

ORIGINAL

IN THE SUPREME COURT OF OHIO

**STATE EX REL. RUSCILLI CONSTRUCTION :
CO., INC. :**

v. :

**INDUSTRIAL COMMISSION OF OHIO :
And DAVID D. BARNO :**

CASE NO. 2010-1614

BRIEF OF APPELLEE RUSCILLI CONSTRUCTION CO., INC.

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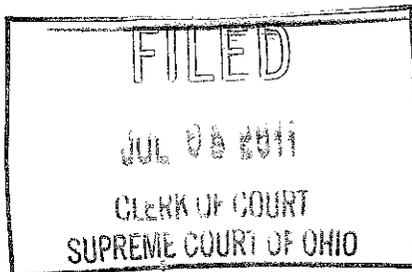


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STATEMENT OF THE CASE AND OF THE FACTS

Appellant David Barno seeks an additional award for an alleged violation of a specific safety requirement. On September 11, 2007 Mr. Barno removed plywood that had been nailed into a concrete floor to cover a floor opening. (Stip., p. 41). He then fell through the hole he had just created.

Mr. Barno admitted that he was the one that picked up the plywood that had been over the hole. (Stip., p. 41). Quoting his testimony:

Hearing Officer Sullivan: You picked up the plywood over the hole?

Mr. Barno: Yeah. I didn't know there was a hole there.

Hearing Officer Sullivan: You're picking it up?

Mr. Barno: I leaned forward with my left hand. And it would be like a doormat. When I went to pick it up, I went straight forward and then landed on my face and broke everything under my nose, and then my temporal bone, it went like that." (Stip., p. 41).

Mr. Barno was an employee of a sub-contractor of Appellee Ruscilli Construction. However, Ruscilli concedes that it is the proper employer for consideration of whether or not Mr. Barno is entitled to the additional award since it controlled the worksite.

Deborah Webb was Ruscilli's Corporate Safety Officer at the time of Mr. Barno's accident. (Stip., p. 62). She has been in the construction industry for 20 years. (Stip., p. 71). She is familiar both with Ohio Administrative Code safety requirements and is an OSHA Instructor. (Stip., p. 71). She was familiar with the Seneca Hotel job site. (Stip., p. 63). As part of her duties, she would make weekly visits to all Ruscilli job sites to make sure the safety codes were being complied with. All floor openings and holes were covered from the time the job started. (Stip., p. 63-64). On a weekly basis she would go out and kick the floor coverings

to see if they would move. (Stip., p. 64). In addition, she would make sure that all four nails were in and that the word "HOLE" was written on the covering. (Stip., p. 64).

In response to a question from the Hearing Officer regarding layers of plywood, Ms. Webb testified:

"We never use two layers on any of our plywood unless there would be a lift involved on the floors. It's standard just to use one plywood." (Stip., p. 64).

On the day of Mr. Barno's accident, Ms. Webb received a phone call from the job site and within a short period of time she was at the job site investigating the accident. (Stip., p. 66). Her investigation revealed that the cover on the hole on the first floor had been removed. She noticed that the word "HOLE" was written on the cover and there was one board at the hole. (Stip., p. 66). While in place, the board completely covered the hole. (Stip., p. 67).

Jerry Lee Crawford was Mr. Barno's foreman. He is the person that actually covered all of the holes at the Seneca Hotel job site with plywood. (Stip., p. 54). He testified that he placed covers over all the holes, secured them to the floor and painted the word "HOLE" on them. (Stip., p. 56). Just as Ms. Webb did, he would routinely kick the covers to make sure they do not slide over. (Stip., p. 56).

On the date of the accident, Mr. Crawford filled out an accident report and found the cover lying next to the hole that Mr. Barno fell in. He stated under oath:

"After the accident, I looked at the cover laying next to the hole. It was dirty, but I could still read the word "HOLE" painted on it in red. 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 it up." (Stip., p. 56).

In addition to the testimony at the Industrial Commission hearing, the record also contained the investigation report completed by Damon Viers of Skilled Trades. (Stip., p. 10).

