

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Darrin C. Richmond, :
Relator, :
v. : No. 11AP-771
The Industrial Commission of Ohio and : (REGULAR CALENDAR)
Lamar Advertising of Youngstown, Inc., :
Respondents. :
:

D E C I S I O N

Rendered on September 27, 2012

Boyd, Rummell, Carach & Curry Co., LPA, and Walter Kaufmann, for relator.

Michael DeWine, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

Cohen, Todd, Kite & Stanford, LLC, and Jill T. O'Shea, for respondent Lamar Advertising of Youngstown, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Darrin C. Richmond, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to

vacate its order that denied him an additional award for a violation of specific safety requirement ("VSSR") on the part of his employer, respondent Lamar Advertising of Youngstown, Inc. ("Lamar"), and to enter an order granting him an additional VSSR award.

{¶ 2} Pursuant to Civ.R. 53 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 concluded the commission did not abuse its discretion in failing to grant relator an additional VSSR award. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} No objections have been raised regarding the findings of fact set forth in the magistrate's decision. Following an independent review of the record, we adopt those findings of fact as our own.

I. LAMAR'S OBJECTION

{¶ 4} Lamar has filed a single objection to the magistrate's decision. According to Lamar, in ¶ 38, the magistrate inaccurately summarizes the finding of the staff hearing officer. Lamar contends the magistrate's statement, "when the feet of the ladder were inside the ladder stops," should state "when the hooks of the hook ladder are within the ladder stops." There are no arguments challenging Lamar's objection. After review, we sustain the objection and replace the challenged phrase of ¶ 38 with the phrase "when the hooks of the hook ladder are within the ladder stops."

II. RELATOR'S OBJECTIONS

{¶ 5} Relator has filed the following five objections to the magistrate's conclusions of law:

1. As to the application of the Federal OSHA exemption is contrary to law and an abuse of discretion.
2. The Magistrate's decision holding that the "hook ladder" is a part of the "structure" is contrary to law and an abuse of discretion.
3. The Magistrate's failure to address the application of O.A.C. 4123:1-3-03(J) is contrary to law and an abuse of discretion.

4. The Magistrate's decision holding that the company is not in violation based upon Claimant's unilateral negligence is contrary to law and an abuse of discretion.

5. The Magistrate's decision holding that O.A.C. 4123:1-5-17 does not apply to this case is contrary to law and an abuse of discretion.

{¶ 6} Under his first objection, relator argues the magistrate created an "OSHA exception for the billboard industry." (Objections, 2.) Contrary to relator's position, the magistrate did not create such exception. Rather, the magistrate explained that where there are no specifically applicable administrative code provisions concerning a particular area, i.e., billboards and the outdoor advertising industry, it is not an abuse of discretion for the commission to consider evidence of whether the employer's actions satisfy the requirements of other codes, such as Occupational Safety and Health Administration ("OSHA"). Additionally, to the extent relator challenges company manager Brian Conley's testimony regarding compliance with OSHA regulations, we remain mindful that questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as factfinder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 7} Accordingly, relator's first objection is overruled.

{¶ 8} In his second objection, relator contends the conclusion that the hook ladder is a part of the structure is contrary to law and constitutes an abuse of discretion. This argument was made to the magistrate and thoroughly addressed in the magistrate's decision. For the reasons stated therein, this objection is not well-taken.

{¶ 9} Accordingly, relator's second objection is overruled.

{¶ 10} In his third objection, relator contends the magistrate failed to address the application of Ohio Adm.Code 4123:1-3-03(J). A review of the magistrate's decision reveals otherwise. While relator may disagree with the magistrate's analysis and conclusions regarding said administrative provision, it cannot be said that the magistrate failed to address the same.

{¶ 11} Accordingly, relator's third objection is overruled.

{¶ 12} In his fourth objection, relator contends the magistrate inappropriately considered his unilateral negligence. According to relator, his own negligence is irrelevant because injury would have been prevented if he had been furnished with proper equipment. In his fifth objection, relator challenges the magistrate's analysis of Ohio Adm.Code 4123:1-5-17. Both of these issues were presented to and addressed by the magistrate. For the reasons set forth in the magistrate's decision, we do not find merit to either objection.

{¶ 13} Accordingly, relator's fourth and fifth objections are overruled.

III. CONCLUSION

{¶ 14} Following an independent review of this matter, we sustain Lamar's single objection and overrule relator's five objections to the magistrate's decision. With the modification noted in ¶ 4 of this decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Lamar's objection sustained,
relator's objections overruled;
writ of mandamus denied.*

TYACK and CONNOR, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Darrin C. Richmond, Relator, v. The Industrial Commission of Ohio and Lamar Advertising of Youngstown, Inc., Respondents.	: : : : : : :	No. 11AP-771 (REGULAR CALENDAR)
--	---	--

MAGISTRATE'S DECISION

Rendered on May 14, 2012

Boyd, Rummell, Carach & Curry Co., LPA, and Walter Kaufmann, for relator.

Michael DeWine, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

Cohen, Todd, Kite & Stanford, LLC, and Jill T. O'Shea, for respondent Lamar Advertising of Youngstown, Inc.

IN MANDAMUS

{¶ 15} Relator, Darrin C. Richmond, 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 which denied relator an additional award for a violation of a specific safety requirement ("VSSR") on the part of relator's employer,

respondent Lamar Advertising of Youngstown, Inc. ("Lamar"), and ordering the commission to grant him an additional VSSR award.

