



{¶1} Relator, General Mills, Inc., 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 that granted wage-loss compensation to respondent Delvonzo Cotton ("claimant") and to issue an order denying claimant's application for wage-loss compensation on or after September 6, 2003.

{¶2} This matter was referred to a magistrate of this court, pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. (Attached as Appendix A.) No objections have been filed to that decision.

{¶3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the file, this court adopts the magistrate's decision. Relator's request for a writ of mandamus is denied.

*Writ of mandamus denied.*

BRYANT and LAZARUS, JJ., concur.

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## APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

|  |   |                    |
|--|---|--------------------|
| State of Ohio ex rel. General Mills, Inc., | : |                    |
| Relator,                                   | : |                    |
| v.   | : | No. 04AP-366       |
| Industrial Commission of Ohio              | : | (REGULAR CALENDAR) |
| and Delvonzo Cotton,                       | : |                    |
| Respondents.                               | : |                    |

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### MAGISTRATE'S DECISION

Rendered on October 18, 2004

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*Marshall & Melhorn, LLC, Roman Arce and John A. Borell, Jr.*, for relator.

*Jim Petro*, Attorney General, and *Keith Blosser*, for respondent Industrial Commission of Ohio.

*Gallon & Takacs Co., L.P.A.*, and *Theodore A. Bowman*, for respondent Delvonzo Cotton.

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### IN MANDAMUS

{¶4} Relator, General Mills, Inc., 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 granted wage loss compensation to respondent

Delvonzo Cotton ("claimant"), and ordering the commission to issue an order denying claimant's application for wage loss compensation on or after September 6, 2003.

Findings of Fact:

{¶5} 1. Claimant sustained a work-related injury while employed with relator and his claim has been allowed for: "lumbar strain; right hamstring strain; aggravation of pre-existing spinal stenosis L3-4, L4-5; aggravation of pre-existing spondylosis L3-4, L4-5."

{¶6} 2. On October 14, 2003, claimant filed an application for wage loss compensation supported by the medical reports of his treating physician, Dr. Mandel, who placed restrictions upon claimant which prevented him from returning to his former position of employment as a forklift driver.

{¶7} 3. Claimant submitted the following relevant job search information: on July 31, 2002, claimant registered with the Ohio Department of Job and Family Services; on October 10, 2003, claimant contacted relator inquiring whether there were any job opportunities which claimant could perform within the restrictions placed on him by Dr. Mandel; claimant earned a bachelor of arts degree in marketing and sales from the University of Toledo one month before being found to have reached maximum medical improvement in his claim; and numerous job search forms indicating that claimant had contacted 166 different employers seeking work.

{¶8} 4. Claimant's application was heard before a district hearing officer ("DHO") on December 29, 2003, and resulted in an order granting the compensation as follows:

The Injured Worker has restrictions which prevent him from returning to his former position of employment as a forklift driver in Distribution. The restrictions are documented in the Medical Reports completed by Dr. Mandel and dated 08/27/2003 and 12/11/2003.

The Injured Worker earned a Bachelor of Arts degree in Marketing and Sales, graduating from the University of Toledo one month before being found maximum medically improved in this claim. The Injured Worker commenced a job search immediately.

The Injured Worker did register with the Bureau Of Job and Family Services and is looking for comparatively paying work within his restrictions. The Injured Worker stated he organizes his jobs search efforts on a weekly basis, examining newspaper classified ads from various areas, researching jobs and companies on the Internet and has had at least two (2) job interviews.

Based on a review of the job searches, and considering the testimony, it is the finding of the District Hearing Officer that the Injured Worker be paid Non-Working Wage Loss for the period, 07/06/2003 to present (12/29/2003) and continuing upon submission of proof and pursuant to Ohio Revised Code 4123.56.

{¶9} 5. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on February 13, 2004. The SHO modified the prior DHO order and granted wage loss compensation as follows:

It is the finding of this Staff Hearing Officer that injured worker's earnings from 7/6/03 through 12/29/03 were less than the injured worker's wages at the time of injured worker's injury with the instant employer.

It is the further finding of this Staff Hearing Officer that the difference between injured worker's wages, at the time of injured worker's injury, and injured worker's earnings, for the period from 7/6/03 through 12/29/03, was the result of a medical impairment causally related to the industrial injury allowed in this claim, based upon the medical restrictions outlined in the reports of Dr. Mandel, dated 8/27/03 and 12/11/03.

It is the finding of this Staff Hearing Officer that the injured worker has restrictions which arose out of this injury which prohibit the injured worker from returning to the former

position of employment. (See medical evidence from Dr. Mandel.)

{¶10} 6. Relator's appeal was refused by order of the commission mailed March 2, 2004.

{¶11} 7. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶12} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show that she has 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.

{¶13} Entitlement to wage loss compensation is governed by R.C. 4123.56(B), which provides, in pertinent part, as follows:

Where 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 or as a result of being unable to find employment consistent with the claimant's physical capabilities, the employee shall receive compensation at sixty-six and two-thirds per cent of

the employee's weekly wage loss not to exceed the statewide average weekly wage for a period not to exceed two hundred weeks.

