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STATEMENT OF CASE

This case arises from the fatal injury sustained by Patrick Donohoe (“Patrick”) during the course and scope of his employment with Appellant/Cross-Appellee Kenny Huston Company (“Employer”) on August 30, 2004. (Stip. Evid. pg. 5¹). As a result of the injury, Patrick passed away on September 3, 2004. Patrick’s claim to the Ohio Bureau of Workers’ Compensation (“BWC”) was allowed as a death claim. (*Id.*). The claim was further allowed for brain conditions (*nec*); closed skull base fracture—deep coma; open wound of scalp. (Stip. Stip. Evid. pg. 3-4). On January 27, 2006, Patrick’s widow, Appellee/Cross-Appellant Catherine Donohoe (“Relator Donohoe”), applied for additional compensation, alleging that the Employer had committed numerous violations of specific safety requirements (“VSSRs”). (*Id.*).

Specifically, Relator Donohoe alleged that the Employer violated: Ohio Admin. Code § 4121:1-3-03(J)(1) (Requirement of safety belts, lifelines, and lanyards); §4121:1-3-04 (H)(1) (Open-sided floors or platforms); §4121:1-3-04(H)(2)(a) (Runways); §4121:1-3-10(C)(4) (General requirements for all scaffolds); and § 4121:1-5-04(D)(1)(c)(i)(iii) (Stationary scaffolds and guarding). (*Id.*; *see also* Appellant/Cross-Appellee Appx. 28-30).

On June 19, 2007, a hearing was held before the Industrial Commission (“Commission”) on Relator Donohoe’s application for VSSR benefits. (*Id.*). On July 31, 2007 the Commission issued an order denying the VSSR application. (*Id.*). The Commission, in denying the VSSR issued an order, which provides in part:

The facts indicate that **no one saw the decedent fall, no one has knowledge where he was when he fell i.e., did he fall from the scaffold or did he fall climbing up/down the scaffold...** Consequently, the decedent-widow can not prove by a preponderance of the evidence that there was a violation of a

¹ See Joint Stipulation of Evidence (Doc. #29) filed with the Tenth District Court of Appeals on May 13, 2008.

specific safety requirement, if there was a violation of a specific safety requirement, which section was violated and whether that violation caused the decedent's death.

(Id.).

On August 28, 2007, Relator Donohoe timely filed a Motion For Rehearing on the grounds that there was no evidence to support the Commission's Order. Specifically, it was improper for the Commission to require direct evidence and to refuse to draw reasonable inferences from the evidence presented. In particular, the Commission failed to consider the expert testimony that was presented by both parties, which recreated Patrick's accident. All experts agreed it was possible to determine what occurred. Further, the Commission applied the wrong legal standard in denying Relator Donohoe's VSSR application.

On September 25, 2007, Relator Donohoe's Motion For Rehearing was denied. (Stip. Evid. pg. 1). As a result, Relator Donohoe filed a Complaint in Mandamus with the Tenth District Court of Appeals requesting that the Commission vacate its Order denying Relator Donohoe's VSSR application. The Court of Appeals referred the matter to a Magistrate. On March 12, 2009, the Magistrate rendered a decision holding that the Commission did not abuse its discretion by denying the VSSR application. (Appellant/Cross-Appellee Kenny Huston Co. Appx. 17).

In response, on March 25, 2009, Relator Donohoe filed objections to the Magistrate's decision on the following grounds:

OBJECTION NO. 1: The Magistrate Erred in Failing to Find that it Was an Abuse of Discretion For The Industrial Commission to Require Direct Evidence And Refused to Draw Inferences From The Evidence.

OBJECTION NO. 2: The Magistrate Erred in Failing to Find That Relator Produced Reliable And Substantial Evidence to Support Her Claim.

OBJECTION NO. 3: The Magistrate Erred in Failing Address the Commission's Abuse of Discretion in Applying the Wrong Legal Standard.

On March 30, 2010, the Court of Appeals found that Relator Donohoe's first objection had merit and held that the Commission abused its discretion in failing to properly consider the expert opinions in the record. (Appellant/Cross-Appellee Kenny Huston Co. Appx. 6). Therefore, the Court of Appeals issued a writ of mandamus ordering the Commission to vacate its Order denying Relator Donohoe's application for a VSSR. (*Id.*) However, as a procedural matter, the Court of Appeals overruled Relator Donohoe's second and third objections to the Magistrate's decision. (*Id.*)

On April 28, 2010, the Employer appealed to this Court as of right regarding the Court of Appeals decision granting Relator Donohoe's first objection. (Appellant/Cross-Appellee Kenny Huston Co.Appx. 1). On May 5, 2010, Relator Donohoe appealed to this Court regarding the Court of Appeals decision denying her second and third objections. (Appellee/Cross-Appellant Donohoe Appx. A).

