ORIGINAL

In the

Supreme Court of Ohio

STATE ex rel. TROY A. SCOTT,	:	Case No. 2011-1922
Relator-Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
INDUSTRIAL COMMISSION OF OHIO AND COUNTRY SAW & KNIFE, INC., et al.,	:	Court of Appeals Case No. 10AP-713
Respondents-Appellees.	:	

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FILED
APR 26 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 4

Appellee Industrial Commission's Proposition of Law No. 1: 4

An injured worker is not entitled to a VSSR award where he is unable to meet his burden of proof 4

Appellee Industrial Commission's Proposition of Law No. 2: 7

The commission does not abuse its discretion where evidence supports the decision. 7

CONCLUSION 8

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

Cases

State ex rel. A-F Industrial v. Indus. Comm.
26 Ohio St.3d 136 (1986) 4

State ex rel. Allerton v. Indus. Comm.
69 Ohio St.3d 96 (1982) 7

State ex rel. Allied Wheel Products, Inc. v. Indus. Comm.
166 Ohio St. 47 6

State ex rel. Athey v. Indus. Comm.
89 Ohio St.3d 473 (2000) 7

State ex rel. Burley v. Coil Packaging, Inc.
31 Ohio St.3d 18 (1987) 8

State ex rel. Burton v. Indus. Comm.
46 Ohio St.3d 170 (1987) 8

State ex rel. Gilbert v. Indus.Comm.
116 Ohio St.3d 243, 2006-Ohio-1949 ..... 5, 6

State ex rel. Kroger Company v. Indus. Comm.
62 Ohio St.2d 4 (1980) 8

State ex rel. Moss v. Indus. Comm.
75 Ohio St.3d 414 (1996) 7

State ex rel. Trydle v. Indus. Comm.
32 Ohio St.2d 257 (1972) 4

Other Authorities

Ohio Adm.Code 4123:1-5-01 ..... 1, 2, 5

Ohio Adm.Code 4123:1-5-17(F) 1, 2, 5

Ohio Adm. Code 4123:1-5-18(C) 1, 2, 5

INTRODUCTION

In this workers' compensation case, appellant Troy A. Scott ("Scott") alleged that appellee Country Saw & Knife, Inc. ("Country Saw") violated a specific safety requirement ("VSSR") relating to respiratory protection after he was exposed to cobalt and tungsten in the workplace. Scott asserted that Country Saw failed to meet safety requirements found in Ohio Adm.Code 4123:1-5-17(F) and 4123:1-5-18(C), (D), (E), regarding "respiratory protection" and "control of air contaminants." Appellee Industrial Commission of Ohio ("commission") allowed Scott's claim for an occupational lung disease, however denied his VSSR application because Scott failed to meet his burden of proof to establish that he was exposed to "air contaminants" in "hazardous concentrations" as explained in Ohio Adm.Code 4123:1-5-01. The Occupational Safety and Health Administration ("OSHA") conducted an air sampling test that revealed the concentrations of cobalt and tungsten were within permissible exposure limits, and Scott did not submit air sampling tests of his own. Although Scott disputes the validity of the OSHA test, the commission acted within its discretion in finding the test reliable and relevant because there had been no changes to the ventilation system or any of the Country Saw processes that would make the OSHA report unreliable since the time Scott had been exposed to the metals.

The commission asks this Court to affirm the appellate court's decision finding that the commission acted within its discretion in denying Scott's VSSR application. Simply put, Country Saw was not obligated under the Administrative Code to provide Scott with respiratory protection because Scott was not exposed to hazardous concentrations of air contaminants.

STATEMENT OF THE CASE AND FACTS

Scott worked at Country Saw as a brazer, a position which involved soldering carbide teeth on saw blades using a semi-automatic brazing machine. (Second Supplement submitted by Industrial Commission at 1, hereinafter ("SS. at ___"). Following Scott's exposure to metal dust

from this work, Scott applied for workers' compensation benefits. His claim is allowed for hard metal pneumoconiosis and open wound nasal septum. *Id.* Following the allowance of his claim, Scott filed an application for a VSSR award. *Id.* At issue were Ohio Adm.Code 4123:1-5-17(F) and 4123:1-5-18(C), (D), and (E), which cover "respiratory protection" and "control of air contaminants." *Id.* Under Ohio Adm.Code 4123:1-5-01(B)(4), "air contaminants" are defined as "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." "Hazardous concentrations" are defined as "concentrations which are known to be in excess of those which would not normally result in injury to an employee's health." Ohio Adm.Code 4123:1-5-01(B)(74).

