

ORIGINAL

IN THE SUPREME COURT  
OF OHIO

STATE ex rel. TROY A. SCOTT, )  
 )  
 Relator, Appellant )  
 )  
 v. )  
 )  
 INDUSTRIAL COMMISSION OF OHIO )  
 AND COUNTRY SAW & KNIFE, INC., )  
 et al., )  
 )  
 Respondents-Appellees )

Case No.: 2011-1922  
On Appeal from the Franklin  
County Court of Appeals  
Tenth Appellate District  
Court of Appeals  
Case No.: 10AP-713

REPLY BRIEF OF APPELLANT, TROY A. SCOTT

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## ARGUMENT

### Appellants Proposition of Law No. 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.***

A. **There is no evidence supporting the validity of the OSHA test.**

Both Appellees' Reply Briefs show that, absent the OSHA report, there is no basis for the Industrial Commission's decision. Appellees repeated argument that the Staff Hearing Officer's finding that the OSHA test was conclusive and therefore is the "some evidence" to support the decision, has no merit without evidence supporting the validity of the test itself. The test report is not self validating. Unsupported conclusions concerning its validity do not rise to the level of evidence. Yet both the Staff Hearing Officer and the Magistrate reach the crucial conclusion that the OSHA test was "reliable and relevant" and "replicates" the conditions under which Troy Scott worked the key element of *State ex rel. Gilbert v. Indus. Comm.* 116 Ohio St. 3d 243, 2006-Ohio-1949.

As succinctly stated in the Industrial Commission's Merit Brief at page 1:

"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 crucial question is, what evidence did the Staff Hearing Officer and Magistrate cite to support the validity of the OSHA test, or does the actual evidence show that they merely assumed the test was valid.

Unlike the facts of, *Gilbert* there was un rebutted evidence before the Commission in the form of Steven Stock's testimony and sworn affidavit that the test procedure itself unreliable, because it was contrary to OSHA's own test protocols. The company produced no evidence to support to the reliability of the test procedure. To the contrary, its evidence demonstrates the unreliability of the OSHA test. The Staff Hearing Officer's decision stating that the OSHA test is reliable and dispositive is totally unsupported by any evidentiary analysis. It is a bare conclusion. It fails to mention Steven Stock's testimony or, for that matter, any evidence in support of the validity of the test.

When closely examined, the Magistrate's decision is equally without foundation. The Magistrate's decision as to the validity of the test is based entirely on the testimony of Steven Mercer, the company's safety compliance officer. The Magistrate's rationale was:

"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 indicated that the 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 County Saw testified that on the day that 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." (See Appendix C pages 22 and 23)

The record shows that these conclusions are contrary to the evidence. Any of the Magistrate's factual errors concerning the testimony of Steven Mercer are particularly egregious. Scott's attorney specifically pointed to Steven Mercer as having testified, on the record, to facts proving that the grinding machines, which created the dry grinding dust, were not in operation either when Plaintiff's expert was inspecting the plant, or when the OSHA test was being done. Had the Magistrate cited all Mercer's relevant testimony she would have been forced to recognize that the OSHA test was done under completely different conditions.

Mercer's actual testimony was that the OSHA monitor was placed on a company owner, who only ran a brazing machine, and none of the grinders which produced the dust. The only grinders in operation when the test was being done were the wet grinders that do not create the dry metal dust. The dry grinders that produce the metal dust were not operating. If there is any question concerning this fact, see Mercer testimony at SR 311 lines 19 through 25, and SR 312 lines 1 through 4. The Magistrate lifted the words, "all necessary machines were running" directly from Mercer's testimony. (SR 318 lines 3 and 4) This line is taken completely out of context. The Magistrate did not read; failed to recognize; or deliberately refused to acknowledge, the rest of Mercer's testimony at SR 318 through 322. In those pages he admitted that the dry grinders, which produced the heavy metal dust when Troy Scott worked there, were no longer in use when the OSHA test was being done, due to a realignment of the production system. Mercer's testimony that, "all necessary machines were running" which the Magistrate cited as probative and conclusive amounts to a lie by omission. It fails to recognize that the "necessary machines" were

only those which were being used in production at the time the test was being done, and did not include the dry grinders, which had been taken out of production due to a change in the product line.

