[Cite as *State ex rel. One Source v. Indus. Comm.*, 2012-Ohio-4498.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. One Source Facility Services, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-727
The Industrial Commission of Ohio and Nena Quran-Muhamm[a]d,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 28, 2012

Willacy, LoPresti & Marcovy, and *Timothy A. Marcovy*, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Sheldon Karp Co., LPA, and *David J. Steiger*, for respondent Nena Quran-Muhammad.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, One Source Facility Services, Inc. ("One Source"), commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its July 26, 2011 order awarding nonworking wage loss compensation ("NWWL") to respondent Nena Quran-Muhammad ("claimant"), and to enter an order denying that compensation.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} The facts are discussed at length in the magistrate's decision, which is appended to this decision. In summary, One Source employed claimant for 26 years as a

housekeeper. On June 22, 2003, she sustained a work-related injury when she slipped and fell while cleaning a commercial building. Her worker's compensation claim was allowed for "contusion of back; contusion of right knee; [and] aggravation [of] existing osteoarthritis right knee." In 2005, claimant underwent a total right knee replacement and a subsequent surgery on her knee in February 2008. She received temporary total disability compensation for a period ending on November 16, 2009, when the commission determined that she had reached maximum medical improvement ("MMI").

{¶ 3} Beginning in December 2009, claimant participated in vocational rehabilitation, job placement, and other services in an attempt to secure employment that was consistent with her work restrictions. At that time, claimant was 61 years of age. Her vocational rehabilitation counselors suggested to her the possibility of working in jobs relating to childcare, and claimant made multiple applications to obtain a childcare job. But claimant did not obtain new employment. On March 11, 2011, she applied for NWWL as authorized by R.C. 4123.56(B)(1) and Ohio Adm.Code 4125-1-01 .

{¶ 4} Following her injury, several medical professionals examined claimant and issued reports. Among those reports were the following.

{¶ 5} (1) October 15, 2009 Greenspan report: Dr. Gary Greenspan issued an IME (independent medical examination) report listing claimant's allowed conditions as "contusion of back right, contusion of knee right, LOC 2nd Osteoarthr-L/Leg right."[1] He imposed a complete restriction against mopping, climbing of stairs, and heavy lifting, i.e., lifting of ten pounds or more. Dr. Greenspan opined that claimant had reached MMI.

{¶ 6} (2) March 8, 2011 Simone report: Dr. Anthony Simone, claimant's treating physician, prepared a C-140 medical report that was filed with claimant's NWWL application. The report listed claimant's allowed conditions as "low back [and] right knee" and imposed a ten-pound lifting restriction.

{¶ 7} (3) April 14, 2011 Simone letter of additional allowance: Dr. Simone suggested that, in his professional opinion, an additional condition, lumbar spondylosis, should be recognized as an allowed condition. He noted that a bone scan of November 11,

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[1] "LOC 2nd Osteoarthr-L/leg" is a short description for the condition of "osteoarthrosis, localized, secondary, involving lower leg," ICD-9 code 715.26. *See* http://www.icd9data.com/2011/Volume1/710-739/710-719/715/715.26.htm; http://www.pitchstonehealth.com/coding/icd9/715.26--osteoarthrosis-localized-secondary-lower-leg.

2010 revealed lower lumbar spine degenerative changes. The commission subsequently refused to amend the claim to include this condition.

{¶ 8} (4) May 4, 2011 Rodgers report: Dr. Steven Rodgers opined that claimant had no work restrictions due to the allowed conditions as "two of the conditions involving contusions to the back and right knee are soft tissue injuries which would have resolved within 30 days of the date of injury."

{¶ 9} (5) June 16, 2011 Simone report: Dr. Simone filed a supplemental C-140 report based on his March 8, 2011 examination of claimant. The report listed claimant's allowed conditions as "922.31, 924.11, 715.26" and reported a ten-pound lifting restriction. In her decision, the magistrate characterized this second C-140 report as having "corrected" the C-140 filed on March 8, 2011, i.e., the second C-140 substituted the ICD-9 codes for claimant's specific allowed conditions in place of "low back [and] right knee."

{¶ 10} On April 12, 2011, the administrator of the Bureau of Worker's Compensation granted claimant NWWL.

{¶ 11} On May 23, 2011, a district hearing officer ("DHO") vacated the administrator's order and denied claimant's NWWL claim, relying upon the May 4, 2011 report of Dr. Rodgers. The DHO concluded that Dr. Simone's C-140 March 8, 2011 report (the first C-140) was insufficient to support NWWL, in that it listed "low back and right knee" as the allowed conditions and therefore did not clearly report whether claimant's allowed conditions were the source of her medical restrictions. The DHO further noted that claimant had a pending motion requesting the allowance of an additional condition, i.e., aggravation of pre-existing lumbar spondylosis, and that there was "evidence in the file" to support the conclusion that claimant had been diagnosed with a back condition that was not an allowed condition; i.e., lumbar spondylosis, suggesting that her work restrictions may have resulted, at least in part, from that non-allowed condition.

{¶ 12} On July 7, 2011, a staff hearing officer ("SHO") vacated the DHO order and granted NWWL to claimant. The SHO relied on Dr. Greenspan's October 6, 2009 report and Dr. Simone's second C-140 report (which was prepared in June 2011—after the DHO's decision). The SHO concluded that the claimant:

> * * * has physical limitations due to the allowed conditions in the claim that prevent her from having the residual functional capacity to engage in the type of employment that she had

> when she was injured. * * * [Claimant] has been applying for about 20 jobs a week and many of them are in the child care area where she has a history of working.

(Commission order mailed July 7, 2011, at 1.)

{¶ 13} One Source appealed the decision of the SHO to the commission. On July 26, 2011, the commission refused its appeal.

{¶ 14} One Source thereafter filed in this court a complaint seeking a writ of mandamus to vacate claimant's award of NWWL. This court assigned the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals.

