

Case No. 2009-1666

**IN THE SUPREME COURT OF OHIO**

**ORIGINAL**

---

STATE OF OHIO, ex rel. MARIA MARRERO

Relator,

v.

THE INDUSTRIAL COMMISSION OF OHIO,

-and-

LIFE CARE CENTERS OF AMERICA, INC.

Respondents.

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ORIGINAL COMPLAINT IN MANDAMUS

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BRIEF FOR THE RELATOR

---

Daniel L. Shapiro (0059584)  
Leah P. VanderKaay (0073772)

Counsel for Relator

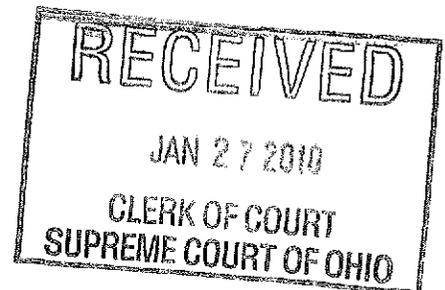
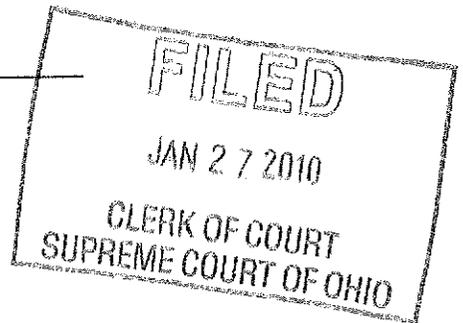


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## STATEMENT OF THE CASE

Relator, Maria Marrero, is the Claimant in a workers' compensation claim carried on the dockets of the Industrial Commission of Ohio and the Bureau of Workers' Compensation as claim number 06-406897. Respondent, Industrial Commission of Ohio ("Commission") is charged by law with the administration of the Workers' Compensation Law of Ohio as it pertains to applications for temporary total disability compensation. Respondent, Life Care Centers of America, Inc. ("Employer"), was at all times material hereto the employer of relator, Maria Marrero.

Relator suffered an injury in the course and scope of her employment with Employer on December 9, 2006. Her claim was assigned claim number 06-406897 and is recognized for the condition of *sprain shoulder/right upper arm*.

Miss. Marrero was out of work from December 10, 2006 through January 4, 2007. She returned to work in a light duty capacity per instructions from her physician of record, Dr. Strimbu. Miss Marrero was able to work only three days in January, 2007 – January 4, January 15, and January 26. **Stip 1 and Stip 2, pages 7, 8 & 9.**

Relator was then able to return to work in a light duty capacity from January 27, 2007 through March 28, 2007. She was offered a full-time position by the Employer, but in actuality was given very part-time work. In fact, Miss. Marrero was scheduled to work full-time during the month of March but was sent home twice, taken off the schedule five times and had her hours cut short on three other occasions. **Stip 1 and Stip 2, pages 10, 11 & 12.**

Miss. Marrero was out of work again from March 29, 2007 through April 26, 2007, as she was not put on the schedule to work. She was then back to work in a light duty capacity from April 27, 2007 and continuing. Again, she was promised full-time work but offered very minimal work. As such, Miss Marrero suffered a significant loss of wages. **Stip 1.**

Because Miss. Marrero was denied full-time work by Employer, she filed a motion with the Bureau of Workers' Compensation on September 5, 2007 for working wage loss compensation from January 27, 2007 through the present and to continue. **Stip 2.**

A subsequent application for working wage loss compensation with restrictions from Dr. Strimbu attached was filed with the Bureau of Workers' Compensation on October 16, 2007. **Stip 3.**

The BWC issued an Order dated February 28, 2008 granting Miss. Marrero's September, 2007 Motion for Working Wage Loss Compensation. The BWC granted payment for the closed period of January 27, 2007 through February 28, 2007 and again for the period from April 28, 2007 and to continue. **Stip. 4.**

Relator's Motions for working wage loss compensation were heard by a District Hearing Officer on April 8, 2008. The District Hearing Officer denied her request for two reasons: (1) she failed to specifically calculate for the hearing officer the exact loss suffered and, (2) she failed to show proof of a "good faith job search" as required by O.A.C. 4125-101 to supplement the request for working wage loss based upon reduced hours of work. **Appendix, pages 1-2.**

A Staff Hearing Officer also denied Miss. Marrero's request for compensation, based on a failure to show good faith effort to mitigate her losses by searching for alternative work. **Appendix, pages 3-4.**

The Industrial Commission affirmed both the District and Staff Hearing Officer's decisions in an Order dated July 1, 2008. **Appendix, pages 5-6.**

Magistrate Stephanie Bisca Brooks rendered a decision on April 29, 2009, finding in favor of relator, Maria Marrero. Specifically, Magistrate Brooks found that it was clear from evidence presented on behalf of Miss. Marrero that her employer was limiting her hours in such a way that her ability to search for other employment was significantly compromised. Further, the Magistrate held that the Commission merely cited the rule governing wage loss applications and failed to explore the circumstances surrounding relator's failure to seek other employment. She held that the employer in these situations should be held accountable for purposefully limiting the number of hours of work given to an employee in Miss. Marrero's position. As such, the Magistrate issued a writ of mandamus "ordering the commission to vacate its order which denied relator wage loss compensation and to issue a new order, either granting or denying the requested compensation, after exploring the reasons why relator was not working full time and how that impacted on her ability to seek other employment." **Appendix, pages 7-16.**

The commission and employer both filed objections to the conclusions of law contained in the magistrate's decision, arguing that relator has the burden to prove her entitlement to working wage loss compensation. The Tenth District Court of Appeals agreed, holding that absent evidence of a good-faith job search, or evidence supporting her argument that a job search was unnecessary under the circumstances, the commission did not abuse its discretion in denying wage loss compensation. **Appendix, pages 18-24.**

## STATEMENT OF THE ISSUE

Miss. Marrero's application for wage loss compensation should have been granted. Miss Marrero was promised full-time work by her employer but her hours were then limited to such an extent that her ability to search for alternate work was significantly compromised. The commission failed to take this purposeful limitation of hours into consideration and, as such, the commission order should be vacated.

## LAW AND ARGUMENT

- I. **THE SUPREME COURT HAS HELD THAT A CLAIMANT IS REQUIRED TO DEMONSTRATE A GOOD-FAITH EFFORT TO SEARCH FOR SUITABLE EMPLOYMENT WHICH IS COMPARABLY PAYING WORK BEFORE BEING ENTITLED TO WAGE LOSS COMPENSATION.**

Ohio Revised Code 4123.56(B)(1) (**Appendix, pages 28-29**) provides that, "If an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment due to an injury \* \* \*, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings not to exceed the statewide average weekly wage. "

O.A.C. 4125-1-01 (C)(5) (**Appendix, pages 30-37**) dictates that all claimants seeking or receiving working or non-working wage loss payments shall supplement their wage loss application with wage loss statements describing the search for

suitable employment. O.A.C. 4125-1-01 (C)(5)(a) says that this statement shall be submitted for every week during which wage loss compensation is sought.

O.A.C. 4125-1-01 (D) reveals that an adjudicator may give consideration to many things when determining a claimant's eligibility for wage loss compensation, one of which is whether the claimant satisfied a "good faith effort" to search for suitable alternative employment. This section of the administrative code indicates that the alternative work must be "comparably paying work." It also reads, "A good faith effort necessitates the claimant's consistent, sincere and best attempts to obtain suitable employment that will eliminate the wage loss." The Supreme Court of Ohio has ruled on such issues, holding that a claimant is required to demonstrate a good-faith effort to search for suitable employment and comparably paying work before he or she is entitled to both nonworking and working wage loss compensation. *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St. 3d 210; *State ex rel. Reamer v. Indus. Comm.* (1997), 77 Ohio St. 3d 450.

In evaluating whether the claimant has made a good faith effort, attention should be given to the following, among other things: (i) claimant's skills, prior employment history and educational background; (ii) number, quality and regularity of contacts made with prospective employers; (iii) the amount of time devoted to making prospective employer contacts as well as the number of hours spent working; (iv) labor market conditions (i.e. number and type of similar jobs/employers within a geographical area); (v) claimant's physical capabilities.

**II. THE SUPREME COURT OF OHIO HAS ALSO HELD THAT A JOB SEARCH IS NOT ALWAYS NECESSARY. THE ANALYSIS OF WHETHER A CLAIMANT SHOULD BE EXCUSED FROM A SEARCH FOR COMPARABLY PAYING WORK MUST BE FLEXIBLE AND BROAD, AND REVIEWED ON A CASE-BY-CASE BASIS.**

Receipt of wage-loss compensation hinges on whether there is a causal relationship between injury and reduced earnings. More specifically, it hinges on a finding that claimant's job choice was motivated by an injury-induced unavailability of other work and not simply a lifestyle choice. *State ex rel. Jones v. Kaiser Found. Hosp. Cleveland*, 84 Ohio St. 3d 405, 407. The requirement of a causal relationship is often satisfied by evidence of an unsuccessful search for other employment at the preinjury rate of pay. However, a job search is "not universally required." *State ex rel Ooten v. Siegel Interior Specialists Co.* (1998), 84 Ohio St. 3d 255, 256. Under some circumstances, a claimant's failure to seek alternate employment will be excused. The overriding concern is the desire to ensure that a lower-paying position, regardless of hours, is necessitated by the disability and not motivated by lifestyle choice. *State ex rel. Yates v. Abbott Laboratories, Inc.*, 95 Ohio St. 3d 142.

