

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Laura L. Walters, :
Relator, :
v. : No. 09AP-337
WEK Acquisition Corp., Inc. dba : (REGULAR CALENDAR)
WEK Industries Inc. et al., :
Respondents. :
:

D E C I S I O N

Rendered on July 29, 2010

Dworken & Bernstein Co., L.P.A., Jonathan T. Stender, and Jo A. Tatarko, for relator.

Hanna, Campbell & Powell, LLP, Timothy C. Campbell, and J. Anthony Coleman, for respondent WEK Acquisition Corp., Inc.

Richard Cordray, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Laura L. Walters, filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of

Ohio ("commission"), to vacate its order (1) finding that she was engaged in work activities during the period in which she received temporary total disability ("TTD") compensation and (2) finding fraud. Relator asks us to order the commission to find that the evidence does not support a finding that her activities were inconsistent with her restrictions or that her activities amounted to sustained remunerative employment and to find that she was not working during the period at issue.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. Relator has filed objections to that decision.

{¶3} Relator's allowed conditions arise from an industrial injury that occurred in 2002. Relator received TTD compensation for her physical conditions for a period beginning in October 2004. In 2006, the commission also allowed relator's claim for depressive disorder and anxiety. The commission ultimately terminated relator's TTD compensation following a hearing in late 2007, after determining that relator's allowed psychological conditions had reached maximum medical improvement ("MMI").

{¶4} In the meantime, in October 2006, the Bureau of Workers' Compensation ("BWC") Special Investigations Departments ("SID"), had begun an investigation of relator's activities. The investigation continued until June 2008. As detailed in the magistrate's decision, the investigation resulted in a finding that relator had been working as a psychic during the period of TTD compensation. BWC asked the commission to declare an overpayment and to make a finding of fraud.

{¶5} After hearings occurring in October 2008 and December 2008, the commission issued an order finding that relator had been overpaid TTD compensation from October 25, 2006 through December 17, 2007. The commission also made a finding of fraud.

{¶6} In her first objection, relator states that the magistrate made several factual errors in her findings of fact. We agree, and we correct those findings as follows.

{¶7} In Findings of Fact No. 18 (¶56), the date on which SID Agent Lang began surveillance at Silver Branch should be corrected to read "December 21, 2006."

{¶8} Also in No. 18 (¶57), the statement that, on February 1, 2007, Agent Creed was presented with a tape of the latest Psychic Thursday program that aired on February 15, 2007, is incorrect. That sentence should read: "Agent Lang obtained a tape of the latest Psychic Thursday program that aired on February 15, 2007, indicating that relator would be teaching classes at Silver Branch."

{¶9} Relator also takes issue with the following sentence in No. 18 (¶57): "On March 27, 2007, Lang learned that relator would be teaching another developmental class on April 4, 2007." We delete that sentence. We change the next sentence to read as follows: "On April 4, 2007, Lang and Miles attended another developmental class and engaged relator in conversation."

{¶10} No. 18 (¶57) also states that Lang was contacted on June 28, 2007, and was informed that relator would be working an event at Silver Branch on June 3, 2007. The correct date of the event is "June 30, 2007."

{¶11} No. 18 (¶57) also states: "On September 9, 2007, Lang and Mergen again received tarot card readings from relator at Lakeland Community College and observed relator providing tarot card readings for other people." According to the investigative report, however, neither agent received a reading that day. We delete that sentence and insert the following: "On September 9, 2007, Lang and Mergen again went to Lakeland Community College, where relator had a booth set up for providing tarot card readings."

{¶12} No. 18 (¶57) states: "On December 7, 2007, SID intern Judi Gill called relator to set up a group reading." The correct date of the call is "December 3, 2007."

{¶13} No. 18 (¶57) also states: "Lang was given a copy of information from March 4 through November 30, 2007, which listed payments made to relator." Upon review of R.219, we conclude that the following is more accurate: "Lang was given a copy of a document listing payment information from March 3, 2007 through November 30, 2007, and for one payment on '1-9-07.' "

{¶14} Finally, No. 18 (¶57) states that relator had worked at Aradia's Garden "as an independent contractor since December 2007." The correct statement is that relator had worked there as an independent contractor since "the summer of 2007."

{¶15} Having made these corrections, we sustain in part relator's first objection. To the extent relator has raised other concerns about the findings of fact, however, we reject them.

{¶16} Relator's five remaining objections relate to the magistrate's conclusions of law. For convenience, we address those objections out of order. And, as an initial matter, we briefly consider the commission's order.

{¶17} In his lengthy opinion following a hearing on December 10, 2008, the staff hearing officer ("SHO") affirmed the district hearing officer's order, which had found an overpayment and included a finding of fraud. The SHO relied on the "voluminous evidence" provided by BWC to find that relator was a self-employed psychic/tarot card reader and a frequent psychic guest on a radio program. The SHO also found that relator received monetary compensation for her services. Because relator was engaged in remunerative activity, the SHO concluded that relator was ineligible to receive TTD compensation.