{¶ 15} The magistrate issued a three-pronged decision. She concluded that: (1) Dr. Greenspan's report of October 15, 2009 constituted some evidence that claimant could not return to her former position of employment as a housekeeper due to the allowed conditions; (2) the commission properly considered claimant's search for childcare jobs in determining whether claimant had made an adequate job search; and (3) the commission never determined that claimant made a good-faith effort to find suitable employment which is comparably paying work and should therefore vacate its order granting NWWL and issue a new order after determining whether claimant made a good-faith effort to search for suitable employment which is comparably paying work.

{¶ 16} For the reasons that follow, we adopt as our own the magistrate's decision, including the findings of fact and conclusions of law as corrected herein,[2] and grant a writ of mandamus ordering the commission to vacate its order granting NWWL and to issue a new order after determining whether claimant made a good-faith effort to search for suitable employment which is comparably paying work.

{¶ 17} All three parties have objected to the magistrate's decision.

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[2] A typographical error appears in finding of fact 27 (¶ 62) of the magistrate's decision, incorrectly reciting the date the commission mailed its order as July 16, 2011. The commission in fact mailed its order refusing One Source's appeal on July 26, 2011.

Similarly we note an error appearing in ¶ 74 of the magistrate's decision. It is apparent from the context that the second sentence should read: "In completing his second report, relator notes that Dr. *Simone*

II. ANALYSIS OF OBJECTIONS TO MAGISTRATE'S DECISION

A. Relator's Objections

{¶ 18} One Source, contends that the magistrate erred in determining that the medical evidence in the record supports the commission's conclusion that claimant cannot return to her former position of employment due to her allowed conditions. Specifically, One Source contends that the magistrate erred in concluding that Dr. Greenspan's October 15, 2009 report suffices to support the commission's finding that claimant was unable to return to her former housekeeper position and constituted some evidence of a causal connection between claimant's allowed conditions and her inability to return to her former position. One Source contends that Dr. Greenspan's October 15, 2009 report does not constitute some evidence that the "allowed conditions alone caused the work restrictions," but only that "the allowed conditions had reached maximum medical improvement as of the date of his examination" as of October 2009. (Relator's Objections at 3.) It argues that Dr. Greenspan's report acknowledged that claimant complained of pain radiating from her back and notes that the commission subsequently denied claimant's additional allowance request for aggravation of lumbar spondylosis. One Source concludes that there is no evidence in the record to support the commission's finding that claimant's inability to perform her prior duties was *solely* due to the allowed conditions in her claim and that the commission's award of wage loss was thus not lawful. We disagree.

{¶ 19} The magistrate correctly observed that Dr. Greenspan's October 15, 2009 report specifically listed the claimant's three allowed conditions, set out his physical findings upon examination, and imposed restrictions on her work capabilities. He opined that claimant could perform housekeeping duties such as dusting, removing trash, and cleaning, provided that she lift no more than ten pounds. He imposed a complete restriction against mopping, climbing of stairs, and heaving lifting. The record disclosed that claimant's injury was sustained while she was mopping floors. We therefore agree with the magistrate's conclusion that this report constitutes some evidence that claimant was unable to return to her former position of employment.

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merely replaced low back and right knee with the correct allowed conditions." (Emphasis added.) The text as written incorrectly references Dr. *Greenspan* as the author of the second C-140 report.

{¶ 20} We reject One Source's argument that Dr Greenspan's report was deficient for failing to expressly state that the allowed conditions alone caused the work restrictions. While it is true that Dr. Greenspan described claimant's reports of pain radiating down her right leg from her back, it is also true that Dr. Greenspan specifically noted claimant's reports of "right knee discomfort that is aggravated by climbing stairs." Moreover, Dr. Greenspan's report does not reference any potential additional diagnoses, such as lumbar spondylosis, nor does One Source point to any evidence in the record to support the conclusion that Dr. Greenspan had considered or was even aware of such a possible diagnosis. Indeed, Dr. Simone did not prepare a letter of additional allowance suggesting the existence of lumbar spondylosis until April 14, 2011, well over a year after Dr. Greenspan's October 2009 report.

{¶ 21} We therefore reject One Source's objection.

B. Commission's Objections

{¶ 22} In its first objection, the commission takes issue with what it characterizes as the "magistrate's conclusion on page 17 [Magistrate's Decision, at ¶ 77] that Dr. Simone's two reports are contradictory rather than the second clarifies the first." (Commissions' objections, at 17.) It contends that Dr. Simone's second C-140 report filed with the commission on June 16, 2011 clarifies, rather than contradicts, his first C-140 report filed with claimant's NWWL application on March 11, 2011.

{¶ 23} We overrule the commission's first objection because we do not accept its underlying premise. The magistrate did not find that Dr. Simone's two C-140s conflicted or were irreconcileable. Rather, the magistrate may have implicitly acknowledged One Source's argument that Dr. Simone's medical reports were contradictory and did concede that "some question" might exist concerning the nature of Dr. Simone's medical opinion. Referring to Dr. Simone's letter of additional allowance of April 14, 2011, the magistrate stated: "Given Dr. Simone's opinion that claimant's claim should be additionally allowed for the condition of aggravation of pre-existing spondylosis, there can be some question concerning Dr. Simone's opinion." (Magistrate's Decision at ¶ 77.) The magistrate then determined that "*if so*," i.e., if Dr. Simone believed that lumbar spondylosis, a nonallowed condition, contributed to claimant's inability to return to her former employment, then Dr. Simone's "first report and second report cannot be reconciled." (Emphasis added.)

(¶ 77.) But, significantly, the magistrate further concluded that, "*[e]ven if* Dr. Simone's report is removed from evidentiary consideration," Dr. Greenspan's October 2009 report sufficed to support the conclusion that there was a causal connection between claimant's inability to work and her wage loss. (Emphasis added.) (¶ 78.)