In determining whether to excuse a claimant's failure to search for another job, a broad-based analysis is used – one that looks beyond mere wage loss. *State ex rel. Brinkman v. Indus. Comm.* (1999), 87 Ohio St. 3d 171. In *State ex rel. Timken Co. v. Kovach*, 99 Ohio St. 3d 21, 2003-Ohio-2450, the Court excused a required job search where, "our broad-based analysis allows us to consider the fact that claimant's current employment is with Timken – the same company at which he was injured. This militates against requiring a job search because claimant has some time invested with Timken. He has years towards a company pension. Moreover, his longevity may have qualified him for additional weeks of vacation or personal days. Much of this could be compromised if claimant were to leave Timken for a job elsewhere."

**III. BASED ON THE UNIQUE FACTS OF THIS CASE, AS OUTLINED BELOW, MISS. MARRERO SHOULD BE EXCUSED FROM THE REQUIREMENT THAT SHE SEARCH FOR ALTERNATE AND COMPARABLY PAYING WORK.**

Miss Marrero's wage loss is due solely to the employer's inability to accommodate her light duty restrictions, as they had promised to do. The employer did not act in good faith when they offered Miss Marrero a full-time position that would accommodate her restrictions, as they must have known that they would not in actuality offer full-time work.

The biggest deterrent to Miss. Marrero's ability to find alternate work that would supplement her wage loss was the fact that the employer in this case promised full-time work but rarely, if ever, offered a set or reliable schedule. Miss Marrero was regularly taken off of the schedule and/or sent home early – this fact is uncontested, as can be seen from a review of the evidence in this case. **Stip. 1 and Stip 2, pages 15-23.** It would have been literally impossible for Miss. Marrero to commit to a second job when she never knew when she would and would not be offered work with the Employer in this case. This unpredictability made it impossible for her to commit to another employer in order to fulfill the "good faith effort" to find alternate work required by the Ohio Administrative Code. The standard to which Maria Marrero was held by the Commission during both her District and Staff Hearings was far beyond the standard to which Ohio Law dictates. What was asked of Miss. Marrero was beyond anything reasonable.

Based on the foregoing, Miss Marrero should have been excused from the standard requirement that she fulfill a "good faith job search" in order to mitigate her wage loss. Someone with a "full-time" job does not need to search for a second position.

As noted above in section I, O.A.C. 4125-1-01 (D) reveals that an adjudicator may give consideration to many things when determining a claimant's eligibility for wage loss compensation, **ONE** of which is whether the claimant satisfied a "good faith effort" to search for suitable alternative employment. Further, the above-cited case law reveals that a job search is "not universally required." *State ex rel Ooten v. Siegel Interior Specialists Co.* (1998), 84 Ohio St. 3d 255, 256. In determining whether to excuse a claimant's failure to search for another job, a broad-based analysis is used – one that looks beyond mere wage loss. *State ex rel. Brinkman v. Indus. Comm.* (1999), 87 Ohio St. 3d 171

As the Magistrate pointed out in her decision, the Commission merely cited the rule governing a request for working wage loss and entirely failed to explore the circumstances surrounding Miss. Marrero's failure to seek other employment. There did not seem to be any exploration of the circumstances surrounding her failure to seek alternate work. There was no consideration that the job-search requirement in this case may have been excused. There was no "broad-based analysis" into circumstances outside of mere wage loss. This was error on the part of the commission.

**IV. JUST AS CLAIMANTS ARE HELD ACCOUNTABLE FOR VOLUNTARILY LIMITING THEIR INCOME, EMPLOYERS SHOULD BE HELD ACCOUNTABLE FOR PURPOSEFULLY LIMITING THE NUMBER OF HOURS OF WORK GIVEN TO A CLAIMANT.**

As cited above, Ohio Admin. Code 4125-1-01(D)(1)(c) holds that a claimant seeking working wage loss and who has not returned to "suitable" employment with comparable pay must demonstrate "a good faith effort to search for suitable

employment which is comparably paying work." This rule goes on to explain, "a good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss." If it is determined that the claimant has not put forth a "good faith effort" which is "consistent" and "sincere", then that claimant will not be deemed eligible for wage loss compensation.

The same standard should apply to an employer who is faced with an application for wage loss compensation. The employer should be required to put forth a "good faith effort" to accommodate an injured worker who is willing and able to come back to work after suffering an injury. That offer of work should be "consistent" and "sincere" which, in this case, the offer was most certainly not. If an employer promises full-time work, then that employer should not be permitted to get away with purposefully limiting that injured worker's hours.

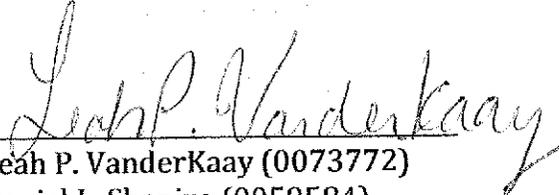
In this case, the employer is solely responsible for the loss of wages suffered by Maria Marrero. Their offer of full-time work was neither consistent nor sincere. She was promised full-time work but given very little. There was no predictability to when she would be sent home or taken off of the schedule and therefore there was not way for her to have committed to a second position somewhere else. Employers should be held accountable for their actions, just as claimants are.

### **CONCLUSION**

The Commission acted unlawfully and arbitrarily when it denied Maria Marrero's application for Working Wage Loss Compensation. By promising full-time work but randomly taking Miss. Marrero off of the schedule and consistently sending her home early, it was impossible for her to commit to a second position elsewhere. Under the unique circumstances of this case, Miss. Marrero should have been

excused from the "good faith job search" requirement. The Commission erred in not fully considering the circumstances surrounding her failure to seek other employment. The employer should be held accountable for purposefully limiting Miss. Marrero's hours and putting in her in a position where the required "good faith search" for comparably paying work was made impossible.

Respectfully submitted,

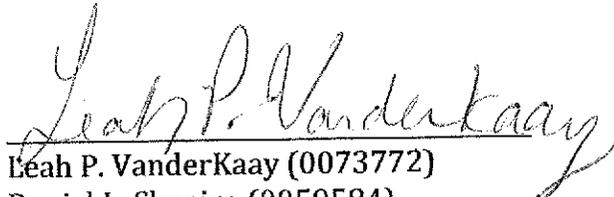
  
Leah P. VanderKaay (0073772)  
Daniel L. Shapiro (0059584)

CERTIFICATE OF SERVICE

A copy of the foregoing Brief for the Relator has been sent by regular U.S. Mail to the following:

Deborah Sesak  
Buckingham, Doolittle & Burroughs, LLP  
One Cleveland Center – Suite 1700  
1375 East 9<sup>th</sup> Street  
Cleveland, Ohio 44114

Elise Porter  
Assistant Attorney General  
Workers' Compensation Section  
150 E. Gay Street, 22<sup>nd</sup> Floor  
Columbus, Ohio 43215

  
Leah P. VanderKaay (0073772)  
Daniel L. Shapiro (0059584)

# **APPENDIX**

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RECORD OF PROCEEDINGS

Claim Number: 06-406897  
LT-ACC-OSIF-COV  
PCN: 2080791 Maria Marrero

Claims Heard: 06-406897

SHAPIRO, SHAPIRO & SHAPIRO CO LPA  
4469 RENAISSANCE PKWY  
WARRENSVILLE HEIGHTS OH 44128-5754

Date of Injury: 12/09/2006

Risk Number: 314542-0

This claim has been previously allowed for: SPRAIN SHOULDER/RIGHT UPPER ARM.

This matter was heard on 04/08/2008 before District Hearing Officer Rhonda Patsouras pursuant to the provisions of Ohio Revised Code Section 4121.34 and 4123.511 on the following:

APPEAL filed by Employer on 03/14/2008 from the order of the Administrator dated 02/28/2008.  
Issue: 1) Wage Loss - 1/27/2007 TO 2/28/2007 AND 4/27/2007 AND TO CONTINUE

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present at the hearing:

APPEARANCE FOR THE INJURED WORKER: VanderKaay, Claimant  
APPEARANCE FOR THE EMPLOYER: Toth  
APPEARANCE FOR THE ADMINISTRATOR: N/A

The order of the Administrator, dated 02/28/2008, is vacated.

It is the order of the District Hearing Officer that the C-88, filed 09/05/2007 is denied and the C-140 filed 09/05/2007 is denied.