{¶18} The purpose of TTD compensation is to give an injured worker income while his or her injury heals. *State ex rel. Bonham v. Indus. Comm.*, 10th Dist. No. 06AP-85, 2006-Ohio-6042, ¶20, citing *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42. Thus, TTD compensation ends when a claimant returns to work. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶19} Here, there was ample evidence to support the commission's determination that relator was working. Although relator's self-employment as a psychic/tarot card reader may have been sporadic, the evidence demonstrates that she was paid for her services. Even part-time self-employment for low wages is sufficient to constitute earnings for these purposes. See, e.g., *State ex rel. Jerdo v. Pride Cast Metals, Inc.*, 95 Ohio St.3d 18, 2002-Ohio-1491 (receipt of salary as minister precluded permanent total disability compensation); *State ex rel. Blabac v. Indus. Comm.*, 87 Ohio St.3d 113, 1999-Ohio-249 (work as part-time scuba instructor precluded TTD compensation); *Bonham* (maintenance of business selling homemade soaps and lotions at a flea market and over the internet precluded TTD compensation).

{¶20} In her fourth objection, relator contends that there is no evidence that she received remuneration for the entire period from October 25, 2006 through December 17, 2007. She cites three dates on which she earned a total of \$135, the earliest of which is March 3, 2007. We disagree with relator's characterization of the evidence.

{¶21} The SID investigative report states that SID received information that relator was observed working at an event on October 25, 2006, and that she could be contacted for private psychic readings at a cost of \$20 for 20 minutes. R.82 is a statement to that effect submitted by the employer's Safety & Risk Coordinator, Sue Freetly. R.83 is a statement submitted by Doreen Morris. R.84 is a statement submitted by Patty Bearce. R.85 is purported to be a photo of relator at the October 25, 2006 event.

{¶22} In addition to the evidence that relates specifically to the event on October 25, 2006, there is also evidence that relator had been working as a psychic for many years. She received advertised fees for this work.

{¶23} Finally, while relator cites to only three specific dates between March 2007 and December 2007, when she received a total of \$135 from SID agents, the record contains far more evidence of payments and earnings during the entire time period. The SID report refers to occasions on which agents observed relator giving a reading or when they observed her appointment book for upcoming readings. R.219 also identifies payments from numerous clients. There was evidence that relator also earned donations or fees for house parties, group readings, private readings, and classes. Therefore, we overrule relator's fourth objection.

{¶24} While the SHO's order concluded that relator was ineligible for TTD compensation because she was working and being compensated for that work, much of the magistrate's decision, and relator's second objection, considers whether relator's activities as a psychic were inconsistent with her disability. We conclude, however, that we need not consider this issue. As the commission contends, the SHO's finding that relator was engaged in remunerative activity was sufficient to preclude TTD compensation for that same time period, regardless of whether relator was performing activities outside her restrictions. See, e.g., *State ex rel. Johnson v. Rawac Plating Co.* (1991), 61 Ohio St.3d 599, 600 (stating that a return to any gainful employment precludes TTD compensation); *Bonham* (maintenance of business precluded TTD even though relator's activities were not necessarily inconsistent with her restrictions).

{¶25} Having concluded that we need not consider whether relator's activities were inconsistent with her restrictions, we overrule relator's second objection. We delete from the magistrate's decision the discussion in ¶¶69-70. We also delete from the magistrate's decision ¶¶75-76.

{¶26} Relator's third and fifth objections contend that the magistrate improperly shifted the burden of proof to relator on the issue of fraud. We disagree and conclude that the magistrate properly stated the applicable burdens of proof. Therefore, we overrule relator's third and fifth objections.

{¶27} In her sixth objection, relator contends that the magistrate erred by denying relator's request for a writ of mandamus on the commission's finding of fraud. Although the magistrate denied the writ, the magistrate states in her decision that she agrees with relator that the commission abused its discretion in finding fraud and also

states: "The record does not support a strong enough case to make a finding of fraud in this situation." We agree that the magistrate's decision includes inconsistent statements concerning the finding of fraud. We begin our analysis with the SHO's order.

{¶28} In his order, the SHO properly stated the elements BWC must establish in order to show a prima facie case of fraud, and he carefully analyzed each element. The SHO found that relator was aware of her duty to disclose work activity. To reach this finding, the SHO relied on the warning on the back of the BWC warrants relator endorsed and the C-84 forms she executed.

{¶29} The SHO also relied on the SID investigative report. The report cites BWC medical documentation, which contains relator's descriptions of her work and social history and her current well-being. Although the documentation contains references to relator's hobbies and daily activities, none of the documents contain any reference to relator's work as a psychic, tarot card reader or radio show guest, whether as a hobby or as an occupation. Nor does the documentation contain any disclosure that relator is an instructor, ordained minister or a certified reiki practitioner.

{¶30} The disclosures relator did make about her daily activities are inconsistent with those documented during the SID investigation. For example, in January 2007, relator stated "that most of the time she is at home and is rather limited in her physical activity." In November 2007, she stated that she visits with friends several times per week. She said that she goes to a friend's store and "spend[s] about three to four hours talking with the owner and the customers." And in December 2007, relator said that her " 'activity level went from high down to nothing.' "

{¶31} Relator was being treated for her allowed psychological conditions. According to the SID investigative report, however, relator did not disclose to Marion Chaterjee, Ph.D., that she was working, that she was involved in psychic readings or fairs or that she was acting as an instructor.

