ORIGINAL

IN THE SUPREME COURT OF OHIO

11-1922

STATE OF OHIO, ex rel., TROY A. SCOTT APPELLANT, vs. INDUSTRIAL COMMISSION OF OHIO, and COUNTRY SAW & KNIFE, INC. APPELLEES	)	APPEAL FROM THE FRANKLIN COUNTY COURT OF APPEALS 10TH APPELLATE DISTRICT COURT OF APPEALS CASE NO.: 10 AP 713

NOTICE OF APPEAL OF APPELLANT, TROY A. SCOTT

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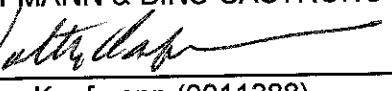
Appellant, Troy A. Scott, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellant District, entered in the Court of Appeals case number 10 AP 713 on October 25, 2011. This mandamus proceeding originated in the Franklin County Court of Appeals and is therefore an appeal of right in this Court.

Respectfully submitted,

BOYD, RUMMELL, CARACH, CURRY,
KAUFMANN & BINS-CASTRONOVO CO, LPA



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 10th day of November 2011, by U.S. Postal Service to:

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29800

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2011 OCT 25 PM 1:13
CLERK OF COURTS

State ex rel. Troy A. Scott,	:	
Relator,	:	
v.	:	No. 10AP-713
Industrial Commission of Ohio and Country Saw & Knife, Inc.,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on October 25, 2011, the objections to the decision of the magistrate are overruled, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs assessed to relator.

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

Judge Peggy Bryant

Judge William A. Klatt

OCT 28 2011

Judge G. Gary Tyack

Counsel

29800

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2011 OCT 25 PM 1:06
CLERK OF COURTS

State ex rel. Troy A. Scott,	:	
Relator,	:	
v.	:	No. 10AP-713
Industrial Commission of Ohio and Country Saw & Knife, Inc.,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on October 25, 2011

Boyd, Rummell, Carach & Curry Co., LPA, and *Walter Kaufmann,* for relator.

Michael DeWine, Attorney General, and *Derrick L. Knapp,* for respondent Industrial Commission of Ohio.

Fitch, Kendall, Cecil, Robinson & Barry Co., L.P.A., and *Timothy A. Barry,* for respondent Country Saw & Knife, Inc.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, Troy A. Scott, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order

OCT 27 2011

denying his request for an additional award for the alleged violation of a specific safety requirement at his workplace and to find he is entitled to such an award.

I. Facts and Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. In her decision, the magistrate determined the commission did not abuse its discretion in denying relator's request for an additional award because (1) relator did not meet his burden of proving that hazardous concentrations of either cobalt or tungsten were present in the air at the plant of his employer, respondent Country Saw & Knife, Inc.; (2) questions of credibility and weight the commission gave to the OSHA report of OSHA's test of the workplace were within the discretion of the commission as fact finder; and (3) the commission did not misapply the Ohio Supreme Court's decision in *State ex rel Gilbert,* 116 Ohio St.3d 243, 2007-Ohio-6096, and the court's decision in *State ex rel. Shelly Co. v. Steigerwald,* 121 Ohio St.3d 158, 2009-Ohio-585, would not have supported a different result. Accordingly, the magistrate determined the requested writ should be denied.

II. Objections

{¶3} Relator filed two objections to the magistrate's conclusions of law:

> 1. The Magistrate's decision as to the conclusiveness of the OSHA report is an abuse of discretion and;
>
> 2. The Magistrate's decision as to the interpretation of OAC 4123:1-5-01(B)(4) air contaminants and (B) (74) hazardous concentrations is an abuse of discretion, in that it nullifies the application of O.A.C. 4123:1-5-17 (F), and O.A.C. 4123:1-5-18 (C), (D), (E).

A. First Objection - *OSHA Report*

{¶4} Relator's first objection is directed to the commission's reliance on the OSHA report in determining whether Country Saw violated the specific safety requirements at issue. Relator initially suggests the chart under finding of fact No. 6 of the magistrate's decision reflects the magistrate's mindset in dealing with the OSHA report. Noting the chart contains an actual exposure level for tungsten, he further points out that the box containing the permitted exposure level indicates none applies. To the contrary, relator asserts, the record reflects a permissible exposure level for tungsten. Relator, however, does not suggest the actual exposure level exceeds the permissible exposure level; rather, he suggests the magistrate's chart reflects "her zeal to support the [staff hearing officer's] decision." (Objections, 2.)