Mr. Veers report stated:

"During cleanup operations, Dave removed plywood covering a hole in the floor. Subsequently, he fell through the hole." (Stip., p. 10).

Jack Clark of Ruscilli Construction also completed an accident report on the date of the accident. (Stip., p. 11). He wrote that Mr. Barno became injured when he pulled up the plywood cover and stepped into the hole that he had created. (Stip., p. 11).

The investigation report also contained photographs that were taken of the board and the hole on the date of the accident. (Stip., p. 29-32).

On May 12, 2008 Mr. Barno filed an application for an additional award for an alleged safety violation, specifically Administrative Code Section 4123:1-3-04(D) which states:

"Floor openings 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."

A hearing of the matter was held before Staff Hearing Officer Chris Sullivan who mailed a decision on July 21, 2009. In her decision, she explained that finding a violation was based on two pieces of plywood being nailed in with two-inch nails leaving approximately $\frac{3}{4}$ " of the nail to secure the cover. (Stip., p. 94). She came to this conclusion despite the testimony from Mr. Crawford and Ms. Webb that there was only one board (Stip., p. 61) and that the board was secured by a nail called a "Hilti pin" shot down two to two and one half inches. In addition, the Staff Hearing Officer decision reveals that she was mistakenly of the belief that the covers were not secured. Quoting her decision:

"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.” (Stip., p. 94).

Hearing Officer Sullivan came to these conclusions despite the fact that all of the witnesses described the floor opening as being in a concrete floor inside the building. Mr. Barno testified regarding the floor being concrete. (Stip., p. 42, 50). Mr. Crawford testified that the covers were secured by nails into the concrete floor. (Stip., p. 56). Deborah Webb testified that the floor holes were covered with plywood nailed into the concrete. (Stip., p. 63).

Ruscilli requested a rehearing of the matter on August 21, 2008. (Stip., p. 91). However, the Industrial Commission denied the request for rehearing. (Stip., p. 99). Ruscilli filed a Complaint in Mandamus alleging that the decision of the Industrial Commission constituted an abuse of the Industrial Commission’s discretion. On April 21, 2010 the Magistrate, Stephanie Bisca Brooks, issued her decision finding that the Industrial Commission did not abuse its discretion. Appellant Ruscilli objected to her decision and on September 2, 2010, the 10th Appellate District issued its decision granting a limited writ of mandamus and ordering the Industrial Commission to vacate its July 2009 order.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1

THE COURT OF APPEALS WAS CORRECT IN GRANTING THE LIMITED WRIT OF MANDAMUS SINCE THE HEARING OFFICER DECISION WAS BASED ON AN INCORRECT RECALL OF THE FACTS BEFORE HER.

At page four of its decision, the Franklin County Court of Appeals pointed out that the decision of the Industrial Commission Staff Hearing Officer and the Court's own Magistrate relies upon inaccurate recall of the testimony before the Hearing Officer. The Court found that the Hearing Officer based her decision on her mistaken belief that there were two layers of plywood covering the hole and that the plywood was nailed into compacted dirt instead of being secured to a concrete floor.

There was no evidence in the record before the Industrial Commission of Ohio that would suggest that the plywood cover in question was nailed into compacted dirt as opposed to the concrete floor. Mr. Barno testified that the floor in question was made of concrete. (Stip., p. 50-51). Mr. Crawford, the foreman on the scene on the date of the accident, testified that after the accident he looked at the cover lying next to the hole. He testified:

"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).

Debbie Webb, the Company's Safety Director, indicated that the plywood board was affixed to the concrete floor with Hilti nails. (Stip., p. 73). When the Hearing Officer asked her about the Hilti nails, she testified:

"It's a power activated tool. And you load it, and then you actually shoot into the wood. That would actually shoot into the concrete. You use them for like if you're putting up a metal stud." (Stip., p. 76).

In addition, the Court of Appeals pointed out that the Industrial Commission Staff Hearing Officer was inaccurate in her recalling the employer testimony that there were two pieces of plywood nailed in place. Ms. Webb made it very clear that they never used two layers of plywood unless there would be a lift involved on the floor. (Stip., p. 64). Mr. Crawford was asked:

“Q: Were these boards ever doubled up to cover these holes?”

