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ARGUMENT

Proposition of Law No. I:

The Industrial Commission abuses its discretion by issuing an order granting a claimant's VSSR application which is not supported by any evidence in the record.

- A. Evidence that the back up alarm was working before the accident dictates the inference that the alarm was working at the time of the accident.

In her merit brief, appellee Christine Steigerwald (hereinafter "Steigerwald") argues that there was some evidence in the record supporting the decision of appellee Industrial Commission of Ohio (hereinafter "Commission") to grant Steigerwald's VSSR application because "[a]ll inspections immediately following the accident proved that the backup alarm was either inoperable or inaudible."¹ (Steigerwald Merit Brief pp. 4-5) Steigerwald contends that appellant The Shelly Company (hereinafter "Shelly") has asked this Court to ignore the evidence of the post-accident inspections, claiming that they "are irrelevant with respect to the circumstances existing at the time of the accident." (Steigerwald Merit Brief p. 6) However, Shelly has not asked the Court to ignore this evidence or claimed that the post-accident inspections are irrelevant. Rather, Shelly has argued that the evidence of the post-accident inspections must be viewed in the context of all the evidence, not standing alone.

As Steigerwald correctly notes, the Commission is permitted to draw reasonable inferences and rely on common sense in evaluating the evidence before it. *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, at ¶69. (Steigerwald Merit Brief pp. 6-7) In this case, the evidence of the post-accident inspections establishing that the truck's back up alarm was not working after the accident, standing alone, would clearly permit the reasonable inference that the back up alarm was not working at the time of the accident.

¹ The Commission makes a similar argument in its merit brief. (Commission Merit Brief pp. 7-8)

However, when viewed in context with the undisputed evidence that the alarm was working the last time the truck was driven before the accident (Supplement to the Briefs, hereinafter "Supp.," p. 188), evidence that the alarm was not working after the accident no longer supports the inference that the alarm was not working at the time of the accident. To the contrary, the fact that the truck's back up alarm was working before the accident, but not after the accident, dictates the inference that the alarm became disabled during the accident or during the subsequent efforts to rescue Steigerwald's decedent (hereinafter "decedent"). This is the only reasonable inference that can be drawn from the evidence when it is considered in its totality and is not selectively chosen.

Steigerwald's selective choice of evidence is further illustrated by her statement that "Shelly's driver (James Pennington, hereinafter "Pennington") admitted that he had not heard the alarm operating since the prior week under circumstances which he could not actually even recall." (Steigerwald Merit Brief p. 6) Steigerwald cites pages 188 and 230 of the Supplement to support this statement. Page 188 is part of the inspection report of the Occupational Safety and Health Administration (hereinafter "OSHA") and contains the following statement: "The Driver swore (*sic* swore) the alarm worked the last time he drove the vehicle on Friday and this was the first time on Monday that the vehicle was backed up." Pennington would have given this statement to the OSHA investigator on the day of the accident. Page 230 is an excerpt from Pennington's deposition taken on January 22, 2003, over two years after the accident. By that time, Pennington's memory had faded, and he could not recall the exact circumstances under which he had heard the back up alarm prior to the accident, but he did recall that he heard the alarm "[w]ithin the last couple days" before the accident. Thus, contrary to the purpose for

which Steigerwald selected it, Pennington's statement to OSHA and his deposition testimony establish that the back up alarm was operating shortly before the accident.

The Commission asserts that Shelly merely wants a reviewing court to reweigh the evidence that was before the Commission. (Commission Merit Brief p. 7) This is not correct. Shelly is seeking to overturn a finding of VSSR liability that is based on an inference which, when viewed in the context of the totality of the evidence, is not a reasonable one. It is not reasonable to infer that a truck's back up alarm which worked the last time the truck was driven on Friday did not work the next time the truck was driven on Monday morning because somehow the alarm became disabled while the truck sat idle over the weekend. (Supp. p. 188)

B. Witnesses did not have the time or opportunity to hear whether the back up alarm was working.

Steigerwald makes much of the fact that no one, including Pennington, heard the back up alarm on the day of the accident. (Steigerwald Merit Brief pp. 7-8) She argues that this creates a reasonable inference that the alarm was not operating at the time of the accident.² (Steigerwald Merit Brief p. 8) However, the evidence demonstrates that no one had the opportunity or was in a position to hear the back up alarm on the day of the accident. The accident occurred when the truck was placed in reverse for the very first time on a Monday morning. (Supp. pp. 188, 193) Pennington told the Ohio State Highway Patrol (hereinafter "Highway Patrol") that he had been backing up only "a matter of seconds" when the accident occurred. (Supp. p. 99) Thus, there would have been very little opportunity for anyone at the construction site to hear the back up alarm of Pennington's truck prior to the accident.