Findings of Fact:

{¶ 16} 1. On June 2, 2008, relator was working on a billboard approximately 25-to-35 feet from the ground for Lamar. At the time of his injury, relator was using a hook ladder and his lanyard was attached to the ladder. While ascending the ladder, the ladder fell from the billboard and both the ladder and relator fell to the ground. As a result, relator sustained the following injuries:

Fracture distal radius-closed, bilateral; sprain left ankle; sprain lumbar region; contusion thigh/leg, right; abrasion of face; abrasion of forehead; contact dermatitis trunk/extremities poison ivy; subjective tinnitus, right; sensorineural hearing loss, unilateral right; post traumatic stress disorder; depressive disorder; left knee strain; head contusion; cervical sprain; disallowed: C4-C5 disc bulge.

{¶ 17} 2. Because he was working alone, there were no witnesses to relator's accident. When first interviewed, relator indicated that he did not know what happened.

{¶ 18} 3. On December 10, 2009, relator filed an application for an additional award for a VSSR alleging that Lamar violated the following specific safety regulations: (1) under Chapter 4123:1-5, "workshop and factory safety," 4123:1-5-17(I)(6) and (7) which relate to personal protective equipment, specifically safety belts, harness, lifelines and lanyards, and safety nets; (2) under Ohio Adm.Code Chapter 4123:1-3, construction safety, Ohio Adm.Code 4123:1-3-03(J) and (L) which also relate to personal protective equipment, specifically safety belts, harnesses, lifelines and lanyards, and safety nets; and (3) also under Ohio Adm.Code Chapter 4123:1-3, construction safety, Ohio Adm.Code 4123:1-3-11(D)(1) and (2) which specifically relate to general requirements for all portable ladders, including hook ladders.

{¶ 19} 4. The Ohio Bureau of Workers' Compensation Safety Violations Investigation Unit investigated relator's claim to determine whether the injury was caused by Lamar's VSSR.

Relator's Statements

{¶ 20} When relator was first interviewed at the hospital, he indicated that he did not know how his accident happened. As part of the investigation, relator supplied an affidavit wherein he made the following relevant statements:

[Four] At the time of my injury I was required to wear steel toe boots, safety harness, lanyard, grip type gloves, safety glasses, and a hard hat. I was wearing these items at the time of my injury.

[Five] On the day of my injury I was working on a Billboard on the 711 bypass north of the Salt Springs Road exit. I went up the board, brought the materials and ladder up. I set the ladder up and completed the bottom row. I hooked up to the ladder an[d] unhooked from the catwalk, as I as going up the ladder to hook my brush, the ladder fell off the edge of the billboard. The ladder took me with it and fell to the ground. I injured both of my arms, thigh, ribs, head, ear, ankle, and I got poison ivy everywhere.

[Six] When I fell I fell between thirty-five and forty feet. The ladder was a hook ladder and was hooked to the top edge of the billboard. The ladder was a fourteen foot ladder. Other than the hooks, there was nothing to secure the ladder to the billboard. I had never been given any additional material to secure the ladder to the billboard.

[Seven] I believe the ladder stops on the edge of the board were not in place at the time of my injury. Each billboard is supposed to have a stop on each side of the billboard to prevent the ladder from coming off of the edge of the billboard. I had worked on this billboard at least twenty times. I never look at the back of the board as I work on the front of the board, so I do not know if the ladder stops were in place the prior times I worked on this board.

* * *

[Nine] The billboard should have a ladder stop that is an L on the back of the billboard on each side.

[Ten] The company requires employees to wear fall protection and be tied off anything two feet above ground.
* * * There is a cable across the bottom of the billboard employee's tie off to when putting the bottom row on. The

lanyard will not reach this bottom cable when putting the top sheet on the billboard.

[Eleven] During my training I was taught to tie off to the ladder.

Lamar's Statements

{¶ 21} The following information was provided to the on-site investigator by the following people:

Corporate Safety Director Chuck Wigger, Operations Manager Jack Mirolo, General Manager Brian Conley, and Operations Manager Jerry Simpson.

The investigation report provides, in relevant part:

[Two] During the on-site investigation Investigator Riley viewed and photographed a similar Werner fourteen foot (14') hook ladder as involved in Mr. Richmond's injury and the fall protection issued to Mr. Richmond * * *. The involved ladder was purchased new in 2006, was in good condition at the time of the injury, and was equipped with corrugated rungs, according to the employer * * *. The ladder was equipped with a tie off point * * *. The tie off point is used when the bill poster is working from the ladder instead of the catwalk.

[Three] Fall protection (safety harness, double lanyard) is issued to employees and is required anytime an employee is over six feet (6') from the ground, Mr. Conley advised * * *. Mr. Richmond was issued and required to wear fall protection and was required to be tied off at the time of his injury. Employees are instructed during training to inspect the fall protection prior to each use, report any issues with the equipment. Mr. Mirolo explained the billboards are equipped with a fixed cable at the bottom of the catwalk. Employees tie off to the cable when working from the catwalk * * *. When working off the ladder, employees tie off to the tie off point on the ladder * * *. Employees are required to tie off on the cable prior to unhooking from the ladder. Employees are also required to tie off to the cable when moving the ladder. Mr. Mirolo further explained because of the double lanyard there is not anytime an employee is not tied off. After Mr. Richmond's injury, Mr.

Mirollo responded to the injury site and found the cable to be in place and to be in proper order.

