

ORIGINAL

IN THE SUPREME COURT OF OHIO

TROY A. SCOTT)	CASE NO. 2011-1922
)	
)	
Appellant,)	APPEAL FROM THE
)	FRANKLIN COUNTY COURT
)	OF APPEALS, TENTH
vs.)	APPELLATE DISTRICT
)	
THE INDUSTRIAL COMMISSION OF)	
OHIO and COUNTRY SAW & KNIFE,)	
INC.)	
)	
Appellees.)	

MERIT BRIEF OF APPELLANT, TROY A. SCOTT

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STATEMENT OF FACTS

TROY SCOTT'S INJURY

Troy Scott began work at Country Saw & Knife at age 19, one year out of high school (Stipulated Record 190, hereinafter referred to as SR). Before working at this employer, he had never experienced respiratory problems of any kind in his life, and had never been exposed to hard metal dust such as tungsten and cobalt. (SR190-191) After working at Country Saw for approximately 1 to ½ years he began experiencing breathing problems. (SR 191, 192). He continued to work there, but his respiratory problems became progressively worse, despite the fact that he used a paper mask provided by his employer, when he was on the job. (SR193 – 194) His treating doctors soon suspected his respiratory problems were related to toxic exposure at his work. They eventually ordered a lung biopsy, which definitively showed the presence of a sufficient density of toxic tungsten and cobalt grinding particles to render him unable to work at age 23. (SR 284-286, 440-441) Troy Scott never smoked in his entire life, and was never exposed to such heavy metals anywhere other than Country Saw. (SR 286) His condition is currently so severe that he is required to use a portable oxygen bottle in order to function on a daily basis.

THE EMPLOYER KNEW THAT THE TUNGSTEN AND COBALT GRINDING DUST COULD BE TOTALLY DISABLING AND FATAL

Country Saw is a mass production saw blade manufacturing operation (SR 322). In one large, open room in its plant, Country Saw, manufactured saw blades tipped with tungsten and cobalt inserts which, as an integral part of the manufacturing process, had to be finished in grinding and sanding machines. (SR 309, 310). This created grinding dust containing the hard metals tungsten and cobalt. All the company

owners, including the part owner/safety manager admitted they were aware from 1993, when it began operating in this plant, through the entire time Scott worked there from June 2004 through September 2007 that grinding dust containing cobalt and tungsten was being generated and blown into the air. (SR 309, 310, 312-316) They also knew from the supplier's material safety data sheets (MSDS) that this grinding dust could be totally disabling or fatal if sufficient quantity was breathed into the lungs over time. (SR 310) The MSDS required by OSHA to be sent by Country Saw's suppliers from 1993 onward explicitly set forth the toxic nature of the cobalt and tungsten in the grinding dust, including the OSHA maximum permissible concentration in air of .1mg/m³ for cobalt and AGICH Industry maximum concentration of 3.0 mg/m³ of tungsten, and new OSHA maximum limit of 1.0 mg/m³ (See SR 41 and 431) The suppliers' MSDS state at page 1:

"ROUTES OF EXPOSURE:

Grinding cemented carbide product will produce dust of potential hazardous ingredients which can be inhaled, swallowed or come in contact with the skin or eyes. "

The MSDS further warns Country Saw:

"EFFECTS OF OVEREXPOSURE:

Inhalation: Dust from grinding can cause irritation of the nose and throat. It also has the potential for causing transient or permanent respiratory disease, including occupational asthma and interstitial fibrosis, in a small percentage of exposed individuals. It is reported that cobalt dust is the most probable cause of such respiratory diseases. Symptoms include productive cough, wheezing, shortness of breath, chest tightness and weight loss. Interstitial fibrosis (lung scarring) can lead to permanent disability or death. Certain pulmonary conditions may be aggravated by exposure.

Skin Contact: Skin contact can cause irritation of an allergic skin rash due to cobalt sensitization."

There is no dispute that the Company knew its manufacturing operation was producing grinding dust and mist which, if inhaled in sufficient quantity, could produce permanent respiratory damage or death, "in a small percentage of the exposed individuals" if Country Saw generated concentrations of grinding dust in the atmosphere over the OSHA maximum permissible exposure limits.

The evidence overwhelmingly shows that company chose to sacrifice that, "small percentage of exposed individuals", including Troy Scott by deliberately ignoring all safety precautions and safety procedures necessary to protect its exposed workers. (SR 308 – 310) The company's safety director testified that it failed to use any abatement measures, because it was not required to do so by either the State or Federal Safety regulations since in its view, it was producing only "nuisance dust", not toxic "air contaminants". (SR 294-295).

COUNTRY SAW OPERATED THE PLANT WITH NO SAFETY CONTROLS OR PRECAUTIONS

Both the Ohio VSSR regulations and MSDS's are clear and concise as to what an employer must do to protect workers' from exposure to toxic heavy metal grinding dust. O.A.C. 4121 (4123):1-5-18(D), (1) (a), states:

- "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." (SR 429)

There is nothing vague about in this language. Where environmental controls are inadequate or impractical the employer is required to furnish the proper personal protective equipment.

See 4121 (4123):1-5-17 (F) states:

“(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.” (SR 424)

What did the employer do to abate the cobalt and tungsten grinding dust which it knew was being generated as a result of its manufacturing process? The answer is nothing.

None of its abrasive wheels or belts were “hooded” and exhausted” (See Scott affidavit and testimony(SR 15, 201-207), Investigative Report (SR 152-153) Expert testimony (SR 245, 249-251) and testimony of company safety manager, (SR 313-314). Although the grinding dust from some of its abrasive wheels and belts were moderated with liquid, the company concedes that at least seven grinders and belts use no liquid whatsoever. (Expert report SR150-154, 249), Company manager (SR 312-316), Michael Painter affidavit, (SR 132-134) Erin McCullough affidavit (SR 135-138).

This is contrary to the MSDS section requiring “special protection”. (SR 43).

“SPECIAL PROTECTION INFORMATION

RESPIRATORY PROTECTION:

Use an appropriate NIOSH approved respirator if airborne dust concentrations exceed the appropriate PEL or TLV.

All appropriate requirements set forth in 29 CFR 1910.134 should be met.

VENTILATION: Use local exhaust ventilation, which is adequate to limit exposure to airborne dust levels, which do not exceed the PEL or TLV. If such equipment is not available, use respirators as specific above.

PROTECTIVE GLOVES: Protective gloves or barrier cream are recommended when contact with dust or mist is likely.”

The only exhaust ventilation in the part of the plant where Scott worked was one wall fan, Investigative report (SR 22-23), Plaintiff's expert report (SR152, 153, 236-238), and Company manager (SR 313). Its placement high up on the outside wall of the building meant that dusts were actually circulated around the open plant area before they could be exhausted to the outside. See investigative report and testimony of Plaintiff's Expert (SR 252-253)

In addition, the company used three or four pedestal fans to cool certain work areas during hot weather. (Company manager, (SR 316) (Investigative report, Record 110-118). These areas included the abrasive wheels and belts with no liquid in use; therefore, the grinding dust was blown throughout the work areas before any of it was exhausted by the wall fan. Painter Affidavit, (SR 132-134), Expert testimony (SR 245, 249, 250), McCullough affidavit (SR135-138), Scott testimony (SR 196-199)

THE COMPANY FURNISHED PAPER MASKS PROVIDED NO PROTECTION.

