[Cite as *State ex rel. Perez v. Indus. Comm.*, 2015-Ohio-588.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Manuel A. Perez,	:	
Relator,	:	
v.	:	No. 14AP-394
Industrial Commission of Ohio and Flour Constructors International,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on February 19, 2015

Bainbridge Firm, LLC, Christopher J. Yeager and *Carol L. Herdman,* for relator.

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

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Manuel A. Perez filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to overturn its finding that Perez had received temporary total disability ("TTD") compensation for periods of time when he was working and to overturn the commission's order that any overpayment could be recouped under R.C. 4123.511(K) as a fraud.

{¶ 2} In accord with Loc.R. 13(M) of the Tenth District Court of Appeals, this case was referred to a magistrate to conduct appropriate proceedings. 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, appended hereto. The magistrate's decision includes a recommendation that we affirm the commission's finding of an overpayment of TTD compensation, but we compel the commission to vacate its finding as to fraud and its applying of R.C. 4123.511(K).

{¶ 3} Counsel for the commission has filed objections as to the magistrate's recommendation with regard to R.C. 4123.511(K). Counsel for Perez has filed a memorandum in response to the commission's objections. Counsel for Perez has filed their own objections to the magistrate's decision, questioning the finding as to an overpayment and the sufficiency of the entry finding an overpayment. Counsel for the commission, understandably, supported that portion of the magistrate's decision.

{¶ 4} The case is now before the court for a full, independent review as to both issues.

{¶ 5} Perez was injured in late 2002. He was awarded TTD compensation beginning in July 2007. The TTD compensation was terminated in 2011 after Perez was found to have reached maximum medical improvement ("MMI").

{¶ 6} While Perez was receiving TTD compensation, someone contacted the Ohio Bureau of Workers' Compensation ("BWC") and alleged Perez was working. The BWC referred the allegation to its Special Investigations Unit ("SIU") to investigate the situation. SIU conducted surveillance for approximately one month in the summer of 2011 and generated a video of Perez doing things which SIU construed as work at an automotive repair shop called M.A. Perez Enterprises.

{¶ 7} SIU followed up with interviews of several individuals who had their motor vehicles repaired at M.A. Perez Enterprises. Apparently Perez had run the repair shop for years before he was injured. Perez claimed that he stopped operating the business when he got injured, but that he kept the business name and its associated liability insurance intact because he lived in the building and a ruptured fuel tank was underneath the building.

{¶ 8} Perez claimed that his son and a friend were still allowed to fix cars at the building, but Perez himself did not engage in the work or share in the proceeds. Testimony before a district hearing officer ("DHO") indicated that Perez had carried on a significant repair business for years before his injury and continued to carry on the business for approximately seven years after. As a result, the DHO found both overpayment and fraud.

{¶ 9} On appeal, an evidentiary hearing was held before a staff hearing officer ("SHO") who reached different conclusions after hearing the testimony of Alberto Guerrero who apparently had been communicating with SIU. Guerrero denied all claims of SIU which involved allegations attributed to Guerrero that Perez did work himself, as opposed to processing funds for others who worked at the garage.

{¶ 10} The BWC appealed to the full commission. Commissioner Bainbridge did not participate since the matters involved the Bainbridge Firm, LLC which represented Perez at the time and still represents Perez. The two remaining commissioners agreed with the findings of the DHO and found both overpayment and fraud. Hence, counsel for Perez initiated this mandamus action.

{¶ 11} Our magistrate has presented a thorough review of the decisions of the Supreme Court of Ohio on the pertinent legal issues. The magistrate has also produced a thorough review of our past decision on this area of law. We agree with our magistrate's observing that there is significant disparity in the decisions as to the amount of activity the commission and the courts have determined is permissible for an injured worker who is drawing TTD compensation. Our magistrate also correctly observed that the commission is the ultimate fact finder and is due some deference as to its factual finding. That deference requires us to affirm the finding of an overpayment.

{¶ 12} We give significantly less deference to the commission's handling of issues which are purely legal issues, but the commission tries to follow the guidance it receives from this court and the Supreme Court of Ohio on legal issues.

{¶ 13} Our magistrate set forth the six elements to be proved for a fraud finding to be established. The magistrate then accurately noted why the "some evidence" standard is not met as to certain of the elements in this case.

{¶ 14} Nothing in the objections filed on behalf of Perez or filed on behalf of the commission leads us to find that the magistrate's findings of fact or conclusions of law are incorrect. We therefore overrule the objections filed by the parties and adopt the findings of fact and conclusions of law contained in the magistrate's decision.