[Four] Each billboard is equipped with ladder stops located at the back of the billboard on each side, according to Mr. Conley. The ladder stops prevent the hook ladder from coming off the side of the billboard. When Mr. Mirollo responded to the injury site after the injury, the ladder stops were in place * * *. Investigator Riley asked if the ladder stops were put into place after the injury. Mr. Mirollo stated the ladder stops were in place at the time of the injury and were not added after the fact * * *. Mr. Simpson advised employees are instructed to inspect the entire structure before starting work. The inspection is looking for abnormalities, unsafe issues, rust, wear and tear, missing bolts, cracks in the welds, missing ladder stops, and inspection of the cable * * *. If anything is found wrong it is to be reported to Mr. Simpson or Mr. Conley. Mr. Simpson reiterated employees are instructed if they feel something is not safe the employee is to stop working and call the office. The employer reported Mr. Richmond had been to the involved structure several times as this billboard is changed almost monthly. There had not been any issues with the structure reported prior to the injury.

[Five] When the employer responded to the injury site the tapered end of the ladder was found facing away from the structure with the hooks in the grass. The lanyard was hooked to a rung on the ladder and not the tie off point * * *. The employer does not believe the ladder slide [sic] off the end of the billboard as there were ladder stops at both sides and there was not any damage to the [sic] either end of the billboard. The employer believes Mr. Richmond was moving the ladder (possibly around an obstruction sprit, safety cable, ledge arm), lost control of the ladder and fell. When moving the ladder, Mr. Richmond should have been tied off to the cable. The employer observed the bottom five posters were completed and the top five had not been started when they arrived at the injury site. The next poster to be placed was still in its bag at the end of the catwalk further indicating Mr. Richmond was moving the ladder and the ladder did not slide off the end of the billboard.

* * *

[Seven] Investigator Riley photographed the involved billboard February 22, 2010 * * *.

[Eight] On February 18, 2010 Investigator Riley interviewed Darrin C. Richmond * * *. Mr. Richmond relayed his uncertainty to Investigator Riley as to whether the ladder stops were in place at the time of his injury * * *.

{¶ 22} 5. A hearing was held before a staff hearing officer ("SHO") on April 27, 2011. Relator provided the following relevant testimony:

Q[uestion] Okay. Did every one of the billboards that you worked on actually have a ladder stop?

A[nsWER] I couldn't tell you that.

* * *

Q[uestion] All right. Did you know at the time that you were working on this board whether it had a ladder stop or not?

A[nsWER] No.

* * *

Q[uestion] And what were you in the process of doing when this accident began?

A[nsWER] I had hooked to the ladder, unhooked from the cable on the catwalk, and I was going up to attach my brush to the ladder because some guys put it around their waist, and that's just messy, so I do mine on the ladder.

* * *

A[nsWER] I clip it to the ladder. So I was going to the top of the ladder to clip the brush.

* * *

Q[uestion] And what happened then that caused you to fall?

A[nsWER] I really don't know. I just -- I -- it just started going. I don't know if it was, like, 'cause there was bolts back there; I don't know if it was --

Q[uestion] Hang on. Did something happen to the ladder?

A[answer] Yeah, it was falling off the edge, so I jumped off.

Q[uestion] Okay. So the ladder was actually falling off the edge of the billboard?

A[answer] Yep.

Q[uestion] And as it's falling off the edge of the billboard, what did you do?

A[answer] I jumped to the catwalk.

Q[uestion] Did you make it to the catwalk?

A[answer] Yes.

Q[uestion] And then what happened?

A[answer] Ripped me right off.

Q[uestion] Because your lanyard was still tied to the ladder?

A[answer] Right. Correct.

Q[uestion] So the reason that you actually went off this billboard was because you were pulled off by the ladder?

A[answer] Correct.

* * *

Q[uestion] Okay. You cannot state there were no ladder stops in place on this particular board on the date of the accident; correct?

A[answer] I didn't look at the ladder stops.

Q[uestion] So you would -- it's correct; you can't state they were not there?

A[answer] No, I can't.

Q[uestion] Okay. And you did know that before you were to move the ladder, that you needed to re-engage on the cable on the platform?

A[answer] Yes.

Q[uestion] To move the ladder?

A[nswer] Yes.

Q[uestion] All right. And that was part of your training with Lamar?

A[nswer] Yes.

Q[uestion] And you knew as part of your training with Lamar that you should place the ladder within the ladder stops of a billboard; correct?

A[nswer] No, I'm not saying that. I just was trained to go up and set my ladder up like I always did.

Q[uestion] Okay. But you knew the ladder stops were in place to prevent the ladders from falling as part of your training, did you not?

A[nswer] I guess, yes, I guess.

Q[uestion] All right.

A[nswer] But I mean, if there's no ladder stops, what good is that training?

Q[uestion] Okay, but you know that that -- you knew that; you understood as part of your training that that was the purpose of ladder stops?

A[nswer] Yes.

Q[uestion] Before this accident?

A[nswer] Yes, yes, yes, yes.

Q[uestion] All right. So as we sit here today, you can't dispute that that ladder stop was in place at the time of this accident?

A[nswer] No, I can't dispute that.

* * *

Q[uestion] All right. When you're climbing up this ladder, can you actually see the ladder stop in the back?

A[answer] No, not always, no. You mean the posting ladder? Or going up the board; is that what you're talking about?

Q[uestion] Going up the board.

A[answer] Sometimes you can and sometimes you can't.

Q[uestion] Okay. On this particular one, could you see the ladder stop in the back of the board?

A[answer] If I was looking for it, yeah.

Q[uestion] Okay. What I'm saying is, when you're already up there and you're climbing up the ladder, can you see the ladder stop?

A[answer] If you're looking for it, yeah. I mean, yeah, if you're climbing up the stationary ladder, yeah.

(Tr. 28-31, 60-61, 68-69.) Mr. Conley testified on behalf of Lamar and made the following relevant statements:

Q[uestion] As part of Lamar's training, were ladder stops addressed?

A[answer] Yes.

Q[uestion] To look for the ladder stops and make sure they were there?

A[answer] Yes.