{¶32} Finally, when interviewed by SID agents, relator stated that she is an ordained minister and that she had counseled people at a friend's store over the last three years. When asked whether she had received payment, she revealed only that she "may have received '\$10 here or there.' "

{¶33} Having reviewed the entire record, we disagree with the magistrate's statement that the evidence was not strong enough to establish fraud. Therefore, we delete ¶81 from the magistrate's decision. We also delete the sentence "This magistrate agrees" from ¶77.

{¶34} The commission has discretion to determine questions of credibility and the weight to be given evidence. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. Based on the evidence before it, particularly the evidence contained in the SID investigative report, the commission did not abuse its discretion in making a finding of fraud. Therefore, we need not disturb the magistrate's refusal to grant a writ of mandamus as to the commission's finding of fraud, and we overrule relator's sixth objection.

{¶35} Based on our independent review of the evidence in this matter, we sustain relator's first objection in part, and we overrule relator's second, third, fourth, fifth, and sixth objections. We adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, only to the extent stated in our decision. In

accordance with the foregoing decision and the remaining portions of the magistrate's decision, we deny the requested writ.

*Objection sustained in part,
remaining objections overruled,
writ of mandamus denied.*

BRYANT and KLATT, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Laura L. Walters,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-337
	:	
WEK Acquisition Corp., Inc. dba	:	(REGULAR CALENDAR)
WEK Industries Inc. and Industrial	:	
Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 11, 2010

Dworken & Bernstein Co., L.P.A., Jonathan T. Stender and Jo A. Tatarko, for relator.

Hanna, Campbell & Powell, Timothy Campbell and Anthony Coleman, for respondent WEK Acquisition Corp.

Richard Cordray, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶36} Relator, Laura L. Waters, 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 finding that she was engaged in work activities during the period in which she received temporary total disability ("TTD") compensation and

finding fraud. Relator asks this court to order the commission to find that the evidence does not support a finding that her activities were inconsistent with her restrictions or that it amounted to sustained remunerative employment and finding that she was not working during the period at issue.

Findings of Fact:

{¶37} 1. On November 26, 2002, relator sustained an industrial injury and her workers' compensation claim was originally allowed for "bilateral shoulder sprain; impingement syndrome right; tear right rotator cuff."

{¶38} 2. Based on these allowed conditions, relator was awarded TTD compensation beginning October 9, 2004 through March 1, 2005, and continuing.

{¶39} 3. In a letter mailed November 3, 2005, the Ohio Bureau of Workers' Compensation ("BWC") informed relator that there was information from an independent medical examination finding that her allowed physical conditions had reached maximum medical improvement ("MMI"). Relator was informed that either the BWC or the commission would consider whether or not her TTD compensation should be terminated.

{¶40} 4. Relator requested a new period of TTD compensation beginning September 16, 2005, and the BWC referred the claim to the commission for consideration.

{¶41} 5. Following the hearing on December 13, 2005, a district hearing officer ("DHO") granted relator's request for TTD compensation from September 16, 2005 through December 13, 2005.

{¶42} 6. Relator requested that her claim be additionally allowed for certain psychological conditions and, following a hearing on January 30, 2006, the DHO granted the motion and relator's claim was additionally allowed for "depressive disorder nec and anxiety nos."

{¶43} 7. At some point in time in 2006, relator's TTD compensation, being paid based solely on her allowed physical conditions, was terminated.

{¶44} 8. Earlier, in a report dated September 6, 2005, Donald Jay Weinstein, Ph.D., opined that relator's allowed psychological conditions rendered her unable to perform her former position of employment.

{¶45} 9. In a C-84 dated September 11, 2006, Marion M. Chatterjee, Ph.D., certified a period of temporary total disability beginning September 6, 2005. According to Dr. Chatterjee, relator was irritable, anxious, and had a decreased inability to tolerate stress.

{¶46} 10. Dr. Chatterjee or her associate, Dr. Weinstein, continued to certify that relator was temporarily totally disabled, submitting C-84s through January 29, 2008. Regarding either the restrictions or objective findings upon which they based their certification, the doctors noted further: low mental stamina; low energy; frustration; difficulties with concentration; inability to focus; anxiety; and fatigue.

{¶47} 11. Relator was examined by Michael B. Leach, Ph.D., on August 14, 2006. With regard to her current symptoms, Dr. Leach noted that relator reported she was anxious and depressed and that she was unable to work because the pain affects her entire life causing her to suffer anger, resentment, and frustration. Relator indicated that the medication helped her feel different, but that she still did not feel better. She

indicated further that she was trying to get into a routine so that she could get back to doing the things she used to do. Dr. Leach's assistant administered the Beck Depression Inventory-II test to relator. According to the test, relator's depression was in the moderate range indicating that she continues to experience symptoms including "sadness, worry, pessimism, feelings that she is being punished, loss of interest and pleasure in activities, and difficulty concentrating." Dr. Leach opined that relator's allowed psychological condition had not yet reached MMI and that she would likely require continuing psychiatric care for the next 12 months. Dr. Leach indicated further that relator was not able to return to her former position. With regard to functional limitations, Dr. Leach stated:

