

ORIGINAL

IN THE SUPREME COURT OF OHIO

TROY A. SCOTT)	CASE NO.: 2011-1922
)	
Appellant,)	Action in Mandamus, Originating
)	in Court of Appeals
VS.)	
)	On Appeal from the Franklin County
INDUSTRIAL COMMISSION)	Court of Appeals, Tenth Appellate
OF OHIO, <u>et al.</u>)	District
)	
Appellees.)	Court of Appeals Case No. 10-AP-713

MERIT BRIEF OF APPELLEE COUNTRY SAW & KNIFE, INC.

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I. STATEMENT OF FACTS:

This is a worker's compensation case arising as an original mandamus action. Troy A. Scott ("Appellant") has an allowed Workers Compensation claim designated as Claim No. 07-394890. Appellant filed an application for an additional award of compensation for violation of specific safety requirement ("VSSR") against Country Saw & Knife, Inc. ("Country Saw" or "Appellee") alleging that Employer violated specific safety requirements regarding respiratory protection that must be provided when air contaminants exist in hazardous concentrations. Appellant contends that the Industrial Commission abused its discretion by denying his application for a VSSR award.

On Appellant's mandamus appeal the Tenth District Magistrate concluded that the Appellant had not demonstrated that the Industrial Commission of Ohio ("Industrial Commission") abused its discretion by denying Appellant's application for an additional award concluding that some evidence supported the Industrial Commission's decision. The Tenth District Court of Appeals denied Appellant's objections to the decision of the Magistrate and denied the requested writ of mandamus.

There was no evidence in the record to support a VSSR award for additional benefits. Appellant presented no evidence to the Industrial Commission of the concentration of cobalt or tungsten to which Appellant was exposed. The only evidence presented at the merit hearing was testing conducted by the United States Department of Labor, Occupational Safety and Health Administration ("OSHA") shortly after Appellant was diagnosed with an occupational illness. The OSHA testing showed levels of cobalt and tungsten within the permissible limits allowed by published regulations. Further, Appellant never has presented any evidence showing hazardous concentrations of cobalt or tungsten that exceeded OSHA limits. A VSSR award should not be automatically granted because a claimant has an occupational disease claim allowed by the Bureau of Workers' Compensation ("BWC").

Appellant began working for Country Saw in July 2004. *Stipulated Record* (hereinafter “*Stip R.*” 208).¹ Appellant was employed as a brazer, a position which involved soldering carbide teeth on saw blades on a semi-automatic brazing machine. (*Stip R.* 195 and 212). After a year and a half, Appellant developed what was initially diagnosed as bronchitis, and subsequently was diagnosed as hard metal lung disease (*Stip R.* 191). Appellant was specifically told by his pulmonologist that his lung problem was caused by exposure to cobalt and tungsten. (*Stip R.* 212-14). Further, Appellant’s Doctor confirmed that some individuals have a particular sensitivity or hypersensitivity to cobalt or tungsten unrelated to the length of exposure. (*Stip R.* 214-215). Appellant acknowledged that Dr. Chapman told him that an important aspect of hard metal lung disease is that it could occur after a short duration of exposure. (*Stip R.* 215-216).

Appellant has an allowed workers’ compensation claim which carries a date of diagnosis of October 23, 2007, and has been recognized for hard metal pneumoconiosis. (*Stip R.* 396). Appellant subsequently filed the VSSR application seeking to receive additional monies from Country Saw as a penalty for violations of specific safety requirements. Appellant’s application went to hearing on November 9, 2009, and a complete copy of the transcript of that hearing is contained in the Stipulated Records. (*Stip R.* 171-395).