District Hearing Officer denies the request for working wage loss from 01/27/2007 to present as not substantiated by the evidence on file.

District Hearing Officer finds claimant was released to return to work with restrictions by Dr. Strimbu as of 01/27/2007 and returned to work light duty with the employer of record.

District Hearing Officer finds the physician of record did not restrict the number of hours worked and did release claimant to continue working eight hours per day. District Hearing Officer finds the claimant returned to work light duty at the same rate of pay but apparently was not scheduled for 40 hours per week per testimony at hearing.

District Hearing Officer finds claimant has failed to submit the requisite proof as enumerated by OAC Section 4125-1-01 for calculation of the requested working wage loss. District Hearing Officer also finds no evidence of the required good faith job search pursuant to OAC 4125-101 to supplement the request for working wage loss based upon reduced hours of work.

District Hearing Officer further finds claimant did not work in any capacity from 04/01/2007 to 04/26/2007 and then returned to work light duty as of 04/27/2007 on a part-time basis. District Hearing Officer again

DJ (DHOSF)

RECORD OF PROCEEDINGS

Claim Number: 06-406897

finds claimant has failed to search for any other suitable employment of comparable pay which was confirmed by testimony at hearing. District Hearing Officer, accordingly, finds the evidence on file fails to substantiate the request for working wage loss which is denied in its entirety.

All evidence on file has been reviewed and considered in making this finding.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at [www.ohioic.com](http://www.ohioic.com) or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Cleveland Regional Office, 615 Superior Avenue, N.W. - 7th Floor Cleveland OH 44113-1898.

Typed By: kej  
Date Typed: 04/08/2008  
Date Received: 03/17/2008  
Findings Mailed: 04/11/2008

Rhonda Patsouras  
District Hearing Officer

Electronically signed by  
Rhonda Patsouras

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

06-406897  
Maria Marrero  
4731 Chelsea Dr  
Lorain OH 44055-3765

ID No: 16622-90  
Shapiro, Shapiro & Shapiro Co LPA  
4469 Renaissance Pkwy  
Warrensville Heights OH 44128-5754

Risk No: 314542-0  
Life Care Centers Of America Inc  
The Oakridge Home  
Dickey Douglas  
26520 Center Ridge Rd  
Westlake OH 44145-4033

ID No: 900-80  
\*\*\*Compmanagement, Inc.\*\*\*  
PO Box 884  
Dublin OH 43017-6884

BWC, LAW DIRECTOR

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT [www.ohioic.com](http://www.ohioic.com). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

2

RECORD OF PROCEEDINGS

Claim Number: 06-406897 Claims Heard: 06-406897  
LT-ACC-OSIF-COV  
PCN: 2080791 Maria Marrero

SHAPIRO, SHAPIRO & SHAPIRO CO LPA  
4469 RENAISSANCE PKWY  
WARRENSVILLE HEIGHTS OH 44128-5754

Date of Injury: 12/09/2006 Risk Number: 314542-0

This claim has been previously allowed for: SPRAIN SHOULDER/RIGHT UPPER ARM.

This matter was heard on 06/11/2008 before Staff Hearing Officer Robin Nash pursuant to the provisions of Ohio Revised Code Section 4121.35(B) and 4123.511(D) on the following:

APPEAL of DHO order from the hearing dated 04/08/2008, filed by Injured Worker on 04/18/2008:  
Issue: 1) Wage Loss - 1/27/2007 TO 2/28/2007 AND 4/27/2007 AND TO CONTINUE

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: VanderKaay, injured Worker  
APPEARANCE FOR THE EMPLOYER: Stucke  
APPEARANCE FOR THE ADMINISTRATOR: None

The order of the District Hearing Officer, from the hearing dated 04/08/2008, is affirmed.

It is the order of the Staff Hearing Officer that the C-40 and C-88 filed 09/05/2007 is denied.

The Injured Worker's representative clarified that working wage loss compensation is being requested for the periods of 01/27/2007 through 03/28/2007 and 04/27/2007 through 04/08/2008. The request is denied. The Staff Hearing Officer finds that the Injured Worker returned to work on 01/27/2007 in a position other than her former position of employment due to physical restrictions caused by the allowed conditions. This finding is based on the records of Dr. Victor Strimbu. The Injured Worker did suffer a wage loss as she was not offered the same number of work hours that she had been working prior to the date of the injury. Wage loss compensation, however, is denied for the reason that there is no evidence that the Injured Worker engaged in a good faith job search for alternate work consistent with her physical restrictions in order to mitigate her wage loss. All proof on file was reviewed and considered.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at [www.ohioic.com](http://www.ohioic.com) or the Appeal

DW

A

RECORD OF PROCEEDINGS

Claim Number: 06-406897

(1C-12) may be sent to the Industrial Commission of Ohio,  
Cleveland Regional Office, 615 Superior Avenue, N.W. - 7th Floor  
Cleveland OH 44113-1898.

Typed By: daw  
Date Typed: 06/11/2008

Robin Nash  
Staff Hearing Officer

Findings Mailed: 06/13/2008

Electronically signed by  
Robin Nash

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

06-406897  
Maria Marrero  
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Lorain OH 44055-3765

ID No: 16622-90  
Shapiro, Shapiro & Shapiro Co LPA  
4469 Renaissance Pkwy  
Warrensville Heights OH 44128-5754

Risk No: 314542-0  
Life Care Centers Of America Inc  
The Oakridge Home  
Dickey Douglas  
26520 Center Ridge Rd  
Westlake OH 44145-4033

ID No: 900-80  
\*\*\*Companagement, Inc.\*\*\*  
PO Box 884  
Dublin OH 43017-6884

BWC, LAW DIRECTOR

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT [www.ohioic.com](http://www.ohioic.com). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

RECORD OF PROCEEDINGS

30557  
DJ

Claim Number: 06-406897  
LT-ACC-OSIF-COV  
PCN: 2080791 Maria Marrero

Claims Heard: 06-406897

SHAPIRO, SHAPIRO & SHAPIRO CO LPA  
4469 RENAISSANCE PKWY  
WARRENSVILLE HEIGHTS OH 44128-5754

*Mendelsohn*

Date of Injury: 12/09/2006

Risk Number: 314542-0

APPEAL filed by Injured Worker on 06/20/2008.  
Issue: 1) Wage Loss - 1/27/2007 TO 2/28/2007 AND 4/27/2007 AND TO CONTINUE

Pursuant to the authority of the Industrial Commission under Ohio Revised Code 4123.511(E), it is ordered that the Appeal filed 06/20/2008 by the Injured Worker from the order issued 06/13/2008 by the Staff Hearing Officer be refused and that copies of this order be mailed to all interested parties.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN 60 DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN OHIO REVISED CODE 4123.512.

Date Reviewed: 06/25/2008  
Typed By: bh  
Date Typed: 06/25/2008  
Findings Mailed: 07/01/2008

John L. Havener  
Staff Hearing Officer

Electronically signed by  
John L. Havener

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

06-406897  
Maria Marrero  
4731 Chelsea Dr  
Lorain OH 44055-3765

ID No: 16622-90  
Shapiro, Shapiro & Shapiro Co LPA  
4469 Renaissance Pkwy  
Warrensville Heights OH 44128-5754

DW

*[Handwritten mark]*

# RECORD OF PROCEEDINGS

Claim Number: 06-406897

Risk No: 314542-0  
Life Care Centers Of America Inc  
The Oakridge Home  
Dickey Douglas  
26520 Center Ridge Rd  
Westlake OH 44145-4033

ID No: 900-80  
\*\*\*Companagement, Inc.\*\*\*  
PO Box 884  
Dublin OH 43017-6884

BWC, LAW DIRECTOR

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NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT [www.ohioic.com](http://www.ohioic.com). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

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SHREFUSE

Page 2

bh/bh

An Equal Opportunity Employer  
and Service Provider

6

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

2009 APR 29 PM 2:33

CLERK OF COURTS

State of Ohio ex rel. Maria Marrero, :

Relator, :

v. :

No. 08AP-922

The Industrial Commission of Ohio and  
Life Care Centers of America, Inc., :

(REGULAR CALENDAR)

Respondents. :

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MAGISTRATE'S DECISION

Rendered on April 29, 2009

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*Shapiro, Shapiro & Shapiro Co. LPA, Daniel L. Shapiro and Leah P. VanderKaay, for relator.*

*Richard Cordray, Attorney General, and Elise Porter, for respondent Industrial Commission of Ohio.*

*Buckingham, Doolittle & Burroughs, LLP, and Deborah Sesek, for respondent Life Care Centers of America, Inc.*

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IN MANDAMUS

Relator, Maria Marrero, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's application for wage loss compensation and ordering the commission to grant her that compensation.

Findings of Fact:

1. Relator sustained a work-related injury on December 9, 2006, and her workers' compensation claim has been allowed for "sprain shoulder/right upper arm."