Pennington also told the Highway Patrol that all of the other workers at the construction site were approximately 200 feet in front of the truck when the accident occurred. (Supp. p. 98)

² The Commission also makes this argument in its merit brief. (Commission Merit Brief pp.8-9)

However, the back up alarm projected to the rear of the truck. (Supp. pp. 238-39) Steigerwald contends that since Pennington's co-workers were close enough to hear his call for help and responded in "split seconds," they would have been close enough to hear the back up alarm if it had been operating. (Steigerwald Merit Brief pp. 7-8) Presumably, however, when Pennington shouted to his co-workers for help, he yelled toward them and not away from them (the direction of the sound of the back up alarm), and the co-workers could certainly have covered the 200 feet of ground to the accident scene in "split seconds" in response to Pennington's shout. This would not have necessitated being able to hear the back up alarm. Thus, the only reasonable inference that can be drawn from the evidence is not that the alarm was not working, but that Pennington's co-workers were not in a position to hear the alarm for the few short seconds it was operating before the accident.

Pennington was also in a bad position to hear the alarm. Pennington testified that the purpose of the back up alarm was not to alert the driver that the truck was moving in reverse, but people around the truck. (Supp. p. 227) And, as just noted, the sound of the back up alarm projected toward the rear of the truck, not toward the cab of the truck. (Supp. pp. 238-39) Additionally, at the time of the accident, Pennington was inside the cab with the windows rolled up and the radio on. (Supp. pp. 99, 125, 231-32) As OSHA noted, "[Pennington] could not hear the backup alarm in the cab with the radio on but was sure the back up alarm worked the previous time he operated the truck." (Supp. p. 193) Thus, it is not surprising that Pennington could not hear the back up alarm for the few short seconds before the accident while sitting in the cab of the truck.

Steigerwald also argues that because decedent was struck by a slow-moving truck, this is evidence that the back up alarm was not functioning. (Steigerwald Merit Brief p. 8) In essence,

Steigerwald's argument is that by virtue of the accident's occurrence, there is an inference that the back up alarm was not working. However, Steigerwald cannot establish VSSR liability by putting forward a theory similar to *res ipsa loquitur*. Steigerwald must point to evidence proving a VSSR. Pointing to the accident itself is not sufficient.

C. Pennington's undisputed testimony is sufficient to establish that the back up alarm was working before the accident.

Steigerwald next argues that there is nothing in the record to substantiate Pennington's belief that the back up alarm was functioning the week before the accident. (Steigerwald Merit Brief p. 8) However, nothing in addition to Pennington's testimony is necessary to establish this fact. Pennington was in the best position to know whether the alarm was working during the period leading up to the accident. He had been driving the same truck for a year and a half at the time the accident occurred. (Supp. p. 97) On the day of the accident, Pennington told Shelly personnel investigating the accident that as far as he knew, the back up alarm had always worked. (Supp. p. 122) Also on the day of the accident, Pennington told the OSHA investigator that the alarm worked the last time he drove the truck the previous Friday. (Supp. p. 188) No evidence has ever been produced to dispute Pennington's statements, and thus contrary to Steigerwald's assertion, no additional evidence is needed to substantiate those statements.

Steigerwald again relies heavily on Pennington's deposition testimony more than two years after the accident when he could not recall the precise circumstances under which he had last heard the back up alarm before the accident. (Steigerwald Merit Brief p. 9) However, on the day of the accident, when Pennington's memory was the freshest, he consistently stated that the alarm was working the last time he operated the truck.

D. The audibility of the back up alarm was immaterial to the Commission's determination to grant Steigerwald's VSSR application.

