penney Outlet closed its operation and the Injured Worker last worked on 12/28/2013. The Injured Worker then became hired by Tiny Toes Daycare and began working on 01/13/2014 as a van driver, a cook and a lunch attendant for the children.

The Hearing Officer finds that the job search efforts that the Injured Worker made were sporadic and were not of comparable pay as the job that she had [with] COTA. The job that she held at COTA she earned over $21.00 per hour. The Injured Worker worked at J.C. Penney earning $7.70 an hour through 12/28/2013 approximately. The Injured Worker was hired in November 2011 at J.C. Penney. The Injured Worker obtained employment at Tiny Toes Daycare and began working on 01/13/2014 earning $8.00 an hour.

The Hearing Officer finds the Injured Worker's employment position at Tiny Toes Daycare do not comply with her medical restrictions. Per Dr. Kaeding's 01/22/2014 C-140 report, the Injured Worker was limited to working four hours a day for five days a week for a total of 20 hours a week. Dr.

> Kaeding opined that these restrictions were permanent restrictions. The Injured Worker testified at hearing that she works approximately seven and a half to eight hours each day for Tiny Toes Daycare and works on Saturdays for approximately four hours. The Injured Worker's restrictions to working 20 hours a week have not been complied with.
>
> According to Dr. Kaeding's 07/17/2013 C-140 report and Dr. Kaeding's 10/24/2013 questionnaire responses, the Injured Worker has restrictions of pushing and pulling. Restrictions on pushing and pulling are not consistent with the allowed industrial injuries. The industrial claim has been allowed for left lower extremity conditions. There are no conditions for the upper extremities which would limit the Injured Worker or prevent the Injured Worker from pushing and pulling.
>
> Based upon Dr. Kaeding's C-140s, dated 01/22/2014 and 07/17/2013, and Dr. Kaeding's 10/24/2013 questionnaire responses, the Injured Worker's job search efforts on file, and the pay records on file, the Hearing Officer does not find the Injured Worker has complied with Ohio Administrative Code 4125-101.

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

Conclusions of Law:

{¶ 22} Relator argues that the commission abused its discretion by finding that she failed to engage in a good-faith job search effort to seek comparably paying work. Specifically, relator cites *State ex rel. Brinkman v. Indus. Comm.*, 87 Ohio St.3d 171 (1999), and asserts that she had been promised full-time work at JCPenney at a higher salary and should have been excused from continuing with a job search. Specifically, relator argues:

> In the instant matter, Relator maintained employment position with JCPenney after her work-place injury with Respondent Employer rendered her unable to return to her position as a bus driver. She worked a part-time position at JCPenney, but was promised by management to advance from within when a full-time position was vacated. Relator did gain increased hours when a full-time employee left the company. Relator had no purpose in, and was not required by law, to seek alternative employment. Similar to the facts in *Brinkman*, Relator ceased looking for full-time

> employment because she had secured part-time employment, in a company where employees are provided preference when full-time slots open, her wage was above that of minimum wage, and her position with JCPenney was the first offered to Relator.
>
> In addition, after JCPenney closed its doors, it cannot be disputed that Relator conducted a good faith job search, as demonstrated in the record. JCPenney closed on December 28, 2013, and by January 9 or 10, 2014, Relator had secured another part-time source of employment with Tiny Toes Daycare.
>
> Clearly, Relator's accepting a lower-paying job was necessitated by the disability she sustained as a result of her work-place injury. It is unreasonable for Respondent IC to require Relator to seek only employment of a certain wage, rather than take a lower wage paying position when she can, in an effort to make ends meet within her household.

(Relator's Brief, 12.)

{¶ 23} For the reasons that follow, the magistrate finds that the commission did not abuse its discretion in denying relator's application for wage loss compensation.

{¶ 24} 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).

{¶ 25} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry*

Co., 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 26} Entitlement to wage loss compensation is governed by R.C. 4123.56(B), which provides:

> Where an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment or as a result of being unable to find employment consistent with the claimant's physical capabilities, the employee shall receive compensation at sixty-six and two-thirds per cent of the employee's weekly wage loss not to exceed the statewide average weekly wage for a period not to exceed two hundred weeks.

{¶ 27} 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.* (1993), 67 Ohio St.3d 452. This principle is equally applicable to claims for wage loss compensation. *State ex rel. The Andersons v. Indus. Comm.* (1992), 64 Ohio St.3d 539. As noted by the court in *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, a wage loss claim has two components: a reduction in wages and a causal relationship between the allowed condition and the wage loss.

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

{¶ 29} Ohio Adm.Code 4125-1-01(A) defines "suitable employment" and "comparably paying work" as follows:

> (7) "Suitable employment" means work which is within the claimant's physical capabilities, and which may be performed by the claimant subject to all physical, psychiatric, mental, and vocational limitations to which the claimant is subject at the time of the injury which resulted in the allowed conditions in the claim or, in occupational disease claims, on the date of the disability which resulted from the allowed conditions in the claim.
>
> (8) "Comparably paying work" means suitable employment in which the claimant's weekly rate of pay is equal to or greater than the average weekly wage received by the claimant in his or her former position of employment.