STATEMENT OF FACTS

A. Patrick Donohoe Dies As A Result Of Falling From Unguarded Scaffolding.

On August 30, 2004, Patrick Donohoe was killed when he fell from unguarded scaffolding during the scope and course of his employment with Appellant/Cross-Appellee, the Kenny Huston Company ("Employer"). (Stip. Evid. pg. 5). Patrick's death, however, could have been avoided. The evidence in the record established that seventeen (17) days prior to Patrick's death, the Employer had been warned that the scaffolding was not safe and was not properly guarded with toe boards and hand rails. (Stip. Evid. pg. 79). In fact, two (2) employees were injured from falling off unguarded scaffolding prior to Patrick's fall. (Stip. Evid. pg. 80-84).

As a result of Patrick's fall, OSHA conducted an investigation and found five (5) serious violations and one (1) repeat violation. (Stip. Evid. pg. 82-84). Significantly, the OSHA citations included:

- The Employer's failure to ensure adequate and frequent inspections to the job site;
- The walking surfaces on the scaffolding were not free of debris;
- The employees were not protected with guardrails or fall protection while working/accessing the working surface;
- The employees were exposed to unprotected falls as employee attempted to gain access to the scaffold in order to gain access to the work area— there was no ladder.

(Id.).

B. Evidence From Unbiased Witnesses Was Presented At VSSR Hearing That The Employer Violated Specific Safety Requirements And Attempted To Cover Up Its Violations.

At the VSSR hearing, the Commission was presented with overwhelming evidence establishing that the Employer violated specific safety requirements and attempted to cover up its violations after Patrick's fall. There is no dispute that there was not a single safety guard or ladder at the work site when Patrick fell from the scaffolding. (Stip. Evid. pg. 22; 34; 85; 89). This fact was established not only by physical evidence but also by the testimony of the Employer's Vice President:

Q: You have seen the testimony. Everybody says he fell from the scaffolding and you have no reason to dispute that, is that fair?

A: That's fair.

Q: Your experts say that, is that fair?

A: That's fair?

Q: The scaffolding was unguarded; is that fair?

A: That's fair.

Q: Did you have a lifeline?

A: No.

Q: Did you have a lanyard?

A: No.

Q: Did the scaffolding have guardrails?

A: **It was not completely guarded.**

(Stip. Evid. pg. 34).

Although the Employer's Vice President made admissions at the VSSR hearing regarding the conditions of the work site, this was not the case following Patrick's fall. Mark Smith, an independent witness, arrived at the work site after Patrick's fall and observed that there was no ladder present. (Stip. Evid. pg. 86). Instead, a ladder was brought to the scene by one of the Employer's employees. (*Id.*). Considering that there was only one extension ladder on the site, it was clear that there was no extension ladder prior to Patrick's fall, despite being required by the Employer's own job regulations. (Stip. Evid. pg. 88). The Commission was further presented with evidence that safety equipment was being put on the scaffolding by the Employer's employees one day after Patrick's fall. (Stip. Evid. pg. 89). Significantly, the Employer's alteration of the accident scene took place before OSHA arrived and was confirmed by independent witness statements. (Stip. Evid. pg. 85; 89).

C. The Industrial Commission Disregarded All Circumstantial Evidence And All Expert Opinions.

The VSSR hearing before the Commission lasted three (3) hours with hundreds of pages of exhibits submitted by the parties. (Stip. Evid. pg. 9-78). In addition to the evidence submitted at the VSSR hearing, which established that the Employer failed to provide the proper safety equipment, each party submitted affidavits of expert witnesses who were able to reconstruct Patrick's accident. Relator Donohoe's expert Richard Hayes was able to analyze the evidence and circumstances of Patrick's fall and reached the conclusion that Patrick's injury and ultimate

death was the direct result of a fall from an unprotected or unguarded area of the scaffolding. (Stip. Evid. pg. 93 at ¶8).

The Employer's experts were also able to reconstruct the accident and render opinions about what Patrick was doing at the time of his accident. For instance, John Messineo concluded, to a reasonable degree of engineering and technical certainty that Patrick fell while climbing the scaffolding. (Stip. Evid. pg. 100 at ¶13). Mari Susan Truman was also able to review the evidence and conclude, to reasonable degree of certainty, that Patrick's fracture pattern was consistent with a fall from a height of about 12 to 15 feet. (Stip. Evid. pg. 127).