A: Typically, no.

Q: As best you recall, was this particular board where Mr. Barno fell, after removing the board, was that doubled up with two layers of board?

A: I don't believe so. I mean, normally, I would only double it if I was worried about someone driving equipment across it. Everyone knew the area was -- there was a big void under that floor, so nobody was allowed to drive equipment in there.” (Stip., p. 61).

In order for a Court to issue a writ of mandamus as a remedy from a determination of the Industrial Commission, Relator must show a clear legal right to the relief sought and that the Industrial Commission has a clear legal duty to provide such relief. State ex rel. Pressley v. Industrial Commission (1967), 11 Ohio St.2d 141. A clear right to a writ is shown where the Relator shows that the Industrial Commission abused its discretion by entering an order that is not supported by any evidence in the record. State ex rel. Elliott v. Industrial Commission (1986), 26 Ohio St.3d 76. There is no evidence in the record that supports the Hearing Officer's factual determination that the cover in question consisted of two pieces of plywood or that the cover was secured in compacted dirt as opposed to concrete.

Questions of credibility and weight to be given the evidence are clearly within the discretion of the Industrial Commission as fact finder. State ex rel. Teece v. Industrial

Commission (1981), 68 Ohio St.2d 165. However, here, there was no evidence to support the Staff Hearing Officer's conclusions.

The Court of Appeals conclusion that a writ should be granted was based on the Hearing Officer obviously misrecalling the testimony before her. There was only one layer of plywood, not the two stated by the Hearing Officer. The plywood was placed over the floor opening and secured by nailing it into concrete, not compacted mud as stated by the Hearing Officer.

PROPOSITION OF LAW NO. 2

APPELLANT'S UNILATERAL NEGLIGENCE BARS RECOVERY OF A VSSR AWARD.

Specific safety requirements are intended to protect employees from their own negligence as well as provide a safe place to work. State ex rel. Cotterman v. St. Mary's Foundry (1989), 46 Ohio St.3d 42. However, this Court has held that if the employee's unilateral negligence takes the employer out of compliance with the specific safety requirement, he is not entitled to a VSSR award. State ex rel. Frank Brown & Sons, Inc. v. Industrial Commission (1988), 37 Ohio St.2d 162. A claimant's alleged negligence is a defense where an employer has first complied with relevant safety requirements and compliance ends as a result of the employee's conduct. This Court refined its definition of unilateral negligence in State ex rel. Quality Tower Service, Inc. v. Industrial Commission (2000), 88 Ohio St.3d 190. This Court noted that (1) employers can be subject to VSSR penalties for only those acts within the employer's control and (2) a specific safety requirement does not impose a duty of constant surveillance to insure that employees do not take the employer out of compliance with the Code.

The applicable Code in this case is Ohio Administrative Code Section 4123:1-3-04(D). Copy appended. That Section states in pertinent part:

1. Floor Openings.

Floor openings 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.

Mr. Barno's foreman, Jeremy Crawford, specifically recalled placing a cover over the hole that Mr. Barno fell in. He had on several occasions kicked the cover to make sure it was secure. (Stip., p. 56). After the accident, he discovered the plywood cover lying next to the hole that

Mr. Barno had fallen into. (Stip., p. 56). He turned the cover over and saw the nails sticking out of the bottom of the plywood that had previously secured the cover to the concrete floor. (Stip., p. 56). Debbie Webb, Ruscilli Construction Company's Corporate Safety Officer had been on this job site on multiple occasions. (Stip., p. 63). She did weekly safety audits of all of the company's job sites. (Stip., p. 63). She testified that the floor opening on the first level of the hotel was covered from day one. (Stip., p. 63). During her safety audits Ms. Webb would kick the covers to make sure that all four nails are in. (Stip., p. 64).

Mr. Barno admitted that he was the one that picked up the plywood cover over the hole. (Stip., p. 41). Quoting his testimony:

"Hearing Officer Sullivan: You picked up the plywood over the hole?