Country Saw furnished only paper masks as personal protective equipment. It is undisputed that the manufacturer of these masks, in its literature to the customer, informed Country Saw that the masks were not designed to protect against the heavy metal grinding dust being generated there. See Investigative Report (SR 48-50), and Expert testimony (SR 246-248). It is further undisputed that the company safety manager, during the entire time Scott worked there, knew that paper masks being furnished would not protect against the inhalation of cobalt and tungsten grinding dust. His explanation was that these were "nuisance dusts" for which the masks were designed (SR 294-295). Plaintiff's engineering expert testified they were not nuisance

dust, but toxic metal dust and that the masks were never designed to protect against this heavy metal grinding dust. (SR 246-248)

COUNTRY SAW NEVER TESTED THE PLANT ENVIRONMENT OR THE EMPLOYEES FOR TOXIC HARD METAL DUST

The Company, through its management, has steadfastly maintained it had no duty to protect anyone against toxic grinding dust, because the levels of such dust were never high enough to be dangerous. Yet, it is uncontested that the levels inhaled by Troy Scott were high enough to permanently damage his lungs to the point of disability in less than three years of exposure. The company admits that, from 1993 when Country Saw began operations in the plant until, after Scott left the plant in 2007, not a single test was done of the plant environment or any of its workers. There is no base line testing data showing the concentrations of cobalt and tungsten dust to which Scott was exposed, when that he was working there. This is entirely contrary to the MSDS instructions concerning use of the product, which recommends environmental periodic testing and physical examinations of exposed individuals. (SR 43) Plaintiff's expert testified that the MSDS, and the various state and federal codes require such periodic testing for the safe use and handling of these known toxic metals. (SR 276-278) Even after Scott informed the company his doctors related to his respiratory problems to work exposure, Country Saw never followed the instructions to test either the environment or the workers (SR 307 to 309). This is despite the fact that one company owner testified, on cross examination that he was hospitalized, and part of his lungs were removed, due to lung disease, while Scott worked there. (SR 341-343).

There is no base line test data to show whether the environment in the plant exceeded the permissible OSHA and Industry levels for toxic tungsten and cobalt dust

since the company, over a course of fourteen years, never did a single test on any person or the environment. It "bootstrapped" its total failure to test into a complete defense in this case.

THE OSHA TEST WAS UNRELIABLE AND INVALID

There are two reasons the OSHA test, which is the sole basis for the Industrial Commission decision, is irrelevant to the case.

First, it is uncontested that a single test pump was placed on one of the company owners for only 6 ½ hours, and was not otherwise monitored. This is contrary to all accepted reliability standards for such test procedures. Second, the OSHA test was taken under conditions, which did not exist when Scott worked in the plant.

Over 6 months after Scott left the plant, one OSHA monitor was placed on a company owner and measured the air for exactly 404 minutes, or 6 hours and 44 minutes. (SR 44, 45, 311). Even in this short time, it collected .03 mg per meter of cobalt and .33 mg per meter of tungsten dust. (SR 44, 45) One third of the allowable long term exposure maximum limit for both cobalt and tungsten were drawn into the meter in the course of less than one shift from a person, who did not operate any of the dust producing grinders and sanders, and on a day when none of the dust producing grinders were operating. (SR 317-321)

The sole evidence as to the reliability of this test came from Scott's environmental engineer, Stephen J. Stock. He holds a master's degree in environmental science and was an OSHA instructor. He testified that the test results were entirely unreliable. (SR 261, 262, 263, 266, 279-281)

Steve Stock testified as to the correct, reliable test procedure, under the OSHA test protocols. It included testing not only one individual, but several individuals over the course of one week so as to obtain accurate and reliable results (SR 276-279) and under similar conditions as when Scott was working. Even under its own protocols, the OSHA test has no validity in determining whether Scott was exposed to "hazardous concentrations" of these hard metal dusts, when he worked there. The best evidence of the conditions under which the OSHA test was done was provided by Steve Mercer, the company manager and part owner responsible for safety. He admitted that, when the OSHA test was being done, the grinders and sanders machines that generated the heavy metal dust were hardly running or not running at all (SR 311-313, 317-322) This was corroborated by another company witness, Dave Butcher. (SR 363-365) Furthermore, the OSHA sample was drawn on April 16, 2008 (SR 44); therefore, the portable fans that blew the dust around the plant floor were not operating. These were certainly not the circumstances under which these machines were being operated when Scott was there, as shown by the testimony of Scott, and affidavits of his co-workers Painter (SR 132-134) and McCullough (SR 135-138)

THE METAL DUST PERMEATED THE BUILDING

The testimony of Scott; the affidavits of Painter, and McCullough; the report and testimony of Steven Scott; and the VSSR investigative report findings; show the true concentrations of dust and grit present in the plant area, when Scott worked there. These were entirely different from when the OSHA sample was taken. These accounts were validated by the company witnesses, Dave Butcher (SR 363-366) and the company owner's son (SR 372-375)

The most telling evidence as to the concentration of grit and dust generated during the actual operation of the machines is shown by photographs of the only fan providing ventilation for the work area. The VSSR investigative photos show the black metal grit and dust caked-on the fan at the time of the April 27, 2009 investigation (SR 22, 23,106 to 109). The photos of the same fan housing taken by Stock in his investigation on November 5, 2009 again show the black metal grit caked on the fan and housing, as well as on the outside wall of the building below the fan. These photos are corroborated by McCullough's affidavit. (SR 155, 137, 138) The company manager, further corroborated that this fan and housing were periodically cleaned; therefore the visible, caked on metal grit shown in the VSSR investigation and stock inspection accumulated despite the cleaning. (Record 325-327) Since the grit and dust was breathed in by workers before it was sucked up by the wall fan, these photos provide irrefutable corroboration of the testimony of Scott, Painter, and McCullough, as to the dense, almost overwhelming atmosphere of metal dust in which they worked.

When the Industrial Commission investigation and Steve Stock's inspection took place, the dust producing grinders were hardly in use. Yet enough grit was still being produced to cake up the fan housing and blades. This is despite the fact the company's own witness testified the company cleaned this fan approximately every month. These photographs are proof of the true nature of the operation and the actual concentration of toxic metal dust, even after Scott left, and conclusively refute the reliability and therefore the relevance of the single OSHA test.

LAW AND ARGUMENT

PROPOSITION OF LAW I:

The Industrial Commission abuses its discretion when a factual finding as to one claim nullifies the specific safety requirement.

The some evidence test cannot be applied to uphold such an Industrial Commission decision.

The language of the Industrial Commission rules at issue in this case is both vague and inherently subject to a wide variation in interpretation. Furthermore, these regulations are almost unique in that case specific factual determinations of the regulations at issue can result in the denial of not only a particular claim, based upon the unique facts of that claim, but all claims, past and future with the Claimant's employer. To support such a denial the Industrial Commission, as a fact finder, must support the denial of a claim beyond the mere scintilla of evidence required by the some evidence test.

