

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Reginald D. Humphrey,	:	
	:	
Relator,	:	No. 11AP-446
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and	:	
City of Cleveland,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on June 14, 2012

Nager, Romaine & Schneiberg Co. L.P.A., Jerald A. Schneiberg, Jennifer L. Lawther and Stacy M. Callen, for relator.

Michael DeWine, Attorney General, and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

Jose M. Gonzalaz, for respondent City of Cleveland.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, Reginald D. Humphrey, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying relator's application for working wage loss compensation beginning February 2005, and to order the commission to grant the compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that the commission did not abuse its discretion when it denied relator an award of wage loss compensation based upon: (1) relator's failure to make a good-faith effort to secure comparably paying work during the period in question; and (2) relator's failure to file supplemental medical evidence every 180 days throughout the period of the alleged wage loss as required by Ohio Adm.Code 4125-1-01(C)(3). Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶ 3} Relator has filed an objection to the magistrate's decision arguing that the magistrate applied an incorrect legal standard in determining that relator was required to make a good-faith job search to be eligible for working wage loss compensation. This is relator's sole argument. Significantly, we note that the commission denied relator working wage loss compensation for two reasons: (1) failure to engage in a good-faith job search; and (2) failure to file supplemental medical evidence every 180 days. It is undisputed that relator failed to file supplemental medical evidence every 180 days as required by Ohio Adm.Code 4125-1-01(C)(3). This failure alone is some evidence supporting the commission's decision. Therefore, the magistrate correctly found that the commission did not abuse its discretion when it denied relator's application for working wage loss compensation based in part upon relator's failure to file supplemental medical evidence. For this reason, we overrule relator's objection.

{¶ 4} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

Objection overruled; writ of mandamus denied.

BRYANT and TYACK, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Reginald D. Humphrey,	:	
	:	
Relator,	:	No. 11AP-446
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and	:	
City of Cleveland,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 9, 2012

Nager, Romaine & Schneiberg Co. L.P.A., Jerald A. Schneiberg, and Christopher B. Ermisch, for relator.

Michael DeWine, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 5} Relator, Reginald D. Humphrey, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's application for working wage loss compensation beginning February 2005, and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 6} 1. Relator sustained a work-related injury on June 22, 2001, and his workers' compensation claim was originally allowed for "lumbosacral sprain."

{¶ 7} 2. According to relator's brief, he was awarded a period of temporary total disability ("TTD") compensation from June 23 through July 31, 2001, at which time he returned to work with the city of Cleveland.

{¶ 8} 3. Also according to his brief, relator's employment was terminated effective August 6, 2001.

{¶ 9} 4. No one denies that relator had physical restrictions. There are five separate forms from Frederick D. Harris, M.D., in the record completed from 2001 through 2003 which indicate that relator had restrictions including: (1) no lifting more than 20 pounds; (2) no stooping or twisting; and (3) no prolonged sitting for more than 2 hours.

{¶ 10} 5. Relator began a job search in 2002 which ultimately resulted in his being hired on February 9, 2005, as a shuttle driver for Airport Fast Park. A review of his job search records indicates that relator averaged five job contacts per month. In his brief, relator indicates that he "worked an average of thirty-eight hours per week including overtime," and that whether or not Airport Fast Park considered him to be a "full time" employee, he was for all intents and purposes working full time hours." (Relator's brief, at 11.)

{¶ 11} 6. In terms of medical evidence submitted by relator during this time period, the only medical evidence comes from Dr. Harris who, as stated previously, indicated that relator could return to work with restrictions.

{¶ 12} 7. Other medical evidence in the record includes office notes from Susan E. Stephens, M.D., beginning July 12, 2005, through June 15, 2007. Those records indicate that Dr. Stephens saw relator one time in July, September, November, and December 2005, one time in January 2006, twice in April, once in July, and once in October 2006, one time in May 2007, and on June 15, 2007. At those visits, relator complained of low back pain with radiculopathy and his condition largely remained unchanged. In the April 4, 2006 office note, Dr. Stephens noted that relator treated at Huron Hospital and received an epidural block. In the note dated October 20, 2006, Dr.

Stephens indicated that relator's claim had finally been allowed for L4-5 disc herniation and aggravation of pre-existing lumbar canal stenosis and that it was her intention to proceed with epidural blocks. None of these notes included any work restrictions.

{¶ 13} 8. With regard to additional medical evidence, the stipulation of evidence contains the June 13, 2007 report from Mark Allen, M.D., referencing an epidural injection. Relator saw Dr. Allen again on June 19, 2007, as well as June 20 and 27, 2007 at which time he again received epidural blocks.