{¶ 24} The magistrate thus did not conclude that Dr. Simone's reports could not be reconciled. Moreover, even were one to construe her decision in that way, that conclusion is not determinative of the appeal. This is so because, even assuming hypothetically that Dr. Simone's medical reports conflicted and his professional opinions should be excluded, the magistrate correctly found that Dr. Greenspan's report constituted some medical evidence sufficient to support the commission's conclusion that claimant's allowed conditions alone rendered her incapable of returning to her former position of employment.

{¶ 25} In its second objection, the commission asserts that it should not be required to rewrite its order to specifically indicate that claimant made a good-faith job search for comparably paying work. The commission contends that its order was not deficient. It contends that claimant sought the types of employment she was encouraged to pursue during vocational rehabilitation and posits that "[n]oting the vocational rehabilitation plans in the commission's order is equivalent to a finding of a good faith job search." (Commission objections at 5.) It asserts that the commission should not be required to "state the obvious," i.e., that claimant's job search satisfied the good-faith requirement. But the SHO's order included only a veiled reference to the vocational rehabilitation plans. The SHO's entire discussion of the adequacy of claimant's job search was, as follows:

> The Injured Worker has been applying for about 20 jobs a week and many of them are in the child care area where she has a history of working. When she was in living maintenance she was directed towards those kinds of jobs. Since Ms. Quran-Muhammad does not drive, she has to take public transportation which limits her job search.

(Commission order of July 7, 2011, at 1.)

{¶ 26} Moreover, the SHO order included no statement concerning whether the childcare jobs for which claimant had applied provided pay comparable to that of her former housekeeper job.

{¶ 27} The magistrate reviewed the record, summarized the evidence presented in the case, and discussed the controlling law concerning the adequacy of a claimant's job search for suitable employment that is comparably paying work. As noted by the magistrate at ¶ 70, Ohio Adm.Code 4125-1-01(D)(1)(c) provides multiple relevant factors for evaluating whether a claimant has made a good-faith effort to obtain suitable employment which is comparably paying work that would eliminate a wage loss.

{¶ 28} But, more significantly, the magistrate observed that the commission never explicitly found that claimant made a good-faith effort to find suitable employment, nor did it explicitly find that her job search was for suitable employment which is comparably paying work. (Magistrate's decision at ¶ 83.) The magistrate applied controlling precedent from this court that such findings must be made by the commission to support an award of NWWL. *State ex rel. AFG Industries, Inc., d/b/a/ AP Technolgass Co. v. Indus. Comm.*, 10th Dist. No. 03AP-383, 2004-Ohio-1732.

{¶ 29} In *AFG Industries, Inc.*, we recognized that "[w]hether a claimant has presented sufficient evidence that he made a good faith job search for suitable employment paying at a wage comparable to that which he earned with his former employer is a 'critical question' that must be addressed by the commission in any order awarding wage loss compensation." *Id.* at ¶ 10, citing *State ex rel. Honda Transmission Mfg. of America, Inc. v. Indus. Comm.*, 95 Ohio St.3d 95, 96, 2002-Ohio-1934. We cited an additional decision of the Supreme Court of Ohio for the proposition that " 'The commission's failure to examine [the] critical issues [of the adequacy of the job search] dictates a return to the commission for further consideration.' " *Id.* at ¶ 11, quoting *State ex rel. Consolidated Freightways v. Engerer*, 74 Ohio St.3d 241, 246 (1996). We further concluded that the commission had abused its discretion when it ordered wage-loss compensation while making no finding as to whether a claimant had demonstrated that his job search included attempts to find "comparably paying work," as defined in Ohio Adm.Code 4125-1-01(A)(7).

{¶ 30} Accordingly, pursuant to *AFG Industries, Inc.*, it is not appropriate for this court in a mandamus action to make a finding, in the first instance, that a claimant has made a good-faith effort to obtain suitable employment which is comparably paying work. Nor does *AFG Industries, Inc.* permit us to assume that the commission made that finding but did not express it in its order.

{¶ 31} The commission has not argued, nor are we convinced, that *AFG Industries, Inc.* should be overruled. Compliance with the mandate of that case does not impose an unreasonable burden on the commission. *Compare State ex rel. Johnson Controls, Inc. v. Montez,* 10th Dist. No. 09AP-98, 2009-Ohio-4488, ¶ 4 (finding sufficient an order that included a discussion of the relevant factors provided in the regulations and stated that claimant "was in essence looking for comparable and suitable work"). Accordingly, we also reject the commission's second objection.

C. Claimant's Objections

{¶ 32} The claimant objects to (1) the magistrate's exclusion from evidence of Dr. Simone's two C-140 reports as irreconcilable, and (2) the magistrate's recommendation that the case must be returned to the commission for it to determine whether claimant made a good-faith job search for suitable employment that is comparably paying work. The claimant's objections are therefore, in essence, the same as those of the commission. We therefore reject the claimant's objections for the reasons discussed above.

III. DISPOSITION

{¶ 33} We have independently reviewed the record and overrule all objections made by the parties. We therefore adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it as corrected herein, and grant a writ of mandamus ordering the commission to vacate its order granting non-working wage loss compensation and to issue a new order after determining whether claimant made a good-faith effort to search for suitable employment which is comparably paying work.

Objections overruled; writ of mandamus granted.

BROWN, P.J., and SADLER, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. One Source Facility Services, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-727
The Industrial Commission of Ohio and Nena Quran-Muhamm[a]d,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on after April 25, 2012

Willacy, LoPresti & Marcovy, and *Timothy A. Marcovy*, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Sheldon Karp Co., LPA, and *David J. Steiger*, for respondent Nena Quran-Muhammad.

