

ORIGINAL

In the
Supreme Court of Ohio

STATE ex rel. CAMACO, LLC,	:	Case No. 2015-0036
	:	
Appellant,	:	On Appeal from the
	:	Franklin County Court of Appeals,
vs.	:	Tenth Appellate District,
	:	Case No. 13AP-1002
INDUSTRIAL COMMISSION OF OHIO,	:	
et al.,	:	
	:	
Appellees.	:	

**BRIEF OF APPELLEE,
INDUSTRIAL COMMISSION OF OHIO**

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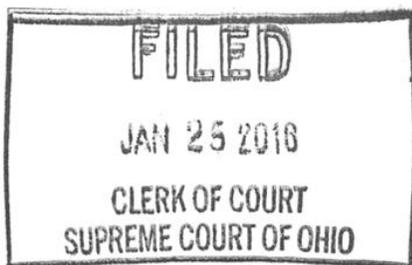


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INTRODUCTION

This is an appeal of an original action in mandamus concerning an award for the violation of a specific safety requirement (“VSSR”) in a workers’ compensation claim. In the Court of Appeals, Appellant, Camaco, LLC (“Camaco”) requested a writ of mandamus to compel the Appellee, Industrial Commission of Ohio (“commission”) to vacate its order, which granted Respondent, Robert Abu (“Abu”) an additional award for a VSSR. Specifically, the commission found that Camaco failed to provide its employees, including Abu, with “suitable headgear” where “the potential hazards to their heads exists from . . . physical contact with rigid objects.” Ohio Adm.Code 4123:1-5-17(G)(1)(a).

The Court of Appeals held there was some evidence from which the commission could find that “[Camaco] 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. [Camaco], therefore, should have provided head protection to [Abu]. Had [Camaco] done so the injury might not have occurred or might have been much less serious.” *State ex rel. Camaco, L.L.C. v. Abu*, 10th Dist. Franklin No. 13AP-1002, 2014-Ohio-5330, ¶ 32 (“App. Op., ¶ ___”), quoting the commission’s decision. The commission also “relied on the Mangold report and concluded that [Abu’s] injury would have occurred even if [Abu] had entered the cell through the main door because of the defective stop circuit.” (App. Op., ¶¶ 5 and 45). The Court of Appeals found the commission had evidence that allowed it to reject Camaco’s defense of unilateral negligence on the part of the Abu. (App. Op., ¶¶ 11 and 43-46). Finally, the Court of Appeals found that Camaco’s latent defect defense, essentially a “first time failure” defense, was not timely raised at the administrative level and was, therefore, waived. (App. Op., ¶¶ 6-10 and 41-42).

Having found that the commission's order is supported by some evidence, and the commission did not abuse its discretion nor act contrary to law, the Court of Appeals denied Camaco's request for a writ of mandamus. The commission submits that this Court should affirm the Court of Appeals' decision and deny the requested writ of mandamus.

STATEMENT OF THE CASE AND FACTS

Albu sustained serious injuries on January 31, 2006, "when he was struck in the head by the transfer arm from a Wayne Trail bending machine and then struck his head on a pipe." (App. Op., ¶¶ 15, 20). He filed a workers' compensation claim, which is allowed for a number of medical conditions, including "traumatic brain injury." *Id.* Albu then filed an application for an additional award for the VSSR. (App. Op., ¶ 21; Appellant Camaco's Supplement, p. 2, "Supp., p. ____."). [The pagination of the Supplement filed by Camaco, herein, is the same pagination for the "Stipulation of Record," filed in the Court of Appeals.]

Albu was employed as a weld technician by Camaco, which manufactures automotive parts. (Supp., p. 560). The machine in question is the Wayne Trail bending machine. (Supp., pp. 554-555). Working in concert with the Wayne Trail is the Motoman robot. *Id.* The Motoman robot transfers metal tubing to the Wayne Trail. The Wayne Trail bends the metal tubing to form seat frames for automobiles. (Supp., pp. 554-555). The Motoman robot and the Wayne Trail machines are surrounded by a fence to keep employees away from the machines. *Id.*; App. Op., ¶ 23. This fenced-in area is called "the cell." (Supp., pp. 587 and 588; App. Op., ¶ 4). Access to the machines inside of the cell is through safety "interlock doors." (Supp. Pp. 574, 588; App. Op., ¶ 23). When a worker enters the cell through one of the interlock doors, electrical power is shut off to both machines inside the cell. (Supp., pp. 564, 567-568, 585-586, 587 and 602-603; App. Op., ¶ 25).