Q[uestion] And to place your ladder within the ladder stops?

A[answer] Yes.

Q[uestion] All right. Are you aware of any occasions where Mr. Richmond was not at a monthly safety meeting and signed off nonetheless?

A[answer] No.

* * *

Q[uestion] As part of the monthly safety meetings as Mr. Richmond testified, are employees instructed to look for and report any unsafe conditions of the billboards?

A[answer] Yes.

* * *

Q[uestion] Did you disturb anything at the scene of the accident before you took the two pictures?

A[answer] Absolutely not.

Q[uestion] Okay. Where the lanyard is attached is that an approved anchorage point?

A[answer] No, it's not.

Q[uestion] Was Mr. Richmond trained and instructed to use the anchorage point of the Werner ladders?

A[answer] Yes.

* * *

Q[uestion] To your knowledge, has Darrin Richmond been involved in any work-related accidents prior to the one at issue?

A[answer] Not to my knowledge.

Q[uestion] Has Lamar had any employees involved in any accidents as a result of end stops being missing or ladders, hook ladders being placed outside of the end stops?

A[answer] Not to my knowledge.

Q[uestion] Have any employees been involved in accidents as a result of moving and disengaging the ladder while attached to the ladder rather than the safety cable on the platform?

A[answer] Not to my knowledge.

Q[uestion] Are the hook ladders provided by Werner subject to any type of variance or subject to any type of OSHA regulation that you're aware of?

A[answer] Yeah, I mean, it's a Gannett regulation that OSHA has that's specific for our industry that allows the use of hook ladders, and once the hooks are engaged on the sign, they

become part of the structure, and you are allowed to tie off to the anchorage points on the ladder.

* * *

Q[uestion] And your training is consistent with Mr. Richmond's testimony that when they move the ladder, they are supposed to, before they do that, they are to unhook from the ladder and hook back to the cable before moving the ladder?

A[nsWER] Correct.

Q[uestion] All right. So if Mr. Richmond was lifting and disengaged the ladder while hooked to the ladder, that's a violation of your training?

A[nsWER] Absolutely.

Q[uestion] If Mr. Richmond had the ladder outside the ladder stops, that's also a violation of your training?

A[nsWER] Absolutely.

* * *

A[nsWER] Our industry is a unique industry, and that's why, you know, there's variances with OSHA and everything, because we're not a factory.

* * *

A[nsWER] And we follow, you know, nationwide the regulations that are set down by OSHA. You know, there's a Gannett variance.

* * *

A[nsWER] I'm just saying that a lot of things that apply to other industries, even OSHA has recognized don't apply to our industry because of the uniqueness of what we do.

* * *

Q[uestion] Okay. So basically the two potential causes of this accident was he placed the ladder outside of the ladder stop

and it slipped off, which is a violation of company training and policy?

A[answer] Yes.

Q[uestion] The second option, based on where the ladder landed and your inspection of the scene that there was no damage to the panel, was that he had completely disengaged the ladder when he was hooked up to the ladder and lost control of the ladder?

A[answer] Correct.

Q[uestion] And by his testimony and your testimony, when you are moving the ladder, whether you're erecting it, taking it down, or moving it, you're to tie the safety cable so you're not attached to the ladder; correct?

A[answer] Correct.

(Tr. 70-72, 76, 83-84, 101-02, 113-14.)

{¶ 23} 6. Following the hearing, the SHO determined that relator had failed to meet his burden of proving that Lamar had violated a specific safety requirement and denied his application. The SHO discussed the applicability of each cited provision separately. In regard to Ohio Adm.Code 4123:1-5-17(I)(6) and (7) the SHO stated:

The Injured Worker's contention that the Employer violated specific safety regulations 4123:1-5-17(I)(6) and 4123:1-5-17(I)(7), is hereby rejected and denied as said regulations specifically pertain to workshops and factory sites. The Staff Hearing Officer specifically finds that the injury site where the mechanism of injury upon which this claim is predicated, took place, was not established by a preponderance of the evidence to be a "workshop and/or factory."

Therefore these regulations are not applicable to the facts in this claim.

By way of clarification the injury site in this claim was an outdoor billboard structure which is located along the side of a local public highway.

It is not located on the roadway property, but rather, adjacent property thereto. The ownership of this property is not known by this Staff Hearing Officer as this issue was not addressed specifically in the application or at hearing.

The Staff Hearing Officer does not find such outdoor billboard structure to constitute either a workshop or factory.

The Staff Hearing Officer finds that there was no building or factory structure, with or without a fenced-in area, adjacent to a building or factory structure, where any part of the factory type work or process was performed.

Here, the billboard structure was adjacent to a public highway which connects several Interstate Highways, State Highways and local highways and other public roadways. Further, while this particular highway, (commonly referred to as the 711 connector), has a fence erected adjacent to its roadside property edge. This fence only passes alongside the general area of the billboard structure and is not part of the structure, but rather, the public roadway system. No other fencing was shown to exist near the injury site herein.

Given the above findings and conclusions, the Staff Hearing Officer concludes that the Injured Worker has failed to meet his burden of proof as relates to the applicability of regulations 4123:1-5-17(I)(6) and 4123:1-5-17(I)(7) to this claim.

Therefore, the Injured Worker's request to find a violation of these regulations by the Employer of record, is denied.

In regard to Ohio Adm.Code 4123:1-3-11(D)(1)(a) and (b) the SHO stated:

The Staff He[a]ring Officer further finds that Regulations 4123:1-3-11(D)(1)(a) and 4123:1-3-11(D)(1)(b), as was also cited by the Injured Worker, are merely definitional regulations and impose no additional duty or obligation upon the Employer or the Injured Worker herein. However, for purposes of clarity, it was the undisputed testimony of both the Injured Worker and Mr. Conley, that at the time of injury herein, the Injured Worker was utilizing a "Hook" Ladder as defined by 4123:1-3-11(D)(c) [sic] and such ladder was provided by the Employer of record.