{¶ 15} As a result, we issue a writ of mandamus solely to compel the commission to vacate its order of finding fraud as to Manuel A. Perez.

Objections overruled; writ granted.

BROWN, P.J., and BRUNNER, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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Relator,	:	
v.	:	No. 14AP-394
Industrial Commission of Ohio and Flour Constructors International,	:	(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

Bainbridge Firm, LLC, Christopher J. Yeager, and *Carol L. Herdman,* for relator.

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

IN MANDAMUS

{¶ 16} Relator, Manuel A. Perez, 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 found that his work activities at his auto repair shop directly generated income, finding he was overpaid temporary total disability ("TTD") compensation, further finding fraud, and ordering the commission to find that his activities were not inconsistent with his receipt of TTD compensation.

Findings of Fact:

{¶ 17} 1. Relator sustained a work-related injury on December 30, 2002 and his workers' compensation claim has been allowed for the following conditions:

> Sprain neck; lumbar sprain; thoracic sprain; bulging disc C3-C4; bulging disc C4-C5; protruding disc C5-C6; protruding disc C6-C7; bulging disc C7-T1; cervical spondylosis; major depression; cognitive disorder.

{¶ 18} 2. Relator was awarded TTD compensation beginning July 28, 2007 until his allowed conditions were found to have reached maximum medical improvement in Fall 2011.

{¶ 19} 3. While relator was receiving TTD compensation, the Ohio Bureau of Workers' Compensation ("BWC") received an allegation from an anonymous source that relator had been working while receiving disability benefits.

{¶ 20} 4. The BWC's Special Investigations Unit ("SIU") conducted surveillance on relator for approximately one month during summer 2011. The video obtained is less than 25 minutes long and, according to the SIU, the footage demonstrates that relator was performing work activities at M.A. Perez Enterprises, an automotive repair shop. (Relator looks under the hood of a white truck and talks to a man, perhaps the owner, for approximately eight minutes and spends another eight minutes looking at an engine block, primarily sitting on a short stool with wheels. In the remaining six minutes, relator walks around, talks on his cell phone, hands someone some tools, looks under the hood of a car, talks to people, and sits inside the cab of a black car doing something.)

{¶ 21} 5. SIU agents interviewed at least seven individuals whose names they received from a confidential informant. Although each of these individuals acknowledged they discussed issues concerning their automobiles with relator and, when repairs were finished they paid relator, only one of the individuals saw relator work on their cars (relator replaced plugs). Scott McNabb, an employee with Advanced Auto, indicated relator was a regular customer, had a commercial business account, and frequently ordered parts which he picked up. The interview with the confidential informant provides, in pertinent part, as follows:

> The source advised claimant, Tony Perez (PEREZ) was engaged in conflict work activity while receiving disability benefits from the Ohio Bureau of Workers' Compensation

> (BWC). The source advised PEREZ was operating a car repair business located at his residence * * *. The source stated PEREZ has been operating this business many years.
>
> The source provided names of customers; Steve Sturgill, Eugene Collins, Bill Blevins, Nick ? (works at Kroger's), Rusty Whitman, Jake Walters, a female employee from the local IGA (West Portsmouth) and Perry Walters.
>
> The source stated PEREZ obtains his parts from Advanced Auto Parts located in Portsmouth, Ohio. The source stated PEREZ does occasionally obtain parts from Barbour's Auto Parts as well, but mainly frequents Advanced Auto.
>
> The source stated PEREZ also acts as a translator for Spanish speaking individuals who are involved with legal issues. The source was not aware if PEREZ was paid for such activity. The source stated PEREZ is very aware and paranoid of BWC "watching him." **The source subsequently performs all of the repair work inside the garage and out of sight.**
>
> The source stated PEREZ receives cash payments from customers and banks at Wesbanco.

(Emphasis added.)

{¶ 22} 6. The BWC's motion was heard before a district hearing officer ("DHO") on March 25, 2013. The DHO summarized the evidence:

> The key dispute in this matter is whether or not Injured Worker continued to operate an auto repair shop which he had owned prior to this industrial injury.
>
> Injured Worker maintains that he did not. He testified that Perez Enterprises had ceased to be an active business when he was hurt, and the only reason the corporation continued to exist is for insurance purposes due to a ruptured fuel tank located underneath the property. Injured Worker's personal residence is over the garage of his allegedly former business. He testified that he allowed his son and best friend to use the garage to fix their own personal vehicles and to work on other people's cars for money, but that he (Injured Worker) never shared in any of the proceeds.
>
> The Bureau of Workers' Compensation presented the statements of several witnesses to the contrary. Steve