Steigerwald notes Pennington's statement that he could not hear the back up alarm due to traffic noise, and OSHA's comment that "[t]he backup alarm may have been overcome by ambient background noise," to assert that the alarm could not be heard over the surrounding noise on the construction site at the time of the accident.³ (Steigerwald Merit Brief p. 9) However, these statements are not proof that the back up alarm was not working at the time of the accident. Arguably, they could be used to show that the alarm was not audible above the surrounding noise at the construction site, but this was not the determination made by the Commission. The Commission determined that the back up alarm was not working at all and made no reference whatsoever to the surrounding noise at the job site or the alarm's purported lack of audibility. Thus, Pennington's statement and OSHA's comment were irrelevant to the Commission's decision, and in fact, the Commission never cited to this evidence.

E. There is no evidence that the back up alarm had failed in the past.

Steigerwald argues that the day of the accident was not the first time that the back up alarm had failed.⁴ (Steigerwald Merit Brief p. 10) However, there is no evidence in the record to support this contention. The evidence cited by Steigerwald shows that on July 10, 2000, Pennington repaired the back up alarm, but there is nothing to suggest that the repair was needed because the alarm was not working. (Supp. p. 274) Pennington told the Highway Patrol that the repair was made because of corrosion on the ends of the terminal for the back up alarm. (Supp. p. 101) Contrary to Steigerwald's representation, Pennington did not tell the Highway Patrol that he had experienced previous problems with the alarm. Pennington was asked: "Have you ever had any work done to the reverse alarm on the truck?" Pennington responded: "Yes. I needed to

³ Steigerwald returns to this theme at several points in her brief, but for the sake of brevity, Shelly will only address it here. See Steigerwald Merit Brief pp. 12, 14, 21. The Commission also alludes to this theme in its brief. See Commission Merit Brief p. 9.

⁴ The Commission also erroneously asserts that the back up alarm "malfunctioned" three months prior to the accident. (Commission Merit Brief p. 12)

put ends on the terminal because of corrosion." Pennington was then asked: "Have you had any other problems with the reverse alarm?" He responded: "No." (Supp. p. 101) These statements do not support the conclusion that Pennington was reporting previous instances when the alarm did not work.

Steigerwald asserts that the back up alarm did not work after the accident because of a "corroded" wire, noting that this was same reason Pennington repaired the alarm in July 2000. (Steigerwald Merit Brief p. 10) Steigerwald's assertion, however, can only be made by using language from a question, and not from the answer to the question. Neil Slessman (hereinafter "Slessman") was asked: "Now you mention that there was a wire corroded or loose and that it would break contact when you were looking at it after the accident happened?" Slessman responded: "That is correct." (Supp. p. 137) However, Slessman later made clear that it was a "loose connection" that caused the alarm to work only intermittently after the accident, and there was no reference whatsoever to corrosion in Slessman's responses to the questions. *Id.* Thus, Steigerwald can only argue that the failure of the back up alarm was due to corrosion by misrepresenting the substance of Slessman's statements.

F. The "defeat switch" was not an issue addressed by the Commission.

Steigerwald next argues that "[t]here is even evidence in the record to demonstrate that the backup alarm had a 'defeat switch' on it that prevented its proper operation." (Steigerwald Merit Brief p. 10) However, Steigerwald's discussion in this regard is irrelevant. The Commission did not make such a finding or even address this issue. Moreover, as Steigerwald notes, her counsel conceded at the VSSR hearing that "no one was ever able to figure out if it⁵ worked or didn't work or what actually happened." (Supp. p. 59) (Steigerwald Merit Brief p. 11)

⁵ Steigerwald's counsel could have been referring to either the back up alarm or the "defeat switch." It is unclear from the context of his statement.

Steigerwald cannot now say that the back up alarm was not working at the time of the accident, claiming that there is definitive evidence that a "defeat switch" prevented the alarm from working.

