

[Cite as *State ex rel. Dearing v. Indus. Comm.*, 2011-Ohio-5466.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State ex rel. Katherine A. Dearing,	:	
	:	
Relator,	:	
	:	Nos. 10AP-474
v.	:	and
	:	10AP-475
Industrial Commission of Ohio and	:	
Akron Metropolitan Housing Authority,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	
	:	

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D E C I S I O N

Rendered on October 25, 2011

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*Barrett & Davis, and Thomas E. Davis, for relator.*

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

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} In this original action, relator, Katherine A. Dearing, asks this court to issue writs of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order finding that she was overpaid compensation for

permanent total disability ("PTD") and temporary total disability ("TTD") and to vacate its order finding that she engaged in fraud.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate concluded that the commission did not abuse its discretion when it determined that relator had improperly received both PTD and TTD compensation and when it found that relator had committed fraud. Accordingly, the magistrate recommended that this court deny the requested writs of mandamus.

{¶3} Relator has filed objections to the magistrate's findings of fact<sup>1</sup> and conclusions of law. No response has been filed by respondents.

{¶4} In her objections to the magistrate's findings of fact, relator argues that the magistrate erred in finding that TTD was paid through April 30, 2007. According to relator, an investigative report prepared by the commission's Special Investigations Department ("SID") indicates that TTD was actually paid through June 8, 2006. Because the SID report does not show receipt of TTD compensation in 2007, relator contends that the magistrate erroneously "relie[d]" on an IRS 1099 document from 2007 as evidence she was working while receiving TTD compensation.

{¶5} Contrary to relator's claim, it was the district hearing officer ("DHO"), not the magistrate, who found that TTD was paid through April 30, 2007. The magistrate

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<sup>1</sup> Although relator initially claims her objections are limited to three of the magistrate's conclusions of law, the memorandum in support of those objections presents a separate argument entitled "Objections to findings of fact." The number of factual objections presented by relator is not entirely clear; however, we will address the two we believe to be sufficiently presented.

merely referenced the DHO's finding in a footnote to highlight the difference between the date calculated by the DHO and the date arrived at by relator. According to the magistrate, page three of relator's brief argued that TTD compensation was paid through January 31, 2006 based on C-84 disability forms completed by relator and her physician of record. Aside from recognizing these differing accounts, the magistrate did not adopt the April 30, 2007 date over the January 31, 2006 date.

{¶6} Relator also challenges statements made by the DHO and the staff hearing officer ("SHO") as if they were "findings of fact" rendered by the magistrate. Although the magistrate's findings of fact quoted from the orders of the DHO and SHO, the magistrate did so to "set forth the evidence and facts *relied upon by the commission.*" (Magistrate's Opinion at ¶15. Emphasis added.) The magistrate did not necessarily endorse every factual finding and legal conclusion rendered by the DHO and the SHO. Accordingly, relator's objections to the magistrate's findings of fact are overruled.

{¶7} In her objections to the magistrate's conclusions of law, relator argues that there was not sufficient evidence upon which the SHO could find overpayment of TTD, overpayment of PTD or fraud. These objections fail to raise any new issues and simply reargue the contentions which were presented to, and sufficiently addressed by, the magistrate. Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶8} Accordingly, relator's objections to the magistrate's decision are overruled, and the requested writs of mandamus are hereby denied.

*Objections overruled;  
writs of mandamus denied.*

BRYANT, P.J., and FRENCH, J., concur.

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**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Katherine A. Dearing,	:	
	:	
Relator,	:	Nos. 10AP-474
	:	and
v.	:	10AP-475
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Akron Metropolitan Housing Authority,	:	
	:	
Respondents.	:	
	:	

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

Rendered on June 29, 2011

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*Barrett & Davis, and Thomas E. Davis, for relator.*

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

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IN MANDAMUS

{¶9} Relator, Katherine A. Dearing, has filed these mandamus actions requesting that this court issue writs of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its orders which found that relator was over-paid both permanent total disability ("PTD") and temporary total disability ("TTD")

compensation because she was engaged in work activity while receiving both forms of compensation and, further, in finding fraud.

Findings of Fact:

{¶10} 1. Relator sustained a work-related injury on December 19, 2002 and her workers' compensation claim has been allowed for the following conditions:

Contusion scalp (head); cervical disc displacement C4-5 and C5-6 with myelopathy; herniated disc and spondylosis at L4-5; cervical disc herniations at the C3-4 and C6-7 levels; cervical spondylosis with myelopathy; complex regional pain syndrome/reflex sympathetic dystrophy right upper limb; flexor tenosynovitis of the right index, middle, and ring fingers.

{¶11} 2. According to her brief, relator received TTD compensation for the period "January 1, 2005 through January 31, 2006"<sup>2</sup> based upon C-84 disability forms completed by relator and her physician of record. (Relator's brief, at 3.)