THE EMPLOYER'S ARGUMENT AND THE INDUSTRIAL COMMISSION DECISION

In order to understand the broad implications of the Industrial Commission decision in this case, it is necessary to first understand the employer's argument. This argument formed the foundation of the decision, since it was fully embraced by the Industrial Commission. The employer argued that it was exempt from the VSSR requirements to provide any respiratory protection, either personal protective equipment, or environmental control because it only produced "nuisance dust" and not "air contaminants" in its operations. This is an absolute exemption applying to not only past operations, but all future operations as well. In its decision, the Industrial

Commission clearly recognized the nature and extent of the employer's position. At page 3 of the decision, the Industrial Commission stated:

"It is the employer's position that the injured worker was not exposed to air contaminants as defined in the Ohio Administrative Code, therefore, the employer had no duty to minimize the exposure. The employer's position is based on the definition of air contaminants and hazardous concentrations as set forth in Ohio Administrative Code Section 4123:1-5-01(4) and 4123:15-01 (74) it reads as follows:

(4) "air contaminants": hazardous concentrations of fibrosis producing or toxic dust, 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 both which would not normally result in injuries to an employee's health." (SR 398)

The Industrial Commission further held:

"The Staff Hearing Officer finds the employer's position persuasive for the following reasons.....
If no air contaminant exists than no duty to mitigate exists. In arriving at the conclusion that there was no exposure to an air contaminant, the Staff Hearing Officer relies on the OSHA report in file that shows cobalt was below permissible limits. OSHA did not test for tungsten, however, the injured worker has not introduced any evidence that this substance or any other substance exists at levels that the require the employer to provide protection."

This means that there is no duty to mitigate for known toxic heavy metal dust generated by the company's operations, either past or present. If five more of claimant's co-workers are shown to have contracted heavy metal lung disease from exposure to heavy metal dust while working at the company, even while this case is pending in the Supreme Court, the company is given a free pass by the Industrial Commission. By definition, there was, and is, no duty to provide any protection at all.

This is all based upon one OSHA report in the file. Before this Court endorses such a far reaching Industrial Commission decision, it must consider the totality of the facts of this case, especially in light of this Court's earlier decision in *State ex rel. Gilbert vs. Industrial Commission*, 116 Ohio State 3d 243 (2008), which the Industrial Commission relied upon to make its decision. Specifically, the Industrial Commission held:

"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. Gilbert vs. Industrial Commission* 116 Ohio State 3d 243 (2007) which upheld the denial of the specific safety violations based in part upon an OSHA investigation done after the injured worker's exposure."

This Court's reasoning in *Gilbert* was that, where there are no hazardous concentrations, there are no air contaminants; therefore, there is no duty. The entire regulatory scheme therefore relies upon the definition of "hazards concentrations" which in turn relies upon the words:

"Concentrations which are known to be in excess of those which would not normally result in injury to an employee's health."

The question as to whether there is any duty therefore revolves entirely around the meaning and application of the word "normally". Attempting to apply "normally" across the spectrum of cases involving toxic substances is virtually impossible, since ~~of~~ that term is so vague as to be virtually meaningless.

This Court in *Gilbert* therefore recognized that determinations involving the application of that word, must necessarily be fact specific. This Court warned that there is no, "one size fits all", "cookie cutter" approach that can be used to decide such

cases. Each must be decided based on the totality of the evidence before the Commission. That is why this Court in *Gilbert* cautioned the Commission against the blind reliance of one OSHA report to absolve the employer of any obligation to protect its workers. This Court held at page 247 and 248:

“In some cases, testing after an 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 in place. On the other hand, where the environment replicates the earlier exposure conditions the test 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—employer may assume that air quality is satisfactory until alerted otherwise. Consequently, in some situations, the only test results available would 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 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 nineteen days later. The Commission had the evidentiary discretion to conclude that this test was representative of the amount of contaminants to which AHC cleaning procedure generally exposed employees.”

The converse is also true, in that commission must consider all the evidence surrounding the OSHA test and previous environment to determine if the OSHA test has any relevance, so as to prevent an abuse of discretion.

How did the Industrial Commission apply this warning and instruction from the Ohio Supreme Court? It held, without any evidentiary consideration, or the citation to any evidence in the record, the following:

“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.”

What evidence, out of the hundreds of pages of investigative report, affidavits and testimony, did the Industrial Commission cite to support their conclusion? The answer is none. What evidence did the Industrial Commission cite from the voluminous record to support the conclusion that the OSHA test procedure was even reliable? The answer is none. Where is there any indication that the Industrial Commission considered any of the evidence other than the OSHA report, which it assumed was reliable and probative? The answer also is none.

The Industrial Commission relied entirely on one piece of evidence, namely, the OSHA report, to the exclusion of all the other contrary evidence, coupled it with the *Gilbert* result and found, ipso facto, that the employer had no duty to protect Scott because, by definition he was not exposed to “air contaminants”.

WHAT DOES AN UNBIASED, COMPREHENSIVE REVIEW OF THE EVIDENCE SHOW?

THE OSHA REPORT IS UNRELIABLE AND IRRELEVANT

In *Gilbert*, no one ever challenged the validity or reliability of the test itself. Stated otherwise, there was no issue whether the OSHA test was properly done, given OSHA's own test procedures, and protocols. In the present case, the only evidence shows that the test was unreliable. Steven Stock whose training includes a master's

degree in environmental science and previous employment as an OSHA instructor stated in his report:

“Both the Ohio Bureau of Workers Compensation SVIU and OSHA inspections were conducted long after Mr. Scott’s last day of work and do not actually reflect the dusts, mists, vapors, smoke and fumes present during his two year employment at the firm. The Actually working conditions and quality of breathing air are probably not reflected in these untimely government air sampling measurements” (Record 153)

In his testimony he explained the unreliability of the test. At Record page 261 he states:

“Q.: Now in this case they talk about cobalt and the PEL is .1. The actual exposure, based on their tests, was 03.

A.: Yes it was low.

Q.: It was below?

A.: It was low. As I said, during that testing where these tests run—the mechanical grinding machines are pocketers in operation or the belt sanders in the facility, I don’t know?”

At page 262 he stated:

“Q.: And, again, the test here they were within acceptable limits, they were below the PEL?

A.: When the test was done --- as I said, without interviewing or speaking to the individual that went out and conducted the test to know whether the machines were in operation you didn’t know.”

At page 276 and 277 he testified:

“Q.....If you had a MSDS that was sent to you by one of your suppliers that indicated that the product that they were grinding and creating dust had this type of risk, Okay as an employer what would you do in order to meet the requirements of these codes with respect to dealing with this risk?

A.: I would test the employees.

Q.: To you knowledge and in your report, I think you referred to it, is there any evidence that they ever tested any of their employee’s at any time with respect - - and what you mean by “testing” you mean testing to see what their exposed

to?

A.: Yeah.

Q.: How would you conduct that test?

A.: There's companies that come out and will put a machine on an individual and you have to carry around.

Q.: For how long?

A.: A week.

Q.: Would fifteen minutes be enough?

A.: No.

Q.: Would one day be enough?

A.: No.

Q.: Would it have to be done in an environment similar to what the working environment is in the plan at the time that the testing was being done.

A.: Yes sir.

Q.: In other words, the machines are going to have to be run. They're not going to have to be shut down.

A.: Right.

Q.: If there are working grinders without liquid those grinders would have to be in operation. Is that correct?

A.: Correct.

Q.: If there are fans that were blowing the material around those fans would have to be on blowing the material around. It would have to be a real world test. Is that correct?

A.: Yes sir.

Q.: Not some staged event or something abnormal, is that right?

A.: Correct.

Q.: Not for example like when you were out there when none of these machines were in operation. Is that right?

A.: Correct.

At page 279 and 280 he testified:

"Q.: But we don't know under what circumstances that test was actually done. We don't know what machines were running. We don't know if the fans were on. We don't know any of that, do we?

A.: No we don't.

Q.: All we know that it was done some five months after Mr. Scott was no longer there, is that right?

A.: Correct.

Q.: So would you say that that has any meaning to what were talking about here or any relevance to what we're talking about here in this case unless we know how long the sample was, what machines were running and all of the other

circumstances surrounding the test?