{¶5} Relator's argument is unpersuasive for two reasons. Initially, the magistrate's decision purports to report, and in fact reports, the results of the OSHA report precisely as they are set out in the OSHA report, including the "N/A" contained in the box designated for permissible emission levels of tungsten. Secondly, although, as relator contends, the record elsewhere contains evidence about permissible levels of tungsten, the level is 5mg. per cubic meter of air, while the OSHA report reflected 0.33mg. of tungsten per cubic meter of air.

{¶6} Moreover, the remainder of the magistrate's decision concerning the OSHA report reflects that the magistrate adequately addressed the OSHA report. The magistrate noted the OSHA testing demonstrated the amount of cobalt in the air was below the permissible emission limits. As to the tungsten levels, the report indicates a level below the permissible emission level relator notes in his first objection. In the face of such

evidence, relator failed to submit evidence that the workplace had hazardous concentrations of cobalt or tungsten. Although relator presented the testimony of forensic engineer Steven J. Stock in an effort to demonstrate OSHA's testing methods were below standards, relator did not test the air himself, presented no evidence contrary to the OSHA report, and thus left the commission to evaluate the credibility and weight it would give to the OSHA report. In the absence of other evidence to the contrary, the commission did not abuse its discretion in relying on the OSHA results and concluding relator failed to demonstrate concentrations of either cobalt or tungsten at Country Saw's facility reached the level of "air contaminants" and triggered Country Saw's requirements under the administrative code provisions at issue.

{¶7} Relator's first objection is overruled.

B. Second Objection - *Interpretation of Administrative Code Provisions*

{¶8} Relator's second objection asserts the interpretation the commission ascribed to the various administrative code provisions gives an employer "a free pass" from complying with them. Contrary to relator's contentions, the commission's decision not to grant relator an additional award did not arise because the provisions at issue are deficient but because relator was unable to prove Country Saw failed to comply with the applicable requirements. In the face of OSHA's report, relator conducted no tests of his own and presented no evidence of tests indicating impermissible levels of cobalt or tungsten at the plant. Nothing in the magistrate's decision suggests an employer need not comply with the applicable administrative code provisions, and relator's inability to prove a violation in this case does not provide a free pass for future instances of injury. Relator's contentions being unpersuasive, the second objection is overruled.

III. Disposition

{¶9} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ denied.

KLATT and TYACK, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Troy A. Scott,	:	
Relator,	:	
v.	:	No 10AP-713
Industrial Commission of Ohio and Country Saw & Knife, Inc.,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on May 17, 2011

Boyd, Rummell, Carach & Curry Co., LPA, and *Walter Kaufmann*, for relator.

Michael DeWine, Attorney General, and *Derrick L. Knapp*, for respondent Industrial Commission of Ohio.

Fitch, Kendall, Cecil, Robinson & Barry Co., L.P.A., and *Timothy A. Barry*, for respondent Country Saw & Knife, Inc.

IN MANDAMUS

{¶10} Relator, Troy A. Scott, 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 his request for an additional award for the

alleged violation of a specific safety requirement ("VSSR") by respondent Country Saw & Knife, Inc. ("Country Saw"), and ordering the commission to find that he was entitled to a VSSR.

Findings of Fact:

{¶11} 1. Relator began working for Country Saw in 2004.

{¶12} 2. Relator worked primarily as a brazer, a position involving soldering carbide teeth on saw blades through the use of a "semi automatic brazing machine." (Tr. 195, 212.)

{¶13} 3. Approximately one and one-half years after he began his employment with Country Saw, relator developed respiratory problems which were initially diagnosed as bronchitis but were subsequently diagnosed as hard metal lung disease.

{¶14} 4. Relator's claim has been allowed for "hard metal pneumoconiosis; open wound nasal septum; depressive disorder; generalized anxiety disorder," with a date of diagnosis of October 23, 2007.