2. Relator was off work from December 10, 2006 through January 3, 2007.

3. Relator's treating physician released her to return to work in a light-duty capacity provided that she not use her right arm and not lift over 20 pounds.

4. Relator's employer, respondent Life Care Centers of America, Inc. ("employer"), provided relator with light-duty employment within her restrictions.

5. The record is clear that, for the next several months, relator worked intermittently. As documented in a letter dated June 5, 2007 from Thomas A. Walden, the employer's director of human resources, relator worked as follows:

- Off work December 10th - January 3rd
- Worked one day January 4th
- Off work January 5th - 14th
- Worked January 15th
- Off work January 16th - 25th
- Worked January 26th - March 1st
- Off work March 2nd - March 12th
- Worked March 13th - 28th
- Off work March 29th - April 26th
- Worked April 27th - present

6. In September 2007, relator sought working wage loss compensation beginning January 27, 2007. Relator attached thereto her records regarding days worked. Her record keeping essentially mirrors the record keeping the employer provided in its June 5, 2007 letter with certain notable exceptions. Specifically, relator's records indicate that on March 2 and 5, 2007, sent home; March 6, 7, 9, 10 and 12, 2007, taken off schedule; April 1 through 25, 2007, not scheduled; July 2007 worked full time

light-duty work; July 31, 2007, sent home; August 7, 2007, sent home; first week of August 2007, worked five days; second week of August 2007, worked four days; third week of August 2007, worked five days; fourth week of August 2007, worked two days; "[s]tarted cutting my hours no longer giving me full time 5 days a week schedule"; first week of September 2007, worked four days; second week of September 2007, worked two days; third week of September 2007, worked four days; fourth week of September 2007, worked two days; "[c]ut schedule more."

7. The record also contains forms/records for the period July 19 through October 10, 2007. On these forms are the names of 18 employees, including relator. The form indicates that an "R" indicates a "requested day off" and a "V" indicates a "vacation day." Neither "R" nor "V" is used to designate any days for relator. Instead, the only letter designations are "N" and "X." No explanation is provided for these two letters. These records appear to indicate that relator did not request any days off or vacation days during this time period.

8. Relator did not submit any evidence which would indicate that she sought other employment during the relevant time period.

9. Relator's request for wage loss compensation was granted by order of the Ohio Bureau of Workers' Compensation ("BWC") dated February 28, 2008. That order specifically states:

Injured worker request working wage loss from 1-27-07 through the present and to continue with supporting documentation. Administrator grants request minus any period of time the injured worker was off work receiving temporary total compensation.

This decision is based on:

Return to work information. The injured worker will be granted working wage loss beginning 1-27-07 to 2-28-07. Injured worker returned to work on 3-1-07. Working wage loss will resume again for period 4-28-07 and continue with documentation.

10. The employer appealed and the matter was heard before a district hearing officer ("DHO") on April 8, 2008. The DHO vacated the prior BWC order and denied relator wage loss compensation on grounds that she failed to submit the requisite proof as enumerated in Ohio Adm.Code 4125-1-01 for calculating the requested working wage loss and failed to submit evidence of the required good-faith job search to supplement the request for working wage loss based upon reduced hours of work. Specifically, the DHO also stated:

District Hearing Officer finds claimant was released to return to work with restrictions by Dr. Strimbu as of 01/27/2007 and returned to work light duty with the employer of record.

District Hearing Officer finds the physician of record did not restrict the number of hours worked and did release claimant to continue working eight hours per day. District Hearing Officer finds the claimant returned to work light duty at the same rate of pay but apparently was not scheduled for 40 hours per week per testimony at hearing.

11. Relator's appeal was heard before a staff hearing officer ("SHO") on June 11, 2008. The SHO affirmed the prior DHO's order and denied relator's request for wage loss compensation:

The Injured Worker's representative clarified that working wage loss compensation is being requested for the periods of 01/27/2007 through 03/28/2007 and 04/27/2007 through 04/08/2008. The request is denied. The Staff Hearing Officer finds that the Injured Worker returned to work on 01/27/2007 in a position other than her former position of employment due to physical restrictions caused by the allowed conditions. This finding is based on the records of Dr. Victor Strimbu. The Injured Worker did suffer a wage loss as she

was not offered the same number of work hours that she had been working prior to the date of the injury. Wage loss compensation, however, is denied for the reason that there is no evidence that the Injured Worker engaged in a good faith job search for alternate work consistent with her physical restrictions in order to mitigate her wage loss. All proof on file was reviewed and considered.

12. Relator's appeal was refused by order of the commission mailed July 1, 2008.

13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

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* (1983), 6 Ohio St.3d 28.

Relator contends that the commission abused its discretion by denying her wage loss compensation based solely upon her failure to conduct a job search without considering the circumstances surrounding her employment situation. For the reasons that follow, this magistrate agrees.

Entitlement to wage loss compensation is governed by R.C. 4123.56(B)(1) which provides:

If an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment due to an injury \* \* \*, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings not to exceed the statewide average

weekly wage. The payments may continue for up to a maximum of two hundred weeks[.] \* \* \*

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 a claimant's search for suitable employment, a claimant's failure to accept a good-faith offer of suitable employment, and other actions of a claimant that constitute voluntarily limiting income from 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 wage loss and working wage loss compensation. *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210; *State ex rel. Reamer v. Indus. Comm.* (1997), 77 Ohio St.3d 450; and *State ex rel. Rizer v. Indus. Comm.* (2000), 88 Ohio St.3d 1. A good-faith effort necessitates a claimant's consistent, sincere, and best attempt to obtain suitable employment that will eliminate the wage loss.

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

As such, in examining a claimant's failure to search for another job, the court must use a broad analysis that goes beyond mere wage loss. *Timken*, at ¶25. This broader analysis was first emphasized in *State ex rel. Brinkman v. Indus. Comm.* (1999), 87 Ohio St.3d 171, where the Supreme Court first recognized that, under some situations, it would be inappropriate to ask a claimant to leave a good thing solely to reduce a wage differential. As the court stated in *Brinkman*, a broad analysis is necessary in light of the temporary nature of wage loss compensation which ends after 200 weeks.

Recently, this court released *State ex rel. Jackson v. Indus. Comm.*, 10th Dist. No. 08AP-498, 2009-Ohio-1045. In that case, the commission had denied the claimant's application for working wage loss compensation on grounds that the claimant had failed to conduct the required ongoing good-faith job search. In this court, the claimant argued that she was not required to continue to look for comparably paying work because she was working an average of 45.8 hours per week in her new employment. Also, the claimant argued that her longevity in her former employment was the main basis for her high pre-injury earnings and not because she had unique skills or knowledge that could produce comparably paying work.

This court granted a writ of mandamus and ordered the commission to pay the claimant wage loss compensation. This court stated "the analysis of whether a claimant should be excused for failing to search for comparably paying work must be flexible and broad, and is subject to review on a case-by-case basis," and that the overriding concern is to ensure that a lower-paying position, regardless of hours, is necessitated by the disability and not motivated by the lifestyle choice. *Id.* at ¶7.

This case is unusual in one major respect—claimant is working for the same employer for which she worked at the time of her injury. Ordinarily, in cases involving wage loss compensation, the claimant is no longer working for their original employer but is now working for a different employer, often performing work which is vastly different from the work performed at the time they were injured. In this particular case, the magistrate finds this to be very significant.

Here, it is undisputed that relator has not sought other employment besides the job she is currently performing for her employer. Further, based upon the evidence relator submitted, it is equally clear that relator made the argument that her employer had been limiting her hours. There is also evidence in the record that relator did not request any days off during a certain period of time. If it is true that her employer has been limiting the number of hours that relator is scheduled to work, then there might be some merit to relator's argument that she was unable to search for other work because, while she expected to be working full time, her employer was not providing her with full-time employment and, on several occasions, her employer sent her home after she reported to work. Also, at oral argument, relator's counsel argued that perhaps the employer had not really made a good-faith offer of modified work. The employer did not fire relator, but instead limited the hours she was scheduled to work.

The Supreme Court has held claimants accountable for voluntarily limiting their income. Conversely, this magistrate finds it appropriate that an employer who rehires one of their own injured workers and purposefully limits the number of hours of work given that claimant to work, should likewise be held accountable for their respon-

sibility in causing the claimant to suffer a wage loss. It appears that relator is making this argument here.

In the present case, it is clear that relator's evidence raised the issue of whether or not her employer was limiting her hours in such a way that relator's ability to search for other employment was compromised.

Here, the commission merely cited the rule. The commission failed to provide any analysis. Because the commission did not explore the circumstances surrounding relator's failure to seek other employment and because the record before this court substantiates relator's argument that the hours she was working for her employer were varied by the employer and not because of any request may by relator or a life-style choice, this magistrate finds that the commission did abuse its discretion.

