[Cite as *State ex rel. Wilson v. Indus. Comm.*, 2013-Ohio-2449.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Derek L. Wilson,	:	
Relator,	:	
v.	:	No. 11AP-1092
Industrial Commission of Ohio and Honda of America Mfg., Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 13, 2013

Philip J. Fulton Law Office, and *Chelsea J. Fulton*, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Vorys, Sater, Seymour and Pease LLP, *Robert A. Minor*, and *Bethany R. Spain*, for respondent Honda of America Mfg., Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Derek L. Wilson ("relator"), filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its prior order. In that order, the commission exercised its continuing jurisdiction and denied relator's application for working wage loss compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals we referred the matter to a magistrate, who has now issued a decision that includes findings of fact and conclusions of law and is appended hereto. The magistrate concluded that the commission did not abuse its discretion by exercising its continuing jurisdiction and finding that relator is not entitled to working wage loss compensation. The magistrate recommends that we deny the requested writ of mandamus. Relator objects to the magistrate's conclusions, and the matter is now before us for our independent review.

{¶ 3} Relator has suffered a work-related injury resulting in an allowed claim. Medical restrictions arising out of this injury preclude him from returning to his former position of employment with respondent Honda of America Mfg., Inc. ("Honda"). After receiving non-working wage loss compensation for a time, relator obtained new employment within his medical restrictions, albeit at a lower rate of pay than in his former position with Honda. Based upon the pay differential, relator sought working wage loss compensation under R.C. 4123.56(B)(1). As detailed in the magistrate's decision, Honda opposed such an award and the case made its way through successive hearings before a district hearing officer and a staff hearing officer ("SHO"), who each concluded that relator had demonstrated a good-faith effort to secure work with pay comparable to that of his employment with Honda, before and during his employment in his new lower-wage position with his new employer.

{¶ 4} Honda's initial appeal from the SHO's order was refused by the commission, but upon Honda's later request for reconsideration, the commission determined that it could exercise its continuing jurisdiction to revisit the matter. After doing so, the commission determined that the SHO's order contained a clear mistake of law in that the SHO had mistakenly excused relator from the requirement of submitting wage loss statements as required by Ohio Adm.Code 4125-1-01(C)(5)(a). The commission found that the failure to submit weekly wage loss statements prevented a meaningful review of whether relator had engaged in a good-faith job search. The commission further determined that the evidence of the job search actually submitted was inadequate, and working wage loss compensation should be denied.

{¶ 5} Relator objects to the magistrate's decision and recommendation in two respects: first, relator argues that the commission did not have a basis to exercise its continuing jurisdiction and vacate the SHO's order. Second, relator argues that when reconsidering the matter the commission erred in finding that relator could not be excused from establishing a good-faith job search.

{¶ 6} The commission retains continuing jurisdiction only in certain limited circumstances. These include, as is found in the present case, the occurrence of a clear mistake of law in a previous administrative determination. *See, generally*, *State ex rel. KPGW Holding Co., L.L.C. v. Indus. Comm.*, 10th Dist. No. 11AP-407, 2012-Ohio-5035, ¶ 7. Although the question of whether the commission should have exercised continuing jurisdiction in this case has been argued as an independent issue, the specific posture of this case in fact makes that a subordinate question; if the commission correctly decided the matter upon reconsideration, this presumes a finding of a clear mistake of law in prior proceedings.

{¶ 7} "The purpose of wage-loss compensation is to return to work those claimants who cannot return to their former position of employment but can do other work. Ideally, that other work generates pay comparable to the claimant's former position. Where it does not, wage-loss compensation covers the difference." *State ex rel. Timken Co. v. Kovach*, 99 Ohio St.3d 21, 2003-Ohio-2450, ¶ 19. During receipt of such compensation, the claimant is required to pursue work with pay comparable to his former position, and Ohio Adm.Code 4125-1-01(C)(5) states that the injured worker seeking working wage loss compensation must not only conduct a job search for comparably paying employment but document it in writing, submitting that documentation to the bureau as a condition precedent to the receipt of working wage loss compensation.

{¶ 8} Only a few cases have found that a worker may be excused from the requirement of a job search as a precondition to the receipt of wage loss compensation, and those cases have crafted such exceptions on carefully limited facts. In *Kovach*, the injured worker was not required to leave a light-duty position with his current employer, having been constrained to leave a higher-paying position with the same employer, where the loss of pension benefits would have made such a move unreasonably onerous.

In *State ex rel. Brinkman v. Indus. Comm.*, 87 Ohio St.3d 171 (1999), the claimant was excused from a job search when his new part-time job at a high hourly wage offered a realistic possibility of becoming a full-time position, and it was unreasonable to force the claimant to abandon that position for a full-time job with lower hourly pay.