A.: As I said I don't know foundations for how they tested, and was on, and what wasn't on during their operation.

Q.: How would anyone --- I guess is a question relating to the regulation and the requirements of the regulation how would anyone actually know that there was a toxic concentration of dust, unless they actually tested for it under real world circumstance.

A.: They would not."

The test result itself shows two things. First, it tested 404 minutes (six hours and 44 minutes) of time. Contrary to what the Staff Hearing Officer concluded in the decision, tungsten particles were found in the sample. The "actual exposure" of tungsten was .33 mg per cubic meter. The test report itself does not provide the permissible limit for tungsten, but both of the MSDS's in the record state both industry and OSHA limits (3.0 mg/m³) (Record 41) (1.0 mg/m³) (Record 431) (See Record 45).

The most enlightening testimony as to the conditions under which the OSHA test was done was provided by Steve Mercer, the "safety compliance officer" for the plant, whose father was one of the owners of the company. He frankly admitted that the grinders and belt sanders that created the tungsten and cobalt dust were not operating when the sample was being drawn. (SR 309 lines 6 through 25, 310 lines 1 through 6). He admitted that the person wearing the monitor was actually one of the owners of the company, and that he was not working on the grinders at the time. (SR 311) He admitted that the air sample did show both tungsten and cobalt (SR 317 lines 19 through 25). His key admission, however, concerned the machines which were running when the OSHA test was being done. When Steven Stock inspected the premises, and when the OSHA tests were being done virtually none of the seven

grinders and sanders, which had no liquid to moderate the dust were being operated. (SR 318 through 322). He admitted that the factory where Scott worked is a mass production operation; therefore, under normal operations, the grinders work nonstop.

“Question: Now, I also heard you say that your shop is a mass production shop, is that right?

Answer: That’s the way we make money.

We do have to try to get the most out of it.

Question: We are not talking about a shop that just make a few pieces of this, or few pieces of that, or does any kind of repair work.

We are talking about an actually mass production facility is that right?

Answer: We try to be as productive as possible.” (SR 322).

Furthermore, he admitted that the three or four pedestal fans which blow directly on the dry grinders to keep the operators cool as were also not operating. In addition to that, Stanley Glista, one of the company’s owners, testified that at the time the OSHA test was being done virtually none of the dry grinders and belt sanders were in daily or weekly use. (SR 333 through 336) The most telling testimony concerning the concentration of toxic dust and their potential for producing lung damage, comes from Glista himself. On direct examination he stated:

“Question: Have you ever had any problems with any of these dusts or metal particles?

Answer: No, I have been breathing them for thirty years. (SR 338).

The truth, however, came out on cross examination:

“Question: You have had lung problems right?

Answer: I didn’t have.

Question: You had surgery on your lungs?

Answer: They operated on me.

Question: When did they operate on your lungs?

Answer: A couple of years ago.

Question: So what you are saying is that you had lung difficulties to the extent that you actually had lung surgery on your lungs?

Answer: Yeah.

Question: Is that correct?

Answer: That's correct.

Question: What surgery did they do?

Answer: They took a lower cut of the lung out.

Question: They actually took out part of your lower lobe of your lung?

Answer: Yep.

Question: That's having lung problems isn't it?

Answer: Yeah.

Question: Yes?

Answer: That's what they said, do you want the results?

Question: The bottom line is you had lung problems to the extent where they actually remove the part of your lung right?

Answer: Yep.

(SR 343)"

THE EVIDENCE AS TO THE TRUE ENVIRONMENTAL CONDITIONS WHEN SCOTT WORKED IN THE PLANT

It has already been demonstrated that, the company owner who wore the OSHA monitor worked on none of the dry grinders and belt sanders. None of the pedestal fans were working, None of the dry grinders and belt sanders were operating. Yet, the OSHA sample still showed a concentration of Cobalt and Tungsten dust, 1/3 of the maximum long term exposure limit from a sample of less than seven hours. What does the record show as to the actual conditions under which Troy Scott worked in comparison to when the OSHA test was being done? What evidence did the Staff Hearing Officer either ignore entirely, or simply fail to consider, in making the decision, that there was never any hazardous concentrations of cobalt or tungsten dust?

THE DISINTERESTED CO-WORKER'S TESTIMONY

Michael Painter, a co-worker, testified under oath that the sanders and grinders with no liquid on them were in use all day, every day. (Record 133) When the pedestal fans were blowing on them, dust was blown into the air. He further testified:

"The dust and grit would get onto my skin everyday, and would actually cause blackish pimples on my back, shoulder and face. After any shift, if I blew my nose the snot would be black with obvious metal dust in it. It got into my hair, and even my ears, so that a q-tip would be black with grit." (Record 133 and 134)

This is entirely consistent with the MSDS which warns of a health hazard from overexposure due to skin contact which "can cause irritation of an allergic skin rash due to cobalt sensitization." (See Record 41) It is uncontradicted that grinders he operated had no liquid to moderate the dust. For Painter the results of over exposure to grit and dust was a skin reaction. This is direct evidence of exposure beyond OSHA PEL limits.

Aaron McCullough swore that his primary function, when Troy Scott was there, was to operate the face sander, another machine with no liquid to moderate the dust. Contrary to the testimony of company employees, this face sander sanded off the cobalt and tungsten grit that adhered to the blade while it was being ground. Contrary to the company manager's testimony, he ran this machine every day, at least six hours per day. Contrary to the testimony of company witnesses, the manual pocket grinder, and belt sander were used on a continuous basis, every day, with no liquid. The three manual pocket grinders on the wall, which the company witness testified had not been in use for almost one year at the time the OSHA test was done, were used at the time Scott worked there, approximately four hours every day with no liquid on them.

(Record 135-138) As for the only exhaust fan on the wall immediately above the face sander, which was his primary work station, he testified:

"I have seen the photos of this fan and it is covered with metal dust when I worked there. The dust covered every surface around this fan. In the photos it has been cleaned up" (Record 137-138)

Troy Scott's testimony was particularly revealing. He testified:

“Q.: When you began wearing a mask (company furnished paper mask) at the end of the usual work day what would that mask look like?

A.: Black.

Q.: Black with what?

A.: Metal and shavings dirt.

Q.: Is that every day?

A.: Every day?

Q.: Were there days were you actually had to change your mask more than once, because they were getting so

A.: Yeah

Q.: Filled up with the..... how often did that happen?

A.: Every once in awhile, once a week maybe.”

(Record 195).

As to the presence of grinding dust, his testimony was as follows:

“Q.: So would it be fair to say that those fans while the plant was in operation, especially on warm days were basically blowing onto various work stations to cool the people down?

A.: Yes, that's right.

Q.: In the process of doing that, what were they doing? to the dust that was being generated off the grinders?

A.: Circulating it.

Q.: Did the dust go just generally out in the large open work area, by the way was this one big room?

A.: Yes. That is yes.

Q.: So you worked in this work area that was just one large room, is that correct?

A.: Yep.

Q.: NO partitions?

A.: No. There was like a hallway but basically one big box.

Q.: When this dust was being generated off the grinders and blown up by the fan okay, what did it look like in the room?

A.: Almost like a haze.

Q.: I want to focus you on photograph number 10 now (Investigative Report Record 22). Can you tell us what photograph number 10 is?

A.: A picture of the exhaust fan.

Q.: I noticed this up there in photograph number 9 also is that right?