{¶ 14} 9. Relator was examined by Donald C. Mann, M.D. In his August 31, 2006 report, Dr. Mann opined that relator did have a herniated disc at L4-5 and aggravation of pre-existing canal stenosis, and opined that the conditions of herniated disc L4-5 and aggravation of pre-existing canal stenosis were the direct result of his June 22, 2001 injury.¹

{¶ 15} 10. Relator's November 24, 2004 application for wage loss compensation beginning November 24, 2002, through February 9, 2005 (the date he was hired by Airport Fast Park) was initially heard before a district hearing officer ("DHO") on March 24, 2005. (At this time, relator's claim was only allowed for lumbosacral sprain.) The DHO denied relator's application for non-working wage loss for two reasons: (1) in a report dated June 28, 2004, Dr. Costarella² opined that relator's then allowed condition of lumbosacral sprain would have resolved after 12 weeks and that any wage loss which did exist was not due to the allowed condition, and (2) relator's job search did not qualify as a good-faith job search inasmuch as his searches were sporadic and not frequent enough noting that contacts were made once or twice per week if at all. The DHO denied working wage loss beginning February 10, 2005, on grounds that relator failed to show that his restrictions were due to the allowed conditions.

{¶ 16} 11. Relator's appeal was heard before a staff hearing officer ("SHO") on April 27, 2005. Although the SHO vacated the prior DHO order, relator's request for non-working wage loss compensation remained denied. The SHO found that any non-working wage loss was not caused by the allowed condition based on the fact that relator's request for additional, more serious conditions had, at that time, been denied. Further, the SHO

¹ It is unclear from the record when relator's claim was additionally allowed for the above conditions, but it appears that it was after August 31, 2006.

² This report is not included in the stipulation of evidence.

concluded that relator's job searches, beginning October 25, 2004, did not constitute a good-faith job search as they were sporadic and infrequent. The SHO also found that working wage loss compensation beginning February 2 through March 24, 2005, should be denied, finding that relator had not met his burden of proving that his permanent restrictions were the direct and proximate result of his presently allowed condition. The SHO's order was likewise based on the report of Dr. Costarella and the evidence submitted.

{¶ 17} 12. Relator's further appeal was refused by order of the commission mailed June 29, 2005.

{¶ 18} 13. Relator filed an application solely for working wage loss compensation on February 9, 2007. Relator included a report from Dr. Stephens indicating that relator had the following permanent restrictions: sit for four hours, stand and walk for one hour during an eight-hour workday; never squat, crawl or climb; occasionally bend and frequently reach; occasionally lift and carry up to ten pounds; and cannot use either/both feet in repetitive movements of leg controls. (At this time, relator's claim had been additionally allowed for herniated disc at L4-5 and aggravation of pre-existing lumbar canal stenosis.)

{¶ 19} 14. This application was likewise denied by a DHO following a hearing on June 26, 2007. The DHO concluded that relator had not established that he made a good-faith job search for comparably paying work. Specifically, the DHO stated:

District Hearing Officer denies the request for working wage loss from 02/10/2005 to present as claimant has failed to meet his burden of entitlement to working wage loss benefits as provided by O.A.C. 4125-1-01.

District Hearing Officer finds that the issue of wage loss was previously adjudicated and determined that claimant's wage loss was not due to the allowed conditions of lumbosacral sprain at that time. (District Hearing Officer order dated 03/04/2004, and Staff Hearing Officer [order] dated 04/27/2005).

District Hearing Officer fins [sic] this claim was subsequently amended to include herniated disc at L4-5 and aggravation of pre-existing lumbar canal stenosis on 0/05/2007 [sic] which precipitated the new application for fork [sic]. District Hearing Officer however finds claimant

has not provided sufficient proof for the requested working wage loss from 02/10/2005 to date as claimant has failed to provide documentation of good faith job search for comparably paying work as required by O.A.C. 4125-1-01.

District Hearing Officer finds O.A.C. 4125-1-01(C)(5) provides:

All claimant's [sic] 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..."

District Hearing Officer finds no proof of job search to supplement claimant's receipt of working wage loss from 02/10/2005 to date. District Hearing Officer further finds O.A.C. 4125-1-01(D)(1)(C) [sic] also provides:

"A good faith effort to search for suitable employment which is comparably paying work is required of those seeking non-working wage loss and those seeking working wage loss who have not returned to suitable employment which is comparably paying work...."