Accordingly, it is this magistrate's conclusion that this court should issue a writ of mandamus ordering the commission to vacate its order which denied relator wage loss compensation and order the commission to issue a new order, either granting or denying the requested compensation, after exploring the reasons why relator was not working full time and how that impacted on her ability to seek other employment.



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).

May 4, 2009

Ms. Maria Marrero  
4731 Chelsea Drive  
Lorain, OH 44055

File No. 50351P-1  
Claim No. 06-406897

Dear Ms. Marrero:

Enclosed please find decision from the Magistrate of the Court of Appeals. This was only round one so it is not final yet however it is a good start. I will let you know as soon as I know if we will receive money for your lost wages in 2007.

Very truly yours,

SHAPIRO, SHAPIRO & SHAPIRO CO, L.P.A.

Daniel L. Shapiro

DLS / dls

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

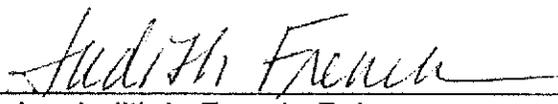
FILED  
AUG 27 2009  
AUG 27 PM 1:27  
CLERK OF COURTS

State of Ohio ex rel. Maria Marrero, :  
Relator, :  
v. : No. 08AP-922  
The Industrial Commission of Ohio et al., : (REGULAR CALENDAR)  
Respondents. :

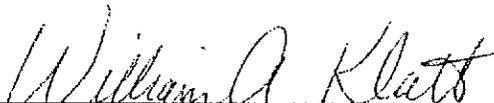
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 27, 2009, the objections to the decision of the magistrate are sustained, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs shall be assessed against relator.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

  
\_\_\_\_\_  
Judge Judith L. French, P.J.

  
\_\_\_\_\_  
Judge Susan Brown

  
\_\_\_\_\_  
Judge William A. Klatt

Daniel L. Shapiro

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT  
2009 AUG 27 PM 12:23  
CLERK OF COURTS

State of Ohio ex rel. Maria Marrero, :  
Relator, :  
v. :  
The Industrial Commission of Ohio et al., :  
Respondents. :

No. 08AP-922  
(REGULAR CALENDAR)

D E C I S I O N

Rendered on August 27, 2009

*Shapiro, Shapiro & Shapiro Co. LPA, Daniel L. Shapiro, and Leah P. VanderKaay, for relator.*

*Richard Cordray, Attorney General, and Elise Porter, for respondent Industrial Commission of Ohio.*

*Buckingham, Doolittle & Burroughs, LLP, and Deborah Sesek, for respondent Life Care Centers of America, Inc.*

IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, P.J.

{¶1} Relator, Maria Marrero, filed this original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of

Ohio ("commission"), to vacate its order, which denied relator's application for wage-loss compensation, and ordering the commission to grant her that compensation.

{¶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 grant a writ of mandamus ordering the commission to vacate its previous order denying compensation and issue a new order, either granting or denying the requested compensation, after exploring the reasons why relator was not working full-time and how that impacted her ability to seek other employment.

{¶3} The commission and relator's employer, Life Care Centers of America, Inc. (collectively, "respondents"), objected to the conclusions of law contained in the magistrate's decision. Respondents argue that relator had the burden to prove her entitlement to working-wage-loss compensation. Absent evidence of a good-faith job search, or evidence supporting her argument that a job search was unnecessary under the circumstances, the commission did not abuse its discretion in denying that compensation. We agree.

{¶4} A claimant seeking working-wage loss who has not returned to suitable employment with comparable pay must demonstrate "[a] good faith effort to search for suitable employment which is comparably paying work." Ohio Adm.Code 4125-1-01(D)(1)(c). For these purposes, "[a] good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate

the wage loss." *Id.* The commission will consider a number of factors in evaluating the claimant's effort, including her "skills, prior employment history, and educational background." Ohio Adm.Code 4125-1-01(D)(1)(c)(i). These factors include both qualitative and quantitative indicators of a claimant's efforts.

{¶5} In some cases, this court and the Supreme Court of Ohio have excused a claimant's failure to conduct a job search. In *State ex rel. Timken Co. v. Kovach*, 99 Ohio St.3d 21, 2003-Ohio-2450, for example, the court excused the required job search where the claimant continued to hold a position with his original employer, with whom he had worked for a long time, had accumulated years toward a pension, and qualified for additional vacation and personal days. See also *State ex rel. Brinkman v. Indus. Comm.*, 87 Ohio St.3d 171, 1999-Ohio-320 (holding that it was inappropriate to require a claimant to leave a lucrative position with long-term potential solely to make more money in the short term); *State ex rel. Jackson v. Indus. Comm.*, 10th Dist. No. 08AP-498, 2009-Ohio-1045, ¶14 (holding that the claimant's "specific circumstances relieved her of her duty to continue" her job search).

{¶6} We conclude that the commission's order denying compensation to relator is not inconsistent with this precedent. Ohio Adm.Code 4125-1-01(D) provides that a "claimant is solely responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation. Unless the claimant meets this burden, wage loss compensation shall be denied."

{¶7} Here, the district hearing officer ("DHO") stated that relator had "failed to submit the requisite proof as enumerated by OAC Section 4125-1-01 for calculation of

the requested working wage loss." The DHO also found "no evidence of the required good faith job search pursuant to OAC 4125-[1-01] to supplement the request for working wage loss based upon reduced hours of work. \* \* \* [The DHO] again finds claimant has failed to search for any other suitable employment of comparable pay which was confirmed by testimony at hearing. [DHO], accordingly, finds the evidence on file fails to substantiate the request for working wage loss which is denied in its entirety."

{¶8} The staff hearing officer ("SHO") acknowledged that claimant had suffered a wage loss because she was not offered the same number of hours as she had been working prior to her injury. Nevertheless, the SHO denied relator's request for wage-loss compensation "for the reason that there is no evidence that the Injured Worker engaged in a good faith job search for alternate work consistent with her physical restrictions in order to mitigate her wage loss. All proof on file was reviewed and considered."

{¶9} Our review of the record before us similarly reveals a complete absence of evidence that relator searched for comparably paying work or that relator should be excused from that requirement. In her brief before the magistrate (relator did not respond to respondents' objections), relator argued that her situation was unique, and her labor market limited, because (1) she worked the third shift, 10:30 p.m. to 6:30 a.m., (2) she could only perform left-handed work, and (3) her schedule with her employer was highly unpredictable. As for her working the third shift, however, relator also stated that she worked this shift because "she has three small children at home – ages 6, 8

and 13 – whom she cares for during the day and assist[s] with schooling [o]bligations. As such, taking a position with daytime working hours was not an option for her." While admirable, relator's decision to work a schedule that allows her to be home during the day with her children is a lifestyle choice, which the commission properly may consider as a factor favoring denial of compensation. Compare *State ex rel. Bishop v. Indus. Comm.*, 10th Dist. No. 04AP-747, 2005-Ohio-4548, ¶17 (concluding that denial of wage-loss compensation was an abuse of discretion, in part because there was no evidence that the claimant accepted employment as a car salesman as a personal lifestyle choice).

{¶10} As for her physical restrictions, we agree with relator that her restriction to left-handed work is a relevant factor for determining whether she made a good-faith effort at finding comparably paying work. See Ohio Adm.Code 4125-1-01(D)(1)(c)(ix) (identifying a "claimant's physical capabilities" as a relevant factor). Here, while it makes sense that relator might have difficulty in finding a job restricted to left-handed work, our record contains no evidence that no left-handed work is available to her or that she tried, but failed, to find left-handed work. We note, too, that her lifestyle choices have made a potential search even more difficult because she has limited herself to finding "a position that required left-handed only work that was available during the midnight shift."

{¶11} Finally, relator argued to the magistrate that her employer promised her full-time work, but regularly took her off the schedule or sent her home early. This unpredictability, relator argued, made it impossible for her to commit to a second

position with another employer. Based on these arguments, the magistrate concluded that the commission failed to analyze the impact of relator's reduced hours upon her ability to search for other employment. We disagree.

{¶12} In considering a claimant's eligibility for compensation, the commission must consider, "and base the determinations on, evidence in the file, or presented at hearing." Ohio Adm.Code 4125-1-01(D). Both the DHO and the SHO stated that they each had considered the entire record, which apparently included hearing testimony, and they each acknowledged that relator worked fewer hours. Faced with different evidence, they might have engaged in a discussion of relator's hours and perhaps considered the number of hours she had worked previously, her current work schedule, and the hours she spent searching for comparably paying work. See Ohio Adm.Code 4125-1-01(D)(1)(c)(iv) (identifying as relevant factors the amount of time devoted to making prospective employment contacts and the amount of time spent working, and allowing the adjudicator to consider, but not deem dispositive, "this comparison in reaching a determination of whether there was a good faith job search"). But the record before us does not compel that discussion. Relator may have testified that her unpredictable schedule kept her from searching for another job, but our record does not include that testimony. Nor does our record contain any evidence that relator made any effort, of any kind, to conduct any job search at all. Under these circumstances, we cannot conclude that the commission abused its discretion by denying wage-loss compensation.