Nonetheless, despite the exhibits and expert opinions presented by the parties, the Commission concluded that since there were no direct witnesses to Patrick's fall it was impossible to determine what occurred. (Stip. Evid. pg. 3-4). The Commission's conclusion is contrary to all of the arguments presented by the parties. Neither Relator Donohoe nor the Employer argued that direct witnesses were necessary to determine the circumstances of Patrick's fall. At the hearing, all agreed what occurred could be determined. The Commission's Order does not contain any reference whatsoever to the expert opinions or other facts that were presented at the hearing.

The Commission simply disregarded every piece of evidence, including expert opinions. As such, the Commission's Order is not supported by the evidence in the record. Quite the opposite, the Commission's Order is contradictory to the evidence presented by both parties. Accordingly, this Court must hold that the Commission abused its discretion in requiring direct evidence. Further, in light of the evidence, which establishes beyond doubt that the Employer violated specific safety requirements, this Court should hold that Relator Donohoe produced reliable and substantial evidence to support her VSSR claim.

ARGUMENTS IN RESPONSE TO APPELLANT/CROSS-APPELLEE
KENNY HUSTON'COMPANY'S MERIT BRIEF

A. The Court of Appeals Properly Held That The Commission Abused Its Discretion By Requiring Direct Evidence And Refusing To Draw Reasonable Inferences.

To be entitled to a writ of mandamus, Relator Donohoe was required to show that the Commission abused its discretion. *State ex rel. Mees v. Indus. Comm.* (1972), 29 Ohio St.2d 128, 130, 279 N.E.2d 861. This Court has held that “[w]here there is no evidence upon which the commission could have based its orders, there is an abuse of discretion.” *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, 58, 386 N.E.2d 1109. As such, the commission’s order must be supported by “some evidence” in the record. *State ex rel. Fiber-Lite Corp. v. Indus. Comm.* (1988), 36 Ohio St.3d 202, syllabus, 522 N.E.2d 548.

In this matter, the Court of Appeals properly held that the Commission abused its discretion by requiring direct evidence. This Court has long recognized that direct evidence is not required in a VSSR claim. *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.* (2002), 98 Ohio St.3d 134, 143, 781 N.E.2d 170. “To the contrary, in determining the merits of a VSSR claim, the commission or its Staff Hearing Officer, like any fact finder in any administrative, civil, or criminal proceeding, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence. *Id.* citing *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170, 172, 545 N.E.2d 1216. Indeed, this Court has been critical of the commission where, “en route to a factual determination, it separately examined individual evidentiary items without ever considering the combined or cumulative effect of the evidence as a whole.” *Supreme Bumpers*, supra at 143.

Here, contrary to the law set forth in *Supreme Bumpers*, the Commission concluded that without direct evidence, it was impossible to determine where Patrick was when he fell or what

he was doing. (Stip. Evid. pg. 3-4). As recognized by the Court of Appeals, the Commission used the absence of eyewitness testimony as the basis for its decision. (Appellant/Cross-Appellee Kenny Huston Co. Appx. 13, ¶ 19). The Commission specifically noted that Burt Selby and Todd Jenkins could not testify as to the cause of Patrick's fall. Although the Commission's Order referenced Mr. Selby and Mr. Jenkins, there was no reference whatsoever to the expert affidavits submitted by both parties. (Stip. Evid. pg. 3-4).

The Commission's failure to reference the expert affidavits is critical because both the Employer and Relator Donohoe submitted affidavits of experts each stating that it was, in fact, possible to recreate Patrick's accident. While the experts disagreed on certain aspects of how the accident occurred, each expert agreed that it could be inferred **to a reasonable degree of scientific probability** what Patrick was doing when the accident occurred. In fact, neither party argued that the circumstances of Patrick's fall could not be determined. (*See generally* Stip. Evid. pg. 9-78). Therefore, the Commission's conclusion that the circumstances of Patrick's fall could not be determined absent eyewitness testimony is contrary to the evidence in the record and the arguments presented by both parties.

Significantly, this Court has issued a writ of mandamus and remanded similar orders when the Commission reaches a conclusion that is contrary to the evidence and further fails to identify critical evidence. For instance, in *State ex rel. Scouler v. Indus. Comm.*, the commission denied a claimant's application for temporary total disability compensation retroactive to September 20, 2005. (2008), 119 Ohio St.3d 276, 893 N.E.2d 496. Akin to the case at bar, the commission in *Scouler* denied the claimants application based upon the insufficiency of evidence. *Id.* at ¶ 1, 8. In reviewing the commission's order denying temporary total disability compensation, this Court expressed two concerns. *Id.* at ¶ 15.