{¶15} 5. During his testimony, relator indicated that he had been told that his lung problem was caused by an exposure to "a combination of the tungsten and cobalt," (Tr. 43) and that:

> * * * "The development of hard metal lung disease is a rare event and is almost unrelated to the duration and extent of exposure, an observation that has been attributed to the presence of a particular individual's sensitivity."

(Tr. 44.)

{¶16} 6. On April 16, 2008, the Occupational Safety and Health Administration ("OSHA") conducted an air sampling at the Country Saw facility to evaluate the potential

exposure of its employees to cobalt and tungsten. The test was conducted by using a pump filter worn by one of the owners for 404 minutes. The results revealed that the amounts were well below the permissible exposure limits. Specifically, the testing yielded the following results:

Chemical	PEL (mg/m^3)	Actual exposure (mg/m^3)	PEL exceeded
Cobalt	0.1	0.03	no
Tungsten	NA	0.33	NA

Notes:

[One] mg/m^3 = milligrams per cubic meter of air
[Two] PEL = permissible exposure limit

{¶17} 7. On November 25, 2008, relator filed an application for an award for a VSSR arguing that Country Saw violated the following provisions of the Ohio Administrative Code: "4121 (4123):1-5-17(F), [and] 4121 (4123):1-5-18(C), (D), (E)." These provisions apply to respiratory protection and effective exhaust systems designed to protect employees from various air contaminates. Relator argued that Country Saw failed to provide him with adequate protection to minimize his exposure to toxic substances.

{¶18} 8. Relator's application was heard before a staff hearing officer ("SHO") on November 9, 2009. After setting forth relator's argument, the various code sections, and Country Saw's response to relator's allegations, the SHO determined that relator failed to demonstrate that hazardous concentrations of cobalt and tungsten existed which would

trigger Country Saw's corresponding duty to provide protection. Specifically, the SHO stated:

> The employer asserts that its duty to minimize exposure to toxic substances only exists when the toxic substances are in concentrations known to be in excess of those which would not normally result in injury to an employee's health. In this case the employer contends that the testing done by OSHA albeit after the Injured Worker's exposure, shows that the cobalt was below the permissible limits. No toxic substance was shown to exist at levels that are known to be in excess of those which would not normally result in injury to an employee's health.
>
> The Staff Hearing Officer finds that employer's position persuasive for the following reasons. First, the Injured Worker has only shown that he was exposed to toxic substances and as a result of that exposure he developed an occupational disease. However, the Injured Worker has not shown that the proximate cause of his occupational disease is exposure to toxic substances in excess of those that would not normally result in injury to an employee's health. Such level of exposure must be shown because the statute requires exposure to hazardous concentrations of a toxic substance before the toxic substance can be categorized as an air contaminant. If no air contaminant exists then no duty to mitigate exists. In arriving at the conclusion that there was no exposure to an air contaminant the Staff Hearing Officer relies [o]n the OSHA report in file that shows cobalt was below the permissible limits. OSHA did not test for tungsten; however, the Injured Worker has not introduce[d] any evidence that this substance or any other substance exist at levels that require the employer to provide protection.
>
> The Staff Hearing Officer finds that the testing done after the Injured Worker's exposure is relevant and reliable evidence that there were no harmful exposures before the testing was done. In arriving at this conclusion the Staff Hearing Officer relies on the case of State ex rel. of Gilbert V. Indus. Comm. 116 Ohio St., 3d 243 (2007) which upheld the denial of a specific safety violation that was based in part upon an OSHA investigation done after the Injured Worker's exposure period. The court found that the report remained

> relevant because there had been no modifications to the work environment prior to the investigation. In this case, just as in Gilbert there have been no changes to the ventilation system or any of the processes that would make the OSHA report unreliable.
>
> Secondly, although the record in this case clearly shows the injured worker suffers from a devastating occupational disease, its presence alone does not automatically establish that hazardous concentrations of a substance existed. Again, the Staff Hearing Officer relies on Gilbert wherein the injured worker had urged allowance of his specific safety violation because he had contracted an occupational disease. In response to Mr. Gilbert's position the court stated, "This position from the outset, conflicts with the definition of [']hazardous concentration.['] the definition describes concentrations that would not normally cause injury. As used in that definition, [']normally['] is a qualifying term. Inherent in the use of this word is the recognition that some persons have an abnormal sensitivity to a given substance, for which the employer could not be held accountable."
>
> Based on the foregoing facts the Staff Hearing Officer concludes that there was no exposure to an air contaminant as defined in the statute; therefore, no violation of the safety regulations cited has occurred.