{¶13} In conclusion, we agree with respondents that relator had the burden to prove her entitlement to working-wage-loss compensation. Absent evidence of a good-faith job search, or evidence supporting her argument that a job search was unnecessary under the circumstances, the commission did not abuse its discretion in denying that compensation. Therefore, we sustain respondents' objections.

{¶14} Based on our independent review, we adopt the findings of fact contained in the magistrate's decision, but decline to adopt the magistrate's conclusions of law. The requested writ of mandamus is denied.

*Objections sustained,  
writ of mandamus denied.*

BROWN and KLATT, JJ., concur.

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IN THE SUPREME COURT OF OHIO  
FRANKLIN COUNTY, OHIO

STATE OF OHIO, ex rel. MARIA )  
MARRERO )  
4731 CHELSEA DRIVE )  
LORAIN, OHIO 44055 )

Relator, )

-vs- )

THE INDUSTRIAL COMMISSION )  
OF OHIO )  
30 WEST SPRING STREET )  
COLUMBUS, OHIO 43215 )

-and- )

LIFE CARE CENTERS OF )  
AMERICA, INC. )  
THE OAKRIDGE HOME )  
26520 CENTER RIDGE ROAD )  
WESTLAKE, OHIO 44145 )

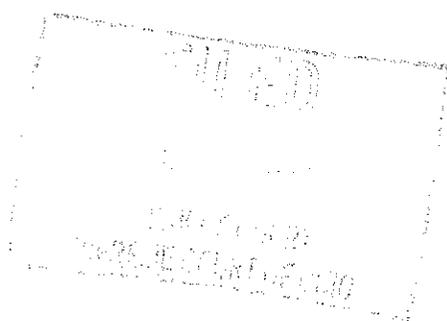
Respondents. )

09-1665

CASE NO.: 08AP-922

NOTICE OF APPEAL

ORAL ARGUMENT REQUESTED



NOTICE OF APPEAL

Now comes Appellant-Relator and appeals from the decision of the Court of Appeals of Ohio, Tenth Appellate District, dated August 27, 2009. The Court of Appeals has declined to adopt the Magistrate's conclusions of law, which were favorable to Relator.

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
2009 SEP 18 PM 1:24  
CLERK OF COURTS

Relator respectfully requests that this Court accept her appeal and make a final determination on the issues of law at dispute.

Respectfully submitted,

SHAPIRO, SHAPIRO & SHAPIRO CO., L.P.A.

A handwritten signature in cursive script, appearing to read "Daniel Shapiro", written over a horizontal line.

Daniel L. Shapiro (0059584)

Leah P. VanderKaay (0073772)

SHAPIRO, SHAPIRO & SHAPIRO CO., L.P.A.

4469 Renaissance Parkway

Warrensville Hts., OH 44128

(216) 927-2030

(216) 763-2620 - fax

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal has been sent by U.S. mail, postage prepaid this 7<sup>th</sup> day of September, 2009 to the following parties:

Deborah Sesak, Esq.  
Buckingham, Doolittle & Burroughs, LLP  
One Cleveland Center - Suite 1700  
1375 East 9<sup>th</sup> Street  
Cleveland, Ohio 44114

Elise Porter, Esq.  
Assistant Attorney General  
Workers' Compensation Section  
150 E. Gay Street, 22<sup>nd</sup> Floor  
Columbus, Ohio 43215



Leah P. VanderKaay (0073772)  
Daniel L. Shapiro (0059584)

**4123.56****Title [41] XLI LABOR AND INDUSTRY  
Chapter 4123: WORKERS' COMPENSATION****4123.56 Compensation in case of temporary disability.**

(A) Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code unless the employee's wage is less than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event the employee shall receive compensation equal to the employee's full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the lesser of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code or one hundred per cent of the employee's net take-home weekly wage. In the case of a self-insuring employer, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of section 4123.511 of the Revised Code. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

After two hundred weeks of temporary total disability benefits, the medical section of the bureau of workers' compensation shall schedule the claimant for an examination for an evaluation to determine whether or not the temporary disability has become permanent. A self-insuring employer shall notify the bureau immediately after payment of two hundred weeks of temporary total disability and request that the bureau schedule the claimant for such an examination.

When the employee is awarded compensation for temporary total disability for a period for which the employee has received benefits under Chapter 4141. of the Revised Code, the bureau shall pay an amount equal to the amount received from the award to the director of job and family services and the director shall credit the amount to the accounts of the employers to whose accounts the payment of benefits was charged or is chargeable to the extent it was charged or is chargeable.

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or program paid or payable. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

As used in this division, "net take-home weekly wage" means the amount obtained by dividing an employee's total remuneration, as defined in section 4141.01 of the Revised Code, paid to or earned by the employee during the first four of the last five completed calendar quarters which immediately precede the first day of the employee's entitlement to benefits under this division, by the number of weeks during which the employee was paid or earned remuneration during those four quarters, less the amount of local, state, and federal income taxes deducted for each such week.

(B)(1) 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, but the payments shall be reduced by the corresponding number of weeks in which the employee receives payments pursuant to division (B) of section 4121.67 Of the Revised Code.

(2) If an employee in a claim allowed under this chapter suffers a wage loss as a result of being unable to find employment consistent with the employee's disability resulting from the employee's 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 fifty-two weeks. The first twenty-six weeks of payments under division (B)(2) of this section shall be in addition to the maximum of two hundred weeks of payments allowed under division (B)(1) of this section. If an employee in a claim allowed under this chapter receives compensation under division (B)(2) of this section in excess of twenty-six weeks, the number of weeks of compensation allowable under division (B)(1) of this section shall be reduced by the corresponding number of weeks in excess of twenty-six, and up to fifty-two, that is allowable under division (B)(1) of this section.

(3) The number of weeks of wage loss payable to an employee under divisions (B)(1) and (2) of this section shall not exceed two hundred and twenty-six weeks in the aggregate.

(C) In the event an employee of a professional sports franchise domiciled in this state is disabled as the result of an injury or occupational disease, the total amount of payments made under a contract of hire or collective bargaining agreement to the employee during a period of disability is deemed an advanced payment of compensation payable under sections 4123.56 to 4123.58 of the Revised Code. The employer shall be reimbursed the total amount of the advanced payments out of any award of compensation made pursuant to sections 4123.56 to 4123.58 of the Revised Code.

(D) If an employee receives temporary total disability benefits pursuant to division (A) of this section and social security retirement benefits pursuant to the "Social Security Act," the weekly benefit amount under division (A) of this section shall not exceed sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code.

Effective Date: 07-01-2000; 2006 SB7 10-11-2006

## **4125 Industrial Commission/Worker's Compensation**

### **Chapter 4125-1 Wage Loss Compensation**

#### **4125-1-01 Compensation for wage losses.**

(A) The following definitions shall apply to the adjudication of applications for wage loss compensation:

(1) "Claimant," for purposes of wage loss compensation, means an employee as defined in division (A) of section 4121.01 and division (A)(1) of section 4123.01 of the Revised Code, who asserts a right, demand, or claim for benefits pursuant to division (B) of section 4123.56 of the Revised Code.

(2) "Employment" means work performed or to be performed pursuant to a contract of hire between an employee and an employer as those terms are defined in divisions (A) and (B) of section 4123.01 of the Revised Code. "Employment" also includes work performed or to be performed as self-employment.

(3) "Former position of employment" means the employment engaged in by the claimant, including job duties, hours and rate of pay, at the time of the industrial injury allowed in the claim or on the date of disability, in an occupational disease claim allowed under Chapter 4123. of the Revised Code.

(4) "Employer of record" means the employer with whom the claimant was employed at the time of the injury.

(5) "Restriction" means any physical and/or psychiatric limitation caused by the impairments causally related to the allowed conditions in the claim.

(6) "Physical capabilities" means the claimant's physical and/or psychiatric abilities as diminished solely by the restrictions caused by the impairments resulting from the allowed conditions in the claim. In no case will the claimant's "physical capabilities" be reduced by any impairment of the claimant's physical and/or psychiatric abilities, which arises subsequent to the injury or, in occupational disease claims, the date of disability, unless that impairment results from an allowed condition in the claim.

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

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

(9) "Working wage loss" means the dollar amount of the diminishment in wages sustained by a claimant who has returned to employment which is not his or her former position of employment. However, the extent of the diminishment must be the direct result of physical and/or psychiatric restriction(s) caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123. of the Revised Code.

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

(11) "Claimant's weekly wage loss" means his or her working wage loss or non-working wage loss during a calendar week ending at midnight Saturday.

(12) "Retirement" means voluntary termination of employment by a claimant such that the claimant is completely removed from the active work force.