A significant portion of the argument at the merit hearing focused on the general conditions in the Country Saw facility. Country Saw is a family owned business that sharpens saw blades and puts carbide teeth on saw blades. The notion expressed by Appellant that Country Saw would sacrifice individuals by deliberately ignoring all safety precautions is without merit. Country Saw is a family business made up of fathers, sons, and nephews’ of the owners. Four of Country Saw’s five witnesses

¹ The Merit Hearing Transcript is contained in the Stipulated Record and all references will be to the pages of the Stipulated Record.

were either owner's or relatives of owners (*Stip R. 306, 354-55, 367*). Why would they imperil their own health with the approach that they can sacrifice a small percentage of individuals by ignoring safety regulations?

OSHA investigators conducted an air quality assessment at the Country Saw facility on April 16, 2008. OSHA wanted to determine the levels of cobalt and tungsten in the facility. (*Stip R. 44-45*). The results of the OSHA air sampling data and testing are attached to the August 6, 2008 cover letter from Rob Medlock, the OSHA Area Director. (*Stip R. 44, 45*). As indicated in Mr. Medlock's letter, the OSHA air sampling performed shortly after Appellant's diagnosis, found no evidence of exposure levels above permissible exposure limits for cobalt and tungsten. The air sampling revealed cobalt levels of only .03 mg/m³ (milligrams per cubic meter of air) with the PEL-permissible exposure limit defined as 0.1 mg/m³. Thus, the OSHA testing established that cobalt levels were well below the OSHA permissible exposure limit. (*Stip R. 45*). Similarly, OSHA tested for tungsten and found a level of 0.33 mg/m³. As noted in Appellant's brief the AGICH Industry maximum concentration for tungsten was 3.0 mg/m³. Appellant Brief, p. 2. Thus the OSHA report established that neither cobalt or tungsten exceeded a permissible exposure limit. (*Stip R. 45*).

Following the hearing, the Industrial Commission Staff Hearing Officer issued an order denying Appellant's VSSR application. *Stip R. 396-99*. Based upon the testimony of the witnesses who appeared at the hearing, and consideration of the evidence which had been presented, the Staff Hearing Officers made the following factual findings:

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 this 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 the file that shows cobalt was below the permissible limits. OSHA did not test for tungsten (sic); 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.

(*Stip R. 398*) (emphasis added).

The Staff Hearing Officer found no violation of O.A.C. 4123:1-5-17(F). She correctly concluded that the analytical framework of the code sections provide that an employer has a duty to minimize exposure to air contaminants with respiratory equipment per the applicable Administrative Code sections when they are in hazardous concentrations i.e. known to be in excess of those which would not normally result in injury to an employee's health. The conclusion was that the OSHA testing established that the cobalt was below 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." *Id.* As acknowledged by Appellant in his brief, the tungsten level was tested and found to be below permissible exposure levels also (*Stip R. 317*) (Appellant Brief p. 2).

The Staff Hearing Officer's order further advised that a motion for rehearing as permitted by O.A.C. 4123-3-20(C) could be filed within 30 days of receipt of his order. (*Stip R. 399*) Appellant subsequently filed a Motion for Rehearing (*Stip R. 401*). In his attached memorandum, Appellant argued that the Staff Hearing Officer's order was inappropriately based upon OSHA air sampling performed after the date of Appellant's diagnosis. Country Saw filed a response to Appellant's Motion for Rehearing, arguing that rehearing was not justified either on substantive or procedural grounds, since Appellant's Motion for Rehearing did not meet the criteria specified in O.A.C. 4121-3-20(C). (*Stip R. 411-18*).

The Industrial Commission, by means of an order issued by a different Staff Hearing Officer, denied Appellant's Request for Rehearing in an Order mailed May 7, 2010 (*Stip R. 420*). The Staff Hearing Officer found that Appellant had not submitted any new and relevant evidence and that no showing had been made that the Staff Hearing Officer's order was based upon an obvious mistake of fact or law. (*Stip R. 420*).