District Hearing Officer finds claimant has failed to demonstrate a consistent, sincere or best attempt to eliminate her wage loss as required by the aforementioned administrative code section.

For the foregoing reasons, claimant's C140 as filed in [sic] denied.

(Emphasis sic.)

{¶ 20} 15. Relator's further appeal was heard before an SHO on August 7, 2007. The SHO affirmed the prior DHO order and denied relator's application for wage loss compensation stating:

The C-140 application for wage loss compensation filed 02/09/2007 is denied. The Staff Hearing Officer makes the following determination in accord with the findings of the District Hearing Officer at the 06/26/2007 hearing below.

Claimant has failed to meet his burden to establish entitlement to wage loss compensation under requirements of O.A.C. 4125-0-01 [sic].

The claim has been amended to include "herniated disc L4-5 and aggravation of pre-existing lumbar canal stenosis" since the prior wage loss denials by District Hearing Officer 03/04/2004 and Staff Hearing Officer 04/27/2005. Since the new application for wage loss compensation was filed, Staff Hearing Officer finds that there is still a lack of sufficient proof to establish documentation of a good faith job search for comparably paying work as required under rule 4125-1-01.

O.A.C. 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...."

Staff Hearing Officer finds no proof of job search to supplement claimant's receipt of working wage loss from 02/10/2005 to date. Staff Hearing Officer further finds O.A.C. 4125-1-01(D)(1)(C) [sic] also provides:

"A good faith effort to search for suitable employment which is comparably paying work is required of those seeking non-working wage loss and those seeking working wage loss who have not returned to suitable employment which is comparably paying work..."

Claimant has failed to demonstrate a consistent, straightforward attempt to eliminate the wage loss as required under applicable code. At hearing, claimant testified that at his former position of employment at the time of injury he was earning \$19.58, full-time hourly. He has sought work and did find a driving job at \$8.50 per hour, but there is no record of continuing job search for comparably paying work even when the new job at Airport Fast Park was part-time. The attempt to limit the wage loss as evidenced by a good faith job search for comparably paying work is an essential part of requirements to establish eligibility for wage loss compensation. This has not been shown in this case.

Medical proof is also insufficient to establish restriction causally related to the claim throughout the period of wage

loss alleged. O.A.C. 4125-1-01(C)(3) requires the submission of supplemental medical reports regarding the ongoing status of medical restrictions every 90 days after the initial application if temporary and every 180 days if permanent. There is one report identified during the period of wage loss alleged: Dr. Stephens' report from examination 02/02/2007. Credibility of the medical proof is brought into question as claimant testified to working beyond the 4 hour daily sitting restriction from Dr. Stephens. Claimant has demonstrated ability to work beyond the restrictions set forth by the physician. The wage loss alleged is more likely termed to be economically related (i.e. inability to land as high-a-paying job for similar work as at the former position of employment), rather than disability related (i.e. an inability to perform the duties of the former position of employment).

(Emphasis sic.)

{¶ 21} 16. Relator's further appeal was refused by order of the commission mailed September 6, 2007.

{¶ 22} 17. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 23} In this mandamus action, relator contends that the commission abused its discretion by finding that he did not make a good-faith job search and further, that inasmuch as a good-faith job search is not necessarily required in order to receive wage loss compensation, that the commission abused its discretion in finding that he was required to make a good-faith job search.

{¶ 24} The magistrate finds that the commission did not abuse its discretion in finding that relator was not entitled to an award of wage loss compensation.

{¶ 25} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 26} 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 * * *, 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, but the payments shall be reduced by the corresponding number of weeks in which the employee receives payments pursuant to division (B) of section 4121.67 Of the Revised Code.

{¶ 27} In order to receive workers' compensation, a claimant must show not only that a work-related injury arose out of and in the course of employment, but, also, that a direct and proximate causal relationship exists between the injury and the harm or disability. *State ex rel. Waddle v. Indus. Comm.*, 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: (1) a reduction in wages, and (2) a causal relationship between the allowed conditions and the wage loss.

{¶ 28} Ohio Adm.Code 4125-1-01(A) provides the following relevant definitions for purposes of wage loss:

(7) "Suitable employment" means work which is within the claimant's physical capabilities, and which may be performed by the claimant subject to all physical, psychiatric, mental, and vocational limitations to which the claimant is subject at the time of the injury which resulted in the allowed conditions in the claim or, in occupational disease claims, on the date of the disability which resulted from the allowed conditions in the claim.

