

**IN THE SUPREME COURT OF OHIO**

STATE EX REL. CAMACO, LLC.,	:	
	:	Case No. 2015-0036
Appellant,	:	
	:	ON APPEAL FROM THE FRANKLIN
v.	:	COUNTY COURT OF APPEALS,
	:	TENTH APPELLATE DISTRICT COURT OF
ROBERT J. ALBU AND THE	:	APPEALS CASE NO. 13A-1002
INDUSTRIAL COMMISSION	:	
OF OHIO,	:	
	:	
Appellees.	:	

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**MERIT BRIEF OF APPELLANT CAMACO, LLC**

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**PROPOSITION OF LAW NO. II**— The doctrine of appellate waiver does not preclude an employer from seeking mandamus relief from a final decision of the Industrial Commission of Ohio (“ICO”) imposing an Additional Award for Violation of Specific Safety Requirement (“VSSR”) with respect to an issue first raised by ICO in its final decision.

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## STATEMENT OF THE FACTS AND CASE

### **I. Introduction**

Appellant Camaco, LLC (“Camaco”) appeals the judgment of the Tenth Appellate District denying Camaco’s request for a writ of mandamus commanding the Industrial Commission of Ohio (“ICO”) to deny Appellee Robert Albu’s (“Albu”) application for Additional Award for Violation of Specific Safety Requirement (“VSSR Award”) relating to a January 31, 2006 industrial accident in which Albu was injured while in the course and scope of his employment for Camaco (“Accident”).<sup>1</sup> See *State ex rel. Camaco v. Albu*, 10<sup>th</sup> Dist. No. 13-AP-1002, 2014-Ohio-5330 (Appx. 1-26).

Albu claims that the VSSR Award is justified because Camaco failed to provide him with protective headgear pursuant to OAC 4123:1-5-17(G)(1)(a) which provides, in pertinent part:

Whenever employees are required to be present where the potential hazards to their head exists from . . . physical contact with rigid objects . . . employers shall provide employees with suitable headgear.

However, the undisputed evidence demonstrates that the Accident occurred for two reasons. First, there was an alleged hidden, latent design defect in the machine Albu was servicing that was the specific proximate cause of Albu’s injuries—to wit, the machine could allegedly continue to move at full speed even though the machine was supposedly under Albu’s full control and capable of moving only at slow speed when so controlled. Second, Albu knowingly and unilaterally bypassed safety devices that may have protected him from the alleged defect in the machine. Absent one or both these reasons, there would have been no potential hazard to Albu’s head from

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<sup>1</sup> Albu also sought and is receiving workers’ compensation for his injuries arising from the Accident. (Stipulation of Evidence, Ex. A, Bates No. Stip. Evid. 000001). Camaco disputes only the VSSR Award. The Supplement in this case is composed of the Stipulation of Evidence and retains its original pagination for ease of reference and to avoid confusion.

physical contact with rigid objects. Accordingly, OAC 4123:1-5-17(G)(1)(a) has no application to the Accident, was not violated by Camaco and that there is not any evidence supporting ICO's decision otherwise.

Rather, the undisputed evidence is that neither Camaco nor Abu nor the manufacturer of the machine, Wayne Trail Technologies, Inc. ("WTT"), knew of the alleged design defect prior to the Accident. Indeed, the alleged defect was not discovered until years after the Accident when Abu sued WTT in a separate products liability lawsuit. Ohio law does not impose VSSR liability upon employers for unknown hazards. *See State ex rel. Taylor v. ICO*, 70 Ohio St.3d 3d 445, 447-448, 1994-Ohio-445; *State ex rel. Maghie & Savage, Inc. v. Nobel*, 81 Ohio St.3d 328, 330-331, 1998-Ohio-476; *State ex rel. M.T.D. Products, Inc. v. Stebbins*, 43 Ohio St.2d 114, 118, 330 N.E.2d 904 (1975). Nor does Ohio law impose VSSR liability upon employers where an employee has deliberately circumvented a safety device resulting in a workplace injury. *See State ex rel. Quality Tower Serv., Inc. v. ICO*, 88 Ohio St.3d 190, 192-193, 2000-Ohio-296.

ICO originally denied Abu's application for the VSSR Award on the basis that Abu deliberately circumvented safety features of the WTT machine. However, on rehearing, ICO allowed the VSSR Award based solely upon an argument that Abu had never raised—that a design defect in the WTT machine rendered Abu's unilateral negligence irrelevant. When Camaco challenged ICO's decision in the mandamus action below, the Tenth Appellate District wrongly found that Camaco waived its right to make the argument. In so doing, the Tenth Appellate District found that Camaco was required to raise the issue in its own motion for rehearing or be deemed to have waived the issue. *Camaco*, 2014-Ohio-5330, at ¶8 (Appx. 4-5). Such a holding, however, is contrary to this Court's holding in *State ex rel. Shelly Co. v. Steigerwald*, 121 Ohio St.3d 158, 2009-Ohio-585, at ¶¶15-26. Consequently, Camaco is entitled

to have the Tenth Appellate District's decision reversed and to have judgment entered on Camaco's behalf.

## **II. Factual Background and History**

To better understand the Tenth Appellate District's error, it is important to understand the safety features of the machine, the background of the Accident and the administrative proceedings before ICO.

### **A. The safety features of the machine**

At the time of the Accident, Albu was employed by Camaco as a "weld tech trainee".<sup>2</sup> As such, his duties included troubleshooting robotic problems with some of the automated machines used by Camaco to manufacture car parts.<sup>3</sup> One such machine has been variously described as a "Seatback Manufacturing System, Q70411E" and "1500RD Flexbending System, Model WTFBS-1500RD-8" manufactured by WTT (collectively the "Wayne Trail 2").<sup>4</sup>

The Wayne Trail 2 is used to bend metal tubing to form seat frames for automobiles. It uses a Motoman robot to move bent frame tubes to different molds through the manufacturing process. Because it is fully automated, it is surrounded by a perimeter fence to keep workers away from the hazards of the automated machinery. The perimeter fence is entered by one of two safety-interlocked doors that are designed to de-energize the entire machine when opened.<sup>5</sup> A Camaco employee troubleshooting production problems is supposed to be able to stop/control all moving parts within the perimeter fence via a handheld computer called a "teach pendant."<sup>6</sup>

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<sup>2</sup> (Stipulation of Evidence, Ex. G, Bates No. Stip. Evid. 000127).

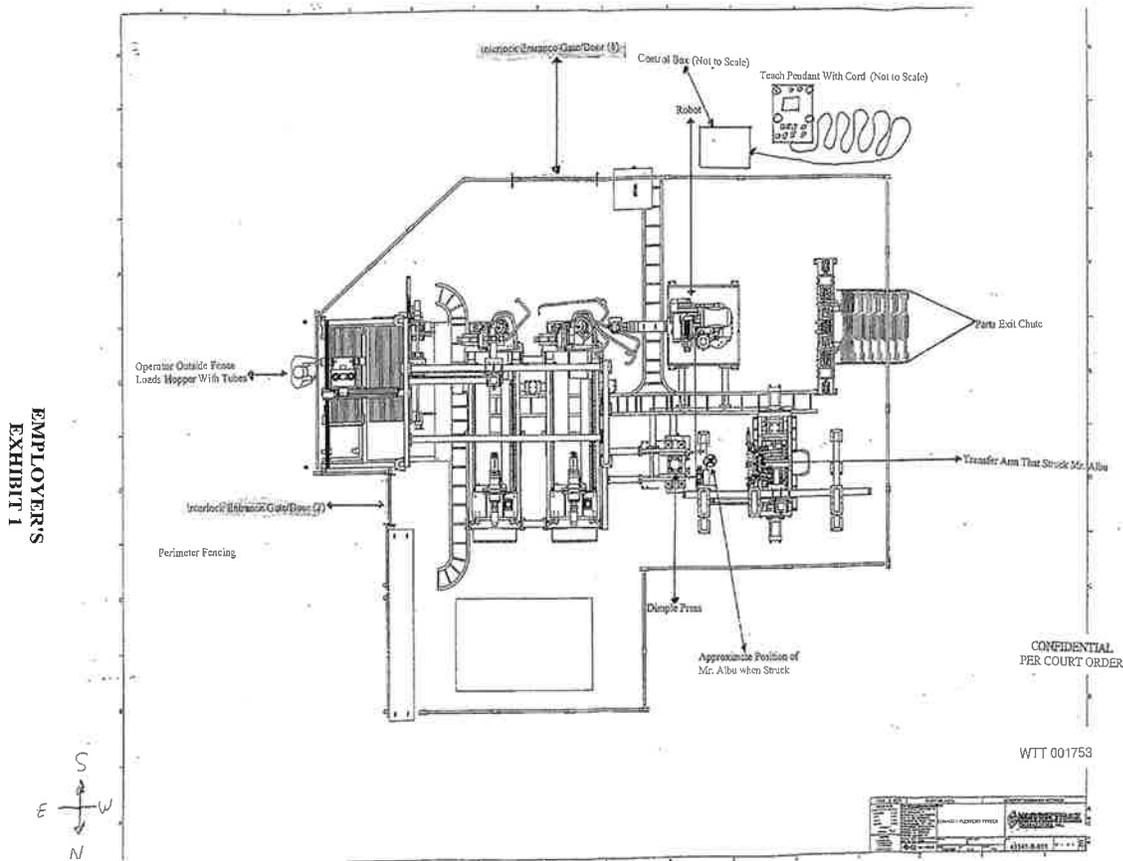
<sup>3</sup> (Stipulation of Evidence, Ex. G, Bates No. Stip. Evid. 000133; *Id.*, at Ex. D, Bates No. Stip. Evid. 000005; *Id.*, at Ex. J, Bates No. Stip. Evid. 000303).

<sup>4</sup> (Stipulation of Evidence, Ex. K, Bates No. Stip. Evid. 000515).

<sup>5</sup> (Stipulation of Evidence, Ex. D, Bates Nos. Stip. Evid. 000005; *Id.*, at Ex. K, Stip. Evid. 000471).

<sup>6</sup>(Stipulation of Evidence, Ex. E, Bates Nos. Stip. Evid. 000112 to Stip.Evid. 000113).

A graphic depiction of the Wayne Trail 2 is below.<sup>7</sup> It depicts the perimeter fence with the two safety-interlock doors. Product generally moves from the left (where the operator loads the hopper) → to the right through the machine via the Motoman robot (center top), the transfer (right bottom of machine) and then out of the parts exit chute (far right of the diagram):



After the Accident, a team of experts was employed by Albu to explain, among other things, the manner in which these safety measures should have worked to protect Camaco's

<sup>7</sup> (Stipulation of Evidence, Ex. K, Bates No. Stip. Evid. 000366).

employees.<sup>8</sup> Industry safety standards dictated: “Safeguarding the Operator: The safeguards shall either [1] prevent the operator from being in the restricted work envelope during robot motion, or [2] prevent or inhibit robot motion while any part of an operator’s body is within the restricted work envelope.”<sup>9</sup>

With respect to restricting the work envelope during robot motion, the Wayne Trail 2 was surrounded by perimeter fencing that prevented unintentional access to moving machinery. The perimeter fence was to be entered by way of two safety-interlock doors that “when opened, the electrical, hydraulic and pneumatic power are shut down and therefore all motion for the robot and other equipment in the work cell stops.”<sup>10</sup> The perimeter fencing was also marked with warning signs required by industry standards.<sup>11</sup> All of these were generally effective to prevent workers from unwittingly being exposed to potential hazards to their heads by automated machine movements.<sup>12</sup>

However, from time to time, Camaco employees might be required to enter the perimeter

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<sup>8</sup> The experts, Vernon Mangold Jr. (“Mangold”) (robotics), Steven N. Kramer (“Kramer”) (mechanical design/safety) and Tarald O. Kvalseth (“Kvalseth”)(human factors/safety), were hired by Albu to provide opinions with respect to his lawsuit against Camaco, WTT, and other manufacturing defendants in *Robert Albu, et al. v. Camaco Lorain Mfg., et al.*, Case No. 8CV155034, in the Court of Common Pleas for Lorain County, Ohio (“Tort Litigation”, Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000398 to Stip. Evid. 000409, Stip. Evid. 000452 to Stip. Evid. 000547; see also [http://cp.onlinedockets.com/loraincp/case\\_dockets/Docket.aspx?CaseID=220740](http://cp.onlinedockets.com/loraincp/case_dockets/Docket.aspx?CaseID=220740) for online docket [last visited on Feb. 18, 2014]). In the Tort Litigation, Albu sought damages for employer intentional tort (common law and statutory) against Camaco and products liability claims against the manufacturers of the Wayne Trail 2.

<sup>9</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000543 to Stip. Evid. 000544, Stip. Evid. 000475 to Stip. Evid. 000476).

<sup>10</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000471, Stip. Evid. 000522 to Stip. Evid. 000523).

<sup>11</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000481 to Stip. Evid. 000481 to 000484).

