

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.)	Case No. 2009-1666
MARIA MARRERO,)	
)	
Appellant,)	
)	On Appeal from the Franklin County
vs.)	Court of Appeals, Case No. 08AP-922
)	
INDUSTRIAL COMMISSION OF OHIO)	
)	
and)	
)	
LIFE CARE CENTERS OF AMERICA,)	
INC.,)	
)	
Appellees.)	

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STATEMENT OF FACTS

This is an appeal by Maria Marrero from the decision of the Franklin County Court of Appeals denying her request for a writ of mandamus directing the Industrial Commission of Ohio to award her wage loss compensation. The relevant facts are as follows.

On December 9, 2006, Marrero was employed by Appellee Life Care Centers of America, Inc. ("Life Care") at the Oakridge Home in Westlake, Ohio. She claimed that while assisting a resident, she injured her right shoulder and right upper arm. Marrero's application for compensation and benefits was assigned Claim No. 06-406897 by the Ohio Bureau of Workers' Compensation ("BWC"), and her claim was allowed for sprain right shoulder.

Marrero received medical treatment and was off work from December 10, 2006 through January 3, 2007. Stipulation of Evidence at 1. (Stip.) She was released to return to work with restrictions and was provided light duty work by Life Care.

In September 2007, Marrero filed a motion with the BWC requesting the payment of working wage loss compensation from January 27, 2007 through the present and to continue. Stip. at 2. In support of the motion, she submitted *inter alia* a wage loss application, a job description, work status reports with limitations/restrictions, her calendar purportedly showing days worked, and work schedules. Stip. at 3-23.

The BWC issued a decision granting working wage loss from January 27 to February 28, 2007, and again from April 28, 2007 to continue upon submission of appropriate documentation. Stip. at 26-27. Life Care timely appealed the BWC decision. Following hearing, a district hearing officer for the Industrial Commission denied the request for working wage loss because it was not substantiated by the evidence in the record. According to the district hearing officer, Marrero returned to light duty work at the same rate of pay, but was not scheduled for 8 hours

per day or 40 hours per week. The hearing officer found that Marrero failed to search for any other suitable employment, and did not submit evidence of the required good faith job search. Stip. at 28-20.

Marrero's appeal from the decision of the district hearing officer was heard by a staff hearing officer who affirmed the order. The staff hearing officer denied wage loss compensation because there is no evidence that Marrero engaged in a good faith job search for alternate work consistent with her physical restrictions in order to mitigate her wage loss. Stip. at 30. Marrero's further appeal was refused by the Industrial Commission. Stip. at 32.

Thereafter Marrero filed an original action in mandamus in the Franklin County Court of Appeals. Upon referral, a magistrate recommended that a writ issue. Both Life Care and the Industrial Commission filed objections. The Court of Appeals accepted the magistrate's findings of fact, but declined to adopt her conclusions and denied the writ. In its decision, the Court concluded that Marrero had the burden to prove her entitlement to working wage loss compensation, and in the absence of evidence of a good faith job search or evidence supporting her argument that a job search was unnecessary under the circumstances, the Industrial Commission did not abuse its discretion in denying compensation. From that decision, Marrero has filed her notice of appeal in this Court.

ARGUMENT

It is well settled that mandamus is an extraordinary legal remedy. Marrero has the burden of proof to show that she has a clear legal right to the relief requested, and that the Commission has a clear legal duty to provide that relief. *State ex rel. Pressley v. Industrial Commission* (1967), 11 Ohio St. 2d 141. She must show that the Commission abused its discretion in rendering a decision which is not supported by any evidence in the record. *State ex rel. Elliott v. Industrial Commission* (1986), 26 Ohio St. 3d 76. Where there is some evidence supporting the decision of the Commission, there is not an abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St. 3d 56.

An action in mandamus is not a *de novo* proceeding. Courts are not to re-weigh the evidence, but must give due deference to the Industrial Commission which is the exclusive determiner of the weight and credibility to be given the evidence in the record. *State ex rel. Athey v. Industrial Commission* (2000), 89 Ohio St. 3d 473.

Applying these essential legal principles to this case, the Commission's decision complies with applicable legal requirements and is supported by the evidence. Marrero is not entitled to the relief requested.

Proposition of Law

A claimant is not entitled to working wage loss compensation when she made no good faith effort to search for suitable alternate or comparably paying employment and produced no evidence that her failure to mitigate the wage loss was excused or justified.

In her Brief, Marrero acknowledges that this Court has held that a claimant is required to demonstrate a good faith effort to search for suitable employment and comparably paying work before being entitled to wage loss compensation. However, she asserts that this Court has not always required a good faith job search but has in certain circumstances excused that

requirement. Marrero thus argues that she should be excused from the job search requirement because her wage loss is due solely to Life Care's inability to provide full time work consistent with her restrictions. Her arguments are not supported by either the evidence or the law, and do not establish an abuse of discretion by the Industrial Commission entitling her to a writ of mandamus and award of working wage loss compensation.