It must be noted that Steigerwald again cites evidence for a proposition that the evidence does not support. Steigerwald claims that Slessman "even conceded that the backup alarm should not have been wired in this manner." (Steigerwald Merit Brief p. 11) However, Slessman merely testified that he would have wired the back up alarm and back up lights differently. He did not state that the back up alarm was wired incorrectly. (Supp. p. 234)

G. Proof of the accident itself is not evidence establishing proximate cause.

Steigerwald argues that "[t]he evidence clearly demonstrates that the backup alarm's failure was the proximate cause of [decedent's] injury and death." (Steigerwald Merit Brief p. 12) Steigerwald contends that "[t]he Commission logically reasoned that, had the backup alarm been operating properly, [decedent] would have heeded its warning and avoided the vehicle's path." *Id.* Steigerwald bases this contention on the testimony of Dave Furiate (hereinafter "Furiate") which she represents as showing that Pennington "had been maneuvering 'straight back' at a 'very, very slow speed' at the time of the accident." *Id.* However, Steigerwald again has trouble distilling the facts from the evidence. While there is no dispute that Pennington was driving very slowly at the time of the accident, the evidence does not show that he was maneuvering "straight back." Furiate testified that Pennington "maneuvered straight back on the shoulder of the road, the paved shoulder." (Supp. p. 240) However, the accident did not happen in the shoulder lane. It happened in the driving lane. Pennington testified that he had to turn from the shoulder lane into the driving lane in order to avoid dump trucks in the driving lane to his right and a pick up truck and car in the shoulder lane behind him. (Supp. pp. 123-24) The

accident occurred just as Pennington was completing the turn and straightening up the truck. (Supp. p. 124) Thus, Pennington was not driving "straight back" at the time of the accident.

Both Steigerwald and the Commission rely upon this Court's decision in *State ex rel. Timken Co. v. Hammer*, 95 Ohio St.3d 121, 2002-Ohio-1754, to support the position that "the Commission was entitled to infer that had the backup alarm been properly operating, [decedent] would have avoided being struck...." (Steigerwald Merit Brief pp. 12-13; Commission Merit Brief p. 9) Their reliance on *Timken* is misplaced. In *Timken*, the Commission noted the testimony of the truck's driver that the equipment added to the truck (the safety violation) caused him to lose sight of the decedent. *Id.* at ¶40. It was from this that "the commission was entitled to infer that had the driver been able to see the decedent, he would have made an effort to avoid him." *Id.* Thus, this Court determined that the Commission did not abuse its discretion by concluding that the driver's inability to see the decedent resulting from the safety violation was the proximate cause of the accident. *Id.*

In this case, the issue was not Pennington's inability to see decedent as a result of a safety violation. The issue was decedent's failure to move out of the way of Pennington's truck. The Commission found, and both the Commission and Steigerwald argue, that decedent's failure to move necessarily resulted from the failure of the back up alarm, and this was sufficient to establish proximate cause. In other words, the fact that the accident happened proved causation. However, proximate cause for VSSR purposes cannot be proven by merely pointing to the accident itself. There must be evidence showing a causal relationship between the injury and the safety violation. *State ex rel. Bishop v. Waterbeds 'N' Stuff, Inc.*, 94 Ohio St.3d 105, 108, 2002-Ohio-62.

Here, there is no evidence to support the conclusion that decedent did not move out of the way because the back up alarm was not working. In fact, the evidence demonstrates that employees' failure to move out of the way of moving equipment despite audible warning devices is an anticipated hazard in the construction industry. The evidence shows that on August 14, 2000, approximately two and one-half months before the accident, Shelly's supervisor held a "Weekly Toolbox Talk" on "[b]eing aware of backup alarms." (Supp. p. 215) The message to employees at the construction site was: "Do not allow yourself to tone [sic tune] that noise (of the back up alarms) out." *Id.* The evidence also shows that on October 18, 2000, less than two weeks before the accident, Shelly held a "Weekly Safety Meeting" for its employees at the construction site which addressed "'Crushed By' & Moving Part Accidents." (Supp. p. 217) The safety message began:

Did you know that 18% of fatalities in the construction industry are due to "crushed-by" accidents? For example, a worker is laying out grade stakes for a concrete pour. Working nearby is a hydraulic excavator. The man is focused on his work and doesn't hear the backup alarm. Before you know it he is crushed under the tracks of that excavator.... *Id.*

The safety message later admonished: "Listen for and pay attention to backup alarms. Don't stand or work in the blind spots of equipment -- if you can't see the operator, there's no way the operator can see you." *Id.* The safety message concluded:

We've all heard these warnings before, but time after time we see people doing crazy things. You play a major role in job-site safety. Watch out for yourself and for your co-workers. Pay attention to where you ... are! Don't get caught between "a rock and a hard place." *Id.*

If decedent would have automatically moved out of the way upon hearing the back up alarm on Pennington's truck, these types of warnings would be completely unnecessary in the construction industry. However, the fact of the matter is that the warnings are necessary because workers

tend to become comfortable with the familiar noises around them on the job site, even noises which are intended to warn them of potential danger. Thus, it is nothing more than speculation to believe that decedent would have moved upon hearing the back up alarm, and speculation is not the same as evidence establishing proximate causation.