Accordingly, the Staff Hearing Officer concludes that Regulation 4123:1-3-11(D)(1) has not been shown by a preponderance of the evidence to have been violated by the Employer, as was alleged. Therefore, the Injured Worker's request for the declaration of such a violation is hereby denied.

Furthermore, the Staff Hearing Officer finds that Regulation 4123:1-3-11(D)(2) is also a definitional rule and imposes no additional duty or obligation upon either the Employer or the Injured Worker herein. However, this definitional regulation pertains specifically to "Extension Ladders". Based upon the said testimony of the Injured Worker and Mr. Conley, the Staff Hearing Officer concludes that this regulation does not apply to the facts in this case as it is undisputed that the ladder in issue herein, is a "Hook Ladder". Therefore, the Injured Worker's request to find a violation of this regulation, is also denied.

In regard to Ohio Adm.Code 4123:1-3-03(J)(1) and (L), the SHO first concluded that the ladder being used was a "hook ladder" stating:

By way of clarification, the Injured Worker and Mr. Conley both testified that the ladder in issue was a "Hook Ladder" and such ladder is defined under 4123:1-3-11(D)(1)(c) as:

Ladders designed for use by hooking shall be equipped with two or more substantial metal hooks at the top of the ladder. (For chicken or roof ladders, see paragraph (H) of rule 4123:1-3-09 of the Administrative Code.)

The Injured Worker's and Mr. Conley's testimony at hearing was that the Hook Ladder used by the Injured Worker on date of injury, had two metal hooks at the top of the ladder and these hooks were utilized to secure the ladder to the top edge of the billboard.

The hooks wrap around the top of the billboard's top edge of its frame and continues down the backside of the edge for approximately eight inches. The bottom of the ladder is positioned near the outer edge of the catwalk which is located on the front side of the billboard frame, so that when positioned correctly, the ladder, the billboard's front facing, and the catwalk, form a ninety degree right triangle image when viewed from the side.

Per Mr. Conley's testimony, the ladder in issue was made by the "Werner" company specifically for the advertising industry and has a 5,000 pound rating.

No evidence or allegation of error to the contrary of this part of Mr. Conley's testimony was offered by the Injured Worker.

Second, the SHO concluded that Lamar had provided relevant personal protection equipment stating:

Upon review of the Injured Worker's testimony at hearing, as contained within transcription filed 05/09/2011, the Staff Hearing Officer finds that the Injured Worker acknowledges being provided with a safety belt or harness and lanyard, by the Employer; that these items were being utilized at the time of injury by the Injured Worker; that Injured Worker was working at a level greater than six feet above ground at the time of injury; and that he had secured his lanyard to the "hook point" that was part of his hook ladder.

* * *

It is noted that Mr. Conley also testified that the Employer provided the Injured Worker with a six foot, non-retractable safety line as well as a safety harness and lanyard, which the Injured Worker was using on the date of injury herein.

The Staff Hearing Officer finds that Mr. Conley based his testimony upon his personal observations at the injury situs [sic], on the date of injury.

Given the above stated findings, the Staff Hearing Officer concludes that the Employer provided the Injured Worker with lifelines, safety belts or harnesses and lanyards, as required by 4123:1-3-03(J)(1); that the Injured Worker was working at a level greater than six feet above ground level; that he was utilizing the said equipment provided by the Employer at the time of injury; and that he was exposed to the hazard of falling while performing his occupational duties, as is also required by said regulation.

Thereafter, the SHO determined that the remaining issue was whether or not the lifelines and safety belts or harnesses were securely fastened to the structure. The SHO set forth relator's argument as follows:

The Staff Hearing Officer finds that the Injured Worker contends that a "Hook Ladder" is not part of the billboard structure and therefore, the Employer was under an obligation to provide the Injured Worker safety lines/lanyards that would reach high enough to connect to a safety cable that runs along, but behind, the top edge of the billboard and long enough to attach to a safety cable that runs along the catwalk to enable the Injured Worker to perform his occupational duties without the necessity of hooking his safety line to the Hook Ladder. The Injured Worker's representative argues that the Injured Worker should have been provided a retractable safety line/lanyard, and safety nets.

The SHO set forth Lamar's argument:

In response, the Employer argues that the design of the ladder, coupled with the end-stops contained near both ends of the billboard, secure the ladder sufficiently to the billboard structure, to satisfy the regulation and that the use of the specific Hook Ladder in issue, is accepted as the industry standard.

Thereafter, the SHO determined that, when properly secured, the hook ladder became a part of the structure. Specifically, the SHO made the following relevant findings and analysis:

The Staff Hearing Officer finds that the mechanism of injury upon which this claim is predicated, per the Injured Worker's testimony, was that for some unknown reason, his hook ladder slipped out from under him and began to fall to the ground some 25 feet below. The Injured Worker testified that as the ladder began to fall, he jumped to the catwalk for safety, but due to the fact that his safety line/lanyard was hooked to the ladder, he was pulled by the force of the falling ladder, to the ground below, sustaining injury. Of import, the Staff Hearing Officer also finds that the Injured Worker testified that on the date of injury, he never looked for, nor observed whether or not this particular billboard had the two end stops in place.

Mr. Conley, who went to the accident scene immediately after the Employer learned of the accident, testified that the billboard in question, did have end stops in place.