IN MANDAMUS

{¶ 34} Relator, One Source Facility Services, Inc., 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 granted non-working wage loss compensation to respondent Nena Quran-Muhammad ("claimant") and ordering the commission to find that claimant is not entitled to that compensation.

Findings of Fact:

{¶ 35} 1. After working for relator as a housekeeper for 26 years, claimant sustained a work-related injury on June 22, 2003. Claimant's workers' compensation claim has been allowed for "contusion of back; contusion of right knee; aggravation pre-existing osteoarthritis right knee."

{¶ 36} 2. Claimant was able to return to work after the injury.

{¶ 37} 3. Claimant underwent a total knee replacement in 2005 and a revision surgery in February 2008.

{¶ 38} 4. Claimant received temporary total disability ("TTD") compensation which was terminated based on the finding that her allowed conditions had reached maximum medical improvement ("MMI") following a hearing before a district hearing officer ("DHO") on November 16, 2009. After her TTD compensation was terminated, claimant began participating in vocational rehabilitation beginning in December 2009.

{¶ 39} 5. Independent Vocational Services, Inc. ("IVS") completed an initial assessment report on January 4, 2010. At the time she began rehabilitation, claimant was 61 years of age. The initial assessment report provides the following relevant information:

> Functionally N[e]na is not able to perform standing walking sitting or [ ] activities for longer than 20 minute time periods per her report. She must change her positions following 20 minutes of these activities. She reports being able to climb stairs sideways only.
>
> * * *
>
> Ms. Mohammed [sic] is a 24 year * * * employee of one source facility services Inc. as a housekeeper. She has had no other employment during her work life. In the late 1980s N[e]na participated in courses at Cuyahoga Community College for preschool teaching. She did not complete this program.
>
> * * *
>
> Miss Mohammed [sic] is interested in clerical, customer service clerking and perhaps medical secretary occupational areas for employment.

> Ms. Mohammed [sic] reports limited experience with computer software operation therefore will likely require a clerical work adjustment program beginning service to address this need as well as to allow her to adjust from being off work for several years and transition to a new occupational area[.]
>
> RECOMMENDATIONS
>
> It is suggested that a vocational evaluation be conducted as well as career counseling sessions in order to allow for identification of perhaps additional vocational options and or to support the clerical more medical clerical vocational goal interest/options. It is likely a skills upgrade will be necessary in order to allow her to become competitive with other job seekers in a new occupational area. At this time the vocational goal options are tentative and will be solidified as a result of the services previously mentioned.

{¶ 40} 6. An individualized vocational rehabilitation plan was prepared on February 1, 2010. It was noted that her employer indicated that there were no return-to-work options available, and the vocational goal was a different job with a different employer. Following a physical therapy evaluation by Anthony Simone, D.C., an active physical therapy program was recommended:

> [A]t 3-5 sessions per week for a period of 6 weeks in order to provide improvement in strength, and range of motion as well as for reduction of pain symptoms. This is a necessary service as a beginning step toward successful vocational rehabilitation as Ms. Quran will need improved function of her right leg and knee in order to sustain any work related activity for a period of time.

{¶ 41} 7. The first plan amendment was prepared March 21, 2010. The outcome of the active physical therapy program was described as follows:

> Ms. Quran has made improvements in regard to strengthening of the injured knee as well as range of motion. Pain and some minor swelling are reported with exercise. Passive modalities has been requested by the physician of record as a concurrent medical service as this treatment would further enhance progress due to addressing of pain symptoms thus allowing Ms. Quran to progress further in her exercise regime. * * * Dr. Simone indicate[s] that Ms. Quran has improved with treatment and is now ready to

> transition to a **Work Conditioning Program** in order to allow for further strengthening and stabilization of [t]he injured area, to diminish pain discomfort. It is understood that this will be a[n] overall full body stamina, endurance building and strengthening program of which will service to improve her overall physical condition in preparation for return to employment. This will be performed at 3-5 sessions per week for an initial 8-week time period. The two final allowable weeks will be assessed for need following the initial six weeks time period.

(Emphasis sic.)

{¶ 42} 8. The second plan amendment was prepared on May 12, 2010. An additional two weeks of work conditioning was requested because claimant remained somewhat symptomatic and had not reached a treatment plateau. It was expected that this would be accomplished within the next two weeks. A one-week period of vocational guidance was recommended. The second amendment describes the following services which were expected to be provided:

> Due to the fact that Nena does not have a position to return to and the fact that the physician of record has indicated it is not possible for Nena to perform the tasks of her original occupation the vocational goal is different job/different employer. It is necessary to identify new vocational direction for Ms. Quran therefore a Vocational Evaluation is recommended to be performed. This will serve to identify occupational aptitudes, skills, abilities and interests and transferable skills analysis for use in identification of appropriate vocational goals of which will also be within Nena's physical abilities. Due to the fact that final outcomes of work conditioning will be necessary for identification of physical abilities and restrictions, it is also recommended that this service take place upon completion of the final two weeks of work conditioning and allow for the physician of record to determine physical restrictions upon completion of this program.
>
> Vocational Evaluation results are recommended for use in Career Counseling Services of which will serve to allow for occupational exploration and research of which will result in selection of appropriate specific vocational goals. This will be provided via once per week sessions with provider Deborah Lee.

> This service will also be provided concurrent to an Office/Computer/Clerical Work Adjustment Program to be conducted at Townsend Learning Center. Ms. Quran has no exposure or experience with an office work environment or the operation of a computer. The purpose of work adjustment will be to serve as a transition from a non-working lifestyle to one of which simulates a work schedule and work environment. It is expected that Nena will need to acclimate to an office environment as most sedentary to light work are office, clerking or customer service related and involve some type of office. Clerical related tasks. She will also need to have exposure to basic computer software operations such as Microsoft Word, Internet, and Outlook / Email and Access Programs to name a few for any job goal office related or not as this is a standard for any employment in the current labor force.