The Magistrate's statement, "no evidence was presented that would indicate that Country Saw made any changes in the environment in which Relator was working" is simply wrong. The OSHA test was done on April 16, 2008. The un-rebutted testimony from both the Claimant, and the company witnesses, was that the three or four large propeller fans which blew the dry metal dust off the dry grinders and into the air only operated in the summer. (SR 316 and 365, 366) (also see Troy Scott testimony and affidavit of Painter and McCollough). The Magistrate has failed to mention that no fans were blowing dry grinding dust all over the facility when the OSHA test was being done.

Any question as to which machines were not running when OSHA tested in comparison to when Troy Scott worked there, are laid to rest by the testimony of the company president, Stanley Glista. At the record hearing he admitted on direct examination that most of the grinding machines which produced the dry grinding dust, were no longer in use at all when the test was being done. (SR 332 through 336) In response to this testimony the Staff Hearing Officer cross examined Troy Scott as to whether he actually operated the dry grinding machines which produced the grinding dust. He testified that he did so on a regular basis (SR 348 through 350). Yet, neither the Staff Hearing Officer, nor the Magistrate acknowledge that the company owner, on whom OSHA hung the tester for less than one day, only ran the brazing machine which produces no grinding dust. When the test was being done, it never reflected the

true environment in which Troy Scott worked, since he also worked regularly on the dry grinders.

**B. Country Saw's evidence proves the OSHA test was irrelevant**

It is particularly revealing that the Magistrate's decision is totally silent as to any evidence presented by the Claimant. She states as fact:

"Further, as indicated previously, Relator could have but did not present any evidence of his own, and Relator could have conducted his own air quality test at the facility; however, for whatever reason chose not to." (See Appendix C, Page 23)

The Magistrate totally ignores the testimony of Steven Stock, which is the only testimony addressing the methodology of the OSHA test; the length of time that it should have been done; and the invalidity of the test results due to invalidity of the test procedure. Yet, in the magistrate's decision she states:

"Mercer did testify that, on the day *Counsel* visited the facility, many machines were not running. This time period is irrelevant."

This is a revealing conclusion given the circumstances of Steven Stock's investigation. The Magistrate fails to recognize that Steven Stock was at Country Saw at the same time counsel was there. Stock has already testified that this time period is irrelevant because the dust producing machines were not running. Testing on that day would have been irrelevant, as recognized by the Magistrate; therefore, there was no point in running an irrelevant test. The record shows that a comparison of which dry grinders were not running when counsel and Stock were there, with the testimony of both Mercer and Stanley Glista as to which dry grinders were not running when OSHA was testing, shows that the environment when Stock was there was the same as when OSHA was there. A simple comparison of those machines that were not running when

Stock was there, to those that were not running when the OSHA test was done, shows that, by the company's own omission, the OSHA test was irrelevant the same as a Stock test would have been irrelevant. This leads to the inevitable conclusion that the Magistrate's factual finding as to the alleged validity of the OSHA test is debunked by her own logic.

**PROPOSITION OF LAW II:**

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

**A. The law requires an actual evaluation of the evidence.**

Both Respondents' reply to Scott's proposition of Law II is summarized by the Attorney General at Page 7 of the Industrial Commission's Brief, wherein it is stated:

"The Commission's order is supported by evidence in the record, namely, the OSHA test and Scott admitted 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 reweigh the evidence before the Commission."

What Scott is seeking from this Court, and what he sought from both the Industrial Commission and the lower Court, is an actual evaluation of all the evidence. Justice requires an unbiased consideration of the actual evidence presented, not a mere repeat of the Staff Hearing Officer's bare assertion that Scott submitted no proof of his own. Simply because the Staff Hearing Officer and Magistrate's decisions are totally silent as to any evidence presented by the Claimant does not mean that the record is devoid of such evidence. The record shows that the Staff Hearing Officer and the Magistrate chose to ignore that evidence. Although both repeatedly cited the

unsupported testimony of company witnesses, virtually nothing is mentioned about the evidence presented in support of Troy Scott.

What is Troy Scott's affidavit and testimony?

What is the affidavit of Michael Painter?

What is the affidavit of Aaron McCullough?

What is the report and testimony of Steven Stock?

What are the photographs of the work environment taken by both the Industrial Commission investigator and Plaintiff's expert of the black metal grit and dust caked on the walls, and inside frame of the only fan in the entire building?