Over the course of a six-hour hearing before a commission staff hearing officer ("SHO"), the parties presented evidence regarding Scott's VSSR application. (SS. 8-10). The voluminous stipulated record available to the appellate court revealed that the administrative hearing generated a 224 page transcript of counsel's statements, and testimony from various witnesses. *Id.* Furthermore, counsel for both Scott and Country Saw submitted legal briefs to the SHO either at the hearing or just after it took place.

Ultimately, the SHO found that Country Saw did not violate the Administrative Code safety provisions. (SS. 1). The SHO was persuaded by Country Saw's argument that its duty to minimize exposure to toxic substances arose only when those substances exceeded levels which would not normally result in an injury. If the metal concentration in Country Saw's air did not reach that level, then the substances Scott was exposed to are not considered "air contaminants" as defined in the Administrative Code. (SS. 3). The SHO relied on an OSHA test to find that Scott was not exposed to hazardous concentrations of heavy metals. *Id.* OSHA performed a

surprise visit to Country Saw to examine the workroom, and later came back to perform air quality testing. (SS. 6-7, 17). The OSHA test, performed on April 16, 2008, approximately 6 months after Scott stopped working, revealed that the metal levels were within permissible limits. (SS. 6-7, 12-16). As noted in the very lengthy commission hearing transcript, although the OSHA chart reflecting test results did not list a permissible exposure limit ("PEL") for tungsten, the tungsten level actually measured (0.33 mg) fell below OSHA's PEL of 1.0 mg/cubic meter of air and the ACGIH Industry maximum limit of 3.0 mg/cubic meter of air. *Id.* Thus, the tungsten level was within permissible limits. Similarly, OSHA measured 0.03 mg of cobalt, which fell below the PEL of 0.1 mg/cubic meter of air. *Id.* The SHO also noted that Scott did not submit his own evidence establishing impermissible metal levels. (SS. 3).

Moreover, the SHO found OSHA's results to be reliable and relevant evidence to establish that Scott was not exposed to a harmful level of these metals before the test was performed because there had not been any modifications to the work room before the OSHA testing. *Id.* Lastly, the SHO noted that the fact Scott has an occupational disease, alone, was not evidence of a VSSR. Rather, Scott must have proven that the concentration of metals to which he was exposed exceeded those that would not normally result in an injury. *Id.*

Scott's motion for a rehearing was refused, and he filed this mandamus action. The appellate court denied Scott's request for a writ because he failed to meet his burden of proof. Appellate Decision at ¶ 6. While Scott alleged the OSHA test was unreliable, he submitted no proof of his own that he was exposed to hazardous concentrations of cobalt or tungsten. Without such exposure, Country Saw was not obligated to adhere to the safety provisions relating to respiratory protection. *Id.* Additionally, the court found that the commission did not abuse its discretion by relying on the OSHA air sampling test. The OSHA test revealed metal levels

within normal limits. Appellate Decision at ¶ 5. Given that Scott did not test Country Saw's air quality, or present evidence contrary to the OSHA report, the commission acted within its discretion in weighing the weight and credibility of the OSHA report. Appellate Decision at ¶ 6. Lastly, the appellate court found that the commission did not incorrectly interpret the relevant administrative code provisions. The court rejected Scott's argument that the commission's interpretation of the provisions was inadequate; rather, he was not entitled to a VSSR award because he failed to meet his burden of proof.

ARGUMENT

Appellee Industrial Commission's Proposition of Law No. 1:

An injured worker is not entitled to a VSSR award where he is unable to meet his burden of proof.