> Sturgill, operations director of Community Action Organization, indicated that he contracted with Perez Enterprises to do the maintenance and repair of CAO's cars from 2000 to 2009. Financial records show that CAO paid Perez Enterprises $7,500 over this period. Mr. Sturgill indicated that Injured Worker personally scheduled the appointments, negotiated the pricing, and accepted the organization's checks. Injured Worker testified that only he and his ex-wife have access to the Perez Enterprises checking account these funds were paid into. Injured Worker's explanation of what happened to the money after it went into the checking account is inconsistent. His original testimony was that he kept no money for himself, but instead gave it to his friend or son AFTER EXPENSES were paid. He originally testified that these "expenses" included the parts that were used and paying garage's utilities and mortgage. Obviously, paying the mortgage on the garage that he owns is personal use of the money by INJURED WORKER himself, and is gross income to him. Under questioning from his attorney, Injured Worker later recanted this testimony. District Hearing Officer does not find this recantation credible.
>
> Documentation from Advanced Auto Parts shows that over the period in question Perez Enterprises bought $43,000 worth of auto parts. Such a sum is clearly more consistent with the operation of a business than allowing friends and family to work on their personal vehicles. Per the owner of Advanced Auto Parts, the transactions were almost always carried out by Injured Worker personally.
>
> Finally, the Administrator presents statements from various witnesses that they had their cars repaired at Injured Worker's shop before, during, and after the period at issue. Video surveillance shows Injured Worker personally working on auto repairs and installing a radio in a car in June of 2011.

(Emphasis sic.)

{¶ 23} The DHO determined that relator was indeed performing work activities during the time at issue:

> District Hearing Officer finds that Injured Worker continued to operate Perez Enterprises as an auto repair shop during the period at issue. Furthermore, District Hearing Officer finds that the extent of Injured Worker's activities amounted to work rather than a passive investment. His personal involvement went far beyond "minimal activities" and

> constituted "income generating" behavior for the business. Therefore, Injured Worker is overpaid in temporary total benefits that he received while working from 09/14/2007 and 10/03/2011.

{¶ 24} The DHO also concluded that the BWC had satisfied its burden of demonstrating that relator also committed fraud.

{¶ 25} 7. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on May 2, 2013. Relator had not presented any witnesses when his case was heard before the DHO; however, the confidential informant, Alberto "Pollo" Guerrero appeared and testified on behalf of relator. The SHO concluded that the evidence did not demonstrate that relator was working during the relevant time period, stating:

> The allegation brought by the Administrator is that the Injured Worker, while receiving temporary total compensation, continued to operate Perez Enterprises, an auto repair business. An overpayment was requested for temporary total compensation paid beginning 09/14/2007, based on records from Community Action Organization (CAO). Steve Sturgill, Operations Director of CAO, asserted that the Injured Worker was involved in all aspects of the contract with CAO including the actual servicing of their vehicles. Statements were provided from other sources that made assertions that the Injured Worker had performed work, although some of the reports do not list the time period the alleged work was performed or did not indicate the author witnessed the Injured Worker perform the work.
>
> Based on the testimony of the Injured Worker and Alberto "Pollo" Guerrero, as well as the statements of Alberto Guerrero, dated January, 2013, Jacob Walters, dated 03/02/2013, and Aaron Simon, dated 02/19/2013[,] [t]he Staff Hearing Officer finds the Injured Worker did not engage in remunerative employment over the period at issue nor commit fraud in regard to the receipt of temporary total compensation. The Staff Hearing Officer notes that Mr. Guerrero did not attend the District Hearing Officer hearing.
>
> The Staff Hearing Officer finds the testimony of the Injured Worker to be credible. The Injured Worker testified that he lives in a house above the garages where auto repair was performed. However, since his injury in 2002, the Injured Worker testified he has not performed any work or received any money related to the repair work done in the garages. He

stated that repair work continues to be performed in the garages but that work was, and is, performed by his "brother" Alberto, their sons, and friends. He further testified that the money earned for the work performed was paid to those individuals and not to him. He may have accepted the money on their behalf, but the money was then forwarded to the appropriate individuals who did the work.

The Injured Worker testified that Mr. Guerrero often performed the work and left as soon as the work was completed. Mr. Guerrero would leave the client's keys with the Injured Worker, who would give them to the client and accept the check for Mr. Guerrero when the clients came to redeem their cars. The Injured Worker did not do any of the work on the cars and did not receive any compensation for the use of the garage. Some of the checks were made out to the Injured Worker, but the Injured Worker merely cashed the checks and forwarded the money to Mr. Guerrero or the appropriate mechanic.