{¶19} 9. Relator's request for rehearing was denied by order of the commission mailed May 7, 2010.

{¶20} 10. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶21} Relator contends that the commission abused its discretion by denying his application for an additional award for Country Saw's VSSR. Specifically, relator argues Country Saw knew that cobalt and tungsten grinding dust could be disabling and fatal and, yet, Country Saw operated the plant with no safety controls or precautions and never tested for toxic hard metal dust until after relator sustained his injury. Relator also argues

that the commission abused its discretion by relying on the OSHA test which relator claims was unreliable and invalid, that the SHO misapplied *State ex rel. Gilbert v. Indus. Comm.*, 116 Ohio St.3d 243, 2007-Ohio-6096, and should have applied *State ex rel. Shelly Co. v. Steigerwald*, 121 Ohio St.3d 158, 2009-Ohio-585.

{¶22} It is this magistrate's decision that the commission did not abuse its discretion. Relator was unable to meet his burden of proving that hazardous concentrations of either cobalt or tungsten dust were present in the air at the plant. This evidence is a prerequisite to the triggering of the administrative code provisions requiring Country Saw to take measures to protect its employees from exposure to cobalt and tungsten dust. Further, although relator presented testimony in an effort to demonstrate that the OSHA test was unreliable and invalid, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. See *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. Further, the magistrate finds that the commission did not misapply *Gilbert* and that, even if the *Shelly Co.* case was applied, the result would not have been different.

{¶23} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶24} 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.

{¶25} 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 standard. *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.

{¶26} Relator alleged that Country Saw violated Ohio Adm.Code Sections 4123:1-5-17(F), and 4123:1-5-18(C), (D) and (E). These statutory sections provide, in pertinent part:

> (F) Respiratory protection.
>
> (1) Where there are air contaminants as defined in rule 4121:1-5-01 of the Administrative Code, the employer shall provide respiratory equipment approved for the hazard. It shall be the responsibility of the employee to use the respirator or respiratory equipment provided by the employer, guard it against damage and report any malfunction to the employer. Note: See appendix to this rule for basic guides for the selection of respirators.
>
> (2) This requirement does not apply where an effective exhaust system (see rules 4121:1-5-18 and 4121:1-5-992 of the Administrative Code) or where other means of equal or greater protection have been provided.

Ohio Adm.Code 4123:1-5-18:

(C) Where employees are exposed to air contaminants, the air contaminants shall be minimized by at least one of the following methods:

(1) Substitute a non-hazardous, or less hazardous material;

(2) Confine or isolate the contaminants;

(3) Remove at or near source;

(4) Dilution ventilation;

(5) Exhaust ventilation; (for examples of exhaust ventilation, see rule 4121:1-5-992 of the Administrative Code).

(6) Using wet methods to allay dusts. Note: Good housekeeping is of definite value in minimizing air contaminants created by dusts.

(D) Exhaust systems: machinery and equipment.

(1) Grinding, polishing and buffing.

(a) Abrasive wheels and belts.

(i) Abrasive wheels and belts shall be hooded and exhausted when there is a hazardous concentration of air contaminants.

(ii) This does not apply to abrasive wheels or belts:

(a) Upon which water, oil, or other liquid substance is used at the point of the grinding contact; or

(b) To small abrasive wheels used occasionally for tool grinding.

(b) Separate exhaust systems.

Abrasive wheel and buffing wheel exhaust systems shall be separate when the dust from the buffing wheel is of flammable material.

(2) Generation of toxic materials.
When toxic materials are generated in hazardous concentrations during their application, drying, or handling, they shall be minimized or eliminated by at least one of the methods described in paragraph (C) of this rule.

(3) Internal combustion engines.

Hazardous concentrations of air contaminants produced by internal combustion engines shall be exhausted.

(E) Exhaust systems--structural requirements.

(1) Exhaust or ventilating fan.
Each exhaust or ventilating fan located less than seven feet above the floor or normal working level shall be guarded.

(2) Ductwork.