{¶ 9} In the present case, relator presented no evidence at the administrative level that any of these exceptions to the documented job search requirement applied to him. Because the commission correctly concluded that the hearing officers had made a clear mistake of law in failing to apply the requirement of a documented job search where the administrative code clearly imposed such a requirement and none of the precedential case exceptions applied, the commission properly exercised its continuing jurisdiction to review the matter and correct the error.

{¶ 10} With respect to the second objection, relator continues to argue that his own testimony at hearings demonstrates that he in fact did undertake a good-faith job search. For the reasons developed in the magistrate's decision, we agree with the commission that the evidence presented was not sufficient to demonstrate a good-faith effort to find comparably paying work. Because relator bore the burden of proving his entitlement to working wage loss compensation, and relator failed to present evidence establishing that he should be excused from the job search requirement, the commission acted appropriately when it exercised its continuing jurisdiction, corrected the error in the SHO's determination, and denied working wage loss compensation in this matter.

{¶ 11} Based upon our independent review of the matter, relator's objections are overruled and we adopt the magistrate's decision as our own including the findings of fact and conclusions of law contained therein, and deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied.

KLATT, P.J., and DORRIAN, J., concur.

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A P P E N D I X

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Industrial Commission of Ohio and Honda of America Mfg. Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on July 23, 2012

Philip J. Fulton Law Office, and *Chelsea J. Fulton*, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Vorys, Sater, Seymour and Pease LLP, Robert A. Minor and *Bethany R. Spain*, for respondent Honda of America Mfg., Inc.

IN MANDAMUS

{¶ 12} Relator, Derek L. Wilson, 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 in which the commission exercised its continuing jurisdiction and denied relator's application for working wage loss compensation and ordering the commission to find that he is entitled to an award of wage loss compensation.

Findings of Fact:

{¶ 13} 1. Relator sustained a work-related injury on March 8, 2005 and his workers' compensation claim has been allowed for the following condition: "left lateral epicondylitis."

{¶ 14} 2. It is undisputed that relator has permanent restrictions which preclude him from returning to his former position of employment with respondent Honda of American Mfg., Inc. ("Honda").

{¶ 15} 3. Relator applied for and received a period of non-working wage loss compensation.

{¶ 16} 4. A review of the stipulation of evidence indicates that Honda actively reviewed relator's documentation submitted in support of continuing non-working wage loss compensation. Specifically, during the May 29, 2009 hearing before a district hearing officer ("DHO"), Honda challenged two of relator's potential contacts:

> The Dispute over the continued payment of non-working wage loss compensation centered on responses from two potential employers contacted by the Self-Insuring Employer for purposes of job contact verification. The first, from Dexter's Village Market, indicated the Injured Worker had submitted an application on 11/25/2008. However, the Injured Worker's job search log indicates a contact date of 03/27/2009. The Injured Worker testified persuasively at hearing that the 03/27/2009 contact was a follow-up contact, and while he left a copy of his resume he did not fill out a second job application to submit along with the first application completed on 11/25/2008. It was his understanding that the resume would be attached with his first job application. Based on this testimony the District Hearing Officer is persuaded the Injured Worker did contact this employer on 03/27/2009.
>
> The second Employer response discussed was from World Wide Marketing, Inc. This Employer indicated the Injured Worker had what was termed as a "preliminary interview" on

> 03/03/2009 and that he was scheduled for a second interview on 03/04/2009 but said interview was cancelled. At hearing, the Injured Worker testified that he chose not to attend this second interview. On questioning from both Employer's counsel and the Hearing Officer, it was revealed that the Injured Worker was given little, if any, practical information on the job that he was to be performing for this Employer. He was told that said job would be in sales and that telecommunications products would be sold. However, he was not told what specific product he would be selling, how he would be paid (straight commission, salary, or a combination of the two), sales quota numbers, hours of work required per week or month, or the physical requirements of the job. Based on the lack of any real specifics concerning this job, the Injured Worker * * * chose not to attend the second interview.

{¶ 17} The DHO addressed Honda's concerns and determined that relator's efforts to secure suitable employment which is comparably paying work were sufficient to warrant the payment of non-working wage loss compensation, stating:

> Ohio Admin. Code 4125-1-01 requires an Injured Worker to undertake a good faith effort to search for suitable employment which is comparably paying work. The rule goes on to state in Section (D)(1)(c): "A good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss." First, the Injured Worker was provided no information at his initial interview to determine whether the work to be performed was "suitable employment." As noted, the Injured Worker did not know what the work would involve and whether said work included physical requirements outside of the Injured Worker's restrictions. Second, there was no information provided demonstrating that this work would "eliminate the wage loss." No information was provided as to how long the Injured Worker would have to work before being paid, what sales quotas were expected before payment, whether the Injured Worker would be paid a salary, straight commission, or a combination, or what percentage commission would be paid. Therefore, rather than pursue a job with no evidence that said job was "suitable employment" that would "eliminate the wage loss", the Injured Worker chose to continue searching for other suitable employment to eliminate his wage loss.