II. LAW AND ARGUMENT:

The extraordinary writ of mandamus is provided in only limited circumstances. "For mandamus to issue, it must be demonstrated that: (1) the Appellant has a clear legal right to the relief requested; (2) respondents are under a clear legal duty to perform the acts requested; and (3) Appellant has no plain and adequate remedy at law." *State ex rel. Stafford v. Indus. Comm.* (1989) 47 Ohio St.3d 76, 77-78, 547 N.E.2d 1171.

Mandamus relief may only be issued if Appellant has demonstrated a clear legal right to the relief sought. *State, ex rel. Hughes v. Goodyear Tire & Rubber Co.* (1986) 26 Ohio St.3d 71, 498 N.E. 2d 459. To show a clear legal right, the Appellant must demonstrate that the Industrial Commission abused its discretion by entering an order which is not supported by any evidence in the record. *State, ex rel. Hutton v. Indus. Comm.* (1972) 29 Ohio St.2d 9, 278 N.E. 2d 34. If the record contains some evidence to support the decision of the Commission, Appellant is not entitled to mandamus relief as there is no abuse of discretion. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56, 58, 505 N.E.2d 962. If the Industrial Commission weighs the evidence and finds that a specific safety requirement was or was not violated, a court may not substitute its judgment for that of the Industrial Commission absent a showing of abuse of discretion. *State, ex rel Teeco v. Ind. Comm.*(1981) 68 Ohio St.2d 165.

The burden is on the Appellant to show this abuse of discretion. *State, ex rel. Morris v. Indus. Comm.* (1984) 14 Ohio St. 3d 38, 39, 471 N.E. 2d 465. Further the Supreme Court has been clear that an abuse of discretion “implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency.” *State, ex rel. Shafer v. Ohio Turnpike Comm.* (1953) 159 Ohio St. 581, 590. Where the record contains some evidence to support the Commission’s findings, there has been no abuse of discretion, and mandamus relief will not lie. *State, ex rel. Milburn v. Indus. Comm.* (1986) Ohio St.3d 119, 498 N.E.2d 440.

In a VSSR proceeding, the claimant has the burden of proving a VSSR by a preponderance of the evidence. The Industrial Commission alone is responsible for evaluating the weight and credibility of the evidence. The interpretation of regulations under the workers’ compensation law is within the sound discretion of the Industrial Commission. *State, ex rel. Allied Wheel Products, Inc. v. Ind. Comm.* (1956) 166 Ohio St. 47. Furthermore, since a VSSR claim is a penalty imposed on the employer, 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. See *State, ex rel. Gilbert v. Indus. Comm.* (2007) 116 Ohio St.3d 243; *State, ex rel. Burton*, (1989) 46 Ohio St.3d at 172, 545 N.E. 2d 1216.

In order to establish a VSSR claim, a claimant must establish four elements.

Before the commission makes an additional award, a claimant must show that the safety requirement was specific and applicable, that the employer was not in compliance and that such noncompliance caused the injury. If any of these requirements is not met, the employer is not liable for an additional award.

State, ex rel. Whitman v. Industrial Commission of Ohio (1936) 131 Ohio St. 375;

Thus, the claimant must establish by evidence presented at the merit hearing that four elements are satisfied: (1) The safety requirement is specific; (2) The safety requirement is

applicable; (3) The Employer was not in compliance with the specific safety requirement; and (4) The Employer's failure to comply with the specific safety requirement caused Claimant's injury.

Country Saw did not dispute elements one and two at the hearing. However, the Industrial Commission hearing officer after considering all the evidence concluded that Appellant failed to establish that elements' three and four were satisfied. Appellant failed to establish that air contaminants existed in hazardous concentrations as required by the safety requirement in order for respiratory protection to have to be provided. Thus, under the long standing statutory analytical framework the Employer had not violated the specific safety requirement. Although not required by law, Country Saw always had breathing masks available for use (*Stip R.* 293, 354, 360). Also, the Industrial Commission hearing officer concluded that Appellant failed to establish that the proximate cause of his occupational disease is exposure to toxic substances in concentrations in excess of those that would not normally result in an injury to an employee's health. *See State ex rel. Haines v. Indus. Comm.* (1972) 29 Ohio St. 2d 15.