Ms. Walters is not capable of handling the stress of employment at this time due to depressive and anxiety symptoms. * * *

Ms. Walters should be afforded continued counseling through the vocational rehab. process and she is very motivated to be able to work; her psychological symptoms as a result of this injury would likely improve if she were able to return to gainful employment. * * *

{¶48} 12. Relator was examined again on January 3, 2007, by Thomas Cassady, Ph.D. Dr. Cassady indicated that relator had been in psychotherapy since September 2005. Testing administered by Dr. Cassady suggested that relator suffered from a variety of depressive symptoms, including:

* * * [F]eeling sad all the time, feeling discouraged about the future, feeling like a failure, not enjoying things the way she use to, and feeling disappointed in herself. Further symptomology included getting annoyed and irritated much of [the] time, feeling less interested in other people, putting off decisions, worry and concern about being old and unattractive, having to push herself to do things, waking up

prematurely, getting fatigued and tired doing almost everything, a lessened interest in sex, and chronic worry about physical problems.

{¶49} Thereafter, Dr. Cassady identified the medical records which he reviewed and concluded that relator had not reached MMI. Further, Dr. Cassady opined that relator could neither return to her former position of employment nor could she return to any other employment at the present time. Dr. Cassady stated that relator was depressed, anxious, coping with daily limitations, socially isolated, and negativistic. These symptoms would make it very difficult for her to perform any kind of employment.

{¶50} 13. Relator was examined by Cheryl Benson-Blankenship, Ph.D., on June 1, 2007. Dr. Benson-Blankenship opined that relator's level of depression was moderate, that she had not yet reached MMI and could not return to her former position of employment. Dr. Benson-Blankenship did notice some lessening in the areas of socialization, stress tolerance, focus, concentration, and adaptation, as well as a reduction in the diagnostic symptoms of depression and anxiety; however, she was not yet able to return to work.

{¶51} 14. Relator was examined by Stanley J. Palumbo, Ph.D., in November 2007. In his report dated November 8, 2007, Dr. Palumbo reviewed the medical evidence in the record and administered certain tests. Thereafter, Dr. Palumbo opined that relator had reached MMI and had mild to moderate problems with energy, tearfulness, and irritability. He indicated that presently, relator presented with minimal symptoms of anxiety and depression, which symptoms have been present since the earliest evaluations. Dr. Palumbo noted that relator did report improvement in these symptoms, but they did not go away.

{¶52} 15. A hearing was held before a DHO on December 17, 2007. At that time, the DHO concluded that relator's allowed psychological conditions had reached MMI based upon the report of Dr. Palumbo and relator's TTD compensation was terminated.

{¶53} 16. Relator's appeal was heard before a staff hearing officer ("SHO") on January 28, 2008. The SHO affirmed the prior DHO's order and, relying on Dr. Palumbo's report, concluded that relator's allowed psychological conditions had reached MMI and that her TTD compensation should be terminated.

{¶54} 17. Relator's further appeal was refused by order of the commission mailed February 13, 2008.

{¶55} 18. In the interim, the BWC Special Investigations Department ("SID") began investigating relator. The investigation began as follows:

On November 14, 2006, the BWC SID received a fraud allegation via BWC's website from Sue Freetly (Freetly) with the Employer of Record (EOR), WEK Industries (WEK)[.] Freetly referred this case based on statements from her and other WEK employees who observed WALTERS working as a psychic at a "Women Who Wine" event held at Debonne's Winery on October 25, 2006 in Madison, OH. At this event, WALTERS stated that she (WALTERS) could be contacted through the Silver Branch gift store for private psychic readings (\$20 for twenty minutes)[.]

{¶56} The investigation continued through June 2008. The evidence gathered by SID included the following: On December 19, 2006, SID was informed by Sue Freetly that relator provided free psychic readings at the "Women Who Wine" event and that she occasionally heard relator on the radio station during their Psychic Thursday program. Freetly also stated that relator was at a psychic fair sponsored by Silver

Branch on November 18, 2006. Relator provided psychic readings costing \$20 for 20 minutes. Freetly also stated that the radio announcers indicated that relator had been doing psychic readings for 12 years. On December [21], 2006, SID agent Lang began surveillance at Silver Branch. Relator's business card was available at Silver Branch and provided the following information: "Rev Laura Walters, specializing in hypnotherapy, past life regression, baptism and other practices." According to the owner of Silver Branch, Shari Lynn, she booked readings for relator at Silver Branch and would call relator directly to set up appointments. On January 18, 2007, Lang received information from Freetly that she had heard relator, identified on the radio as "Lady Laura," indicate that she would be working at Silver Branch next week and at a psychic fair on January 27, 2007. Apparently, the radio station also advertised that Lady Laura would be at the Clyde Psychic Fair.