> As such, based on Ohio Admin. Code 4125-1-01 and the factual circumstances surrounding the Injured Worker's job interview with World Wide Marketing the District Hearing Officer is persuaded the Injured Worker's cancellation of a second interview with this Employer remains consistent with the requirements of a good faith effort to search for suitable employment which is comparably paying work. Based on this and as all other prerequisites of the wage loss rule have been met payment of wage loss compensation is to continue on submission of sufficient evidence of a wage loss due to the allowed condition in this claim.

{¶ 18} 5. Honda's appeal was heard before a staff hearing officer ("SHO") on July 1, 2009. The SHO affirmed the prior DHO's order noting the following additional efforts taken by relator:

> In addition the Staff Hearing Officer relies upon the fact that the Injured Worker did have two interviews the last week of June and this first week of July based upon the Injured Worker's testimony at hearing. The Injured Worker testified that he interviewed at M.C. Sports for an assistant position and also at Immeke Honda Northwest in a sales position. The Staff Hearing Officer finds that the positions for which the Injured Worker had interviews do fall within the Injured Worker's physical limitations of no lifting over 20 pounds and occasional lifting between 11 and 20 pounds. The Staff Hearing Officer further finds that based upon the Injured Worker's testimony at hearing the Injured Worker did seek work at Adecco, Ohio Job and Family Services, and an employment guide which he would pick up at the store, and make contact with the Employer's online and both face to face. The Injured Worker also testified that he searched for work in Plain City, Marion and Marysville, Ohio. The Injured Worker also testified that he would ask for an employment application and when an application was not provided he would provide them with his resume which he would request them to keep on file. The Staff Hearing Officer finds that the Injured Worker's efforts to seek work are sincere and are found to be in good faith. The Staff Hearing Officer notes though that consistently searching for work of fifteen job contacts a week does raise scrutiny as to the nature of his job search effort. The Staff Hearing Officer notes that the Injured Worker must demonstrate a 40 hour sincere effort to seek work within his restrictions and that there are no

> limitations to the amount of job search efforts to which he should pursue.
>
> The Staff Hearing Officer relies upon the C-140s on file and namely the Injured Worker's persuasive testimony at hearing.

{¶ 19} 6. Honda continued to challenge relator's ongoing receipt of non-working wage loss compensation and, on July 14, 2010, Honda filed a motion to terminate relator's non-working wage loss compensation.

{¶ 20} 7. The motion was heard by a DHO on October 5, 2010. Based on the fact that relator had obtained employment, his non-working wage loss compensation was terminated effective August 30, 2010. Concerning Honda's challenge to relator's entitlement to non-working wage loss compensation up until August 30, 2010, the DHO determined that relator had satisfied the requirements and demonstrated a good-faith effort to secure suitable employment which is comparably paying work, stating:

> [T]he District Hearing Officer specifically finds that the evidence on file documents that the Injured Worker has conducted a good faith job search from 07/05/2010 through 08/30/2010. The job search logs on file document a consistent, sincere effort in an attempt to obtain employment. Furthermore, the multiple job contact follow-up verification reports which were filed at hearing today which pertain to job search contacts from 07/05/2010 through 08/30/2010 clearly verify the vast majority of the Injured Worker's job search contacts which were checked. In addition, the fact that the Injured Worker was able to secure employment effective 08/31/2010 supports the conclusion that the Injured Worker was engaged in a good faith job search for the approximate eight week period leading up to his securing employment. The job contact verification responses from various employer's which was submitted with the Employer's C-86 motion, filed 07/14/2010, is not found to be dispositive with respect to the Injured Worker's job search efforts from 07/05/2010 through 08/30/2010. The job verification documentation submitted with the Employer's motion reference job contacts all preceding 07/05/2010. Although questions may be raised about the Injured Worker's job search activity from these responses, the District Hearing Officer is not persuaded that the Employer contact responses during the time period from

> March of 2010 through June of 2010 invalidate the Injured Worker's job search efforts for the period of time at issue from 07/05/2010 through 08/30/2010.

{¶ 21} 8. After relator obtained employment at Marysville Journal Tribune Newspaper ("newspaper"), he continued to earn less than he earned when working for Honda. Relator's position at the newspaper paid him at a rate of $10 per hour, while his former position at Honda paid him $23 per hour.

{¶ 22} 9. On October 13, 2010, relator filed an application for working wage loss compensation for the closed period of August 31, 2010 to January 9, 2011. Relator submitted a physical capacity form providing his work restrictions and five pay stubs which reflected the wages he earned from the newspaper for the relevant time period. Relator did not submit any wage loss statements detailing his search for suitable employment with his application.

{¶ 23} 10. Relator's application was heard before a DHO on March 2, 2011. Despite the fact that relator had not submitted any wage loss statements, the DHO relied on relator's testimony and determined that he had conducted an ongoing job search and ordered Honda to pay him working wage loss compensation.

