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STATUTE(S)

Ohio Adm. Code § 4121:1-3-10 (C)(9)2
Ohio Adm. Code §4121:1-3-043
Ohio Adm. Code § 4123:1-3-03(J)(1)3

I. INTRODUCTION

Throughout this case the Employer has never disputed that it violated multiple specific safety requirements. Instead, the Employer's only argument has been that Patrick's death was the result of his unilateral negligence. However, once it was conceded that the Employer violated a specific safety requirement regarding the phantom ladder it was not entitled to a unilateral negligence defense as a matter of law.

Likewise, none of the Respondents dispute that—under any possible scenario on how Patrick died—it was a result of a specific safety requirement violation. Therefore, this Court should remand this matter back to the Commission and order the Commission to find that a specific safety violation caused Patrick's death. Simply put, this employer had been warned about safety requirements numerous times on this job site and had two other employees fall off scaffolding in the two years prior to Patrick's death. VSSR were specifically designed for employers such as this.

II. LAW & ARGUMENT

A. Relator Donohoe Is Entitled To A Writ Of Mandamus Because There Is No Dispute That Patrick's Fall Was The Result Of A Specific Safety Requirement Violation.

The Employer continues to take the position that a ladder was present at the job site but Patrick chose to climb the scaffolding. (Appellant/Cross-Appellee Kenny Huston Co. Response Brief pg 1). The Employer, however, does not dispute the fact that even if a ladder was present, it was unguarded.

The law set forth by this Court is clear that an employer may not use the defense of unilateral negligence unless "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 482, ¶13; citing *State ex rel. Frank Brown & Sons, Inc. v. Indus. Comm.* (1988), 37 Ohio St.3d 162, 524 N.E.2d 482. As such, even if a ladder was present at the job site, the Employer is not entitled to a unilateral negligence defense because the alternative safety means (the 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.

Moreover, this Court has held that when the facts indicate that there is a substantial likelihood that the relator should prevail on her claim; courts are permitted to order the Commission to award the appropriate relief. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315, 626 N.E.2d 666, syllabus. In this matter, the Employer's failure to dispute that there were no safety guards on the alleged ladder requires that this Court to direct the Commission to enter a finding that Patrick's death was the result of a violation of a specific safety requirement. Indeed, the facts of this case establish that under any scenario, Relator Donohoe is entitled to a VSSR award.

There were essentially two arguments presented to the Commission. Relator Donohoe argued that Patrick had no choice but to climb the scaffolding because a ladder was not provided as required by Ohio Admin. Code § 4121:1-3-10(C)(9). The Employer's sole argument was that a ladder was present at the time of Patrick's fall. Significantly, the Employer's own Vice President testified that even if a ladder was present it was completely unguarded. (Stip. Evid. pg. 32). As such, the evidence was uncontroverted that the alleged ladder was not guarded as required by Ohio Admin. Code § 4121:1-3-04. Because the Employer did not first comply with the applicable safety requirement, it cannot prevail on its only defense asserting unilateral

negligence. Therefore, even assuming *arguendo* that a ladder was present, which Relator Donohoe vehemently denies, Relator Donohoe is entitled to a VSSR award.

In addition to the undisputed fact that the alleged ladder was unguarded, it was also established that scaffolding from where Patrick fell was unguarded. (Stip. Evid. pg. 34). Plaintiff's expert John Messineo testified that Patrick fell while climbing the scaffolding. (Stip. Evid. pg. 100, at ¶13). At the VSSR hearing, the Employer's Vice President conceded that there were no safety guards on the scaffolding as required by Ohio Admin. Code § 4123:1-3-03(J)(1). (Stip. Evid. pg. 22; 34). The Employer in its Response Brief does not make any attempts to dispute that employees were not provided lifelines and lanyards as required by Ohio Admin. Code § 4123: 1-3-03(J)(1). (Stip. Evid. pg. 34). Thus, there is no question that the Employer violated multiple specific safety requirements.

Based on the uncontested evidence presented to the Commission, Patrick's death was either caused by the Employer's failure to provide a safe egress to the work site or from the Employer's failure to properly guard the scaffolding. Under either determination, Relator Donohoe is entitled to a VSSR award. Consequently, there is no dispute that Patrick's death was the result of a specific safety requirement violation. Accordingly, this Court should direct the Commission to enter an Order granting Relator Donohoe VSSR benefits.