A.: Same fan.
Q.: How many exhaust fans were there in this entire building?
A.: That's the only one.
Q.: That's the only one? When this exhaust fan is operating, what is it doing to the dust in the room?
A.: Generally it sucks in the dust that's around it.
Q.: I'd like you to look at photograph number 11. please that's the same fan is that correct?
A.: Yes.
Q.: What is all of that grit and other material that is around that fan?
A.: That's grindings.
Q.: That's metal dust?
A.: Yes.
Q.: Is that the same metal dust and grindings that were that you found in your mask?
A.: Yep.
Q.: At the end of a usual work day there, what basically did you look like?
A.: Pretty dirty. Clothes were black dirty, hands dirty face.
Q.: Did you have grit on your face all over?
A.: Yeah, in your nose, in your ears, fingernails.
Q.: How about your hair, did it get into you hair?
A.: O yeah.
Q.: And were there times, and if so, how often if you coughed something up or if you sneezed. Would you actually have black mucus.
A.: Every time, everybody did.
Q.: What was causing, I guess we will call it "snot", okay? What was causing the snot in your nose to turn black?
A.: breathing in the air in the building." (See Record 200 and 201).

The fan referred to in photograph 9, 10, and 11, is the same fan which the company's manager admitted was being cleaned on a periodic basis, and still gathered the amounts of dust and grit shown in the photographs. Even Stanley Glista, the son of the owner of the son admitted, that there was enough black dust and grit to cause the snot from his nose to become black. (SR 375).

CONCLUSION

The Industrial Commission, as an unbiased fact finder, has the duty to review all the evidence in the record. It commits an abuse of discretion where it "cherry picks" one piece of evidence, out of context, and bases its entire decision thereon. In this case, instead of applying *Gilbert* to reach its decision, the Industrial Commission ignored *Gilbert* to reach its decision. The result of this flawed evaluation, process is that according to the Industrial Commission, the employer gets complete immunity for its total failure to provide either personal protective equipment, or environmental controls, to protect against the known, toxic heavy metal dust, either before or after Troy Scott's exposure.

The compound this legal error; the Court of Appeals applied the "some evidence" standard to the Industrial Commission decision by holding that the single OSHA test is sufficient to support the decision, without making any comment on, or evaluation of, any of the other evidence presented in this record. Where such a factual finding results in a total denial of protection, a comprehensive evaluation of the evidence by the Industrial Commission is necessary and the Court of Appeals, in its de novo consideration of the case, must also evaluate the overall evidence presented. It cannot "bless" the Industrial Commission simply by focusing on one piece of evidence and reciting the rule that "some evidence" is enough. A scintilla of evidence is not enough, when it results in a total nullification of VSSR protection.

PROPOSITION OF LAW II:

The Industrial Commission abuses its discretion where, as a fact finder, it construes safety requirements to negate their effect.

WHAT IS AN ABUSE OF DISCRETION BY THE INDUSTRIAL COMMISSION

Black's Law Dictionary defines "abuse of discretion" as follows:

"Abuse of discretion" is synonymous with a failure to exercise a sound, reasonable and legal discretion.

.....
and it does not imply intentional wrong or bad faith or misconduct, not any reflection on the judge, but means a clearly erroneous conclusion and judgment – one that is clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; and error of law.
a discretion exercised to an end or purpose not justified by and clearly against reason and evidence".

In line with Black's Law Dictionary, in VSSR cases involving the interpretation and application of a regulation, the Ohio Supreme Court has consistently applied three tests for determining an abuse of discretion. The first is whether the Industrial Commission's interpretation or application amounts to a, "rewrite of the rule". See for example *State ex rel. Lamp vs. Croson* (1996) 75 Ohio St. 3d 77. The second is whether the Industrial Commission's interpretation, "negates the effect" of the rule. See *State ex rel. Haines vs. Industrial Commission* (1972) 29 Ohio St. 2d 15, and *State ex rel. Martin Painting and Coating vs. Industrial Commission* (1997) 78 Ohio St. 3d 333. The third is whether the Industrial Commission's interpretation or application, "gives rise to a patently illogical result" See for example *State ex rel. Harris vs. Industrial Commission* (1984) 12 Ohio St. 3d 152 and *State ex rel. United Foundries Inc vs. Industrial Commission* 101 Ohio St 207, 204 Ohio State 704. As the Court observed in *Gilbert*, the purpose of specific safety requirements is to provide reasonable, not absolute safety for employees (See *State ex rel. Harris vs. Industrial Commission* (1984) 12 Ohio State 3d 152).

The Supreme Court has always held that the Industrial Commission does have discretion in its interpretation of regulations so long as that discretion is exercised soundly and within legal bounds. See *Copperweld Steel vs. Industrial Commission* (1944) 142 Ohio St 439, and *State ex rel. Humble vs. Mark Concepts Inc.*, (1979) 60 Ohio State 2d 77. Any application and interpretation of a regulation that denies reasonable protection and safety for an employee is simply an illegal interpretation and cannot be upheld. In terms of the commission's consideration of the facts and evidence before it, the Supreme Court has also held that direct evidence is not necessary to establish a VSSR claim. As stated in *State ex rel. Shelly Co. vs. Steigerwald*, 121 Ohio State 3d 158 2009 Ohio 585 at page 163:

"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 fact finder 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."

This Court, in the case of *State ex rel. Donohoe vs. Industrial Commission*, 130 Ohio St 3d 390, 2011-Ohio-5027, has again reminded the Industrial Commission that

there is no requirement for direct evidence in order for a Claimant to prove a VSSR application.

In that regard, the key language of the Industrial Commission decision in this case, was as follows:

“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.....
In arriving at the conclusion that there was no exposure to an air contaminant the Staff Hearing Officer relies on the OSHA report in file that shows cobalt was below permissible limits. OSHA did not test for tungsten however, the injured worker has not introduced any evidence that this substance, or any other substance existed at levels that require the employer to provide protection.”

Obviously, the Industrial Commission hearing officer was wrong concerning tungsten. OSHA did test for tungsten and it showed as being 1/3 of the OSHA long term permissible limits in the six hour test period. More important, the Staff Hearing Officer, as supported by the Industrial Commission, held that were there is no direct evidence of testing other than OSHA, therefore, Claimant can not prove that he was exposed to levels of dust that require any protection. This means that, absent some prior test, which directly proves excessive levels of dust, there is no way, according to the Staff Hearing Officer, that this violation can ever be proved. Employers who therefore ignore safe practice to periodically test the environment, or their workers are therefore rewarded with a “free pass”. Employers that “stage” OSHA inspections are rewarded with no obligation to protect workers.

Worse yet, both the Industrial Commission and the Magistrate state, as fact, that the conditions when the OSHA test was conducted were identical to those when

Troy Scott worked there. The key statement from the Magistrate was that, “no evidence was presented that would indicate that Country Saw made any changes in the environment in which Relator was working” from when the OSHA test was done. This is blatantly wrong. The exposure conditions under which Troy Scott “normally” worked were like night and day compared to those which were present when the OSHA test was done over six months after he left the plant.