(8) "Comparably paying work" means suitable employment in which the claimant's weekly rate of pay is equal to or greater than the average weekly wage received by the claimant in his or her former position of employment.

(9) "Working wage loss" means the dollar amount of the diminishment in wages sustained by a claimant who has returned to employment which is not his or her former position of employment. However, the extent of the diminishment must be the direct result of physical and/or

psychiatric restriction(s) caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123. of the Revised Code.

(10) "Non-working wage loss" means the dollar amount of the diminishment in wages sustained by a claimant who has not returned to work because he or she has been unable to find suitable employment. However, the extent of the diminishment must be the direct result of physical and/or psychiatric restrictions caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123. of the Revised Code.

{¶ 29} It is undisputed that a claimant bears the burden of establishing a reduction in wages and a causal relationship between the allowed condition and the wage loss. Ohio Adm.Code 4125-1-01(C) identifies for the claimant the relevant information which must be contained in an application for wage loss. Specifically:

(2) A medical report shall accompany the application. The report shall contain:

(a) A list of all restrictions;

(b) An opinion on whether the restrictions are permanent or temporary;

(c) When the restrictions are temporary, an opinion as to the expected duration of the restrictions;

(d) The date of the last medical examinations;

(e) The date of the report;

(f) The name of the physician who authored the report; and

(g) The physician's signature.

(3) Supplemental medical reports regarding the ongoing status of the medical restrictions causally related to the allowed conditions in the claim must be submitted to the bureau of workers' compensation or the self-insured employer in self-insured claims once during every ninety day period after the initial application, if the restrictions are temporary, or once during every one hundred eighty day

period after the initial application, if the medical restrictions are permanent. The supplemental report shall comply with paragraph (C)(2) of this rule.

* * *

(5) All claimants seeking or receiving working or non-working wage loss payments shall supplement their wage loss application with wage loss statements, describing the search for suitable employment, as provided herein. The claimant's failure to submit wage loss statements in accordance with this rule shall not result in the dismissal of the wage loss application, but shall result in the suspension of wage loss payments until the wage loss statements are submitted in accordance with this rule.

(a) A claimant seeking or receiving wage loss compensation shall complete a wage loss statement(s) for every week during which wage loss compensation is sought.

(b) A claimant seeking wage loss compensation shall submit the completed wage loss statements with the wage loss application and/or any subsequent request for wage loss compensation in the same claim.

(c) A claimant who receives wage loss compensation for periods after the filing of the wage loss application and/or any subsequent request for wage loss compensation in the same claim shall submit the wage loss statements completed pursuant to paragraphs (C)(5)(a), (C)(5)(d) and (C)(5)(e) of this rule every four weeks to the bureau of worker's [sic] compensation or the self-insured employer during the period when wage loss compensation is received.

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

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

{¶ 30} Ohio Adm.Code 4125-1-01(D)(1)(c) provides certain relevant factors to be considered by the commission in evaluating whether a claimant has made a good-faith effort to find suitable employment. Those factors include: the claimant's skills, prior

employment history, and educational background; the number, quality, and regularity of contacts made with prospective employers; for a claimant seeking any amount of working wage loss compensation, the amount of time devoted to making prospective employer contacts during the period for which working wage loss is sought, as well as the number of hours spent working, any refusal by the claimant to accept assistance from the Ohio Bureau of Workers' Compensation in finding employment; any refusal by the claimant to accept the assistance of any public or private employment agency; labor market conditions; the claimant's physical capabilities; any recent activity on the part of the claimant to change their place of residence and the impact such change would have on the reasonable probability of success and the search for employment; the claimant's economic status; the claimant's documentation of efforts to produce self-employment income; any part-time employment engaged in by the claimant and whether that employment constitutes a voluntary limitation on the claimant's present earnings; whether the claimant restricts a search of employment that would require the claimant to work fewer hours per week than worked in the former position of employment; and whether, as a result of physical restrictions, the claimant is enrolled in a rehabilitation program.

{¶ 31} Claimants are required to demonstrate that they made a good-faith effort to search for suitable employment which is comparably paying work. 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.

{¶ 32} It is undisputed that relator failed to file supplemental medical evidence every 180 days as required. The commission did not abuse its discretion when relying on this lack of medical evidence to deny relator's application for wage loss compensation.

{¶ 33} The commission also determined that relator had failed to make a good-faith effort to search for suitable employment which is comparably paying work.