Mr. Barno: Yeah. I didn't know there was a hole there.

Hearing Officer Sullivan: You're picking it up?

Mr. Barno: I leaned forward with my left hand. And it would be like a doormat. When I went to pick it up, I went straight forward and then landed on my face and broke everything under my nose, and then my temporal bone, it went like that." (Stip., p. 41).

Administrative Code Section 4123:1-3-04(D)(1) states that "floor openings 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." The decision of the Court of Appeals found at paragraph 8 of its decision that the Industrial Commission's Hearing Officer incorrectly recalled the facts regarding the plywood cover and its being secured to the concrete floor. In turn, the Court found that its own Magistrate relied upon much of the same inaccurate testimony. Furthermore, at page 9 of its decision, the Court was critical of its Magistrate for applying its own standard for guarding the hole finding that the cover could not be easily displaced rather than accidentally displaced.

Since a VSSR is a penalty against an employer it must be strictly construed and all reasonable doubts concerning the interpretation of this safety standard are to be construed against its applicability to the employer. State ex rel. Burton v. Industrial Commission (1989), 46 Ohio St.3d 170. Here, the Industrial Commission's Hearing Officer and the 10th Appellate District's Magistrate did the opposite in that they construed the language of the Code such that it required a cover not to be accidentally removed and inserted its own requirement that it not be **easily** albeit intentionally removed.

In this case, clearly Ruscilli was in compliance with the Code Section and Mr. Barno's unilateral negligence took the company out of compliance by removing the cover. Not only did that violate this Court's ruling in State ex rel. Quality Tower Service, Inc. v. Industrial Commission, supra, but it violated the 10th Appellate District's own ruling in State ex rel. Sheely v. Industrial Commission (10th App. Dist., 2008, unreported case, copy appended) where the facts were virtually identical to the facts in this case. Quoting the Sheely decision at paragraph 4:

"Relator and the co-worker lifted a plywood cover in order to move it, relator became distracted by something behind him and stopped momentarily, the co-worker continued to move, relator was pulled off balance, and relator fell into the hole they had just uncovered."

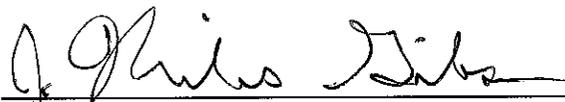
That is exactly what happened here. Mr. Barno removed a plywood cover and fell into the hole he had just created. The Court in Sheely, supra, strictly construed Administrative Code Section 4123:1-3-04(D)(1) and analogized the factual scenario where an employer would have a machine with properly guarded saw blades. In order to complete the next project a new blade needs to be installed. The employee removes the guard so that the new blade can be installed. So if, during this process, an employee somehow is injured by cutting his hand on the blade, it would not be a VSSR.

CONCLUSION

The decision of the Industrial Commission Staff Hearing contained both clear mistakes of fact and clear mistakes of law. The Hearing Officer's recalling the plywood cover being two layers and secured into compacted dirt is inconsistent with the facts that there was one layer of plywood and it was secured into a concrete floor. The decision was contrary to law in that clearly Mr. Barno's conduct of removing the plywood cover was conduct that created the hazard that he fell in and hence, is not a VSSR.

Respectfully submitted,

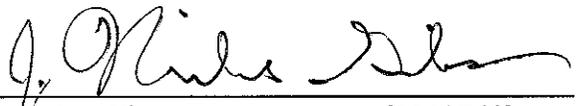
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served by regular U. S. Mail, postage prepaid, upon Kevin J. Reis, Assistant Attorney General, Attorney for Industrial Commission of Ohio, at the OFFICE OF THE ATTORNEY GENERAL, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215 and upon Mark Heinzerling, Attorney for Appellant Barno, at HEINZERLING LAW OFFICE, 5900 Roche Drive, Suite 502, Columbus, Ohio 43229 on this 5th day of July, 2011.