- A. Counterstatement to Appellant's Proposition of Law No. 1. Where the Industrial Commission's decision is based on some evidence that the employer did not violate a specific safety rule there is no abuse of discretion.

The Industrial Commission's order denying Appellant's VSSR application is appropriately supported by "some evidence," namely, the OSHA test results, as well as the other evidence cited by the Staff Hearing Officer. In fact, the Staff Hearing Officer's order was supported by the only objective evidence contained in the file relevant to the presence of "air contaminants."

The safety provision which is the focus of Appellant's argument is 4123:1-5-17(F), "Respiratory Protection." That section provides, in relevant 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 ...

O.A.C. 4123:1-5-17(F). “Air contaminants,” in turn, are defined in § 4121:1-5-01(4) as follows:

“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.

O.A.C. 4121:1-5-01(B)(4). Finally, “hazardous concentrations” are defined by the regulations as follows:

“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.

O.A.C 4121:1-5-01(B)(74).

The Staff Hearing Officer found that “air contaminants” within the meaning of O.A.C. 4121:1-5-17 were not present, there was no exposure to “air contaminants” and therefore the requirement for respiratory protection was not triggered and no violation of the specific safety regulations cited had occurred. The Staff Hearing Officer specifically concluded that Appellant only showed that he was exposed to a toxic substance and as a result developed an occupational disease. *Stip R. 398*. The Staff Hearing Officer further concluded that “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 an injury to an employee’s health. Such exposure must be shown because the statute requires exposure to hazardous concentrations of a toxic substance before the toxic substance can be categorized as air contaminant.” (*Stip R.398*).

Moreover, the Court of Appeals in its decision holding that the Industrial Commission did not abuse its discretion stated:

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.

Magistrate Decision, 5-17-11, p.6.

Appellant's expert, Steve Stock ("Stock") tried to characterize the OSHA test as unreliable. This characterization was inaccurate. Stock acknowledged that OSHA goes to a facility when it believes there is a problem and the facility was on OSHA's "radar." (*Stip R 255*). OSHA went to the Country Saw facility testing for the air contaminants it thought were the problem, in this case cobalt and tungsten. (*Stip R. 260-61*). Stock acknowledged that the Country Saw facility was not required by law to do air testing (*Stip R. 257-58*). Stock, a former OSHA employee, had not done OSHA air testing. He was in the directorate of construction and investigated industrial accounts (*Stip R. 260*). Stock acknowledged that OSHA PEL's (permissible exposure limits) are the levels an employer should be concerned about. (*Stip R. 261*). Stock acknowledged that the OSHA cobalt testing turned up low levels well below the PEL. (*Stip R. 261*).

Testing was conducted by OSHA with an OSHA investigator present in the Country Saw facility the entire day. (*Stip R. 328-29*). As Stock testified, OSHA comes to a facility when there is a problem that puts the facility on its radar. (*Stip R. 260-61*). OSHA's mission is to protect the workers and locate a problem if it exists. It makes no sense that OSHA would not conduct the necessary tests in a competent, thorough manner utilizing acceptable testing techniques and protocols to locate a potential problem. Appellant's assertion, unsupported by any fact in the record, that the OSHA test was "staged" by Country Saw facility is without merit. (Appellant Brief, p. 26).

Moreover, no evidence is contained in the record which would demonstrate the presence of hazardous concentrations or any air contaminant known to Country Saw to be in excess of those which would not normally result in injuries to an employee's health. In fact, the evidence demonstrates the opposite. The Staff Hearing Officer specifically relied upon the objective test performed by OSHA, an independent governmental agency. (*Stip R.* 398). Those test results, in turn, demonstrate concentrations of cobalt and tungsten which are only a fraction of OSHA permissible exposure levels or the exposure levels contained on the MSDS sheets.