{¶12} 3. On "May 4, 2007," relator filed an application for PTD compensation. (Relator's brief, at 3.)

{¶13} 4. Ultimately, PTD compensation was awarded beginning May 1, 2007 based solely on the medical factors alone and without consideration of relator's non-medical disability factors.

{¶14} 5. In April 2007, the Ohio Bureau of Workers' Compensation ("BWC") Special Investigations Division ("SID") received an anonymous tip from a person claiming that relator had "been working at the Akron Arid Club as the Bingo Chairperson while being compensated in gift cards." As a result, BWC SID agents began an

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<sup>2</sup>According to the District Hearing Officer's order from the May 15, 2009 hearing, relator actually received TTD compensation through April 30, 2007.

investigation which ultimately led to the filing of a motion to terminate both relator's PTD and TTD compensation and asking the commission to find an over-payment and fraud.

{¶15} 6. The SID report and documentation comprises over 300 pages (1 to 325). The evidence collected includes personal observations by SID agents, statements from fellow members and officers of the Akron Arid Club ("club"), copies of 1099s issued to relator, reimbursement requests submitted by relator, gift card tracking sheets, copies of 7 different meeting notes from the club's Board of Directors, the Attorney General's Site Inspection Report, BWC warrants, and PTD contact letters. The magistrate finds that the best way to succinctly set forth the evidence and facts relied upon by the commission finding over-payments of both PTD and TTD compensation can be found in the commission's various orders.

#### **Over-payment of PTD compensation**

{¶16} SHO order from hearing held April 9, 2009:

It is the order of the Staff Hearing Officer that the Injured Worker engaged in work activity while receiving Permanent Total Disability benefits.

This order is based on the Bureau of Workers' Compensation Special Investigations' Report of Investigation dated 09/23/2008. This report supports a finding that the Injured Worker worked as a Bingo Chairperson for the Akron Arid Club.

Also, the Injured Worker intentionally concealed her activities from the Bureau of Workers' Compensation in order to receive Permanent Total Disability benefits.

This order is based on the following evidence:

[One] 07/13/2007 – Undercover operation wherein the Injured Worker was observed counting money and preparing Bingo tickets, and coordinating employees.

[Two] 09/07/2007 – Undercover operation wherein the Injured Worker was observed coordinating the Bingo game, including counting money, selling tickets, and calling out numbers on the microphone.

[Three] 09/21/2007 – Undercover operation wherein the Injured Worker was observed coordinating the Bingo operation.

[Four] Application for charitable Bingo license in 2007 noting the Injured Worker as the primary Bingo operator and custodian of records.

[Five] Letter dated 06/18/2007 wherein the Injured Worker refers to herself as the Bingo Chairperson.

[Six] 1099 Tax Statements outlining the Injured Worker's earnings and corrected 1099 indicating the Injured Worker earned \$4,110.00 in 2007.

[Seven] Mileage reimbursement checks paid to the Injured Worker for her participation in Bingo shows.

[Eight] Affidavits of Helen Bonoff, Don Swan, and Jim Sparks, naming the Injured Worker as the Bingo Chairperson.

[Nine] Affidavit of the Financial Secretary for Akron Arid Club Tammy Sparks. Said affidavit dated 09/08/2008 notes the Injured Worker spent six to seven days per week from the hours of 8:00 A.M. to 4:00 P.M. and also had her own desk at the Akron Arid Club.

[Ten] The Injured Workers' testimony that she served as the Bingo Chairperson for the Akron Arid Club.

Based on the entire investigation report dated 09/23/2008 as well as the specific evidence cited above, the Hearing Officer finds the Administrator has established the Injured Worker engaged in work activity commencing 05/01/2007, while collecting Permanent Total Disability benefits.

**Over-payment of TTD compensation**

{¶17} (1) District hearing officer ("DHO") order from hearing May 15, 2009:



The Hearing Officer finds that the Bureau of Workers' Compensation Special Investigations Department began investigation into the Injured Worker and found that the Injured Worker while receiving temporary total compensation and subsequently permanent and total disability had been employed by the Akron Arid Club on Brown Street in Akron, Ohio.

Upon an investigation the SID Unit found that the Injured Worker was working as a primary Bingo officer for the club from 2005 to 2007.

The Hearing Officer finds that pursuant to statements made by officers of the club as well as documentation in file showing wages that the Injured Worker received that was indicated as gift cards that the Injured Worker was indeed employed while receiving Bureau of Workers' Compensation compensation.

Documentation in file shows that the Injured Worker worked everyday at the club from eight until four, had a desk at the club, and also was over the Bingo sessions that were run daily at the club.