He also testified that if the Hook ladder is properly secured at the top of the billboard and placed near one edge of the billboard, absent the Injured Worker lifting the ladder up until the "J-hooks" cleared the top edge, the ladder could not fall sideways because of the hooks and/or the end stop.

Mr. Conley specifically stated that this Hook Ladder was accepted as the industry standard since once it is secured, it could not fall.

Mr. Conley further testified that the Injured Worker was trained to use this type of ladder and specifically to tie off or hook off at the hooking point located approximately in the center of the ladder. For safety reasons, the Injured Worker, per Mr. Conley, was trained to hook to the said hooking point, after hooking to the safety cable on the catwalk, but before ascending the ladder. If his work required him to move the ladder, he was to remain attached to the catwalk cable, then disengage from the ladder and then move the ladder. Once the ladder was in place, the process is repeated for the Injured Worker to work off the ladder again.

Given the testimony of Mr. Conley regarding the "Werner Hook Ladder" and how it is secured to the billboard structure as well as his uncontroverted testimony that this ladder is the "Industry Standard", the Staff Hearing Officer concludes that when this particular Hook Ladder is secured to the billboard structure properly, then the Hook Ladder itself also becomes part of the billboard structure. There is no persuasive evidence to conclude that this hook ladder was improperly secured at the time of injury. The ladder was inspected after the fall and was still intact, i.e. no broken components.

Therefore, the Employer herein, did provide the Injured Worker with the proper tools and equipment and was not under any specific obligation to provide the Injured Worker with a retractable safety line, harness, and/or lanyard or safety nets, as argued by the Injured Worker.

Further, the SHO determined that, because Lamar had provided lifelines and safety belts or harnesses, Lamar was not required to provide safety nets and found that Lamar had met its obligations:

Furthermore, the Staff Hearing Officer finds that 4123:1-3-03(J)(7) provides that: "safety nets may {emphasis added}

be used in lieu of lifelines and safety belts or harnesses," while 4123:1-3-03(L)(1) provides in relevant part: "Safety nets shall be provided where the use of ladders, ...safety lines or safety belts or harnesses is impractical."

The Staff Hearing Officer concludes, based upon these last two cited regulations, that safety nets may be used as a substitute for safety belts, lifelines, safety harnesses/- lanyards, where the use of these items are deemed impractical.

Here, the Staff Hearing Officer finds that while the Injured Worker offers a viable alternative as to which specific equipment the Employer should have provided the Injured Worker to perform his occupational duties, the testimony of Mr. Conley clearly establishes that the equipment provided by Employer, also enabled the Injured Worker to perform his occupational duties in a viable and acceptable manner. As such, the Staff Hearing Officer concludes that the Employer did satisfy all the elements of 4123:1-3-03(J)(1).

The Staff Hearing Officer specifically rules that the Employer's use of ladders, safety lines/harnesses/belts and lanyards, as outlined above, was not impractical and therefore the Employer was under no additional obligation to provide different and/or additional safety protection tools.

In sum, the Staff Hearing Officer concludes that the Injured Worker has failed to establish by a preponderance of the evidence that any of the specifically alleged safety regulations were violated by the Employer of record on the date of injury herein, as was alleged.

The SHO cited the following relevant evidence upon which the decision was based:

In rendering this decision, the Staff Hearing Officer has relied upon the Bureau of Workers' Compensation's Violation of Specific Safety Regulation Investigative Report and supporting documents thereto; the testimony of the Injured Worker and Mr. Conley as reflected above and contained within the hearing transcription filed 05/09/2011.

{¶ 24} 7. Relator filed a request for rehearing which was denied in an order mailed July 21, 2011.

{¶ 25} 8. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 26} Relator contends that the commission abused its discretion in denying his application for an additional award for Lamar's alleged VSSR as follows: (1) finding that Ohio Adm.Code 4123:1-5-17 did not apply; (2) finding that the "hook ladder" became a part of the structure; (3) that the hook ladder and the manner in which it was used was accepted as industry standard per Occupational Safety and Health Administration ("OSHA") requirements; (4) that Lamar provided relator with proper fall protection; and (5) finding that relator's negligence factored in to his injury.

{¶ 27} It is this magistrate's decision that the commission did not abuse its discretion by finding that Ohio Adm.Code 4123:1-5-17, which applies to workshops and factories did not apply, by utilizing industry standards and OSHA regulations to determine that the hook ladder became part of the structure for purposes of the application of the administrative code provisions, and by finding that Lamar did provide the required safety equipment. Further, the magistrate finds that the commission's treatment of relator's negligence was proper.

{¶ 28} Relator first contends that the commission abused its discretion by finding that Ohio Adm.Code 4123:1-5-17(I)(6) and (7) did not apply. Ohio Adm.Code Chapter 4123:1-5 applies specifically to workshops and factories. That rule provides:

(I) Protection of the body and exposed parts and other protective equipment.

* * *

(6) Safety belts, harness, lifelines and lanyards.

(a) Lifelines, safety belts or harnesses and lanyards shall be provided by the employer, and it shall be the responsibility of the employee to wear such equipment when exposed to hazards of falling where the operation being performed is more than six feet above the ground or above a floor or platform, except as otherwise specified in this chapter, and when required to work on stored material in silos, hoppers, tanks, and similar storage areas. Lifelines and safety belts or harnesses shall be securely fastened to the structure and shall sustain a static load of no less than three thousand pounds.

* * *

(7) Safety nets.

(a) Safety nets shall be provided when workplaces are more than thirty feet above the ground, water, or other surface where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

It is undisputed that the above provision is in the chapter entitled workshops and factories. Relator contends that, pursuant to *State ex rel. Parks v. Indus. Comm.*, 85 Ohio St.3d 22 (1999), the commission abused its discretion by finding that the provisions did not apply here. For the reasons that follow, this magistrate disagrees.

