

ORIGINAL

In the  
Supreme Court of Ohio

STATE OF OHIO ex rel.  
MARIA MARRERO,  
  
Relator-Appellant,  
  
v.

INDUSTRIAL COMMISSION OF OHIO,  
et al.,  
  
Respondent-Appellees.

Case No. 2009-1666  
  
On Appeal from the  
Franklin County  
Court of Appeals,  
Tenth Appellate District  
  
Court of Appeals  
Case No. 08APD100922

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**RESPONDENT-APPELLEE INDUSTRIAL COMMISSION'S  
BRIEF ON THE MERITS**

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## INTRODUCTION

This case is about the obligation of an applicant for wage loss benefits under the workers' compensation system to engage in a good-faith job search. In this case, Relator Maria Marrero ("Marrero") was injured at work and was able to continue only light-duty work. Her employer could provide that work only on a part-time and inconsistent basis, so she applied for working wage loss, that is, a percentage of the difference between her light-duty part-time wages and her full-time wages before the injury.

The Industrial Commission denied Marrero's application for wage loss because she had not engaged in a mandatory good-faith search for a comparably-paying job. Because there was no evidence whatsoever on the record showing that Marrero had tried to find any other work, the commission did not abuse its discretion.

Specifically, an injured worker claiming wage loss benefits has the burden of proof to show that she is eligible for working wage loss. Here, Marrero provided virtually no pertinent record evidence. Marrero did not carry her burden because there was no evidence whatsoever on the record showing that she had tried to find any other work. A good-faith job search being a prerequisite to an award of wage loss benefits, Marrero is ineligible unless she can show that she meets one of the few exceptions to this rule, which she also fails to do.

And while the case may be unusual in that Marrero returned to the same employer, it is not unique. At least two working wage loss cases deal with injured workers returning to the same employer. The case closest to the facts here held that wage loss caused by normal fluctuation in work hours is not sufficient to support wage loss compensation.

Perhaps most important, Marrero's arguments are all predicated on her unsupported contention below that she cannot look for other work because she "must" work the third shift.

The reason given for the shift requirement is her personal family life. In other words, the restriction on her work that she contends makes it impossible for her to find other work is the result of a lifestyle choice, and not a result of her injury. A lifestyle choice has been specifically held to be an unacceptable reason to limit the mandatory job search.

In short, this case falls very far short of the required gross abuse of discretion. The Court of Appeals was correct in not issuing a writ, and this Court should affirm.

### **STATEMENT OF THE CASE AND FACTS**

Marrero injured her arm at work in December of 2006. She was out of work for a few weeks, and returned to work in a “light duty” capacity on instructions from her doctor. Specifically, the doctor stated that she could not use her right arm, and could not lift over twenty pounds. Stipulation of Facts at page 25 (“Stip. at 25”). Her employer, Life Care Centers of America, Inc. (“Life Care”) gave Marrero “light duty” work inconsistently and intermittently. Stip at 1, 15-20.

Because of the intermittent work hours, Marrero’s wages were considerably less than when she was able to work full-time. She filed a motion and application for working wage loss compensation. Stip. at 2-25.

The Bureau of Workers’ Compensation granted the motion for working wage loss, but Life Care appealed to the Commission. The Commission’s District Hearing Officer (“DHO”) reversed and denied Marrero’s working wage loss in part because she failed to make a good-faith effort to find another job as required by OAC 4123-1-01(D). Stip at 28-29. The Staff Hearing Officer (“SHO”) likewise denied the working wage loss based on a failure to show a good-faith effort to mitigate the wage loss by searching for another job. Stip. at 30-31. Further administrative appeals were denied. Stip at 32-33.

Marrero filed this action in mandamus, and the magistrate recommended that a writ issue. The Commission and Life Care filed objections to the magistrate's recommendation, and a panel of the Tenth District Court of Appeals reversed, finding that the Commission did not abuse its discretion in denying Marrero working wage loss compensation.

### ARGUMENT

Mandamus is an extraordinary legal remedy. R.C. 2731.01. For Marrero to get a writ of mandamus, she must have a clear legal right to the relief sought, and the respondent—here the Commission—must be under a clear legal duty to provide the relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A mandamus proceeding is not a *de novo* review in which the court re-weighs the evidence. Rather, the court must decide whether the commission's determination of a factual question is contrary to law or is otherwise a gross abuse of discretion. *State ex rel. Athey v. Indus. Comm.* (2000), 89 Ohio St.3d 473, 475 (“[T]he commission is the exclusive evaluator of weight and credibility” of the evidence presented to it. (emphasis added.)); see also *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 376; *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 167; *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414, 416.

The commission's decision will not be overturned by a court in mandamus if “some evidence” in the record supports it. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170, (“so long as there is some evidence in the file to support [the commission's] findings and orders, this court will not overturn . . . .”); see also *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 20.

The commission's determination here is completely within its authority, is fully supported by evidence, and meets all of the prescribed standards for a legal order. The Court should affirm the Court of Appeals and deny the writ.