The SID operatives witnessed as indicated the Injured Worker behind the counter selling instant Bingo cards and also other Bingo equipment. Although the Investigative Unit did not witness the Injured Worker everyday the affidavit from the financial officer of the club, indicates that the Injured Worker was indeed at the club everyday and in using her words "rarely missed a Bingo session, in fact, Kathleen Dearing came to the club everyday to handle a variety of duties including counting the instant Bingo tickets, going to the bank, and on occasion going to purchase the gift certificates that would be passed out to the Bingo volunteers." The Hearing Officer finds that documentation in file indicates that the Injured Worker received gas mileage for going to the bank and also going to a Bingo show in order to pick up Bingo supplies.

Documentation in file also shows that the Injured Worker received approximately \$4,100 in 2007 pursuant to a 1099 that was issued by the club.

Prior to 2007 the club did not issue 1099's but pursuant to wage documentation in file the Injured Worker did receive approximately \$350 to \$450 a month prior to 2007, in 2005 and 2006.

Further showing that the Injured Worker had management duties at the club there is documentation from the Ohio Attorney General which indicates that Ms. Dearing was involved in the Akron Arid Club from 2005 to 2007 and that as indicated by Trustee J. Reed Yoder had received "a substantial amount of compensation from the club." The Hearing Officer finds that the gift cards that the Injured Worker was getting was compensation for work that she was performing at the Bingo sessions and for the club.

The Hearing Officer finds that based on the fact that the Injured Worker was receiving compensation for work performed from the Akron Arid Club while receiving compensation from the Bureau of Workers' Compensation in the form of temporary total compensation and also after 05/01/2007 permanent total disability compensation that the Injured Worker has been found overpaid from 01/01/2005 through 04/30/2007 by receiving temporary total disability benefits and overpaid from receiving permanent total disability benefits from 05/01/2007 through the present. The Hearing Officer finds that the Injured Worker had the ability and did return to gainful employment as a Bingo chairperson for the Akron Arid Club and was not entitled to compensation during the above periods of time.

{¶18} (2) Staff hearing officer's ("SHO") order from hearing September 18, 2009:

In support of its motion the Bureau of Workers' Compensation offers its Special Investigation Unit's report, and attachments to show that the Injured Worker performed activities at the Arid Club that are consistent with gainful employment. Based upon the fact that the Injured Worker engaged in gainful employment while she received temporary total compensation the Bureau of Workers' Compensation contends that the Injured Worker fraudulently received the temporary benefits; therefore, she is overpaid.

The Injured Worker asserts that the Arid Club is a private club for recovering alcoholics and drug addicts. The club also had a public side where members of the public could by

[sic] food and partake in bingo games. The Injured Worker also asserts that she served as a volunteer for the club and was not paid for her efforts. When giving direct testimony the Injured Worker indicated that she was given gift cards as reimbursement for her reasonable expenses. (see transcript of hearing page 18 lines 13 through 16).

The Staff Hearing Officer finds that the Injured Worker managed the bingo games for the Arid Club two days a week from January 1 2005 through January 31, 2006 while she was receiving temporary total compensation. The Staff Hearing Officer also finds that the Injured Worker received gift cards in varying amounts for the services that she rendered.

Despite the Injured Worker's characterizing money she received as a gift, it is clear from the record the [sic] she was being compensated for the activities she performed. When a person receives money for deeds done the person is working. According to Ohio Revised Code Section 4123.56 (A) the payment to temporary total compensation is prohibited when one has returned to work. Since the Injured Worker did return to work, albeit part-time work she is not entitled to temporary total compensation; therefore, the Injured Worker is overpaid temporary total compensation from January 1, 2005 through January 31, 2006.

{¶19} 7. Following the completion of the SID investigation, the BWC first filed a motion to terminate relator's PTD compensation and asking the commission to declare an over-payment and find fraud as well as a later motion asking the commission to find that relator had been working while receiving TTD compensation and asking the commission to declare an over-payment and fraud.

{¶20} 8. Based upon the above outlined evidence, the commission determined that: relator had been engaged in work activity while collecting PTD benefits, and had returned to work for which she was compensated while collecting TTD benefits.

{¶21} 9. Thereafter, the commission addressed the BWC's contention that relator had received the above compensation through fraud. Concerning her receipt of PTD compensation, following the April 9, 2009 hearing, and the finding of an over-payment, the commission made the following determination:

In addition, the Injured Worker procured Permanent Total Disability benefits through fraud. Industrial Commission of Ohio Memorandum S2 outlines the requirement regarding a finding of fraud. The prima facie elements of fraud which must be established are: 1) a representation, or where there is a duty to disclose, concealment of fact 2) which is material to the transaction at hand 3) made falsely with the knowledge of its falsity, or which such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred 4) with the intent of misleading another into relying upon it 5) justifiable reliance upon the representation or concealment, and 6) a resulting injury proximately caused by the reliance.

