

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Ruscilli :
 Construction Co, Inc. :
 :
 : Case No.: 2010-1614
 :
 v. :
 :
 Industrial Commission of Ohio, et al. :
 and David D. Barno :
 :
 :

BRIEF OF APPELLANT, DAVID D. BARNO

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STATEMENT OF THE CASE

In this workers' compensation mandamus action, Appellant, David Barno, asserts that the court of appeals erred in granting a requested writ of mandamus on behalf of Appellee, Ruscilli Construction Co. Specifically, the court of appeals granted a writ of mandamus to remand a valid decision of the Industrial Commission to grant a Violation of a Specific Safety Requirement (VSSR) {Appendix p. 13}. The VSSR had been filed by Mr. Barno against Ruscilli Construction Co. for failure to cover a hole in a manner that would preclude "accidental displacement" of the cover. In granting the writ the court of appeals wrongly held that the Staff Hearing Officer (SHO) of the Industrial Commission improperly recalled and relied upon testimony that was not at evidence in granting the VSSR (App. P 3). The court further found that the magistrate applied a different standard to the cover over this hole, stating that the cover could not be "easily displaced", rather than "accidentally displaced." Both statements are true, however neither is a distinction of any legal merit as neither changes the legal analysis nor the standard being applied in any way. The decision of the Industrial Commission remains based upon "some evidence" in the record and a writ of mandamus ordering a remand is not appropriate here.

While the commission found that Ruscilli was in violation of the applicable code section of the Ohio Administrative Code (4123:1-3-04) in no way does its decision constitute an abuse of discretion as the award was supported by the evidence produced at hearing.

STATEMENT OF FACTS

Mr. Barno was injured in the course of and arising out of his employment with his employer, Skilled Trades, who was subcontracting for Ruscilli on a remodeling job at the old Seneca Hotel site. See Stipulation of Evidence, page 36-37 (hereinafter, “Stip., p. x”). In his third day on the job, Mr. Barno had received permission to come late that day, and when he arrived he was directed by his supervisor to remove scrap and debris left behind by an HVAC contractor that had been working in an enclosed, garage type area. (Stip. pp 6, 39). Mr. Barno collected a wheelbarrow and set to work on his appointed task, and in doing so noticed two 3x3 sheets of plywood on the floor, one stacked on top of the other. He loaded the top sheet during his initial run to the dumpster and upon returning bent down, and picked up the second sheet. Unbeknownst to Mr. Barno, that sheet was covering a hole and when he picked up the second sheet of plywood, which offered no resistance at all, he ended up plunging ten to fifteen feet down into this hole. He landed face first with the result of shattering his jaw. (Stip. pp 39-44).

Skilled Trades is a temporary agency, and as such is not the employer of record for the purposes of filing a VSSR application. Pursuant to *State ex rel. Newman v. Indus. Comm.* (1997), 77 Ohio St.3d 271; as the situs employer, Ruscilli was his “employer” for the purposes of a VSSR allegation, a fact not in dispute at the hearing before the Staff Hearing Officer of the commission. Such an application was filed against Ruscilli, and a hearing held before a Staff Hearing Officer of the commission, who found a violation of OAC §4123:1-3-04(D)(1). That section covers “Floor Openings” which “...shall be guarded by a standard guard railing and toe board **or A cover with a safety factor of no less than two and so constructed that the cover cannot be accidentally displaced.**”

(Emphasis added). The sole issue discussed at the hearing before the commission was whether or not this 3x3 sheet of plywood, placed over the hole by Ruscilli, was immune to accidental displacement. The staff hearing officer found, after listening to the testimony, and weighing the evidence, that indeed Ruscilli had violated this section (Stip. p. 89).

Ruscilli then filed a motion for rehearing before the commission on August 21, 2009 relying on what they declared to be a mistake of fact that the SHO commented on two boards being across the hole, and, for the first time, that the doctrine of unilateral negligence was applicable to this case. The commission, through its order mailed September 24, 2009, declined to grant this request noting that the employer had not "...submitted any new and relevant evidence nor shown that the order issued 7/21/2009 was based on an obvious mistake of fact or on a clear mistake of law." (Stip. p. 99). Following that denial Ruscilli filed a request for a writ of mandamus to the Tenth Appellate District of Ohio. After briefing and oral argument a magistrate issued a decision on April 21, 2010 which denied the requested writ of mandamus. In a well reasoned decision the magistrate found that Ruscilli had failed to prove the commission order was not based on some evidence as the testimony of Mr. Barno itself supported the commission's findings.

Upon objections the magistrate's decision was reviewed by three judges of the Tenth Appellate District who rendered a decision on September 2, 2010 which reversed the magistrate and issued a limited writ of mandamus ordering the Industrial Commission to adjudicate the application for the VSSR. The decision was based on what was determined to be two errors, one by the hearing officer and the other by the magistrate.

By the hearing officer it was determined that the testimony recalled in the order was inaccurate as to how many boards were over the hole and how they were secured. The SHO indicated the employer's testimony was it was their practice to use two pieces of plywood when in fact they routinely only used one. Further it was found that the SHO had wrongly recalled that the board was fastened to compacted dirt when it was instead fastened to a concrete floor. Neither item changes the actual analysis of the question which is: was the cover securely fastened so as to preclude "accidental displacement." That it wasn't was supported by the testimonial evidence at hearing that Mr. Barno simply lifted the board up without any resistance at all.

The second error was found in the magistrate's decision that improperly places emphasis on whether or not Mr. Barno "yanked" the board and then applied a different standard than what was required, i.e. that the cover could not be "easily displaced" as opposed to "accidentally displaced." That distinction was made only in distinguishing the facts of the case at bar with those in another case and were not the basis of the magistrate's decision to uphold the underlying commission order.

ARGUMENT

Standard of Review

In order to prevail in a mandamus action, the Relator must show a clear legal right to the relief sought and that the respondent has a clear legal duty to provide such relief. See *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, paragraph 9 of the syllabus. To prevail in a workers' compensation mandamus action, the Relator must

show that the commission's decision constitutes an abuse of discretion. See *State ex rel. Pass v. CST Extraction Co.* (1996), 74 Ohio St.3d 373, 376.

Because the commission speaks only through its orders, mandamus review is limited solely to the evidence and reasoning set forth in the commission's order. See *State ex rel. Pinson v. Indus. Comm.*, 155 Ohio App.3d 270, ("matters outside the four corners of the commission's order ... simply cannot be considered").

The commission is the ultimate arbiter of facts and the credibility of evidence. See *State ex rel. LTV Steel Co. v. Indus. Comm.* (2000), 88 Ohio St.3d 284, 287. Thus, courts may not disturb the Industrial Commission's reasoning when it is supported by "some evidence." See *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 655. Where the record contains some evidence to support Industrial Commission's factual findings, such findings will remain undisturbed and are not subject to an action in mandamus. *State ex rel. Hudson v. Indus. Comm.* (1984), 12 Ohio St.3d 169. In appeals regarding workers' compensation decisions made by the commission, requests that evidence be reweighed and a court reach a conclusion opposite that reached by the commission will be denied. *State ex rel. Mitchell v. Robbins & Myers, Inc* (1983) 6 Ohio St.3d 481.