In *Gilbert*, the claimant cleaned commercial exhaust systems using a chemical stripper he sprayed on the exhaust system. Gilbert's doctor diagnosed him with a lung disease likely due to exposure to the stripper. Gilbert filed a VSSR claim arguing that employer failed to supply respiratory protection required by OAC 4123:1-5-17(F). An OSHA test conducted after Gilbert's diagnosis established that the amount of air contaminants were below permissible exposure limits defined by OSHA. Gilbert argued that the OSHA test performed after his diagnosis was irrelevant, he cited the Material Safety Data Sheets that said that the air contaminants could be harmful and he argued that his doctor's report established that he had an occupational disease caused by chemical exposure. These are the exact same arguments Appellant makes in this case.

Gilbert's argument failed, as does Appellant's, because despite the fact the Supreme Court in *Gilbert* outlined the exact analysis to follow to allow such a VSSR claim, the Appellant has failed to provide the evidence necessary to establish that he was entitled to be awarded a VSSR claim.

The *Gilbert* Court stressed the point that the definition of "hazardous concentration" requires concentrations in excess of those that would not normally cause injury. The Court in *Gilbert* stated as follows:

Gilbert's position is essentially this: I have an occupational disease due to chemical exposure; ergo, the level of exposure was hazardous. 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.

State ex rel v. Gilbert at 246.

The *Gilbert* Court noted that such logic, i.e. the fact an injury occurred means a VSSR exists, had been rejected previously by the Ohio Supreme Court. The *Gilbert* Court stated:

The claimant's position reflect 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 violation and (2) all reasonable doubts as to a specific safety requirement's applicability must be resolved in the employer's favor. (citation omitted)

* * *

To hold that the mere presence of an occupational disease establishes that a VSSR occurred would in effect impose strict liability on an employer, contrary to a long line of cases. See, e.g., *State ex rel. M.T.D. Prods. V. Stebbins* (1975) 43 Ohio St.2d 114, 72 O.O.2d 63, 330 N.E.2d 904; *State ex rel. Taylor v. Indus. Comm.* (1994) 70 Ohio St.3d 445, 639 N.E.2d 101; *State ex rel. S & Z Tool and Die Co. v. Indus. Comm.* (1999) 84 Ohio St.3d 288, 703 N.E.2d 779. We have recognized "the practical impossibility of guaranteeing that a device will protect against all contingencies." *State ex rel. Jeep Corp. V. Indus. Comm.* (1989) 42 Ohio St.3d 83, 84, 537 N.E.2d 215, citing *State ex rel. Harris v. Indus. Comm.* (1984) 12 Ohio St.3d 152, 12 OBR 223, 465 N.E.2d 1286. The purpose of specific safety requirements is to "provid[e] reasonable, not absolute safety for employees."

* * *

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 re. 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.

Gilbert at 246-47.

Finally, Appellant’s Argument that the conditions in the Country Saw facility were not the same when the OSHA test was conducted and when Appellant worked there is without merit and was rejected by the Magistrate as baseless. Magistrate’s Decision, 5-17-11, p. 14. Mercer testified, that on the day that the OSHA test was conducted all necessary machines were running. (*Stip R.* 311-12). And as noted by the Magistrate, “no evidence was presented that would indicate that Country Saw made any changes in the environment in which relator had been working.” *Id.*

- B. Counterstatement to Appellant’s Proposition of Law No. 2. The Commission alone is permitted to weigh the evidence presented, an action in mandamus may not seek to re-weigh the evidence and application of the specific safety rule as written and applied by previous Court decisions is not an abuse of discretion.

Appellant asks that this Court reconsider and reinterpret the facts essentially arguing that the presence of cobalt and tungsten in the facility due to the saw blade sharpening process should make Appellee liable for the VSSR. What Appellant ignores is the existing analytical framework that an employer is responsible for a VSSR if an air contaminant exists in hazardous concentrations. Appellant did not submit any evidence that cobalt or tungsten existed in hazardous concentrations.