{¶ 29} In *Parks*, Joseph J. Parks was employed as a tree service worker when he received an electrical shock from a power line while trimming a storm-damaged tree. Parks claim was allowed and he also applied for additional compensation for VSSRs alleging that the city had not complied with Ohio Adm.Code 4121:1-5-23(E)(1) and (2). Those rules require employers in the electric utility and clearance tree-trimming industries to provide insulated gloves or other protective measures to employees trimming trees around electrical power lines.

{¶ 30} The commission denied Parks' VSSR application because he was not injured in a workshop or factory. Finding that it was clear that Parks was outdoors and up a tree at the time he was injured, the commission determined that the workshop and factory provisions did not apply.

{¶ 31} Ultimately, the Supreme Court of Ohio disagreed and found a violation. The court found that Ohio Adm.Code 4121:1-5-23 was a more specialized regulation which specified precautions for precise vocational acts, whereas Ohio Adm.Code 4121:1-5-01(A) described general principles for applying specific requirements. The court noted further that the drafters could have inserted the word "only" to establish that the chapter applied exclusively to all workshops and factories; however, the drafters did not. The court concluded by stating:

[A]ctivities that are regulated in Ohio Adm.Code 4121:1-5-23(E) and are obviously conducted outdoors must be considered an exception to the rule that Ohio Adm.Code

Chapter 4121:1-5 protects activities occurring indoors in workshops or factories.

With this construction of the rule, we can reconcile today's decision with [*State ex rel. Buurma Farms, Inc. v. Indus. Comm.*, 69 Ohio St.3d 111 (1994)] and [*State ex rel. Waugh v. Indus. Comm.*, 77 Ohio St.3d 453 (1997)], the cases that are most analogous, despite having reached the opposite result. *Buurma Farms* and *Waugh* establish that, where specific safety requirements regulate activities that can be performed indoors or outdoors, the Ohio Adm.Code 4121:1-5-01(A) workshops and factories restriction limits an employer's reasonable expectations of liability to VSSRs that are committed indoors. However, the rule must be different where activity is regulated but cannot be performed indoors. In that case, the employer cannot reasonably expect exemption because Ohio Adm.Code 4121:1-5-01(A) does not apply *exclusively* to workshops and factories.

(Emphasis sic.) *Parks* at 25-26.

{¶ 32} The workshop and factory chapter of the Ohio Administrative Code has no provisions for billboards or for the outdoor advertising industry. This fact distinguishes relator's case from *Parks*. Because there were provisions pertaining to the tree trimming industry under the workshop and factory heading, the court determined that those provisions applied. However, because there are no provisions for billboards or for the outdoor advertising industry under the workshop and factory chapter, the magistrate finds that the commission did not abuse its discretion by finding that those provisions did not apply.

{¶ 33} Relator next contends that the commission abused its discretion by determining that the hook ladder became a part of the structure for purposes of the application of the code provisions. Specifically, relator claims it was improper for the commission to utilize industry standards and OSHA exceptions in reaching its conclusion. Relator contends that the hook ladder did not become a part of the structure; therefore, the hook ladder was not an appropriate location for an anchorage point.

{¶ 34} Relator cites the following code provision which he believes Lamar violated:

4123:1-3-03 Personal protective equipment

* * *

(J) Safety belts, harness lifelines and lanyards.

(1) Lifelines, safety belts or harnesses and lanyards shall be provided by the employer, and it shall be the responsibility of the employee to wear such equipment when exposed to hazards of falling where the operation being performed is more than six feet above ground or above a floor or platform, except as otherwise specified in this chapter, and when required to work on stored material in silos, hoppers, tanks, and similar storage areas. Lifelines and safety belts or harnesses shall be securely fastened to the structure and shall sustain a static load of no less than three thousand pounds.

* * *

(L) Safety nets.

(1) Safety nets shall be provided when workplaces are more than twenty-five feet above the ground, water, or other surface where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines or safety belts or harnesses is impractical.

The ladder at issue here is defined in Ohio Adm.Code 4123:1-3-11(D)(1) as follows:

(c) Hook ladders.

Ladders designed for use by hooking shall be equipped with two or more substantial metal hooks at the top of the ladder.

{¶ 35} It is undisputed that Lamar did provide safety belts or harnesses, lanyards, and lifelines. Further, it is undisputed that there was a catwalk cable which acted as a lifeline. Employees were required to attach their lanyard to the catwalk cable when they reached the catwalk, applied the lowest levels of poster to the billboard, and when they moved the ladder. This is not in dispute. Instead, relator contends that the commission abused its discretion when it determined that when the hooks of the ladder were properly placed over the top of the billboard and when the bottom of the ladder was placed inside the ladder stops, the hook ladder became a part of the structure so that

there was an attachment point to which the lifeline, safety belts or harnesses could be securely fashioned to the ladder as a structure.

{¶ 36} Lamar was required to provide lifelines, safety belts or harnesses, and lanyards which were required to be securely fastened to the structure and which would sustain a static load of no less than 3,000 pounds. The terms "securely fastened" and "structure" are defined in Ohio Adm.Code 4123:1-3-01(B) as follows:

(24) "Securely fastened" means that the object or thing referred to shall be substantially fixed in place.