Proposition of Law 1:

THE VSSR AWARD ISSUED BY THE INDUSTRIAL COMMISSION WAS SUPPORTED BY SOME EVIDENCE AND THE ISSUED WRIT WAS IN ERROR

As discussed in the order of the magistrate which refused to grant the requested writ of mandamus, a VSSR award is founded upon a three part test the claimant must meet. First that there exists an applicable and specific safety requirement in effect at the

time of the injury, second the employer failed to comply with the requirements and third, the failure to comply with that requirement was the proximate cause of the injury in question. *State ex rel. Trydle v. Indus. Comm.* (1972), 32 Ohio St.2d 257.

The transcript from the VSSR hearing held June 18, 2009 was part of the stipulated record in this mandamus action. In reading the transcript it is clear that the bulk of the hearing revolved around testimony from the claimant, Mr. Barno, his supervisor, Jeremy Crawford, and Ruscilli's corporate safety officer, Deborah Webb. (Stip. pp 34-79). At the conclusion of Mr. Barno's testimony, counsel for Respondent Barno made the argument that his injury occurred simply because the plywood board covering the hole was not properly fastened down so as to prevent accidental dislodgment. When he was picking up what he believed was a piece of scrap wood, it came free without any resistance, thereby exposing the hole, and he lost his balance and fell in. (Stip. pp 45, 46). In response counsel for Relator took the testimony of Mr. Crawford and Ms. Webb, who were also subject to cross exam and questions from the staff hearing officer (Stip. pp. 52-79). At the conclusion of questions from the hearing officer to Ms. Webb, counsel for Ruscilli indicated he wanted to make a "presubmission" and proceeded to defend against the VSSR application on two very specific grounds (Stip. P 79-81).

Ruscilli's first defense was that they had substantially complied with the requirements of OAC §4123:1-3-04(D) regarding fastening the cover properly. The hearing officer quite frankly disagreed in finding the violation present and Ruscilli responsible. The second argument was that a VSSR award would be "inappropriate and impermissible and unconstitutional...when the injured worker has elected to take the wage compensation in lieu of temporary total disability benefits." (Stip. p. 81). That

argument is wholly without merit legally, and factually incorrect as Mr. Barno had been paid at least a period of temporary total disability benefits by the Bureau of Workers' Compensation. The only time Mr. Barno's actions are even discussed by counsel in relationship to any potential fault is near the end when counsel spends two sentences on "pulling is an intentional act" but fails to note this as a defense under the theory of unilateral negligence, nor does he provide any of the applicable case law for unilateral negligence, and the issue was not further explored at the hearing.

After the award was issued, Ruscilli, through counsel, filed a Motion for Rehearing with the commission, which alleged first a mistake of fact, and second that "the Employee intentionally removed a safety device...that was the sole and proximate result of his injury, as opposed to any violations of O.A.C. §4123:1-3-04(D)(1). (Stip. p. 91, emphasis added). That motion was denied by the Industrial Commission on the basis that the employer had not "...submitted any new and relevant evidence nor shown that the order issued 7/21/2009 was based on an obvious mistake of fact or clear mistake of law." (App. P. 11).

The sole issue before the commission at the hearing was whether or not the employer had securely fastened constructed and fastened the cover over this hole in such a manner as to prevent accidental dislodgement. The order of the commission did contain mention of two boards being placed over the hole, and the hearing officer did mention that such an arrangement would have protected the claimant. However, that discussion is mere dicta to the actual holding in the order. The hearing officer, after listening and weighing the evidence discusses the method used to fasten down the board and finds that: "...the plywood cover of a hole that was big enough for a man to fall through was

ineffective. It is noted that the picture of a plywood board (in Exhibit A) does not have any holes at the corners where nails were once used to secure it.” The sentence which follows states “Based upon the foregoing findings, it is found that the Employer violated O.A.C. 4123:1-3-04(D)(1).” (App. p.14). To state the applicable standard again, where the records contains some evidence to support Industrial Commission’s factual findings, such findings will remain undisturbed and are not subject to an action in mandamus. *State ex rel. Hudson v. Indus. Comm.* (1984), 12 Ohio St.3d 169.

However in granting the requested writ, the appellate court determined that the SHO had incorrectly relied upon recalled testimony in reaching the conclusion that the employer failed to “...use an effective method of guarding the hole.” (App. p.5). The court found fault with the magistrate’s decision because there was improper emphasis on whether or not Mr. Barno had to “yank” on the cover, and there is a brief mention in the decision regarding whether the cover was “easily displaced” rather than “accidentally displaced.” (Id.). Both are distinctions without merit and even taking both at face value leaves the decision to grant the VSSR award supported by “some evidence.” What the court failed to appreciate is that in reality, regardless of how the board was fastened, it came free with almost no resistance when Mr. Barno lifted it up without knowing of the hole it covered. Any cover that could be so readily removed cannot possibly be said to be secured in a manner that would preclude “accidental displacement.” Much like the elements of *res ipsa loquitor* this fact speaks very much for itself.

A review of the transcript of the hearing reveals the following exchanges with the employer’s witnesses. First, the supervisor reading his affidavit to the BWC’s investigator regarding his findings after the accident: “I turned the cover over and the

nails were sticking out of the bottom of the plywood. It was secured by four nails into the concrete floor; however, they apparently came loose from the concrete as he lifted up.” (Stip. p. 56). Then, on cross exam, the employer’s safety officer, Ms. Webb testified that they only “kick” the covers from side to side to see if they are fastened down and that she does not try to pick them up herself. When asked if she had ever personally witnessed someone pick up a board fastened in such a manner, Ms. Webb answered “Yes, I’ve personally witnessed it myself at a job.” (Stip. p. 74). Upon being asked “Was it a struggle or did he pick it right up?” she replied with “He pulled it right up...”. (Id.). Clearly picking up on that testimony the hearing officer herself asks Ms. Webb “So if somebody were to walk up to a piece of plywood and pull up on it and not meet a lot of resistance, then wouldn’t you say it did not have the appropriate nails in it?” (Stip. p. 79). Ms. Webb’s answer: “If there was no resistance, but I wouldn’t know without doing it myself.” (Id.)

Setting aside the dicta what is clear from the order is that the hearing officer listened to the testimony presented and the arguments made, and issued a decision that the employer had not met the requirements of OAC 4123:1-3-04(D)(1) that this cover be fastened in such a manner as to prevent accidental dislodgment. Not only is that decision within the purview and discretion of the commission, it’s clearly supported by at least “some evidence” as necessary to withstand scrutiny on mandamus. It was certainly correct that the commission found that there were perhaps better ways to cover the hole, but the finding was that the cover as it existed was subject to accidental dislodgment.

In the same vein the court misunderstands the magistrate’s reasoning in upholding the award. While there is discussion of the employer’s testimony that someone would

have to “yank” on such a cover, the magistrate found that based upon claimant’s testimony there is some evidence in the record that the cover could be accidentally displaced. (App. p.9) Given that Mr. Barno was under oath and that the commission is the arbiter of fact, it was well within the discretion of the commission to use Mr. Barno’s testimony as “some evidence” of an accidental displacement of the cover. The magistrate states that there was no evidence that he “yanked” on the cover to point out that no one at the hearing was alleging that Mr. Barno ripped up the cover, ostensibly for the sole purpose of diving to the bottom of the hole. It was simply an accident, one that started with an assigned task and while carrying out that task he lifted up the cover and fell. If the cover had been securely place to prevent such “accidental” dislodgment it would have either not budged when he lifted on it, or provided such resistance that would have made him consider why this board was fastened to the floor. Instead with no resistance and with no warning of what lay below the board, he simply lifted it off the floor. That was the crux of the commission’s reasons for granting the application and it is fully supported by the testimonial evidence given at hearing. Once the evidence was presented, without any evidence that the cover was in any way difficult to remove, the commission has the discretion to weigh the evidence before it. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St 2d. 165. The commission chose to find credible and rely upon the testimony in granting the award and where evidence exists to support the commission’s factual findings, those findings will not be disturbed. *State ex rel. General Motors v. Indus. Comm.* (1975), 42 Ohio St.2d 278.