First, the commissions' order contained statements that were contrary to the evidence in the record. *Id.* This Court was also concerned by the commissions' lack of reference to a questionnaire that was completed by the claimant's physician. *Id.* at ¶ 16. Although the commissions' order referenced certain evidence in the record, it omitted any reference to the physician's questionnaire. *Id.* at ¶ 16. Identical to the Commission's Order in this case, the order in *Scouler* provided the boiler plate language that "all relevant evidence was reviewed and considered." *Id.* at ¶ 18.

Nonetheless, this Court found that the lack of reference to the questionnaire was significant because the tenor of the commission's order was that there was no evidence that certified the claimant's disability before the cut-off date at issue. *Id.* at ¶ 18. The physician's questionnaire, however, alleged disability prior to the cut-off date. *Id.* In other words, the findings of the commission were not compatible with the physician's report. Consequently, this Court held that when the commission "elects to list evidence before it, but omits a particular document from that recitation, there is a presumption that the document was over-looked." *Id.* at ¶ 17 (citations omitted). "If that document could influence the outcome of the matter in question, [this Court] will return the matter to the commission for further consideration." *Id.*

Similar to *Scouler*, the Commission in this case failed to reference the expert opinions presented by the parties and reached a conclusion that was in direct conflict with the evidence. As correctly noted by the Court of Appeals, the tenor of the Commission's Order is that Relator Donohoe was incapable of proving her VSSR claim in the absence of eyewitness testimony. (Appellant/Cross-Appellee Kenny Huston Co. Appx. 13 at ¶ 19). The Commission's conclusion is improper both legally and factually. As stated above, this Court in *Supreme Bumpers*, held that direct testimony is not necessary. *Supreme Bumpers*, supra at 143.

Further, it is clear that the Commission did not consider the expert opinions because its conclusion that the circumstances of Patrick's fall could not be determined without eyewitnesses is simply not true. Every expert witness presented by the parties concluded that it was possible to determine what Patrick was doing when the accident occurred. (Stip. Evid. 93, 100, 114). Thus, the Commission's Order is not supported by "some evidence" in the record. Quite the opposite, the Commission's Order is contrary to the evidence and the arguments presented by the parties. Because the opinions of the expert witnesses would certainly influence the outcome of Relator Donohoe's VSSR application, this Court must return the matter to the Commission for further consideration.

1. The Commission Abused its Discretion by Failing to Draw Any Inferences From The Evidence.

In addition to improperly requiring direct evidence, the Commission failed to analyze the circumstantial evidence that was presented and make factual determinations. In determining the merits of a VSSR claim, the commission or its [staff hearing officer] like any fact finder in any administrative, civil, or criminal proceeding, may "draw reasonable inferences and rely on his or her own common sense in evaluating the evidence. *State ex rel. Shelly Co. v. Steigerwald* (2009), 121 Ohio St.3d 158, 902 N.E.2d 970, citing *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.* (2002), 98 Ohio St.3d 134, 781 N.E.2d 170. The Commission has substantial leeway in evaluating the evidence before it and drawing inferences. *State ex rel. Shelly Co. v. Steigerwald* (2009), 121 Ohio St.3d 158, 2009-Ohio-585, ¶28 citing *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936 [citations omitted].

In this case, the Employer urges this Court to assume that the Commission considered the evidence and made reasonable inferences based on the fact the Commission's Order contained the phrase "all evidence was reviewed and considered." This same argument was rejected by

this Court in *Scouler*, supra. It is not sufficient that the Commission's Order simply contain boiler plate language that all evidence was considered. Rather, this Court has required the commission to enumerate in its order the evidence which was relied upon to reach its conclusion. *State ex rel. Mitchel v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 483-484, 453 N.E.2d 721.

As noted by the Court of Appeals, “[i]n any order of the Industrial Commission granting or denying benefits to a claimant, the commission must specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision.” *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, at syllabus, 567 N.E.2d 245. A reviewing court will not “search the commission’s file for ‘some evidence’ to support an order of the commission not otherwise specified as a basis for its decision.” *Noll* at 204, citing *State ex rel Cox. v. Indus. Comm.* (1981), 67 Ohio St.2d 235, 423 N.E.2d 441. The purpose of requiring such evidentiary identification and explanation is so that a “meaningful review can be accomplished.” *State ex. rel. Noll v. Indus. Comm.*, 57 Ohio St.3d at 206.

Therefore, this Court must look beyond the boiler plate language contained in the Commission's Order and determine whether the Commission properly considered the evidence and drew reasonable inferences. Although it is not the role of this Court to *reweigh* the evidence, this Court must determine whether the Commission weighed the evidence in the first place. When reviewing the evidence that was submitted in this case, it is clear that the Commission neglected its duty, as a fact finder, to evaluate all of the evidence and make reasonable inferences. The sole basis of the Commission denying Relator Donohoe's VSSR application was that there were no eyewitnesses. Instead of reviewing all of the evidence and making a decision,

the Commission disregarded the experts' affidavits presented by both parties. After determining that there were no eyewitnesses, the Commission's analysis simply stopped.