This is consistent with the statements of Jacob Walters, Aaron Simon and Alberto Guerrero, submitted to the file on 03/21/2013. The statements indicate that the three men worked on various cars at the garage and the Injured Worker performed none of the work. This is also consistent with the testimony of Mr. Guerrero. Pursuant to the Special Investigation Unit's (SIU) report, their initial investigation of the Injured Worker was closed on 01/23/2012 based on a lack of monetary benefits. Eleven months later, the investigation was reopened based on a source alleging new allegations. At hearing, that source was identified as Mr. Guerrero. This is important as Mr. Guerrero, at hearing, essentially denied all the alleged statements made by him to the BWC investigators. Most persuasive of the testimony at hearing from Mr. Guerrero was that he did all the work and received all the money earned from that work. Further, he testified that the Injured Worker did none of the work. This testimony also applied to the CAO contract. Mr. Guerrero testified that he performed the work under that contract based on the terms of that contract, a contract that had existed for a number of years. The check was issued to Perez Enterprises, but the money was paid by the Injured Worker to Mr. Guerrero, minus the cost of parts. That testimony is consistent with that given by the Injured Worker. Mr. Sturgill was not at hearing to clarify his statements as it related to the testimony of Mr. Guerrero and the CAO contract.

In regard to the issue of parts, there is evidence of a large number of purchases of auto parts over the period at issue. The Injured Worker testified the parts purchased were for personal cars of his family or for work done by others. The Injured Worker testified that he kept the account active so the parts could be purchased wholesale and not retail. Counsel for the Administrator noted a difference in the prices charged for the parts, the parts were purchased wholesale but the clients were charged retail. Counsel raised the issue of who kept the difference. Mr. Guerrero indicated that the difference was reinvested in supplies for use in the garage by the mechanics.

The Administrator also submitted video evidence that allegedly shows the Injured Worker working. The Staff Hearing Officer finds the video evidence is not persuasive to support the allegation that the Injured Worker was working. The video shows the Injured Worker looking into the engine of a truck, it does not document him performing any work. The video also shows the Injured Worker looking at an engine in the garage. The Injured Worker testified the other man in the video was his son and the engine belonged to the son. Alleged evidence of the Injured Worker repairing a radio in a truck does not actually show what the Injured Worker is doing in the truck. None of the video evidence shows the Injured Worker working outside his restrictions and there is no evidence that the Injured Worker received any compensation for any alleged "work" performed in the video.

The Staff Hearing Officer finds that there is insufficient proof that the Injured Worker received remuneration for any activity performed in his garage, or that he performed any activity for pay during the period at issue. There is also insufficient evidence that the Injured Worker performed work beyond his restrictions. The Staff Hearing Officer finds the Injured Worker did receive money on behalf of people who actually performed the work, but he essentially served as a pass-through for the money. The money paid from CAO to Perez Enterprises would be the most suspect transaction; however, the Staff Hearing Officer finds both Mr. Guerrero and the Injured Worker persuasive that ultimately all the funds from that were used to pay for parts or given to Mr. Guerrero. The Injured Worker neither performed the work nor kept any of the payments. The Staff Hearing Officer also finds the testimony of the Injured Worker and Mr. Guerrero, as well as the written statements of Mr. Simon and Mr.

> Walters, are consistent and support the finding that the Injured Worker did not perform work over the period at issue.

{¶ 26} 8. The BWC asked the commission to exercise its continuing jurisdiction over the matter and the commission did so.

{¶ 27} 9. The matter was heard before the commission on August 13, 2013. The commission determined that relator was working during the relevant time period, stating:

> Following the date of injury, the Commission finds the Injured Worker continued to operate his own auto repair business, M.A. Perez Enterprises, located in a garage under his residence during the period from 09/14/2007 through 10/03/2011, while receiving temporary total disability compensation. The Commission finds the Injured Worker's activities constituted "work" and were more than just a passive investment. The Commission further finds the Injured Worker had more than just minimal involvement in this business despite his allegation that he was not working, and any activity in the garage was a result of his son and his son's friends as well as Mr. Guerrero, using the garage to repair cars for money. The Injured Worker alleged he never received any portion of the money as a result of these services performed by his son, son's friends and Mr. Guerrero.
>
> An investigation into the activities at the garage was conducted by the Bureau of Workers' Compensation Special Investigations Unit, including surveillance with a video from 06/03/2011 through 07/16/2011. The Injured Worker was observed performing auto repair work including working on a tractor and helping with repair work on an engine block. He was also observed meeting customers and discussing auto issues with them.
>
> There are statements from various customers on file stating they dealt exclusively with the Injured Worker when doing business at his shop. They never actually saw him physically work on their cars, but he performed activities such as scheduling when to bring the car into the shop, diagnosing their car problem, and receiving payment when picking up the car. There is also a statement from Scott McNabb, Manager of Advanced Auto Parts stating the Injured Worker would order and pick-up parts. Also, on file are records supporting numerous purchases from Advanced Auto Parts and credit card records for auto parts purchased.