CONCLUSION

The commission did not abuse its discretion in awarding the VSSR to claimant David Barno as the decision is supported by evidence contained in the record. The commission upheld it's duty, hear the evidence, weigh the facts and be the arbiter of the dispute. There is no abuse of discretion present and the appellate court had no basis to grant the writ as requested. For these reasons the requested writ should be denied and the order of the commission should be allowed to stand as written.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Brief was served on J. Miles Gibson, Esq. of Wiles Boyle Burkholder and Bringardner, 300 Spruce St., Floor One, Columbus, Ohio 43215 and Kevin J. Reis, Esq., Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215, by regular U.S. Mail on this 13th day of June, 2011.



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APPENDIX

Notice of Appeal to the Supreme Court of Ohio.....1

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ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. David D. Barno	:	
	:	On Appeal From the Franklin
Respondent-Appellant	:	County Court of Appeals,
	:	Tenth Appellate District
v.	:	
	:	
State ex rel. Ruscilli Construction	:	Court of Appeals
	:	Case No.: 09AP-1006
Relator-Appellee	:	

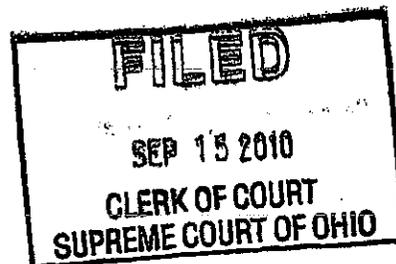
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NOTICE OF APPEAL OF RELATOR-APPELLANT, DAVID D. BARNO

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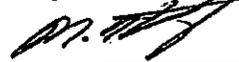


NOTICE OF APPEAL

Now comes Relator-Appellant, David D. Barno, and hereby gives notice of his appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, in case number 09AP-1006. Said judgment entry was filed by the court of appeals on September 2, 2010.

This Court has appellate jurisdiction over this appeal as of right because the case below originated in the court of appeals as an original action in mandamus. A copy of the judgment entry of the Tenth District Court of Appeals is attached hereto.

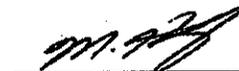
Respectfully submitted,



Mark Heinzerling (0067017)

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Notice of Appeal was served on J. Miles Gibson, Esq, 300 Spruce Street, Floor One, Columbus, Ohio 43215 and Kevin Reis, Esq., Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215, by regular U.S. Mail on this 15th day of September, 2010



Mark Heinzerling (0067017)

	No negative treatment in subsequent cases For other cases cited see Casecheck+... top right column	CASEcheck
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State ex rel. Ruscilli Construction Company Inc. v. Industrial Commission of Ohio, 2010-Ohio-4126, 09AP-1006 (OHCA10)

2010-Ohio-4126

State ex rel. Ruscilli Construction Company, Inc., Relator,

v.

Industrial Commission of Ohio and David D. Barno, Respondents.

No. 09AP-1006

Court of Appeals of Ohio, Tenth District

September 2, 2010

IN MANDAMUS ON OBJECTIONS TO THE MAGISTRATE'S DECISION

Wiles Boyle Burkholder & Bringardner Co., LPA, J. Miles Gibson and Samuel M. Pipino, for relator.

Richard Cord ray, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

Heinzerling & Goodman, LLC, and Mark Heinzerling, for respondent David D. Barno.

DECISION

CONNOR, J.

{¶1} Relator, Ruscilli Construction Company, Inc. ("relator" or "Ruscilli"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its award to respondent, David D. Barno ("claimant"), for relator's violation of a specific safety requirement ("VSSR").

{¶2} The court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion in granting claimant an additional award for a VSSR because there was some evidence in the record that the cover was constructed in a fashion that allowed it to be accidentally displaced. The magistrate further concluded this case was distinguishable from *State ex rel. Sheeley v. Indus. Comm.*, 10th Dist. No. 07AP-1011, 2008-Ohio-4547, because the cover in this case was "easily displaced," thereby resulting in claimant's injuries. Therefore, the magistrate recommended that this court deny relator's

request for a writ of mandamus.

{¶3} Relator has filed the following two objections to the magistrate's decision:

[I] RELATOR OBJECTS TO THE MAGISTRATE'S FACTUAL FINDING "BASED ON CLAIMANT'S TESTIMONY, THERE IS SOME EVIDENCE IN THE RECORD THAT THE COVER PROVIDED BY RELATOR WAS NOT SO CONSTRUCTED THAT THE COVER COULD NOT BE ACCIDENTALLY DISPLACED".

[II] THE FACTS OF THIS CASE ARE NOT DISTINGUISHABLE FROM THE FACTS IN THIS COURT'S DECISION IN STATE EX REL. *SHEELY V. INDUSTRIAL COMMISSION, 10TH DISTRICT* NO. 07AP-10[1]1, 2008-Ohio-4547.

{¶4} In its first objection, relator argues the magistrate erred by substituting the phrase "not easily displaced" for the "cannot be accidentally displaced" language used in Ohio Adm.Code 4123:1-3-04(D)(1) and by assuming facts which are not supported by the evidence in the record. In its second objection, relator argues the magistrate improperly attempted to distinguish this case from *State ex rel. Sheely v. Indus. Comm.*, 10th Dist. No. 07AP-1011, 2008-Ohio-4547, by using a "lack of resistance test" to determine that relator had failed to comply with the applicable code provision.

{¶5} The magistrate's findings of facts are based in large part upon the findings of the Staff Hearing Officer ("SHO"). The SHO found claimant sustained injury on September 11, 2007, in the course of his employment when he removed a plywood board covering a hole on the floor at a construction site and fell several feet through the hole. Claimant testified he did not know the hole was present and that he was able to remove the board without resistance.

{¶6} The SHO further found claimant's injury was the result of relator's failure to effectively cover the hole as required by Ohio Adm.Code 4123:1-3-04(D)(1). This section applies to temporary conditions where there exists the danger of employees or materials falling through the floor, roof, wall opening or stairway at a construction site. It requires that any such opening be guarded. Specifically, Ohio Adm.Code 4123:1-3-04(D)(1) provides in relevant part:

(D) Openings. (1) Floor openings. Floor openings shall be guarded by a standard guard railing and toeboard or a cover with a safety factor of no less than two and so constructed that the cover cannot be accidentally displaced. * * *

{¶7} Citing to claimant's testimony, the SHO determined the hole was covered with only a single piece of plywood, but that relator's safety representative had testified it was standard practice to place two pieces of plywood over every hole and to boldly write the word "hole" on the top piece of plywood. The SHO found that if two pieces of plywood had been covering the hole, claimant would not have been injured. In addition, the SHO concluded the practice of using two inch nails to hold two pieces of plywood in place over a hole was not an effective way to guard the hole, given the depth of the boards and the limited amount of the nail that would remain available to secure the boards to the ground. Furthermore, the SHO determined that because the ground was compacted dirt that could shift or become less secure due to weather conditions such as rain, the method used to guard the hole was ineffective.