<sup>12</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000471, Stip. Evid. 000522 to Stip. Evid. 000523).

fencing, and, therefore, additional safety features were necessary “to prevent or inhibit robot motion while any part of an operator’s body is within the restricted work envelope.” For employees who did not need the machine to be energized in any way, the safety-interlock doors provided an effective protection against potential hazards to their head as all equipment was de-energized when entry was made through the doors. However, some Camaco employees might need to enter the perimeter fencing to “teach” the robot new tasks or to troubleshoot production problems. Such employees were able to use the teach pendant in “teach mode” which restricted the speed of the robot “so that it cannot travel any faster than what is described as slow speed”<sup>13</sup> and only in the manner specifically directed by the employee using the teach pendant.<sup>14</sup>

Albu’s experts further explained the safety function of the “teach pendant” as follows:

#### **4. SAFEGUARDING**

\* \* \*

4.5.5. When teach mode is selected, the following conditions shall be met:

- (1) the robot system shall be under the sole control of the teacher.
- (2) When under drive power, the robot shall operate at slow speed only. When a speed greater than slow speed is provided from the verification of a program, it shall require a deliberate action by the teacher to select a speed and shall require a constant actuation of the controls to continue robot motion.
- (3) The robot shall not respond to any remote interlocks or signals that would cause motion.
- (4) Movement of other equipment in the work envelope shall be under the sole control of the teacher if such movement would present a hazard.<sup>[15]</sup>

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<sup>13</sup> “Slow speed” is limited to “the current ANSI slow speed of 10 inches/second”. (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000475).

<sup>14</sup> (Stipulation of Evidence, Ex. K, Bates No. Stip. Evid. 000471).

<sup>15</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000543 to Stip. Evid. 000544, Stip. Evid. 000475 to Stip. Evid. 000476).

Using all of the foregoing safety features, Albu's experts explained the process that should have been available to Camaco's employees to troubleshoot production problems with the Wayne

Trail 2:

6-After the operator discovered that the robot had mispositioned the part at the dimple press fixture the operator would confirm that the robot was placed in teach mode and the operator would enter the work cell enclosed space. The operator would be free to stand in the danger zone of the robot while using the teach pendant in teach mode.

7-The overhead transfer robot would be locked out utilizing proscribed methods and the dimple press safety equipment and/or PPE would be employed to insure that the press could be safely serviced.

8-The operator would proceed to use the robot teach pendant to modify the defective point and the teach pendant would be used to cycle fixture clamping and locating components as required to test the corrected point.

9-After the programming corrections are complete the operator exits the work cell via the main ingress gate and closes and arms the gate and enclosure safeguards.

10-The operator is then required to initiate a deliberate act at the operator control panel to allow the system to resume the manufacturing process. The system would be incapable of self-starting after the correction was made without a deliberate act.<sup>[16]</sup>

Based upon such safety features, it is not surprising that protective head gear was not required for Camaco's employees.<sup>17</sup> Employees outside of the perimeter fencing were not subject to potential hazards to their heads. Employees required to go inside the perimeter fencing entered through safety-interlock doors which immobilized all moving parts such that there was no danger to their heads. When employees were required to troubleshoot production problems or "teach" robots new production, they could operate within the perimeter fencing with the teach pendant in "teach mode" which was supposed to immobilize all equipment in the perimeter

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<sup>16</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000524 to Stip. Evid. 000525, Stip. Evid. 000475 to Stip. Evid. 000476).

<sup>17</sup> (Stipulation of Evidence, Ex. L, Bates No. Stip. Evid. 000604).

fencing except the robot which could then only move at “slow speed” and under the direct control of the “teacher.” Again, there would be no potential hazard to the heads of such employees. If this was all the evidence in this case, it likely would not have been the subject of so much dispute.<sup>18</sup>

However, *four years after the Accident*, during the Tort Litigation, Albu’s robotics expert, Mangold, identified a hidden, latent defect in the Wayne Trail 2 that was unknown by WTT, Camaco or Albu and that potentially undermined all of the foregoing safety features.<sup>19</sup> Mangold opined that:

- a. WTT designed, manufactured and installed a turnkey integrated industrial robot system that was flawed by the presence of numerous significant defects. Significant defects that are material to this analysis include and can be summarized as follows:

\* \* \*

- vi. ***Emergency stop circuit was improperly and defectively designed because the robot teach pendant emergency-stop is not designed to emergency-stop all equipment within work cell [sic] that can produce safety hazards to personnel.*** WTT failed to provide a property emergency stop control scheme integrating emergency stop controls in a coherent electrical design that complies with ANSI single point of control requirements. Thus, the function of the robot teach pendant emergency stop control and the interaction of the control feature with other capital equipment system elements present in the integrated system

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<sup>18</sup> Albu’s products liability experts otherwise alleged manufacturing and design defects with the Wayne Trail 2 that are tangential to the issues in this case, including, but not limited to: (1) the size of the area enclosed by the perimeter fence; (2) the size of the parts exit chute; (3) the failure to incorporate safety features within the area enclosed by the perimeter fencing, such as light curtains and safety mats, that would have automatically de-energized the entire machine if an employee entered the enclosure through an ingress point other than the safety-interlock doors; and (4) the failure to adequately train Camaco and its employees on the interaction between the safety features and the safest manner in which to troubleshoot the machine. (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000456 to Stip. Evid. 000459, Stip. Evid. 000495 to Stip. Evid. 000498).

<sup>19</sup> Because, as explained below, ICO expressly relied upon Mangold’s opinions when allowing the VSSR Award, Camaco is obligated to give credence to Mangold’s opinions for purposes of this action. However, Camaco does not agree with Mangold’s opinions.

was not properly designed. In the event that the emergency-stop circuit had been properly designed, then the use of the e-stop control on the teach pendant could have prevented Mr. Albu's incident from occurring. The risks of this emergency stop circuit design outweigh any conceivable benefit.

\* \* \*

- j. At the time WTT designed, fabricated and installed this industrial robot system at Camaco they (WTT) did not have a thorough understanding of the operation and function of the Motoman controller. *WTT's recommended fault recovery process was incorrect, hazardous, defective and potentially lethal. The transfer device that did strike Mr. Albu was capable of moving at full speed even if the robot was in teach mode and even if Mr. Albu entered the work cell through the interlocked gate.* As a result, it is incorrect to claim that Mr. Albu would have been safe with the robot in teach mode because the program logic control (PLC) control system that WTT designed and built allowed for the subject overhead transfer mechanism and the vertical hydraulic dimple press to operate independently of the robot machine control.

\* \* \*

- m. The WTT industrial robot system was not fully and properly programmed so that it had the required capability to safely allow for the type of process adjustment correction ("fault recovery" or "jam recovery") that Mr. Albu was attempting to perform at the time of this incident. A properly designed control system would have produced a sequence of events that I summarized on pages 10 to 11 of my Report. (Emphasis added).<sup>[20]</sup>

Thus, according to Mangold, the Wayne Trail 2 had been designed and manufactured in such a way that, contrary to safety and industry standards, the teach pendant was not "a single point of control" for "all equipment within [the] work cell that can produce safety hazards to personnel." While the teach pendant allowed Camaco employees to control the robot, inexplicably, it did control the transfer or the dimple press, but allowed these automated parts to continue to operate at

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<sup>20</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000508 to Stip. Evid. 000512).

full speed. Thus, even if Camaco and its employees adhered to all safety training and safety features provided by WTT, they might still unwittingly be subject to hazardous automated machine movements based upon design defect attributable to WTT.

While the design defect may have presented a potential hazard of contact with rigid objects with the heads of Camaco employees, there is no evidence in the record that Camaco or Albu knew (or should have known) of this design defect until after Mangold issued his report in 2010—more than four years after the Accident.<sup>21</sup> Indeed, the defect was directly contrary to the representations and training provided by WTT to Camaco and its employees regarding the safety features of the Wayne Trail 2. Furthermore, the Wayne Trail 2 was installed in mid-2005—just a few months before the Accident.<sup>22</sup> Accordingly, Camaco had a relatively small window of experience between the installation and the Accident, and there is no evidence that, prior to the Accident, the defect ever manifested itself during these few months.

## **B. The Accident**

At the time of the Accident, the Wayne Trail 2 was being operated by Ollie Higgins (“Higgins”)—another Camaco employee.<sup>23</sup> After Higgins changed parts during production, the robot picked up a part and moved it to another station, but then the entire process abruptly halted—presumably because “it didn’t trip the sensor for the machine to keep running.”<sup>24</sup> Albu was called to troubleshoot the problem.<sup>25</sup> Albu and Higgins both acknowledge that Albu entered the perimeter fence through the parts exit chute, with the teach pendant, rather than through the

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<sup>21</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000521 to Stip. Evid. 000526).

<sup>22</sup> (Stipulation of Evidence, Ex. J, Bates No. Stip. Evid. 000302; *Id.*, at Ex. I, Bates Nos. Stip. Evid. 000246 to Stip. Evid. 000247).

<sup>23</sup> (Stipulation of Evidence, Ex. K, Bates No. Stip. Evid. 000446).

<sup>24</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000447 to Stip. Evid. 000448).

<sup>25</sup> (Stipulation of Evidence, Ex. G, Bates No. Stip. Evid. 000155).

safety-interlock gate.<sup>26</sup> Higgins testified that Albu then said: “‘I see what the problem is.’ He hit the part, it hit the sensor, and that’s when the machine activated.”<sup>27</sup> Higgins further observed: “When he hit it with his hand it tripped a sensor and the transfers activated. The transfer hit him in the back off [sic] the head.”<sup>28</sup>

Unfortunately, Albu does not remember much of the Accident.<sup>29</sup> Nevertheless, Albu acknowledges that he knew it was dangerous to enter the cell if the Wayne Trail 2 was energized, yet he did not use the safety-interlock door. He understood that the parts exit chute was not a “proper” means of entering or exiting the perimeter fence.<sup>30</sup> In doing so, Albu acknowledges that he deliberately circumvented this important safety feature of the Wayne Trail 2 and that circumvention of any safety features violated company policy.<sup>31</sup> He acknowledges that no one at Camaco ever trained him to enter the parts exit chute, and Camaco’s Safety and Training Coordinator confirmed that to do so would be in violation of company policy.<sup>32</sup> Having circumvented the safety-interlock doors, he cannot recall whether he did anything else to de-energize the machinery in the cell other than to hit the emergency stop (“E-stop”) on his teach pendant—but he’s not even sure that he actually did that.<sup>33</sup> In fact, his trainer, Sheppard, testified

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<sup>26</sup> (Stipulation of Evidence, Ex. G, Bates No. Stip. Evid. 000146; *Id.*, at Ex. K, Bates No. Stip.Evid. 000447).

<sup>27</sup> (Stipulation of Evidence, Ex. K, Bates No. Stip. Evid. 000447).

<sup>28</sup> (Stipulation of Evidence, Ex. D, Bates No. Stip.Evid. 0000033).

<sup>29</sup> (Stipulation of Evidence, Ex. G, Bates Nos. Stip. Evid. 000146, Stip. Evid. 000154, Stip. Evid. 000165; *Id.*, at Ex. L, Bates No. Stip. Evid. 000575).

<sup>30</sup> (Stipulation of Evidence, Ex. L, Bates No. Stip. Evid. 000587; *Id.*, at Ex. G, Bates No. Stip. Evid. 000159).

<sup>31</sup> (Stipulation of Evidence, Ex. G, Bates Nos. Stip. Evid. 000141, Stip. Evid. 000161).

<sup>32</sup> (Stipulation of Evidence, Ex. G, Bates No. Stip. Evid. 000165; *Id.*, at Ex. L, Bates Nos. Stip. Evid. 000604 to 000605; *Id.*, at Ex. H, Bates No. Stip. Evid. 000230; *Id.*, at Ex. I, Bates No. Stip. Evid. 000266). Of course, there is no evidence that Sheppard was aware of the alleged design defect in the teach pendant.

<sup>33</sup> (Stipulation of Evidence, Ex. G, Bates Nos. Stip. Evid. 000155 to Stip. Evid. 000158, Stip. Evid. 000169; *Id.*, at Ex. L, Bates No. Stip. Evid. 000580).

that Albu could not have activated the “E-stop” on his teach pendant in light of the manner in which the Accident occurred.<sup>34</sup>

Albu provides no clear reason for his actions. He testified that he never had an occasion where he could not troubleshoot a machine from outside of its perimeter fence, and he believed that it “should have been an easy fix from doing it outside” on this occasion. Yet he admits that he made no attempt to troubleshoot this problem from outside of the perimeter fence.<sup>35</sup> Additionally, both Albu and Sheppard acknowledge that Albu could have entered the perimeter fence through the safety-interlock door and completed some or all of the troubleshooting, but it would have taken longer.<sup>36</sup> Albu half-heartedly explained that his decision was based upon his own fear that using the safety-interlock door would cause the Wayne Trail 2 to “shut down” and he did not know how to restart the machine. However, he acknowledged that it was not his responsibility to restart the machine and that he did not fear being disciplined for doing so.<sup>37</sup> Furthermore, Camaco had a well-known policy that employees were entitled to refuse to do jobs that they felt were unsafe.<sup>38</sup>

There is no question that Albu knew that he was shortcutting and sacrificing safety. While Albu *once* saw Sheppard enter the perimeter fence through the parts exit chute, both Albu and Sheppard testified that Sheppard did not train, suggest or require Albu to do the same.<sup>39</sup> Moreover, it is undisputed that Sheppard is the only person Albu ever saw enter the perimeter

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<sup>34</sup> (Stipulation of Evidence, Ex. I, Bates Nos. Stip. Evid. 000273).

<sup>35</sup> (Stipulation of Evidence, Ex. G, Bates Nos. Stip. Evid. 000157 to Stip. Evid 000158).

<sup>36</sup> Stipulation of Evidence, Ex. I, Bates No. Stip. Evid. 000275; *Id.*, at Ex. V, Bates No. Stip. Evid. 000735.

<sup>37</sup> Stipulation of Evidence, Ex. G, Bates Nos. Stip. Evid. 000155 to Stip. Evid 000157, Stip. Evid. 000169.

<sup>38</sup> Stipulation of Evidence, Ex. H, Bates No. Stip. Evid. 000231; *Id.*, at Ex. I, Bates No. Stip. Evid. 000249.

