

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 :
 :
 :

REPLY BRIEF OF APPELLANT, DAVID D. BARNO

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STATEMENT OF THE CASE

In this workers' compensation case, Appellant David Barno alleges the original order from the Industrial Commission of Ohio was supported by "some evidence" and the decision of the 10th District Court of Appeals which issued a limited writ should be reversed. That was the sole Proposition of Law brought before this court by Appellant David Barno, who was the only party to the underlying action to file an appeal. Suddenly in the response brief Appellee Ruscilli has raised a new proposition of law claiming that Appellant's unilateral negligence bars recovery of a VSSR award. The raising of this issue in this format is improper as not only did they accept the writ as issued by the court of appeal (which was not based on unilateral negligence) but Appellee is barred from raising it at this level as it was not raised at hearing before the Industrial Commission.

In fact, 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. While Ruscilli clearly dislikes the outcome and spends considerable time attempting to re-argue the facts, it is clear from the record that they failed to argue unilateral negligence at the VSSR hearing and that based on the facts as presented Ruscilli failed to provide a secure cover over a hole as required.

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.

ARGUMENT

Proposition of Law 1:

THE COURT OF APPEALS ERRED IN GRANTING A LIMITED WRIT RETURNING THE VSSR APPLICATION TO THE INDUSTRIAL COMMISSION

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 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)." (Appendix p. 2). 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

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 in the order, and the employer’s impermissible request to reweigh the evidence, 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 requirements of the commission, it’s clearly supported by at least “some evidence” as necessary to withstand scrutiny on mandamus.

Proposition of Law 2:

APPELLEE IS PRECLUDED FROM ARGUING THE LEGAL THEORY OF UNILATERAL NEGLIGENCE AS THEY DID NOT RAISE IT BEFORE THE INDUSTRIAL COMMISSION OF OHIO

The transcript from the VSSR hearing held June 18, 2009 has been made 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).

The Supreme Court of Ohio has addressed the issue of whether or not an employer waives an issue on mandamus by failing to argue it administratively in *State ex rel. Quarto Mining v. Foreman* (1997), 79 Ohio St.3d 78. The employer, Quarto Mining, alleged that the issue of claimant's retirement was relevant to the determination as to whether or not he was permanently and totally disabled. Their difficulty was that they waited until the appellate level to raise the issue, formally or informally, and argued that it "...raises itself by virtue of being manifest in the record." *Id.*, at 81. The court noted longstanding precedent which held that "Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed" and that issues not previously raised are waived, nor does the court have to "...consider an error which the complaining party could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial

court.” *Id.*, (string cites omitted). The court went on to note how deeply rooted in our jurisprudence these principles are, stating:

These rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition they protect the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error.

The employer, however, essentially seeks a dispensation or relaxation of these rules in proceedings before the commission. However, there is nothing about the purpose of worker’s compensation legislation or the character of the proceedings before the commission that would justify such action. *Id.*

The court was not willing to deny the claimant a meaningful opportunity to respond by agreeing to such relaxation of the rules which would create a de novo appeal on the issue. It may be that Relator will argue that the issue was raised by those two sentences at the end of a long and contentious hearing, or that the misleading statement in the request for rehearing was enough to raise the issue of unilateral negligence.¹ It was not, certainly not in any meaningful way. The term “unilateral negligence” was never discussed, no case law was introduced and the issue was only discussed after the employer’s defenses were raised and argued.

Recently the court revisited this very issue in the context of a VSSR proceeding in *State ex rel. Shelly Co. v. Indus. Comm.* (2009), 121 Ohio St.3d 158. There the employer argued that the commission had abused its discretion by failing to accept the motion for rehearing where the employer raised a new defense not made at the actual hearing. Applying the holding from *State ex rel. Schlegel v. Stykemain Pontiac Buick GMC, Ltd.*

¹ That the intentional act was the sole and proximate “result” of his injury.

(2008), 120 Ohio St.3d 43, in which a claimant had attempted to raise a new argument at rehearing, the court accepted the magistrate's holding that the commission did not have to review belatedly submitted evidence and "(t)he resultant absence of this evidence from the administrative record bars its consideration here." *Shelly*, at 161.

Relator in the present case is trying to raise this issue now, when it is simply too late to do so. Had the issue been presented at the hearing all sides would have had the opportunity to discuss the issue, and the hearing officer would have been able to factor it in to her decision if she felt it was relevant. Because it was not discussed, which is clear from the plain reading of the transcript, it simply cannot be raised by Relator before this court.

The same argument and analysis applies to Relator's third issue in their brief, that the commission's decision violates the holding of this court in *Sheely v. Indus. Comm.* 2008 Ohio App. LEXIS 3822. Again Relator failed to raise this defense at hearing, when all parties were present and available and the argument may have been relevant to the hearing officer. Had it been raised perhaps a lively and informative discussion would have ensued regarding whether or not *Sheely* was applicable to Mr. Barno's situation and his VSSR, given that the facts are quite disparate in the cases beyond their surface similarity. Certainly the parties would have been able to argue over whether or not the fastening down of the board met the statutory requirement of OAC 4123-1-3-04(D)(1).

If the cover did not meet that requirement, as the commission held, then certainly the discussion would have shifted to the holding of *State ex rel. Danstar Builders v. Indus. Comm.* (2006), 108 Ohio St.3d 315, in which the supreme court of Ohio held that where an employer fails to comply with the statutory requirements they cannot avail

themselves of the defense of unilateral negligence. Since the defense was never raised, there was absolutely no discussion about whether or not this holding would come in to play.

As it was, the employer remained silent on these issues and failed to raise any argument regarding these defenses when they were appropriate. The cases could not be any more clear on this issue, failure to raise issues administratively means they cannot be raised on appeal. It simply is not the time nor is it the forum to be discussing whether or not such issues as these apply, to do so allows the employer a de novo proceeding, which is outside of the purview of this court. As a result Appellee's proposed Proposition of Law No. 2 should be stricken from this action.

CONCLUSION

The commission did not abuse its discretion in awarding the VSSR to claimant David Barno as its decision was supported by "some evidence" in finding the award. The Industrial Commission did exactly what it is mandated to do which is to hear the evidence and be the arbiter of the dispute. There is no abuse of discretion here and the court simply cannot step in, as it did, and overturn a valid order from the Industrial Commission. For these reasons, the limited writ granted by the court of appeals should be reversed.

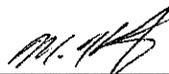
Respectfully submitted,



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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 21st day of July, 2011.



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APPENDIX

Order of the Industrial Commission granting VSSR application.....1-3
Ohio Administrative Code Section 4123:1-3-04.....4-12

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 MUCCOID 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
Findings Mailed: 07/21/2009

C. A. Sullivan
Staff Hearing Officer

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
299 Cadbury Dr
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

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ID No: 217858-91
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Ruscilli Construction
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Columbus OH 43228-4107

ID No: 361-03
The Skilled Trades Co
1 Elizabeth Pl Ste 700
Dayton OH 45408-1445

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).

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-eights-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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