

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

**Question: What factors are considered when determining whether an employee seeking Wage Loss Compensation ("WL") has made a sufficient search for suitable employment?**

Working wage loss compensation (WL) is compensation that is intended to make up the difference in wages between her former position of employment and her current position. WL is governed by R. C. §4123.56(B), which permits payment at sixty-six and two-thirds percent of the employee's weekly wage loss, not to exceed the statewide average weekly wage, for a period not to exceed 200 weeks. *R.C. §4123.56(B)*. In order to receive wage loss compensation, it is incumbent upon the claimant to demonstrate 1) an actual reduction in wages; and 2) a causal relationship between the allowed condition and the wage loss. In awarding WL, the Commission is required to consider a number of factors, including whether there was a good-faith effort to search for "suitable employment" in a "comparably paying job." *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210. Recently, the Tenth Appellate District was presented with a case which involved what constitutes "suitable employment and "comparably paying job," and whether a claimant had met her burden under the statute.

*State ex rel. Vinson v. Indus. Comm.*, 2015-Ohio-3006, involved a claimant who was injured in the course of and arising from her employment as a bus driver on June 1, 2006. A workers' compensation claim was filed, which was allowed for several conditions pertaining to the claimant's left leg and knee. As a result of this injury, the claimant was unable to return to her former position, which paid \$21.74 per hour. In 2012, the claimant filed a motion seeking working wage loss compensation (WL) beginning in November, 2011. At that time, the claimant started working as a cashier/receptionist at a J.C. Penney outlet store, making \$7.95 per hour. The claimant also submitted medical records from her treating physician which included a number of restrictions, such as use of her hands, pushing and pulling, and restrictions on sitting and standing. The matter went to hearing, at which time the claimant admitted that she sometimes performed work outside of her restrictions, and that she had not sought other employment since being hired as a cashier. A DHO denied the application because the restrictions were unrelated to the injury, she was working outside of the restrictions, and she had not made a good-faith effort to find suitable employment in a comparably paying job. The motion was dismissed and re-filed, but this second application was also denied based upon a failure to conduct a good-faith job search for comparably paying work, with the SHO noting that the claimant was making roughly one-third of her prior wages and was working part-time. Her job search efforts were also found to be "sporadic" and not of comparable pay to her former position. Additionally, both the cashier work and a subsequent position at a day-care facility were outside of her medical restrictions. The claimant argued that she accepted the lower-paying positions in hopes of securing a full-time position, arguing that *State ex rel. Brinkman v. Indus. Comm.* was controlling. When further appeals were denied, a *mandamus* action followed.

The Tenth District affirmed the findings of its magistrate that there was "some evidence" to support the denial of working wage loss compensation, and therefore a *mandamus* order should

not issue. The magistrate's opinion contained a detailed analysis of the applicable law, and particularly of *Brinkman*, which involved a former police officer who accepted a part-time position as a security guard at a slightly reduced wage because he hoped to secure a full time position. In the case at bar, the claimant's decision to accept a position which paid roughly 1/3 of her former wages distinguished this situation from *Brinkman*. A good-faith effort requires the claimant's consistent, sincere, and best attempt to obtain suitable employment that will eliminate the job loss. "Suitable employment" is defined as work within the claimant's physical restrictions. In the case at bar, the claimant not only accepted work at jobs that were not comparably paying work, but in each case she both submitted restrictions that were wholly unrelated to her allowed conditions (a leg injury) and regularly performed work that exceeded these restrictions in nature and scope. The court also took note of the fact that the claimant's store was closing, that she had known this for months, and had failed to even look for suitable, comparably paying work.

*Vinson* (or at least the magistrate's opinion) contains an excellent discussion of the factors involved in pursuing a working wage loss claim in Ohio. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

Donald G. Drinko, Esq.  
Certified Workers' Compensation Specialist,  
Ohio State Bar Association  
Gallagher Sharp  
1501 Euclid Avenue  
Cleveland, OH 44115  
Direct: 216.522.1326  
[ddrinko@gallaghersharp.com](mailto:ddrinko@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)