{¶57} On January 19, 2007, Lang attended the Clyde Psychic Fair, saw a poster board in the lobby listing relator as a tarot card reader and observed relator providing a tarot card reading for a customer. On January 25, 2007, SID agent Creed was informed that relator had again appeared on the radio on the Psychic Thursday program. On January 26, 2007, Lang contacted Silver Branch and learned that relator would not be present at the January 27, 2007 psychic fair because she recently had surgery. ~~On February 1, 2007, Creed was presented with a tape of the latest Psychic Thursday program which~~ [Agent Lang obtained a tape of the latest Psychic Thursday program that] aired on February 15, 2007, indicating that relator would be teaching classes at Silver Branch. On February 27, 2007, Lang traveled to Silver Branch and obtained information regarding a new monthly class entitled "Awakening the Psychic You" with

Lady Laura. Lang learned that the cost for the class was a \$10 donation. On March 1, 2007, Lang recorded the Psychic Thursday program; however, relator did not appear that day. On March 2, 2007, Lang contacted Silver Branch and learned that Lady Laura was conducting a "mediumship or developmental class" on March 7, 2007, and asking for a \$10 donation. On March 7, 2007, Lang and SID agent Miles attended the class where relator explained the process of meditation and led the class through a meditation circle. Relator indicated that, as the class progressed, some homework would be assigned. Donations were taken. ~~On March 27, 2007, Lang learned that relator would be teaching another developmental class on April 4, 2007.~~ On April 4, 2007, Lang and Miles attended [another] ~~the~~ developmental class and engaged relator in conversation. They asked relator about getting a group of friends together and having relator provide readings. Relator indicated that she does do private readings. Donations were requested and it was established that the class would meet every other Wednesday beginning April 18, 2007. Relator requested e-mail addresses so she could provide updates and reminders of upcoming events to her students. On April 17, 2008, Lang received an e-mail reminder for the next class. On April 18, 2007, Lang e-mailed relator indicating that he would not be able to attend class that evening and asking again about a group reading. Relator responded, indicating that she had some interest in starting a Saturday class. On April 19, 2007, Lang received an audio recording of the March 18, 2007 Psychic Thursday program. On May 15, 2007, Lang received an e-mail from relator indicating that she was recently working at large psychic fairs and that she would be working a ghost tour in July and at Lakeland Community College in September. On May 24, 2007, Lang received a telephone call from Freetly indicating

that relator would be working a psychic fair at the Silver Branch on May 26, 2007. Lang was again contacted on June 28, 2007, and informed that relator would be working the psychic fair at Silver Branch on June [30], 2007, and at Aradia's Garden on July 1, 2007. On August 13, 2007, Creed visited the website for Aradia's Garden and learned that relator did readings there on Thursdays by appointment only. On August 15, 2007, Creed learned that relator had been named psychic of the month for August at Aradia's Garden and that, on September 7 through 9, 2007, an event called "The Mind, Body, & Soul Expo 2007" would be sponsored by "The Journey." Creed completed a Google search of "The Journey" and saw that relator's business card was included in their e-magazine edition. On August 23, 2007, Lang and SID agent Mergen went to Aradia's Garden, but learned that relator would not be there until Thursday. On September 6, 2007, Lang called Aradia's Garden to schedule an appointment for a private reading with relator. A 2:00 p.m. appointment was arranged; however, relator had to cancel the appointment. Lang also obtained more tapes from the Psychic Thursday programs for the month of August. On September 7, 2007, Lang and Mergen went to Lakeland Community College and observed relator providing tarot card readings. Lang received a tarot card reading and asked relator about her developmental psychic classes. Apparently, relator indicated that the classes were going well and that she was adding a "sweat lodge session" to the class. She also indicated that she had been "so 'busy' that she did not have time to respond to e-mails." Lang paid relator \$25 for the session and observed relator give tarot card readings to other people. ~~On September 9, 2007, Lang and Mergen again received tarot card readings from relator at Lakeland Community College and observed relator providing tarot card readings for other people. [On~~

September 9, 2007, Lang and Mergen again went to Lakeland Community College, where relator had a booth set up for providing tarot card readings.] The agents reviewed relator's sign-up book for the expo weekend and noted that it appeared full for Friday and Saturday with appointments every 20 minutes. Mergen inquired about private readings. Relator provided her with a business card from Aradia's Garden and indicated that she was there every Thursday. Relator indicated that the price for a private reading was \$35 for 30 minutes. Relator also provided Mergen with a business card from Silver Branch and indicated that she was there on Wednesdays. On September 10, 2007, Lang received a fax from Freetly regarding additional advertisements for relator. On November 1, 2007, Lang received a call from Freetly indicating that relator continued to appear on the radio on the Psychic Thursday program. Freetly indicated that relator stated that she had a " 'Fairy Festival' to attend in Philadelphia with Shari from the Silver Branch." On November 4, 2007, Lang was at Silver Branch and spoke with relator. As they were talking, Lang learned that relator only had one or two readings the previous day, that she was still appearing on the radio, that readings were \$20 for 25 minutes, that she had been very busy since "The Mind, Body, & Soul Expo 2007" at Lakeland Community College, that she had been giving readings all over and recently had a house party the previous week, that she had two readings at Silver Branch the next day, as well as one reading at the "Ashtabula Wellness Center" and house party. On November 5, 2007, additional evidence was gathered concerning relator's availability for readings. On December [3], 2007, SID intern Judi Gill called relator to set up a group reading. Gill was informed that a large group would be \$25 for 20 minutes or \$35 for 30 minutes per person. On December 12,