R.C. 4123.56(B)(1) provides that if an injured worker suffers a loss in wages because she returns to employment other than her former position of employment, she is entitled to compensation as prescribed. In order to receive wage loss compensation, claimant must comply with the requirements of OAC 4125-1-01. In pertinent part, OAC 4125-1-01(D) provides:

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 person 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.

The claimant alone is responsible for and bears the burden of producing evidence establishing and proving her entitlement to wage loss compensation. The evidence is to consist of a wage loss application, medical reports, and wage loss statements describing the search for suitable employment. OAC 4125-1-01 (C).

In determining eligibility for wage loss, consideration shall be given to whether a claimant made a good faith effort to search for suitable employment which is comparably paying work. A good faith effort requires consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss. OAC 4125-1-01(D).

With respect to these requirements, Marrero did not conduct a good faith search for comparably paying work that would eliminate the wage loss. She presented no evidence of any

job search, good faith or otherwise. The evidence consists of Marrero's application for wage loss compensation, various medical records, and documents purportedly showing the dates she worked for Life Care. There are no wage loss statements showing any attempt by Marrero to find comparably paying employment or mitigate her claimed wage loss. There is no evidence of a registration with the Ohio Bureau of Employment Services ("OBES"), a job search, or wage loss statements all required by OAC 4125-1-01(C) and (D). The record thus lacks any evidence showing the requisite job search.

Marrero nonetheless asserts that a job search is not always necessary but may be excused based upon a review of the circumstances. She argues that based upon the unique facts of her case, she should be excused from a job search because her wage loss is due solely to Life Care's inability to accommodate her restrictions on a consistent full time basis. Marrero's reliance upon an exception rather than the rule is misplaced. There is no evidence supporting her argument that the circumstances fall within an exception making a good faith job search unnecessary.

In *State ex rel. Timken Co. v. Kovach* (2003), 99 Ohio St. 3d 21, 2003-Ohio-2450, claimant returned to work with the same company at a lower paying position and did not search for other comparably paying employment. In determining whether to excuse claimant's failure to do a job search, the Court adopted and utilized "a broad-based analysis that looks beyond mere wage loss." *Supra* at 24. After reviewing the evidence in the record, the Court did not require but excused a job search for two reasons. First, claimant had "years towards a company pension," and his longevity may have qualified him for additional weeks of vacation or personal days. *Id.* Claimant would have to give up earned benefits or "a good thing" which the Court would not require. Second, the evidence established that the employer waived several requirements for wage loss compensation, including the necessity of a job search by previously

paying wage loss compensation without requiring claimant to seek other employment, file wage statements, or register with OBES. *Id.* at 25.

Neither reason cited for excusing a job search in the *Timken* case is applicable here. There is no evidence Marrero would suffer the loss of any earned benefits or forego "a good thing" by seeking other employment inasmuch as she had worked for Life Care for only a little over one year prior to her injury. There is also no evidence that the employer waived any of the requirements for wage loss compensation.

In *State ex rel. Jackson v. Industrial Commission*, 10th Dist. No. 08 AP-498, 2009 Ohio 1045, claimant had a wage loss after accepting new employment at a substantially reduced hourly rate. She argued that she was not required to continue looking for comparably paying work because she was working an average of 45.8 hours per week at her new job. However, merely because claimant was working full time did not automatically relieve her of the responsibility to search for comparably paying work. Citing *Timken*, the Court of Appeals reiterated that in determining whether to excuse a failure to search for another job, a broad-based analysis that looks beyond mere wage loss is necessary. *Id.* at 4. The wage loss must be necessitated by the disability and not by a life-style choice.

Upon review of the record in *Jackson*, the Court found there was no evidence claimant's new job in which she earned significantly less money was motivated by life-style choice. Rather, her physical limitations, limited education, training, and work experience contributed to her inability to obtain comparably paying work. *Id.* at 10. The Court found it relevant that claimant was working over-time, had made a substantial effort to find comparable employment, and her wages increased since beginning her second job thereby reducing her wage loss. Also claimant continued training at her new job and learned new job skills. *Id.* at 11. All of these factors demonstrated claimant's motivation to mitigate and reduce her wage loss. Considering

these circumstances, the Court concluded that claimant was excused from continuing to search for comparably paying work, and that her lower paying job was necessitated by her disability and not motivated by a life-style choice. *Id.* at 12.

Based upon these facts, the decision in *Jackson* does not apply to the instant case. There is simply no evidence of the kind cited and relied upon by the Court to excuse and justify Marrero's complete failure to search for comparable work. Unlike claimant in *Jackson*, Marrero undertook no job search, and while the claimant in *Jackson* was working 40 hours per week plus over-time, Marrero was working reduced hours so she would have time to look for other work. She simply did nothing and completely failed to mitigate her wage loss.