The Administrator has established the elements outlined above. The Injured Worker concealed her employment as the Bingo Chairperson from the Bureau of Workers' Compensation. The Injured Worker completed the Permanent Total Disability Application on 05/26/2006 and noted her last day of employment was 02/26/2003. She also completed two annual Permanent Total Disability questionnaires reporting that she has not worked since the receipt of Permanent Total Disability benefits.

The Injured Workers' concealment of her work status is material to the transaction as the Bureau of Workers' compensation would not have paid Permanent Total Disability benefits with the knowledge that the Injured Worker had returned to work.

The Injured Worker concealed her employment as a Bingo Chairperson as she failed to report her work status on the Permanent Total Disability Application or Permanent Total Disability questionnaires. These misrepresentations misled the Bureau of Workers' Compensation into paying Permanent Total Disability benefits as they relied upon the concealment.

Accordingly, the Bureau of Workers' Compensation sustained an injury as benefits were paid that the Injured Worker was not entitled to receive.

Therefore, it is the order of the Staff Hearing Officer that Permanent Total Disability benefits are terminated, Permanent Total Disability benefits are ordered overpaid from 05/01/2007 through 04/09/2009, and Permanent Total Disability benefits are ordered recouped pursuant to the fraud provision in Ohio Revised Code 4123.511 as a finding of fraud is made in accordance with Industrial Commission Memorandum S2.

With regard to the receipt of TTD compensation, following the September 18, 2009 hearing and the finding of an over-payment, the commission made the following determination:

The next issue is whether or not the Injured Worker's receipt of temporary total disability benefits while working, as the bingo hall manager constitutes fraud.

In order to support a finding of fraud the Staff Hearing Officer must find that there was 1) a representation, or where there is a duty to disclose; concealment of fact, 2) which is material to the transaction at hand; 3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred 4) with the intent of misleading another into relying upon it; 5) justifiable reliance upon the representation of concealment; and 6) resulting injury proximately caused by the reliance. State ex rel. Koonce v. Indus. Comm., (198) 18 Ohio St. 3d 60 and Memo No U.3 of the Industrial Commission of Ohio Policy Statements and Guidelines.

There is no credible evidence in the record which would establish that this Injured Worker had a good faith belief that she could both be paid for work activities and receive temporary total payments at the same time. Therefore, she had a duty to report any pay she received to the Bureau. The Injured Worker failed to disclose the receipt of the gift cards when she had a duty to do so. The fact that Injured Worker was receiving payment for work performed was certainly material the bureau when determining whether or not to pay

temporary total benefits. The Injured Worker's acceptance of the temporary total benefits while working is tantamount to falsely stating that she was not working. The Injured Worker failed to report her earnings to the bureau so that he temporary total benefits would not be interrupted. The bureau relied on the fact that there was no indication that the Injured Worker was employment and continued to pay compensation to its detriment.

The aforementioned findings of fact establish that the Injured Worker fraudulently procured temporary total payments from the bureau from January 5, 2005 through January 31, 2006. Accordingly, the bureau is permitted to recoup the overpayment pursuant to the fraud provisions of Ohio Revised Code Section 4123.511.

(Sic passim.)

{¶22} 10. Relator's appeals and requests for reconsideration were denied by the commission and the instant mandamus actions followed.

Conclusions of Law:

{¶23} Three separate arguments are raised in these mandamus actions. First, whether the commission abused its discretion when it determined that relator's activities at the club disqualified her from receiving PTD compensation. Second, whether the commission abused its discretion by finding that she had been compensated for her activities thereby precluding her from receiving TTD compensation. And third, whether the commission abused its discretion when it made its finding of fraud.

{¶24} It is this magistrate's decision that the commission did not abuse its discretion when it determined that relator had improperly received both PTD and TTD compensation and when it determined that relator had committed fraud.

{¶25} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief

sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶26} Because the hearings related to the receipt of PTD compensation were held first and because the parties addressed this issue first in their briefs, the magistrate will address the issue of receipt of PTD compensation first, followed by relator's receipt of TTD compensation and the issue of fraud.

#### **PTD compensation**

{¶27} The relevant inquiry in assessing a claimant's entitlement to an award of PTD compensation under R.C. 4123.58 is the claimant's capacity for sustained remunerative work activity. *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, is the seminal case in this area and sets forth the conditions under which the payment of PTD compensation is inappropriate. Specifically, the payment of PTD compensation is inappropriate where there is evidence of:

\* \* \* (1) actual sustained remunerative employment, *State ex rel. Kirby v. Indus. Comm.*, 97 Ohio St.3d 427, 2002-Ohio-6668, 780 N.E.2d 275; (2) the physical ability to do sustained

remunerative employment, *State ex rel. Schultz v. Indus. Comm.*, 96 Ohio St.3d 27, 2002-Ohio-3316, 770 N.E.2d 576; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. See *State ex rel. Timmerman Truss, Inc. v. Indus. Comm.*, 102 Ohio St.3d 244, 2004-Ohio-2589, 809 N.E.2d 15, ¶26.