{¶ 28} 10. The commission also made a finding of fraud.

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

Conclusions of Law:

{¶ 30} Relator argues that the commission abused its discretion when it found that he was overpaid TTD compensation because he was working and further finding that this overpayment should be recouped under the fraud provisions of the workers' compensation statute.

{¶ 31} The magistrate finds that the commission did not abuse its discretion when it found that relator was overpaid TTD compensation because he was working; however, the magistrate finds that the commission did abuse its discretion when it determined that the overpayment should be recouped under the fraud provisions of the workers' compensation statute.

{¶ 32} This case is but one in a long line of cases that have come through the courts raising the question of how much activity can an injured worker perform while receiving TTD compensation. At times, it is difficult to distinguish one commission determination from another. As such, it is important to remember that these cases are very fact intensive and, as the trier of fact, a commission order should be upheld if there is some evidence in the record to support it. This is especially notable here where both this court and the Supreme Court of Ohio have, as a general rule, upheld decisions from the commission which found that injured workers were working and had been overpaid TTD compensation and have also upheld decisions where the commission has found that the injured worker was not working.

{¶ 33} In December 2002, the Supreme Court of Ohio decided *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98 Ohio St.3d 20, 2002-Ohio-7038. At the time of his injury, Christopher D. Posey held two jobs concurrently: one with Ford Motor Company ("Ford") and the other was his own lawn care business.

{¶ 34} In 1998, Posey sustained a work-related injury which temporarily forced him from his job at Ford and for which he received TTD compensation. His injury also forced him to stop his physical participation in his lawn care business. Ford later sought to recoup the TTD compensation paid to Posey on grounds that his participation in his lawn care business constituted work. Evidence of Posey's participation in his business

established only that he signed his four worker's pay checks and fueled and drove riding lawn mowers onto a truck. Surveillance supports Posey's contention that he did no landscaping work in connection with his business while receiving TTD compensation.

{¶ 35} The commission denied Ford's request to declare that TTD compensation had been overpaid specifically noting that, after his injury Posey withdrew from nearly all physical business activities and hired others to do physical labor. The commission also noted that, with the exception of signing payroll checks, all the clerical duties of Posey's business were performed by his girlfriend.

{¶ 36} This court declined Ford's request to order the commission to vacate its order and, on appeal, the Supreme Court agreed.

{¶ 37} The *Ford Motor* case continues to be cited for the proposition that the mere ownership of a business, without more, is not incompatible with the receipt of disability compensation. The court found that Posey's activities were truly minimal and only indirectly related to generating income.

{¶ 38} One year later, this court considered a case involving the payment of permanent total disability ("PTD") compensation (and not TTD compensation) to an injured worker and the subsequent allegation that the injured worker was performing some sustained remunerative employment. In *State ex rel. Campbell v. Indus. Comm.*, 10th Dist. No. 02AP-1253, 2003-Ohio-4824, this court discussed the relevance of the *Ford Motor* case, stating:

> [A] person receiving disability compensation may have personal investments and give reasonable attention to them. See, generally, *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98 Ohio St.3d 20, 2002-Ohio-7038 (clarifying that mere ownership of a business is not incompatible per se with receiving disability compensation). Nevertheless, some entrepreneurial activities and some investment activities may be sufficiently extensive to be deemed employment. Where a person is actively involved in operating a business, the commission **may** conclude that his or her activities are inconsistent with receipt of total disability compensation. Involvement such as making sales or assisting in day-to-day operations of a shop **may** be viewed as employment incompatible with disability, as opposed to mere ownership or managing one's personal finances. See, generally, [*State ex rel. Nahod v. Indus. Comm.*, 10th Dist. No. 98AP-1157 (Sept. 2, 1999)]; [*State ex rel. Schultz v. Indus. Comm.*, 10th

> Dist. No. 00AP-166 (Nov. 28, 2000)]; *State ex rel. Rousher v. Indus. Comm.*, [10th Dist. No. 99AP-286 (Feb. 3, 2000)].
>
> The courts have recognized, however, that there are circumstances where some degree of managerial activity is compatible with receiving total disability compensation. Where the allowed conditions prevent an injured worker from continuing his former participation in a business he operated prior to his injury, and where the injury has forced claimant to withdraw from his former business activities except those necessary to preserve the business until he is physically able to return to it, the commission has discretion to conclude that the activities were compatible with receipt of total disability compensation where the claimant's activities were minimal and only indirectly generated income. *Ford,* supra. See, also, *State ex rel. Am. Std., Inc. v. Boehler,* [10th Dist.] No. 01AP-1138, 2002-Ohio-3323 (involving a worker who owned rental properties but could no longer perform the necessary repairs/remodeling after the injury, hiring workers to perform it and supervising them).