Throughout Appellant's brief he acknowledges that the exposure levels in the Country Saw facility were below the OSHA PEL and the PEL mentioned on the MSDS sheets.

In this case, Employer relied on the OSHA testing done shortly after Appellant became ill to establish that the levels of cobalt and tungsten in the Employer's shop were well within OSHA permissible exposure limits. It is important to note that for the test OSHA conducted it appeared at Country Saw facility unannounced and outfitted an employee with a monitoring filter device that was worn for 6 hours by the individual operating the same machine that Appellant operated. (*Stip R. 292-94.*) The OSHA's representative remained on site while the test was conducted. (*Stip R. 329.*) The August 2008 report established that the PEL for cobalt was .01 milligrams per cubic meter (mg/m^3) and the tested level in Country Saw's shop was .03 mg/m^3 , well below the PEL. The obvious conclusion is there were no air contaminants in hazardous concentrations.

Appellants assertion that Country Saw never tested air quality was inaccurate. Steve Mercer, the safety compliance officer, arranged for a company to test the Country Saw facility for cobalt and tungsten in 1993. The results were well below prescribed limits (*Stip R. 288-90*). Since the business operations of Country Saw had not changed in twenty-years Country Saw concluded there was no need for re-testing. (*Stip R. 307*). Such testing is not required by State or Federal Law and for a small business struggling to survive, the cost would be difficult to bear.

Appellant states on page 3 of his brief:

The evidence overwhelmingly shows that the 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 evidence showed no such thing. Steve Mercer had the facility independently tested in 1993 for cobalt and tungsten. The test results for both were well below the exposure limits. (*Stip R. 287-290*). Steve Mercer further testified that liquid coolant was used on the machines to suppress grinding dust. (SR 309). Steve Mercer, as was the whole company, was, concerned with cobalt and tungsten in hazardous concentrations but did not believe such concentrations existed. (*Stip R. 310*).

The policy advanced by Appellant is that if there is a potential contaminant in use in a facility then the employer should conduct tests to establish exposure levels without any indication of a problem in a facility. Most employers, like Country Saw, are small outfits with limited resources. Ignoring the current regulatory framework of requiring respiratory protection when air contaminants exist in hazardous concentrations and requiring employers to conduct testing of their facilities creates an unbearable financial burden for the employer. When should it test? For what? How often?

The affidavits of Michael Painter, and Aaron McCullough cited in Appellant's brief should be considered cautiously, since the affiants were not called to testify at the merit hearing and were not subject to cross examination by Country Saw's counsel.

The remainder of Appellant's arguments are equally unconvincing. Appellant essentially argues that the Staff Hearing Officer should not have relied upon the OSHA air sampling data as "some evidence" because the testing occurred under conditions controlled by the employer. This is an argument with no factual basis and is largely an argument going to the relative weight placed upon the OSHA test results. A decision that is left to the Industrial Commission by Ohio law.

Appellant disagrees with the objective OSHA air sampling results relied upon by the Staff Hearing Officer and argues that the Staff Hearing Officer should have relied upon other evidence to determine the issue concerning the presence of "air contaminants." Like the objections to the OSHA

air sampling results, Appellant's additional arguments lack any merit. In particular, Appellant contends that the presence of "air contaminants" referred to as dust and mist must be conclusively accepted. Such an argument makes little sense. Air contaminants must exist in hazardous concentrations. As previously noted, the definition of "hazardous concentrations" requires concentrations "which are **known to be in excess of those which would not normally result in injury to employee's health.**" O.A.C. 4121 : 1-5-01(B)(74) (emphasis added). This was not established by Appellant.