H. OSHA considered the same evidence as the Commission, applied the same legal standard, and determined that there was no safety violation.

Steigerwald argues that the Commission is not bound by OSHA's determination not to cite Shelly for a safety violation. (Steigerwald Merit Brief p. 13) Shelly agrees. Contrary to Steigerwald's assertion, Shelly has never argued that the Commission was bound by OSHA's decision.⁶ Rather, Shelly's contention is that the Commission erred by considering the same evidence, applying the same legal standard (preponderance of the evidence), and then reaching the opposite result as to whether a violation occurred.

Steigerwald claims that "OSHA did not have the benefit of the 'mountain of evidence' that was available to the Commission at the VSSR hearing following the extensive discovery conducted over the course of this case and in the companion civil matter. Substantial depositions, expert reports, and discovery permitted the Commission to make a more informed determination." (Steigerwald Merit Brief p. 13) However, the Commission did not rely on any depositions, expert reports or other information in granting Steigerwald's VSSR application that was not considered by OSHA. (Supp. pp. 21-23) Rather, the Commission relied on the same information that was available to OSHA when OSHA made its determination that no safety

⁶ The Commission made a similarly erroneous assertion in its merit brief. (Commission Merit Brief p. 10) The Commission also erroneously asserts that "the OSHA report does not conclude the backup alarm was working at the time of the accident." *Id.* at 10-11. However, the OSHA report states: "The vehicle apparently had a backup alarm that was by every indication working (but confirmed by no one)." (Emphasis added.) (Supp. p. 193) Thus, although after the accident no one could confirm that the back up alarm had been working (for the reasons set forth under Section B of Proposition of Law No. I above), OSHA concluded that the totality of the evidence pointed to the fact that the alarm was working at the time of the accident.

violation could be proven by a preponderance of the evidence. (Supp. p. 189) Ironically, the Commission, while purporting to rely on the results of OSHA's inspection after the accident (Supp. p. 22), rejected OSHA's conclusion that no safety violation could be proven on the basis of the evidence presented.

Steigerwald states that OSHA regulations are not relevant in determining whether a violation of an Ohio safety regulation has occurred. (Steigerwald Merit Brief p. 13) While this is a correct statement of law, in this case the Commission and OSHA were both looking at whether the back up alarm was operating at the time of the accident. Both considered the same evidence and applied the same standard of law, but while OSHA found the evidence to be inconclusive as to whether a safety violation had occurred, the Commission reached the exact opposite result. This is not a case, like those cited by Steigerwald (Steigerwald Merit Brief p. 14), where the Commission and OSHA were determining whether there had been a violation of dissimilar state and federal safety regulations.

I. OSHA concluded that the back up alarm became inoperable as a result of the accident or subsequent rescue efforts.

Steigerwald contends that "OSHA did not conclude that the alarm became inoperable when the truck struck [decedent] or when [decedent] was pulled out from under the truck." (Emphasis *sic.*) (Steigerwald Merit Brief p. 14) Steigerwald asserts that "OSHA merely notes that Shelly's own mechanics indicated that there was a loose connection at the transmission that 'could have been caused' by such occurrences," and that "OSHA was merely reciting the contention of Shelly." (Emphasis *sic.*) *Id.* However, Steigerwald's assertion can only be made by misrepresenting the contents of OSHA's report. The portion of the report cited by Steigerwald actually provides, in pertinent part:

... The backup alarm when tested directly after the accident did not work. Mechanics later determined that the connector was loose at the transmission. This could have been caused by the victim or by rescuers under the truck and potentially hanging up on the wires that went to the back-up alarm. This tugging on the wires could easily dislodge the connector.... (Supp. p. 193)

The plain language of OSHA's report shows that OSHA was not merely documenting the conclusion of Shelly's mechanics. This was OSHA's own conclusion based on its investigation.