Id. at ¶16.

{¶28} Relator challenges each of the above three criteria. In making her arguments, the magistrate notes that relator appears to argue that the commission must find all three of the above criteria in order to find that her receipt of PTD compensation was inappropriate. However, as clearly indicated by the language used by the Supreme Court of Ohio, a finding of any of the three criteria constitutes grounds for the finding that the award of PTD compensation was inappropriate.

{¶29} Relator first contends that the commission never found that she was actually engaged in sustained remunerative employment and that the commission only determined that she was the bingo chairman. In support of this argument, relator points out that, after the award of PTD compensation was made, she returned all the gift cards she received. Relator also contends that there is no medical evidence which was videotaped demonstrating that her physical activities actually reflect an ability to engage in sustained remunerative employment. Lastly, relator contends that even if her receipt of the gift cards constituted wages and even if her activities constituted work, there was no evidence that she was medically capable of performing some sustained remunerative employment.



{¶30} In *Lawson*, the Supreme Court of Ohio considered the above criteria and confronted the issue concerning just how much activity a claimant receiving PTD compensation could engage in. To that extent, the *Lawson* court stated as follows:

Neither "sustained" nor "work" has been conclusively defined for workers' compensation purposes. As to the latter, clearly, labor exchanged for pay is work. *Schultz* also teaches that unpaid activity that is potentially remunerative can be considered for purposes of establishing a physical capacity for remunerative employment. This principle, however, should always be thoughtfully approached, particularly when PTD is at issue.

One of the most enduring (though not often explicitly stated) misconceptions about PTD is that once it is granted, the recipient must thereafter remain virtually housebound. This is a fallacy. PTD exempts no one from life's daily demands. Groceries must be purchased and meals cooked. Errands must be run and appointments kept. The yard must be tended and the dog walked. Where children are involved, there may be significant chauffeur time. For some, family and friends shoulder much of the burden. Others, on the other hand, lack such support, leaving the onus of these chores on the PTD claimant.

These simple activities can nevertheless often generate considerable controversy. That is because all of these tasks are potentially remunerative. From the school cafeteria to the four-star restaurant, people are paid to prepare meals. People are paid for lawn and child care. Many people earn their living behind the wheel. *State ex rel. Parma Comm. Gen. Hosp. v. Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336, 767 N.E.2d 1143, acknowledged this and cautioned against an automatic disqualification from compensation based on the performance of routine tasks, regardless of their potential for payment. We instead compared the activities with claimant's medical restrictions to determine whether they were so inconsistent as to impeach the medical evidence underlying the disability award.

\* \* \*

In *State ex rel. Midmark Corp. v. Indus. Comm.* (1997), 78 Ohio St.3d 2, 676 N.E.2d 73, the employer challenged

claimant's PTD application with surveillance evidence of claimant walking unassisted, raking leaves, and doing minor house repairs. The commission was not persuaded by Midmark's evidence and ordered PTD. The case eventually came before this court, which upheld the commission:

"First, the [surveillance] material does not establish a medical capacity for work greater than sedentary. It simply shows claimant walking unassisted or doing fairly un strenuous domestic chores. \* \* \*

"Second, these documented activities, even if deemed inconsistent and work-amenable, do not establish that claimant can do *sustained* remunerative employment. Midmark's investigation spanned approximately fifteen months, yet it could show only five days in which claimant was performing allegedly questionable activities. There is no evidence of claimant's performing even any medium-exertion labor, nor is there any evidence of claimant's doing the recorded activity on anything other than rare occasions. The surveillance package, therefore, proved very little." (Emphasis sic.) Id. at 11, 676 N.E.2d 73.

Id. at ¶19-21, 30-32.

{¶31} Contrary to relator's assertions, the SHO specifically relied on the following evidence: relator spent six to seven days per week during the hours of 8:00 a.m. to 4:00 p.m. at the club, she served as the bingo chairman for the club, had her own desk at the club, was reimbursed for her mileage, earned over \$4,000 in 2007, was the custodian of the records and was responsible for the club's application for the charity bingo license in 2007, as well as SID agent's observations of her activities. Although relator contends that her daily presence at the club constituted nothing more than volunteering and socializing, there is evidence in the record which would indicate otherwise. The evidence cited by the SHO demonstrated that relator had a daily presence at the club and, during that time, she performed many activities which

supported the club's bingo operations. It should be remembered that relator received PTD compensation based solely upon the allowed medical factors and without consideration of the non-medical disability factors. As such, the commission determined that relator was physically incapable of performing some sustained remunerative employment. The magistrate finds that it was not an abuse of discretion for the commission to find that relator's ability to be at the club six to seven days a week from 8:00 a.m. to 4:00 p.m. demonstrated an ability to perform some sustained remunerative employment.