(13) "Voluntary separation from employment" means separation from employment by the claimant when:

(a) There exists no valid medical reason for the separation;

(b) The separation is not precipitated by a violation(s) of local, state, or federal law by the employer which has a direct, substantial, and adverse impact on the claimant in his or her employment;

(c) The termination is not the result of the claimant's retirement;

(d) The separation is not precipitated by a breach of a collective bargaining agreement as a result of action of the employer; and

(e) The separation is not precipitated by a breach of the contract of hire, as defined in section 4123.01 of the Revised Code, as a result of actions of the employer or conduct of the employer that a reasonable person should have known would be interpreted as a breach of the contract of hire.

(14) "Discharge for just cause" means:

(a) Termination of employment by the employer generated by the claimant's violation of a work rule or policy which clearly defined the prohibited conduct, had previously been identified by the employer as a dischargeable offense, and was known or should have been known to the employee; or

(b) In instances where there is no work rule or policy, "discharge for just cause" shall mean discharge as a direct result of conduct by the claimant that a reasonable person should have known would result in a discharge from employment.

(15) "Adjudicator" means the administrator of the bureau of workers' compensation, a district hearing officer, a staff hearing officer, or the industrial commission. However, in the case of a wage loss application filed with a self-insuring employer, the self-insuring employer shall make the initial determination as provided in paragraph (G) of this rule.

(16) "Present earnings" means the claimant's actual weekly earnings which are generated by gainful employment unless the claimant has substantial variations in earnings. Where the claimant has substantial variations in earnings, the adjudicator shall apportion the earnings over such period of time that reasonably reflects the claimant's efforts to earn such an amount. Earnings generated from commission sales, bonuses, gratuities, and all other forms of compensation for personal services customarily received by a claimant in the course of his or her employment and accounted for by the claimant to his or her employer will be included in present earnings for the purposes of computing the wage loss award. In instances where sales commission, bonuses, gratuities, or other compensation are not paid on a weekly or biweekly basis, their receipt will be apportioned prospectively over the number of weeks it is determined were required to initiate and consummate the sale or earn the bonus, gratuity, or other compensation. In the case of a claimant engaged in self-employment, "present earnings" means gross income minus expenses. For purposes of calculating present earnings, there shall be a rebuttable presumption that a claimant engaged in self-employment has a gross income of at least one hundred dollars per week or such other compensation that the bureau of workers' compensation shall impute to self-employed persons for purposes of determining premium payments. Income derived from self-employment shall be reported on at least a quarterly basis.

(17) "Principal income source employment" means any employment from which the claimant has derived twenty-five per cent or more of his or her individual gross income for any period of six months or more, during the past ten years.

(18) "Statewide average weekly wage" has the same meaning as set forth in division (C) of section 4123.62 of the Revised Code.

(19) "Wages" means the amount upon which the claimant's average weekly wage is calculated pursuant to section 4123.61 of the Revised Code.

(B) A claimant who has a working wage loss or a non-working wage loss shall receive compensation at sixty-six and two thirds per cent of the claimant's weekly wage loss, not to exceed the statewide average weekly wage, for no longer than the time period authorized by division (B) of section 4123.56 of the Revised Code.

(C) Applications for compensation for wage losses shall be filed with the bureau of workers' compensation

on forms provided by the bureau. In cases involving self-insured employers, a copy of the application shall be filed with the self-insured employer. Failure to file the request on the appropriate form shall not result in the dismissal of said request, but shall result in the suspension of the application until the appropriate form is filed.

(1) The claimant must certify that all the information that is provided in the application is true and accurate to the best of his or her knowledge and further certify that he or she served a copy of the application, with copies of supporting documents, on the employer of record.

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

- (a) A list of all restrictions;
- (b) An opinion on whether the restrictions are permanent or temporary;
- (c) When the restrictions are temporary, an opinion as to the expected duration of the restrictions;
- (d) The date of the last medical examination;
- (e) The date of the report;
- (f) The name of the physician who authored the report; and
- (g) The physician's signature.

(3) Supplemental medical reports regarding the ongoing status of the medical restrictions causally related to the allowed conditions in the claim must be submitted to the bureau of workers' compensation or the self-insured employer in self-insured claims once during every ninety day period after the initial application, if the restrictions are temporary, or once during every one hundred eighty day period after the initial application, if the medical restrictions are permanent. The supplemental report shall comply with paragraph (C)(2) of this rule.

(4) The application shall contain an employment history. The employment history shall include a reasonably detailed description of each position which was principal income source employment held by the claimant.

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

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

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

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

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

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

(D) The claimant is solely responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation. Unless the claimant meets this burden, wage loss compensation shall

be denied. A party who asserts, as a defense to the payment of wage loss compensation, that the claimant has failed to meet his burden of producing evidence regarding his or her entitlement to wage loss compensation is not required to produce evidence to support that assertion. However, any party asserting other defenses to the payment of wage loss compensation, through motion, appeal, or otherwise is solely responsible for and bears the burden of producing evidence to support those defenses. If there is insufficient evidence to support a defense to the payment of wage loss compensation, that defense shall not be used as a grounds to deny such compensation. In no case shall this rule be construed as placing on the industrial commission any burden to produce evidence.

In considering a claimant's eligibility for compensation for wage loss, the adjudicator shall give consideration to, and base the determinations on, evidence in the file, or presented at hearing, relating to:

(1) The claimant's search for suitable employment.

(a) As a prerequisite to receiving wage loss compensation for any period during which such compensation is requested, the claimant shall demonstrate that he or she has:

(i) Complied with paragraph (C)(2) of this rule and, if applicable, with paragraph (C)(3) of this rule;

(ii) Sought suitable employment with the employer of record at the onset of the first period for which wage loss compensation is requested. The claimant shall also seek suitable employment with the employer of record where there has been an interruption in wage loss compensation benefits for a period of three months or more; and

(iii) Registered with the ohio bureau of employment services and begun or continued a job search if no suitable employment is available with the employer of record.

(b) A claimant may first search for suitable employment which is within his or her skills, prior employment history, and educational background. If within sixty days from the commencement of the claimant's job search, he or she is unable to find such employment, the claimant shall expand his or her job search to include entry level and/or unskilled employment opportunities.

(c) A good faith effort to search for suitable employment which is comparably paying work is required of those seeking non-working wage loss and of those seeking working-wage loss who have not returned to suitable employment which is comparably paying work, except for those claimants who are receiving public relief and are defined as work relief employees in Chapter 4127. Of the Revised Code. A good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss. In evaluating whether the claimant has made a good faith effort, attention will be given to the evidence regarding all relevant factors including, but not limited to:

(i) The claimant's skills, prior employment history, and educational background;

(ii) The number, quality (e.g., in-person, telephone, mail, with resume), and regularity of contacts made by the claimant with prospective employers, public and private employment services;

(iii) Except as provided in paragraph (D)(1)(c)(v) of this rule, for a claimant seeking any amount of non-working wage loss, the amount of time devoted to making prospective employer contacts during the period for which non-working wage loss is sought as compared with the time spent working at the former position of employment; while the adjudicator shall consider this comparison in reaching a determination of whether there was a good faith job search, the fact that a claimant did not search for work for as many hours as were worked in the former position of employment shall not necessarily be dispositive;

(iv) Except as provided in paragraph (D)(1)(c)(v) of this rule, for a claimant seeking any amount of working wage loss, 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; while the adjudicator shall consider this comparison in reaching a determination of whether there was a good faith job search, the fact that the sum of the hours the claimant spent searching for work and working is not as many hours as were worked in the former position of employment shall not necessarily be dispositive;

(v) Where the claimant, in the former position of employment, worked a variable number of hours per week, the adjudicator shall determine, with respect to the former position of employment, for the period of

fifty-two calendar weeks preceding the injury, or in occupational disease cases, the date of disability, the minimum, maximum, and average number of hours per week the claimant worked. If the claimant worked less than fifty-two calendar weeks in the former position of employment, the determination shall be based on the number of weeks the claimant actually worked. The adjudicator shall consider these determinations in relation to:

(a) The amount of time devoted to making prospective employer contacts during the period for which working wage loss is sought as well as the number of hours spent working, for a claimant seeking any amount of working wage loss; and

(b) The amount of time devoted to making prospective employer contacts during the period for which non-working wage loss is sought as compared with the time spent working at the former position of employment, for a claimant seeking non-working wage loss; while the adjudicator shall consider the determinations arrived at pursuant to paragraph (D)(1)(c)(v) of this rule in reaching a conclusion as to whether there was a good faith job search, no number of hours per week, in and of itself, shall necessarily be dispositive.