To prevail in a VSSR application, the claimant must establish that an applicable safety requirement exists that was in effect at the time of the injury, that the employer failed to comply with the requirement, and that the employer's non-compliance caused the injury. *State ex rel. Trydle v. Indus. Comm.*, 32 Ohio St.2d 257 (1972). The claimant bears the burden of proof to establish each essential element of the claim by a preponderance of the evidence. See *State ex rel. Pre Finish Metals v. Indus. Comm.*, 39 Ohio St.3d 314 (1988). Whether an employer's failure to satisfy a specific safety requirement caused the injury is a question of fact to be decided by the commission, subject to an "abuse of discretion" review. See *State ex rel. A-F Industrial v. Indus. Comm.*, 26 Ohio St.3d 136 (1986).

Scott is not entitled to a writ of mandamus regarding the commission's denial of the VSSR award for the sole reason that he has not met his burden of proof to establish that Country Saw violated a specific safety requirement. In denying the VSSR application, the commission relied on the OSHA report as evidence that Scott was not exposed to hazardous concentrations of air

contaminants, as defined by Ohio Adm.Code 4123:1-5-01. Country Saw's obligation to provide respiratory protection arises only if Scott was exposed to hazardous concentrations of these metal dusts. Ohio Adm.Code 4123:1-5-17(F); 4123:1-5-18(C), (D), (E). "Hazardous concentrations" are those "which are known to be in excess of those which would not normally result in injury to an employee's health." Ohio Adm.Code 4123:1-5-01.

This Court has previously interpreted this provision. *State ex rel. Gilbert v. Indus.Comm.*, 116 Ohio St.3d 243, 2006-Ohio-1949. The word "'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." *Id.* at ¶ 19. The *Gilbert* Court further noted that "[t]he 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." Id. Because an individual's susceptibility cannot form the basis of a specific safety requirement, which, by definition, is a specific requirement that the employer must abide by, it is appropriate to use OSHA tests as a standard to measure the employer's compliance. *Id.* at ¶¶ 24-25.

Here, OSHA tested the employer's air quality, and the commission correctly relied on its findings to use as the measuring stick for Country Saw's compliance with the Administrative Code provisions. The OSHA inspector attached a pump filter for one work day to one of the owners who worked in Scott's tipper position following his departure from Country Saw. (SS. 16-18, 24). OSHA found 0.03 mg of cobalt/cubic meter of air, which did not exceed OSHA's PEL for that metal. (SS. 6, 7, 13-15). Similarly, OSHA found 0.33 mg of tungsten/cubic meter of air. (SS. 6-7, 22). Although OSHA's chart indicates "N/A" with regard to the PEL for that

metal, the stipulated record reveals that the PEL is 1.0 for tungsten. (SS. 22). Moreover, in his merit brief, Scott acknowledges that the OSHA test revealed permissible levels of cobalt and tungsten. (Merit Brief of Appellant at 7, 17). Notably, the OSHA test is the only objective evidence of metal concentrations at Country Saw.

Although Scott did not perform air quality testing of his own, he asserts, by way of testimony of Stephen J. Stock, that the OSHA test is unreliable. His assertion ignores that the determination of disputed facts and the interpretation of regulations under the workers' compensation law are within the sound discretion of the commission. *State ex rel. Allied Wheel Products, Inc. v. Indus. Comm.*, 166 Ohio St. 47 (1956). As this Court found to be permissible under *Gilbert*, the commission may rely on OSHA tests to determine whether a specific safety requirement has been violated, even where the test occurs after the injurious exposure. *Gilbert*, 116 Ohio St.3d at 248. As the *Gilbert* Court noted:

> 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.

Id. After noting the OSHA results, the SHO found that the test was reliable evidence that Scott was not exposed to hazardous concentrations of metals, given that Country Saw had not changed its processes or ventilation system between Scott's exposure and the OSHA test. Scott faults this aspect of the order, but his assertion is without merit. Again, the record reflects that more than 220 pages of testimony and arguments were transcribed from the SHO hearing, and the parties submitted post-hearing legal briefs. The SHO heard arguments related to Country Saw's

processes and ventilation system during Scott's exposure and during the OSHA visits. After hearing the testimony and arguments, the SHO gave the OSHA test its due weight and credibility.