{¶ 43} 9. The third plan amendment was prepared May 25, 2010. At that time, it was explained that claimant was continuing to participate in the aforementioned program.

{¶ 44} 10. The fourth plan amendment was prepared July 6, 2010. It was noted that claimant was adjusting very well to all aspects of the program, was showing motivation, and was currently working to complete basic computer software courses. A report from Deborah Lee, a career counselor, prepared June 21, 2010, revealed the following:

> During the first session of counseling the following jobs were identified as being of interest and appropriate based upon vocational evaluation testing: Mail Clerk, File Clerk, Ticket Seller, Information Giver, Receptionist, Parking Lot Cashier and Day Care Center teacher assistant.

The following additional information was also provided:

> Reading vocabulary is 0.4 grades equivalent, Reading comprehension is 10.1 grade equivalent. Spelling is 3rd grade equivalent and math is 10 grades equivalent. Possible job goals per testing results and transferable skills analysis are Cashier, Guard (selective placement) Day [C]are Aid, Mail [C]lerk and File Clerk. Assets are that Ms. Quran has a GED, a good work history, appropriate appearance for working with the public and a desire and financial incentive for work. Limitations include use of bus for transpiration [sic] only, no

> computer skills, single occupation work history and no transferable skills, lack of confidence in communication skills and no transferable skills. Ms. Quran has taken some courses previously in early childhood development and also has a daughter who works in the field. Due to this, it has been agreed that further exploration in this area during career counseling sessions is warranted. At the second session, Ms. Quran was provided with a list of Day Care Centers within relatively close distance of her home and it was agreed she would contact them to explore openings or potential openings and minimum qualifications for them. Service jobs that meet physical restrictions and abilities are in [the] process of being explored and identified and additional time is necessary in order to discern a strong vocational direction and obtain information on the necessary requirements for entry into and to compete for employment in these areas.

{¶ 45} 11. Deborah Lee completed two career counseling reports, dated July 16 and 26, 2010. It was noted that claimant contacted some of the day care centers in her area to learn of current openings, potential openings and the training required to access various positions. Additional training beyond basic clerical skills was discussed. It was noted that claimant did not find any openings for day care positions, and it was noted that she would likely get the same response from her upcoming contacts with parking companies. Lee stated:

> Ms. Quran seemed somewhat more open to considering additional skill acquisition beyond the CWA program. However, there are factors to consider, with one being whether Ms. Quran as [ ] a mature worker with only six years of active work life before she can collect her full retirement benefits, is interested in devoting the time to skill training. Input on her learning ability from the CWA would be beneficial as well as whether there is an active labor market for any skill training jobs in her geographic area.

{¶ 46} It was noted that claimant questioned whether or not she wanted to continue participating in skill training given that she was 61 years of age and wondered whether or not the time invested in training was worth how long she may potentially work. It was concluded that there were no highly marketable employment options within her restrictions and skills.

{¶ 47} 12. The fifth plan amendment was prepared August 16, 2010. The following relevant information was provided:

> Results of the final six weeks of computer/clerical/office skills enhancement services are as follows: The following information is obtained from 8-13-10-work adjustment progress summary from Townsend Learning Center. Ms. Quran has had good attendance throughout the program as demonstrated by having had perfect attendance at for weeks 1-4 then from weeks 5 to 8 she had [one] absence due to the illness of a family member. She had one early out as well but made up all this time. From weeks 9-11 she also missed only one day but due to an IC/BWC court hearing. In regard to work behaviors in the program, Nena is rated as average and above average in all aspects of the program. Please refer to the report itself for a full listing. For example areas of above average performance are following guidelines and policies, accepting supervision, responding to email from staff, solves problems, sustains concentration, has good stamina, verbal communication, dress for office, following verbal instructtions, following written instructions, employs learning skills, retains instruction, improves with repetition[.] Also, she has basic skills in windows, outlook, email and internet, excel and has most basic skills in word as well. Ms[.] Quran has issues with typing speed due to lack of experience and also due to her injury. Work Adjustment will be continued to the 12th week.

{¶ 48} 13. Deborah Lee completed a job-seeking skills training report dated September 9, 2010. That report indicates that claimant attended six job-seeking skills sessions, completed participation in a "CWA program" where she gained rudimentary computer-use skills, and participated in career counseling. The following jobs were identified as a target: companion/housekeeper, child care worker, day care center food preparation worker, and selective security positions. The report notes further that claimant was an interested participant in the sessions and completed all homework assignments. Claimant expressed difficulty with certain aspects of the job search process, such as using the telephone. Apparently, claimant stutters. It was also noted that claimant rides the bus and would need additional practice of both telephone use and interviewing skills. Claimant was registered with the state of Ohio, and was shown how to

use other job browsers. Although claimant does not have a computer, her daughter has one and an e-mail address was obtained for claimant. Lee concluded as follows:

> Prognosis for return to work is guarded. Ms. Quran Mohammad [sic] has limited skills to competitively compete for most jobs at the sedentary level of exertion. The jobs that she has identified to target will need to be carefully reviewed to determine if she can perform them on a sustained basis. She will require a job on a bus line which further limits her job options. Ms. Quran Mohammad [sic] is now asking about skill enhancement, something that she had not seriously considered during career counseling when the subject was broached. She may require skill enhancement depending on how her job search progresses.

{¶ 49} 14. IVS completed a second report dated October 5, 2010. In that report, it was noted that claimant had completed four weeks of job placement and development and job-search services and that her job goal areas were expanded to include housekeeping and child care along with the original employment goal of companion. Because the child care occupational area mostly required certifications or specialized training or course work, it was recommended that this vocational option be eliminated.