<sup>39</sup> (Brief of Relator Camaco, LLC [“Camaco Brief”], Brief, p. 18; Stipulation of Evidence, Ex. I, Bates No. Stip. Evid. 000266).

fence in this manner.<sup>40</sup> Despite seeing Sheppard do this, Albu understood the safety issue and understood that it was a violation of Camaco's safety policy to enter the perimeter fencing through the parts exit chute.<sup>41</sup> To defeat this admission, Albu claimed that another Camaco employee, Alfred F. Horton, III ("Horton"), testified that Camaco did not have any such safety policy, but Horton actually testified over and over that he was unaware of any such policy not that there wasn't one.<sup>42</sup> Sheppard and Wright provided similar testimony.<sup>43</sup>

Even with the alleged design defect, the Accident may have been avoided if Albu had simply followed the known safety features for the Wayne Trail 2. Had Albu entered the perimeter fence through the safety-interlock door, the evidence indicates that all machinery for the Wayne Trail 2 would have been de-energized, removing any potential hazards from contact with rigid objects to Albu's head. Albu could have then identified and cleared the jammed part, and then had Higgins re-energize the Wayne Trail 2 with Albu controlling the robot in teach mode through the teach pendant. Mangold's product defect may not have manifested itself under such circumstances because, the jam cleared, Albu may have been differently positioned within the perimeter fence and not tripped a sensor at the dimple press with the machine fully energized triggering the transfer to move automatically and strike him in the head.

Thus, Albu's argument that the Accident would have occurred regardless of his circumvention of the safety features of the Wayne Trail 2 is unsupported by *any* evidence. This was a quantum leap of reasoning detached from the actual evidence. At most, the Staff Hearing

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<sup>40</sup> (Stipulation of Evidence, Ex. G, Bates No. Stip. Evid. 000165). ICO's representation that "Albu had seen other *workers* gain access inside the 'the cell' fenced area, by crawling through the gap in the fence by the exit chute/ramp" is unsupported by the actual evidence. (ICO Brief, p. 17) (emphasis added).

<sup>41</sup> (Camaco Brief, pp. 17-18).

<sup>42</sup> (Albu Brief, p. 17; Stipulation of Evidence, Ex. H, Bates No. Stip. Evid. 000226).

<sup>43</sup> (Stipulation of Evidence, Ex. I, Bates No. Stip. Evid. 000257; Stipulation of Evidence, Ex. J, Bates No. Stip. Evid. 000316).

Officer might have been able to speculate that the Accident was still possible due to Mangold's alleged design defect, but, as Maysonet's "near miss" suggests, it is impossible for her to have determined that the Accident would have happened anyway. In this regard, the undisputed evidence is that Albu would not have been in danger: (1) outside of the perimeter fence; (2) had he entered the perimeter fence through the safety-interlock door; and/or (3) if was inside the perimeter fence using the teach pendant in teach mode (or so Camaco and Albu believed). Accordingly, the evidence demonstrates that the movement of the transfer which struck Albu in the head was caused by: (a) the design defect which neither Camaco nor Albu knew or should have known existed; (b) Albu's deliberate circumvention of the safety features of the Wayne Trail 2; or (c) a combination of both.

### **C. The VSSR Award**

On April 27, 2007, Albu filed an Application for the VSSR Award—Claim No. 06-804789.<sup>44</sup> Albu was required to "set forth the facts which are the basis of the alleged violation" when applying for the VSSR Award. OAC 4121-3-20(A). Throughout the administrative proceedings, Albu argued that he had to be inside the perimeter fence with the Wayne Trail 2 energized in order to troubleshoot the problem. He acknowledged that he deliberately circumvented safety features and procedures, but that he needed to do so to troubleshoot the problem. He never argued that his conduct did not cause the Accident because of a defect in the teach pendant that allowed the transfer to move while in teach mode.

On December 19, 2012, a VSSR-Merits of Application-Record Hearing was held.<sup>45</sup> The Staff Hearing Officer denied the VSSR Award explaining, in pertinent part:

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<sup>44</sup> (Stipulation of Evidence, Ex. B, Bates No. Stip. Evid. 000002).

<sup>45</sup> (Stipulation of Evidence, Ex. D-F, Bates Nos. Stip. Evid. 000004 to Stip. Evid. 000119, *Id.*, at Ex. L, Bates Nos. Stip. Evid. 000548 to Stip. Evid. 000658).

The Staff Hearing Officer finds that, but for Mr. Albu's intentional act in circumventing the safety features (limit switch equipped man doors) protecting the cell, the Wayne Trail machine would not have been energized at the time during which Mr. Albu was within the cell and that, consequently, his injury would not have taken place. The question of whether or not head protection was required or whether or not there was a violation of O.A.C. 4123:1-5-17(G) is not pertinent in the present scenario as there would have been no potential for a head injury to occur, in the manner sustained by Mr. Albu, had the personnel doors been used by Mr. Albu and the cell de-energized.<sup>[46]</sup>

Albu subsequently filed a Motion for Rehearing in which he argued that the Staff Hearing Officer's decision had been predicated upon the incorrect assumption that Albu could "troubleshoot the problem on the Wayne Trail 2 without the machinery being energized."<sup>47</sup> Although Camaco opposed the motion, ICO granted Albu's Motion for Rehearing ostensibly to determine whether: (1) the Wayne Trail 2 had to be energized for Albu to use the teach pendant in teach mode; and (2) if head protection were required if Albu was required to be within perimeter fence to troubleshoot while the Wayne Trail 2 was energized.<sup>48</sup> ICO did not find that an alleged defect in the Wayne Trail 2 justified rehearing.

At the rehearing, Albu again argued that he was required to be inside the perimeter fence with the Wayne Trail 2 energized in order to troubleshoot.<sup>49</sup> Camaco countered that Albu's own experts opined that he could have entered the perimeter fence through the interlock doors and still used the teach pendant in teach mode to troubleshoot the Wayne Trail 2 without danger to his head.<sup>50</sup> Despite these arguments, Albu did not present any argument that there was a defect in the teach pendant that allowed equipment within the perimeter fence to continue to move at full speed

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<sup>46</sup> (Stipulation of Evidence, Ex. F, Bates No. Stip. Evid. 000118).

<sup>47</sup> (Stipulation of Evidence, Ex. O, Bates No. Stip. Evid. 000661).

<sup>48</sup> (Stipulation of Evidence, Ex. R, Bates Nos. Stip. Evid. 000703 to Stip. Evid. 000704).

<sup>49</sup> (Stipulation of Evidence, Ex. V, Bates Nos. Stip. Evid. 000723 to Stip. Evid. 000806).

<sup>50</sup> (Stipulation of Evidence, Ex. V, Bates Nos. Stip. Evid. 000795 to Stip. Evid. 000797).

Importantly, Albu did not present Mangold's opinions—Camaco did. Albu never argued or even intimated that the transfer could move while the teach pendant was in teach mode.

while the teach pendant was being used in teach mode.

Following the rehearing, ICO granted the VSSR Award. In so doing, the Staff Hearing Officer justified her decision on the sole basis of Mangold's alleged, hidden, latent defect in the Wayne Trail 2, explaining:

***There is no doubt that the Injured Worker bypassed a safety device when he entered the enclosure through means other than the main door.*** The Hearing Officer, however, finds that the injury would have occurred even if the Injured Worker had gone into the enclosure through the main door. The file contains a report from Vernon Mangold, an expert in the design and operation of robotic systems. Mr. Mangold indicated that it was not possible for the Injured Worker to enter the enclosure and then turn on power only to the robot by means of the teach pendant. Mr. Mangold states that the transfer arm of the bending machine was capable of moving at full speed when the robot was in teach mode. ***He indicated that even the employees of Wayne Trail who trained the employees of the Employer were not aware of this.***

The Hearing Officer finds that the Injured Worker's employer did present a potential hazard of head contact with rigid objects as the system did not permit power to be turned off to the bending machine when power to the robot was activated. The Employer, therefore, should have provided protection to the Injured Worker. (emphasis added)<sup>51</sup>

Thus, ICO once again found that Albu deliberately circumvented a safety feature of the Wayne Trail 2, but this time found that such misconduct did not cause the Accident because there was a hidden, latent defect in Wayne Trail 2, that neither Albu nor Camaco knew of, that allowed the transfer and dimple press to continue to operate at full speed even when the teach pendant was in teach mode.

Camaco then moved for rehearing arguing that: (1) Mangold was wrong; and (2) the transfer was not capable of moving when the teach pendant was being used in teach mode.<sup>52</sup> However, ICO summarily overruled Camaco's motion for failure to "to meet the criteria of

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<sup>51</sup> (Stipulation of Evidence, Ex. U, Bates Nos. Stip. Evid. 000720 to Stip. Evid. 000722).

<sup>52</sup> (Stipulation of Evidence, Ex. W, Bates Nos. Stip. Evid. 000809 to Stip. Evid. 000817).

Industrial Commission Resolution R08-01, dated 11-01-2008.”<sup>53</sup> No other explanation was provided.

**D. The Mandamus Action**

Camaco subsequently filed a mandamus complaint in the Tenth Appellate District.

The mandamus action was referred to a magistrate for resolution on a stipulated record, briefs and oral argument.

On May 29, 2014, the Magistrate issued a Magistrate’s Decision denying the writ and finding that the VSSR Award was proper.<sup>54</sup> The magistrate found that: (1) Camaco waived the right to argue that Albu’s injuries were caused by a hidden, latent defect in the Wayne Trail 2 because it did not make the argument before ICO; and (2) Mangold’s opinion that the Wayne Trail 2 had such a defect rendered Albu’s unilateral negligence irrelevant because Albu’s injuries would have occurred anyway. In deciding the issue of waiver, the magistrate acknowledged Camaco’s argument that the issue was first raised by the Staff Hearing Officer when allowing the VSSR Award, but held that Camaco “could have raised this issue when it sought review of the June 26, 2013 SHO order; however, [Camaco] did not.”<sup>55</sup> Thus, according to the magistrate, Camaco “failed to raise this argument at a time when the commission could have considered it and the magistrate does not find it appropriate for this court to consider the potential implications of the SHO’s statements.”<sup>56</sup>

Camaco timely objected to the magistrate’s decision, but the Tenth Appellate District overruled Camaco’s objections and adopted the magistrate’s decision without modification.

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<sup>53</sup> (Stipulation of Evidence, Exs. X-Z, Bates Nos. Stip. Evid. 000884, Stip. Evid. 000888, Stip. Evid. 000899).

<sup>54</sup> The Magistrate’s Decision is appended to *Camaco*, 2014-Ohio-5330, ¶13 (Appx. 7 to 25).

<sup>55</sup> (Magistrate’s Decision, ¶42)(Appx.23).

<sup>56</sup> (Magistrate’s Decision, ¶42)(Appx. 23).

(Camaco, 2014-Ohio-5330)(Appx.1 to 6).

With respect to waiver, Camaco argued:

- (1) that if waiver had any application to this case, it barred Albu from obtaining a VSSR Award based upon an issue he had never raised;
- (2) that waiver does not apply to issues first interjected in a final judgment of a trial court or final decision of an administrative agency and not previously raised by the litigants;
- (3) that waiver does not require a party to file a motion for reconsideration, rehearing or for judgment notwithstanding the verdict in order to preserve the issue on appeal/mandamus;
- (4) that waiver does not preclude a reviewing court from considering an issue that inextricably linked with other issues that are clearly before the court; and
- (5) application of waiver to this case to preclude Camaco from challenging this particular issue, ie. imposition of VSSR liability for an unknown, hidden, latent defect in a machine, would constitute plain error in light of the punitive nature of VSSR liability.<sup>57</sup>

However, the Tenth Appellate District agreed with the magistrate, opining:

[I]n its motion for rehearing, relator did not argue that the accident resulted from a latent defect, nor that it lacked notice or knowledge of any defect in the system . . . Relator could have offered this as an alternative basis for granting rehearing but failed to raise this issue before the commission . . . Instead, relator asserted the argument for the first time in this court before the magistrate. The magistrate properly concluded that relator waived the issue by failing to assert it in the proceedings before the commission. We agree and reject relator's second objection that the magistrate erred by concluding that relator waived the latent-defect argument.<sup>[58]</sup>

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<sup>57</sup> (Objections of Relator Camaco, LLC ["Camaco Objections"], pp. 12-21)

<sup>58</sup> (*Camaco*, 2014-Ohio-5330, at ¶8) (Appx. 3-4). Because the VSSR Award is a penalty against Camaco, all reasonable doubts concerning application of OAC 4123:1-5-17(G)(1)(a) to the Accident must be construed in favor of Camaco. *State ex rel. Gilbert v. ICO*, 116 Ohio St.3d 243, 2007-Ohio-6096, at ¶14. In this regard, OAC 4123:1-5-17(G)(1)(a) is not to be interpreted as imposing strict liability. *State ex rel. Taylor*, 70 Ohio St.3d at 448-449; *State ex rel. M.T.D. Products*, 43 Ohio St.2d at 118; *State ex rel. Gilbert*, 116 Ohio St.3d 243, at ¶23. For this Court has recognized "the practical impossibility of guaranteeing that a device will protect against all contingencies". *State ex rel. Gilbert*, 116 Ohio St.3d 243, at ¶23. Rather, the purpose of specific safety requirements is to "provide reasonable, not absolute safety for employees." *Id.*

The Tenth Appellate District also rejected Camaco’s alternative argument that imposition of VSSR liability in the manner done so in this case would constitute “plain error,” explaining: “We are unaware of any case in which the plain-error doctrine has been applied to overrule a commission decision granting a VSSR award, and relator fails to cite any such decision.”<sup>59</sup>

### ARGUMENT

**PROPOSITION OF LAW NO. I—An employer is not subject to an Additional Award for Violation of Specific Safety Requirement (“VSSR”) for an injury caused to its employee resulting from: (1) a hidden, latent design or manufacturing defect in equipment the employee was operating; and/or (2) the employee’s knowing and unilateral bypassing of safety devices for equipment the employee was operating.**

In order to establish entitlement to the VSSR Award, Albu was required to prove that: (1) an applicable and specific safety requirement was in effect at the time of the Accident; (2) Camaco failed to comply with the requirement; and (3) Camaco’s failure to comply was the proximate cause of the injury in question. *State ex. rel. Scott v. ICO*, 136 Ohio St.3d 92, 2013-Ohio-2445, at ¶11. For the VSSR Award, Albu claims that Camaco violated OAC 4123:1-5-17(G)(1)(a) which provides, in pertinent part:

Whenever employees are required to be present where the potential hazards to their head exists from . . . physical contact with rigid objects . . . employers shall provide employees with suitable headgear.