Steigerwald disputes OSHA's determination that the loose connection at the transmission could have been caused by decedent or his rescuers because "[decedent], and the rescue efforts to free him, were located far away from the transmission and the backup alarm wiring." (Steigerwald Merit Brief p. 14) However, as just noted, OSHA concluded that "[t]his tugging on the wires [by decedent or his rescuers] could easily dislodge the connector." (Supp. p. 193) Steigerwald erroneously assumes that the tugging on the wires had to take place close to the transmission in order for the connector to become dislodged. The connector could just as easily have been loosened by someone pulling on the wiring at the rear of the truck.

Proposition of Law No. II:

The Industrial Commission abuses its discretion by granting a claimant's VSSR application when the failure of the safety device in question occurred on only the single occasion of the claimant's injury.

Assuming *arguendo* that the back up alarm was not functioning at the time of the accident, it was the first-time failure of the alarm. In arguing against this assertion, Steigerwald recycles some of the same arguments addressed under the previous Proposition of Law. She again argues that the alarm had previously malfunctioned prompting Pennington's repair of the alarm in July 2000. (Steigerwald Merit Brief p. 16) However, as noted above, there is no evidence that Pennington repaired the alarm because it was malfunctioning. To the contrary,

Pennington, the person in the best position to know, plainly stated on October 30, 2000 that, to the best of his knowledge, the alarm had always worked. (Supp. p. 122)

Steigerwald also recycles the assertion that the back up alarm failed on the day of the accident due to corrosion. (Steigerwald Merit Brief p. 16) Again, as noted above, the evidence shows that the alarm worked only intermittently after the accident because of a loose connection at the transmission, not because of a corroded wire or connector. (Supp. p. 137)

Citing this Court's decision in *State ex rel. Taylor v. Indus. Comm.*, 70 Ohio St.3d 445, 447, 1994-Ohio-445, Steigerwald correctly states that "the employer's awareness of even a single prior malfunction ... negates any first-time failure defense of the employer." (Steigerwald Merit Brief p. 17) In *Taylor*, the Court concluded that a safety violation "cannot be sustained without evidence of prior malfunction and employer awareness thereof." (Emphasis added.) *Id.* Here, not only is there no evidence of a prior malfunction of the back up alarm, but, assuming *arguendo* that Pennington's repair in July 2000 was prompted by the alarm's malfunction, Steigerwald points to no evidence showing that Shelly was aware of the malfunction. Furthermore, even if Shelly was aware of the alarm's malfunction in July 2000, it was also aware that Pennington took the proper action and repaired the alarm so that it would work. (Supp. p. 274) Thus, at the time of the accident, Shelly would have been aware that Pennington had repaired the alarm to ensure that it was working. Accordingly, Shelly could not have predicted the failure of the alarm only three months later.

The Commission argues that Shelly cannot avail itself of the first-time failure defense because it failed to inspect and maintain the back up alarm to ensure that the alarm did not malfunction, and asserts that this purported failure to inspect "appears to be one of the causes" of the accident. (Commission Merit Brief p. 12) However, failure to inspect the back up alarm is

not a specific safety requirement which Shelly is alleged to have violated. Thus, the Commission's discussion in this regard is irrelevant. In any event, Pennington testified that before the accident he would check the alarm "[e]very day or so" to make sure it was working. (Supp. p. 228) Pennington's testimony is corroborated by the fact that three months before the accident, his inspection of the alarm found corroded ends on the terminal which he then replaced. (Supp. p. 101) Thus, the evidence shows that Pennington was inspecting and maintaining the alarm before the accident.

Proposition of Law No. III:

An employer properly preserves a defense to a VSSR claim by pointing to specific evidence supporting the defense during the VSSR hearing and in its post-hearing position memorandum and then expressly identifying the defense in its motion for rehearing.