The Commission's conclusion that it was not possible to determine what occurred at the time of Patrick's accident, clearly indicates that the expert opinions were not properly considered. It cannot be repeated enough that each expert offered an opinion recreating Patrick's fall. Although the experts disagreed on the specific circumstances of Patrick's fall, the Commission should have considered the expert affidavits presented by both parties and made a determination, as a fact finder, which expert was more persuasive. In reaching this decision, the Commission should have also considered the testimony that was presented at the VSSR hearing. Significantly, the fact that Patrick fell off the scaffolding was never in dispute. In fact, the Employer's own Vice President testified that Patrick fell from unguarded scaffolding. (Stip. Evid. pg. 34).

In short, the Commission was required to make a decision instead of disregarding the evidence all together. It is not enough that the Commission's Order states that "all evidence was reviewed and considered." This phrase is meaningless if the Commission's Order is not supported by the evidence. The Commission's conclusions should reflect the evidence and indicate the pertinent information that was considered. There is no indication from the Commission's Order in this case that the evidence was properly analyzed.

Somehow, the Employer gleans from the Commission's Order that the basis for denying Relator Donohoe's VSSR claim is that there was conflicting evidence. (Appellant/Cross-Appellee Kenny Huston Co. Merit Brief. pg. 5). Importantly, the Commission's Order does not contain any reference to conflicting evidence as a reason for its decision. (Stip. Evid. pg. 3-4). The reference to conflicting evidence did not appear until the Commission denied Relator

Donohoe's request for a rehearing. Nonetheless, this Court should not allow the Commission to deny VSSR claims simply because there is conflicting evidence. If this were the case it would be virtually impossible for a claimant to prevail on a VSSR claim. All cases have conflicting evidence. If there was no conflicting evidence, a fact finder would not be necessary.

The law required the Commission to review the conflicting evidence and make a choice. The Commission did not find that Relator Donohoe could not establish her claim because it was persuaded by the evidence set forth by the Employer. Instead, the Commission's decision was based on the lack of eyewitnesses, which is not permitted by this Court. Accordingly, this Court must hold that the Commission abrogated its duty to evaluate the evidence and make reasonable inferences.

2. The Commission's Decision Contradicted The Opinion of The Employer's Expert, Which Opinion Mandated A Finding in Favor Relator Donohoe.

The Commission ignored expert evidence submitted by the Employer which mandated a finding for Relator Donohoe. John Messineo specifically testified, as an expert witness for the Employer, that Patrick fell while climbing the scaffold. (Stip. Evid. pg. 100 at ¶13). It was Relator Donohoe's position that Patrick was forced to climb the scaffolding because a ladder was not provided by the Employer in violation of Ohio Admin. Code § 4121:1-3-10(C)(9). (Stip. Evid. pg. 93 at ¶ 10). The specific safety rules clearly require a ladder. Ohio Admin. Code § 4121:1-3-10(C)(9). If a properly guarded ladder or safe access was not provided, and Patrick was forced to climb scaffolding to get to the job site, a VSSR should have been awarded.

A review of the transcript from the VSSR hearing shows that the only argument the Employer made was that a ladder was provided.² The Employer agreed, however, that this phantom ladder, itself, was not guarded as required by Ohio Admin. Code § 4121:1-3-04 and in violation of its own safety policy. (Stip. Evid. pg. 32). An employer may not use the defense of unilateral negligence when the alternative safety means (the alleged ladder) was not properly guarded. *State ex rel. Coffman v. Indus. Comm.* (2006), 109 Ohio St.3d 298, 300, 847 N.E.2d 482; *see also State ex rel. Cotterman v. St. Mary's Foundry* (1989), 46 Ohio St.3d 42, 47, 544 N.E.2d 887 ("It is the employer who has the obligation to comply with specific safety requirements adopted for the protection of employees."). Therefore, if the Commission simply believed the Employer's own expert – that Patrick died because he was climbing scaffolding – a VSSR award should have been granted because the alleged ladder was, admittedly, not properly guarded resulting in the Employer's failure to provide safe egress on the job site in violation of Ohio Admin. Code § 4121:1-3-04 and Ohio Admin. Code § 4121:1-3-10(C)(9).