{¶ 24} 11. Honda appealed and the matter was heard before an SHO on April 12, 2011. The SHO acknowledged that relator had not submitted any documentation concerning his ongoing search for suitable employment; however, the SHO relied on relator's testimony and determined that he had made a good-faith effort to obtain suitable employment. Honda argued that relator had not demonstrated an ongoing good-faith job search to find suitable employment. The SHO rejected Honda's argument, stating:

> Injured Worker's testimony today is also as it is [sic] was at the prior hearing-that he continued to look for work in the classified ad section of the Journal Tribune on a weekly basis which was facilitated by the fact that he received free copies of that publication since he was an Employee.
>
> In addition to written job source guides, Injured Worker also testified at hearing today that he did avail himself of online job search sources on an ongoing basis. He also indicated that he applied for two positions with Verizon, one located at

> Tuttle Mall and the other at a call-in center. Per his testimony, these positions would have paid $11.00 per hour plus commissions. Injured Worker interviewed for one of these positions but unfortunately was not offered a position.
>
> In light of the limited nature of the period involved (four months duration), the less than favorable job market in Ohio in general and Union County in particular, and the poor economy on both a state and national level, together with the Injured Worker's sufficiently credible testimony regarding his efforts at finding employment, the Staff Hearing Officer finds sufficient evidence to support the payment of working wage loss for this closed period of time specified above.
>
> Finally, the Employer's representative noted in his review of the file that he could find no evidence that Injured Worker had ever registered with [Ohio Department of Job and Family Services] as is required by rule. Injured Worker responded at hearing today again, with persuasive testimony, that he had in fact previously registered with ODJFS on line two years ago.
>
> Working wage loss compensation therefore properly remains authorized for the closed period from 08/31/2010 through 01/09/2011 and is to be paid in accordance with the applicable provisions under [R.C.] 4123.56 and Rule 4125-1-01.

{¶ 25} 12. Honda's further appeal was refused by order of the commission mailed May 12, 2011.

{¶ 26} 13. Honda filed a request for reconsideration arguing that the SHO's order contained a clear mistake of law, specifically, the SHO failed to properly apply Ohio Adm.Code 4125-1-01(C)(5) when finding that relator was entitled to an award of wage loss compensation.

{¶ 27} 14. In an interlocutory order mailed July 12, 2011, the commission granted Honda's motion stating:

> It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.

> Specifically, it is alleged that the Staff Hearing Officer violated OAC 4125-1-01(C)(5) by ordering payment of working wage loss compensation in the absence of wage statements including the information required by the rule.
>
> The order issued 05/12/2011 is vacated, set aside and held for naught.
>
> Based on these findings, the Industrial Commission directs that the Employer's request for reconsideration, filed 05/31/2011, is to be set for hearing to determine whether the alleged mistake of law as noted herein is sufficient for the Industrial Commission to invoke its continuing jurisdiction.

{¶ 28} 15. A hearing was held before the commission on August 18, 2011, at which time all three commissioners determined that Honda had met its burden of proving that the SHO's order contained a clear mistake of law of such character that remedial action would clearly follow. The commission determined that the SHO mistakenly excused relator from the requirement of submitting wage loss statements as required by Ohio Adm.Code 4125-1-01(C)(5). Thereafter, the commission determined that relator was not entitled to an award of working wage loss compensation because he had failed to meet his burden of proof. Specifically, the commission stated:

> Working wage loss compensation is denied from 08/31/2010 to 01/09/2011. The Commission finds the Injured Worker's diminution in wages is not causally related to restrictions stemming from the allowed condition.
>
> It is undisputed that the allowed condition precludes the Injured Worker's return to work at his former position of employment. The Injured Worker obtained alternative employment as a newspaper advertising representative and requests the payment of working wage loss compensation for the closed period of 08/31/2010 to 01/09/2011.
>
> Prior to 08/31/2010, the Injured Worker engaged in a good faith search for suitable employment. Nonworking wage loss compensation was awarded by Staff Hearing Officer order issued 07/14/2009 and District Hearing Officer order, issued 10/08/2010. When the Injured Worker returned to alternative work, he stopped completing and submitting weekly wage loss statements. The Injured Worker testified

that he continued to search for comparably paying work, but neglected to document his efforts as he had done previously. The only wage loss statement for the period at issue is dated 01/24/2011. This wage loss statement indicates the Injured Worker applied for work at Verizon Wireless, twice at one location and once at a different location. These three contacts were made on 12/22/2010, 01/08/2011 and 01/24/2011, respectively.

Ohio Adm.Code 4125-1-01(C)(5) enumerates:
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 . . .

> (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.

The Court, in State ex rel. Jones v. Kaiser Foundation Hospitals Cleveland (1999), 84 Ohio St.3d 405, clarified:

> The mere fact of a job search does not entitle a claimant to wage-loss compensation. There is a qualitative component to that job search that must be satisfied-one of adequacy and good faith...Adequacy is determined on a case-by-case basis and can encompass many factors, including the number and character of job contacts...Adequacy cannot be evaluated when a claimant fails to submit any evidence of his or her job contacts.