{¶32} Relator also argues that the gift cards were not wages. However, the commission found otherwise. The record indicates that relator and others were routinely given gift cards for their services. Further, a review of the minutes from the club's board meetings indicates that relator lobbied strongly that she and others be awarded gift cards in higher dollar amounts. Further, 1099 tax statements specifically listed relator's earnings of more than \$4,000 in 2007. There is some evidence in the record upon which the commission could rely to find that the gift cards did constitute wages.

{¶33} Relator also contends that even if the gift cards are considered wages and even if her activities do constitute work, there is no evidence that she was capable of performing sustained remunerative employment. In support of her argument, relator cites this court's decision in *State ex rel. Bentley v. Indus. Comm.*, 10th Dist. No. 05AP-336, 2005-Ohio-6755. Relator contends that her activities were similar to the activities of the claimant in that case and that her activities did not establish that she was

medically capable of performing some sustained remunerative employment. As hereinafter explained below, this magistrate disagrees.

{¶34} In *Bentley*, Virgil P. Bentley, Jr., was receiving PTD compensation. At the same time, Bentley worked during the school year as a part-time van driver, 8:30 a.m. to 9:00 a.m. and 3:00 p.m. to 3:30 p.m. Monday through Friday, for the Washington Courthouse City Schools. Bentley had earned approximately \$3,500 in 2002.

{¶35} Following an investigation, the BWC filed a motion to terminate Bentley's PTD compensation and asked the commission to declare an over-payment and requested that the commission make a finding of fraud. The commission agreed and determined that Bentley had engaged in part-time work over a period for which he was retroactively awarded PTD compensation.

{¶36} Bentley filed a mandamus action in this court and, in adopting the decision of its magistrate, this court granted Bentley a writ of mandamus after finding that Bentley's activities as a van driver did not constitute actual sustained remunerative employment, did not demonstrate the physical ability to perform sustained remunerative employment, and were not so medically inconsistent with the disability evidence that they impeached the medical evidence underlying the award. With regard to Bentley's work activities, this court stated, at ¶4:

\* \* \* The commission notes that relator was paid for his time as a van driver and worked consistently from July 19, 2002 through December 20, 2002. However, as the magistrate found, the employment involved was not medically inconsistent with relator's medical restrictions, was only for 30 minutes before school and 30 minutes after school, and involved the use of only his left hand, not his right hand, the use of which was severely limited. We believe the magistrate's findings, in this respect, were consistent with

the Ohio Supreme Court's decision in *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, in that relator's activities as a van driver did not constitute actual sustained remunerative employment, did not demonstrate the physical ability to perform sustained remunerative employment, and were not so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. See id. at ¶15-16. \* \* \*

{¶37} The facts of the present case are significantly different from the facts in the *Bentley* case. Relator herein was at the club six to seven days a week from the hours of 8:00 a.m. to 4:00 p.m. By comparison, Bentley drove a school van for one hour per day during the school year. Driving the van was not inconsistent with Bentley's physical limitations as he was able to perform those activities solely with his left hand. In the present case, the commission determined that, based solely on the allowed medical conditions, relator was unable to perform any sustained remunerative employment. Although relator contends that she did nothing more than socialize at the club and occasionally volunteer, the evidence in the record and cited by the commission demonstrates otherwise. Further, relator's activities were sustained: six to seven days per week and up to eight hours per day. The facts of relator's case are not analogous to the facts in the *Bentley* case.

{¶38} Relator notes several times that the videotape evidence was not sufficient to establish that she was working. The problem with this argument is that the commission relied on much more than just the videotape evidence. Further, relator's argument that the fact that she returned many of the gift cards after she was awarded PTD compensation does not in any way change the fact that the commission still found that she was engaged in sustained activities demonstrating an ability to perform some

sustained remunerative employment. Relator's attempts to minimize the evidence cited by the commission asks this court to reweigh the evidence. However, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. Further, it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373. The magistrate finds that relator has not demonstrated that the commission abused its discretion in finding that she was engaged in activities which were inconsistent with the receipt of PTD compensation.

#### **TTD compensation**

{¶39} Relator also contends that the commission abused its discretion when it determined that she was not entitled to TTD compensation because she was working. As she argued before, she was volunteering at the club, did not volunteer with the expectation of remuneration, but to help the organization that has helped her maintain her sobriety. Relator argues that there is no proof such as pay stubs or numerous 1099s to prove that she was paid.

{¶40} In support of her argument, relator cites this court's decision in *State ex rel. Kemp v. Indus. Comm.*, 10th Dist. No. 07AP-113, 2008-Ohio-239. In that case, Olivia Kemp was receiving TTD compensation. Kemp filed a new motion for TTD compensation for an unspecified period of time and the BWC filed a motion seeking to terminate Kemp's TTD compensation presumably on grounds that her condition had reached maximum medical improvement. The motions were heard before a DHO who granted Kemp's motion for TTD compensation and yet found that no TTD compensation

was payable. The DHO determined that Kemp had received compensation from the county for caring for a disabled adult and that constituted work.