Exhaust ductwork shall be sized in accordance with good design practice which shall include consideration of fan capacity, length of duct, number of turns and elbows, variation in size, volume, and character of materials being exhausted.

(3) Discharge.

The outlet from every separator or (collector) shall discharge the air contaminants collected by the exhaust system, in such manner that the discharged materials shall not re-enter the working area in hazardous concentrations.

(4) Location of air supply openings or inlets.

Air supply openings or inlets through which air enters the building or room in which the local exhaust system is in operation shall be isolated from any known source of contamination from outside of the building.

{¶27} Before Country Saw was required to comply with these requirements, relator needed to present some evidence that there were "hazardous concentrations" of

"air contaminants" as defined in Ohio Adm.Code 4123:1-5-01. That section provides, in relevant part:

> (B) Definitions.
>
> * * *
>
> (4) "Air contaminants": hazardous concentrations of fibrosis-producing or toxic dusts, toxic fumes, toxic mists, toxic vapors, or toxic gases, or any combination of them when suspended in the atmosphere.
>
> * * *
>
> (74) "Hazardous concentrations (as applied to air contaminants)": concentrations which are known to be in excess of those which would not normally result in injury to an employee's health.

{¶28} In the present case, the commission relied on the OSHA report which demonstrated that the amount of cobalt in the air was well below the permissible limits. Further, although it appears that OSHA tested for tungsten, their testing did not produce any results. As such, the commission determined that relator failed to present some evidence that "hazardous concentrations" of cobalt were present in the air at Country Saw's facility to categorize the amount of cobalt as an "air contaminant." Further, given that the OSHA testing provided no results for tungsten, it was incumbent upon relator to present some evidence that "hazardous concentrations" of tungsten existed in the air at Country Saw's facility to qualify as an "air contaminant." Relator failed to do so.

{¶29} Relator argues that he presented evidence that OSHA's testing was unreliable and invalid. Relator did present testimony from Stephen J. Stock, a forensic engineer, in an attempt to demonstrate that OSHA's testing methods were below standards. However, relator did not have the air tested himself and presented no contrary

evidence. Stock's testimony could have been a factor in the commission's determination of the weight and credibility to be given to the OSHA report as evidence. Here, in the absence of any other evidence, the commission relied on the results as determined by OSHA and found that relator had failed to demonstrate that hazardous concentrations of either cobalt or tungsten existed at Country Saw's facility to constitute "air contaminants" and triggering Country Saw's requirement to protect its employees.

{¶30} Because the OSHA test results constitute some evidence upon which the commission could rely, the commission did not abuse its discretion in determining that relator failed to present sufficient evidence to trigger the applicability of the specific safety requirements at issue.

{¶31} In taking the argument one step further, relator first asserts that the commission misapplied the court's reasoning in *Gilbert*. For the reasons that follow, the magistrate disagrees.

{¶32} In the *Gilbert* case, Harvey Gilbert worked as an exhaust-system cleaner for American Hood Cleaning II, Inc. ("AHC"), and was ultimately diagnosed with restrictive lung disease which was likely due to his long term, low level exposure to the chemical strippers he used at his job. Gilbert alleged that AHC had violated former Ohio Adm.Code Section 4121:1-5-17(F)(1), now 4123:1-5-17(F)(1), which required the employer to provide respiratory protection where there are air contaminants as defined in the code.

{¶33} At the hearing, the parties agreed that no respirator had been provided to Gilbert until after he complained of respiratory problems. AHC maintained that no respirator had been provided previously because the level of chemical exposure was

below the hazard threshold. In support, AHC relied on an air-quality test performed by OSHA conducted several days after Gilbert's diagnosis. That test measured the amounts of relevant chemicals in the work environment and determined that they were far below the permissible exposure limits as defined by OSHA.

{¶34} The commission found that the regulations did not apply because, pursuant to OSHA's testing, there were not hazardous concentrations of dust, fumes, mist, vapors, or gases within the definition of "air contaminants" and found that Gilbert had not established that the proximate cause of his injuries was AHC's non-compliance with the safety requirements.