J. Miles Gibson (0019760)
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458373v1

APPENDIX



2 of 4 DOCUMENTS

State of Ohio ex rel. Kevin R. Sheely, Relator, v. Industrial Commission of Ohio and Crew Soccer Stadium LLC, Respondents.

No. 07AP-1011

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT,
FRANKLIN COUNTY**

2008 Ohio 4547; 2008 Ohio App. LEXIS 3822

September 9, 2008, Rendered

DISPOSITION: [1]**

COUNSEL: Heinzerling, Goodman & Reinhard, LLC, and Jonathan H. Goodman, for relator.

Nancy H. Rogers, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

Bricker & Maxfield, LLC, and Michael L. Maxfield, for respondent Crew Soccer Stadium LLC.

JUDGES: FRENCH, J. BRYANT and GREY, JJ., concur. GREY, retired of the Fourth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: FRENCH

OPINION

(REGULAR CALENDAR)

DECISION

IN MANDAMUS

ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

[*P1] Relator, Kevin R. Sheely, filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order, which denied relator an additional award for the violation of a specific safety requirement ("VSSR") by respondent Crew Soccer Stadium LLC, and ordering the commission to find that relator is entitled to an additional award for the VSSR.

[*P2] This 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 [**2] fact and conclusions of law, recommending that this court deny the requested writ. (Attached as Appendix A.) Relator filed two objections to the magistrate's decision.

[*P3] First, relator argues that the magistrate erred by finding that relator and a co-worker were removing a plywood cover from the floor opening so that roof supports could be put into place. Relator asserts that the roof supports were not being placed at the time of the injury, but were to be placed at some later time.

[*P4] Relator was part of a work crew constructing a concert stage at Crew Stadium. During construction of the stage, workers placed pieces of plywood over holes in the stage floor where roof

supports would eventually go. To cover openings on stage right, where work was taking place, relator and a co-worker were directed to remove plywood from stage left and carry it to stage right. Relator and the co-worker lifted a plywood cover in order to move it, relator became distracted by something behind him and stopped momentarily, the co-worker continued to move, relator was pulled off balance, and relator fell into the hole they had just uncovered.

[*P5] Through his objection, relator seeks to clarify that movement of the [**3] plywood was not necessary for the immediate construction of a roof support in the hole where he fell. While we do not accept relator's criticism that the magistrate was acting as a "super-commission," we acknowledge the need for clarity. We will change the first sentence of Finding of Fact 2 to the following: "At the time relator was injured, he and a co-worker were removing a plywood cover and moving it from one area of the stage to another." Nevertheless, we conclude that this change has no substantive impact on the outcome of this matter.

[*P6] In his second objection, relator argues that the magistrate erred by upholding the commission's decision. We conclude, however, that the magistrate analyzed and resolved this argument appropriately. We adopt the magistrate's reasoning as our own and overrule the objection.

[*P7] Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it, except as we indicated above. In accordance with the magistrate's decision, the requested writ is denied.

Objections overruled, writ of mandamus denied.

BRYANT and GREY, JJ., [**4] concur.

GREY, retired of the Fourth Appellate District, assigned to active duty under authority of *Section 6(C), Article IV, Ohio Constitution*.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Kevin R. Sheely, Relator,
v. Industrial Commission of Ohio and Crew Soccer
Stadium LLC, Respondents.

No. 07AP-1011

(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered on June 19, 2008

*Heinzerling, Goodman & Reinhard,
LLC, and Jonathan H. Goodman, for
relator.*

*Nancy H. Rogers, Attorney Gen-
eral, and Sandra E. Pinkerton, for re-
spondent Industrial Commission of
Ohio.*

*Bricker & Maxfield, LLC, and
Michael L. Maxfield, for respondent
Crew Soccer Stadium LLC.*

IN MANDAMUS

[*P8] Relator, Kevin R. Sheely, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator an additional award for the violation of a specific safety requirement ("VSSR") by respondent Crew Soccer Stadium LLC ("employer"), and ordering the commission to find that relator is entitled to an additional award for the VSSR.