2007, Gill set up an appointment with relator for a group reading. On December 15, 2007, Lang and others participated in a group reading with relator and she was paid a total of \$100. On January 9, 2008, Lang traveled to Aradia's Garden and was told that relator was an independent contractor. On January 9, 2008, Lang also traveled to the "Wellness and Total Learning Center" ("WTLC") seeking a list of relator's clients and payment information. ~~Lang was given a copy of information from March 4 through November 30, 2007, which listed payments made to relator.~~ [Lang was given a copy of a document listing payment information from March 3, 2007 through November 30, 2007, and for one payment on "1-9-07."] On January 17, 2008, Lang completed a review of the client list from WTLC and learned that relator gave three readings at various psychic fairs and six private readings. On February 21, 2008, Lang and Creed confirmed relator's activities at Aradia's Garden: relator had worked there as an independent contractor since ~~December~~ [the summer of] 2007, was available/on-call on Thursdays for appointments and indicated that only two people came for readings that summer. On March 19, 2008, Lang and Creed confirmed the information they had previously gathered from Silver Branch and, on June 2, 2008, Lang contacted relator through her attorneys. All of this information is included in the SID report of investigation dated June 30, 2008.

{¶58} 19. The BWC filed a motion requesting that the commission declare an overpayment and make a finding of fraud. As part of the evidence submitted, the BWC included copies of warrant checks negotiated by relator from November 2, 2006 through December 24, 2007. Each of those warrants includes language warning the recipient that they are not entitled to TTD compensation if they are employed.

{¶59} 20. A hearing was held before a DHO on October 30, 2008, and resulted in an order finding that relator had been self-employed as a psychic/tarot card reader during the period at issue and was not entitled to TTD compensation. The DHO also found that the BWC had met its burden of proof with regard to the issue of fraud and found that relator had been overpaid TTD compensation from October 25, 2006 through December 17, 2007, and that the amount should be recouped pursuant to R.C. 4123.511.

{¶60} 21. Relator appealed and the matter was heard before an SHO on December 10, 2008. The SHO affirmed the prior DHO's order finding that relator had been overpaid TTD compensation from October 25, 2006 through December 17, 2007, and finding that the BWC had met its burden of establishing fraud so the overpayment would be recouped pursuant to the fraud provisions of R.C. 4123.511. In finding that relator had been self-employed as a psychic/tarot card reader during that same period, the SHO identified the evidence upon which he relied:

In issuing this order, the Staff Hearing Officer relies upon the voluminous evidence attached as Exhibits 1-19 to the Bureau of Workers' Compensation Motion of 07/23/08. These exhibits set forth the investigation performed by the Bureau of Workers' Compensation Special Investigations Unit concerning Walters' self-employment as a "Psychic/Tarot Card Reader" in the period in which she received temporary total disability compensation. This evidence demonstrates that Walters was self-employed as a "Psychic/Tarot Card Reader" at various locations; including but not limited to, the Silver Branch, Aradia's Garden, and WLTC [sic]. Walters advertised that the fee for psychic services was \$20.00 for 20 minutes. In addition to providing services at these locations, Walters presented monthly classes, entitled "Awakening the Psychic You," beginning 03/07/07 at the Silver Branch. Donations of \$10.00 were requested from each participant in the class that Walters

instructed. Agents for the Bureau of Workers' Compensation Special Investigations Unit attended such a class on 03/07/07 and complied with the \$10.00 donation request. In addition, Agents for the Bureau of Workers' Compensation Special Investigations Unit provided Walters a total amount of \$100.00 for a group reading scheduled with the undercover agents on 12/15/07.

In addition to the above activities, Walters was a frequent psychic guest on Radio Station STAR. The evidence in file establishes that Claimant appeared as a guest on this Radio Program on 01/25/07, 02/15/07, 03/01/07, 03/18/07, 08/23/07, 08/30/08, 09/06/07, 10/11/07 and 11/01/07. In these appearances, Walters advertised that her fee for Psychic/Tarot Card Readings was \$20.00 for 20 minutes. In addition, the Radio Station would provide advertising of special events at which Walters would be performing as a Psychic/Tarot Card Reader. Such places included the Clyde Psychic Fair; the Psychic Fair scheduled at the Silver Branch on 05/26/07; and the Fairy Festival in Philadelphia held in late fall of 2007.

Exhibits 1-19 attached to the Bureau of Workers' Compensation Motion of 07/23/08 established that Walters was engaged in self-employment in the period for which she received temporary total disability compensation benefits from 10/25/06 through 12/17/07, inclusive. This evidence further establishes that this activity was for profit. The evidence further establishes that Walters advertised her fees for her services, and in fact, on several occasions received monetary compensation from the Bureau of Workers' Compensation undercover Special Investigations Unit agents for her services in providing "group readings," and psychic classes called "Awakening the Psychic You." Walters was not present at hearing to refute any of this evidence submitted by the Bureau of Workers' Compensation in support of its Motion. Given these findings, the Staff Hearing Officer is persuaded that the Bureau of Workers' Compensation has established its requisite burden of proof in support of its 07/23/08 request for overpayment of temporary total disability compensation benefits, and a finding of fraud.