For the reasons that follow, under the foregoing standards, there can be no VSSR liability imposed upon Camaco for violation of OAC 4123:1-5-17(G)(1)(a) with respect to the Accident.

It is undisputed that there was no danger to Albu’s head outside the perimeter fence or if he had entered through the safety-interlock doors. Moreover, when Camaco employees were required to enter the perimeter fencing to service or troubleshoot the Wayne Trail 2 with the teach pendant in teach mode, the Stipulation of Evidence establishes that all equipment within the

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<sup>59</sup> (*Camaco*, 2014-Ohio-5330, at ¶9)(Appx.4).

perimeter fence was supposed to be de-energized with the exception of the robot which could then only move at slow speed under the direct control of the employee using the teach pendant. Under such circumstances, there would have been no potential hazard from physical contact with rigid objects to the heads of Camaco employees so using the teach pendant. However, Mangold allegedly discovered a design defect with the Wayne Trail 2 that allowed the dimple press and transfer to operate at full speed even when the teach pendant was in teach mode. With the exception of Mangold and the Accident itself, there is no evidence in the Stipulation of Evidence to suggest that the teach pendant did not work in the manner Camaco and Albu believed it was supposed to work. That is, Mangold's opinions and the Accident itself are the sole evidence used by ICO to support its finding that that Camaco failed to provide Albu with head protection required by OAC 4123:1-5-17(G)(1)(a).

Such evidence is insufficient to impose VSSR liability upon Camaco as a matter of law. In this regard, the Stipulation of Evidence establishes that the defect in the teach pendant: (1) was a clear deviation from industry safety standards; and (2) was unknown to Camaco, Albu and possibly WTT. Furthermore, the Wayne Trail 2 had only been in operation for a few months at the time of the Accident. Thus, Camaco had very little experience with the machine other than the training and information provided by WTT. Albu attempts to avoid Camaco's defense by arguing that the potential hazards to employees' heads from physical contact with rigid objects within the Wayne Trail 2 perimeter fence were known to Camaco because of other incidents. But as previously explained, there is not any evidence that these other incidents had anything to do with defective teach pendants—known or unknown. There is no reasonable way to read the record in this case in which it might be assumed that Camaco or its employees might have known about the alleged defect at the time of the Accident.

Nevertheless, Appellees have attempted to prove that Camaco knew, or should have known, of the alleged defect by reference to unrelated incidents. In this regard, Albu and ICO claim to rely upon the following evidence:

- (a) WTT provided signs for the Wayne Trail 2 warning of moving parts;
- (b) Camaco was aware of:
  - (i) employees entering cells while they were energized to troubleshoot automated machinery; and
  - (ii) injuries or near injuries to other employees involving similar circumstances.<sup>60</sup>

However, examination of these incidents reveals them as unrelated and irrelevant to the alleged defect.

First, the existence of warning signs and the perimeter fence were simply to deter Camaco employees from inadvertently entering the perimeter fence while the automated machinery was in operation. There is nothing about this evidence that suggests that there was a potential hazard to employees' heads from contact with physical objects while inside the perimeter fencing and properly troubleshooting with the teach pendant in teach mode. Rather, Kvalseth opined that law and custom placed a duty on WTT, as manufacturer and seller of the Wayne Trail 2, to provide adequate warning signs to: (a) inform Camaco and its employees about potential hazards; and (b) to remind Camaco and its employees about potential hazards.<sup>61</sup> In pertinent part, Kvalseth faulted WTT for not providing a warning sign near the parts exit chute and for failure to provide adequate warnings in the operator manual, to wit:

The Manual should, for example, have explained how the robot could still

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<sup>60</sup> (Brief of Respondent, Robert Albu ["Albu's Brief"], pp. 10-23; Brief of Respondent, Industrial Commission of Ohio ["ICO Brief"], pp. 13-22).

<sup>61</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000482 to Stip. Evid. 000484).

have been controlled if an individual entered the cell through an interlocked gate. Similarly, the fault recovery should have been explained in the Manual so as to minimize the need for an individual to have to enter the cell for troubleshooting.<sup>62</sup>

Nowhere did Kvalseth fault WTT or Camaco for failing to post signs warning of the danger of equipment moving while an employee was inside the perimeter fence while properly using the teach pendant because, assuming Mangold's opinions are correct (as the Staff Hearing Officer did), nobody knew about that danger.

Second, with respect to employees entering energized cells to troubleshoot, neither Albu nor ICO point to any evidence that such employees were entering energized cells with teach pendants in teach mode. When considering this evidence, it is important to recall that Camaco's experience with the Wayne Trail 2 was very short before the Accident. The Wayne Trail 2 was installed in early July 2005,<sup>63</sup> therefore, Camaco and its employees had only a few months' experience with the Wayne Trail 2 before the Accident. For much of this time, WTT had not even supplied operator manuals to Camaco. The evidence relied upon by Albu and ICO during these few months fails to support the VSSR Award.

In this regard, at pp. 17-19 of Albu's Brief, Albu claims that the testimony of Albu's supervisor, Jonathan Wright ("Wright"), proves that Wright and Camaco's Human Resource Manager, Karen Mayfield ("Mayfield"), were aware that Wright had worked inside the perimeter fence of an unidentified machine while it was energized yet did nothing in response. However, this is not supported by Wright's actual testimony. Wright testified: (1) that the machine was "not in production mode, but was in manual mode"; and (2) Camaco specifically admonished him

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<sup>62</sup> (Stipulation of Evidence, Ex. K, Bates No. Stip. Evid. 000484).

<sup>63</sup> (Stipulation of Evidence, Ex. G, Bates No. Stip. Evid. 000170).

that he “shouldn’t be doing that.”<sup>64</sup>

At pp. 14-16 of Albu’s Brief, Albu claims that Roland Sheppard’s testimony proves that Camaco’s Maintenance Supervisor, Bill Hamby, Jr. (“Hamby”) was “aware of the danger that weld-techs were placed in when working in the cell,” but there is no testimony regarding the use of teach pendants in teach mode. Rather, Sheppard testified that a month after the Wayne Trail 2 was installed, he asked Hamby if there was a way to enter the safety-interlock gate while keeping the robot powered. This was apparently during the period of time before that WTT had provided operator’s manuals.<sup>65</sup> Hamby advised that he would look into it, but Sheppard left employment for Camaco without ever asking Hamby about his response.<sup>66</sup>

At pp. 19-20 of Albu’s Brief, Albu claims that Wright was present when Albu entered the parts exit chute, yet did nothing to stop Albu. In response to a leading question, Albu claims that Wright “was standing around this equipment” when Albu bypassed a safety feature—by entering the perimeter fence through the parts exit chute, but there is no testimony that Wright’s attention was on Albu or Albu’s actions. Rather, Wright testified that he “was in the tool room and an employee . . . ran back screaming, Bob’s hurt . . . call 911”.<sup>67</sup> Thus, whether Wright was “around” or not, his attention was elsewhere. Even had he been paying attention to Albu, so long as he believed the Wayne Trail 2 was in manual mode and Albu was using the teach pendant in teach mode, he would have believed that there was no potential danger to Albu—“what [Albu] was

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<sup>64</sup> (Stipulation of Evidence, Ex. J, Bates Nos. Stip. Evid. 000315, Stip. Evid. 000322). Wright testified that “manual mode” means that the machine is under the control of the operator and not automated. *Id.*

<sup>65</sup> “The Manual was not provided to Camaco until several weeks after the equipment was up and running.” (Stipulation of Evidence, Ex. K, Bates No. Stip. Evid. 000484).

<sup>66</sup> (Stipulation of Evidence, Ex. I, Bates Nos. Stip. Evid. 000244, Stip. Evid. 000260 to Stip. Evid. 000261).

<sup>67</sup> (Stipulation of Evidence, Ex. J, Bates Nos. Stip. Evid. 000324).

doing was normal adjustment.”<sup>68</sup>

Third, the evidence of other alleged injuries do not support the VSSR Award. At pp. 12-14 of Albu’s Brief, Albu claims that Sheppard testified that Dave Maysonet (“Maysonet”) was almost injured while working within the perimeter fence of the Wayne Trail 2. However, there is no evidence as to whether Maysonet was properly using the teach pendant in teach mode or that any formal report was ever made with Camaco regarding the incident—even though Camaco has a “near miss” reporting procedure.<sup>69</sup> Elsewhere, Albu also claimed that Wright had actually been struck by automated parts within a perimeter fence of another machine.<sup>70</sup> However, Wright testified that the injury occurred on a completely different machine, during the installation process (rather than production process) before perimeter fencing was installed, and that the incident was “completely my fault” due to “lack of thinking.”<sup>71</sup> Again, there was no evidence of use of the teach pendant in teach mode or other indicia of similarity to the Accident to give the incident any probative value.

Thus, even after years of adversarial proceedings in state court and before ICO, Appellees have been unable to provide a single reference in the record to Camaco’s knowledge of the alleged defect prior to the Accident—assuming it ever existed. On the other hand, the Tenth Appellate District expressly acknowledged that:

- (1) ICO found that “even the employees of Wayne Trail who trained the employees of [Camaco] were not aware of” the alleged defect;<sup>72</sup> and
- (2) Albu’s expert Kramer opined: “In depositions taken in May 2009, it was stated by Wayne Trail . . . that the robot will operate in teach

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<sup>68</sup> (Stipulation of Evidence, Ex. J, Bates Nos. Stip. Evid. 000324).

<sup>69</sup> (Stipulation of Evidence, Ex. I, Bates Nos. Stip. Evid. 000254 to 000255).

<sup>70</sup> (Stipulation of Evidence, Ex. N, Bates No. Stip. Evid. 000660).

<sup>71</sup> (Stipulation of Evidence, Ex. J, Bates No. Stip. Evid. 000320).

<sup>72</sup> (*Camaco*, 2014-Ohio-5330, at ¶9)(Appx. 4)

mode with the interlocking gate open. However, this was not adequately, if at all, conveyed to Camaco since Mr. Albu and other Camaco employees did not know of this feature.”<sup>73</sup>

- (3) Mangold opined that WTT has “emphatically stated that the transfer device could not have injured Albu while he was standing in the danger zone of the dimple press with the robot teach pendant in hand and the robot in teach mode.”<sup>74</sup>

Thus, the Stipulation of Evidence establishes that: (1) there were safety features in place that should have obviated any potential hazards to employees’ heads from physical contact with rigid objects within the perimeter fence, *see State ex rel. Maghie & Savage, Inc.*, 81 Ohio St.3d at 331 (“We conclude that it is illogical to require an employer to provide duplicate protection in the absence of a duplicate-protection requirement”); (2) this was the first and only time such a workplace injury occurred; and (3) the movement of the transfer which struck Albu in the head was caused by: (a) the design defect which neither Camaco nor Albu knew, or should have known, existed; (b) Albu’s deliberate circumvention of safety features of the Wayne Trail 2; or (c) a combination of both (the precise percentage of fault of either is irrelevant since neither forms the basis for the imposition of VSSR liability upon Camaco).

In this regard, Ohio law does not impose VSSR liability upon employers for unknown hazards. *See State ex rel. Taylor*, 70 Ohio St.3d at 447-448; *State ex rel. Maghie & Savage, Inc.*, 81 Ohio St.3d at 330-331; *State ex. rel. M.T.D. Products, Inc.*, 43 Ohio St.2d at 118.<sup>75</sup> Nor does Ohio law impose VSSR liability upon employers where an employee has deliberately circumvented a safety device resulting in a workplace injury. *See State ex rel. Quality Tower*

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<sup>73</sup> (Magistrate’s Decision, ¶28(a), adopted at *Camaco*, 2014-Ohio-5330, at ¶13)(Appx.6)

<sup>74</sup> (Magistrate’s Decision, ¶28(c), adopted at *Camaco*, 2014-Ohio-5330, at ¶13)(Appx.6).

<sup>75</sup> Sometimes referred to as the “first-time failure” defense, this rule of law is actually broader and is based upon a strong public policy of avoiding making administrative “penalties” into strict liability offenses where employers have no reason to know that they would be subject to such penalties.

*Serv., Inc.*, 88 Ohio at 192-193. Thus, any combination of the foregoing is legally insufficient for VSSR liability.