{¶8} However, our review of the record of proceedings reveals relator's safety officer actually testified that it was standard practice to use just one layer of plywood. As a result, the nails only had to penetrate one layer of plywood and more of the nail could be inserted into the ground. Furthermore, the witness testimony appears to establish that the plywood was secured into the concrete floor, rather than into compacted dirt. The SHO appears to have incorrectly recalled this relevant and significant testimony of the witnesses and thus relied upon that incorrect testimony in reaching

her conclusion that relator failed to use an effective method of guarding the hole. In turn, the magistrate appears to have relied upon much of the same inaccurate testimony.

{¶9} Furthermore, the magistrate's decision improperly places significant emphasis upon the fact that there is no testimony to establish that claimant "yanked" on the board and applies a different standard for guarding the hole: that the cover could not be "easily displaced," rather than "accidentally displaced."

{¶10} For these reasons, we grant a limited writ of mandamus directing the commission to vacate its July 2009 order and remand this matter to the commission to adjudicate the application for VSSR and determine the facts, either based upon the record or, if necessary, by holding a new hearing.

Limited writ of mandamus granted.

TYACK, P.J., and FRENCH, J., concur

APPENDIX

April 21, 2010

IN MANDAMUS

MAGISTRATE'S DECISION

STEPHANIE BISCA BROOKS MAGISTRATE

{¶11} Relator, Ruscilli Construction Company, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to grant its order which granted respondent, David D. Barno ("claimant"), an additional award for the violation of a specific safety requirement ("VSSR") and ordering the commission to find that claimant is not entitled to that award.

Findings of Fact:

{¶12} 1. Claimant sustained a work-related injury on September 11, 2007 and his workers' compensation has been allowed for the following conditions: fracture condylar process of mandible; open fracture symphysis of body of mandible; fracture malar/maxillary-open; bilateral dislocation jaw-open; loss of tooth 9 trauma; loss of tooth 10 trauma; right perforation of tympanic membrane; unilateral mixed hearing loss; peripheral vertigo; right chronic mucoid otitis media simple.

{¶13} 2. September 11, 2007 was claimant's third day on the job at this particular work site. Claimant had obtained permission to arrive late that day, and when he arrived, the crew was on break. Claimant's supervisor directed him to remove scraps and other debris in an enclosed garage-type area. The scraps had been left behind by an HVAC contractor who had been working the preceding night. Using a wheelbarrow, claimant began picking up scraps, including scraps of plywood, placing them in the wheelbarrow, and dumping them in the dumpster. According to claimant's testimony, he noticed two three quarter inch sheets of plywood approximately three feet by three feet. Claimant loaded the first one in the wheelbarrow and dumped it. When he returned, claimant bent down to pick up the other piece of

plywood which, unbeknownst to claimant, was covering a hole. As he picked up the piece of plywood, claimant fell into the hole and sustained his injuries. There were no witnesses to claimant's accident.

{¶14} 3. The other workers from whom statements were taken had been on the work site for months and knew the hole existed and was covered with a sheet of plywood. According to the testimony, the plywood was secured to the concrete floor with four nails. Further, testimony indicated that the word "hole" was spray painted on the plywood. Apparently, the object was to secure the plywood in such a manner that it could not be pushed, kicked or slid off the hole. Workers, supervisors, and relator's corporate safety officer would kick occasionally the piece of plywood to be certain that it remained secured. It was not anticipated that anyone would attempt to lift up the piece of plywood.

{¶15} 4. Deborah Webb, relator's corporate safety officer, testified that a person would need to yank on this piece of plywood in order to lift it off the hole. Claimant testified that he bent over to pick up the piece of plywood and felt no resistance.

{¶16} 5. Exhibit 12 on page 29 of the stipulation of evidence was presented at the hearing. In that exhibit, it is apparent that the plywood cover had been walked across frequently and was dirty because the word "hole" is difficult to read.

{¶17} 6. In May 2008, claimant filed his application for an additional award for relator's VSSR. Claimant cited Ohio Adm.Code 4121:3-04(D)(1) which applies to temporary conditions where there is danger of employees or material falling through the floor, roof, wall openings or stairways, and requiring that those openings be guarded by a standard guard railing and toeboard or a cover.

{¶18} 7. Relator's motion was heard before a staff hearing officer ("SHO") on June 18, 2009. The SHO determined that claimant met his burden of proof and granted him a VSSR as follows:

It is further the finding of the Staff Hearing Officer that the Injured Worker's injury was the result of the Employer's failure to effectively cover the hole as required by 4123:1-3-04(D)(1), the Code of Specific Requirements of the Industrial Commission relating to construction.

The Injured Worker arrived at the job site to which he was assigned at 8:15 in the morning. He was instructed to get an industrial dumpster and load it with scrap wood. He came upon a piece of plywood laying on the ground and bent over to pick it up. He felt no resistance from the board when he had both hands on it. Since nothing was written on it, he assumed it was ordinary scrap wood. As the Injured Worker began pulling the board away, he accidentally leaned forward and fell head-first down a manmade hole, sustaining the injuries of record.

The Injured Worker cites O.A.C. 4121:3-04(A) and (D)(1), regarding the protection of floors and guarding of openings. The rule applies "... to temporary conditions where there is danger of employees or material falling through floor, roof or wall openings...." He specifically cites paragraph (D)(1) which states: "floor openings shall be guarded by a standard guard railing and toeboard or cover. Standard guard railing and toeboard shall be provided on all exposed sides...."

Based upon the Injured Worker's testimony, it is found that the hole was only covered with a single piece of plywood that had no indication on or around it that a hole was underneath. The Employer's safety representative presented pictures of a board that had the word "HOLE" written on it in large red letters.

She stated that it is the Employer's custom to put two pieces of plywood over every hole, with the top piece having the word "hole" written boldly and clearly on it.

It is found that if two pieces of plywood were over the hole, the Injured Worker would not have fallen through, since he only lifted one piece. Further, whether or not the word "hole" was written on the plywood, it did not serve to deter the Injured Worker from picking it up. The picture that the Employer submits at hearing (exhibit A) contains the word "hole" on it, but it is not clearly visible because of the many shoes, boots, and equipment pieces that have partially obscured the word.

The Employer further stated that the two pieces of plywood were nailed in place with two-inch nails. Again, this is not found to be an effective way of guarding the hole. Each board was approximately 5/8" deep, which means that two of them would take up 1 1/4" of a 2" nail. Approximately 3/4" of the nail was left to secure the boards to the ground. Considering that the ground was merely compacted dirt that could shift because of the hole adjacent to it, or that a rainy day could cause the ground to be less secure than usual, it is found that the plywood cover of a hole that was big enough for a man to fall through was ineffective. It is noted that the picture of a plywood board (in exhibit A) does not have any holes at the corners where nails were once used to secure it. Based upon the foregoing findings, it is found that the Employer violated O.A.C. 4123:3-04(D)(1).