{¶61} The SHO also concluded that the BWC had presented substantial, probative, and reliable evidence to establish each of the elements of fraud as follows:

The Staff Hearing Officer finds that, Walters intentionally concealed from the Bureau of Workers' Compensation that she was engaged in sustained remunerative employment in the period from 10/25/06 through 12/17/07, inclusive. The evidence of record substantiates that Walters worked as a "Psychic/Tarot Card Reader" during the above period. Walters was paid for her services. This is evidenced by the payments made by undercover agents for the Bureau of Workers' Compensation Special Investigations Unit for group readings, and for their attendance in a psychic class instructed by Walters. In addition, this is evidenced in the manner in which Walters advertised for her services, specifically setting a fee of \$20.00 for 20 minutes per each psychic reading.

The Staff Hearing Officer further finds that Walters was aware of her duty to disclose such work activity by the language of the warning on the back of the Bureau of Workers' Compensation Warrants which she endorsed, and by virtue of the C-84 Forms she executed and filed with the Bureau of Workers' Compensation to secure temporary total disability compensation benefits during the above time frame. These forms specifically instruct that an injured worker is not entitled to temporary total disability compensation benefits if that injured worker is employed. Walters was under a duty to disclose to the Bureau of Workers' Compensation her return to any sustained remunerative employment. Walters chose to disregard this duty, and instead sought to conceal her work activity by falsifying her C-84 request for temporary total disability compensation benefits pertinent to the above period.

The Staff Hearing Officer further finds that Walters' concealment of her employment during the above time frame from the Bureau of Workers' Compensation was material to the transaction at hand; had Walters informed the Bureau of Workers' Compensation of her employment, Laura L. Walters would not have received temporary total disability compensation benefits from 10/25/06 through 12/17/07, inclusive. The Staff Hearing Officer further finds that Walters' falsification of her C-84 request for compensation was made

with the intent of misleading the Bureau of Workers' Compensation to believe that she was not engaged in sustained remunerative activities. The false belief of the Bureau of Workers' Compensation, created by Walters, was for the purpose of her securing temporary total disability compensation benefits for which she would not have otherwise been entitled to receive.

The Staff Hearing Officer finds that the Bureau of Workers' Compensation justifiably relied upon the misrepresentations of Walters that she was not engaged in work activity during the period from 10/25/06 through 12/17/07, inclusive. As a consequence of this reliance, the Bureau of Workers' Compensation suffered harm in that it paid out a substantial sum of temporary total disability compensation benefits to which Walters was not otherwise entitled to received [sic].

{¶62} 22. Relator's further appeal was refused by order of the commission mailed January 3, 2009.

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

Conclusions of Law:

{¶64} For the reasons that follow, it is this magistrate's decision that this court deny relator's request for a writ of mandamus.

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

of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶66} Relator argues that there is no evidence that her activity rose to the level of work, which is required to prove overpayment and fraud. Further, relator contends that there is no evidence to support the finding that she intended to defraud the BWC. Relator contends that a finding of fraud is not supported when it involves insubstantial amounts of money and where the activities are not inconsistent with the restrictions. Lastly, relator contends that the finding of an overpayment for the entire period is not supported by the evidence.

{¶67} Temporary total disability benefits are intended to compensate an injured worker for the loss of earnings sustained while their work injury heals. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, and *State ex rel. Parma Community Gen. Hosp. v. Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336. Accordingly, temporary total benefits cease when a claimant has returned to work. *Id.* *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630. While *Ramirez* did not define "work," later cases indicate that remuneration is a key element. *Parma Community*. Therefore, if a claimant (1) is performing only minimal activity which is not inconsistent with the claimant's medical restriction, and (2) the claimant is receiving no remuneration for it, then the claimant generally may receive TTD compensation for the period in which the claimant is performing the activity. *Parma Community*.

{¶68} In the present case, relator was receiving TTD compensation solely for her allowed psychological conditions. As indicated in the findings of fact, the medical evidence upon which the commission relied in finding that relator could not return to her former position of employment included that relator was anxious and depressed, was irritable and suffered from fatigue, appetite loss, depression, as well as impaired memory and concentration. Relator had indicated that she lacked energy and motivation and that she found it exhausting to deal with people. The evidence indicates that relator continued to struggle with confusion and a sense of being overwhelmed. All of these symptoms/restrictions upon which the doctors relied in opining that she was not capable of returning to work would affect relator's ability to interact with people.

~~{¶69} Although relator contends that she was not performing activities outside of her restrictions, the magistrate disagrees. Relator had to schedule appointments, meet clients at different locations, constantly adjust her schedule, interact with individuals as well as groups of people, and all of this on an ongoing basis. While relator is correct to argue that the evidence does not show that she received substantial amounts of money, relator is incorrect when she asserts that her activities were not outside her restrictions. The cases cited by relator involve the claimants with physical restrictions and where it was found that their activities did not exceed their physical restrictions and their remuneration was insubstantial. In those cases, it was determined that the claimants' activities did not constitute work. Here, the magistrate finds that the commission did not abuse its discretion in finding that relator was working because her activities are outside her restrictions. As such, regardless of the fact that her earnings were modest, the~~

~~record indicates that relator was performing activities outside her restrictions on a continuous basis from October 25, 2006 and continuing.~~

~~{¶70} At oral argument, relator's counsel argued that none of the doctors were asked whether or not these activities were outside relator's restrictions. This is true. It is easy to say that a claimant with a back injury and a five pound lifting limit is performing activities outside his/her restrictions if they are digging ditches. Here, while it may not be as easy, the magistrate finds that there is more than enough evidence from which the commission could conclude that relator's activities as a psychic were outside her psychological restrictions.~~

{¶71} Relator also contends that the commission did not establish that she was remunerated during the entire period. Presumably, this is based on a lack of evidence that relator was paid while working as a psychic at the "Women Who Wine" event on October 25, 2006.