**Administrator's Proposition of Law:**

*An injured worker is not eligible for working wage loss benefits under Ohio Administrative Code 4125-1-01 if she has made no good-faith effort to find alternative or additional employment that would mitigate the loss, merely because her current work hours are intermittent and unpredictable.*

**A. Marrero does not carry her burden to prove that she made a good-faith search for a job that will eliminate her wage loss, or that she fits into any of the few exceptions to the job search requirement.**

**1. Under Ohio Administrative Code 4125-1-01, to get wage loss benefits, an injured worker has the burden to prove that she made a good-faith search for a job that will eliminate the wage loss.**

If an injured worker suffers a loss in wages because she returns to employment other than her former position, she is entitled to  $66\frac{2}{3}$  percent of the difference between her original average weekly wage and her current average weekly wage. R.C. 4123.56(B)(1). An injured worker may receive up to two hundred weeks of working wage loss if she returns to lower-paying work due to the injury. *Id.*

However, to receive this benefit, the injured worker must comply with the requirements of Ohio Administrative Code 4125-1-01. In addition, the burden of proof for the working wage loss is entirely on the injured worker. OAC 4125-1-01(D).

Among other requirements for working wage loss compensation, an injured worker must make a good-faith search for a job that will eliminate the wage loss; in other words, she must try to find a job that earns an amount comparable to what she earned before the job-related injury:

[A] good faith effort to search for suitable employment which is comparably paying work is required of those seeking non-working wage loss and of those seeking working-wage loss who have not returned to suitable employment which is comparably paying work . . . . A good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss.

OAC 4125-1-01(D)(1)(c)(emphasis added). Thus, an injured worker must make consistent and sincere efforts to obtain work that will eliminate the wage loss.

As explained below, Marrero failed to comply with this requirement.

**2. Marrero failed to conduct any job search at all, let alone a good-faith job search for work paying an amount comparable to what she made before her injury.**

Marrero failed to conduct a good-faith job search for a job that would eliminate her wage loss. Indeed, the record is entirely devoid of evidence that Marrero made any job search whatsoever.

The stipulation of evidence consists entirely of Marrero's application for wage loss, various medical records and records documenting her work hours at Life Care. Not a single document reflects any attempt to find work of any kind anywhere.

Nor are Marrero's self-serving arguments in her briefs below apposite. She asserted there that a good-faith job search for her would be "asking the impossible." However, without any evidence that she actually tried to find a job, her contention that finding another job would be impossible is just that: a contention without any factual support. Marrero has no idea whether there are jobs in her area that fit her needs, because she has not looked for one.

As the claimant has the burden of proof, Marrero had the responsibility to put on the record evidence sufficient to prove her case. As she did not, no writ should issue.

**3. Marrero fits into none of the recognized exceptions to the job-search requirement.**

Marrero provides no evidence that she fits into any of the recognized exceptions to the job-search requirement. Although not in her original brief, at oral argument before the magistrate, Marrero argued that she should not have to make a good-faith job search because "she already has one." Before this Court Marrero is arguing that because the employer, Life Care Centers of

America, Inc. (“Life Care”) is restricting her hours, she should be exempt from the job-search requirement.

There are at least four reasons this argument is without merit, each of which is dispositive. First, Marrero is wrong in thinking that the job search is for a “second job,” and that she cannot look for a second job because she does not know when her current employer will give her work. The job search can be for one of two types of job. Marrero can search for a second part-time job to supplement her current work, inform Life Care of the hours required for that new job, and request that her hours at Life Care be scheduled around that new job. Or Marrero can search for an entirely new job that she can perform instead of the one she has at Life Care, that she can perform within her restrictions, and that makes up some or all of her working wage loss.

Marrero has made no attempt to find either type of job, but instead merely complains that the intermittent hours makes it “impossible” for her to “commit” to another job. Moreover, Marrero is on third shift; that is, she works at night. She has not provided any evidence or reason why she cannot look for alternate employment during the day. In short, Marrero does not explain why intermittent hours make it impossible to look for a job to either supplement or supplant her current hours at Life Care.

Second, the mere fact that an employer provides fewer hours for an injured worker is not sufficient to absolve the employee from the job-search requirement. In *State of Ohio ex rel. DaimlerChrysler v. Breuer*, Fr. App. No. 06AP-895, 2007-Ohio-5093, an employee returned to his original place of employment after an injury. He took a job in a different department of the company because of the limitations from his injury. The employee later applied for working wage loss benefits, arguing that the employer offered him fewer hours in the new job. The Court of Appeals denied the benefits because “[c]laimant offers no evidence that the employer singled

him out in any way or that his ability to work overtime in the new position was directly related to his injury or work restrictions.” Id. at ¶ 10.

Similarly here, Marrero had to take a different job when returning to work. Like Breuer, she worked all hours available and offered to her, but was not offered as many hours as she had previously worked. Similar to *Breuer*, it is possible that the fewer work hours are due to the “fluctuation in hours” available to any person performing her new duties. Id. at ¶ 10.