{¶ 30} Ohio Adm.Code 4125-1-01(C) identifies for claimants the relevant information which must be contained in an application for wage loss compensation. Specifically, Ohio Adm.Code 4125-1-01(C)(5) provides:

> (5) All claimants seeking or receiving working or non-working wage loss payments shall supplement their wage loss application with wage loss statements, describing the search for suitable employment, as provided herein. The claimant's failure to submit wage loss statements in accordance with this rule shall not result in the dismissal of the wage loss application, but shall result in the suspension of wage loss payments until the wage loss statements are submitted in accordance with this rule.
>
> (a) A claimant seeking or receiving wage loss compensation shall complete a wage loss statement(s) for every week during which wage loss compensation is sought.
>
> (b) A claimant seeking wage loss compensation shall submit the completed wage loss statements with the wage loss application and/or any subsequent request for wage loss compensation in the same claim.
>
> (c) A claimant who receives wage loss compensation for periods after the filing of the wage loss application and/or any subsequent request for wage loss compensation in the same claim shall submit the wage loss statements completed pursuant to paragraphs (C)(5)(a), (C)(5)(d) and (C)(5)(e) of

this rule every four weeks to the bureau of worker's compensation or the self-insured employer during the period when wage loss compensation is received.

(d) Wage loss statements shall include the address of each employer contacted, the employer's telephone number, the position sought, a reasonable identification by name or position of the person contacted, the method of contact, and the result of the contact.

(e) Wage loss statements shall be submitted on forms provided by the bureau of workers' compensation.

Thereafter, Ohio Adm.Code 4125-1-01(D) provides, in pertinent part:

(D) The claimant is solely responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation. Unless the claimant meets this burden, wage loss compensation shall be denied.

* * *

In considering a claimant's eligibility for compensation for wage loss, the adjudicator shall give consideration to, and base the determinations on, evidence in the file, or presented at hearing, relating to:

(1) The claimant's search for suitable employment.

(a) As a prerequisite to receiving wage loss compensation for any period during which such compensation is requested, the claimant shall demonstrate that he or she has:

(i) Complied with paragraph (C)(2) of this rule and, if applicable, with paragraph (C)(3) of this rule [relating to the submission of medical evidence];

(ii) Sought suitable employment with the employer of record at the onset of the first period for which wage loss compensation is requested. The claimant shall also seek suitable employment with the employer of record where there has been an interruption in wage loss compensation benefits for a period of three months or more; and

> (iii) Registered with the Ohio bureau of employment services and begun or continued a job search if no suitable employment is available with the employer of record.
>
> (b) A claimant may first search for suitable employment which is within his or her skills, prior employment history, and educational background. If within sixty days from the commencement of the claimant's job search, he or she is unable to find such employment, the claimant shall expand his or her job search to include entry level and/or unskilled employment opportunities.
>
> (c) A good faith effort to search for suitable employment which is comparably paying work is required of those seeking non-working wage loss and of those seeking working-wage loss who have not returned to suitable employment which is comparably paying work, except for those claimants who are receiving public relief and are defined as work relief employees in Chapter 4127. of the Revised Code. A good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss.

{¶ 31} Ohio Adm.Code 4125-1-01(D)(1)(c) provides certain relevant factors to be considered by the commission in evaluating whether claimant has made a good-faith effort. Those factors including: claimant's skills, prior employment history, and educational background; the number, quality, and regularity of contacts made with prospective employers; for a claimant seeking any amount of working wage loss compensation, the amount of time devoted to making prospective employer contacts during the period for which working wage loss is sought, as well as the number of hours spent working, any refusal by claimant to accept assistance from the BWC in finding employment; any refusal by claimant to accept the assistance of any public or private employment agency; labor market conditions; claimant's physical capabilities; any recent activity on the part of claimant to change her place of residence and the impact such change would have on the reasonable probability of success and the search for employment; claimant's economic status; claimant's documentation of efforts to produce self-employment income; any part-time employment engaged in by claimant and whether that employment constitutes a voluntary limitation on claimant's present earnings;

whether claimant restricts her search to employment that would require her to work fewer hours per week than she worked in the former position of employment; and whether, as a result of physical restrictions, claimant is enrolled in a rehabilitation program.

{¶ 32} Relator asserts that the facts of her case are analogous to the facts in the *Brinkman* case and that the commission abused its discretion here.

{¶ 33} William A. Brinkman, a Columbus police officer, sustained multiple injuries in 1994, was not able to return to his former job, and a disability retirement was granted. Brinkman continued his National Guard duties and found part-time work as a school bus driver. He continued looking for work and applied for security work with several local hospitals. In February 1995, Brinkman obtained a part-time job with Anheuser-Busch, Inc. ("Busch") earning $20 per hour. Brinkman had been told that part-time workers were given preference for full-time positions as they became available.