{¶35} Ultimately, the commission's determination was upheld by the Supreme Court of Ohio. Gilbert's argument was similar to relator's argument here—because his occupational disease was due to chemical exposure, the level of the exposure must have been hazardous. The court disagreed and stated:

> * * * This position, from the outset, conflicts with the definition of "hazardous concentrations." The definition describes concentrations that would not *normally* cause injury. As used in that definition, "normally" is a qualifying term. Inherent in the use of this word is the recognition that some persons may have an abnormal sensitivity to a given substance, for which the employer could not be held accountable. The presence of an occupational disease does not necessarily establish that hazardous concentrations of contaminant existed, since a person may have contracted an occupational disease because of abnormal sensitivity to or because of hazardous concentrations of a contaminant.
>
> Gilbert's logic was previously rejected in *State ex rel. Garza v. Indus. Comm.* (2002), 94 Ohio St.3d 397, 763 N.E.2d 174. At issue was whether an accident occurred during a press's "operating cycle." Responding to an argument similar to Gilbert's, we wrote:

> "These cases can be difficult because of the simple truth exemplified by the claim before us: the press obviously cycled when the claimant's arm was in the danger zone or claimant would not have been hurt.
>
> "The claimant's position reflects this reasoning. The hidden danger in this approach, however, is that, in effect, it declares that because there was an injury there was *by necessity* a VSSR—i.e., someone was injured; therefore, the safety device was inadequate. This violates two workers' compensation tenets: (1) the commission determines the presence or absence of a violation and (2) all reasonable doubts as to a specific safety requirement's applicability must be resolved in the employer's favor." (Emphasis sic.) Id. at 400, 763 N.E.2d 174.
>
> * * *
>
> Specific safety requirements, moreover, must contain "specific and definite requirements or standards of conduct * * * which are of a character plainly to apprise an employer of his legal obligations toward his employees." *State ex rel. Holdosh v. Indus. Comm.* (1948), 149 Ohio St. 179, 182, 36 O.O. 516, 78 N.E.2d 165. A specific standard, however, cannot arise from individual susceptibility. There must be a quantifiable baseline from which the employer can work in order to measure compliance. The baseline cannot vary from employee to employee.

Id. at ¶19-22, 24. (Emphasis sic.)

{¶36} In arguing that the commission misapplied *Gilbert*, relator points to the following language in *Gilbert*:

> * * * In some cases, testing after the injurious exposure will be irrelevant because the work environment has changed. New exhaust systems may have been installed, ventilation may have been improved, or other safety initiatives may have been put into place. On the other hand, where the test environment replicates the earlier exposure conditions, the testing results may be significant.
>
> The varying facts that may exist underscore the importance of preserving the commission's evidentiary discretion and

> authority. Many times, contemporaneous air-sampling data will not be available because-absent a duty to monitor-employers may assume that air quality is satisfactory until alerted otherwise. Consequently, in some situations, the only test results available will be either from a prior test or from a test performed after a problem has been alleged. For this reason, it is crucial to maintain the commission's ability to evaluate each situation individually in order to determine whether a particular test result is relevant to the claim being made.
>
> In this case, Gilbert was diagnosed on September 5, 2001. The OSHA air-quality test was done on September 24, 2001, just 19 days later. The commission had the evidentiary discretion to conclude that this test was representative of the amount of contaminants to which AHC's cleaning procedure generally exposed employees. This data, therefore, provided the requisite evidence to support the conclusion that Gilbert was not exposed to hazardous concentrations of air contaminants.

Id. at ¶26-28.

{¶37} Relator argues that the record was full of evidence that the conditions at Country Saw's facility were not the same at the time testing was conducted as they were at the time that relator worked there. The magistrate disagrees with relator's statements.

{¶38} In the present case, relator presented evidence tending to show that not all the machines were in operation on the day of the test as part of his assertion that OSHA's testing was invalid. By comparison, Country Saw presented evidence indicating that they continued with business as usual at the facility and, on the day of the OSHA testing, machines were in operation that needed to be in operation. Further, although relator asserts that Steve Mercer, the Safety Compliance Officer for Country Saw, testified that, on the day OSHA conducted the test, none of the grinders were operating, the magistrate disagrees. Mercer testified that, on the day OSHA tested the air, all necessary machines

were running. Mercer did testify that, on the day *counsel* visited the facility, many machines were not running. This time period is irrelevant. Further, no evidence was presented that would indicate that Country Saw made any changes in the environment in which relator had been working. The commission did not misapply *Gilbert.* Instead, as indicated in *Gilbert*, "it is crucial to maintain the commission's ability to evaluate each situation individually in order to determine whether a particular test result is relevant to the claim being made." Id.