(Emphasis added.) *Id.* ¶ 53-54.

{¶ 39} Less than one year later, this court had the opportunity to consider the applicability of the *Ford Motor* case where an injured worker who had been working two jobs concurrently at the time he was injured. In *State ex rel. Rollins v. Indus. Comm.*, 10th Dist. No. 03AP-444, 2004-Ohio-1058, Roger Rollins had been serving as pastor of the Bellevue Missionary Baptist Church while working another job where he sustained an injury. Following his injury, Rollins continued at the church performing three services a week. He received $60 per week from the church.

{¶ 40} The BWC filed a motion asking the commission to terminate Rollins TTD compensation and declare an overpayment. The BWC did not ask for a finding of fraud. The commission determined that, even though he only worked a few hours each week and was paid a modest sum, his activities constituted work for which he was paid.

{¶ 41} Rollins filed a mandamus action asking this court to vacate the commission's order. This court refused. In adopting the decision of its magistrate, this court stated:

> [T]he law does not preclude a TTC [sic] recipient from having personal investments and giving reasonable attention to them. See *State ex rel. Ackerman v. Indus. Comm.*, 99 Ohio St.3d 26, 788 N.E.2d 1042, 2003-Ohio-2448 (noting that the mere fact of business ownership, without more, does not defeat eligibility for permanent total compensation). In cases involving TTC [sic], the courts have recognized that, where the injured worker had a preexisting business to which he gave substantial labor and supervision before the injury, and where he was forced to hire laborers to replace his physical contribution during his recuperation, the claimant may engage in some supervisory activities to preserve his business while receiving TTC [sic]. *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98 Ohio St.3d 20, 2002-Ohio-7038*;* see, also, *State ex rel. Am. Std., Inc. v.. Boehler*, Franklin App. No. 01AP-1138, 2002-Ohio-3323 .

Id. ¶ 19.

{¶ 42} The case of *State ex rel. Cassano v. Indus. Comm.*, 10th Dist. No. 03AP-1227, 2005-Ohio-68, also involved an injured worker who was working a second job at the time he sustained his work-related injury. Larry L. Cassano, Jr., was working as a driver when he sustained his injuries. During that time, he also operated a car dealership as a separate business. While receiving TTD compensation, the BWC followed up on an anonymous tip that Cassano was working at his business. When asked, Cassano stated that he went to his dealership approximately two to three times per week to get mail, write up deals on car sales, sign paperwork, handle customers who approach, and supervise his friends who were helping him out with the business. Cassano indicated that he did not attend auto auctions, but that he sent a friend and he did not perform any of the mechanical work which he formerly performed. However, surveillance logs indicated that Cassano was more involved than he admitted.

{¶ 43} Cassano argued that he did nothing more than Christopher Posey had done: putting gasoline in lawn mowers once a week, signing checks, and issuing cash for employee's wages, on one occasion pushing a self-propelled mower into the garage, and continuing to store landscaping equipment at his residence. The commission found that his activities constituted work and this court denied the request for a writ of mandamus. However, as the magistrate noted, the record indicated that prior to the re-aggravation of

his injury, Cassano worked as a mechanic and there was some evidence in the record that Cassano was engaged in more work activity than he admitted to the agents.

{¶ 44} In *State ex rel. Meade v. Indus. Comm.*, 10th Dist. No. 04AP-1184, 2005-Ohio-6206, the injured worker, Steven L. Meade, and his wife owned a pizza shop at the time he sustained a work-related injury while working a different job and began receiving TTD compensation. Meade's employer filed a motion asking the commission to declare an overpayment and the commission agreed. Meade filed a mandamus action in this court.

{¶ 45} In upholding the decision of the commission, this court discussed not only the *Ford Motor* case, but also *State ex rel. Am. Std. Inc. v. Boehler,* 99 Ohio St.3d 39, 2003-Ohio-2457, a case decided by the Supreme Court shortly after the *Ford Motor* case.

