From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Is a "good faith job search" always necessary to obtain wage loss compensation?

Wage loss compensation is intended to reimburse workers who can still work, but not return to former positions of employment. Unlike temporary total compensation, wage loss compensation requires that an injured worker conduct a "good-faith search for work within their medical and vocational limitations." *See, OAC 4125-1-01(D)(1)(c)*. The Supreme Court recently decided a case which considered whether an employee could be excused from conducting a job search due to the intermittent nature of her light duty position with the same employer.

State ex rel. Marrero v. Indus. Comm., 126 Ohio St.3d 439, 2010-Ohio-3755, involved a claimant who injured her shoulder while working as a nurse's aide. She accepted a "light duty" position offered by her employer, but the position was less than 40 hours per week. She applied for wage loss compensation to recoup the difference between her former full-time wages and the part-time earnings, but the Industrial Commission denied her request, stating that she had failed to produce evidence of a "good faith job search." The claimant filed a *mandamus* action to the 10th District Court of Appeals, arguing that she could not conduct a job search because her light duty position was intermittent, and that the employer had reneged on an oral promise of a full-time position. The 10th District refused to issue a writ, prompting an appeal as of right.

The Supreme Court affirmed, finding that the claimant had produced no evidence of an offer of full-time light duty. In fact, the evidence was clear that the employer informed the claimant that no such positions were available. The Court also rejected claimant's argument that the claimant could look for suitable employment because of her job, noting that she worked 3rd shift by choice (to care for her children), that she should not have restricted herself to other part-time positions, and should have been seeking full-time positions within her restrictions. In a strongly worded dissent, former Chief Justice Brown (joined by Pfeifer and Lundberg Stratton) argued that evidence of a job search is not required in some circumstances, such as when a claimant is working too much to conduct a search, citing *State ex rel. Timken Co. v. Kovach*, 99, Ohio St3d 21, 2003-Ohio-2450.

We have a new Chief Justice, but this decision would seem to fit within the logic of the statute. However, the realities of arguing whether an employee conducted a "good faith" job search vary by case and jurisdiction. Some hearing officers will accept hand-written lists of numbers allegedly called, others will want contacts and follow-up correspondence. Employers should ensure that they are prepared to argue these issues with evidence, and follow up on alleged searches when necessary.

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