Moreover, even if the alleged defect in the Wayne Trail 2 could serve as a legitimate basis for the VSSR Award (which it can't), any argument that the Accident would have occurred regardless of Albu's circumvention of the safety features of the Wayne Trail 2 is unsupported by *any* evidence. This was a quantum leap of reasoning detached from the actual evidence. At most, the Staff Hearing Officer might have been able to speculate that the Accident was still possible due to Mangold's alleged design defect, but, as Maysonet's "near miss" suggests, it is impossible for her to have determined that the Accident would have happened anyway. In this regard, the undisputed evidence is that Albu would not have been in danger: (1) outside of the perimeter fence; (2) had he entered the perimeter fence through the safety-interlock door; and/or (3) if was inside the perimeter fence using the teach pendant in teach mode (or so Camaco and Albu believed).

**PROPOSITION OF LAW NO. II— The doctrine of appellate waiver does not preclude an employer from seeking mandamus relief from a final decision of the Industrial Commission of Ohio (“ICO”) imposing an Additional Award for Violation of Specific Safety Requirement (“VSSR”) with respect to an issue first raised by ICO in its final decision.**

Neither the Appellees nor the Tenth Appellate District disagreed with the proposition that the VSSR Award cannot be supported by: (a) a design defect which neither Camaco nor Albu knew or should have known existed; (b) Albu's deliberate circumvention of safety features of the Wayne Trail 2; or (c) a combination of both. Instead, Appellees argued, and the Tenth Appellate District found, that: (a) Albu's deliberate circumvention of the safety features of the Wayne Trail 2 was irrelevant to Albu's injuries because of the alleged design defect; but (b) Camaco waived its right to argue that VSSR liability could be imposed for the alleged design defect because it did not raise the argument in a motion for rehearing after ICO's final decision on the VSSR Award. For

the reasons that follow, however, the Tenth Appellate District's decision constitutes reversible error on this issue.

First, the alleged defect issue was first introduced into the case in ICO's final decision to allow the VSSR Award. Ohio law holds that a party does not waive an issue that is first interjected in a case by a trial court's judgment. *See e.g. See Padgett v. Padgett*, 10<sup>th</sup> Dist. No. 08AP-269, 2008-Ohio-6815, at ¶¶31-32 ("Because the trial court's written decision and entry following the hearing on objections was the first to award travel expenses, [appellant] . . . did not waive the issue by failing to raise it in the trial court"); *Lungaro v. Lungaro*, 9<sup>th</sup> Dist. No. 09CA0024-M, 2009-Ohio-6372, at ¶6 (holding that appellant did not waive right to challenge judgment based upon improper judicial transfer where appellant "did not become aware of the transfer until after the judgment was issued"). Such a rule derives from the history of the appellate waiver doctrine. As explained in *Int'l Lottery, Inc., v. Kerouac*, 102 Ohio App.3d 660, 669, 657 N.E.2d 820 (1<sup>st</sup> Dist. 1995):

The rule that issues not raised in the trial court are waived and cannot be raised for the first time on appeal persists in contemporary appellate practice solely because of an inherited tradition. Six hundred years ago, a separate quasi-criminal proceeding existed to challenge the judge for his wrongful act when, during the trial, he incorrectly ruled on questions of law. It was, therefore, held that the judge was entitled to know the charges against him. *Sunderland, Improvement of Appellate Procedure* (1940), 26 Iowa L.Rev. 3,7-8. The common-law writ of error which evolved did not seek to review the merits of the judgment. The sole inquiry, which is the origin of today's formal assignment of error, was whether the judge committed error. If he did, the judgment failed. Whether the judgment was just or unjust was immaterial since the aim of the writ of error was the existence or absence of error. *Id.*, at 7-8.

The rule persists in modern times for practical reasons:

These rules, it is said, have their foundation in a just regard to the fair administration of justice, which requires that when an error is supposed to have been committed there would be an opportunity to correct it at once, before it has had any consequences; and does not permit the party to lie by,

without stating the ground of his objection, and take the chances of success on the grounds on which the judge has placed the cause and then, if he fails to succeed, avail himself of any objection which, if had been stated, might have been removed.

*State v. Driscoll*, 106 Ohio St. 33, 38-39, 138 N.E. 376 (1922); *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81-83, 1997-Ohio-71 (applying appellate waiver doctrine to administrative appeal for same practical reasons). Thus, the rule is practical and designed to compel counsel to be diligent and timely, but not to bar address of issues that were first raised by the trial court in a final judgment. Indeed, rather than waiver, this Court has opined that if ICO was going to consider an issue not raised or argued by the parties, such as the alleged defect, the proper practice would be to “give the parties notice of its intention and an opportunity to brief the issue.” *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 177, 522 N.E.2d 524 (1988). ICO did not follow such practice in this case. Instead, it struck out on its own and made a finding that was contrary to well-established law.

The Tenth Appellate District conceded the timing problem with its application of the waiver doctrine when it found that waiver applied because Camaco did not raise the defect issue in its motion for rehearing—rather than at some earlier time.<sup>76</sup> However, this Court, consistent with a well-established precedent on waiver,<sup>77</sup> has squarely rejected the argument that motions for rehearing, reconsideration and the like are useful or necessary to preserve issues for mandamus review of administrative actions. *See Steigerwald*, 2009-Ohio-585, at ¶¶24-26.

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<sup>76</sup> (*Camaco*, 2014-Ohio-5330, at ¶8)(Appx.3-4).

<sup>77</sup> *See e.g. Padgett*, at ¶¶31-32 (finding that memorandum contra objections to magistrate’s decision were not necessary to seek redress on appeal of issue first raised in magistrate’s decision; “We decline to extend waiver, or forfeiture, so far”); *Lungaro*, at ¶6 (finding that Civ. R. 60(B) motion was not necessary to seek redress on appeal of issue first raised in trial court’s final judgment). Procedurally, a motion for rehearing was necessary, however, in order exhaust administrative remedies. *State ex rel. Cotterman v. St. Marys Foundry*, 46 Ohio St.3d 42, 43-44, 544 N.E.2d 887 (1989)

In *Steigerwald*, an employee was killed in the course and scope of employment at a construction site when a truck backed over him. An extensive investigation revealed that the truck's reverse warning alarm was not working immediately after the accident which caused the decedent's personal representative to seek a VSSR award for based upon violation of OAC 4121:1-3-06 governing use of reverse signal alarms on such vehicles. *Id.*, at ¶¶5-12. Although the employer disputed whether the alarm was working at the time of the accident, it was not until after the VSSR award was allowed that the employer raised the "first-time failure" defense in a motion for rehearing—which was denied. *Id.*, at ¶¶13-15. The Tenth Appellate District denied the employer's subsequent mandamus petition, and the employer appealed to this Court. On appeal, this Court, relying upon its earlier decision in *State ex rel. Schlegel v. Stykemain Pontiac Buick GMC, Ltd.*, 120 Ohio St.3d 43, 2008-Ohio-5303, found that the "first-time failure" defense was not timely raised when it was first raised in a motion for rehearing.<sup>78</sup> Therefore, it was waived. *Id.*, at ¶¶24-26. Camaco cannot have been deemed to have waived its right to present the alleged defect issue by not including the issue in a motion for rehearing.

Second, under the circumstances of this case, the defect issue was inextricably intertwined with the issue of whether Albu deliberately circumvented the safety features of the Wayne Trail 2. In this regard, the Staff Hearing Officer raised Mangold's defect opinion in order to overcome Camaco's argument that Albu had deliberately circumvented the Wayne Trail 2 safety features, ie. to find that the Accident would have happened anyway.<sup>79</sup> Camaco addressed the interaction

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<sup>78</sup> This is consistent with Ohio's treatment of motions to reconsider in other contexts. *See Franks v. The Lima News*, 109 Ohio App.3d 408, 411, 72 N.E.2d 245 (3<sup>rd</sup> Dist. 1996); *Stanley v. City of Miamisburg*, 2<sup>nd</sup> Dist. No. 17912, 2000 WL 84645, \*4.

<sup>79</sup> At ¶39 of the Magistrate's Decision, the magistrate attempted to de-couple these issues ("At this time, relator also contends that the Wayne Trail 2 had a designed defect and because of that defect, relator could not be held responsible for claimant's injuries"), but it is clear that they were linked in the administrative proceedings by ICO in order to avoid the conclusion that the Accident was

between these issues in detail at pp. 2-8 of Camaco’s Reply Brief. The “issue” of the legal effect of Albu’s undisputed circumvention of the safety features was squarely before the Staff Hearing Officer. This Court has made clear that “[w]hen an issue of law that was not argued below is implicit in another issue that was argued and presented by an appeal, we may consider and resolve that implicit issue. To put it another way, if we must resolve a legal issue that was not raised below in order to reach a legal issue that was raised, we will do so.” *Belvedere Condominium Unit Owners Ass’n v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 1993-Ohio-119; *Hill v. City of Urbana*, 79 Ohio St.3d 130, 133-134, 1997-Ohio-400. Moreover, it is hornbook law that “if an issue was raised in the trial court, new legal arguments in support of a party’s contention on that issue may be raised in the court of appeals.” Oh. App. Prac. §7:4 (2012). Once an issue is raised in the trial court, it is not necessary that every nuance of the issue be argued in order for the issue to be preserved on appeal. *Long v. Village of Hanging Rock*, 4<sup>th</sup> Dist. No. 09CA30, 2011-Ohio-5137, at ¶33; *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, at ¶19. While Camaco could not argue new issues on appeal or mandamus, such as arguing that Albu’s VSSR claim was barred by the statute of limitations, Ohio law does not prevent Camaco from arguing that VSSR liability cannot be imposed for a hidden, latent design defect when that issue is interjected by ICO in order to overcome Albu’s deliberate circumvention of the safety features of the Wayne Trail 2.

Finally, if the doctrine of appellate waiver is going to be imposed in the manner advocated by Appellees and applied by the Tenth Appellate District, then Camaco contends that the allowance of the VSSR Award constitutes a manifest injustice and plain error that this Court could, and should, remedy. In this regard, the availability of plain error in civil cases is well-established.

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caused by Albu’s deliberate circumvention of a safety guard—an issue which the Magistrate concedes “was never disputed by the any of the parties.” (Magistrate Decision, ¶44).

See e.g. *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 123-124, 512 N.E.2d 640 (1987); *Townsend v. Phommarath*, 10<sup>th</sup> Dist. No. 10AP-598, 2011-Ohio-1891, at ¶9. In *Phommarath*, this Tenth Appellate District succinctly summed up its application as follows:

“In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require” the court to apply it “to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 . . .

*Id.*, at ¶9. For the reasons that follow, if Camaco is deemed to have waived the right to challenge the VSSR Award on the basis of the hidden, latent defect in the Wayne Trail 2, then it should nonetheless be able to assert plain error to raise such argument for the following reasons: (1) ICO originally denied the VSSR Award on the basis that Albu deliberately circumvented a safety feature of the Wayne Trail 2; (2) ICO granted rehearing for reasons other than the hidden, latent defect in the Wayne Trail 2; (3) at rehearing, Albu did not make any argument about a hidden, latent defect in the Wayne Trail 2; (4) ICO subsequently allowed the VSSR Award on the basis that the hidden, latent defect in the Wayne Trail 2 caused the Accident instead of Albu’s deliberate circumvention of safety features of the Wayne Trail 2; and (5) in so doing, ICO sua sponte imposed VSSR liability in contravention of controlling legal authority. See *State ex rel. Taylor*, 70 Ohio St.3d 3d at 447-448; *State ex rel. Maghie & Savage, Inc.*, 81 Ohio St.3d at 330-331; *State ex rel. v. M.T.D. Products, Inc.*, 43 Ohio St.3d at 118; *State ex rel. Pressware Int’l, Inc. v. ICO*, 85 Ohio St.3d 284, 289-290, 1999-Ohio-265. Under such circumstances, application of the plain error doctrine is appropriate. See e.g. *Kerouac*, 102 Ohio App.3d at 670 (applying plain error to trial court’s decision ordering defendant to pay attorneys’ fees in violation of controlling legal authority to the contrary); *Young v. Young*, 10<sup>th</sup> Dist. No. 95APF03-247, 1995 WL 912747, at \*4

(applying plain error to trial court decision that did not equally distribute property between spouses when record suggested that equal distribution was intended).

This is not a case in which Camaco missed a winning argument at the administrative level and seeks to raise it now. This is a case where ICO sua sponte interjected a fundamental error into the allowance of the VSSR Award by finding that VSSR liability could be imposed upon an employer for a hidden, latent defect in a machine of which the employer had no knowledge. Under such circumstances, plain error should be applicable to avoid any argument of waiver.

### CONCLUSION

To be entitled to mandamus, Camaco was required to demonstrate that it had a clear legal right to have the VSSR Award denied and that ICO abused its discretion in finding otherwise. *State ex rel. Rouch v. Eagle Tool & Machine Co.*, 26 Ohio St.3d 197, 198, 498 N.E.2d 464 (1986). Because of the broad discretion given ICO, its decision to grant the VSSR Award is reviewed for an abuse of discretion. *State ex. rel. Scott v. ICO*, 136 Ohio St.3d 92, 2013-Ohio-2445, at ¶¶12-13. This simply asks the question whether the VSSR Award is supported by “some evidence.” *State ex rel. Burly v. Coil Packing, Inc.*, 31 Ohio St.3d 18, 20, 508 N.E.2d 936 (1987); *State ex rel. Rouch*, 26 Ohio St.3d at 198.

The VSSR Award is not supported by “some evidence” because it ignores the fact that the Accident occurred for two reasons: (1) the design defect in the Wayne Trail 2; and/or (2) Albu knowingly and unilaterally bypassing safety devices that may have protected him from injury. This is not the basis for a VSSR Award. Ohio law does not impose strict liability upon employers for unknown hazards. Nor does Ohio law impose VSSR liability upon employers where an employee has deliberately circumvented a safety device resulting in a workplace injury.