Scott argues that the conditions at Country Saw during the OSHA visit did not mimic the conditions under which Scott worked, allegedly because various machines were not running that day. However, the record does not support that contention. Although Mr. Stock alleged various deficiencies with Country Saw's exhaust system, he had no proof that the conditions were *not* similar at OSHA's visit compared to when Scott worked there. (SS. 11-14). In fact, one of Country Saw's employee's testified that all necessary machines were in operation at the time of the OSHA visit. (SS. 23-24). Scott did not present any evidence that Country's Saw's processes or ventilation system had changed from the time Scott worked there until the time of the air testing. As the appellate court aptly noted, the commission had no other air quality test results, and no evidence contrary to OSHA's report. It was well within the commission's purview to find as it did, and to find the OSHA test reliable and relevant.

Appellee Industrial Commission's Proposition of Law No. 2:

The commission does not abuse its discretion where evidence supports its decision.

The commission's order is supported by evidence in the record, namely the OSHA test, and Scott submitted no objective proof of his own to establish that he was exposed to hazardous concentrations of heavy metals. Scott's second proposition of law essentially asks this Court to re-weigh the evidence before the commission. Because the determination of disputed facts is within the final jurisdiction of the commission, the courts will not reevaluate or reweigh the evidence before the commission. *State ex rel. Allerton v. Indus. Comm.*, 69 Ohio St.3d 96 (1982); *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414 (1996); *State ex rel. Athey v. Indus. Comm.*, 89 Ohio St.3d 473, 475 (2000). Courts should not evaluate and judge the

credibility of evidence that was before the commission; to do so renders them a "super commission." *State ex rel. Burley v. Coil Packaging, Inc.*, 31 Ohio St.3d 18, 20 (1987).

Although Scott argues that the commission has construed the safety provisions to negate their effect, the appellate court correctly noted that "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." Appellate Decision at ¶ 8. The remainder of Scott's argument in his second proposition reiterates arguments he made in the first proposition.

In short, Scott has not submitted evidence that he was exposed to air contaminants in hazardous concentrations, as defined in the Administrative Code. The parties do not dispute that Scott has contracted a lung disease based on his exposure to hard metals while at Country Saw, however the exposure does not necessitate a VSSR award. A VSSR award is in the nature of a penalty to the employer. *State ex rel. Kroger Company v. Indus. Comm.*, 62 Ohio St.2d 4 (1980). Strict construction applies, requiring all reasonable doubts concerning the interpretation of the VSSR to be resolved in the employer's favor. *State ex rel. Burton v. Indus. Comm.*, 46 Ohio St.3d 170 (1987).

CONCLUSION

Where OSHA testing revealed that the metal levels at Country Saw were within permissible limits, and that test is the only objective evidence of the air quality, Scott cannot establish that he was exposed to hazardous metal concentrations. Moreover, the record contains literally hundreds of pages of testimony and arguments related to the VSSR award, and the conditions at Country Saw. Scott's argument that the OSHA test was unreliable lacks merit in light of the bounty of evidence. Moreover, the commission is the sole judge of the weight and credibility to be given the evidence, and it was within the commission's discretion to find that

the processes and ventilation system six months after Scott left Country Saw were unchanged from the time at which Scott was exposed to the metals. As the appellate court noted, that is especially true because Scott never presented contrary evidence. Thus, Scott cannot effectively assert that the OSHA testing was irrelevant or unreliable, and he has not met his burden of proof.

In short, the OSHA report is evidence that the levels of cobalt and tungsten in the workplace did not rise to an impermissible level. Because Scott was never exposed to hazardous concentrations of these metals, Country Saw was not obligated to provide respiratory protection under the Administrative Code, and no VSSR award is warranted.

Respectfully submitted,

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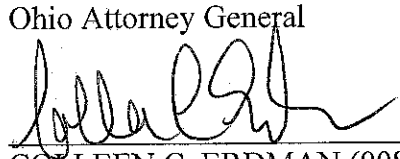

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by U.S. mail this 26th day of April, 2012, upon the following counsel:

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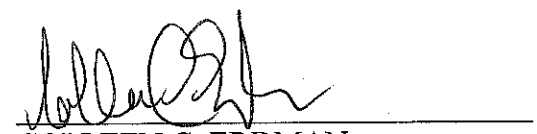

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