The testimony established that Appellant was the first and only Country Saw employee who has ever filed a Worker's Compensation claim alleging a work-related respiratory condition. (*Stip R. 243-345*). Appellant's assertion that Appellant was not the only person who worked at Country Saw that had respiratory problems pointing to the President of Country Saw, Inc., Stanley Glista ("Glista") as also having respiratory problems, is inaccurate.

Appellant incompletely and inaccurately cites the testimony of Stanley Glista to try to establish he had lung problems related to his work.

Appellant's quoted Stanley Glista's at p. 18-19 of his brief as follows:

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)"

Incredibly, the Appellant omits a critical question and answer. The omitted question was as

follows:

Question: When did they operate on your lungs?

Answer: Couple of years ago.

OMITTED Question: What did they operate for?

OMITTED Answer: Because they insisted I had lung cancer and I didn't. All of my tests showed negative, and they insisted, and I should never have let them. I almost didn't make it.

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

Answer: Yeah.

(SR 342)

Contrary to Appellant's contention, the truth of Stanley Glista's condition came out on redirect examination:

Q. Tell us what this is about. Feel free to talk.

A. They thought I had a stroke because I got dizzy at the golf course. They took me in, did EKGs. Right away they want do a lung x-ray. They come back out and said, "There's a wee little spot at the lower part of your lung" --

Q. "Spot" being what? Are they saying it's cancer?

A. Could be cancerous. They said, "You should go to another specialist and have it looked at."

So I went and they tried to dig it – get a biopsy with a tube. They cut me and probed and couldn't get it because it was behind a rib. They said, "We need to get this out of there. We need to get this out of there."

I said, "I don't know."

They said, "Yeah, we need to."

So I said, "All right."

It's supposed to be an easy operation. They was just going to cut me, take that little piece out. Then I almost died.

Q. Complications related to surgery, unrelated to the lung?

A. No, they gave me morphine, almost shut me down. I was in intensive care for nine days.

Q. The biopsy came back what?

A. Everything is negative. I have nothing, no metal in my lungs, no nothing.

(*Stip R. 345-46*) (emphasis added).

The fact that Appellant developed a respiratory condition, whether based upon his individual peculiar susceptibility or other factors, provides no basis to impute knowledge of hazardous concentrations of air contaminants, dust or mist to Country Saw prior to or after the time of Appellant's diagnosis.

Appellant's interpretation of *State, ex rel. Steigerwald*, 121 Ohio St. 3d 158 is wrong. The *Steigerwald* case supports the result the Staff Hearing Officer reached in this case. David J. *Steigerwald*, the deceased employee was killed when a truck backed over him. The VSSR claim was based on a specific safety requirement requiring a reverse signal alarm be audible when a vehicle was backing up. No one witnessed the accident and no one could testify if the alarm was working at the time of the accident. Post accident vehicle inspection reports stated that the alarm was not working. While the *Steigerwald* Court stated it does not require direct evidence of a VSSR, it went on to rely on the post accident report to establish a breach of the safety requirement. In the case at bar, the post diagnosis OSHA testing was relied on to conclude the safety requirement was not violated.

III. CONCLUSION

The Commission order denying the VSSR claim is not an abuse of discretion. The Commission supported its order with evidence from the OSHA test report. Likewise, the record is devoid of evidence of "hazardous exposures" which would have triggered the requirement for respiratory protection. Appellant's arguments for mandamus relief would have the Court engage in an impermissible re-weighing of the evidence.

Therefore, Appellee, Country Saw & Knife, Inc. would respectfully request that the decision of the Commission and the Tenth District Court of Appeals be upheld and the writ of mandamus be denied.

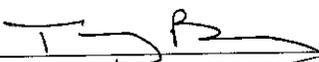
Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing was sent this 5th day of April, 2012, via regular U.S. Mail, postage prepaid, to Walter Kaufmann, Huntington Bank Building, P.O. Box 6565, Youngstown, Ohio 44501-6565; and Colleen Erdman, Esq., Assistant Attorney General, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215.



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