{¶ 46} Robert Boehler, also held two jobs concurrently: one with American Standard and the other was his own rental property business. Boehler testified that every week there were activities in connection with the properties, but that since the worsening of his condition, he had been unable to do any of the repair and maintenance work he had formerly done and had hired contractors to do that work. An investigator testified that he saw Boehler at the properties engaging in the following activities: directing workers, picking up tools and carrying them, passing tools, measuring, pouring paint into a paint sprayer, helping to clean up after painting, helping cut boards and put paneling in place, delivering materials to a work site in a truck, and assisting workers to unload equipment.

{¶ 47} The commission concluded that Boehler's activities did not constitute employment but were merely supervision of investment property. The commission determined that the activities of Boehler were reasonable actions of a person who has a substantial capital investment in the form of a passive investment in rental properties and that such activity did not rise to the level of self-employment as alleged.

{¶ 48} This court agreed with the commission's determination and the Supreme Court agreed. The *Boehler* court stated, at ¶ 22-26, as follows:

> TTC compensates for the loss of earnings a claimant sustains while his or her injury heals. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44 * * *. This means that TTC [sic] is precluded when the claimant begins to earn again, i.e., when he or she is paid money in direct exchange for labor. *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98

> Ohio St.3d 20, 2002-Ohio-7038 * * *, supports this, by refusing to disqualify claimants whose activities "produced money only secondarily" or were "only indirectly related to generating income." *Id.* at ¶ 23 and 24, 780 N.E.2d 1016.
>
> The disputed amount in this case was not given in exchange for claimant's labor-it was paid pursuant to a contractual rental agreement. Certainly it can be argued that if claimant's apartments were not kept up, rental income could evaporate. There are, however, two key flaws in this logic. First, it runs counter to *Ford*. There, claimant's industrial injury not only removed him from his former job but also kept him from his side business of mowing lawns. Claimant was forced to hire others to do this work and paid them accordingly. Ford argued that claimant's act of signing payroll checks to these workers constituted "work" so as to foreclose TTC [sic]. We disagreed, writing that "this claimant's activities did not, in and of themselves, generate income; claimant's activities produced money only secondarily, e.g., claimant signed the paychecks that kept *his employees* doing the tasks that generated income." (Emphasis sic.) *Id.* at ¶ 23, 788 N.E.2d 1053.
>
> In the case before us, rental upkeep generated income secondarily. It was the contractual relationship between claimant and his tenants that directly compelled the payment of money. It was not directly generated by the claimant's labor.
>
> Second, American Standard confuses the concept of remuneration with claimant's physical presence at the rental site. If claimant had never visited his properties and had never participated in their rental or upkeep, leaving those tasks to others, claimant would still have received his rental income. Few would argue that in such a case, TTC [sic] would be precluded. This indeed suggests that the pivotal point of American Standard's position is claimant's physical presence at the rental units. Nothing, however, prevents claimant from going there. The only thing that *is* barred is claimant's participation in any activities that are medically inconsistent with his allegation of an inability to return to his former position of employment or that *directly* generate income, and there is evidence of neither here.
>
> *Ford* acknowledged the perils of situations such as that at issue, cautioning that "this rationale must be applied on a case-by-case basis and only when a claimant's activities are

> minimal. A claimant should not be able to erect a facade of third-party labor to hide the fact that he or she is working." Id., 98, 788 N.E.2d 1053 Oho St.3d 20, 2002-Ohio-7038, 98 Ohio St.3d 20, 780 N.E.2d 1016, * * * at ¶ 24.

(Emphasis sic.)

{¶ 49} In *State ex rel. Couch v. Indus. Comm.*, 10th Dist. No. 05AP-652, (June 22, 2006), Ernie L. Couch sustained injuries while working as a laborer and was receiving TTD compensation. While employed as a laborer, Couch and his brother owned and operated a truck/hauling company. While receiving TTD compensation, Couch continued to perform the sedentary activities he had always performed for his company, including hiring, dispatching drivers, and determining payroll. The commission found these activities generated income and constituted work. This court upheld that determination.

{¶ 50} In 2007, the Supreme Court of Ohio decided *State ex rel. Honda of Am. Mfg. Co. v. Indus. Comm.*, 113 Ohio St.3d 5, 2007-Ohio-969. Like the *Ford Motor* case, the injured worker's activities while receiving TTD compensation were found not to constitute work. After she was injured and unable to return to her former position of employment, Edith K. Anderson opened a scrap booking shop with proceeds from her husband's life insurance. It was a family undertaking and her sons and two daughters worked there in addition to a manager and other employees. Because she was frequently seen in the store, Anderson's activities came under scrutiny and Honda began an investigation. Anderson was observed talking on the phone, using the cash register, showing displays, and describing classes offered by the store to customers.