Accordingly, ICO abused its discretion finding otherwise and this Court should grant Camaco the requested writ and order ICO to deny the VSSR Award.

The Tenth Appellate District tacitly conceded this conclusion by finding that: (1) it was “undisputed” that Albu circumvented safety features of the Wayne Trail 2; and (2) the only reason the VSSR Award was supported by some evidence was because Camaco waived its right to challenge the VSSR Award on the basis of the hidden, latent defect in the Wayne Trail 2. As demonstrated above, the analysis with respect to waiver is without merit. Accordingly, this Court should reverse the Tenth Appellate District, grant Camaco the requested writ and order ICO to deny the VSSR Award.

Respectfully submitted,

*/s/ Richard M. Garner*

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Notice of Appeal was served on the following counsel of record by electronic mail this 2<sup>nd</sup> day of December, 2015:

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\_\_\_\_\_  
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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Camaco, LLC,	:	
	:	
Relator,	:	
	:	
v.	:	No. 13AP-1002
	:	
Robert J. Albu and The Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

DECISION

Rendered on December 2, 2014

*Davis & Young, Richard M. Garner and Sunny L. Horacek,*  
for relator.

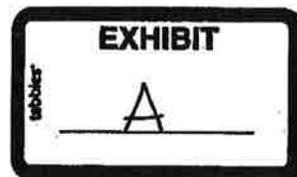
*Bentoff & Duber Co., LPA, and Glen Richardson,* for  
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*Michael DeWine, Attorney General, and Kevin J. Reis,* for  
respondent Industrial Commission of Ohio.

IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, Camaco, LLC ("relator"), filed this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting a violation of a specific safety requirement ("VSSR") award related to a workplace injury sustained by respondent Robert J. Albu ("claimant"), and ordering the commission to find that there was no VSSR.



{¶ 2} Pursuant to Civ.R. 53(D) and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate recommends that this court deny the request for a writ of mandamus.

{¶ 3} Relator sets forth two objections to the magistrate's decision:

1. The Magistrate incorrectly found that Albu was entitled to the VSSR Award where the undisputed evidence proves that Albu's injuries were caused by: (a) a hidden, latent design or manufacturing defect in the Wayne Trail 2; and/or (b) Albu knowingly and unilaterally bypassing safety devices for the Wayne Trail 2 that would have protected him from injury.
2. The Magistrate incorrectly found that Camaco waived the right to argue that Albu's injuries were caused by a hidden, latent design or manufacturing defect in the Wayne Trail 2.

{¶ 4} As explained in the magistrate's decision, claimant was injured while correcting a malfunction in a system that used a Motoman robot to transfer pipes to a Wayne Trail 2 bending machine that bent the pipes to form frames for automobile seats. The system was contained inside a fenced area, or "cell." The cell could be accessed via two safety-interlocked doors that were designed to stop power to the Motoman robot and the Wayne Trail 2 bending machine when opened. On the day he was injured, claimant entered the cell to make adjustments to the Motoman robot through an opening in the perimeter fence that was intended to allow finished product to exit, rather than through the interlocked doors. In support of his VSSR claim, claimant offered a report from Vernon Mangold, Jr., an expert in the design and operation of robotic systems, who concluded that the emergency stop circuit on the system was improperly and defectively designed.

{¶ 5} Following an initial order denying the VSSR claim, the commission granted claimant's request for rehearing, and a second staff hearing officer ("SHO") granted the award. The second SHO relied on the Mangold report and concluded that claimant's injury would have occurred even if claimant had entered the cell through the main door because of the defective stop circuit. The SHO further noted that "[Mangold] indicated that even the employees of Wayne Trail who trained the employees of the Employer were

not aware of this." (Second SHO Report, 2.) On review of relator's mandamus claim, the magistrate concluded that the Mangold report constituted some evidence on which the commission could rely in concluding that relator violated a safety requirement. The magistrate further concluded that relator waived the argument that a VSSR award was inappropriate because the accident resulted from a latent defect and that relator was unaware of the defect.

{¶ 6} We begin with relator's second objection, in which relator asserts that the magistrate incorrectly concluded that it waived the right to argue that the accident resulted from a latent defect. Generally, reviewing courts do not "consider an error which the complaining party 'could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.'" *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997), quoting *State v. Williams*, 51 Ohio St.2d 112, 117 (1977). This principle has been applied in cases involving the commission and in cases seeking mandamus relief. *See Quarto Mining* at 81-82; *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319, 320 (1988); *State ex rel. M.T.D. Prods., Inc. v. Stebbins*, 43 Ohio St.2d 114, 118 (1975).

{¶ 7} In *M.T.D. Prods.*, the claimant was injured while operating a plastic injection molding machine. *M.T.D. Prods.* at 114. The commission granted a VSSR award, concluding that the injury was caused by the lack of an effective guard on the machine. *Id.* at 117. On appeal, the Supreme Court of Ohio concluded that the machine in question had a safety gate that complied with the relevant safety requirements and that the safety gate had not malfunctioned prior to the claimant's injury. *Id.* at 117-18. The Supreme Court held that the commission abused its discretion in granting the VSSR award because a single failure of the safety gate was not sufficient to find that the regulation was violated. *Id.* at 118. In reaching its decision, the Supreme Court rejected the claimant's argument that the employer had notice that the machine was not operating properly because the claimant asserted this argument for the first time on appeal. *Id.*

{¶ 8} The present case presents a scenario similar to *M.T.D. Prods.* In this case, after the second SHO granted the VSSR award, relator filed a motion for rehearing. In the memorandum in support of its motion, relator argued that the Mangold report was inaccurate and that the expert reports and witness testimony that relator presented

contradicted the Mangold report. Relator claimed that the second SHO abused her discretion by failing to make a credibility determination with respect to the contradictory expert reports. However, in its motion for rehearing, relator did not argue that the accident resulted from a latent defect, nor that it lacked notice or knowledge of any defect in the system.<sup>1</sup> Relator could have offered this as an alternative basis for granting rehearing but failed to raise this issue before the commission.<sup>2</sup> Instead, relator asserted the argument for the first time in this court before the magistrate. The magistrate properly concluded that relator waived the issue by failing to assert it in the proceedings before the commission. We agree and reject relator's second objection that the magistrate erred by concluding that relator waived the latent-defect argument.

{¶ 9} As an alternative, relator asserts that, even if the latent-defect argument was waived, the commission's grant of the VSSR award constitutes plain error. In a civil proceeding, "plain error involves those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material, adverse effect on the character of and public confidence in, judicial proceedings." *In re Moore*, 10th Dist. No. 04AP-299, 2005-Ohio-747, ¶ 8, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122 (1997). Reviewing courts must proceed with "the utmost caution" in applying the doctrine of plain error in civil cases. *Goldfuss* at 121. We are unaware of any case in which the plain-error doctrine has been applied to overrule a commission decision granting a VSSR award, and relator fails to cite any such decision. Relator argues that it would be unjust to impose VSSR liability when the accident was the result of a latent defect. However, although relator states in its objections that the second SHO found that claimant's circumvention of the safety feature did not cause the accident "because there was a

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<sup>1</sup> In its motion for rehearing, relator quoted portions of the second SHO's report and highlighted in particular the following: "Mr. Mangold indicated that it was not possible for the Injured Worker to enter the enclosure and then turn on power only to the robot by means of the teach pendant. Mr. Mangold states that the transfer arm of the bending machine was capable of moving at full speed when the robot was in teach mode." (Motion for Rehearing, 2.) Relator then inserted ellipses in lieu of the following sentence from the second SHO's report: "[Mangold] indicated that even the employees of Wayne Trail who trained the employees of the Employer were not aware of this." It is the latter sentence which relator now highlights on appeal.

<sup>2</sup> Relator filed a "Motion to Vacate and to Reinstate Motion for Rehearing" after the commission denied its motion for rehearing. Therein, relator raised only technical/procedural issues but did not raise the issue of latent defect.

hidden, latent defect in Wayne Trail 2, *that neither Albu nor Camaco knew of* that allowed the transfer arm to continue to operate in teach mode, careful reading of the SHO's finding belies relator's statement. (Emphasis added.) (Objections, 7.) While the SHO did find that the transfer arm was capable of moving at full speed in teach mode, she noted that Mangold indicated that "*the employees of Wayne Trail* who trained the employees of the Employer were not aware of this." (Emphasis added.) (Second SHO Report, 2.) Relator argues this necessarily means that relator could not have been aware of it. We do not agree. Contrary to relator's assertion, the SHO did not find that relator was unaware of the defect.<sup>3</sup> Furthermore, relator points us to no evidence in support of its argument that it was unaware. Under these circumstances, we conclude that this is not one of those rare cases where the plain-error doctrine must be applied to prevent a manifest miscarriage of justice.

{¶ 10} Accordingly, relator's second objection to the magistrate's decision lacks merit and is overruled.

{¶ 11} In relator's first objection, it argues that the magistrate erred by finding that claimant was entitled to the VSSR award because his injuries were caused by a latent defect in the system and because claimant unilaterally bypassed safety devices that would have protected him from injury. With respect to the first argument, that claimant's injuries were caused by a latent defect, as explained above, relator waived this argument by failing to assert it before the commission. With respect to the second argument, that claimant unilaterally bypassed safety devices by entering the enclosure through an exit chute rather than the main door, the second SHO rejected this argument. Relying on the Mangold report, the second SHO concluded the injury would have occurred even if claimant had entered through the main door. The magistrate properly concluded that the Mangold report constituted some evidence on which the commission could rely in granting the VSSR award.

{¶ 12} Accordingly, relator's first objection to the magistrate's decision lacks merit and is overruled.

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<sup>3</sup> Here, we note as well that there was evidence presented to the commission indicating that, prior to claimant's accident, another employee was nearly struck when performing a similar task and that one employee spoke with relator's maintenance supervisor about modifying the system to avoid the risk of injury. *See Sheppard Depo., Stipulated Evidence at 254, 260-61.*

{¶ 13} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find that the magistrate has properly determined the pertinent facts and applied the appropriate law. We therefore overrule relator's two objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

*Objections overruled; writ denied.*

TYACK and KLATT, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Camaco, LLC,	:	
	:	
Relator,	:	
	:	
v.	:	No. 13AP-1002
	:	
Robert J. Albu and The Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on May 29, 2014

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*Davis & Young, Richard M. Garner and Sunny L. Horacek,*  
for relator.

*Bentoff & Duber Co., LPA, and Glen Richardson,* for  
respondent Robert J. Albu.

*Michael DeWine, Attorney General, and Kevin J. Reis,* for  
respondent Industrial Commission of Ohio.

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IN MANDAMUS

{¶ 14} Relator, Camaco, LLC ("relator" or "Camaco"), 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 finding that relator violated a

specific safety requirement ("VSSR") relative to the work-related injury sustained by Robert J. Albu ("claimant"), and ordering the commission to find that there was no VSSR.

Findings of Fact:

{¶ 15} 1. Claimant sustained a work-related injury on January 31, 2006 when he was struck in the head by the transfer arm of a Wayne Trail 2 bending machine and then struck his head on a pipe. Claimant's workers' compensation claim has been allowed for the following conditions:

Open skull/other fracture-brief coma; encephalocele; fracture condyle process mandible-closed; contusion, face; cortex contusion-brief coma; ankylosis left ear ossicles; orbit deformity due to trauma-right; open wound face complicated; open wound external left ear; open wound scalp-complicated; traumatic brain injury; subdural hemorrhage; brain conditions; nonpsychotic brain syndrome; brief depressive reaction; conductive hear loss tympanic membrane, left ear; cervical syndrome.

{¶ 16} 2. There is no real dispute by the parties concerning how claimant's injuries occurred. Claimant was employed as a weld technician by Camaco, which manufactures automotive parts. The machine in question was a Wayne Trail 2 bending machine that bent pipes to form frames for automobile seats. In the same area, a Motoman robot would transfer pipes to the bending machine to accomplish this task. The job of the weld tech is to alter the program on the robot (teach the robot) to adjust for a weld operation.

{¶ 17} At the time of the accident, the Wayne Trail 2 was being operated by Ollie Higgins—another Camaco employee. After Higgins changed parts during production, the robot picked up a part and moved it to another station, but then the entire process abruptly halted—presumably because it did not trip the sensor for the machine to keep running. Claimant was called to troubleshoot the problem.

{¶ 18} Claimant's job as a weld-tech required him to correct malfunctions (troubleshoot) inside a fenced area or cell that contained the Wayne Trail 2 bending machine and a robot called a Motoman. On the day in question, claimant was called to resolve a jam that had occurred inside the cell when the transfer process between the Motoman and the Wayne Trail 2 malfunctioned. In order to troubleshoot or diagnose the problem, claimant could either be inside or outside the enclosed fenced area.

{¶ 19} On the day of injury, claimant was not able to see the problem area from outside the fenced area and needed to go inside the fenced area. Claimant did not gain access through the interlock doors. Claimant testified that he crawled through the gap between the machine and the fence where the machine's discharge or exit chute delivers the finished part. Entering the fenced area through the exit ramp chute does not shut down electricity to the Wayne Trail 2 or the Motoman robot.

{¶ 20} When claimant entered the cell with the power on, he attempted to adjust the Motoman robot using the teach pendant. He apparently made an adjustment and the transfer arm from the Wayne Trail 2 moved and struck him in the head, driving his head into a pipe that was in the machine. This incident resulted in serious injuries to claimant.