{¶41} On appeal, an SHO agreed finding that Kemp had been receiving funds from the county for caring for a disabled adult and that those funds were income, precluded the receipt of TTD compensation, and that the monies should be recouped pursuant to R.C. 4123.511(J).

{¶42} Kemp filed a mandamus action in this court. This court adopted the decision of its magistrate and granted a writ of mandamus ordering the commission to vacate its order which had terminated Kemp's TTD compensation and ordering the commission to reconsider the matter and properly address the relevant factors to determine Kemp's eligibility for TTD compensation.

{¶43} This court agree with its magistrate's finding that the SHO's sole basis for finding that Kemp was not entitled to TTD compensation was that she had received income; however, that finding did not adequately address the issue. This court determined that the issues to be addressed were whether Kemp was performing work and whether the county payments Kemp received were in the nature of compensation to her for caring for the disabled adult or whether the payments were more in the nature of the type of payments made for foster care maintenance to cover costs for items for the disabled adult, such as food, clothing, travel and liability insurance. This court indicated that if the county payments were meant to solely benefit the disabled adult and pay the living expenses of that disabled adult, they could not be considered wages, income or compensation to Kemp and that Kemp's care for the disabled adult could not be termed remunerative or work activity.

{¶44} In citing to the *Kemp* decision, relator contends that, in her case, the SHO did not perform the requisite analysis. Relator appears to be arguing that more analysis was necessary to determine whether or not the gift cards actually constituted wages.

{¶45} The commission determined that relator did return to work. Although relator had testified that she was given gift cards as reimbursement for her reasonable expenses, the commission disagreed. As noted previously, relator was given a gift card every time she worked a bingo event and yet, nowhere in her testimony did relator explain what reasonable expenses she incurred by virtue of "volunteering" at the bingo sessions. Further, the record includes evidence that relator was specifically reimbursed for other expenses such as mileage. The situation presented here does not raise the same questions as were raised in the *Kemp* case.

{¶46} TTD compensation is designed to compensate a claimant for a total loss of earnings. See *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, and R.C. 4123.56(A). A claimant who is engaged in any sort of remunerative work activity is precluded from receiving TTD compensation. For example, in *State ex rel. Johnson v. Rawac Plating Co.* (1991), 61 Ohio St.3d 599, the court held that claimants cannot receive TTD compensation who, while unable to return to their former position of employment, continue to work second, part-time jobs. In *State ex rel. Blabac v. Indus. Comm.*, 87 Ohio St.3d 113, 1999-Ohio-249, John C. Blabac injured his back and was unable to return to his former position of employment. However, Blabac had part-time work as a scuba-diving instructor. While receiving TTD compensation, Blabac sat at the edge of the pool and observed his students. Because Blabac received compensation, the court found that he was not entitled to receive TTD compensation. Further, it was



immaterial that Blabac's work activities were within his physical restrictions. It was the fact that he was compensated that made him ineligible to receive TTD compensation. In this situation, the commission determined that the gift cards relator received were compensation and, having already determined that this finding did not constitute an abuse of discretion, the fact that relator was receiving wages precluded her eligibility for TTD compensation.

### **Fraud**

{¶47} Relator's final argument is that the commission abused its discretion by finding that she fraudulently collected PTD and TTD compensation. In making this argument, relator emphasizes the fact that she testified that she merely volunteered at the club, that her actions were simply her way of "giving back" to an organization that had helped her maintain her sobriety, and that, inasmuch as she believed the gift cards were nothing more than reimbursement, the commission abused its discretion in making the finding of fraud.

{¶48} It is this magistrate's decision that the commission did not abuse its discretion in making a finding of fraud. The elements of fraud which must be established are: (1) a representation, or where there is a duty to disclose, a concealment of fact; (2) which is material to the transaction at hand; (3) made falsely, with the knowledge of its falsity, or with such utter disregard or recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused the reliance. See *State ex*

*rel. Koonce v. Indus. Comm.* (1994), 69 Ohio St.3d 436, *State ex rel. Ellis v. Indus. Comm.*, 92 Ohio St.3d 508, 2001-Ohio-1273.

{¶49} As noted in the findings of fact, the commission made findings of fraud with regard to relator's receipt of both PTD and TTD compensation. With regard to PTD compensation, the commission determined that relator concealed her employment as the bingo chairman, completed her PTD application noting that her last date of employment was February 26, 2003, completed two annual PTD questionnaires indicating that she had not worked since the receipt of PTD benefits, that the concealment of her work status was material because the BWC would not have paid her PTD compensation with knowledge that she had returned to work, that she concealed her employment by failing to report her work status and that the misrepresentations misled the BWC into paying her as the BWC relied upon the concealment, and that the BWC sustained an injury as a result of paying relator benefits to which she was not entitled.