What is the evidence shown by all of the other photographs including those photographs, referred to in the record, of all the dry grinding machines with metal dust piled around them?

What are the photographs of the large propeller fans which blow the dust all over the building when they are operating?

What is the MSDS for tungsten and cobalt contained in the investigative report?

Most important, what is the un-rebutted fact that Troy Scott entered the plant a healthy 19 year old and exited the plant less than 2 ½ years later with permanent disabling lung damage, due to exposure to cobalt and tungsten grinding dust?

Given this evidence, one is left to wonder why the Staff Hearing Officer and Magistrate failed to acknowledge that this evidence even exists. Yet, both the Staff Hearing Officer and Magistrate choose to rely on the unsubstantiated testimony of a part company owner, and compliance officer, Steve Mercer. The Magistrate found this testimony to be particularly persuasive. She stated:

"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." (See Addendum 3 Page 25)

The Magistrate fails to mention that Mercer could not produce the test results even though he was requested to do so by both the VSSR Investigator, and Claimant's Engineer Steven Stock (SR 289). In short, the unsubstantiated testimony of a company owner is probative and conclusive, while any evidence presented in support of the Claimant is not even acknowledged to be evidence. This pattern of selective evaluation of the evidence and blind acceptance of one OSHA test is exactly what this Court warned against in *Gilbert* at pages 247 and 248 :

"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 in place. On the other hand, where the test 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 of duty to monitor..... employers may assume that air quality is satisfactory until alerted otherwise. Consequently, in some situations, the only test result available will be either from a prior test, or from a test performed after the 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."

Did the Staff Hearing Officer evaluate all the evidence in the record as presented? The record shows the Staff Hearing Officer did not follow the *Gilbert* warning. Did the Magistrate evaluate all the evidence in the record in order to determine the validity the OSHA test? The record shows, No! Had the reasoning in

*State ex rel. Steigerwald*, 121 Ohio St. 3d 158, 2009, and *State ex rel. Gilbert* been applied to all of the evidence in the case, the inevitable conclusion is that the claim should be allowed. The justice system, both at the Industrial Commission and in the Courts does not condone decision making by “cherry picking” evidence and “tunnel vision” reasoning. An abuse of discretion denotes, “a failure to exercise a sound, reasonable and legal discretion” (Black’s Law Dictionary). The decision of the Magistrate, upholding entirely the Staff Hearing Officer’s decision and adopted by the Court of Appeals must be reversed and the case remanded for rehearing pursuant to the Industrial Commission rules.

B. **THE INTERPRETATION AND APPLICATION OF “HAZARDOUS CONCENTRATIONS” CONSTITUTES AN ABUSE OF DISCRETION**

The crux of the company’s argument in this case at the Industrial Commission in the lower Court, and in this Court, is stated at page 14 at its merit brief:

“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 the facility. Most employers, like County Saw, are small outfits with limited resources. Ignoring the current regulatory framework of required 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?”

At the outset, it should be recognized that the recommendation for testing is found in the MSDS, which the Federal Government requires the manufacturer of the tungsten carbide product to send to the user (Country Saw) to warn of potential dangers, and proper handling and testing procedures (SR 41). The company’s safety director, Mr. Mercer, acknowledge that he was aware of this MSDS the

entire time from 1993 forward, and admitted he knew from the MSDS that this included the risk of permanent disability or death. (SR 309 and 310) Yet, the company failed to test the environment or even consider any abatement measures, even after Troy Scott developed respiratory problems and continued working in the plant. His explanation for this total lack of testing and use of protection was that he considered the cobalt and tungsten grinding dust to be "nuisance dust". (SR 322 to 324) This argument also conveniently ignores the actual testimony of its own manager that the company makes its money by being a mass producer of saw blades (See SR 322). Given the Staff Hearing Officer's decision, the company convinced the Commission that VSSR regulations are to be interpreted and determined by how they affect the company's profit, not by whether they provide safety for the employee's.

Between the Staff Hearing Officer and the Magistrate, they have clearly lost sight of the purpose for VSSR regulations. O.A.C. 4123:1-5-01 (A) scope and definition states in the first sentence:

"The purpose of this code is to provide reasonable safety for life, limb, and health of employees."