{¶ 21} 3. On April 27, 2007, claimant filed an application for an additional award for a VSSR under Ohio Adm.Code section 4123:1-5-17(G) alleging that relator failed to provide suitable protective headgear where his work activity exposed his head to potential physical contact with rigid objects.

{¶ 22} 4. The Ohio Bureau of Workers' Compensation Safety Violations Investigation Unit conducted an investigation to determine whether claimant's injury was caused by relator's violation of a VSSR. The March 26, 2008 report is contained in the stipulation of evidence; however, the investigators did not reach a conclusion, and, instead, stated:

There are conflicting statements about why Robert Albu entered into the wire-mesh fencing area of the machine. Robert Albu states in his sworn affidavit he was trained by Roland Sheppard, an experienced Weld Tech, to climb through the material exit opening of the fencing in order to program the Motoman robot (Exhibit 1). The employer states Robert Albu would have not received any injuries had he used the Motoman Teach Pendant properly and programmed the Motoman robot from outside the wire-mesh fencing. Also, the employer states Robert Albu would not have received any injuries had he not bypassed the machine's safety features, the man-door interlocks, and entered the wire-mesh fencing through the material exit opening in the fencing.

(Emphasis sic.)

{¶ 23} 5. While acknowledging that this will be a very simplistic description of how these machines work, the magistrate notes these basic facts. Two machines were involved here: the Wayne Trail 2 is used to bend metal tubing to form seat frames for automobiles and it uses a Motoman robot to move bent frame tubes to different molds during the manufacturing process. The machines are fully automated and are surrounded by a perimeter fence to keep workers safe and away from the machines. There are two safety-interlocked doors which are designed to de-energize both machines when opened.

{¶ 24} Claimant was employed by relator as a weld tech trainee and his duties included troubleshooting robotic problems with some of the automated machines used by relator including the Wayne Trail 2 and its Motoman robot. Employees such as claimant used a "teach pendant" to re-program the Motoman robot. The teach pendant is supposed to control the Motoman robot at a slow speed while the Wayne Trail 2 is de-energized.

{¶ 25} 6. At the hearings before the commission, relator's argument focused on the fact that it was undisputed that claimant gained access to the area inside the perimeter fence through an opening in the fence and did not utilize the safety doors. In this regard, relator asserts that if claimant would have entered the area through the safety doors, power to the machines would have been off, and claimant would not have sustained his injuries.

{¶ 26} In response, claimant admitted that he gained access to the machine through an opening in the perimeter fencing and that he had been taught this method. Claimant also acknowledged that opening the safety doors would shut off power to both the Wayne Trail 2 and the Motoman robot. Claimant also indicated that it was necessary to have power turned on to both machines in order to troubleshoot the problems and use the teach pendant to alter the Motoman robot's actions. Because both machines needed to be energized, the opening in the perimeter fence was utilized by employees so that the machines would not need to be de-energized and then re-energized since that took time.

{¶ 27} 7. Three different experts prepared reports relative to ongoing litigation. The magistrate has reviewed all three reports and below has noted salient findings and opinions of those three experts which are relevant to the issues raised here.

{¶ 28} (a) At the outset of his September 15, 2009 report, Steven Kramer, Ph.D., stated:

At issue is the fence surrounding the work cell. The salient questions about the fence are: [1] Is it strong enough? [2] Is it large enough or too large? and [3] Does it do what it is supposed to do? The answers are: [1] yes, the fence is strong enough in that someone cannot break through and enter the work cell. [2] the work cell was made larger than it should have been in the area where workers needed to view the robot gripper in order to make adjustments.

To question number three; does it do what it is supposed to do? The answer is yes and no. Yes to the portion of the fence with the two interlocking gates because when either is opened, the electrical, hydraulic and pneumatic power are shut down and therefore all motion of the robot and other equipment in the work cell stops. In depositions taken in May 2009, it was stated by Wayne Trail [hereafter noted as WT], that the robot will operate in teach mode with the interlocking gate open. However, this was not adequately, if at all, conveyed to Camaco since Mr. Albu and other Camaco employees did not know of this feature. Back to question three: The part of the answer which is No pertains to the portion of the fence where the parts exit the work cell in what has been called the exit opening or exit chute.

At the time of the accident the portion of the fence where the bent tubes exited the work cell consisted of an opening that was 32 inches high by 71 inches wide starting at a height of 21 inches above the floor.

This opening was much larger than needed. \* \* \* Had the opening been sized to allow only the bent tubes to exit the work cell, this accident would not have occurred.

Camaco had safety walks throughout the plant by members of their safety committee every other week. It is unfortunate that no one on this committee identified this large opening as a potential problem. The RIA Standard says: "Safeguarding devices [in this case, the safety fence] shall be designed, constructed, attached and maintained to ensure that personnel cannot reach over, under, around, or through the device undetected and reach the hazard." More simply, the same standard in section 11.1 says: "Barrier guards, fixed and interlocked, shall prevent access to a hazard." In my

opinion, the safety committee should have identified this large opening as a potential problem and made the opening smaller. Had they done this, the accident would not have occurred.

Someone designing this safety fence as well as someone in charge of safety at this company should have known that employees at some point would climb through such an opening as a shortcut. The safety standards for robotics and moving machinery accept as a predicate that workers will either inadvertently, or intentionally, obtain access to machinery that is guarded by an inadequate fixed barrier guard. Why? Sometimes workers try to cut corners, sometimes they are pressured to keeping production running while needing to fix a jam-up, or sometimes they think they can make an adjustment on-the-fly in the work cell. The safety standards accept this as a premise in the design of the machinery and safety devices. Thus, the design of this machinery and safety fence were a proximate cause in this accident.

\* \* \*

There is another issue regarding the design of the work cell. That is, the equipment that gripped the tubes was positioned inside the work cell such that they could not be adequately seen from outside the work cell. On page 102 and 103 of Mr. Curtis Taylor's deposition, Mr. Taylor says Mr. Albu couldn't have made the adjustment from outside "because you have a big post in your way when you're looking at it from the backside of the machine....it's so far away and up so high you can't see the die itself...and you have the second flattening station that are all in your line of sight to be able to see exactly what you had to do to lay that part down." Consequently weld techs needed to enter the work cell to get a better look in order to make any needed adjustments. Also Mr. Roland Sheppard stated in his deposition that weld techs who were positioned outside the work cell said they could not adequately see how the tubes were being gripped in the clamping devices. Consequently weld techs had to enter the work cell to get a closer look in order to troubleshoot and touch-up [their word for adjust] a pickup or drop-off point. They indicated they needed the power kept on in order to make the proper adjustment. Mr. Taylor said [page 97] "now...after the accident, we don't run that side. We run the other side where everything is easy to see, its right in front of

you up close, you know. You can adjust any problem as far as the robot goes, you can adjust from outside."

Having personally seen the work cell on February 10, 2009 I can corroborate that the clamping devices were too far from the fence to be adequately viewed from outside the work cell. If the clamping devices would have been positioned closer to any portion of the fence, or the fence positioned closer to where the pickup and drop-off positions were, touch-up could have been accomplished using the pendant from outside the work cell. From a design standpoint, it was entirely feasible to reposition the clamping devices, benders, robot, fence and transfer mechanisms, just as done on the other side of this work cell. Had the work cell been so designed, there would have been no need to enter the work cell with it powered up.

In order to adequately troubleshoot the manufacturing line [and hence adjust a drop-off or pickup point] a weld tech or other suitably trained person needed to be inside the work cell with the power turned on and the robot in teach mode. Camaco did not have a policy about entering the work cell. The policy they did have concerning not dismantling or overriding or tampering guarding [Exhibit 8] was ambiguous because it was interpreted by weld techs to not apply to troubleshooting as well as not prohibiting entering the work cell through the unguarded exit opening.

In April and May you sent me the following depositions for my review: Stephanie Fox, William Hamby Jr., Ollie Higgins, Alfred Horton III, David Maysonet, Patrick Schwartz, Roland Sheppard, Curtis Taylor, Jonathan Wright and of course Robert Albu in January 2009. In June you sent me depositions for review of: Matthew Brown, Danny Haid, Kevin Greiner, Chris May, Robert Mayse, Scott McCabe, and Mark Swob. Although your safety expert, Mr. Rennell, will likely comment on safety issues discussed in these depositions, I noted the following points in the deposition of Mr. Roland Sheppard. Mr. Sheppard stated...and I'm paraphrasing:

[One] The work cell did not have any sort of physical safety device preventing or stopping people from entering it through the parts exit opening which was large enough for a grown man to fit through it rather easily.

[Two] The company put production numbers ahead of safety. They cared about production numbers and getting parts out; that's why their quality lagged. They make it an emphasis to get the equipment or the work cell back up and running as quickly as possible.

[Three] Several weld techs were inside of the WT2 work cell while it was powered up and the company knew this.

[Four] Dave Maysonet almost had a near miss on this line some time before Albu's accident.

[Five] Maintenance supervisor, Bill Hamby, Jr. said he would look into trying to figure out a way for us to be able to be in the work cell without all of this other stuff going on.

Mr. Taylor also detailed that several weld techs including himself entered the work cell through the exit opening in order to troubleshoot and adjust the robot pickup and drop-off points. He provided an accurate description of the power to the robot and other equipment and how the sensors sent signals to these devices. He indicated it was the WT guys who showed Camaco employees how to go into the work cell when necessary [page 32]. It appears that it was common practice at Camaco for weld techs to enter the work cell when the power was on in order to fix a problem that might have occurred. In my opinion, this clearly violates good safety principles in the workplace since injury was substantially certain to occur.

\* \* \*

In the WT2 work cell at Camaco it appears the robot can move in teach mode while the interlock barrier gate is open. This in itself is not a violation of RIA or OSHA. However, it is not known if the speed of 10 inches/second [for safety, no doubt] was maintained in troubleshooting mode.

(Emphasis sic.)

(b) In his October 14, 2009 report, Tarald O. Kvalseth, Ph.D., noted:

The opening through the fence was unnecessarily large and could easily and foreseeably be used by an individual to enter the cell to perform maintenance work or troubleshooting instead of going through an interlocked gate. Entering through that opening could certainly and foreseeably be

perceived by an individual as being more efficient than going through an interlocked gate, which would shut down the power to the equipment.

\* \* \*

Camaco had not provided Robert Albu with sufficient training for him to perform the type of maintenance and troubleshooting that he was doing at the time of his injury. It seems clear from his and other depositions that he was not sufficiently qualified to do this work by himself.

\* \* \*

The unsafe act by Robert Albu involved entering the enclosure through the fence opening rather than using the electrically interlocked gate, which would have de-energized the equipment. However, he apparently did it as he had observed others do it. He did not act contrary to any instructions he had been provided with. He believed that he needed power to the equipment in order to properly perform his task, which could be achieved efficiently by going through the fence opening. He did not act contrary to any warning sign informing or reminding him that this fence opening should not be used to enter the enclosure since none was provided.

(c) The November 30, 2009 report of Vernon Mangold, Jr., who stated:

At the time that WTT designed, fabricated and installed the system at Camaco they did not have a thorough understanding of the operation and function of the Motoman controller. In layman's language: their recommended fault recovery process was incorrect and potentially lethal.

In several of the depositions WTT personnel erroneously state that Mr. Albu's incident could not have happened if he entered the work cell via the main entrance gate. They assert that entering through the gate would have placed the system in a hold mode and the robot would be placed in teach mode to allow Albu to correct the type of machine fault that he observed at the dimple press. They have emphatically stated that the transfer device could not have injured Albu while he was standing in the danger zone of the dimple press with the robot teach pendant in hand and the robot in teach mode.

Simply put: Conventional robots that have been marketed and sold in the US since 1992 are equipped with sophisticated safety control devices known as teach pendants. Modern teach pendants are equipped with a mid-position enable switch that must be properly depressed to cause the robot to move exclusively by means of teach pendant control. The robot is restricted in its movement so that it cannot travel any faster than what is described as slow speed during teach mode. This control feature is useful but is specific to the robot only.

It can be proven that the robot did not strike anyone. However, the transfer device that did strike Mr. Albu was, at the time of the incident, capable of moving at full speed while the robot is in tech mode. How is this possible? Robot control interfaces have a factory installed feature that allows a person to, in the parlance of the industry, "Force an Output On" from the teach pendant with the robot in the teach mode.

It is incorrect to assert that Albu would have been safe with the robot in teach mode. WTT designed and built a PLC control system that allowed for a custom robotic device, in this case the overhead transfer mechanism that struck Albu, and a vertical hydraulic dimple press, to operate independently of the robot machine control.

\* \* \*

Emergency stop circuit was improperly and defectively designed because the robot teach pendant emergency-stop is not designed to emergency-stop all equipment within work cell that can produce safety hazards to personnel. WTT failed to provide a proper emergency stop control scheme integrating emergency stop controls in a coherent electrical design that complies with ANSI single point of control requirements. Thus, the functioning of the robot teach pendant emergency stop control and the interaction of the control feature with other capital equipment system elements present in the integrated system was not properly designed. In the event that the emergency-stop circuit had been properly designed, then the use of the e-stop control on the teach pendant could have prevented Mr. Albu's incident from occurring. The risks of this emergency stop circuit design outweigh any conceivable benefit.

\* \* \*

At the time WTT designed, fabricated and installed this industrial robot system at Camaco they (WTT) did not have a thorough understanding of the operation and function of the Motorman controller. WTT's recommended fault recovery process was incorrect, hazardous, defective and potentially lethal. The transfer device that did strike Mr. Albu was capable of moving at full speed even if the robot was in teach mode and even if Mr. Albu entered the work cell through the interlocked gate. As a result, it is incorrect to claim that Mr. Albu would have been safe with the robot in teach mode because the program logic control (PLC) control [sic] system that WTT designed and built allowed for the subject overhead transfer mechanism and the vertical hydraulic dimple press to operate independently of the robot machine control.