In her brief before the Court of Appeals, Marrero stated that she worked third shift from 10:30 p.m. to 6:30 a.m. because she cares for three small children during the day and taking a position with daytime working hours was not an option for her. Although Marrero has not advanced that same argument before this Court, these representations are instructive for two reasons. First, Marrero was available during normal daytime business hours to look for suitable employment. She clearly was not working like claimant in *Jackson* 40 hours per week plus over-time. Second, and perhaps more significantly, Marrero made a life-style choice self-limiting herself to a nightshift or nighttime working hours. She self-limited any job search and did not look for work because "taking a position with daytime working hours was not an option for her." Appellate Brief of Relator at 5. Marrero's lack of a job search was apparently motivated by a personal life-style choice.

Similarly, Marrero asserted before the Court of Appeals that she was restricted to only left-handed work because of the restrictions from her treating physician. In *State ex rel. v. International Truck & Engine Corp. v. Industrial Commission*, 10th Dist. No. 05 AP-1337, 2006 Ohio 6255, claimant also suffered a right shoulder injury and had physical restrictions similar to

those of Marrero. Claimant found another job which created a substantial wage loss, and did not pursue comparably paying work. In reversing the Industrial Commission's award of wage loss, the Court found that claimant failed to present any evidence showing that to require her to conduct a job search would be asking her to "leave a good thing." *Id.* at 6. Similarly, claimant failed to present any evidence that her current employment provided valuable benefits that would justify a failure to look for better paying employment. *Id.* That is the case here.

Marrero, like the claimant in *International Truck*, has presented absolutely no evidence showing that her circumstances justified a deviation from the good faith job search requirement. She has produced no evidence that she would be "leaving a good thing" or would give up valuable earned benefits by seeking comparably paying work to mitigate her wage loss.

In *State of Ohio ex rel. DaimlerChrysler Corp. v. Breuer*, 10th Dist. No. 06 AP-895, 2007 Ohio 5093, claimant returned to his original place of employment following an injury, but took a job in a different department because of permanent restrictions due to his injury. He later applied for working wage loss compensation based upon alleged reduced wages due to a fluctuation in the number of overtime hours available in the new job. The Industrial Commission awarded wage loss because claimant had fewer overtime hours in the new department. However, the Court of Appeals granted a writ ordering the Commission to deny wage loss compensation because claimant offered no evidence that the employer singled him out in any way as a result of his injury or that his inability to work overtime in the new position was directly related to his injury or work restrictions.

Similar to *Breuer*, Marrero returned to different work because of her physician's restrictions, and apparently worked all hours available and offered to her, but was not offered as many hours as she had worked before her injury. Marrero has neither offered nor produced any evidence that the employer singled her out in any way because of her injury. She has only made

unsupported accusations that the employer did not act in good faith and purposefully limited the number of hours of work given to her. However, Marrero presented absolutely no evidence of this alleged "bad faith" or purposeful limitation of her income and hours by Life Care because of her injury. Because Marrero has the burden of proof, she alone has the burden to insure the presentation and preservation of evidence in the record as to the reasons she did not have full time work. Here she has merely offered unsupported allegations and speculation.

Based upon the record, there was and is nothing for the Industrial Commission to analyze concerning the alleged circumstances excusing Marrero's lack of job search. Marrero has produced no evidence as to the reasons for her failure to have full-time work upon her return to a new light duty position. In the absence of any evidence showing a direct causal relationship between Marrero's injury and fewer hours of work, the Commission cannot and should not engage in speculation because to do so would constitute error and an abuse of discretion. Here the Commission reviewed the record and found it wanting in showing either a good faith effort to find suitable employment or circumstances excusing that requirement. The Commission did not abuse its discretion because Marrero failed to produce any evidence to support her claim.

Finally, Marrero argues that her wage loss is solely the fault of Life Care because the unpredictability of her work schedule made it impossible to find alternate work or to commit to another employer. Her allegation implies that she was looking only "to commit to a second job" and not find other suitable paying employment. If so, Marrero essentially made a life-style choice and decided for herself that she could not find a "second position" so she did not even try. She has not presented or produced any evidence that her ability to search for other employment was compromised by her working hours. If anything she had even more time to look for work.

In summary, there is simply no evidence that the circumstances presented here relieve Marrero from the obligation to make a good faith search for suitable employment and mitigate

her wage loss. Her situation fits within none of the factors cited and relied upon by the Courts. On the contrary, Marrero's assertions show that her failure to do anything was the result of her own life-style choice and perceptions about the unavailability of work without any proof. The record is completely lacking any documents, sworn statements, testimony, or other evidence which would show any of the factors relevant to a determination that a job search is excused.

CONCLUSION

For all of the reasons stated and based upon the cited authorities, Appellee Life Care Centers of America, Inc. respectfully urges this Honorable Court to affirm the decision of the Court of Appeals, find that the Industrial Commission decision denying wage loss compensation is supported by the evidence and is not an abuse of discretion, and deny Marrero's request for a writ of mandamus.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellee Life Care Centers, Inc. was served by regular U.S. Mail on this 24th day of February, 2010 upon:

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