The duties of a weld tech, included altering “the program on the [Motoman robot] to adjust for a weld operation.” (Supp., p. 561; App. Op., ¶ 18). To “trouble shoot’ or diagnose a problem, a weld tech would use a Motoman “teach pendant.” (Supp., pp. 563-564; App. Op., ¶ 20) Albu was a weld tech but did not have training on the operation of the Motoman robot. (App. Op., ¶ 18). Albu was not the operator of either the Motoman robot or the Wayne Trail. (Supp., p. 584).

On the date in question, the “robot stopped at the Wayne Trail 2.” (Supp., pp. 584-585; App. Op., ¶ 18). Albu’s job was “to determine what the problem was with the [Motoman robot.]” (Supp., pp. 562 and 570; App. Op., ¶ 18). In order to “trouble shoot” or diagnose the problem, a weld tech would use a Motoman “teach pendant” and could be either inside or outside “the cell,” the enclosed fenced-in area. (Supp., pp. 563-564, 755; App. Op., ¶¶ 18-20). In this instance, Albu was unable to see the problem with the Motoman robot from outside of the cell, due to the positioning of the robot in relation to the fencing. (Kramer Affidavit, Supp., p. 459, 472).

The robot must have electrical power in order for the employee to operate it while the employee is troubleshooting inside the cell because the employee has to determine where the problem is located or adjust the robot. (Supp., p. 565; App. Op., ¶¶ 26 and 43). The Motoman robot is designed to respond to the employee’s commands delivered by the teach pendant to the robot. (Supp., pp. 755 and 773-774; App. Op., ¶¶ 24 and 43). Teach mode occurs when the employee is using the teach pendant to adjust or instruct the Motoman robot. (Supp., p. 755; App. Op., ¶¶ 24 and 43).

When the interlock doors are opened, a lockout would shut off all electrical power to the cell, including the Motoman robot. (Supp., pp. 564, 609). In order to resume operations,

someone would have to restart both machines. (Supp., p. 564; App. Op., ¶ 26). Albu did not know how to restart the Wayne Trail and the Motoman robot. (Supp., p. 594; App. Op., ¶ 32).

Albu testified that “you could go through the gate, but that shuts everything down.” (Supp., p. 564). Albu explained that he “can’t fix the problem without having the power to adjust the robot.” (Supp., pp. 565 and 585-586). Albu also testified that, to do his job, he has to be inside the cell in order to see the problem, with the power on to both the Wayne Trail and the Motoman robot and, while inside the cell, use the teach pendant to operate or instruct the Motoman robot. (Supp., p. 565, 572-573).

On the date of injury, Albu did not gain access through the interlock door. Albu testified that he crawled through the gap between the exit chute of the machine and the fence, where the machine’s “discharge” or “exit chute” delivers the finished part. (Supp., pp. 566, 571, 587, 590 and 601-602; App. Op., ¶ 19). Entering the fenced area through the exit ramp chute does not shut down electricity to the Wayne’s Trail or the Motoman robot. (Supp., pp. 564-566, 570, 585-586; App. Op., ¶¶ 25-26).

In order to maintain power to the Motoman robot, Albu entered the cell, through the exit chute area where there was a gap between the fence and the machine, which allowed a worker to crawl into the cell. Albu explained that he could not see to diagnose the problem or direct the Motoman robot while standing outside “the cell.” (Supp., p. 571). Prior to the date of injury, Albu and other workers entered “the cell” by crawling through the unprotected area or gap in the fence near the “exit chute.” This practice existed and was known to Camaco well before the date of injury. (Supp., pp. 571-572, 574, 585, 587, 595, 660, 739-740 and 742-743).

When Albu entered the cell, the machines were not moving because a part was stuck. (Supp., p. 570). Once inside the cell, Albu was struck by the transfer arm of the Wayne Trail.