{¶19} 8. Relator filed a motion for rehearing arguing the following:

- 1) Contrary to the Notice of Award, the Employer did *not* state that two pieces of plywood were nailed over openings in the floor as standard safety practice (rather, the Employer's witnesses testified only *1 board* would be used); and
- 2) Contrary to the Notice of Award, the Employee intentionally removed a safety device (i.e., pulling up a nailed board) that was the sole and proximate result of his injury, as opposed to any Violations of O.A.C. §4121:3-04(A) and (D)(1).

{¶20} 9. Relator's motion for rehearing was denied by order of the commission mailed September 24, 2009.

{¶21} 10. The day after, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶22} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶23} In order to establish a VSSR, a claimant must prove that: (1) there exists an applicable and specific safety

requirement in effect at the time of the injury; (2) the employer failed to comply with the requirements; and (3) the failure to comply was the proximate cause of the injury in question. *State ex rel. Trydle v. Indus. Comm.* (1972), 32 Ohio St.2d 257.

{¶24} The interpretation of a specific safety requirement is within the final jurisdiction of the commission. *State ex rel. Berry v. Indus. Comm.* (1983), 4 Ohio St.3d 193. Because a VSSR is a penalty, however, it must be strictly construed, and all reasonable doubts concerning the interpretation of the safety standard are to be construed against its applicability to the employer. *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170. The question of whether an injury was caused by an employer's failure to satisfy a specific safety requirement is a question of fact to be decided by the commission subject only to the abuse of discretion test. *Trydle*; *State ex rel. A-F Industries v. Indus. Comm.* (1986), 26 Ohio St.3d 136; *State ex rel. Ish v. Indus. Comm.* (1985), 19 Ohio St.3d 28.

{¶25} In this mandamus action, relator argues that the commission abused its discretion by granting claimant an additional award for a VSSR. Relator argues that the commission impermissibly added its own requirement to the code by requiring that the word "hole" should have been visible, that the commission's order is contrary to this court's decision in *State ex rel. Sheely v. Indus. Comm.*, 10th Dist. No. 07AP-1001, 2008-Ohio-4547, and that claimant's injuries were caused by his own unilateral negligence when he removed the plywood, which otherwise complied with the code, from the opening in the floor.

{¶26} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶27} The code section at issue here, Ohio Adm.Code 4123:1-3-04 provides, in pertinent part:

(A) Scope.

This rule shall apply to temporary conditions where there is danger of employees or material falling through floor, roof or wall openings or from stairways or runways.

* * *

(D) Openings.

(1) Floor openings.

Floor openings shall be guarded by a standard guard railing and toeboard or a cover with a safety factor of no less than two and so constructed that the cover cannot be accidentally displaced.

{¶28} The code requires that relator guard the opening in the concrete floor in either one of two ways: (1) by providing a standard guard railing and toeboard or (2) providing a cover with a safety factor of no less than two and so constructed that the cover cannot be accidentally displaced.

{¶29} As noted in the findings of fact, there were no witnesses to claimant's accident. Claimant testified that he bent over, lifted up the cover, felt no resistance, and then fell through the opening. By comparison, relator's employees testified that they routinely kicked the cover to make sure it would not slide off the hole, and Ms. Webb testified that the

only way she had ever seen one of these covers removed (but not this one) was when a worker yanked on it. Nothing in claimant's testimony indicates that he yanked on the cover. Based upon claimant's testimony, there is some evidence in the record that the cover provided by relator was not "so constructed that the cover [could not] be accidentally displaced." This, in and of itself, supports the commission's findings.

{¶30} Relator first argues that the commission impermissibly added its own requirement to the code by requiring that the employer clearly label the cover with the word "hole." The magistrate disagrees with relator's characterization of the commission's order. Through testimony and statements, relator's employees repeatedly emphasized the fact that the cover was not only nailed down but that the word "hole" was spray painted on the cover in bright orange paint so that it would be visible. Although Exhibit 12 is a black and white photograph and would not demonstrate that the lettering was orange, the commission found, and this magistrate agrees, that the word "hole" is rather obscured. The magistrate finds that the SHO was merely addressing one of the arguments relator made indicating that claimant should have realized there was a hole under the piece of plywood. Nothing in the commission's order indicates that the commission was requiring that the word "hole" be written on this or any other cover in order to comply with the code provisions.

{¶31} Relator also contends that the commission's decision is contrary to this court's decision in the *Sheely* case. For the reasons that follow, this magistrate disagrees.

{¶32} In *Sheely*, the injured worker was part of a work crew constructing a concert stage at Crew Stadium. During construction, workers placed pieces of plywood over holes in the stage floor where roof supports would eventually go. In order to cover openings on stage right, where work was taking place, the injured worker and a co-worker were directed to remove plywood from stage left and carry it to stage right. The injured worker and his co-worker lifted a plywood cover in order to move it; the injured worker became distracted by something behind him and stopped momentarily; his co-worker continued to move; the injured worker was pulled off balance and fell into the hole they had just uncovered. The commission denied the injured worker's request for an additional award for a VSSR and this court agreed.

{¶33} In finding no violation, the commission first found that Ohio Adm.Code 4123:1-3-04(D)(1) had been met by the employer. The hole was covered. Second, the commission determined that the removal of the covering was necessary in order to proceed to the next phase of construction. Further, the commission found that there was no way for the employer to guard the opening between the time the plywood cover was removed and taken to the other side. Upon review, this court agreed with the commission's reasoning.

{¶34} Paramount to the decision in *Sheely*, the commission found that the employer had complied with the code requirements: the hole had been properly covered. Second, the commission determined that removal of the cover was necessary and that while the injured worker's injury was unfortunate, it was an accident, neither the employer's nor the injured worker's fault.

{¶35} Contrary to relator's assertions, the facts in *Sheely* are not analogous to the facts in the present case. In *Sheely*, the hole was properly guarded in the first instance as required by the code. In this case, the commission found that the opening was not properly guarded and that relator did not comply with the code section. In *Sheely*, two workers were required to remove the cover, i.e., it was not easily displaced. In the present case, claimant testified that he lifted up the cover with no resistance. Here, the cover was easy to displace and claimant did in fact, easily displace the cover and sustain his injuries. In *Sheely*, it was necessary to remove the cover in order to proceed with construction. In the present case, it was not necessary to remove the cover. Instead, the cover needed to stay in place. The two cases are very different and the commission's decision in this case is not contrary to our holding in *Sheely*.

{¶36} Lastly, relator cites *State ex rel. Frank Brown & Sons v. Indus. Comm.* (1988), 37 Ohio St.3d 162, and argues

that claimant's injuries were caused by his own unilateral negligence negating any specific safety code violations by relator. However, in *State ex rel. Martin Painting & Coating Co. v. Indus. Comm.*, 78 Ohio St.3d 333, 1997-Ohio-45, the court specifically stated that the holding from *Brown* only applies where an otherwise compliant device has been rendered non-compliant by the claimant's deliberate action. In the present case, although relator presented testimony that one would need to yank on the cover to remove it, no one witnessed claimant's accident. Claimant himself testified that he did not know there was a hole, he leaned over, picked up the cover, felt no resistance, and fell through the hole. Because there was some evidence in the record from which the commission specifically found that relator did not comply with the safety requirements and through claimant's testimony himself, the holding from *Brown* does not apply here.