B. The Commission Improperly Denied Relator Donohoe's VSSR Award Based Solely On The Fact There Were No Eyewitnesses To Patrick's Fall.

Rather than fulfilling its duty as a fact finder, the Commission failed to analyze the evidence that was presented by both parties and as a result reached a conclusion that was at odds with all of the evidence in the record. By stating that the circumstances of Patrick's fall could

not be determined due to the lack of eyewitnesses, it is clear that the Commission required direct evidence.

Notably, neither the Commission nor the Employer dispute 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. (emphasis added). The Commission was required to act as a fact finder and “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, however, failed to evaluate the circumstantial evidence, including the expert reports and affidavits that were presented by both parties at the VSSR hearing.

The Commission’s failure to evaluate the evidence is highlighted by the fact that the Commission’s Order does not contain any reference to the expert witness reports or affidavits that were presented by the parties, which each concluded to a reasonable degree of certainty that it was possible to reconstruct Patrick’s fall. The Commission’ neglect to reference the expert opinions warrants an issuance of a writ of mandamus. The Commission’s Order does not comply with this Court’s mandate that the Commission specifically state what evidence was 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. The purpose of requiring such evidentiary identification and explanation is to avoid the exact scenario that is presented in this case and to make it clear what evidence was relied upon so that a “meaningful review can be accomplished.” *State ex. rel. Noll v. Indus. Comm.*, 57 Ohio St.3d at 206. The Commission’s

failure to comply with *Noll* was equivalent to an abuse of discretion. *State ex. rel. Gemind v. Indus. Comm.* (1998), 82 Ohio St.3d 457, 460, 696 N.E.2d 1025.

The Commission and the Employer do not make any attempts to distinguish this case from this Court's holding in *Scouler*, which provides 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.**" *State ex rel. Scouler v. Indus. Comm* (2008), 119 Ohio St.3d 276, 893 N.E.2d 496, ¶ 17 (citations omitted) (emphasis added). "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.*

Here, the Commission's Order reveals that the expert opinions were over-looked. The Court of Appeals properly noted that "the commission did not consider the [expert] reports at all in the absence of supporting eyewitness testimony." (*See* Appellant/Cross-Appellee Kenny Huston Co. Appx. 13, ¶ 24). Further, the Commission's finding that the details of Patrick's fall could not be determined is simply not supported by "some evidence." Every expert determined that it could be inferred where Patrick fell and what he was doing when the accident occurred. Instead of considering the expert reports, the Commission ignored critical evidence and required direct evidence. By requiring direct evidence the Commission violated this Court's holding in *Supreme Bumpers*. The Commission also reached a conclusion that was directly contradicted by the evidence in the record.

Contrary to the Employer's arguments set forth in its Response Brief, Relator Donohoe is not requesting that this Court reweigh the evidence. Rather, this Court must remand this matter because the Commission failed to weigh the evidence in the first place. Relator Donohoe is not seeking to turn this Court into a fact finder but requesting that a directive be issued to the

Commission to fulfill its duty as a fact finder. Importantly, the Commission agrees that this case should be reheard by the Commission. Indeed, the Commission's Brief notes that the Commission did not appeal the Court of Appeals limited writ and does not oppose rewriting the VSSR. (Appellee Industrial Commission Merit Brief pg. 6). Therefore, at a minimum, this Court must remand this matter back to the Commission.

C. The Strict Construction Rule Does Not Permit The Commission To Construe Facts Or Evidence In The Employer's Favor.

The Commission and the Employer incorrectly state that the strict construction rule requires all reasonable doubts to be resolved in the Employer's favor. (*See* Appellee Industrial Commission Brief pg. 5; Appellant/Cross-Appellee Kenny Huston Co. Brief pg. 5). This Court, however, has held that the application of the strict-construction rule, cannot justify an illogical result. *State ex. rel. Supreme Bumpers, Inc. v. Indus. Comm.* (2002), 98 Ohio St.3d 134, 781 N.E.2d 170, ¶ 47. **Moreover, the strict-construction rule does not apply in resolving factual disputes.** *Id.* at ¶ 70. "It permits neither the commission nor a reviewing court to construe the *evidence* of a VSSR strictly in the employer's favor." *Id.* (emphasis in original). Consequently, the Commission was not permitted to construe the evidence in favor of the Employer.