Findings of Fact:

[*P9] 1. On May 24, 2006, relator sustained an industrial [**5] injury while setting up a concert stage at Crew Soccer Stadium. The stage floor was built leaving several temporary openings to accommodate the upright supports for the roof structure. The floor openings were covered with pieces of plywood. When it was time to set the roof supports in place, the plywood was removed from the openings.

[*P10] 2. At the time relator was injured, he and a co-worker were removing a plywood cover [and moving it from one area of the stage to an-

other]. Relator was distracted by a noise and, as the co-worker moved, relator lost his balance, stepped forward into the opening, and fell to the ground below.

[*P11] 3. Relator sustained significant injuries and his claim has been allowed for the following conditions:

* * * Strain of right knee and leg; fracture of the left calcaneus; fracture of the right femoral condyle; fracture of the right upper tibia; right medial collateral ligament tear; strain of the right popliteus muscle; strains of the right soleus muscle, posterior tibialis muscle and lateral head of the gastrocnemius muscle; right anterior cruciate ligament tear; right posterior capsule tear; right medial meniscus tear; fracture of the left sustentaculum tali and posterior [**6] process of the talus; right iliotibial strain; left closed calcaneus fracture ICD code 825.0.

[*P12] 4. On September 19, 2006, relator filed an application seeking an additional award for a VSSR alleging violations of the following Ohio Administrative Code sections: "4123:1-3-04(D)(1)," "4123:1-5-02(C)(1) and (2)," and "4123:1-5-02(D)(1) -- (4)." Those sections relate to guarding floor openings.

[*P13] 5. Relator's application was heard before a staff hearing officer ("SHO") on May 17, 2007, and resulted in an order denying relator's request. First, the SHO determined that *Ohio Adm.Code 4123:1-5-02(C)(1) through (2) and (D)(1) through (4)* did not apply because those sections apply only to workshops and factories. At the time of his injury, relator was setting up an outdoor concert stage and was not working in a workshop or factory.

[*P14] 6. Thereafter, the SHO determined that relator had failed to establish a violation of *Ohio Adm.Code 4123:1-3-04(D)(1)* which provides:

(D) Openings.

(1) Floor openings.

Floor openings 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. A safety belt [**7] or harness may be provided in lieu of a standard guard railing and toeboard or cover.

[*P15] 7. The SHO denied relator's application as follows:

The claimant testified at hearing that he was moving plywood from a floor opening of the stage floor to the other side of the stage in order to cover an opening on the other side of the stage when he inadvertently stepped into the opening. The claimant indicates that the opening was approximately three feet by twenty feet in size (transcript pg. 8) and the plywood was four feet by eight feet in size. The floor opening was constructed for the purpose of installing roof supports (transcript pgs. 9 and 11, and per 10/16/2006 memo from Ryan Smith). The claimant had just lifted a piece of plywood covering the floor opening with another co-worker when he heard something turned his head and stepped forward stepping into the floor opening. The floor opening had been covered but was uncovered by the claimant and another co-worker at the time of the industrial injury. The Staff Hearing Officer does not find a violation of this section for various reasons.

First, the safety requirement of having a cover guarding the floor opening had been met. The claimant testified [**8] that pieces of plywood were laid over the floor opening. The accident occurred after the claimant removed the floor covering/plywood.

Second, the employer could not have guarded the floor opening as the claimant had removed the cover of the floor opening which had provided a guard of this opening.

The Staff Hearing Officer relies on the claimant's testimony at hearing; the IC-8 application; the FROI-1 application; the 10/16/2006 memo from Mr. Smith of the Columbus Crew Stadium; and the claimant's 11/07/2006 affidavit (SVIU Exhibit # 1 and Exhibit # 3).

[*P16] 8. Relator's request for rehearing was denied by order of the commission mailed October 17, 2007.

[*P17] 9. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

[*P18] 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, 228 N.E.2d 631*. 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 [**9] by any evidence in the record. *State ex rel. Elliott v. Indus. Comm. (1986), 26 Ohio St.3d 76, 26 Ohio B. 66, 497 N.E.2d 70*. 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, 29 Ohio B. 438, 505 N.E.2d 962*. 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, 429 N.E.2d 433*.