(Supp., pp. 553 and 752; App. Op., ¶¶ 15, 20). The transfer arm struck Albu in the left-side back of his head, causing his head to strike another part of the machine. (Supp., pp. 576 and 559; App. Op., ¶¶ 15, 20). Evidence indicates that, while the employee is inside the cell (with the interlock door open) using the teach pendant on the Motorman robot in teach mode, the transfer arm of the “Wayne Trail” is capable of moving at top speed. (App. Op., ¶¶ 28(c) and 32). The investigation suggested that Albu was injured when “the sensor was tripped causing the press to cycle.” (Supp., pp. 625-626).

Albu’s application for an additional award for VSSR was heard by a commission staff hearing officer (“SHO”) on June 26, 2013. (Supp. 723-808). Subsequently, the SHO issued a decision denying the application, finding 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.” (Supp., p. 671; App. Op., ¶ 29).

In February 2013, Albu filed a motion for rehearing. (Supp., p. 661; App. Op., ¶ 30). In March 2013, a rehearing was granted. (Supp., p. 703; App. Op., ¶ 31). The commission reasoned that “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.” (Supp., p. 703; App. Op., ¶ 31). Further, the commission noted, “[T]he intentional circumvention of a safety feature is only a bar to an award if the injury would not have occurred had the circumvention not occurred.” (Supp., p. 703; App. Op., ¶ 31). The commission found that the first SHO’s 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.” (Supp., p. 703; App. Op., ¶ 31). Therefore, the commission held that, “[s]ince the Staff Hearing Officer fails to address this issue and cite 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 the *Mitchell* case.” (Supp., pp. 703-704; App. Op., ¶ 31).

Upon the subsequent rehearing, the SHO made the following findings of fact:

*** [Albu] was employed on the date of injury noted above, by the Employer as a weld technician; that [Albu] 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 [Albu] 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. [Albu] 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 the power was cut off to both the robot and the bending machine. At the time of the injury [Albu] did not enter the fenced in area through the door. He, rather, climbed into the enclosure through an opening that was designed to permit finished product to leave the enclosure. [Albu] testified that he had observed other employees enter the enclosure in this way prior to the date of 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 [Albu] 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 injury had occurred. The evidence indicates that [Albu] attempted to adjust the robot using the teach pendant and the transfer arm of the bending machine moved and struck [Albu] in the head. He was then thrown into the pipe that was in the machine.

(Supp., pp. 720-721).

Based upon these facts, the SHO considered the issue of whether Camaco had violated Ohio Adm.Code 4123:1-5-17(G), which requires an employer to provide an employee with suitable protective headgear when the employee's work activity exposes him to potential hazards from either falling or flying objects, or the potential of physical contact to the head from rigid objects. The SHO found no evidence of potential hazards from falling or flying objects, so turned to the issue of the danger of head contact from rigid objects.

The SHO considered Camaco's asserted defense that Albu had bypassed a safety device when he failed to enter the enclosure through the doors designed to shut off all power. While the SHO acknowledged that Albu had bypassed a safety device when he entered the enclosure through means other than the main door, the SHO found that "the injury would have occurred even if [Albu] had gone into the enclosure through the main door." (Supp., p. 721). The SHO relied, for this conclusion, on the report of Vernon Mangold, an expert in the design and operation of robotic systems, who indicated that "it was not possible for [Albu] to enter the enclosure and then turn on power only to the robot by means of the teach pendant." (Supp., p. 721). Rather, Mangold stated that "the transfer arm of the bending machine was capable of moving at full speed when the robot was in teach mode." (Supp., pp. 509, 523, 721). On this basis, the SHO concluded that "the injury would have occurred even if [Albu] had gone into the enclosure through the main door." (Supp., p. 721; App. Op., ¶ 32).

Having denied Camaco's defense argument, the SHO found that Albu's work presented "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. [Camaco], therefore,

should have provided head protection to [Albu].” (Supp., p. 721). The SHO granted Albu an additional award of 35% of the maximum weekly rate. (Supp., p. 721; App. Op., ¶ 32).

Camaco filed a motion for reconsideration. (Supp., p. 809). The commission denied reconsideration. (Supp., p. 884; App. Op., ¶ 34). Further motions for reconsideration and/or rehearing were denied. (Supp., pp. 888 and 899).