{¶50} Relator first argues that she was not compensated for her volunteer efforts at the club; however, the commission determined that her receipt of gift cards constituted compensation. Relator also argues that, after she was awarded PTD compensation, she returned the gift cards to the club. A review of the record reveals that relator did void two checks; however, the following notation appears under the copy of the voided checks: "Both checks were voided and Kathy was given \$700. cash to donate to the bingo volunteers any way she wanted." The above language indicates that, although relator voided those checks, she was, in any event, still given the \$700 in cash.

{¶51} While relator spends a considerable amount of time in her brief arguing that the gift cards did not constitute compensation, the receipt of compensation was not necessary in order for the commission to make a finding that she had been over-paid PTD compensation. The commission also found that relator demonstrated the physical ability to perform sustained remunerative employment and relied on statements that relator was at the club six to seven days a week from the hours of 8:00 a.m. to 4:00 p.m., that she had her own desk at the club, that she served as a bingo chairman, the application for the club's charitable bingo license in 2007 noting that relator was the primary bingo operator and custodian of records, the 1099 tax statements for 2007 and the mileage reimbursement checks paid to relator for her participation in bingo shows. Inasmuch as relator received the award of PTD compensation based solely on the allowed conditions in her claim and without consideration of the non-medical disability factors, the ability to be present at the club six to seven days a week and performing the types of activities relator performed constitutes some evidence establishing that relator had the physical ability to perform sustained remunerative employment. While relator maintains that her activities were volunteer activities and testified that the majority of her time at the club was spent in pursuit of social activities, there is some evidence in the record upon which the commission relied to find that she was indeed working.

{¶52} The above are the only two arguments relator makes in asserting that her receipt of the gift cards did not constitute fraud. However, it is apparent that the commission did not find relator's testimony to be credible. The evidence relied on by the commission is sufficient to meet the elements of fraud: (1) relator failed to disclose that she was working; (2) the fact that she was working was material to the transaction

at hand; (3) the failure to disclose this information was done knowingly or with such utter disregard and recklessness that knowledge may be inferred; (4) with the intent of misleading the BWC into relying upon it; (5) the BWC relied on her concealment; and (6) the BWC paid relator PTD compensation to which she was not entitled thereby causing the resulting injury.

{¶53} Unlike other cases, there is evidence that relator's activities at the club were not sporadic; instead, they were regular and ongoing. Further, unlike other cases where the activities were not outside the medical restrictions of the claimant, relator had received her PTD award based solely upon the allowed conditions—based upon a finding that she was not capable of performing any sustained remunerative employment. As such, the magistrate finds that the commission did not abuse its discretion in finding fraud with regard to her receipt of PTD compensation.

{¶54} Likewise, the magistrate finds that the commission relied on some evidence demonstrating that relator fraudulently received TTD compensation. Here, relator argues that there was no proof such as pay stubs or any 1099s other than the one for 2007. Further, relator contends that the sole basis for finding that she was not entitled to TTD compensation was that she had returned to work, a finding which the commission made without proper analysis. Those are the only two arguments relator makes in this regard.

{¶55} As noted in the findings of fact, it is clear that the commission relied on the SID report finding that relator worked as the primary bingo officer from 2005 to 2007. Further, the commission relied on statements and documentation indicating that the gift cards constituted wages, and that relator worked at the club nearly every day. The

commission also relied on the 1099 from 2007 and, in noting that relator did not receive any 1099s for previous years, the commission found that documentation in the file indicated that relator received between \$350 and \$450 per month in the years 2005 and 2006. The commission found that this was compensation and that relator's receipt of compensation for her activities rendered her ineligible to receive TTD compensation.

{¶56} The magistrate finds that the elements of fraud have been established: (1) relator failed to disclose that she was working and being paid through gift cards; (2) this information was material; (3) relator had knowledge that she should have reported the wages or withheld that information with such utter disregard and recklessness that knowledge may be inferred; (4) with the intent of receiving TTD compensation; (5) the BWC paid that compensation; and (6) in paying the compensation the BWC suffered an injury.

{¶57} All of relator's arguments concern the commission's determination of the facts. Finding that there is some evidence in the record to support the factual determinations made by the commission the magistrate finds that relator is simply asking this court to reweigh that evidence and that request is improper.

{¶58} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in finding over-payments of PTD and TTD compensation and in finding that relator procured that compensation through fraud. As such, this court should deny relator's request for a writ of mandamus.

*/s/ Stephanie Bisca Brooks*  
STEPHANIE BISCA BROOKS  
MAGISTRATE

**NOTICE TO THE PARTIES**

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