{¶ 34} Brinkman applied for wage loss compensation, which was denied based on a finding that his anticipation of full-time employment with Busch cannot be used as the basis for his failing to continue a good-faith search for full-time employment. Brinkman filed a mandamus action, which was ultimately granted by the Supreme Court of Ohio. The court reasoned:

> Despite the laudable goals of wage-loss compensation, there is a heightened potential for abuse whenever weekly compensation and wages are concurrently permitted. In response to this susceptibility, certain post-injury employment is more carefully scrutinized. Among these are part-time and self-employment. Described generically as voluntary limitations of income, these two categories are examined to ensure that wage-loss compensation is not subsidizing speculative business ventures or life-style choices. *State ex rel. Ooten v. Siegel Interior Specialists Co.* (1998), 84 Ohio St.3d 255, 703 N.E.2d 306; *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, 648 N.E.2d 827.
>
> [T]he commission ruled that claimant voluntarily restricted his income. The commission initially appears to assume that the limitation of hours imposed by part-time work automatically equals a proscribed limitation of income. With a $20 per hour job as we have here, however, this assumption is inappropriate. Twenty hours part-time at

Busch will most likely exceed forty hours of minimum-wage work elsewhere.

The commission also characterized claimant's perceived income limitation as voluntary because claimant did not continue to look for full-time work after getting the job at Busch. We have never specifically addressed the question of continuing a full-time job search after acquisition of part-time work. We find particularly appealing Florida's approach to this question due to its judiciary's balance between the normal part-time concerns and economic reality.

In *Stahl v. Southeastern X-Ray* (Fla.App.1984), 447 So.2d 399, the former employer alleged that claimant's failure to look for a better-paying job after accepting other minimum-wage employment constituted a voluntary income limitation. The court disagreed, writing:

"Whether the acceptance of a particular job with lower earnings amounts to voluntary limitation should be determined based on the enumerated factors [physical impairment, age, industrial history, training and education, motivation, work experience, work record, diligence and availability of jobs] and not based simply on a requirement for continued diligent search by claimant after completion of his normal daily work schedule." *Id.* at 401.

Rather than focusing simply on income, the Florida court viewed the claimant's employment situation broadly. Within the first three months of work, the claimant received a forty cent per hour raise and was given increased responsibility. When asked why he had stopped looking for other work, claimant responded that " '[m]y boss has indicated that I have a future there, so I feel that I have a good job right now and it would be silly for me to leave a good thing.' " *Id.* at 402. The court agreed, concluding that "[t]he deputy's order would compel claimant to forfeit any present or future commitment to a full-time job which appears to be appropriate in all ways other than presently diminished earnings." *Id.*

In this case, the commission is also asking the claimant to "leave a good thing." *Stahl* is admittedly distinguishable in that post-injury employment was full-time, not part-time, but whether that does or should excuse a broader-based analysis is questionable. Wage-loss compensation is not

> forever. It ends after two hundred weeks. R.C. 4123.56(B). Thus, when a claimant seeks new post-injury employment, contemplation must extend beyond the short term. The job that a claimant takes may have to support that claimant for the rest of his or her life-long after wage-loss compensation has expired.
>
> This does not mean that the claimant is entitled to turn down a job as paying too little and still claim wage-loss compensation. Neither, however, should it compel the departure from a lucrative job with full-time potential for menial work simply because the latter is immediately available full-time.
>
> There is no evidence contrary to our claimant's assertion that he took the Busch job because it was the first job-full or part-time-that was offered. Claimant's uncontradicted statements also indicate that part-timers were given preference when full-time slots opened. This supports claimant's assertion that a move to full-time was a realistic possibility.
>
> We find, therefore, that under these facts, the commission abused its discretion in finding a voluntary limitation of income. Viewed in totality, the facts do not establish such a limitation or a life-style-motivated job selection-the two concerns that have prompted close examination of part-time work.

Id. at 173-74.

{¶ 35} The magistrate finds that the *Brinkman* case is distinguishable from relator's situation. As the court noted, Brinkman's part-time job paying $20 an hour would likely exceed what he would earn working 40 hours per week at a minimum wage job. The same cannot be said for relator who was earning between $7.50 and $8.10 with JCPenney and then $8.00 an hour with Tiny Toes. This part-time work earned substantially less than her job with COTA and does not compare to the $20 per hour Brinkman earned at his part-time job. To the extent that relator makes comments in her brief that she was eventually given full-time work when an employee left JCPenney, it does not appear that she made that argument at the hearing before the SHO. Further, the stipulation includes a letter from JCPenney dated November 25, 2013. According to this letter, relator had known since September 30, 2013 that the outlet store was closing and

that she would have been terminated on or around November 30, 2013. Because the store was unable to sell all of its inventory, the closure was extended to December 18, 2013. Relator knew for several months that the store was closing and, although she had worked there since November 2011, allegedly expecting that full-time work was a possibility, it was not until the store was about to close its doors that she began working full-time. Relator's job lacked all the potential that Brinkman's job had provided.

{¶ 36} Based on the facts in this case, the magistrate finds that the *Brinkman* case is easily distinguishable and that relator has not demonstrated that the commission abused its discretion when it denied her application for wage loss compensation. As such, 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).