{¶37} Respondents argue that relator did not raise the issue of unilateral negligence at the commission level and, therefore, cannot raise it here. Relator asserts the issue was raised tangentially by inference and that is sufficient. Because relator has not asserted that the commission abused its discretion by not making a finding of unilateral negligence, respondents appear to be correct. In any event, as above stated, there was some evidence that relator did not comply with the requirements first. Relator's unilateral negligence argument fails.

{¶38} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in granting claimant an additional award for the relator's violation of a specific safety requirement and this court should deny relator's request for a writ of mandamus.

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-858493
LT-ACC-OSIF-COV
PCN: 2081401 David D. Barno

Claims Heard: 07-858493

DAVID D. BARNO
299 CADBURY DR
GAHANNA OH 43230-2628

Date of Injury: 9/11/2007

Risk Number: 1492514-0

This claim has been allowed for: FRACTURE CONDYLAR PROCESS OF MANDIBLE; OPEN FRACTURE SYMPHYSIS OF BODY OF MANDIBLE; FRACTURE MALAR/MAXILLARY-OPEN; BILATERAL DISLOCATION JAW-OPEN; LOSS OF TOOTH 9 TRAUMA; LOSS OF TOOTH 10 TRAUMA; RIGHT PERFORATION OF TYMPANIC MEMBRANE; UNILATERAL MIXED HEARING LOSS; PERIPHERAL VERTIGO; RIGHT CHRONIC MUCOID OTITIS MEDIA SIMPLE.

This claim came before Staff Hearing Officer B. Smith as provided for in the Ohio Adm.Code 4121-3-20(C) on:

IC-8 App For Additional Award For VSSR - Non Fatal filed by Injured Worker on 05/12/2008.

Issue: 1) VSSR-Merits Of Application-Record Hearing

It is hereby ordered that the Motion for Rehearing filed 08/24/2009 be denied. The Employer has not submitted any new and relevant evidence nor shown that the order issued 07/21/2009 was based on an obvious mistake of fact or on a clear mistake of law.

Typed By: kas
Date Typed: 09/21/2009

B. Smith
Staff Hearing Officer

Findings Mailed: 09/24/2009

Electronically signed by
B. Smith

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

07-858493
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299 Cadbury Dr
Gahanna OH 43230-2628

ID No: 217301-91
Heinzerling & Goodman, LLC.
5900 Roche Dr Fl 4
Columbus OH 43229-3272

Risk No: 1492514-0
St Industrial Maintenance
4500 Wadsworth Rd
Dayton OH 45414-4779

ID No: 1740-80
Matrix Claims Management Comp
7162 Reading Rd Ste 250
Cincinnati OH 45237-1778

ID No: 21020-91
Wiles Boyle Burkholder & Bringardne
300 Spruce St Fl 1
Columbus OH 43215-1173

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-858493

ID No: 21651-91
Freund, Freeze, & Arnold
1 S Main St Ste 1800
Dayton OH 45402-2017

ID No: 217858-91
Freund Freeze & Arnold
65 E State St Ste 800
Columbus OH 43215-4247

ID No: 360-03
Ruscilli Construction
2041 Arlingate Ln
Columbus OH 43228-4107

ID No: 361-03
The Skilled Trades Co
4500 Wadsworth Rd
Dayton OH 45414-4779

BWC, LAW DIRECTOR

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT www.ohioic.com. ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-858493
LT-ACC-OSIF-COV
PCN: 2081401 David D. Barno

Claims Heard: 07-858493

DAVID D. BARNO
299 CADBURY DR
GAHANNA OH 43230-2628

Date of Injury: 9/11/2007

Risk Number: 1492514-0

This claim has been allowed for: FRACTURE CONDYLAR PROCESS OF MANDIBLE; OPEN FRACTURE SYMPHYSIS OF BODY OF MANDIBLE; FRACTURE MALAR/MAXILLARY-OPEN; BILATERAL DISLOCATION JAW-OPEN; LOSS OF TOOTH 9 TRAUMA; LOSS OF TOOTH 10 TRAUMA; RIGHT PERFORATION OF TYMPANIC MEMBRANE; UNILATERAL MIXED HEARING LOSS; PERIPHERAL VERTIGO; RIGHT CHRONIC MUCOID OTITIS MEDIA SIMPLE.

This matter was heard on 06/18/2009 before Staff Hearing Officer C. A. Sullivan, as provided for in R.C. 4121.35(B)(3) on:

IC-8 App For Additional Award For VSSR - Non Fatal filed by Injured Worker on 05/12/2008.

Issue: 1) VSSR-Merits Of Application-Record Hearing

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than fourteen (14) days prior to this date, and the following were present at the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Heinzerling; Mr. Barno; Mrs. Barno
APPEARANCE FOR THE EMPLOYER: Mr. Pipino; Ms. Webb for Ruscilli;
Mr. Crawford, witness; Court Reporter
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

It is the order of the Staff Hearing Officer that the Injured Worker was employed on the date of injury noted above, by the Employer as a laborer; that the Injured Worker sustained an injury in the course of and arising out of employment when he fell into a hole around a construction site.

It is further the finding of the Staff Hearing Officer that the Injured Worker's injury was the result of the Employer's failure to effectively cover the hole as required by 4123:1-3-04(D)(1), the Code of Specific Requirements of the Industrial Commission relating to construction.

The Injured Worker arrived at the job site to which he was assigned at 8:15 in the morning. He was instructed to get an industrial dumpster and load it with scrap wood. He came upon a piece of plywood laying on the ground and bent over to pick it up. He felt no resistance from the board when he had both hands on it. Since nothing was written on it, he assumed it was ordinary scrap wood. As the Injured Worker began pulling the board away, he accidentally leaned forward and fell head-first down a manmade hole, sustaining the injuries of record.

The Injured Worker cites O.A.C. 4121:3-04(A) and (D)(1), regarding the protection of floors and guarding of openings. The rule applies "...to temporary conditions where there is danger of employees or material falling through floor, roof or wall openings...." He specifically cites paragraph (D)(1) which states: "floor openings shall be guarded by a standard guard railing and toeboard or cover. Standard guard railing and toeboard shall be provided on all exposed sides...."

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-858493

Based upon the Injured Worker's testimony, it is found that the hole was only covered with a single piece of plywood that had no indication on or around it that a hole was underneath. The Employer's safety representative presented pictures of a board that had the word "HOLE" written on it in large red letters. She stated that it is the Employer's custom to put two pieces of plywood over every hole, with the top piece having the word "hole" written boldly and clearly on it.

It is found that if two pieces of plywood were over the hole, the Injured Worker would not have fallen through, since he only lifted one piece. Further, whether or not the word "hole" was written on the plywood, it did not serve to deter the Injured Worker from picking it up. The picture that the Employer submits at hearing (exhibit A) contains the word "hole" on it, but it is not clearly visible because of the many shoes, boots, and equipment pieces that have partially obscured the word.

The Employer further stated that the two pieces of plywood were nailed in place with two-inch nails. Again, this is not found to be an effective way of guarding the hole. Each board was approximately 5/8" deep, which means that two of them would take up 1 1/4" of a 2" nail. Approximately 3/4" of the nail was left to secure the boards to the ground. Considering that the ground was merely compacted dirt that could shift because of the hole adjacent to it, or that a rainy day could cause the ground to be less secure than usual, it is found that the plywood cover of a hole that was big enough for a man to fall through was ineffective. It is noted that the picture of a plywood board (in exhibit A) does not have any holes at the corners where nails were once used to secure it.