{¶ 51} Honda asked the commission to find that Anderson was working while receiving TTD compensation and declare an overpayment. Based on the facts, the commission declined. Finding there was no evidence that Anderson was medically capable of returning to her former position of employment, her treating physician opined the activities she was seen performing were not inconsistent with her physical abilities, she was not paid for her activities, and the commission found the taped activities were minimal and did not directly generate business income.

{¶ 52} Honda filed a mandamus action which this court denied. On appeal to the Supreme Court, the commission's determination was upheld. The court stated:

Honda challenges *Ford*'s applicability, arguing that, unlike Anderson's, Posey's business preexisted both injury and disability. We find this distinction inconsequential. Honda's position would require us to craft two separate tests for the same issue based solely on the timing of the secondary enterprise. Any such dichotomy would be pointless.

Applying *Ford* to these facts, we begin by examining Anderson's activities and the commission's determination that they were minimal. The commission emphasized that over a three-month period, Anderson was viewed just five times. On three of those occasions, she assisted no customers. On the other two, she apparently helped a single customer by answering questions and pointing out displays and once used the cash register for an unknown purpose. This was the sum total of her observed activities at My Crop Shop.

Honda challenges this conclusion, asserting that if Anderson was involved with My Crop Shop on each day of surveillance, she was probably involved with the store on the days she was not observed. This assertion fails for two reasons. First, Anderson's mere presence at the store is not itself disqualifying. Moreover, even if she arguably was engaged in some business activity every time she was seen, the commission—as sole evaluator of evidentiary weight and credibility—was not compelled to conclude that she was doing the same thing when not observed. Accordingly, the commission's determination that Anderson's activities were minimal will not be disturbed.

Ford also questions whether Anderson's activities generated income directly. The commission found that Anderson's activities—to the extent that they generated any income at all—did so only secondarily because they were geared more towards promoting the goodwill of the business. We again defer to that finding. Most of the disputed activities consisted of answering customer questions. Certainly, Anderson cannot be required to ignore customer inquiries in order to maintain eligibility for compensation. That would indeed destroy the business's goodwill. As to the operation of the cash register, it occurred just once, without any evidence that it was connected to a sale, and does not justify termination of Anderson's temporary total disability compensation. Accordingly, given the lack of evidence that Anderson's business involvement was any more extensive, we uphold the commission's determination. This, in turn,

> moots any issue of fraud, because compensation was properly paid.

Id. 26-29.

{¶ 53} In *State ex rel. McBee v. Indus. Comm.*, 10th Dist. No. 09AP-239, 2010-Ohio-5547, the injured worker, Garry K. McBee, attended numerous auctions for McBee Sales while receiving TTD compensation. The commission determined that, although McBee was not paid for attending the auctions, his actions were income generating and inconsistent with the receipt of TTD compensation.

{¶ 54} Considering each of the above cases individually and as a group, one thing is certainly clear: there is significant disparity in the amount of activity the commission determines is permissible for an injured worker to engage in while receiving TTD compensation and it is difficult to predict which conclusion the commission will reach. Given that the commission is the ultimate fact finder and given that credibility and the weight to be given evidence are to be determined by the commission, the magistrate finds that the commission's determination that relator's activities at the garage constituted work is supported by some evidence and should not be disturbed. However, in this particular instance, the magistrate finds that the commission's determination that relator committed fraud is not supported by some evidence.

{¶ 55} A finding of fraud requires six specific elements: (1) a representation or, where there is a duty to disclose, concealment of fact; (2) which is material to the transaction at hand; (3) made falsely with the knowledge of its falsity; (4) with the intent of misleading another into reliance upon the representation; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by such reliance. *State ex rel. Allied Holdings, Inc. v. Meade*, 10th Dist. No. 06AP-1029, 2007-Ohio-5010.

{¶ 56} In the present case, the first thing the magistrate notes is that relator never lied to the BWC or the commission whereas, when investigated, other injured workers attempted to conceal their activities. On multiple occasions, relator disclosed the existence of his business to the BWC. Further, with the exception of two individuals who indicated they observed relator perform minimal tasks, none of the customers interviewed indicated that relator had actually performed work on their cars. Also, the evidence indicates that, just as relator explained, family members and friends worked at the garage.

These were not your regular, everyday employees. The magistrate finds the commission's determination of fraud is not supported and this court should vacate that portion of the commission's order.

{¶ 57} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated the commission abused its discretion in finding he was working while receiving TTD compensation and in declaring an overpayment of compensation. However, to the extent the commission also concluded that relator committed fraud, the magistrate finds the commission abused its discretion in doing so and a writ of mandamus should be issued ordering the commission to vacate that portion of its order.

/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).