This is simply stunning. The Commission ruled against Relator Donohoe when, believing everything the Employer's expert said, it was bound to rule for Relator Donohoe because the alleged ladder was unguarded and the only defense raised by the Employer (unilateral negligence) was not available to it pursuant to the law established by this Court. Conversely, if Relator Donohoe's evidence was believed – that Patrick fell from scaffolding which was unguarded – Relator Donohoe should have won. Somehow the Commission, in a situation where there was no dispute that a violation of a specific safety requirement caused Patrick's death, disregarded both parties' evidence (which would have mandated a VSSR finding) and denied the VSSR application. The Court of Appeals was correct to reverse and

² This assertion was disputed by every single independent witness who testified. (*See generally* Stip. Evid. pg. 9-78).

remand this matter so that a hearing and a decision, consistent with the evidence, could be rendered.

ARGUMENTS IN SUPPORT OF APPELLEE/CROSS-APPELLANT
CATHERINE DONOHOE'S MERIT BRIEF

A. The Court of Appeals Erred In Failing To Find That Relator Donohoe Produced Reliable And Substantial Evidence To Support Her Claim.

It is the longstanding holding of this Court that if the Relator has produced reliable, probative and substantial evidence to support her claim, mandamus will issue, unless the commission can show evidence to the contrary that is also reliable, probative and substantial in order to justify its order denying benefits. *State ex rel. Walters v. Indus. Comm.* (1985), 20 Ohio St.3d 71, 74, 486 N.E.2d 94. "In matters involving the Industrial Commission, the determinative question is whether relator has a clear legal right to relief." *State ex rel. Valley Pontiac Co., Inc. v. Indus. Comm.* (1991), 71 Ohio App.3d 388, 391, 594 N.E.2d 52.

Moreover, when the facts indicate that there is a substantial likelihood that the relator should prevail, courts are not precluded from ordering the Commission, in a mandamus action, to award the appropriate relief. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315, 626 N.E.2d 666. In this case, the Employer's only argument presented at the VSSR hearing was that Patrick's death was the result of unilateral negligence. (*See generally* Stip. Stip. Evid. pg. 9-43). Specifically, the Employer argued that a ladder was available for Patrick but he chose to climb the scaffolding.

This Court, however, has held that a "worker's unilateral negligence will bar a VSSR award only if the employer first complied with the applicable specific safety requirement and its compliance was then nullified by the employee's conduct." *State ex rel. Coffman v. Indus. Comm.* (2006), 109 Ohio St.3d 298, 300, 847 N.E.2d 427 citing *State ex rel. Frank Brown*

& Sons, Inc. v. Indus. Comm. (1988), 37 Ohio St.3d 162, 524 N.E.2d 482. (emphasis added). Thus, if an employer does not initially comply with safety requirements, the employee's conduct is inconsequential. *Id.* Applying this standard to the case at bar, there is no doubt that Relator Donohoe is entitled to a writ of mandamus because there is no genuine dispute that the Employer violated specific safety requirements.

Although the Employer argued that a ladder was present at the work site, the evidence, including the testimony of the Employer's Vice President, established that even if a ladder was present it was unguarded in violation of Ohio Admin. Code § 4121:1-3-04 (requiring the guarding of ladders). The Employer's own safety policies also required the ladder to be properly guarded. Indeed, at the VSSR hearing the Employer's Vice President testified as follows:

Q: And you heard your employee testify that the ladder, if it was there, was completely unguarded; do you have any reason to dispute that?

A: **No.**

Q: That would have been a violation of your safety policies?

A: **Yes.**

(Stip. Evid. pg. 32) (emphasis added).

Further, there is no dispute that there were no safety guards on the scaffolding where Patrick fell. (Stip. Evid. pg. 22, 34; 85; 86). The absence of guarding on the scaffolding was confirmed by the Employer's employee at the VSSR hearing. The employee testified that the scaffolding was unguarded and was not fully erected or completed. (Stip. Evid. pg. 22). Consistent with the testimony of its employee, the Employer's Vice President also testified that the scaffolding on the jobsite did not contain the requisite guarding, lifelines or lanyards as required by Ohio Admin. Code § 4123:1-3-03(J)(1).

Q: ...You have seen the testimony. Everybody says he fell from the scaffolding and you have no reason to dispute that; is that fair?

A: **That's fair.**

Q: Your expert's say that; is that fair?

A: **Yes.**

Q: The scaffolding was unguarded; is that fair?

A: **That's fair.**

Q: Did you have a lifeline?

A: **No.**

Q: Did you have a lanyard?

A: **No.**

(Stip. Evid. pg. 34) (emphasis added). As such, there is no dispute that the Employer violated Ohio Admin. Code § 4123:1-3-10(C)³, which requires that scaffolds have guard rails. The Employer also violated Ohio Admin. Code § 4123: 1-3-03(J)(1), which requires that lifelines and lanyards be provided when the employee is performing work more than six feet above the ground.