Based upon the foregoing findings, it is found that the Employer violated O.A.C. 4123:3-04(D)(1).

It is therefore ordered that an additional award of compensation be granted to the Injured Worker in the amount of 25 percent of the maximum weekly rate under the rule of State ex rel. Engle v. Indus. Comm. (1944), 142 Ohio St. 425.

It is the order of the Industrial Commission that no order requiring a correction of the violation(s) found herein is appropriate for the reason that the violation no longer exists. The Employer provided evidence at hearing that the hole has been covered.

A Motion for Rehearing may be filed within thirty (30) days of the receipt of this order in accordance with the provisions of Ohio Adm.Code 4121-3-20 (C).

Typed By: kas
Date Typed: 07/17/2009

C. A. Sullivan
Staff Hearing Officer

Findings Mailed: 07/21/2009

Electronically signed by
C. A. Sullivan

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

07-858493
David D. Barno
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Gahanna OH 43230-2628

ID No: 217301-91
Heinzerling & Goodman, LLC.
5900 Roche Dr Ste 502
Columbus OH 43229-3282

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-858493

Risk No: 1492514-0
St Industrial Maintenance
4500 Wadsworth Rd
Dayton OH 45414-4779

ID No: 1740-80
Matrix Claims Management Comp
7162 Reading Rd Ste 250
Cincinnati OH 45237-1778

ID No: 21020-91
Wiles Boyle Burkholder & Bringardne
300 Spruce St Fl 1
Columbus OH 43215-1173

ID No: 21651-91
Freund, Freeze, & Arnold
1 S Main St Ste 1800
Dayton OH 45402-2017

ID No: 217858-91
Freund Freeze & Arnold
65 E State St Ste 800
Columbus OH 43215-4247

ID No: 360-03
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Columbus OH 43228-4107

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Dayton OH 45408-1445

BWC, LAW DIRECTOR

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4123:1-3-04 Floors, stairways, railing, overhead protection and guarding of open-sided floors, platforms and runways.

(A) Scope.

This rule shall apply to temporary conditions where there is danger of employees or material falling through floor, roof or wall openings or from stairways or runways.

(B) Definitions.

- (1) "Floor hole" means an opening measuring less than twelve inches but more than two inches in its least dimension in any walking or working surface six feet or more above the lower level.
- (2) "Floor opening" means an opening measuring twelve inches or more in its least dimension in any walking or working surface six feet or more above the lower level.
- (3) "Handrail" means a single bar or pipe supported on brackets from a wall or partition, as on a stairway or ramp.
- (4) "Nose (nosing)" means that portion of a tread projecting beyond the face of the riser immediately below.
- (5) "Platform" means a working space for employees elevated above the surrounding floor or ground.
- (6) "Rise (riser)" means the vertical distance from the top of a tread to the top of the next higher tread.
- (7) "Runway" means a passageway for employees, elevated above surrounding floor or ground level.
- (8) "Stair platform" means an extended step or landing breaking a continuous run of stairs.
- (9) "Stair railing" means a vertical barrier erected along exposed sides of a stairway.
- (10) "Stairs (stairway)" means a series of steps and landings having four or more risers leading from one level or floor to another, or leading to platforms.
- (11) "Standard guard railing" means a substantial barrier, constructed in accordance with paragraph (E) of this rule.

(a) "Intermediate rail" means the intermediate lateral member or members of a standard guard railing, installed at intervals of no more than twenty-one inches.

(b) "Top rail" means the top lateral member of a standard guard railing.

(12) "Toeboard" means a vertical barrier at floor level, erected along exposed edges of a floor opening, platform, runway, or ramp to prevent falls of material.

(13) "Tread width" means the horizontal distance from the front to back of tread, including nosing when used.

(14) "Wall opening" means an opening no less than thirty inches in its vertical dimension and no less than eighteen inches in its horizontal dimension in any wall.

(C) Temporary floors.

(1) Strength and construction.

(a) Strength.

Temporary floors shall be provided in all structures for employees working on various floor levels and shall be substantially constructed to support employees and equipment safely.

(b) Construction.

The planks shall be placed as close together as possible, and shall not extend more than one foot beyond supports unless securely fastened to prevent slipping or tipping.

(2) Guarding of partial area.

(a) When employees are not required to work over the entire area of a floor, only such partial area on which employees are required to work shall be provided with the temporary working floors as required in paragraph (C)(1) of this rule.

(b) Standard guard railing and toeboards shall be provided around the unused portion of exposed sides of all openings in floors, roofs, platforms or shafts.

(3) Joists.

(a) Joists shall be securely fastened to prevent tipping before placing temporary floors.

- (b) Over joists upon which concrete floors are to be placed, expanded metal lath or wire mesh (no greater than one-half inch mesh) may be used where the joist spacing does not exceed twenty-four inches, provided that all laps and joints are securely fastened and that plank runways are provided for safe passage or working thereon by employees.

(4) Temporary floors below finished floor.

In buildings or structures where the upper floors are constructed before the lower floors, temporary floors of the strength required in paragraph (C)(1) of this rule shall be maintained no more than two floors below the floor being constructed.

(5) In structural steel frame buildings.

- (a) Structural steel frame buildings shall have temporary floors as provided in paragraph (C)(1) of this rule placed within two typical floors of the erectors and the riveters. Such floors shall cover the entire floor area beneath riveters or erectors except that no floors are required over hoistway or stairway openings.

(b) Exception.

The provisions of paragraph (C)(5)(a) of this rule shall not apply to what is generally known as mill buildings where no floors are contemplated, and where the operation of overhead cranes, etc., will not permit compliance.

(6) In reinforced concrete frame constructed buildings.

Reinforced concrete frame constructed buildings shall have floor or concrete forms constructed before the forms of the story above are started.

(7) Sectionally constructed buildings.

In sectionally constructed buildings each section constitutes a separate building operation in the application of the temporary floor requirements of this rule.

(D) Openings.

(1) Floor openings.

Floor openings shall be guarded by a standard guard railing and toeboard or a cover with a safety factor of no less than two and so constructed that the cover cannot be accidentally displaced. A safety belt or harness with a lanyard may be provided in lieu of a standard guard railing and toeboard or cover.

(a) Ladderway floor openings or platforms.

Ladder floor opening or platforms shall be guarded by a standard guard railing and toeboard on all exposed sides except at the entrance to the opening, with the passage through the standard guard railing either provided with a swinging gate or so offset that an employee cannot walk directly into the opening.

(b) Floor holes.

Floor holes into which employees can accidentally walk, shall be provided with either a standard guard railing and toeboard on all exposed sides, or a floor hole cover which provides a factor of safety of no less than two and so constructed that the cover cannot be accidentally displaced. While the cover is not in place, the floor hole shall be guarded by a standard guard railing.

(c) Hatchways.

A removable standard guard railing and toeboard shall be provided on no more than two sides of the hatchway opening and fixed standard guard railing and toeboard shall be provided on all other exposed sides. The removable portion of the standard guard railings shall be kept in place when the opening is not in use and where practicable should be hinged or otherwise mounted so as to be conveniently replaceable.

(2) Wall openings.

(a) Guarding.