{¶ 29} 8. Claimant's application was heard before a staff hearing officer ("SHO") on December 19, 2012. The SHO determined that claimant was not entitled to an additional award for a VSSR solely because he circumvented the machine's safety features. Specifically, the SHO stated:

The Staff Hearing Officer finds that, but for Mr. Albu's intentional act in circumventing the safety features (limit switch equipped man doors) protecting the cell, the Wayne Trail machine would not have been energized at the time during which Mr. Albu was within the cell and that, consequently, his injury would not have taken place. The question of whether or not head protection was required or whether or not there was a violation of O.A.C. 4123:1-5-17(G) is not pertinent in the present scenario as there would have been no potential for a head injury to occur, in the manner sustained by Mr. Albu, had the personnel doors been used by Mr. Albu and the cell de-energized.

For all the foregoing reasons, the IC-8 application is denied. All evidence on file and at hearing, including the 12/18/2012 report of Dr. Vargo, the 12/17/2008 deposition of Robert Albu, the 04/16/2009 deposition of Roland Sheppard, the 04/15/2009 deposition of Jonathan V. Wright and the 04/15/2009 deposition of Alfred F. Horton, was reviewed and considered.

{¶ 30} 9. Claimant filed a motion for rehearing.

{¶ 31} 10. In an order mailed March 20, 2013, an SHO granted claimant's motion, stating:

It is the order of the Industrial Commission that the Motion for Rehearing be granted for the reason that the Injured Worker has demonstrated that the order issued 01/26/2013 was bas[ed] on a clear mistake of law in accordance with Ohio Administrative Code 4121-3-20(E)(1)(b).

The Injured Worker's counsel sites [sic] to evidence in the rehearing request that indicates the Injured Worker had to be inside the cell with the power to the machine on in order to trouble shoot and fix the Motoman that was not working. He also cites evidence indicating the Motoman and the Wayne Trail machine were interconnected power wise and that the power could not be turned on or off to each separately. The Staff Hearing Order fails to address these issues and fails to cite any evidence to indicate the Injured Worker did not need to be inside the cell with the power on to the Motoman, and thus also to the Wayne Trail machine, in order to trouble shoot and fix the Motoman. The Employer's rebuttal memo to the rehearing request fails to cite any evidence that contradicts what is noted by the Injured Worker's counsel.

If the evidence sited [sic] by the Injured Worker's counsel is correct, then the intentional circumvention of the doors that automatically shut off the power is immaterial as the power would have to have been turned back on once the Injured Worker was inside the cell so he could perform the required trouble shooting even if he had used the doors. The intentional circumvention of the safety feature is only a bar to an award if the injury would not have occurred had the circumvention not occurred. In this case the order fails to explain why the Injured Worker's argument is not correct that the injury would have occurred despite the circumvention of the safety feature of the doors since the power had to be on once the Injured Worker was in the cell. Since the Staff Hearing Order fails to address this issue and site [sic] evidence indicating the power did not need to be turned on once the Injured Worker was in the cell whether he used the doors to enter or not, or that the Wayne Trail could be turned off without the Motoman being turned off, it is found the order is not legally sufficient pursuant to [*State ex rel. Mitchell v. Robbins & Myers, Inc.*, 6 Ohio St.3d 481 (1983)].

Further, since the order found no violation solely because of the Injured Worker's circumvention of the safety feature associated with the doors, the order does not address whether head protection would have been required by the rule once the Injured Worker was inside the cell with the power back on if such was in fact required to perform the trouble shooting.

(Emphasis added.)

{¶ 32} 11. The matter was reheard before a second SHO on June 26, 2013. The SHO concluded that claimant was entitled to an additional award for a VSSR, stating:

It is the order of the Staff Hearing Officer that the Injured Worker was employed on the date of injury noted above, by the Employer as a weld technician; that the Injured Worker sustained an injury in the course of and arising out of employment when he was struck in the head by a transfer arm from a Wayne Trail bending machine and then struck his head on a pipe.

At the time of the injury the Injured Worker had been assigned to correct a malfunction in a fenced in area that contained a Motoman robot and the Wayne Trail bending machine. Under normal circumstances the robot transferred pipes to the bending machine where they would be formed into frames for automobile seating. On the day in question the transfer process had malfunctioned and the bending machine was not accepting the transfer of a pipe. The Injured Worker was called in to correct the situation. He stated that he needed to enter the enclosure to make the repair as he could not see the area of the problem from outside the enclosure.

The fenced in area was designed so that when a person entered the enclosure through a door power was cut off to both the robot and the bending machine. At the time of the injury the Injured Worker did not enter the fenced in area through a door. He, rather, climbed into the enclosure through an opening that was designed to permit finished product to leave the enclosure. The Injured Worker testified that he had observed other employees enter the enclosure in this way prior to the date of the injury and that he did so as he did not want to cut off power to the bending machine as he did not know how to restart it. Prior to entering the

enclosure the Injured Worker picked up a hand held device called a teach pendant and shut off the power to the robot. He then slid the teach pendant under the bottom of the enclosure and entered the fenced in area. He does not remember any of the events following this until a point after which the injur[y] had occurred. The evidence indicates that the Injured Worker attempted to adjust the robot using the teach pendant and the transfer arm of the bending machine moved and struck the Injured Worker in the head. He was then thrown into the pipe that was in the machine.

The Injured Worker has requested a finding that his injury was the result of the Employer's violation of Section 4123:1-5-17(G) of the Ohio Administrative Code. This section requires an Employer to provide an employee with suitable protective headgear where his work activity exposes him to potential hazards from falling or flying objects or where there is the potential of physical contact to the head from rigid objects. There is no evidence that the Injured Worker's employment presented him with potential hazards from falling or flying objects. The issue is whether his employment presented a potential hazard of contact with rigid objects.

The Employer has asserted that the work activity presented no potential hazard of contact with rigid objects. It states that the Injured Worker bypassed a safety device when he failed to enter the enclosure through a door thereby shutting off all power. The Employer argued that, if he had entered through a door, the Injured Worker could have used the teach pendant to repair the robot by using the teach pendant to turn on power only to the robot and then make the repair when the robot was in teach mode. After the repair was made, the Injured Worker would have exited the enclosure and then turned on power to all of the machinery.

There is no doubt that the Injured Worker bypassed a safety device when he entered the enclosure through means other than the main door. The Hearing Officer, however, finds that the injury would have occurred even if the Injured Worker had gone into the enclosure through the main door. The file contains a report from Vernon Mangold, an expert in the design and operation of robotic systems. Mr. Mangold indicated that it was not possible for the Injured Worker to enter the enclosure and then turn on power only to the robot by means of the teach pendant. Mr. Mangold states that the transfer arm of the bending machine was capable of moving

at full speed when the robot was in teach mode. He indicated that even the employees of Wayne Trail who trained the employees of the Employer were not aware of this.

The Hearing Officer finds that the Injured Worker's employer did present a potential hazard of head contact with rigid objects as the system did not permit power to be turned off to the bending machine when power to the robot was activated. The Employer, therefore, should have provided head protection to the Injured Worker. Had the Employer done so the injury might not have occurred or might have been much less serious.

It is therefore ordered that an additional award of compensation be granted to the Injured Worker in the amount of thirty-five percent of the maximum weekly rate under the rule of State ex rel. Engle v. Indus. Comm. (1944), 142 Ohio St. 425.

{¶ 33} 12. Relator filed requests for reconsideration and rehearing and argued that the Mangold report could not be relied on because it was contradicted by all the other evidence submitted. Further, relator asserted that the SHO failed to explain why the Mangold report was found to be persuasive.

{¶ 34} 13. Relator's requests for reconsideration and rehearing were denied by orders of the commission mailed September 5 and 26, 2013.

{¶ 35} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 36} For the reasons that follow, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by granting claimant an additional award for a VSSR and this court should deny relator's request for a writ of mandamus.

{¶ 37} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel.*

*Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 38} In regard to an application for an additional award for a VSSR, the claimant must establish that an applicable and specific safety requirement exists, which was in effect at the time of the injury, that the employer failed to comply with the requirement, and the failure to comply was the cause of the injury in question. *State ex rel. Trydle v. Indus. Comm.*, 32 Ohio St.2d 257 (1972). The interpretation of a specific safety requirement is within the final jurisdiction of the commission. *State ex rel. Berry v. Indus. Comm.*, 4 Ohio St.3d 193 (1983). Because a VSSR award 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.*, 46 Ohio St.3d 170 (1989). 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 tests. *Trydle*; *State ex rel. A-F Industries v. Indus. Comm.*, 26 Ohio St.3d 136 (1986); and *State ex rel. Ish v. Indus. Comm.*, 19 Ohio St.3d 28 (1985).

{¶ 39} Relator raises some new arguments in this mandamus action which were never made to the commission. The only issue challenged below was whether or not the cited report of Mr. Mangold constituted some evidence upon which the commission could rely to find a VSSR. Relator argued before the commission and continues to argue that Mangold's report is contrary to the reports of Drs. Kramer and Kvalseth, as well as the testimony of Stephanie Fox, and the commission was required to explain the reason why. At this time, relator also contends that the Wayne Trail 2 had a design defect and because of that defect, relator could not be held responsible for claimant's injuries.

{¶ 40} Ohio Adm.Code 4123:1-5-17 provides, in pertinent part:

Personal protective equipment

\* \* \*

(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.

{¶ 41} First, to the extent that relator argues that a VSSR is inappropriate because the Wayne Trail 2 had a latent defect, which relator did not know, relator failed to raise this issue when the matter was still before the commission. Ordinarily reviewing courts do not have to consider an error which the complaining party could have called, but did not call, to the lower tribunal is attention at a time when it could have been avoided or corrected. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78 (1997). These principles also apply to cases reviewed in mandamus. *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319, 320 (1988).

{¶ 42} Relator asserts that it is immaterial that it did not raise this issue because the SHO made it an issue which this court must now consider in this mandamus action. However, the magistrate notes that relator could have raised this issue when it sought review of the June 26, 2013 SHO order; however, relator did not. Relator asserts the SHO made contradictory findings which negate any VSSR penalty. Relator asserts the SHO specifically found that, because of the latent defect, relator could not have known claimant's injuries could have occurred. However, relator still failed to raise this argument at a time when the commission could have considered it and the magistrate does not find it appropriate for this court to consider the potential implications of the SHO's statements.

{¶ 43} Turning now to the finding of a VSSR, relator first argues that there were no potential hazards from physical contact with rigid objects when employees were outside the perimeter fencing. This was never an issue. The danger to employees arose because it

was impractical, if not impossible, to troubleshoot this machine from outside the perimeter fence. There is evidence in the record indicating that the preferred way to troubleshoot these machine was from outside the perimeter fence. As a result, when troubleshooting was required, employees needed to enter inside the perimeter fence. The safety-interlocked gates were designed to shut off power to both of the machines in the event that an employee needed access. However, there is evidence that the teach pendant did not work on the Motoman robot if the power to both machines was shut off. Further, there was a large opening in the perimeter fence used by employees to bypass the safety-interlocked gates to gain access to the machine. There is also evidence that relator knew employees utilized this opening to gain access to the machine and warning signs were posted by the opening. This information is contained within the Mangold report and is corroborated in the other reports as well as deposition testimony from various employees.

{¶ 44} Relator also argues that the finding of a VSSR here is improper because claimant deliberately circumvented the machine's safety features and cites *State ex rel. Quality Tower Serv., Inc. v. Indus. Comm.*, 88 Ohio St.3d 190 (2000). This was never disputed by any of the parties. However, the SHO relied on evidence that even if claimant would have entered the area via the opening, the injury would have occurred. Given this finding, relator's argument fails.

{¶ 45} Although relator challenged the Mangold report in its motion for rehearing, relator does not challenge that report here. Relator only argues that there cannot be a VSSR finding when the injuries were caused by a latent defect about which relator was unaware. As such, the magistrate finds the Mangold report does constitute some evidence upon which the commission could rely to find that even if claimant would have entered through the perimeter fence by way of the safety-interlocked doors, the transfer arm would have been capable of moving at full speed when the robot was in teach mode. As noted previously, the other arguments relator makes here, that the machine was defective, and this was a first time accident cannot be raised, for the first time, in this mandamus action. Relator failed to raise those arguments before the commission.

{¶ 46} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion when it found that relator had

violated a specific safety requirement in making that award to claimant, and this court should deny relator's request for mandamus.

/S/ MAGISTRATE  
STEPHANIE BISCA BROOKS

**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).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Camaco, LLC,

Relator,

v.

Robert J. Albu and The Industrial  
Commission of Ohio,

Respondents.

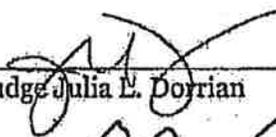
No. 13AP-1002

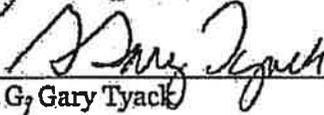
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 2, 2014, relator's objections to the magistrate's decision are overruled, and the decision of the magistrate is approved and adopted by the court as its own. It is the judgment and order of this court that relator's request for a writ of mandamus is denied. Costs shall be assessed against 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 Julia L. Dorrian

  
\_\_\_\_\_  
Judge G. Gary Tyack

  
\_\_\_\_\_  
Judge William A. Klatt

EXHIBIT  
tabbler  
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