While there were disputes regarding the level of Patrick's fault in causing his fall, the one fact that could not be disputed is that the Employer violated specific safety requirements. Consequently, the question of whether Patrick climbed the scaffolding or whether a ladder was present is inconsequential. Under every possible explanation for Patrick's fall, the evidence submitted to the Commission established that the Employer violated a specific safety

³ Ohio Admin. Code § 4123:1-3 was formerly Ohio Admin. Code § 4121:1-3 at the time of Relator Donohoe's VSSR application.

requirement. Yet, the Commission's Order does not mention any of the testimony, which established beyond a doubt that the Employer did not have the required guarding or fall lines.

If the Employer's expert, Mr. Messineo was to be believed, Patrick fell from climbing scaffolding due to the Employer's failure to provide a safely guarded ladder.⁴ This violates Ohio Admin. Code § 4121:1-3-10(C)(9), which required the Employer to provide safe access to the job site. If Relator Donohoe's experts are to be believed, Patrick fell from unguarded scaffolding. This violates Ohio Admin. Code § 4123:1-5-03(D)(1)(c), which requires scaffolding to be guarded. (*See also* Stip. Evid. pg. 93-94). A review of the hearing transcript reveals that no other alternatives were provided. Under either scenario, Patrick died from the Employer's failure to provide a single safety guard on the job site.

The absence of any reference to the testimony presented at the hearing, demonstrates that Commission focused solely on the lack of eyewitnesses. All other evidence was simply disregarded. The Commission's denial of Relator Donohoe's VSSR application is the result of its failure to consider and properly analyze all of the evidence. Relator Donohoe should not be denied compensation simply because there were no witnesses to her husband's falls. In the same vein, the Employer should not be permitted to escape responsibility for its safety violations based on the mere happenstance that there were no eyewitnesses. Rather than focusing on the evidence that was missing, the Commission should have made a decision based on the evidence that was presented. The Commission, however, failed to make any factual findings.

Relator Donohoe should still be with her husband today. Prior to Patrick's death, the Employer was warned that the scaffolding was not safe and was not properly guarded. (Stip. Evid. pg. 79). Even though two (2) employees were previously injured as a result of falling from

⁴ Every independent witness has testified that there was no ladder.

unguarded scaffolding, the Employer did not take these warnings serious. It is simply stunning that an employer, in this day and age, would provide a work site which is devoid of a single safety guard. It is equally stunning that an employee can fall to his death on a work site without a single safety guard and the Commission can conclude – solely because there was no direct eye witness testimony – that there was no violation of a specific safety requirement.

Because the evidence was undisputed that, in every single possible scenario presented by both parties, Patrick’s death was a result of a specific safety requirement in violation, this Court should direct the Commission to enter a decision finding that Patrick’s death was a result of a specific safety requirement and setting a hearing to determine the amount of the penalty.

B. The Court of Appeals Erred In Failing To Find That The Commission Applied The Wrong Legal Standard.

The Commission’s failure to reach the proper conclusion was due, in part, to its application of the wrong legal standard. The Commission’s Order states that the first element requires that “[t]he cited code section applies to the circumstances of the employment being performed at the time of the injury.” (Stip. Evid. pg. 2). The language contained in the Commission’s Order is contrary to the test set forth by this Court in *Supreme Bumpers* and, in fact, placed a greater burden on Relator Donohoe. *Supreme Bumpers*, 98 Ohio St.3d 134.

In *Supreme Bumpers*, this Court held that in order to be entitled to an additional award for a VSSR, “the claimant must establish that an applicable and specific safety requirement existed at the relevant time, that the employer failed to comply with the requirement, and that the employer’s noncompliance was a cause of the injury.” *Id.* at 138. Thus, *Supreme Bumpers* only requires the code section to be applicable and specific, **not** that it applies to the circumstances of the employment being performed at the time of the injury. *Id.*

As discussed above, the evidence presented at the VSSR hearing uniformly established that the Employer violated a specific code section. The ladder, even if present, was not properly guarded and there was no guarding on the scaffolding where Patrick fell. As such, it is undisputed that the Employer failed to comply with a safety requirement and that noncompliance caused Patrick's death. The specific code section that applied to Patrick's fall is a factual determination that should have been resolved by the Commission. *State ex rel. Allied Wheel Products, Inc. v. Indus. Comm.* (1956), 166 Ohio St. 47, 139 N.E.2d 41. The Commission, however, failed to address the relevant evidence and testimony.