{¶72} In *State ex rel. Griffith v. Radix Wire Co.*, 161 Ohio App.3d 30, 2005-Ohio-2200, this court reviewed a commission's order finding that a claimant had been working while receiving TTD compensation and stressed the necessity that the BWC prove that a claimant actually received money for services they provided. In that case, there was testimony from the claimant and the owner of the establishment for which claimant allegedly performed work, that the work activity he performed took place before the date of his injury. The commission rejected this evidence finding that the witnesses were not credible and concluded that the work claimant performed did occur after his injury and that was the activity for which he was paid. This court found that such speculation was improper and concluded that this finding was not supported by some evidence.

{¶73} In the present case, there is evidence in the record indicating that relator appeared as a psychic at the "Women Who Wine" event on October 25, 2006. However, there is no evidence that relator received any compensation for that event. Instead, Freetly provided information that one person had been chosen for a free psychic reading and that relator informed the visitors that she could be reached at Silver Branch for private readings and could be heard on the radio on Psychic Thursday. As such, relator correctly argues that there is no evidence in the record that she received remuneration for this event. In fact, the BWC's evidence could not support a finding that relator received remuneration until sometime in spring 2007 when SID agents visited with her.

{¶74} However, in the present case, the magistrate finds that this lack of evidence with regard to remuneration is immaterial because there is some evidence in the record upon which the commission relied to find that relator was performing activities inconsistent with her psychological restrictions as early as October 26, 2006. Because relator was capable of performing these activities, her medical evidence indicating that these limitations precluded her from returning to her former position of employment are called into issue. The question becomes whether or not these doctors would have certified a period of TTD if they had known that relator was attending these psychic fairs, providing group classes and individual readings, conducting readings in the homes of clients, and guesting on a radio station.

~~{¶75} When a claimant is receiving TTD compensation due to allowed physical conditions and is observed engaging in activities which are inconsistent with their~~

~~physical restrictions, these claimants are not entitled to TTD compensation in spite of the fact that there may be no remuneration at all for their activities.~~

~~{¶76} In the present case, the magistrate finds that the commission did not abuse its discretion in finding that relator was engaged in activities which were inconsistent with her psychological limitations as of October 26, 2006. As such, the magistrate finds that the commission did not abuse its discretion in finding an overpayment as of that date.~~

{¶77} Relator also contends that the commission abused its discretion in finding fraud. ~~This magistrate agrees.~~

{¶78} In order to establish a prima facie case of fraud, the BWC must establish the following six elements: (1) a misrepresentation, or whether there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with the knowledge of its falsity, or with such utter disregard in recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon the misrepresentation or concealment; (5) justifiable reliance upon the representation or concealment; and (6) a result in injury caused by the reliance. *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54.

{¶79} In the present case, relator did not appear to testify before the commission. The commission's decision was based on claimant's medical evidence and the SID report and its attachments. In making her argument, relator argues that the BWC failed to establish intent. In the cases cited by relator in support of her argument, the claimants had presented evidence. Specifically, in *State ex rel. Allied Holdings, Inc. v. Indus. Comm.*, 10th Dist. No. 06AP-1029, 2007-Ohio-5010, the commission found

that the BWC had not demonstrated fraud. In that case, the commission considered the claimant's testimony and found that he did not have the intent necessary to commit fraud.

{¶80} Relator also cites *State ex rel. Honda of Am. Mfg., Inc. v. Indus. Comm.*, 10th Dist. No. 04AP-765, 2005-Ohio-4672, where the commission again found that the BWC had not established fraud. In that case, the BWC presented evidence over a three-month period which included only five days of video surveillance. On only three of the five occasions was the claimant observed giving any customer assistance. The claimant testified that the store was run by her children and the commission found that any income which was generated by the claimant's minimal activities was secondary and that they furthered the goodwill of the business. Further, the commission specifically found that the activities were not inconsistent with the claimant's restrictions. This court upheld the commission's determination as supported by some evidence.

~~{¶81} As stated previously, in the present case, claimant did not offer any evidence or testimony contrary to the evidence presented by the BWC. However, according to the evidence gathered by the BWC, relator had been a psychic for at least the past 12 years. Was this more like an avocation simply something relator had done for pleasure over the years? From the record, it is clear that it was not lucrative. Relator began these activities near the time her second marriage ended in the mid to late 1990s. She is living with one of her sons and has previously worked at Millard's Department Store, K Mart, a florist shop, and a factory. The record does not support a strong enough case to make a finding of fraud in this situation.~~

{¶82} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in finding that she was overpaid TTD compensation and in further finding that she committed fraud and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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