{¶ 50} 15. The seventh amendment to claimant's individualized vocational rehabilitation plan was prepared November 9, 2010. The following additional relevant information includes:

> On 11-7-10 Nena Quran will complete a total of 8 weeks **Job Placement and Development services** as well as **Job Search** was provided and completed by Ms. Quran and provider Deborah Lee. Job goal areas had been expanded to include childcare but it was found that certifications and experience were necessary. She continued to seek employment as a companion but the availability of those jobs is few. Nena agreed to visit a power-sewing program but was concerned that using the foot pedal and [sic] well, as lifting heavy material would be physically difficult for her. Due to this Ms. Quran was counseled that her options would be to close her case and apply for long term disability or for her to attempt a customer service vocational goal of which she had been previously * * * opposed to due to her uncomfortably using a phone due to a previous speech impediment. She was counseled that her job placement options are limited for sedentary physical demand range and due to poor labor market conditions and it may be best for her to apply for

> long-term disability but it is her choice if she wished to attempt customer service work. Nena has requested consideration for a vocational goal in Customer Service.

(Emphasis sic.)

{¶ 51} 16. The eighth amendment was signed December 7, 2010 and provides the following additional relevant information:

> On 11-28-10 Nena Quran will complete a 2-week trial in a Situational Work Assessment for the vocational area of Customer Service. Results did not support entry into the area of customer service for a vocational goal. As a result, there are no suitable additional vocational options to consider and no skills enhancement that is deemed appropriate for Ms. Quran. It has been recommended and agreed to that **job placement and job search services be resumed** with a different provider who may be able to obtain new job leads and thus widen the job goal options for Ms. Quran during placement. This was agreed to by the BWC and MCO.
>
> **Job Placement and Development services** as well as **Job Search** will be provided to allow for once per week meetings with provider Kevin Romance of Voc Care for counseling, guidance and instruction with job seeking efforts as well as to monitor progress in search and provide appropriate job leads. Nena will be required to make 15 face to face employer contacts or as many as the job goal industry will allow given the fact that most applications are now via the internet and also provide post office boxes for contact.

(Emphasis sic.)

{¶ 52} 17. The ninth plan amendment provides no relevant new information.

{¶ 53} 18. The tenth plan amendment dated January 26, 2011 provides the following additional relevant information:

> On 2-6-11 **job placement and job search services weeks 13-16 with** provider Kevin Romance of Advocare will conclude. Per his report of 1-25-11 the following is reported:
>
> "During this reporting period, Ms. Quran has demonstrated solid job search effort and eagerness to secure employment. She has been on time and an active participant during all three scheduled job placement & development appoint-

ments. During review of job leads, Ms. Quran actively plans, in advance, her methods to contact each potential employer. In addition, she presents as knowledgeable during discussion regarding an employer's listed qualifications and the manner in which she can emphasize her strengths and overcome potential discrepancies.

Ms. Quran has maintained an organized job search and submits her employer contacts on a weekly basis. During this reporting period, Ms. Quran has submitted 45 out of 45 documented employer contacts. Though Ms. Quran has made an effort to meet face-to-face with potential employers, many of the contacts are made via internet or email at the request of the employer. Most recently, Ms. Quran has made positive contacts regarding a Youth Program Assistant position with Goodwich-Garnett Neighborhood Center and a position for a Teacher with Children First. Along with job leads provided by this counselor, Ms. Quran has contacted local area employers identified through the Yellow Pages or her own personal knowledge. This counselor continues to discuss positive job contacts and feedback from employers with Ms. Quran. Ms. Quran remains aware and open to the potential for this counselor to contact employers, when appropriate, regarding potential [return-to-work] incentives such as work trial."

* * *

Additionally, job goals have been expanded and are now indicated as follows:

Caregiver
Home Health Companion
Child Life Assistant
Child Enrichment Center Teacher
Child Care Provider
Activities Assistant
Call Center/Customer Service Specialist
File Clerk
Mail Clerk
Medical Records Clerk
Office Assistant

Nena will be required to make 15 face to face employer contacts or as many as the job goal industry will allow given

> the fact that most applications are now via the internet and also provide post office boxes for contact.

{¶ 54} 19. Claimant's vocational rehabilitation file was closed effective March 7, 2011. The closure report provides:

> [T]he following services were provided: Active physical therapy, work conditioning, vocational evaluation, career counseling, job seeking skills training, job placement and development, situational work assessment. Ms. Quran successfully completed all of the above services with attempts to broaden the job goal possibilities but with little success. These were attempted to be expanded during a situational work assessment but was unsuccessful for areas of clerical or customer service therefore Nena was provided with job placement services at first with provider Deb Lee then a change of provider resulted in order to expand job goals and possible success. Case was transferred for job placement services to Kevin Romance of Voc Care Services Inc. and 20 weeks of job placement was provided but with no securement of employment.

{¶ 55} 20. In a letter dated March 14, 2011, claimant was informed that her rehabilitation file had been closed: "This letter is to inform you that your vocational rehabilitation file has been closed effective 3/7/11, as you have completed your plan with no return to work; you have the necessary skills to seek employment independently."

{¶ 56} 21. Claimant immediately began searching for employment and filed the required vocational rehabilitation plan job-search contacts form regularly beginning March 6, 2011 through July 29, 2011. (Joint Stipulation of Evidence, at 125-251.) Claimant's job-search contacts forms consist of 126 pages.

{¶ 57} 22. Claimant filed a motion seeking the payment of non-working wage loss compensation beginning March 23, 2011.

{¶ 58} 23. The following medical evidence was submitted in support of her application: (a) A medical report from Gary A. Greenspan, M.D., dated October 15, 2009. Dr. Greenspan correctly identified the allowed conditions and opined that claimant's allowed physical conditions had reached MMI and that she could return to her former position of employment with restrictions including no climbing of stairs, no mopping, no heavy lifting, and a restriction of lifting no more than ten pounds. (b) A C-140 report

from Dr. Simone, claimant's physician of record, dated March 8, 2011. Dr. Simone listed low back and right knee as the allowed conditions in the claim that were causing restrictions. Those restrictions included the ability to sit/stand and walk each for one hour during an eight-hour day; the ability to lift or carry up to ten pounds occasionally, but not over ten pounds; claimant could reach occasionally, but could never bend, squat, crawl, or climb; claimant was unrestricted in the use of her hands for repetitive actions; and claimant was prohibited from using her feet in repetitive movements of leg controls. (c) The May 4, 2011 report of Steven R. Rodgers, M.D., who opined that claimant had no work restrictions.