How does the Industrial Commission Staff Hearing Officer explain the proven fact that there was sufficient quantity of toxic hard metal dust in Troy Scott’s lungs to cause him to be totally disabled after only 2 ½ years of exposure at Country Saw & Knife? First, the Staff Hearing Officer assumed that the OSHA test result replicated the conditions under which Troy Scott worked. That assumption has been proven to be wrong. The Staff Hearing Officer then assumed that the OSHA test methodology was proper and reliable. That assumption has been proven to be wrong. Even though the OSHA test results themselves show a level of tungsten and cobalt dust 1/3 the maximum long term exposure level from an only six hour test period, the Staff Hearing Officer assumed no long term over exposure. That assumption is shaky at best. Due to these assumptions, the Staff Hearing Officer concluded that Troy Scott’s total disability must have been a result of “abnormal sensitivity”. Is there any evidence to support this conclusion that Troy Scott suffered from “abnormal sensitivity”? There is none. The actual evidence is to the contrary. The company’s owner suffered lung disease sufficient to require the removal of part of his lung. Troy Scott’s co-worker, Michael Painter, swore under oath:

“The dust and grit would get onto my skin every day and would actually cause blackish pimples on my back

shoulder and face.”

This toxic rash is direct evidence of overexposure as shown by the MSDS for cobalt and tungsten. The eyewitness descriptions of the level of dust in the air when Scott worked there, coupled with the metal grit covering virtually every part of the plant and the only exhaust fan are direct evidence of the actual conditions in the plant. This shows that Troy Scott was not overly sensitive to the long term toxic effects of heavy metal dust, but was instead a part of the “small percentage” of workers, who was sure to suffer from permanent injury or death from overexposure beyond the maximum long term permissible limits as set forth by OSHA.

In this context, it must be understood that the OSHA maximum exposure limits, and the Ohio VSSR regulations recognize that a small percentage of the worker's will suffer permanent injury or death, from exposure beyond those limits. These rules are designed to protect those workers' from permanent injury or death, from such exposures, not to immunize employers from the consequences of disabling or killing “a small percentage” of their workers because of a total failure to provide protection. The Industrial Commission Staff Hearing Officer decision stands this principal on its head. It excuses the company from providing any protection of its workers where only a small percentage will suffer permanent injury or death. This is a perversion of the meaning of the word “normal”. “Normal” does not condone the killing or maiming of a “small percentage” of workers, which can easily be prevented by the use mandated protection equipment.

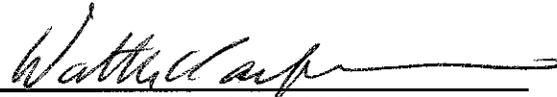
CONCLUSION

The Industrial Commission's interpretation of "normally" allows the company to expose its workers beyond the maximum permissible limit without any protection, so long as only a small percentage of the workers' are killed or maimed. Worst yet, as shown by its decision, where an employer chooses to ignore standard safety practices for periodically testing its work environment or to determine whether it is exposing its workers to impermissible levels of toxic heavy metal dust, that employer is rewarded with immunity from the consequences of a failure to protect its workers. Applying the Industrial Commission's logic, where there is no prior testing there can be no direct proof of concentrations beyond the maximum exposure limits. Therefore, the Claimant has not presented any evidence to show such over exposure. In this case, the risk is not some kind of sprain and strain, or temporary bronchitis. The risk is permanent injury or death. The meaning of "reasonable safety" does not include legally allowing the permanent disability, or death of a small percentage of the work force where the application of reasonable environmental controls or personal protective equipment can prevent them. Otherwise, one is forced to ask, in each instance, what percentage of deaths or disability is "normally" acceptable before any protection must be afforded. Stated otherwise, how many injuries, or deaths must occur before the workplace is considered to be "abnormal" enough to warrant any protection? Certainly, the determination of what is "normal" cannot be made by the Industrial Commission based entirely upon one unreliable OSHA test, done seven months after the injured worker leaves the plant, under entirely different working conditions. In order to justify such a

finding, the Industrial Commission is required, as an unbiased fact finder, to at least explain its decision in more than mere conclusory terms, especially where the decision totally negates the effect of a safety rule. There must be some evaluation of the actual evidence presented. The Industrial Commission decision in this case is a clear abuse of discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing of Merit Brief of Appellant, Troy A.

Scott was served this 5th day of March, 2012 by regular U.S. Mail upon:

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Attorney for Plaintiff

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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FILED
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 SUPREME COURT OF OHIO

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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,

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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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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
2011 OCT 25 PM 1:13
CLERK OF COURTS

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



 Judge G. Gary Wack

29800

Council

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

OCT 25 PM 1:06
CLERK OF COURTS

State ex rel. Troy A. Scott,

Relator,

v.

Industrial Commission of Ohio
and Country Saw & Knife, Inc.,

Respondents.

No. 10AP-713

(REGULAR CALENDAR)

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	:	(REGULAR CALENDAR)
Country Saw & Knife, Inc.,	:	
	:	
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/m³ = 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 contaminants. 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).

29800

RECORD OF PROCEEDINGS

Claim Number: 07-394890
LT-OD-OSIF-COV
PCN: 2083382 Troy A. Scott

Claims Heard: 07-394890

BOYD RUMMELL CARACH & CURR CO LPA
PO BOX 6565
YOUNGSTOWN OH 44501-6565

Date of Diagnosis: 10/23/2007

Risk Number: 908838-0

This claim has been allowed for: **HARD METAL PNEUMOCONIOSIS; OPEN WOUND NASAL SEPTUM; DEPRESSIVE DISORDER; GENERALIZED ANXIETY DISORDER.**

This matter was heard on 11/09/2009 before Staff Hearing Officer Lavonne Meriweather, 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 11/25/2008.
Issue: 1) VSSR - Merits Of Application

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. Kaufman, Mr. Scott and Injured Workers mother, Ashley Wilson
Court Reporter - Ms Mezarias
APPEARANCE FOR THE EMPLOYER: Mr. Barry, Mr. Mercer and Mr. Glick
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

It is the order of the Staff Hearing Officer that the application for specific safety violation, filed 11/25/2007 is denied.

Troy Scott, the Injured Worker, began working Country Saw and Knife, Inc. on July 16, 2004. The Injured Worker's job duties included brazing saw teeth on metal discs and grinding the finished products. The Bureau of Workers' Compensation's Report of Investigation indicates the Injured Worker used electric and pneumatic powered brazers, side dressers. The report goes on define a brazing machine as a machine used to braze carbide teeth onto saw blades. To complete the task of brazing the machine heats up the saw tooth and plate, then welds them into place. The saw dressers and toppers grind the surface of the teeth smooth.

According to the Injured Worker while he was engaged in the aforementioned work activity he was exposed to cobalt and tungsten particles as well as dust. After working for approximately one year the injured worker began to develop difficulty breathing. Thereafter, the Injured Worker sought the care of a pulmonologist. The pulmonologist performed a number of tests but did not give the Injured Worker a final diagnosis. The Injured Worker states the pulmonologist told him his job might be the problems and he should consider wearing a mask. In his affidavit the Injured Worker states he asked for a masks and paper masks were provided for him, but they were not always available when he would need them.

Ultimately the Injured Worker was diagnosed with heavy metal lung disease. The Injured Worker contends that he would not have developed the disease if the employer would have provided him with proper protection as required by

3986

VSSR5

PLAINTIFF'S EXHIBIT
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MAR 26/08
BOYD, RUMMELL, ET AL

27

RECORD OF PROCEEDINGS

Claim Number: 07-394890

Ohio Administrative Code Sections 4123-5-17(F), 4135-5-18(C), (D), (E).
In pertinent part the cited statutory sections read as follows:

4123:1-5-01 Scope and definitions.

(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 approve 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.

4123:1-5-18 Control of air contaminants.

(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.

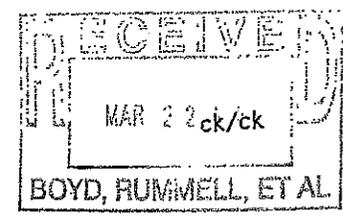
Each exhaust or ventilating fan located less than seven feet above the floor normal working level shall be guarded.