{¶39} As stated previously in this decision, relator's challenge to the validity of the OSHA report was rejected by the commission. Further, as indicated previously, relator could have, but did not, present any evidence of his own. The fact that he did present evidence calling the validity of the report into question is not synonymous with his having presented evidence actually invalidating that report. The report itself is some evidence upon which the commission relied to find that the concentrations of cobalt were within permissible limits and to the extent that the testing was inconclusive regarding tungsten, relator failed to present evidence that it exceeded permissible limits. Because the commission determines the weight and credibility of the evidence, this magistrate cannot say that the commission abused its discretion by finding that operations at Country Saw's facility were essentially the same on the day that OSHA performed the testing as they were at the time that relator worked there.

{¶40} Furthermore, even if the OSHA test results are removed from evidentiary consideration, relator failed to present any evidence that "hazardous quantities" of "air contaminants" were present. Relator did not meet his burden of proof.

{¶41} Relator also contends that the commission should have applied the reasoning of the *Shelly Co.* case. In that case, David J. Steigerwald was working repaving part of the Ohio Turnpike. Steigerwald and co-worker James Pennington were conversing while Steigerwald waited for his work equipment to become available. Pennington climbed into his truck to complete some paperwork, started his truck, and began to back up along the shoulder of the road. Although Pennington backed up extremely slowly, he ran over Steigerwald and Steigerwald died. Steigerwald's widow alleged that the employer violated specific safety requirements, specifically with regard to the requirement to provide a reverse signal alarm audible above the surrounding noise. At the hearing, evidence was presented that the alarm worked only intermittently and, because there had been no witnesses to the event, Steigerwald's widow argued that because the evidence indicated that the alarm was not working after the accident, it was reasonable to assume that it was not functioning immediately before the accident. Although the employer argued that it was just as reasonable to assume that the wires became dislodged during the attempts to rescue Steigerwald, the commission determined otherwise.

{¶42} In its mandamus action, the employer argued that the commission abused its discretion by finding a VSSR in the absence of any evidentiary support and rejecting the employer's argument. The court stated:

> This case is, by necessity, built upon inference, because no one witnessed the accident and no one can definitively state that the backing alarm was working or not working when the mishap occurred. The commission has substantial leeway in evaluating the evidence before it and drawing inferences from it. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936; *State ex rel.*

> *Lawson v. Mondie Forge,* 104 Ohio St.3d 39, 2004-Ohio-6086, 817 N.E.2d 880, ¶ 34. That authority encompasses VSSR cases:
>
> "This court has never required direct evidence of a VSSR. To the contrary, in determining the merits of a VSSR claim, the commission or its [staff hearing officer] like any factfinder in any administrative, civil, or criminal proceeding, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence." *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.,* 98 Ohio St.3d 134, 2002-Ohio-7089, 781 N.E.2d 170, ¶ 69.

Id. at ¶28-29.

{¶43} Relator argues that he was not required to provide direct evidence of excessive levels of cobalt and tungsten. Finding that the facts of this case are not analogous to the facts in the *Shelly Co.* case, this magistrate disagrees. In *Shelly Co.*, the best evidence that was available indicated the likelihood that the alarm had not been working properly. In the present case, the best evidence the commission had was the OSHA report which indicated that the amount of cobalt was within permissible limits. Again, relator could have conducted his own air-quality test at the facility; however, for whatever reason, he chose not to. Relator's entire case rests on his allegation that the OSHA test is invalid and cannot constitute some evidence upon which the commission could rely. However, as stated previously, relator's argument fails. While relator's evidence certainly went to the credibility of the OSHA report, the magistrate cannot say that the commission abused its discretion by relying on that report.

{¶44} Lastly, relator argues that Country Saw never tested the air until relator became sick. However, Mercer testified that the air was tested in 1993 and the levels of cobalt and tungsten were well below acceptable limits.

{¶45} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by denying his application for an additional award for Country Saw's VSSR, and this court should deny relator's 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 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).