{¶ 59} 24. Claimant's application for non-working wage loss compensation was heard before a DHO on May 23, 2011 and was denied for the following reasons: claimant did not provide sufficient medical evidence concerning her medical work restrictions as required; the restrictions from Dr. Simone listing low back and right knee as the allowed conditions is not sufficient because claimant has other back conditions which are not allowed conditions in the claim; it is unclear if the allowed conditions are the source of her medical restrictions; and claimant had a pending motion requesting the allowance of aggravation of pre-existing lumbar spondylosis. Thereafter, the DHO relied on Dr. Rodgers indicating that claimant had no restrictions.

{¶ 60} 25. Thereafter, Dr. Simone corrected his C-140 report and only listed the specific allowed conditions as the source of claimant's medical restrictions.

{¶ 61} 26. Claimant's appeal was heard before a staff hearing officer ("SHO") on July 1, 2011. The SHO vacated the prior DHO's order and granted claimant's application for non-working wage loss compensation. The SHO stated:

> Staff Hearing Officer finds that the Injured Worker has physical limitations due to the allowed conditions in the claim that prevent her from having the residual functional capacity to engage in the type of employment that she had when she was injured. She has had three knee surgeries including a total knee replacement. The report of Dr. Greenspan dated 10/06/2009 gives the Injured Worker a 10 pound lifting restriction due to the allowed injury. Similarly, the treating physician, Dr. Simone lists a 10 pound lifting restriction in his record of 06/16/2011. The Injured Worker has been applying for about 20 jobs a week and many of them are in the child

> care areas where she has a history of working. When she was in living maintenance she was directed towards those kinds of jobs. Since Ms. Quran-Muhammad does not drive, she has to take public transportation which limits her job search.
>
> Staff Hearing Officer awards non-working wage loss from 03/14/2011 through 05/20/2011 and further non-working wage loss is to be paid upon receipt of additional supporting documentation.

{¶ 62} 27. Relator's further appeal was refused by order of the commission mailed July 16, 2011.

{¶ 63} 28. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 64} Relator contends that the commission abused its discretion in granting claimant non-working wage loss compensation. Specifically, relator argues that the medical evidence relied on does not establish that claimant cannot return to her former position of employment. Relator also argues that claimant's job search did not constitute a good-faith search for suitable employment which is comparably paying work and that the commission abused its discretion by granting non-working wage loss compensation without making this finding. Relator also contends that it was improper for claimant to apply for any child care jobs and there is no evidence that the jobs where she applied constituted suitable employment which was comparably paying work.

{¶ 65} The magistrate finds that the medical evidence in the record does establish that claimant cannot return to her former position of employment as a housekeeper. However, because the commission never determined that claimant made a good-faith effort to find suitable employment which is comparably paying work, the commission abused its discretion by awarding claimant non-working wage loss compensation.

{¶ 66} 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).

{¶ 67} 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.

{¶ 68} 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 * * *.

{¶ 69} 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.

{¶ 70} 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. Those factors including: 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.

{¶ 71} Relator first argues that there is no evidence in the record upon which the commission could properly rely to find that claimant was unable to return to her former position of employment due to the allowed conditions in her claim. The magistrate disagrees.

{¶ 72} It is undisputed that claimant must establish that her reduction in wages is specifically related to the allowed conditions. *Waddle*. The commission specifically relied on the reports of Drs. Greenspan and Simone. In his October 15, 2009 report, Dr. Greenspan specifically listed the allowed conditions in claimant's claim. Thereafter, Dr. Greenspan set out his physical findings upon examination and, as noted previously, concluded that claimant could return to her former position of employment with restrictions. Dr. Greenspan indicated that claimant could not climb stairs and that there should be no mopping or heavy lifting. Further, he indicated that she could perform housekeeping duties such as dusting, removing trash and cleaning, provided that she lift no more than ten pounds. This report alone supports the commission's finding that claimant was unable to return to her former position of employment.

{¶ 73} The commission also relied on the March 8, 2011 C-140 report of Dr. Simone who indicated that claimant could sit, stand and walk for only one hour each in an eight-hour workday and agreed with Dr. Greenspan that she had lifting and carrying restrictions of no more than ten pounds.

{¶ 74} Relator criticizes Dr. Simone's C-140 report because his first report listed low back and right knee. In completing his second report, relator notes that Dr. Greenspan merely replaced low back and right knee with the correct allowed conditions. Relator contends that Dr. Simone's corrected report contradicts his other medical reports, wherein he opined that claimant suffered from spondylosis and that condition should be additionally allowed in her claim.

{¶ 75} In a report dated June 30, 2011, Dr. Simone wrote to rebut a report written by a Manhal A. Gahnma, M.D., who had opined that claimant's claim should not be additionally allowed for aggravation of pre-existing lumbar spondylosis. Dr. Simone referenced a report by Dr. Stahlberg who had performed surgery on claimant's right knee and opined that, in his opinion, her continued knee symptoms might be related to her low back injury. Dr. Simone also referenced another office note from Dr. Stahlberg indicating that, in his opinion, the symptoms claimant was experiencing were entirely related to her low back, and he requested a consultation at the spine center. He then referenced a three-phase bone scan which revealed lower lumber spine degenerative changes and indicated that the results were consistent with claimant's symptoms. Relator argues that Dr.