Camaco then filed the underlying mandamus action in the Tenth District Court of Appeals, challenging the commission’s order that granted Albu’s application for an additional award for a VSSR. (App. Op., ¶ 35). The magistrate of the Court of Appeals recommended that the requested writ be denied. (App. Op., ¶¶ 36 and 46). The Court of Appeals overruled Camaco’s objections, and denied any writ. (App. Op., ¶¶ 10, 12 and 13). Camaco’s appeal as of right is now before this Court.

ARGUMENT

It is well settled that the determination of disputed factual issues and the interpretation of regulations under the workers’ compensation law are within the sound discretion of the commission. *State ex rel. Allied Wheel Products, Inc. v. Indus. Comm.*, 166 Ohio St. 47, 139 N.E.2d 41 (1956); see also *State ex rel. Sanchez v. Indus. Comm.*, 18 Ohio St.3d 46, 479 N.E.2d 864 (1985), and *State ex rel. Berry v. Indus. Comm.*, 4 Ohio St.3d 193, 448 N.E.2d 134 (1983). Mandamus will not lie to interfere with the discretion of the commission so long as that discretion is within legal bounds. *State ex rel. Goodyear Tire & Rubber Co. v. Indus. Comm.*, 38 Ohio St.2d 57, 310 N.E.2d 240 (1974). Factual determinations made by the commission are subject to correction in mandamus only upon a showing of abuse of discretion. *State ex rel. Cleveland Wrecking Co. v. Indus. Comm.*, 35 Ohio St.3d 248, 250, 520 N.E.2d 228, 231 (1988); *State ex rel. Haines v. Indus. Comm.*, 29 Ohio St.2d 15, 278 N.E.2d 24 (1972). Questions of

credibility and the weight to be given evidence are clearly within the discretion of the commission as fact-finder. When the commission weighs the evidence and finds that a specific safety requirement was or was not violated, a court may not substitute its judgment for that of the commission, absent a showing of abuse of discretion. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165, 429 N.E.2d 433 (1981).

Camaco must show it has a clear legal right to the relief sought and that the commission has a clear legal duty to provide that relief to obtain a writ of mandamus overruling a determination of the commission. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), syllabus. A clear legal right exists only where Camaco shows that the commission abused its discretion by entering an order that is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76, 78, 497 N.E.2d 70, 71 (1986). In this case, Camaco must show that the commission acted contrary to law or grossly abused its discretion by issuing a determination unsupported by evidence in the administrative record. *Id.*, 11 Ohio St.2d at 78-79. Absent this showing, Camaco is not entitled to the extraordinary writ of mandamus.

When a VSSR is alleged against an employer, the commission must determine whether 1) an applicable and specific safety requirement exists, and was in effect at the time of the injury, 2) the employer failed to comply with the requirement, and 3) the failure to comply was the cause of claimant's injuries. Ohio Constitution, Article II, Section 35; *State ex rel. Haines v. Indus. Comm.*, 29 Ohio St.2d 15, 17, 278 N.E.2d 24, 26 (1972); *State ex rel. Trydle v. Indus. Comm.*, 32 Ohio St.2d 257, 291 N.E.2d 748 (1972). These are factual determinations within the final jurisdiction of the commission, subject to correction in mandamus only on a showing of an abuse of discretion. *Berry, supra*; *Allied Wheel Products, Inc., supra*.

As the Court of Appeals has held, the commission did not abuse its discretion nor did it act contrary to law when it granted Albu's application for a VSSR award

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

The commission does not abuse its discretion in finding a VSSR when there is some evidence that the employer failed to provide its employee protective headgear, as required under Ohio Adm.Code 4123:1-5-17(G)(1)(a), where the employee is in close proximity to a machine that can strike the head.

Compensation for specific safety requirement violations is based on Section 35, Article II of the Ohio Constitution. This section states, in pertinent part:

* * * [The Industrial Commission] shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adopted by such board and its decision shall be final * * *

Since final jurisdiction of these claims rests with the commission, a reviewing court in mandamus may only reverse upon the showing of an abuse of discretion. *Haines*, supra. An abuse of discretion is present only where there is no evidence on which to support the commission's conclusion. *Teece*, supra.