{¶14} In order to receive workers' compensation, a claimant must show not only that a work-related injury arose out of and in the course of employment, but, also, that a direct and proximate causal relationship exists between the injury and the harm or disability. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. This principle is equally applicable to claims for wage loss compensation. *State ex rel. The Andersons v. Indus. Comm.* (1992), 64 Ohio St.3d 539. As noted by the court in *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, a wage loss claim has two components: a reduction in wages, and a causal relationship between the allowed condition and the wage loss. The purpose of wage loss compensation is to encourage workers to return to gainful employment. *State ex rel. Consol. Freightways v. Engerer* (1996), 74 Ohio St.3d 241. It is well-settled that a prerequisite to an award of wage loss compensation is proof that the claimant made a good-faith effort to secure comparable paying work, but was unable to do so due to the allowed condition. *State ex rel. Chora v. Indus. Comm.* (1996), 74 Ohio St.3d 238.

{¶15} Relator makes one argument in this mandamus action: relator contends that claimant did not fully comply with Ohio Adm.Code 4125-1-01(D)(1)(b), as relator contends that claimant was required to search for unskilled, entry-level employment and that he failed to do so. As such, relator contends that claimant's application should have been denied.

{¶16} Ohio Adm.Code 4125-1-01 supplements R.C. 4123.56, and provides, in relevant part, as follows:

(D) The claimant is solely responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation. \* \* \*

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:

\* \* \*

(ii) Sought suitable employment with the employer of record at the onset of the first period for which wage loss compensation is requested. \* \* \*

(iii) Registered with the ohio [sic] 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[.] \* \* \* A good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss. \* \* \*

Thereafter, the Ohio Administrative Code goes on and lists approximately 15 factors for the commission to take into account in determining whether or not the claimant has made a good-faith effort.

{¶17} Relator specifically points to Ohio Adm.Code 4125-1-01(D)(1)(b) which provides that after 60 days of the commencement of a claimant's job search, if the claimant is unable to find suitable employment, the claimant "shall expand his \* \* \* job search to include entry level and/or unskilled employment opportunities."

{¶18} Claimant's job search indicates that, during the relevant time period he contacted approximately 166 employers. Relator is correct in asserting that the majority of those positions for which claimant sought employment involved sales work. Many of those jobs also included positions in management and financial services. It is undisputed that such jobs would be commensurate with claimant's education and would offer reasonable prospects for advancement such that his wage loss would eventually be eliminated. It is also undisputed that claimant's former position of employment paid him approximately \$60,000 per year and that, unskilled entry level jobs would do little to alleviate the wage loss.

{¶19} In *State ex rel. Ameen v. Indus. Comm.*, 100 Ohio St.3d 161, 2003-Ohio-5362, the Supreme Court of Ohio recently held that employment which coincides with a worker's interest, desires, or aptitudes is not inherently suspect. In *Ameen*, the claimant had been employed as a nurse and was permanently unable to return to her former position of employment. The court concluded that her decision to begin a new career was a logical option and that the claimant had prepared herself for a teaching career.

The court concluded that the claimant's decision to teach, rather than to pursue an allied medical career, should not, under those circumstances, be viewed unfavorably.

{¶20} In the present case, after reviewing claimant's job search, the magistrate specifically notes that, out of the 166 employment opportunities claimant explored, 57 of those were specifically for entry level positions within the realm of jobs which would take advantage of claimant's education and provide him with the opportunity for advancement. Ohio Adm.Code 4125-1-01(B)(1)(b) provides that, after 60 days, a claimant should expand their job search to include "entry level and/or unskilled employment opportunities." Several of those 57 jobs were for trainee-type positions. The magistrate notes that these cases need to be viewed on a case-by-case basis, and that a review of some of the recent Supreme Court of Ohio case law demonstrates that the court does not necessarily favor a rigid, mechanical application of the wage loss rules in each and every case. Again, the claimant in *Ameen* returned to college and obtained a degree in education and then, within two weeks after her temporary total disability compensation was terminated, she began a new job as a teacher, which paid her less than her previous position of employment. In ultimately finding that she could receive wage loss compensation, the court reasoned that her new teaching job offered her the opportunity for advancement, as well as security and expectation of pay raises. The court noted further as follows:

The commission has put claimant in a "Catch-22." If claimant had declined the teaching job and had kept looking for something more lucrative—as the order implies she should have—claimant would have been wageless. We suspect, however, that had claimant applied for nonworking wage-loss compensation during this search period, such

compensation would have been denied because of her failure to take the teaching job that reduced her wage loss.

Id. at ¶14.

{¶21} Furthermore, in *State ex rel. Brinkman v. Indus. Comm.* (1999), 87 Ohio St.3d 171, the claimant, a former police officer, was unable to return to his former position of employment. The claimant found part-time work within his restrictions and the work position had the potential to become full time. Ultimately, the Supreme Court of Ohio approved the award of wage loss, finding that the claimant's part-time employment and lack of a continued job search was excusable. The court concluded that the facts of the case did not establish that the claimant had specifically limited his employment or that his job selection was motivated by a lifestyle change. The court found that the claimant should not have to leave a good job opportunity because he had secured good paying, although part-time, employment with the realistic possibility that he would become employed full time.

{¶22} Based upon the above relevant case law and all the facts of this case, and considering the objectives of wage loss compensation, it is this magistrate's decision that relator has not shown an abuse of discretion on the part of the commission. In the present case, because the claimant engaged in an extensive, ongoing job search following his attainment of a college degree, and those jobs were more in line with his new education and abilities and would serve to more quickly alleviate any wage loss, and because 34 percent of his employment contacts were for entry-level jobs utilizing his education, this magistrate finds that the commission did not abuse its discretion in finding

that claimant was entitled to wage loss compensation and this court should deny relator's request for a writ of mandamus.

          /s/ Stephanie Bisca Brooks            
STEPHANIE BISCA BROOKS  
MAGISTRATE