Instead of making the necessary factual determinations, the Commission held that Relator Donohoe could not pinpoint exactly which violation applied because there was no eyewitness testimony of the cause of Patrick's fall. In essence, the Commission held that an employer can violate safety requirements and place employees in danger as long as no one witnesses the injury and the employee can't testify because he is dead. The Employer in this case is better off because Patrick died and thus there are no witnesses. The Commission has sent a message that as long as an employer's violations are out of sight; the violations are out of the mind of the Commission. This message should be rejected by this Court. Accordingly, this Court should hold that the Commission reached an improper conclusion by applying the wrong legal standard.

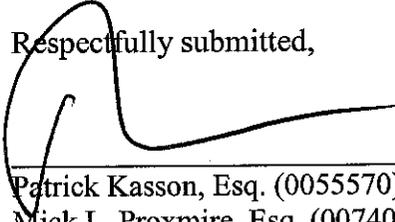
CONCLUSION

The Court of Appeals correctly held that the Commission abused its discretion in requiring direct evidence. This Court has held that direct evidence is not necessary to establish a VSSR claim. This is certainly the case in this matter. The Commission was presented with opinions of expert witnesses that recreated Patrick's fall. The Commission also heard testimony from the Employer's employees and its own Vice President that the jobsite lacked any guarding

on the scaffolding and the access ladder. The Commission, however, disregarded the critical evidence and denied Relator Donohoe's claim based solely on the lack of eyewitnesses.

The Commission was presented with two sets of evidence; one from the Employer and one from Relator Donohoe. Once the Employer's Vice President conceded that the ladder was unguarded at the hearing, it became clear that under either set of evidence, a VSSR award should have been given. This Court should not permit the Commission to set the horrible precedent of denying what is undoubtedly a meritorious VSSR application simply because the employee cannot testify due to his death and the fact there were no other eye witnesses. Because there is no doubt that Patrick died because the work site was completely unguarded, the Commission should be directed to issue a decision consistent with this evidence and have a hearing to determine the amount of the VSSR award.

Respectfully submitted,



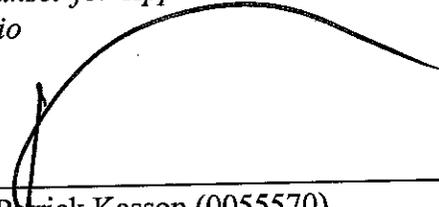
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The undersigned certifies that a true and accurate copy of this document was served via regular US Mail, postage pre-paid, on **October 12, 2010** upon the following:

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APPENDIX

APPENDIX A

Notice of Cross-Appeal of Appellee/Cross-Appellant Catherine M. Donohoe Case No. 2010-734 (Supreme Court of Ohio) (May 5, 2010)

IN THE SUPREME COURT OF OHIO

STATE EX. REL CATHERINE M.
DONOHOE,

Appellee,

v.

THE INDUSTRIAL COMMISSION OF
OHIO, et al.

Appellants.

Case No. 2010-734

On Appeal of Right from the Court of
Appeals for Franklin County, Ohio Tenth
Appellate District

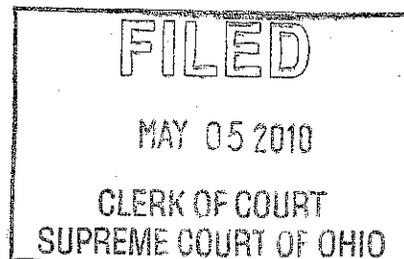
Court of Appeals Case No.: 08AP-201

NOTICE OF CROSS-APPEAL OF APPELLEE
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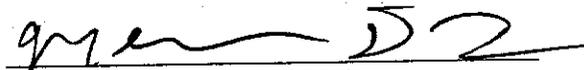


Notice of Cross-Appeal of Appellee Catherine M. Donohoe

Notice is hereby given that Appellee, Catherine M. Donohoe., cross-appeals to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District of Ohio, entered in Case No.: 08AP-201 on March 30, 2010.

This case originated in the court of appeals, and thus this is an appeal of right pursuant to S.Ct. Prac. R.2.1(A)(1). A date stamped copy of the Court of Appeal's judgment entry is attached.

Respectfully submitted,



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Wx

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

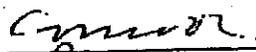
State ex rel. Catherine M. Donohoe, :
Relator, :
v. :
The Industrial Commission of Ohio :
and The Kenny Huston Co., :
Respondents. :

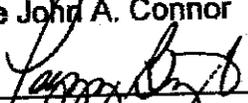
No. 08AP-201
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 30, 2010, we adopt the findings of fact issued in the magistrate's decision and modify the conclusions of law in accordance with our decision. We therefore issue a writ of mandamus ordering the commission to vacate its order denying relator's application for a VSSR and to reconsider the VSSR application in a manner consistent with our decision.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge John A. Connor


Judge Peggy Bryant


Judge William A. Klatt