- (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.

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RECORD OF PROCEEDINGS

Claim Number: 07-394890

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.

It is the employer's position that the injured worker was not exposed to air contaminants as defined in the Ohio Administrative Code. Therefore, the employer had no duty to minimize the exposure. The employer's position is based on the definition of air contaminants and hazardous concentrations as set forth in Ohio Administrative Code Section 4123:1-5-01(4) and 4123:1-5-01(74) that read as follows:

(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.

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 on 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 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

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ROYD, RUMMELL, ET AL

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Claim Number: 07-394890

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 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 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.

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

Typed By: ck
Date Typed: 03/18/2010

Lavonne Meriweather
Staff Hearing Officer

Findings Mailed: 03/20/2010

Electronically signed by
Lavonne Meriweather

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.

07-394890
Troy A. Scott
760 Klinger Ave Apt C
Alliance OH 44601-1583

ID No: 14780-90
Dean R Wagner
1 Cascade Plz Ste 1000
Akron OH 44308-1111

ID No: 20080-91
Boyd Rummell Carach & Curr Co LPA
PO Box 6565
Youngstown OH 44501-6565

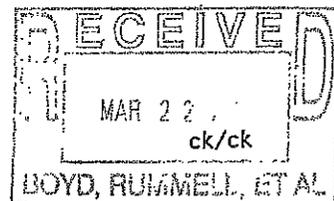
Risk No: 908838-0
Country Saw & Knife Inc
PO Box 887
Salem OH 44460-0887

ID No: 420-80
Spooner Incorporated
28605 Ranney Pkwy
Westlake OH 44145-1163

ID No: 20718-91
Fitch, Kendall & Assoc.
PO Box 590
Salem OH 44460-0590

BWC, LAW DIRECTOR

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RECORD OF PROCEEDINGS

Claim Number: 07-394890

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).

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The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-394890
LT-OD-OSIF-COV
PCN: 2083382 Troy A. Scott

Claims Heard: 07-394890

BOYD RUMMELL CARACH & CURR CO LPA
PO BOX 6565
YOUNGSTOWN OH 44501-6565

Date of Diagnosis: 10/23/2007

Risk Number: 908838-0

This claim has been allowed for: **HARD METAL PNEUMOCONIOSIS; OPEN WOUND
NASAL SEPTUM; DEPRESSIVE DISORDER; GENERALIZED ANXIETY DISORDER.**

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

IC-8 App For Additional Award For VSSR - Non Fatal filed by Injured Worker
on 11/25/2008.
Issue: 1) VSSR - Merits Of Application

It is hereby ordered that the Motion for Rehearing filed 04/02/2010 be
denied. The Injured Worker has not submitted any new and relevant evidence
nor shown that the order mailed 03/20/2010 was based on an obvious mistake
of fact or on a clear mistake of law.

Typed By: plv
Date Typed: 05/04/2010

B. Smith
Staff Hearing Officer

Findings Mailed: 05/07/2010

Electronically signed by
B. Smith

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

07-394890
Troy A. Scott
537 1st St
Alliance OH 44601-1891

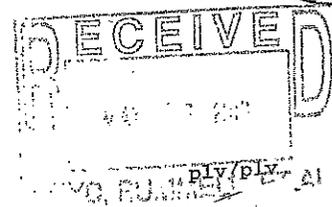
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VSSR4



Page 1



The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

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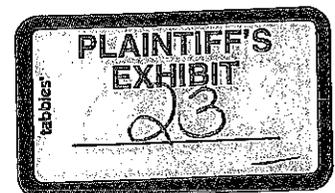
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DIVISION OF WORKERS' COMPENSATION

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- (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.
- (5) "Air-lift hammer": (see "Gravity hammers").
- (6) "Angle of repose": the greatest angle above the horizontal plane at which unexcavated material will lie without sliding.
- (7) "Anti-repeat": the part of the clutch/brake control system designed to limit a mechanical power press to a single stroke if the tripping means is held on the operating position. Anti-repeat requires release of all tripping mechanisms before another stroke can be initiated. Anti-repeat is also called "single stroke reset" or "reset circuit".
- (8) "Approved": accepted or certified by a nationally recognized testing agency, such as "Underwriters' Laboratories," "Factory Mutual Engineering Corporation," or an authorized governmental agency.
- (9) "Approved storage facility (magazine)": a facility for the storage of explosive materials covered by a license or permit issued under authority of the appropriate governmental agencies.
- (10) "Bearer": a horizontal member of a scaffold upon which the platform rests and which may be supported by ledgers.
- (11) "Blast area": the area in which explosives loading and blasting operations are being conducted.
- (12) "Blaster": a person qualified to be in charge of and responsible for the loading and firing of a blast.
- (13) "Blasting agent": any material or mixture consisting of a fuel and oxidizer used for blasting, but not classified as explosives, and in which more of the ingredients are classified as an explosive provided the finished (mixed) product cannot be detonated with a No. 8 test blasting cap when unconfined.
- (14) "Blasting cap": (see "Detonator").
- (15) "Board-type drop hammer": (see "Gravity hammers").
- (16) "Boatswain's chair": a seat supported by slings attached to a suspended rope, designed to accommodate one employee in a sitting position.



- (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.
- (75) "Head protection devices":
- (a) "Bump cap or hat": a thin-shelled plastic headgear worn to provide protection to the head from bumps or lacerations but does not meet the requirements for protective helmets.
 - (b) "Crown straps": that part of the suspension which passes over the head.
 - (c) "Hair enclosure": a hat or cap (other than a protective helmet or bump cap) or a hairnet specifically designed to protect the wearer from entanglement in moving parts of machines, equipment, or from exposure to sparks, hot metal, or ignition.
 - (d) "Protective helmet": a rigid headgear also known as a safety or hard hat, or as a safety or hard cap, that is worn to provide protection for the head, or portions thereof, against impact, flying articles, or electric shock, or any combination thereof, and which is held in place by a suitable suspension.
 - (e) "Suspension": the internal cradle of a protective helmet or bump cap which holds it in place on the head and is made up of the headband and crown straps.
- (76) "Hood": that part of an exhaust system into which the contaminated air or dust, fumes, mist, vapor, or gas first enters.
- (77) "Hot line (live line) tools": those tools which are especially designed for work on energized high voltage conductors and equipment.
- (78) "Inch": an intermittent motion imparted to the slide (on mechanical power presses using part revolution clutches) by momentary operation of the inch operating means.
- (79) "Kickouts": accidental release or failure of a shore or brace used in trenching.
- (80) "Ladder":
- (a) "Extension ladder": a portable ladder, adjustable in length. It consists of two or more sections traveling in guides or brackets so arranged as to permit length adjustment. Its size is designated by the sum length of the sections measured along the side rails.

meeting the standard are not considered eye protection.

(ii) Frames shall bear the trademark, identifying the manufacturer, on both front and temples.

(e) **Lens marking — glass or plastic.**

Each lens shall be distinctly marked in a permanent legible manner with the manufacturer's monogram. Such marking shall be so placed as not to interfere with the vision of the wearer. Each filter lens shall be marked with the shade designation. Each glass filter lens shall be marked with the letter "H" to indicate treatment for impact resistance.