Interestingly, for the first time the Employer now argues that there were factual disputes on virtually each and every issue. (Appellant/Cross-Appellee Kenny Huston Co. Response Brief pg. 5). The Employer further argues that there can only be speculation as to what really occurred at the time of Patrick's fall. The Employer, however, never argued at the VSSR hearing that the circumstances of Patrick's fall could not be determined. (*See generally* Stip. Evid. pg. 9-78). This is an entirely new argument that is contrary to the Employer's own expert testimony that it was possible to recreate Patrick's fall.

The Commission was presented with expert reports from both parties. Although the experts disagreed on certain aspects of how Patrick's fall occurred, each agreed that it could be determined to a reasonable degree of scientific probability what Patrick was doing at the time of his fall. Further, as stated above, the fact that Patrick fell off unguarded scaffolding was never in dispute. (Stip. Evid. pg. 100 at ¶13; Stip. Evid. pg. 34). The Employer's only argument was the unilateral defense, which as explained above, is without merit.

More importantly, as discussed above—in all possible scenarios as to how Patrick fell—the fall was the result of a violation of a specific safety requirement. There were no guards anywhere on the job site. Everywhere Patrick was required to work or access the job site was unguarded in violation of a specific safety requirement.

In this day and age, employees do not fall from heights to their death without a lack of safety guarding. Every specific safety requirement cited in this case, including guardrails and fall protection, were specifically designed to prevent accidents like Patrick's fall. Therefore, regardless of how the Employer wishes to "speculate" as to how Patrick fell, all possible scenarios involve the Employer's failure to provide safety equipment in violation of Ohio Specific Safety Requirements.

In addition to the fact that there was no guarding on the site, it is also undisputed that this employer was warned about it repeatedly and had two other employees fall from scaffolding in the two years prior to Patrick's death. To allow this employer to escape VSSR liability for the sole reason that Patrick died and is unable to testify would be one of the greatest travesties of justice imaginable. Employers like this – who provide no safety guarding whatsoever and have multiple employees injured and/or killed as a result – are the exact type of employers Ohio's VSSR laws are designed to punish.

D. Respondents Fail To Address The Commission's Err In Applying The Wrong Legal Standard.

The Employer and the Commission do not dispute that the Commission applied the wrong legal standard for establishing a VSSR. Specifically, the Commission's Order states that a claimant must demonstrate that: "(1) [t]he cited code section applies to the circumstances of the employment at the time of the injury." (Stip. Evid. pg. 2). The proper test for a VSSR award was set forth by this Court in *Supreme Bumpers*, 98 Ohio St.3d 134. In *Supreme Bumpers* this Court did not require that the code section apply to the circumstances of the employment being performed at the time of the injury. *Id.* at 138.

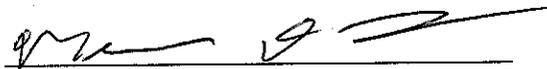
In this matter, there is no dispute that the Employer violated a specific safety requirement. The evidence established that there were no safety guards on the scaffolding and no guarding on the alleged ladder. (Stip. Evid. pg. 32-34). As stated above, Patrick's death was either caused by unguarded scaffolding or the Employer's failure to provide safe egress to the worksite. Either way, the Employer violated a specific safety requirement, which ultimately caused Patrick's death.

At the VSSR hearing, Relator Donohoe presented reliable evidence to support her claim. It was the Commission's duty to review the evidence and determine that a violation caused Patrick's fall. The Commission, however, refrained from making any factual determinations and denied Relator Donohoe's claim based solely on the lack of eyewitnesses. Appropriately, this Court must remand this matter back to the Commission with instructions to apply the correct legal standard to the facts in this case.

III. CONCLUSION

Most Ohio employers make honest and consistent attempts to protect their employees from injuries. Unfortunately, the Employer in this matter did not. The Employer failed to provide any safety guarding – of any nature – on the job site. The Employer had a history of failing to provide the appropriate safety guarding as two prior employees had been injured from falling from scaffolding in the two years prior to Patrick’s death. Independent witnesses testified that a cover-up occurred at the job site following Patrick’s death. Despite this, the Employer has been able to escape liability on this VSSR for the sole reason that Patrick died and is unable to testify. Because of the fact that under either scenario of how Patrick died (working on unguarded scaffolding or accessing the job site through unsafe means) it was as a result of a VSSR, the Commission should be ordered to issue a finding in favor of Relator. Donohoe.

Respectfully submitted,



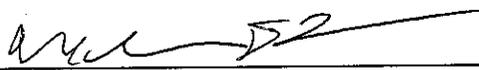
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CERTIFICATE OF SERVICE

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