Simone does not explain why he changed the second C-140 to specifically list the allowed conditions instead of keeping the less specific reference to low back and right knee. The commission and claimant's counsel assert that Dr. Simone's second C-140 simply corrected the perceived error in the first C-140.

{¶ 76} In *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994), the Supreme Court of Ohio summarized the distinction between the ambiguous, equivocal and repudiated reports as follows:

> [E]quivocal medical opinions are not evidence. See, also, *State ex rel. Woodard v. Frigidaire Div., Gen. Motors Corp.* (1985), 18 Ohio St.3d 110 * * *. Such opinions are of no probative value. Further, equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. Ambiguous statements, however, are considered equivocal only while they are unclarified. [*State ex rel. Paragon v. Indus. Comm.*, 5 Ohio St.3d 72 (1983).] Thus, once clarified, such statements fall outside the boundaries of [*State ex rel. Jennings v. Indus. Comm.*, 1 Ohio St.3d 101 (1982)], and its progeny.
>
> Moreover, ambiguous statements are inherently different from those that are repudiated, contradictory or uncertain. Repudiated, contradictory or uncertain statements reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable. Such statements relate to the doctor's position on a critical issue. Ambiguous statements, however, merely reveal that the doctor did not effectively convey what he meant and, therefore, they are not inherently unreliable. Such statements do not relate to the doctor's position, but to his communication skills. If we were to hold that clarified statements, because previously ambiguous, are subject to *Jennings* or to commission rejection, we would effectively allow the commission to put words into a doctor's mouth or, worse, discount a truly probative opinion. Under such a view, any doctor's opinion could be disregarded merely because he failed on a single occasion to employ precise terminology. In a word, once an ambiguity, always an ambiguity. This court cannot countenance such an exclusion of probative evidence.

{¶ 77} Relator is correct to argue that Dr. Simone did not explain why he first opined that it was claimant's right knee and back which caused her disability and then re-

submitted the same C-140 with the proper allowed conditions listed. Given Dr. Simone's opinion that claimant's claim should be additionally allowed for the condition of aggravation of pre-existing spondylosis, there can be some question concerning Dr. Simone's opinion: is it *only* the allowed conditions causing the disability or is her disability caused in part by the non-allowed aggravation of pre-existing spondylosis? If so, his first report and second report cannot be reconciled.

{¶ 78} Even if Dr. Simone's report is removed from evidentiary consideration, Dr. Greenspan's report indicating that claimant would have restrictions if she was to return to her former position of employment indicates that claimant cannot return to her former position of employment, and his report constitutes some evidence upon which the commission could properly rely to find that there was a causal connection between claimant's inability to work and her wage loss. As such, the magistrate finds that there is medical evidence cited by the commission satisfying the requirement that claimant's allowed conditions render her incapable of returning to her former position of employment.

{¶ 79} Relator also challenges the commission's determination that claimant's job search was sufficient to qualify for non-working wage loss compensation. Specifically, relator argues that claimant was specifically told that she should no longer attempt to secure employment at child care facilities because she lacked the proper qualifications. Given this, relator asks this court to remove from her job search all employers where she was seeking child care positions. Relator contends that, if this is done, then 222 of her 300 job contacts would be eliminated. Relator also criticizes claimant for performing the majority of her job search online. Relator also contends that the commission did not address whether or not the job claimant was seeking constituted suitable employment which is comparably paying work.

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

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

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

{¶ 81} The vocational evidence presented demonstrates that claimant has worked very hard to enlarge her skill set and has made every effort to make herself employable within her own restrictions. For example, it is undisputed that claimant does not drive. Therefore, she is restricted to applying for jobs which are near bus lines. Further, claimant has had a problem stuttering since she was a child. As such, it was easier for her to apply for the majority of the jobs online. Further, the vocational evidence indicates that the majority of employers are now accepting online and e-mail applications.

{¶ 82} Relator also argues that claimant should not be looking for jobs in the child care area because she does not have the qualifications for those jobs. However, relator is ignoring two facts: (1) claimant has signed up for classes in an effort to get proper qualifications, and (2) the vocational evaluators continued to direct her toward such jobs in spite of the fact that there was a recommendation that she no longer pursue those jobs because of her lack of qualifications for those jobs.

{¶ 83} The magistrate finds that the commission did not abuse its discretion by finding that claimant made approximately 20 job contacts each week. However, the commission never made the finding that claimant made a good-faith effort to find suitable employment which is comparably paying work. In *State ex rel. AFG Industries Inc. d/b/a AP Technoglass Co. v. Indus. Comm.*, 10th Dist. No. 03AP-383, 2004-Ohio-1732, this court held that the commission abused its discretion when it granted wage loss compensation to Danny M. Diener while making no finding as to whether Diener demonstrated that his job search was adequate in that it included a search for comparably paying work as that term is defined in Ohio Adm.Code 4125-1-01(A)(8).

{¶ 84} The commission stated that Diener made a good-faith job search; however, despite considerable evidence of Diener's efforts, the commission never determined if Diener was searching for suitable employment which is comparably paying work. As

such, this court granted a writ of mandamus ordering the commission to re-determine the matter.

{¶ 85} As in *AFG Industries*, claimant has presented a significant amount of evidence concerning her job-search efforts. However, the commission never concluded that she made even a good-faith job search (as the commission found Diener had) and never addressed whether her job search was for suitable employment which is comparably paying work.

{¶ 86} Based on the foregoing, it is this magistrate's decision that this court should find that claimant's medical evidence supported the finding that she could not return to her former position of employment and should reject relator's contention that claimant's search for child care jobs should be excluded from any determination concerning the adequacy of her job search efforts. However, the magistrate also recommends that this court issue a writ of mandamus ordering the commission to vacate its order granting non-working wage loss compensation and ordering the commission to issue a new order after determining whether claimant made a good-faith effort to search for suitable employment which is comparably paying work.

/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).