The Injured Worker returned to alternative work that was not comparable to what he was paid at his former position of employment. During the period of employment from 08/31/2010 to 01/09/2011, the Injured Worker documented his search for comparably paying work with only one wage loss statement. The wage loss statement listed three job contacts with one employer, and one of these contacts was after the period at issue. The Commission finds the Injured Worker's failure to submit weekly wage loss statements prevents a meaningful review of whether the Injured Worker engaged in a good faith search for employment. The Commission further finds that evidence of two job contacts between 08/31/2010 and 01/09/2011 does not constitute an

> adequate and good faith effort to find comparably paying work. Accordingly, working wage loss compensation is denied.

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

Conclusions of Law:

{¶ 30} In this mandamus action, relator argues that the commission abused its discretion when it: (1) exercised its continuing jurisdiction, and (2) failed to evaluate whether relator should be excused from establishing a good-faith job search. With regard to his first argument, relator contends that the commission improperly reweighed the evidence and, with regard to his second argument, relator argues that the commission should have determined that, given the facts of this case, he was excused from making a good-faith job search for suitable employment.

{¶ 31} The magistrate finds that the commission did not abuse its discretion when it: (1) exercised its continuing jurisdiction, and (2) determined that relator had failed to meet his burden of proving he was entitled to working wage loss compensation. With regard to the first issue, the commission properly found that the SHO had committed a clear mistake of law by finding that Ohio Adm.Code 4125-1-01(C)(5) did not apply to relator and, concerning the second issue, relator did not present any evidence from which the commission could have determined that he was not required to continue a good-faith job search after he became employed with the newspaper.

{¶ 32} Entitlement to wage loss compensation is governed by R.C. 4123.56(B)(1), which provides:

> If 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 due to an injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of two hundred weeks * * *.

{¶ 33} 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.

{¶ 34} In considering a claimant's eligibility for wage loss compensation, the commission is required to give consideration to, and 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 a claimant is entitled to both nonworking and working wage loss compensation. *State ex rel. Pepsi-Cola Bottling Co. v. Morse*, 72 Ohio St.3d 210 (1995); *State ex rel. Reamer v. Indus. Comm.*, 77 Ohio St.3d 450 (1997); and *State ex rel. Rizer v. Indus. Comm.*, 88 Ohio St.3d 1 (2000). A good-faith effort necessitates a claimant's consistent, sincere, and best attempt to obtain suitable employment that will eliminate the wage loss.

{¶ 35} In the present case, because relator was unable to return to his former position of employment, he was required to search for work within his physical, psychiatric, mental, and vocational limitations earning as much if not more than he earned at his former position of employment. Here, in seeking an award of working wage loss compensation, relator was required to demonstrate that the work he was performing at the newspaper was suitable employment (within his limitations), that he continued to seek suitable employment that was comparably paying work or that he should be excused from continuing to search and that his earnings were less than the earnings he received in his former position of employment.

{¶ 36} It is undisputed that relator had the burden of proving his entitlement to wage loss compensation. Specifically, Ohio Adm.Code 4125-1-01(D) provides:

> 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. A party who asserts, as a defense to the payment of wage loss

> compensation, that the claimant has failed to meet his burden of producing evidence regarding his or her entitlement to wage loss compensation is not required to produce evidence to support that assertion.
>
> Ohio Adm.Code 4125-1-01(D)(1)(c) explains:
>
> 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 * * *. A good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss.
>
> Ohio Adm.Code 4125-1-01(C)(5) provides:
>
> 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.
>
> * * *
>
> (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.

{¶ 37} Factors which must be considered are enumerated in Ohio Adm.Code 4125-1-01(D)(1)(c)(v) including the following:

> (a) 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, for a claimant seeking any amount of working wage loss;

* * *

> (viii) Labor market conditions including, but not limited to, the numbers and types of employers located in the geographical area surrounding the claimant's place of residence[.]

{¶ 38} As above indicated, relator was required to complete and submit wage loss statements with his application for wage loss compensation. The fact that he did not submit those forms at the time he filed his application would not have warranted his application being dismissed. However, it was improper for the SHO to have proceeded with the hearing in the absence of those documents. The fact that the SHO proceeded with the hearing and ultimately determined that, in spite of the absence of the required documentation, relator was entitled to wage loss compensation, constituted a clear mistake of law. Pursuant to R.C. 4123.52, the commission had jurisdiction because there was a clear mistake of law. *State ex rel. B & C Machine Co. v. Indus. Comm.*, 65 Ohio St.3d 538 (1992).

{¶ 39} Having found that a clear mistake of law did in fact exist and that the commission did not abuse its discretion in exercising its continuing jurisdiction, the magistrate now addresses relator's second argument, that the commission abused its discretion by failing to find that he was relieved from the burden of making a good-faith effort to secure suitable employment.