Where there is a danger of an employee falling six feet or more to a lower level through a wall opening, the opening shall be guarded by a standard guard railing and toeboard or a barricade. When the height and placement of the opening in relation to the working surface is such that either a standard guardrail or intermediate rail will effectively reduce the danger of falling, one or both shall be provided. One-fourth-inch wire rope, securely fastened in place, may be used in lieu of the top rail and intermediate rail. A safety belt or harness or a safety net system may be provided in lieu of the standard guard railing and toeboard or barricade.

(b) Spreaders.

If spreaders are used in window or door frames, such spreaders shall be substantially secured in place.

- (c) Where doors or gates open directly onto a stairway, a platform shall be provided and the swing of the door shall not reduce the effective width of the platform to less than twenty inches.

(3) Roof openings.

Wherever there is a danger of an employee falling six feet or more to a lower level through a roof opening, including skylights, a standard guard railing and toeboard shall be provided on all exposed sides, or a cover which provides a factor of safety of no less than two shall be provided. A safety belt or harness or a safety net system may be provided in lieu of the standard guard railing and toeboard or cover.

(E) Standard guard railing.

- (1) Standard guard railing shall be constructed as a substantial barrier, securely fastened in place and free from protruding objects such as nails, screws, and bolts, to protect openings or prevent accidental contact with some object. Which barrier shall consist of a top rail no less than thirty-nine inches or more than forty-five inches above the working level, and unless the space between the top rail and the working level is covered with substantial material, an intermediate rail. Minimum material requirements shall be:

(a) Metal

- (i) For pipe railings, the top rail, intermediate rail and uprights shall be no less than one and one half inches nominal diameter with uprights spaced no more than eight feet on centers.
- (ii) For structural steel railings, the top rail, intermediate rail and uprights shall be of two-inch by two-inch by three-eighths-inch angles or other metal shape of equivalent bending strength, with uprights spaced no more than eight feet on centers.
- (iii) For wire rope railings, the top and intermediate rail shall be at least one-quarter inch diameter of thickness.

(b) Wood.

For wood railings, the uprights shall be of no less than two-inch by four-inch (nominal) stock space not to exceed eight feet; the top rail shall be of no less than two-inch by four-inch (nominal) stock; the intermediate rail shall be of no less than one-inch by six-inch stock (nominal).

- (2) A standard toeboard shall be constructed of substantial material. It shall be three and one-half inches minimum in vertical height from its top edge to the level of

the floor, platform, runway or ramp. It shall be securely fastened in place, with a clearance of no more than one-fourth-inch above the floor, platform, runway or ramp.

(F) Stairways.

(1) Uniform dimensions.

- (a) The rise height and tread width shall be uniform throughout any flight of stairs, including any foundation structure used as one or more treads of the stairs.
- (b) Temporary stairs shall have a landing no less than thirty inches in the direction of travel at every twelve feet of vertical rise.
- (c) Temporary spiral (winding) stairways are prohibited.

(2) Angle of stairways.

- (a) Buildings or other structures in which permanent stairways are not installed for construction use, shall be provided with no less than one temporary stairway of substantial construction between floors, fitted with no less than two-inch by eight-inch treads, securely fastened in place. The flights of stairs shall be installed at angles to the horizontal of between thirty and fifty degrees to the floors or other horizontal parts to which they connect or land.
- (b) Where it is not possible to provide temporary stairways due to the absence of floors in the structure, a ladder shall be provided.

(3) Stairways with pan-type treads.

Permanent steel or other metal stairways with hollow pan-type treads that are to be filled with concrete or other materials, when used during construction, shall be filled to the level of the nosing with solid material. This requirement shall apply as each flight of stairs is completed.

(4) Treads, landings, gratings.

Stairways used for construction purposes shall be fitted with substantial treads, securely fastened and shall have tightly floored landings or gratings.

(5) Illumination.

Stairways, ramps, runways and platforms shall be lighted to no less than the minimum illumination intensity of five foot-candles.

(6) Stair railings and handrails.

- (a) Every flight of stairs having four or more risers or rising thirty inches, whichever is less, shall be equipped with stair railings or handrails as specified in paragraphs (F)(6)(a)(i) to (F)(6)(a)(i)(v) of this rule, the width of the stair to be measured clear of all obstructions except handrails:
- (i) On stairways less than forty-four inches wide having both sides enclosed, at least one handrail, preferably on the right side descending;
 - (ii) On stairways less than forty-four inches wide having one side open, at least one stair railing on the open side;
 - (iii) On stairways less than forty-four inches wide having both sides open, one stair railing on each side;
 - (iv) On stairways more than forty-four inches wide but less than eighty-eight inches wide, one handrail on each enclosed side and one stair railing on each open side;
 - (v) On stairways eighty-eight or more inches wide, one handrail on each enclosed side, one stair railing on each open side and one intermediate stair railing located approximately midway of the width;
 - (vi) On the open sides of stairways and stair landings, except where such stairways and landings are protected by studding and other permanent construction, a stair railing shall be provided.

(b) Construction.

(i) Stair railing.

A stair railing shall be of construction similar to a standard guard railing, except that the vertical height shall be no less than thirty-six inches from the upper surface of the top rail to the surface of the tread in line with the face of the riser at the forward edge of the tread.

(ii) Handrail.

(a) A handrail shall be of construction similar to a standard guard railing except that it is mounted to a wall or partition, and does not include an intermediate rail. It shall have a smooth surface along the top and both sides of the handrail. Ends of the handrail shall be constructed so as not to constitute a projection hazard.

- (b) The height of handrails shall be no more than thirty-seven inches and no less than thirty inches from the upper surface of the handrail to the surface of the tread, in line with the face of the riser or to the surface of the ramp.
- (c) Handrails and railings shall be provided with a clearance of approximately three inches between the handrail or railing and any other object.

(G) Overhead protection.

Overhead protection shall be provided where employees are working below other employees on floor levels with open floor above.

(H) Guarding of open-sided floors, platforms and runways.

(1) Open-sided floors or platforms.

- (a) Standard guard railing and toeboards shall be provided on every open-sided floor or platform six feet or more above adjacent floor or ground level, except where there is entrance to a ramp, stairway or fixed ladder.
- (b) One-quarter-inch wire rope and toeboard, substantially secured in place, may be used in lieu of standard guard railing.

(2) Runways.

- (a) Standard guard railings and toeboards shall be provided on all open sides of runways six feet or more above floor or ground level.
- (b) Runways used exclusively for special purposes may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway no less than eighteen inches wide.

(3) Working above dangerous equipment.

- (a) Each employee working less than six feet above dangerous equipment, such as machinery in operation, open vats, hoppers, or tanks, railroad tracks with moving equipment below the work, live electrical conductors unless deenergized and effectively grounded, or similar sources of danger, shall be protected from falling into or onto the dangerous equipment by a standard guard railing and toeboard, or the equipment shall be guarded.
- (b) Each employee working six feet or more above dangerous equipment, such as machinery in operation, open vats, hoppers, or tanks, railroad tracks with

moving equipment below the work, live electrical conductors unless deenergized and effectively grounded, or similar sources of danger, shall be protected from falling into or onto the dangerous equipment by a standard guard railing and toeboard, or safety belt or harness, or a safety net system.

(4) Bridge decks.

The height of the standard guard railing on bridge decks may be adjusted to provide clearance for the operation of paving machinery.

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