And similar to *Breuer*, Marrero “offers no evidence that the employer singled [her] out in any way.” Indeed, as explained above, while Marrero presented evidence that her employer did not have her work 8 hours a day, as she had previously done, there is absolutely no evidence whatsoever on the record as to the employer’s reason for doing so. And as Marrero has the burden of proving her case, she has the burden to ensure that she preserve evidence on the record as to why she was offered fewer hours than before, rather than merely offering unsupported speculation.

Third, Marrero mistakenly reiterates the magistrate’s negative comment on the commission’s order as failing “to provide any analysis” regarding the reasons for the employer’s failure to provide more hourly work. But the commission cannot analyze what is not there. If the claimant does not provide evidence as to the reasons for the reduced hours, the commission cannot evaluate these reasons.

Moreover, Marrero fits none of the other recognized exceptions for the good-faith job search requirement. For example, the Supreme Court in *Brinkman* held that an injured worker was not expected to look for another job when the worker had secured a part-time job with a “realistic possibility that it would change to full-time.” *State ex rel. Brinkman v. Indus. Comm.* (1999), 87 Ohio St.3d 171. Marrero does not fit this exception, as she has not asserted or

provided evidence supporting that there is a realistic possibility that her job will change to full time; indeed, she seems to be arguing that her hours are likely to stay low or decrease.

In *Timken*, the Supreme Court absolved an injured worker of the job-search requirement because he had worked many years for the employer. “He has years towards a company pension. Moreover, his longevity may have qualified him for additional weeks of vacation or personal days.” *State ex rel Timken v. Kovach*, 99 Ohio St.3d 21, 2003-Ohio-2450 at ¶ 27. As in *Brinkman*, the *Timken* Court absolved the injured worker from the job-search requirement, reasoning that he need not “leave a good thing.” *Id.* at ¶ 28. Marrero has not shown that she would be “leaving a good thing” by leaving Life Care, as she has worked there only a few years. Moreover, she provided absolutely no evidence that she would be giving up a pension or other benefits by working somewhere else.

And finally, in *Jackson*, the Tenth District absolved the injured worker from the job-search requirement primarily because the salary she had previously earned as a deputy sheriff was because of longevity at a government job, not because of skills transferable to a non-government job. *State ex rel Jackson v. Franklin County Commissioners*, Fr. App. No. 08AP-498, 2009-Ohio-1045. Moreover, Jackson was already working more than 40 hours a week, had learned new job skills and was applying for higher paying jobs within her company. Marrero has shown no parallels with *Jackson*. There is no evidence she had significant tenure with Life Care, or that she has attempted to acquire new skills or apply for higher-paying positions within the company.

Indeed, this case is similar to one decided recently in which the claimant “failed to submit any evidence demonstrating that her circumstances qualified under any of the narrow exceptions to the general rule . . .” *State ex rel. International Truck and Engine Corp v. Indus. Comm.*, Fr. App. No. 05AP-1337, 2006-Ohio-6255 at ¶ 8. As in *International Truck*, Marrero “submitted no

evidence that her job . . . had the prospect of becoming more financially lucrative in the future, or that it had the potential of eventually eliminating her wage loss. . . . [t]here is no evidence that the claimant would be ‘leaving a good thing’ by seeking better paying work . . .” *Id.* In short, Marrero has not shown that she fits any exception to the job-search rule.

**B. Marrero’s lower-paying job and her refusal to look for other work are motivated by a personal lifestyle choice and not necessitated by her injury.**

The underlying concern for the job-search requirement is to ensure that an injured worker’s lower-paying job is necessitated by the disability, and not motivated by some other reason. An employer should not have to pay wage loss to an employee who has taken a lower-wage job for personal reasons: “[T]he overriding concern in all of these cases . . . is the desire to ensure that a lower paying position—regardless of hours—is necessitated by the disability and not motivated by lifestyle choice.” *Timken*, 2003-Ohio-2450 at ¶ 24, citing *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1994), 72 Ohio St.3d 210.

Marrero asserted below as one of her main reasons for failing to look for another job that she “must” work the third shift, so that she can look after her children at other times. In other words, a main restriction on her ability to find other work is not the disability, but her personal lifestyle choice of wanting to work the third shift. See, also *Brinkman*, 87 Ohio St.3d 171 at 173; *State ex. rel. Jones v. Kaiser Found. Hosp. Cleveland* (1999), 84 Ohio St.3d 405, 407.

As explained above, such a personal lifestyle choice is not sufficient to absolve an injured worker from the obligation to make a good-faith job search. Marrero cannot justify her failure to make a good-faith job search because of her personal lifestyle choice to work only the third shift.

## CONCLUSION

In short, Marrero has provided no evidence whatsoever that she has made a good-faith job search, that her situation fits into any of the recognized exceptions, or that her disability, rather than her lifestyle choices make it difficult for her to seek a job to supplement or supplant her current employment. Marrero also provides no evidence whatsoever regarding her employer's motivations in providing her fewer hours than she worked before, and no evidence whatsoever that her employer has singled her out because of the injury.

For the above reasons, the Industrial Commission respectfully asks the Court to overrule the court below.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Respondent-Appellee Industrial Commission Brief on the Merits was served by U.S. mail this 18<sup>th</sup> day of February, 2010 upon the following counsel:

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