(5) **Laser protection.**

(a) The employer shall provide laser safety goggles which will protect the employee from direct or reflected laser light equal to or greater than 0.005 watts (five milliwatts). The laser safety goggles shall provide protection for the specific wavelength of the laser and be of optical density (O.D.) adequate for the energy involved. The appendix to this rule lists the maximum power or energy density for which adequate protection is afforded by glasses of optical densities from five through eight. Output levels falling between lines in this table shall require the higher density.

(b) **Labeling of eye protection.**

All protective goggles shall bear a label identifying the following data:

- (i) The laser wavelengths for which use is intended;
- (ii) The optical density of those wavelengths;
- (iii) The visible light transmission.

(E) **Foot (toe) protection.**

Foot protection shall be made available by the employer and shall be worn by the employee where an employee is exposed to machinery or equipment that presents a foot hazard or where an employee is handling material which presents a foot hazard.

(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

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4121:1-5-17(G)(2)(a)(i)(c)

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.

(G) Head and hair protection.

(1) Responsibility.

(a) Employer.

- (i) Whenever employees are required to be present where the potential hazards to their head exists from falling or flying objects, or from physical contact with rigid objects, or from exposures where there is a risk of injury from electric shock, employers shall provide employees with suitable protective headgear.
- (ii) When head protection is required employers shall provide accessories designed for use with the headgear.
- (iii) Damaged parts of protective headgear shall be replaced. Protective helmets and bump caps or parts thereof and hair enclosures shall be sanitized before reissue.

(b) Employees.

Employees shall not alter any head or hair protective equipment and shall use such equipment in accordance with instructions and training received.

(2) Protective helmets.

(a) Classes of helmets.

- (i) Protective helmets as defined in paragraph (B) of rule 4121:1-5-01 of the Administrative Code shall be of the following classes:
- (a) Class A — limited voltage protection.
- (b) Class B — high voltage protection.
- (c) Class C — no voltage.

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Respirator Selection Guide

Hazard	Respirator
OXYGEN DEFICIENCY	Self-contained breathing apparatus. Hose mask with blower. Combination air-line respirator with auxiliary self-contained air supply or an air-storage receiver with alarm.
GAS AND VAPOR CONTAMINANTS Immediately dangerous to life or health.	Self-contained breathing apparatus. Hose mask with blower. Air-purifying, full facepiece respirator with chemical canister (gas mask). Self-rescue mouthpiece respirator (for escape only). Combination air-line respirator with auxiliary self-contained air supply or an air-storage receiver with alarm.
Not immediately dangerous to life or health.	Air-line respirator. Hose mask without blower. Air-purifying, half-mask or mouth-piece respirator with chemical cartridge.
PARTICULATE CONTAMINANTS Immediately dangerous to life or health.	Self-contained breathing apparatus. Hose mask with blower. Air-purifying, full facepiece respirator with appropriate filter. Self-rescue mouthpiece respirator (for escape only). Combination air-line respirator with auxiliary self-contained air supply or an air-storage receiver with alarm.
Not immediately dangerous to life or health.	Air-purifying, half-mask or mouth-piece respirator with filter pad or cartridge. Air-line respirator. Air-line abrasive-blasting respirator. Hose mask without blower.

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**COMBINATION GAS,
VAPOR,
AND PARTICULATE
CONTAMINANTS**

Immediately dangerous to
life or health.

Not immediately dangerous
to life or health.

Self-contained breathing apparatus.

Hose mask with blower.

Air-purifying, full facepiece respirator
with chemical canister and appropri-
ate filter (gas mask with filter).

Self-rescue mouthpiece respirator (for
escape only).

Combination air-line respirator with
auxiliary self-contained air supply or
an air-storage receiver with alarm.

Air-line respirator.

Hose mask without blower.

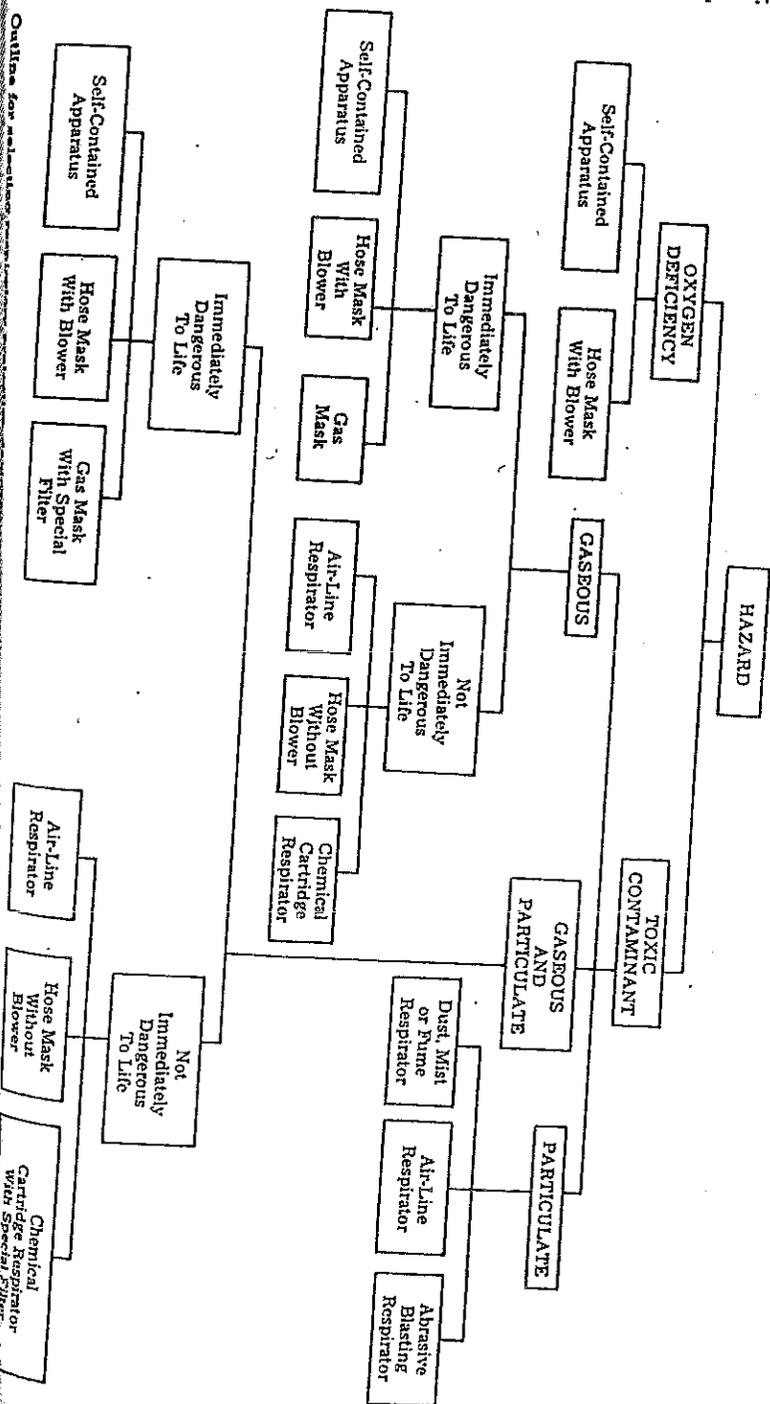
Air-purifying, half-mask or mouth-
piece respirator with chemical cart-
ridge and appropriate filter.

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Effective date: January 1, 1986
Previous effective date: August 1, 1977.



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4121:1-5-18(D)(2)

RULE 4121:1-5-18. CONTROL OF AIR CONTAMINANTS.

(A) Reserved.

(B) Reserved.

(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.

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(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.

Effective date: January 1, 1986.

Previous effective date: August 1, 1977.

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