The purpose of these regulations is not to give an employer a complete exemption from the requirement to provide any environmental controls or personal protective equipment by simply deciding that no air contaminants exist, or ever existed, because, one questionable OSHA test fails to find a concentration of toxic metals beyond the maximum threshold levels. Yet, both the SHO and the Magistrate not only condone, but "bless", this company's complete failure to conduct any air testing over 16 years, despite the fact that it knew of MSD's warning that the products being dry ground in the plant contained permanently disabling and fatal toxic

substances, when dry grinding dust is allowed to escape into the plant environment. The irony is that this company's total failure to test forms the foundation for its defense that there was no problem, despite the fact that it knew Troy Scott's lungs were being ruined by heavy metals, while he continued to work there. Both the SHO and Magistrate have further blessed this company's total failure to provide environmental controls or personal protective equipment to protect its workers from the inhalation of heavy metal grinding dust. They have given this company a blank check in the future to continue its operation without protection, because, by definition, it did not produce air contaminants. and therefore requires no protection for its employees. Does one OSHA test give an employer a permanent "free pass" from VSSR responsibility, as has been held by the SHO and the Magistrate? Stated otherwise, when the next company employee is diagnosed with disabling heavy metal fibrosis in the lungs, will this company again be able to point to this case with the complete defense that it was not required to provide any protection, therefore no VSSR violation exists? It should be obvious that the SHO and Magistrate's decision, "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 vs. Industrial Commission* 101 Ohio St 207, 204 Ohio St 704.)

If this Court is prepared to hold that one OSHA test provides this employer, or any employer, with virtual immunity from VSSR protection, at the very least, justice requires a careful review and evaluation of all of the evidence presented in the record to determine whether this OSHA report (or any other test) actually replicates the

conditions present when the exposure was taking place. In this case neither the SHO, nor the Magistrate has done that.

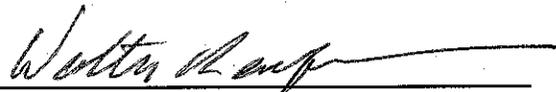
### CONCLUSION

The essence of the company's argument in this case, is that, when it comes to interpreting VSSR regulations in the State of Ohio, profit, and not safety, is the primary consideration. A thorough review of the Staff Hearing Officer and Magistrate's decisions shows that their concern was to interpret the regulations so that the company's total failure to test, or in any way protect its employees from permanently disabling or deadly grinding dust, is excused. This case demonstrates a clear case of abuse of discretion by interpreting a regulation so that its effect is totally negated. The "some evidence" rule, should only have application were the issue is one of the weighing of the evidence as to whether an employer has violated a regulation, which is acknowledged to apply to a particular claim. It cannot be applied to "cherry pick" evidence in support of an argument that a regulation is to be interpreted so that it has no effect at all. This is especially true where the company argues that a major factor in the decision is profit. One is reminded of Upton Sinclair's Book "The Jungle" where he documented, one century ago, the case of a pea canning company enhancing its profits by lacing its canned peas with arsenic to make them look greener and thereby more appealing to the customers. In response to such common practices in American Industry, the State of Ohio created the Ohio Workers' Compensation system by constitutional amendment in 1912. One of the primary purposes of that amendment was to promote safety in the workplace, and the VSSR regulations were an inherent part of that purpose. Without effective VSSR regulations there is no means of

enforcing safety in Ohio, because there is always a financial incentive to enhance profits by ignoring workers' safety. The company certainly makes some additional profit by failing to conduct any testing, or use any abatement measures to protect its employees, but in doing so, the company asks this Court to ignore the fact that Troy Scott is now a financial burden on society, being permanently disabled in his early twenties, not only from the standpoint of the enormous costs of medical care, and disability payments, but also from his inability to be a productive member of this society. Does Country Saw's desire for excess profits justify passing the cost of medical care and disability payments to those other state fund employers, who operate safely, and thereby prevent the unnecessary medical expense and disability payments for their own employees? This Court is required to uphold the Ohio Constitutional Workers' Compensation system and the application and the effective enforcement of the VSSR requirements by remanding this case to the Industrial Commission for determination as to the percentage of additional compensation Troy Scott is to be awarded pursuant to Article II, Section 35 of the Ohio Constitution.

Respectfully submitted,

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