{¶ 40} As a general rule, claimants are required to continue searching for suitable employment which is comparably paying work even when they have secured employment. However, there have been some situations in which the Supreme Court of Ohio and this court have excused a claimant from continuing to seek suitable employment after they have secured some employment. For example, in *State ex rel. Brinkman v. Indus. Comm.*, 87 Ohio St.3d 171 (1999), William A. Brinkman had been employed as a Columbus Police Officer when he sustained injuries which precluded him from returning to his former position of employment. Brinkman obtained a part-time job and was informed that part-time employees were given preference for full-time positions as they became available.

{¶ 41} Brinkman filed an application for working wage loss compensation which the commission denied after finding that his anticipation of becoming a full-time employee could not be used as a basis for his failure to make a good-faith search for suitable full-time employment.

{¶ 42} Ultimately, Brinkman's case was heard before the Supreme Court of Ohio. In finding that Brinkman was entitled to wage loss compensation, the court specifically noted that Brinkman had secured several part-time jobs with various organizations before he obtained the job at Anheuser-Busch. The court also noted that his job with Anheuser-Busch, making $20 per hour, would most likely exceed the pay he would receive if he obtained a 40-hour job at minimum wage. Further, the court noted that Brinkman testified that part-time workers were given preference when full-time positions became available. Under those facts, the court determined that the commission had abused its discretion by finding that Brinkman had voluntarily limited his income and that "[v]iewed in totality, the facts do not establish such a limitation or a lift-style-motivated job selection—the two concerns that have prompted close examination of part-time work." *Id*. at 174.

{¶ 43} In *State ex rel. Ameen v. Indus. Comm.*, 100 Ohio St.3d 161, 2003-Ohio-5362, Jane Ameen was working as a nurse when she sustained injuries which precluded her from returning to employment as a nurse. Ameen sought counseling from the Ohio Bureau of Vocational Rehabilitation and the Private Industry Council and was advised to explore different employment options. Ameen eventually returned to college and obtained a teaching degree.

{¶ 44} Ameen's teaching job paid slightly less than her nursing job and she sought an award of working wage loss compensation. The commission denied her request after finding that she had voluntarily limited her income. This court agreed, finding that her job search was inadequate.

{¶ 45} Ultimately, the Supreme Court of Ohio determined that Ameen was entitled to wage loss compensation. After reiterating that full-time employment does not necessarily relieve a claimant of continuing to seek other employment, the court found that requiring Ameen to continue looking for work with the expectation that she would leave her teaching job was inappropriate. Specifically, the court stated:

> Employment that coincides with one's interests, desires, or aptitudes is not inherently suspect. The present claimant was permanently disqualified from her former position of employment, so a new career was a logical option, and claimant prepared for one. Claimant's decision to teach rather than to pursue an allied medical career should not, under these circumstances, be viewed unfavorably.
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> * * *
>
> [I]t is equally inappropriate to have expected claimant to decline the teaching job or to continue seeking other work. As previously stated, claimant has a future with the school district. Again, there is job security, the prospect of salary increases, and advancement possibility. And there are other considerations that militate against the commission's determination. Claimant's position is presumably contractual and forecloses the option of leaving for another position on short notice. Equally important are the intangibles. Teaching entails commitment. It is a disservice to the claimant and the administration, faculty, and students who rely upon her to expect her to leave midterm should a better position surface.

Id. at ¶ 11, 20.

{¶ 46} In *State ex rel. Bishop v. Indus. Comm.*, 10th Dist. No. 04AP-747, 2005-Ohio-4548, Jarrod C. Bishop sustained a work-related injury while employed as a production associate for Honda. When his conditions had reached maximum medical improvement and he was able to return to light-duty work, Honda informed Bishop that it was unable to meet his medical restrictions. Bishop registered with the Ohio Bureau of Employment Services (now Ohio Department of Job and Family Services) and ultimately became employed as a car salesman for Nelson Auto Group.

{¶ 47} Because he was not satisfied with the commissions he was earning at Nelson Auto Group, Bishop resigned and began employment as a car salesman at Steve Austin Auto Group. At the same time, Bishop applied to and was accepted by The Ohio State University where he intended to major in business administration.

{¶ 48} The commission denied wage loss compensation to Bishop because there was no evidence that he engaged in any job search and that the *Brinkman* and *Ameen* cases did not support Bishop's claim for compensation; instead, the commission held

that his failure to conduct a job search during his employment as a car salesman precluded wage loss compensation as a matter of law.