{¶ 34} The commission has the discretion to determine whether a claimant has made a good-faith effort to secure comparably paying work on a case-by-case basis. *State ex rel. Harsch v. Indus. Comm.*, 83 Ohio St.3d 280 (1998). In *State ex rel. Brinkman v. Indus. Comm.*, 87 Ohio St.3d 171, 173 (1999), the court stated as follows:

Despite the laudable goals of wage-loss compensation, there is a heightened potential for abuse whenever weekly compensation and wages are concurrently permitted. In response to this susceptibility, certain post-injury employment is more carefully scrutinized. Among these are part-time and self-employment. Described generically as voluntary limitations of income, these two categories are examined to ensure that wage-loss compensation is not subsidizing speculative business ventures or life-style choices. *State ex rel. Ooten v. Siegel Interior Specialists Co.* (1998), 84 Ohio St.3d 255, 703 N.E.2d 306; *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, 648 N.E.2d 827.

{¶ 35} Pursuant to *Harsch* and *Brinkman*, a case-by-case analysis is to be performed in determining whether a claimant has made a good-faith effort to secure comparably paying work and whether, in the present circumstances, a claimant who is working and receiving wages must also continue to make a good-faith effort to secure other employment which would help to alleviate the wage loss.

{¶ 36} In the present case, the commission correctly found that relator made one or two job contacts per week, and some weeks he made none. The commission found that this did not constitute a good-faith job search. Although he was present at the hearing, relator did not explain why he only averaged five job contacts per month while he was unemployed.

{¶ 37} Relator does not challenge the commission's finding that, pursuant to his testimony, he was earning \$19.58 per hour while employed with the city of Cleveland. Relator also does not challenge the fact that the job he began in February 2005 only paid him \$8.50 per hour. While this is employment, by definition, it is not comparably paying employment and relator had the duty to continue to try to alleviate the wage loss. Relator contends that he was not required to continue searching for work after he became employed in February 2005.

{¶ 38} A return to full-time employment does not automatically eliminate a claimant's duty to search for comparably paying work. *State ex rel. Yates v. Abbott Laboratories, Inc.*, 95 Ohio St.3d 142, 2002-Ohio-2003. However, it is equally true that the Supreme Court of Ohio has held that the job search is not mandatory. *State ex rel. Timken Co. v. Kovach*, 99 Ohio St.3d 21, 2003-Ohio-2450. Rather, under certain circumstances, a claimant's failure to continue to seek employment will be excused. The overriding concern is to ensure that a lower paying position, regardless of the number of hours worked, is necessitated by the disability and is not motivated by a claimant's lifestyle choice. *Yates; Timken Co.*

{¶ 39} As such, in examining a claimant's failure to search for another job, the court must use a broad analysis that goes beyond mere wage loss. *Timken Co.* This broader analysis was first emphasized in *Brinkman* where the Supreme Court of Ohio first recognized that, under some situations, it would be inappropriate to ask a claimant to leave a good thing solely to reduce a wage differential. As the court stated in *Brinkman*, a broad analysis is necessary in light of the temporary nature of wage loss compensation which ends after 200 weeks.

{¶ 40} Specifically, in *Timken Co.*, the court excused the required job search where the claimant continued to hold a position with his original employer, with whom he had worked for a long time, had accumulated years toward a pension, and qualified for additional vacation and personal days. In *Brinkman*, the court held that it was inappropriate to require a claimant to leave a lucrative position with long-term potential solely to make more money in the short-term.

{¶ 41} Relator also cites *State ex rel. Whirlpool Corp. v. Indus. Comm.*, 10th Dist. No. 09AP-380, 2010-Ohio-255, to support his argument that he was not required to continue looking for work. *Whirlpool* is distinguishable.

{¶ 42} In *Whirlpool*, the claimant had failed to find a job after a job search that lasted 92 weeks and where he averaged 15 job contacts per week. Claimant had twice expanded the geographic region of his job search from 6 miles, to 13 miles, to 30 miles. Thereafter, claimant opened his own business working between 40 to 60 hours per week yet made little, if any, profit. The commission found that, under the circumstances, the claimant was not required to continue searching for work.

{¶ 43} In the present case, relator has not provided any evidence that his current employer has plans to increase his wages and, having not made a good-faith effort to secure the job with Airport Fast Park, it cannot be said that the continued wage loss was due to other factors. Relator failed to explain why he had failed to continue searching for suitable employment, which is comparably paying work. Given these facts, the magistrate finds that the commission did not abuse its discretion by denying relator's application for wage loss compensation on grounds that he failed to conduct a good-faith search for work.

{¶ 44} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying his application for wage loss compensation and relator's request for a writ of mandamus should be denied.

/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).