Steigerwald and the Commission both concede that Shelly expressly raised the first-time failure defense in its motion for rehearing. However, both argue that Shelly did not preserve the issue for judicial review because "the Commission does not have to consider evidence submitted after a hearing." (Steigerwald Merit Brief p. 18; Commission Merit Brief p. 11) Shelly's motion for rehearing, however, was not based on its desire that the Commission consider new evidence. Rather, the motion for rehearing was based on the recognition that applying the law as set forth by this Court in *State ex rel. M.T.D. Products, Inc. v. Stebbins* (1975), 43 Ohio St.2d 114, and its progeny to the evidence establishing that, assuming *arguendo* that the back up alarm failed on the day of the accident, it was a first-time failure of the alarm. (Supp. pp. 34-36) As such, Shelly could not be held liable for the alarm's failure. Thus, to saddle Shelly with VSSR liability was a clear mistake of law which the Commission needed to correct. See Ohio Adm.Code 4121-3-20(E)(1)(b).

Steigerwald argues that Shelly was not entitled to a rehearing based on a clear mistake of law because 1) “the Commission does not have the burden of piecing through the ‘mountain of evidence’ to decipher and identify an employer’s unarticulated defenses;” 2) “it is the employer’s obligation to raise the defense, articulate the defense, and produce evidence supporting the defense;” 3) “[a]ppellate courts need not consider an error which the complaining party ‘could have called, but did not call, to the trial court’s attention at a time when such error could have been avoided or corrected;” and 4) the opposing party must be afforded “a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her case.”⁷ (Steigerwald Merit Brief p. 19) However, 1) Shelly explicitly identified the first-time failure defense in the motion for rehearing, sparing the Commission from having to wade through the evidence; 2) Shelly expressly raised and articulated the first-time failure defense in the motion for rehearing and pointed to evidence supporting the defense; 3) Shelly did call the first-time failure defense to the Commission’s attention at a time when the Commission could have granted rehearing, thereby avoiding error and correcting the clear mistake of law made by its staff hearing officer in assigning VSSR liability to an employer which, under Ohio law, was immune from liability; and 4) Steigerwald did have a meaningful opportunity to respond to Shelly’s motion for rehearing, and in fact did so. (Supp. p. 42) See Ohio Adm.Code 4121-3-20(E) (providing 30 days for an opposing party to file an answer to a motion for rehearing).

Significantly, neither Steigerwald nor the Commission have identified any case standing for the proposition that a party who expressly raises a claim or defense in a motion for rehearing

⁷ The Commission makes some of the same arguments in its merit brief. (Commission Merit Brief p. 12)

from a VSSR order waives judicial review of that claim or defense in mandamus, even if the claim or defense was not expressly raised at the VSSR hearing.⁸

Proposition of Law No. IV:

The Industrial Commission abuses its discretion by finding a violation of a specific safety requirement contained in an administrative code section that no longer exists and never contained a specific safety requirement.

Steigerwald claims that the Commission's reference to a non-existent administrative code section was an "inadvertent typographical error" that was harmless and did not prejudice Shelly.⁹ (Steigerwald Merit Brief p. 20) However, as Shelly noted in its merit brief, it would be difficult to characterize as either "inadvertent" or a "typographical error" an erroneous reference which is made on three separate occasions in the Commission's order. Further, multiple references to a non-existent code section is hardly harmless or non-prejudicial when it reflects an order as deficient from both an evidentiary and legal standpoint as the one at issue in this action.

Steigerwald dismisses the Commission's erroneous references, stating: "Perhaps most importantly, the Commission quoted the language of the correct code section verbatim in the Order." (Steigerwald Merit Brief p. 20) This is not the case. The Commission quoted Ohio Adm.Code 4123:1-3-06(D)(2) requiring either a reverse signal alarm audible above surrounding noise or an observer to signal the assured clear distance, but found a violation of Ohio Adm.Code 4123:1-3-06(D)(1) (although not identifying it as such) requiring an operable, audible warning device. (Supp. pp. 21-22) This compounds the confusion created by the Commission's erroneous references to a non-existent code section; it does not alleviate it.

The Commission argues that "[a]ll parties and the Commission knew which code sections were at issue...." (Commission Merit Brief p. 13) However, it is not even clear the Commission

⁸ Neither the court of appeals nor its magistrate identified any such case either.