The commission found a violation of Ohio Adm.Code 4123:1-5-17(G)(1), which concerns "Head and hair protection" and states in pertinent part:

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, * * * , employers shall provide employees with suitable protective headgear.

In this case, there is some evidence that Camaco was obligated to provide protective headgear and failed to do so. The evidence indicates that at the time of injury, the Motoman robot had malfunctioned. Due to the design of the cell, Albu was unable to see the area where the malfunction occurred without entering the cell. Accessing the cell through one of the safety

interlock doors causes the power on both machines to shut off. To diagnose the problem with the Motoman robot, power to the Wayne Trail was needed to operate the teach pendant which is used to operate the Motoman robot. Albu was summoned to troubleshoot and fix the malfunctioning Motoman robot and had to enter the cell to do so. Albu entered the cell by climbing through an opening in the fence that was next to an exit chute for the finished product. There was a potential hazard that he could hit his head on the moving parts of the Motoman robot, and specifically on the transfer arm of the Wayne Trail.

As the commission found, based on Mangold's report/affidavit, "*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.*" (Italics added). (Supp., p. 721; App. Op., ¶ 32). The commission relied upon the Mangold report to find that "when the robot was in teach mode," the "transfer arm of the bending machine was capable of moving at full speed." *Id.* The commission's SHO concluded that the system presented a potential hazard to the head because "*the system did not permit power to be turned off to the bending machine when power to the robot was activated.*" (Italics added.) (Supp., p. 721; App. Op., ¶ 32). Therefore, the lower court did not err in finding that, Camaco was required to provide head protection.

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

The defense of unilateral negligence does not apply where the employer had not first provided the required safety device.

At the commission hearing, Camaco raised the defense of unilateral negligence. This defense was rejected by the commission. The theory behind the defense of unilateral negligence is that an employer cannot be held responsible when the employee removes or ignores employer-provided safety equipment that complies with the specific safety requirement. Thus, unilateral negligence is a defense to a VSSR only where a *properly complying safety device was provided*

and subsequently removed or rendered inoperable by the worker. *State ex rel. Frank Brown & Sons, Inc. v. Indus. Comm.*, 37 Ohio St.3d 162, 524 N.E.2d 482 (1988). Here, there was no complying protective headgear at the time of Albu's injury.

Camaco's asserted defense was not that Albu had failed to use provided headgear, but that Albu had bypassed a safety device when he failed to enter the enclosure through the doors designed to shut off all power. While the SHO acknowledged that Albu had bypassed that safety device when he entered the enclosure through means other than the safety interlock door, the SHO found that "the injury would have occurred even if [Albu] had gone into the enclosure through the main door." (Supp., p. 721). The SHO relied, for this conclusion, on the report of Vernon Mangold, an expert in the design and operation of robotic systems, who indicated that it was not possible for Albu to enter the enclosure and then turn on power only to the robot by means of the teach pendant. Rather, Mangold stated that the transfer arm of the bending machine was capable of moving at full speed when the robot was in teach mode. (Supp., pp. 509, 523). On this basis, the SHO concluded that Albu's action in bypassing the main door was not the cause of the accident (Supp., p. 721; App. Op., ¶ 32). As such, the defense of unilateral negligence fails.

The safety code is intended to protect employees from mistakes and errors in judgment. *State ex rel. Canton Structural & Ornamental Iron Works, Inc. v. Indus. Comm.*, 91 Ohio St.3d 411, 417, 746 N.E.2d 1065, 1070 (2001). Therefore, for unilateral negligence of the injured worker to be a defense to the violation of a specific safety requirement, the employer must *first have complied* with the safety code. Here, Camaco did not provide any head protection and Albu did not remove or render inoperable that safety feature.

In *State ex rel. Martin Painting & Coating Co. v. Indus. Comm.*, 78 Ohio St.3d 333, 336, 678 N.E.2d 206, 209 (1997), the employer argued that safety equipment was available to the decedent, but the decedent ignored the equipment. The employer further relied on *Frank Brown & Sons, Inc.*, supra, for the proposition that the unilateral negligence on the part of the worker negates any specific safety code violation by the employer. However, on appeal this Court rejected the employer's argument. This court stated that "*Brown applies only where an otherwise complying device is rendered noncompliant by deliberate claimant action.*" *Id.* at 164. (Italics added). Here, there was no unilateral negligence because Albu did not dismantle or render inoperable any employer-provided headgear.