{¶ 49} Bishop filed a mandamus action and this court granted a writ of mandamus ordering the commission to grant him wage loss compensation. Specifically, this court noted as follows:

> [I]t is undisputed that relator had only a high school diploma at the time of his injury, the extent of which precluded his return to the type of work he had previously performed. Thus, the scope and quality of jobs available to relator were limited. Despite this, relator still found employment in just over a month with Nelson Auto. Once employed, he worked in excess of 40 hours per week and took advantage of any opportunity to improve his skills. Moreover, contrary to the notion that relator utterly failed to search for more comparably paying work, he actively sought employment at a second dealership in the hope of increasing his earnings. A short time later, relator returned to Nelson Auto. There, through continued experience, training and hard work, relator eliminated his wage loss from June 20, 2003 through the end of the year. In the end, that is the very essence of why a good-faith job search is required: "to obtain suitable employment that will eliminate the wage loss." Ohio Adm.Code 4125-1-01(D)(1)(c).
>
> Under the facts of this case, we conclude that the commission's decision required relator to "leave a good thing" by abandoning his gainful employment as a car salesman, which became more profitable with experience, motivation, time and training, to seek the possibility of more instant comparably paying work.

Id. at ¶ 18-19.

{¶ 50} In the present case, relator contends that the commission abused its discretion by not evaluating whether a job search was necessary before finding that his failure to submit weekly wage loss statements and that the commission never found that his lower paying job was a lifestyle change that necessitated evidence of a job search.

{¶ 51} Relator cites *State ex rel. Timken Co. v. Kovach*, 99 Ohio St.3d 21, 2003-Ohio-2450, and argues that, before the commission could deny him working wage loss

compensation, the commission was required to determine if a continued job search was necessary given that he had returned to full-time employment.

{¶ 52} In *Timken*, Joseph F. Kovach suffered a work-related injury which rendered him incapable of returning to his former position of employment as a scale counter. Kovach continued to work for Timken Company ("Timken") temporarily in a janitorial position.

{¶ 53} Timken orally offered Kovach a job as a heat-treatment utility worker. This job would pay Kovach more than his former job. While this new job had lifting requirements which would occasionally exceed Kovach's restrictions, Timken allegedly orally assured him that he would be accommodated. Kovach refused the heat-treatment utility worker job and was permanently assigned the lower-paying janitorial job. Because he refused to accept the higher paying job, Timken denied his request for working wage loss compensation.

{¶ 54} The issue of Kovach's entitlement to working wage loss compensation was heard by the commission. The commission awarded Kovach working wage loss compensation finding that Timken's oral job offer did not constitute a good-faith job offer because Ohio Adm.Code 4125-1-01(D)(2) requires that such job offer be in writing.

{¶ 55} Timken filed a mandamus action and the matter was ultimately heard before the Supreme Court of Ohio. Timken argued that Kovach's failure to continue looking for work after he accepted the janitorial job precluded an award of working wage loss compensation.

{¶ 56} The court rejected Timken's argument and found that, in his particular situation, Kovach was not required to continue searching for suitable employment. The court reasoned:

> The purpose of wage-loss compensation is to return to work those claimants who cannot return to their former position of employment but can do other work.
>
> Receipt of such compensation hinges on whether there is a causal relationship between injury and reduced earnings, more specifically, on a finding that "claimant's job choice was motivated by an injury-induced unavailability of other work and was not simply a lifestyle choice." *State ex rel.*

Jones v. Kaiser Found. Hosp. Cleveland (1999), 84 Ohio St.3d 405, 407, 704 N.E.2d 570.

The requirement of a causal relationship is often satisfied by evidence of an unsuccessful search for other employment at the preinjury rate of pay. *State ex rel. Ooten v. Siegel Interior Specialists Co.* (1998), 84 Ohio St.3d 255, 256, 703 N.E.2d 306.

Relying on the Ohio Administrative Code, Timken asserts that a job search is mandatory. We have said otherwise. In *Ooten,* we indicated that a job search is "not universally required." Id. And in *State ex rel. Brinkman v. Indus. Comm.* (1999) 87 Ohio St.3d 171, 173, 718 N.E.2d 897, we excused the claimant's lack of a job search when he had secured lucrative, albeit part-time, employment with a realistic possibility that it would change to full-time.

Brinkman and *Ooten* respectively involved part-time employment and self-employment—two categories of employment subject to enhanced scrutiny "to ensure that wage-loss compensation is not subsidizing speculative business ventures or life-style choices." *Brinkman,* 87 Ohio St.3d at 173, 718 N.E.2d 897.

The employment at issue herein is full-time, not part-time, which lessens—but does not eliminate—these concerns. Indeed, "in *some* situations, the commission may require a claimant with full-time employment to nevertheless continue looking for 'comparably paying work.' " *State ex rel. Yates v. Abbot Laboratories, Inc.*, 95 Ohio St.3d 142, 2002-Ohio-2003, 766 N.E.2d 956 ¶ 38. For regardless of the character of the work, "the overriding concern in all of these cases—as it has been since the seminal case of *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, 648 N.E.2d 827—is the desire to ensure that a lower-paying position—regardless of hours—is necessitated by the disability and not motivated by lifestyle choice. And this is a concern that applies equally to regular full-time employment." Id. at ¶ 37.