⁹ The Commission makes the same argument in its merit brief. (Commission Merit Brief pp. 13-14)

knew which code section it was addressing. According to the Commission, other than Steigerwald's allegation that Shelly had violated Ohio Adm.Code 4123-3-06(2)(a)(b) (actually 4123:1-3-06(D)(2)(a) and (b)), "[a]ll other alleged violations were withdrawn." (Supp. p. 21) The Commission then went out of its way to find that the back up alarm was not working at all (Supp. p. 22), a violation of Ohio Adm.Code 4123:1-3-06(D)(1) -- a violation which, according to the Commission, had been withdrawn. Thus, confusion reigned in the Commission's order, and, as noted under the next Proposition of Law, this evidenced an order that was internally inconsistent.

Proposition of Law No. V:

The Industrial Commission abuses its discretion by issuing an order granting a claimant's VSSR application which is internally inconsistent.

Steigerwald argues that the Commission's order is not internally inconsistent because proof of a violation of Ohio Adm.Code 4123:1-3-06(D)(1) is "necessarily" proof of a violation of Ohio Adm.Code 4123:1-3-06(D)(2)(a), "as an inoperable alarm certainly is not audible above the surrounding noise." (Steigerwald Merit Brief p. 21) However, the Commission did not find that decedent's death was caused because he could not hear the back up alarm, but because the alarm was not working. "It was the fact that the backup alarm did not sound that caused [decedent] to be killed." (Supp. p. 22) Moreover, the requirements of the two code sections are distinctly different. Ohio Adm.Code 4123:1-3-06(D)(1) applies to "[a]ll" trucks, while Ohio Adm.Code 4123:1-3-06(D)(2)(a) applies only to mobile equipment having an obstructed rear view, not to all mobile equipment. Ohio Adm.Code 4123:1-3-06(D)(1) requires an audible warning device without specifying the sound level of the device; Ohio Adm.Code 4123:1-3-06(D)(2)(a) requires the audible signal alarm to be louder than the surrounding noise. Ohio Adm.Code 4123:1-3-06(D)(1) requires the warning device to be located at the operator's station,

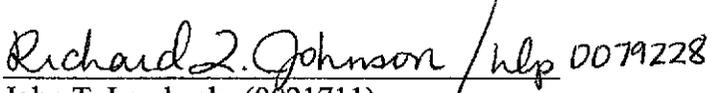
while Ohio Adm.Code 4123:1-3-06(D)(2)(a) is silent as to where the signal alarm must be located. Ohio Adm.Code 4123:1-3-06(D)(1) provides no alternative for complying with the regulation; Ohio Adm.Code 4123:1-3-06(D)(2)(a) permits the omission of the signal alarm if there is an observer to signal the assured clear distance. Clearly, given the differences of what an employer must do to comply with the respective code sections, it cannot be said that proof of a violation of one code section is proof of a violation of the other.¹⁰

CONCLUSION

For all of the above reasons and based upon the above-cited authorities, including those set out in Shelly's merit brief, this Court must reverse the court of appeals' judgment and issue the requested writ of mandamus ordering the Commission to vacate its January 18, 2006 and March 15, 2006 orders and to enter a new order denying Steigerwald's VSSR application.

Respectfully submitted,

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¹⁰ Relying on this Court's decision in *State ex rel. Kenton Structural & Ornamental Iron Works, Inc. v. Indus. Comm.*, 91 Ohio St.3d 411, 415-16, 2001-Ohio-90, the Commission argues that "[a] VSSR order is not internally inconsistent when it discusses the violation of two safety regulations in a two-step analysis." (Commission Merit Brief p. 14) However, in this case, unlike in *Kenton*, the Commission only analyzed one safety regulation, Ohio Adm.Code 4123:1-3-06(D)(2), and indicated at the outset of its order that "[a]ll other alleged violations were withdrawn." (Supp. p. 21) Thus, the Commission did not engage in a two-step analysis to determine whether two different safety violations had been committed.

PROOF OF SERVICE

A copy of the foregoing Reply Brief of Appellant The Shelly Company was sent by regular U.S. Mail on this 23rd day of June, 2008 to Edward D. Murray, Esq., Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., 4775 Munson Street, N.W., P.O. Box 36963, Canton, OH 44735-6963, attorneys for appellee Christine Steigerwald; and to Stephen D. Plymale, Esq., Assistant Attorney General, 150 East Gay Street, 22nd Floor, Columbus, OH 43215-3130, attorney for appellee Industrial Commission of Ohio.

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