In summary, there is "some evidence" to support the commission's finding that Camaco violated Ohio Adm.Code 4123:1-5-17(G)(1) that requires head protection. Protective headgear was not provided. Albu never dismantled or ignored such a safety feature and accordingly, he could not be unilaterally negligent.

Appellee Industrial Commission's Proposition of Law No. 3:

The defense of latent defect must be timely asserted at the administrative level.

Another recognized defense to a VSSR claim is that of a first-time failure of the provided safety device. In *State ex rel. Maghie & Savage, Inc. v. Nobel*, 81 Ohio St.3d 328, 330, 691 N.E.2d 277, 279 (1998), this Court held that "a first-time failure of a safety device cannot sustain a finding of a violation, absent employer knowledge of the defect. *State ex rel. Taylor v. Indus. Comm.*, 70 Ohio St.3d 445, 449, 639 N.E.2d 101, 104 (1994); *State ex rel. Jeep Corp. v. Indus. Comm.*, 42 Ohio St.3d 83, 537 N.E.2d 215 (1989); *State ex rel. M.T.D. Products, Inc. v. Stebbins*, 43 Ohio St.2d 114, 330 N.E.2d 904 (1975). Here, there is no "first time failure of a safety device."

Rather, Camaco appears to claim that, because its machine contained what it calls a “latent defect,” allowing the machine to move rapidly while in teach mode, Camaco was unaware of the danger to its employees and the need for protective headgear. Camaco did not make this argument before the commission and cannot, as the Court of Appeals held, raise it for the first time in mandamus.

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, 679 N.E.2d 706, 709 (1997), quoting *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364, 1367 (1977). This principle has been applied in cases involving the commission and in cases seeking mandamus relief. See *State ex rel. Quarto Mining*, 79 Ohio St.3d at 81–82; *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319, 320, 530 N.E.2d 916, 917 (1988); *State ex rel. M.T.D. Prods., Inc. v. Stebbins*, 43 Ohio St.2d 114, 119, 330 N.E.2d 904, 907 (1975). (App. Op., ¶ 6).

The Court of Appeals held that Camaco did not timely raise the defense of a latent defect at the administrative level. (App. Op., ¶¶ 6 and 10). Furthermore, it appeared to the court that Camaco chose to defend the VSSR solely on the basis of unilateral negligence. Thus, the Court of Appeals found that Camaco had waived any argument as to latent defect. *Id.*

Camaco had the knowledge and opportunity to raise this defense before the commission. The concept of a latent defect was contained in the Mangold report (Supp., pp. 505-547; filed January 29, 2013) which was in evidence before the hearing. Camaco would have knowledge of this report well before that hearing (in June 2013) and could have raised this argument at the SHO hearing, but failed to do so. (Supp., p. 721). Camaco cannot now be heard to argue that the

commission abused its discretion in not considering an argument that Camaco could have, but failed to raise before the commission. The Court of Appeals held that Camaco has waived this argument. *State ex rel. M.T.D. Products, Inc.*, 43 Ohio St.2d at 118. (App. Op., ¶ 6).

CONCLUSION

Camaco failed to sustain its burden of proof for a writ of mandamus. There is “some evidence” to support the commission’s decision that found Camaco violated the specific safety requirement that it provide “suitable headgear” protection where there is known danger or risk of injury to the head. Accordingly, the Tenth District Court of Appeals properly determined that the commission did not abuse its discretion nor act contrary to law when it found that protective headgear was required but not provided. Finally, the violation of the safety code was the proximate cause of Albu’s injury. Therefore, this Court should overrule Camaco’s assignments of error and affirm the Court of Appeals Decision that denies the requested writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served this 25th day of January, 2016,

upon:

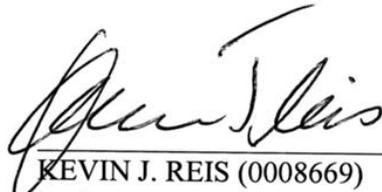
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