In determining whether to excuse a claimant's failure to search for another job, we use a broad-based analysis that looks beyond mere wage loss. This approach was triggered by our recognition that "[w]age-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." *Brinkman,* 87 Ohio St.3d at 174, 718 N.E.2d 897.

In *Brinkman,* a job search was deemed unnecessary where the claimant secured a part-time job with a high hourly wage and a realistic possibility of being offered a full-time position. Conversely, in *Yates,* evidence of a good-faith job search *was* required of a claimant with full-time employment who was making drastically reduced postinjury wages. We stressed in *Yates* that the claimant had voluntarily relocated to a place with a high rate of unemployment and was grossly underutilizing her college degree and real estate license.

In the case before us, our broad-based analysis allows us to consider the fact that claimant's current employment is with Timken—the same company at which he was injured. This militates against requiring a job search because claimant has some time invested with Timken. He has years towards a company pension. Moreover, his longevity may have qualified him for additional weeks of vacation or personal days. Much of this could be compromised if claimant were to leave Timken for a job elsewhere.

Brinkman held that it was inappropriate to ask a claimant to "leave a good thing" solely to narrow a wage differential. Given claimant's years of service with Timken, the benefits he receives there outweigh a higher-paying position he might be able to get at a new company. Thus, we apply *Brinkman*' s rationale and preserve claimant's eligibility for wage-loss compensation.

Timken argued that claimant's failure to seek other employment, failure to file wage statements, and failure to register with OBES, as required by the Administrative Code, made him ineligible for wage-loss compensation. However, the majority found that Timken paid claimant wage-loss compensation during his first stint as a janitor from July 15, 1996, through November 1, 1998, without requiring any of those things.

"[T]he evidence indicates that the employer waived several of the requirements for filing wage-loss applications. Here, the employer provided a light-duty job and paid wage-loss

> compensation for years, waiving the requirements of filing at OBES, doing a job search, etc. When the employer reinstated claimant to another janitorial job after a period of TTD [temporary total disability], it was reasonable for claimant to believe that he would report for work as before and receive wage-loss compensation without filing a job search log, registering with OBES, etc. Given that the employer waived the requirements from July 1996 to August 1999, claimant would not reasonably have known that the waiver was withdrawn as of his job refusal in August 1999."

Id. at ¶ 19-30.

{¶ 57} Relator argues that, pursuant to *Timken*, the commission was required to "use a broad-based analysis that looks beyond mere wage loss." Relator argues that because his job at the newspaper was a full-time position and there was no evidence he accepted the job as a lifestyle choice, he was not required to continue searching for suitable employment.

{¶ 58} The magistrate disagrees with relator's argument. Relator never asked the commission to find that he should be excused from continuing to look for work. Instead, relator testified concerning the efforts he made to find employment that would eliminate the wage loss after he accepted the job at the newspaper. The commission concluded that relator failed to present sufficient evidence from which the commission could reach a conclusion and that the evidence relator did provide did not demonstrate a good-faith effort to find comparably paying work.

{¶ 59} Additionally, the *Timken* court noted that Timken had paid Kovach wage loss compensation for two years (during his first stint as a janitor) without requiring that Kovach seek other employment or submit wage statements or register with the Ohio Bureau of Employment Services. Having waived several of the requirements previously, the court noted that Kovach would not reasonably have known that the waiver had been withdrawn.

{¶ 60} In the present case, Honda had not waived any requirements previously and, in fact, Honda had aggressively challenged relator's earlier applications for non-working wage loss compensation. Relator had every reason to believe that Honda would continue to scrutinize and review his applications.

{¶ 61} Even considering relator's argument that a continued search should have been excused, the magistrate notes the following: relator failed to present any evidence that the commission and/or this court could review to determine whether or not his circumstances were such that a continued job search was not required. There is no evidence that relator's position with the newspaper could potentially lead to a better paying job. Further, there is no evidence that relator trained for his job at the newspaper and that it would be improper to expect him to leave that job. Also, there is no evidence that relator worked more than 40 hours per week. Unlike the claimants in *Brinkman*, *Ameen* and *Bishop*, relator did not present any evidence that would excuse his failure to continue to search for suitable employment which was comparably paying work during the 4 months he worked for the newspaper.

{¶ 62} The magistrate finds that it was a mistake of law for the SHO to excuse relator's failure to submit the required wage statements and grant him working wage loss compensation because he was only seeking compensation for four months. There was a proper reason for the commission to exercise its continuing jurisdiction. Further, because there is no evidence in the record that the commission could have considered to determine whether or not relator was required to continue to search for suitable employment after he became employed at the newspaper, the commission did not abuse its discretion by not addressing this issue. Relator had the burden of proving that he was entitled to wage loss compensation and the commission did not abuse its discretion by finding that he failed to do so.

{¶ 63} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by exercising its continuing jurisdiction and finding that relator was not entitled to working wage loss compensation and this court should deny relator's request for a writ of mandamus.

/s/ *Stephanie Bisca Brooks*
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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