(vi) Any refusal by the claimant to accept assistance from the bureau of workers' compensation in finding employment;

(vii) Any refusal by the claimant to accept the assistance, where such assistance is rendered free of charge to the claimant, of any public or private employment agency or the assistance of the employer of record in finding employment;

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

(ix) The claimant's physical capabilities;

(x) Any recent activity on the part of the claimant to change his or her place of residence and the impact such a change, if made, would have on the reasonable probability of success in the search for employment;

(xi) The claimant's economic status as it impacts on his or her ability to search for employment including, but not limited to, such things as access to public and private transportation and telephone service and other means of communications;

(xii) The self-employed claimant's documentation of efforts undertaken on a weekly basis to produce self-employment income;

(xiii) Any part-time employment engaged in by the claimant and whether that employment constitutes a voluntary limitation on the claimant's present earnings; and

(xiv) Whether the claimant restricts his or her search to employment that would require him or her to work fewer hours per week than he or she worked in the former position of employment. However, the claimant shall not be required to seek employment which would require him or her to work a greater number of hours per week than he or she worked in the former position of employment; and

(xv) Whether, as a result of the restrictions arising from the allowed conditions in the claim, the claimant is enrolled in a rehabilitation program with the bureau of vocational rehabilitation whereby the claimant attends an educational institution approved by the bureau of vocational rehabilitation.

(2) The claimant's failure to accept a good faith offer of suitable employment.

(a) Offers of employment by the employer of record will not be given consideration by the adjudicator unless they are made in writing and contain a reasonable description of the job duties, hours, and rate of pay.

(b) The adjudicator shall consider employment descriptions of any jobs offered to the claimant by employers other than the employer of record.

(c) Although the claimant's refusal to accept a good faith offer of suitable employment may be considered by the adjudicator as a reason for denying, reducing, or eliminating wage loss compensation, the claimant shall not be required, as a precondition to the receipt of wage loss compensation, to accept a job offer which would

require him or her to work a greater number of hours per week than the former position of employment except as provided in paragraph (D)(2)(c)(i) of this rule.

(i) Where the claimant, in the former position of employment, worked a variable number of hours per week and the claimant is offered a job which would require the claimant to work a variable number of hours per week, the offer of variable hour employment shall not be considered an offer of unsuitable employment solely because the minimum or maximum number of hours per week to be worked by the claimant in the position offered is insubstantially greater or less than the minimum or maximum number of hours per week which the claimant worked in the former position of employment. In determining whether, pursuant to this paragraph, an offer of employment is suitable, the adjudicator shall:

(a) Determine, for the period of fifty-two calendar weeks preceding the date of the industrial injury or, in occupational disease cases, the date of disability, the maximum, minimum, and average number of hours per week which the claimant worked in the former position of employment. If the claimant worked less than fifty-two calendar weeks in the former position of employment, the determination shall be based on the number of weeks the claimant actually worked;

(b) Compare the maximum and minimum number of hours per week which the claimant could be required to work in the position of employment offered to the claimant to the determinations made in paragraph (D)(2)(c)(i)(a) of this rule to assist in determining whether the offer is one of suitable employment.

(3) Other actions of the claimant that constitute voluntarily limiting income from employment including, but not limited to, discharges for just cause which result in a wage loss not causally related to the allowed conditions in the claim, retirement, and voluntary separation from employment.

(a) A claimant's discharge for just cause from any position of employment shall not be considered by the adjudicator in determining a claim for wage loss compensation where the medical evidence shows that, as a result of the restrictions, the claimant is unable to return to the position of employment from which he or she was discharged.

(b) The claimant's failure to seek suitable employment which would require him or her to work a greater number of hours than the former position of employment shall not be considered a voluntary limitation on income from employment.

(c) The claimant's failure to work a greater number of hours per week than he or she worked in his or her former position of employment shall not be considered a voluntary limitation on income from employment.

(d) If the claimant voluntarily works less than the number of hours per week he or she worked in the former position of employment, and this results in a wage loss, the claimant shall be considered to have voluntarily limited his present earnings, and the claimant's wage loss compensation shall be reduced pursuant to paragraph (F)(3) of this rule.

(4) The claimant shall not be entitled to wage loss if the claimant has received a full release to return to his or her former position of employment.

(E) The industrial commission and its hearing officers in issuing orders granting or denying compensation for wage losses shall comply with the requirements of division (B) of section 4121.36 of the Revised Code. To comply with division (B)(2) of said section, the commission and/or hearing officer shall recite in those orders that they have considered and weighed the evidence, as required by paragraph (D) of this rule.

(1) In the event of a denial of compensation for a week or period of weeks for which an application has been made, the commission or hearing officer shall recite in the order that the claimant has not met his or her burden of proving compliance with this rule for that week or period of weeks and shall state the evidence relied upon to support the denial of wage loss for that week or period of weeks.

(2) If the commission or hearing officer grants any amount of wage loss compensation for a week or period of weeks for which an application has been made, the commission or hearing officer must find and recite in the order that:

(a) The claimant's present earnings are less than the claimant's wages;

(b) The difference between the claimant's wages and present earnings is the result of a medical

impairment that is causally related to an industrial injury or an occupational disease allowed in a claim which was filed under Chapter 4123. of the Revised Code and in which wage loss is requested;

(c) The claimant has made a good faith effort to search for suitable employment which is comparably paying work but has not returned to suitable employment which is comparably paying work; and

(d) The claimant has otherwise complied with the requirements of this rule.

(F) Computation of wage loss

(1) Unless otherwise provided in paragraph (H)(3) of this rule, diminishment of wages shall be calculated based on the:

(a) Claimant's average weekly wage at the time of the injury or at the time of the disability due to occupational disease in accordance with the provisions of section 4123.61 of the Revised Code; and

(b) The claimant's present earnings.

(2) If a claimant applies for wage loss compensation for a period during which he received amounts from a wage replacement program fully funded by the employer, such amounts shall be considered as present earnings for purposes of wage loss calculation.

(3)(a) The wage loss compensation to be paid to a claimant who voluntarily fails to accept a good faith offer of suitable employment or of suitable employment which is comparably paying work shall be calculated as sixty-six and two-thirds per cent of the difference between the claimant's average weekly wage in the former position of employment and the weekly wage the claimant would have earned in the employment he or she refused to accept.

(b) If the adjudicator finds that the claimant has returned to employment but has voluntarily limited the number of hours which he is working, and that the claimant is nonetheless entitled to wage loss compensation, the adjudicator, for each week of wage loss compensation requested by the claimant, shall determine: The number of hours worked by the claimant in the employment position to which he has returned, and the hourly wage earned by the claimant in the employment position to which he has returned. In such a case, the adjudicator shall order wage loss compensation to be paid at a rate of sixty-six and two-thirds per cent of the difference between:

(i) The weekly wage the claimant would have earned in the former position of employment if the claimant had worked only the number of hours the claimant actually worked each week in the employment position to which the claimant returned; and

(ii) The weekly amount the claimant actually earned in the employment position to which he returned.

(iii) In situations where the adjudicator finds that the claimant has returned to employment and has voluntarily limited the number of hours which he is working, and that the claimant is nonetheless entitled to wage loss compensation, but that paragraphs (F)(3)(b)(i) and (F)(3)(b)(ii) of this rule are not directly applicable, the adjudicator shall have the discretion to establish a number of hours to be utilized in the calculation of wage loss compensation that is not unreasonable, unconscionable or arbitrary.

(4) A claimant's wage loss compensation shall not be reduced by any amounts the claimant receives from unemployment compensation, social security disability benefits, or public or private retirement plans. The wage loss compensation of a claimant who is receiving public relief shall not be reduced by any monies received by the claimant from work relief.

(5) Regardless of whether a claimant is otherwise qualified to receive wage loss benefits during any period of time, a claimant shall not be awarded wage loss benefits for any period before the date on which he or she complies with paragraph (D)(1)(a) of this rule. Wage loss benefits may only be awarded for periods after the claimant's compliance with said paragraph.

(G) Where the employer of record is a self-insuring employer it shall:

(1) Adjudicate the initial application for wage loss compensation and inform the claimant of its decision no later than thirty days after a request for wage loss compensation is received;

(2) Adjudicate all issues which arise with respect to the claimant's ongoing entitlement to wage loss compensation and inform the claimant of its decision in no later than thirty days after the issue arises; and

(3) Ensure that a copy of any decision described in paragraphs (G)(1) and (G)(2) of this rule is filed with either the bureau of worker's compensation or the industrial commission for placement in the claim file.

(H) Prospective application

(1) This rule shall apply to the adjudication of entitlement to wage loss compensation for period(s) on or after the effective date of this rule, unless otherwise provided in paragraph (H)(3) of this rule.

(2) This rule shall not apply to the adjudication of entitlement to wage loss compensation for any period(s) before the effective date of this rule.

(3) Notwithstanding paragraph (H)(1) of this rule, if a claimant files an application for wage loss compensation in a claim in which the injury occurred or the date of disability arose before the effective date of this rule, the wage loss compensation paid shall be calculated based on the greater of the full weekly wage or the average weekly wage.

R.C. 119.032 review dates: 11/08/2002 and 02/01/2007

Promulgated Under: 119.03

Statutory Authority: 4121.30, 4121.31

Rule Amplifies: 4123.56

Prior Effective Dates: 8/22/86 (Emer.), 11/17/86 (Emer.), 2/17/87 (Emer.), 8/6/87, 5/15/97