[*P19] 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, 291 N.E.2d 748*.

[*P20] 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, 4 Ohio B. 513, 448 N.E.2d 134*. Because a VSSR is a penalty, however, it must be strictly construed, and all reasonable doubts concerning the interpretation of the safety [**10] standard are to be construed against its applicability to the employer. *State ex rel. Burton v. Indus. Comm. (1989), 46 Ohio St. 3d 170, 545 N.E.2d 1216*. 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, 26 Ohio B. 117, 497 N.E.2d 90; State ex rel. Ish v. Indus. Comm. (1985), 19 Ohio St. 3d 28, 19 Ohio B. 24, 482 N.E.2d 941*.

[*P21] In this mandamus action, relator argues that the commission abused its discretion and denied his request for a VSSR award due to his unilateral negligence. Relator argues that the defense of unilateral negligence only applies where a claimant not only acted alone, but also acted contrary to the employer's work order. Relator contends that he was following his employer's orders when he removed the plywood cover and sustained his injuries.

[*P22] For the following reasons, the magistrate rejects relator's arguments.

[*P23] In its order, the commission first found that the safety requirement of having a cover guarding the floor opening had been met by the employer. Second, the commission determined that the removal of the [**11] covering was necessary in order to proceed to the next phase of construction. The cover was removed so that the roof supports could be installed in those openings. 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 the roof supports were put in place.

[*P24] Contrary to relator's argument, nothing in the commission's order held relator responsible for the accident due to his own negligence. Unfortunately, circumstances conspired against relator when this accident occurred.

[*P25] First, the employer had the holes guarded with the plywood covers and was in compliance with the code section. Second, the plywood covers had to be removed in order for the project to advance to the next step. Third, as relator and a co-worker were in the process of removing the plywood covering, relator accidentally fell into the opening and was injured. The process here is no different than the following scenario: An employer has a machine with a properly guarded saw blade. In order to complete the next project, a new blade needs to be installed. The employee removes the guard so that the new blade can be installed. If somehow this [**12] employee sustained an injury at this time by cutting his hand on the blade, it likewise would not be a VSSR. This employee is not being asked to use the machine without proper guarding. In the case before us, relator was not being asked to walk around the stage in the vicinity of the floor opening. He fell into the opening as he was removing the plywood covering. A VSSR is a penalty imposed on an employer that fails to comply with specific safety requirements intended to protect workers. Here, the opening was properly guarded. The cover had to be removed. As he re-

moved the cover, relator fell into the opening. The fact that he sustained injuries is extremely unfortunate, but it was an accident: neither the employer's nor relator's fault.

[*P26] Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion by denying his application for an additional award for the employer's VSSR and this court should deny his request for a writ of mandamus.

/s/ Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS

MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption [**13] of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Civ.R. 53(D)(3)(a)(ii)*, unless the party timely and specifically objects to that factual finding or legal conclusion as required by *Civ.R. 53(D)(3)(b)*.



1 of 1 DOCUMENT

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4123:1 Division of Safety and Hygiene
Chapter 4123:1-3 Construction

OAC Ann. 4123:1-3-04 (2009)

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 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. Three-eighths-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.

(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, fixed ladders shall be provided with rest platforms every twenty feet.

(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 requirements 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 protective covering of two-inch plank, three-fourths-inch plywood or other solid material of equivalent strength 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) Three-eighths-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 four 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, a 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.

History: Eff 11-1-79; 4-1-68; 4-1-99.

Rule promulgated under: RC Chapter 119.

Rule authorized by: RC 4121.12, 4121.121, 4121.13.

Rule amplifies: RC 4121.47 119.032 review date: 3/1/03; 3/1/98.

Case Notes And OAG

(1994) Violations of the guardrail and scaffolding requirements of OAC 4121:1-3-04 and 4121:1-3-10 could not be found without evidence of prior malfunction and employer awareness thereof: *State ex rel. Taylor v. Indus. Comm.*, 70 OS3d 445, 1994 Ohio 445, 639 NE2d 101, 1994 Ohio LEXIS 2069.