* * *

(27) "Structure" means that which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

{¶ 37} In determining that, when properly attached, the hook ladder became a part of the structure so that it was an appropriate place to which a lanyard could be anchored safely, the SHO stated:

The Staff Hearing Officer finds that the mechanism of injury upon which this claim is predicated, per the Injured Worker's testimony, was that for some unknown reason, his hook ladder slipped out from under him and began to fall to the ground some 25 feet below. The Injured Worker testified that as the ladder began to fall, he jumped to the catwalk for safety, but due to the fact that his safety line/lanyard was hooked to the ladder, he was pulled by the force of the falling ladder, to the ground below, sustaining injury. Of import, the Staff Hearing Officer also finds that the Injured Worker testified that on the date of injury, he never looked for, nor observed whether or not this particular billboard had the two end stops in place.

Mr. Conley, who went to the accident scene immediately after the Employer learned of the accident, testified that the billboard in question, did have end stops in place.

He also testified that if the Hook ladder is properly secured at the top of the billboard and placed near one edge of the billboard, absent the Injured Worker lifting the ladder up until the "J-hooks" cleared the top edge, the ladder could not fall sideways because of the hooks and/or the end stop.

Mr. Conley specifically stated that this Hook Ladder was accepted as the industry standard since once it is secured, it could not fall.

Mr. Conley further testified that the Injured Worker was trained to use this type of ladder and specifically to tie off or hook off at the hooking point located approximately in the center of the ladder. For safety reasons, the Injured Worker, per Mr. Conley, was trained to hook to the said hooking point, after hooking to the safety cable on the catwalk, but before ascending the ladder. If his work required him to move the ladder, he was to remain attached to the catwalk cable, then disengage from the ladder and then move the ladder. Once the ladder was in place, the process is repeated for the Injured Worker to work off the ladder again.

Given the testimony of Mr. Conley regarding the "Werner Hook Ladder" and how it is secured to the billboard structure as well as his uncontroverted testimony that this ladder is the "Industry Standard", the Staff Hearing Officer concludes that when this particular Hook Ladder is secured to the billboard structure properly, then the Hook Ladder itself also becomes part of the billboard structure. There is no persuasive evidence to conclude that this hook ladder was improperly secured at the time of injury. The ladder was inspected after the fall and was still intact, i.e. no broken components.

Therefore, the Employer herein, did provide the Injured Worker with the proper tools and equipment and was not under any specific obligation to provide the Injured Worker with a retractable safety line, harness, and/or lanyard or safety nets, as argued by the Injured Worker.

{¶ 38} When considering the commission's findings, the magistrate finds that the commission did not abuse its discretion in finding that Lamar provided lifelines and safety belts or harnesses which were "securely fastened to the structure." Ohio Adm.Code 4123:1-3-03(J)(1). The SHO determined that when the hooks were properly placed over the top of the billboard and when the feet of the ladder were inside the ladder stops, the ladder was securely fastened, i.e., substantially fixed in place and that it became a part of the structure, i.e., any piece of work composed of parts joined

together in some definite manner. The commission has discretion to interpret its own rules and, unless the application of those rules to a unique factual situation gives rise to a patently illogical result, then common sense should prevail. *State ex rel. Harris v. Indus. Comm.*, 12 Ohio St.3d 152 (1984). The magistrate finds that the commission's interpretation here is not patently illogical. Further, to the extent that the SHO relied on industry standards and OSHA provisions to determine whether or not the hook ladder was securely fastened so that relator could use it to attach his lanyard, the magistrate finds that the commission did not abuse its discretion.

{¶ 39} Relator argues that the Supreme Court of Ohio has determined that it is immaterial to a VSSR decision that an employer has complied with OSHA regulations and cites *State ex rel. Roberts v. Indus. Comm.*, 10 Ohio St.3d 1 (1984), and *State ex rel. Danstar Builders, Inc. v. Indus. Comm.*, 10th Dist. No. 04AP-309, 2005-Ohio-365. However, a careful reading of those cases reveals that neither apply here.

{¶ 40} In *Roberts*, Charles G. Roberts sustained injuries in the course of his employment when he was overcome by fumes, lost consciousness, fell into solvent and suffered burns to his face, back, and right forearm. Roberts filed an application for an additional award for a VSSR and cited Ohio Administrative Code provisions as well as sections of the United States Code and the Code of Federal Regulations. The commission denied the award.

{¶ 41} Roberts' mandamus action was ultimately heard before the Supreme Court of Ohio and the court denied Roberts' request for a writ of mandamus. The court concluded that the commission did not abuse its discretion by finding that there was no evidence to support a finding that the employer violated the cited Ohio Administrative Code provisions. Thereafter, the court indicated that VSSR awards are to be based upon an employer's violation of a specific identified safety requirement and, where no violation of the administrative code provision is proven, it is immaterial that provisions of other codes were violated.

{¶ 42} In *Roberts*, there were specific safety requirements which Roberts alleged his employer had violated. The court upheld the commission's determination that

Roberts had not established that his employer violated those specific safety requirements and that it was immaterial whether or not the employer's actions would have violated safety provisions of other codes.

{¶ 43} That is not the factual situation here. There are no administrative code provisions which deal with billboards or the outdoor advertising industry. It is not an abuse of discretion for the commission to utilize evidence that the employer's actions had been deemed to meet the requirements of other codes, such as OSHA. An award for a VSSR cannot be based on any requirement other than those found in the Ohio Administrative Code; however, it is not an abuse of discretion for the commission to utilize OSHA provisions and industry standards to determine that no violation occurred in the absence of administrative code provisions specifically addressing the issue.

{¶ 44} This is similar to the situation in *State ex rel. Scott v. Indus. Comm.*, 10th Dist. No. 10AP-713, 2011-Ohio-5467, where the commission had determined that evidence that the employer had complied with OSHA requirements concerning the concentration of air contaminants when determining whether or not the employer was required to provide certain respiratory protection. The administrative code did not identify/quantify dangerous concentrations of specific air contaminants; instead, employers were simply required to protect their employees from hazardous concentrations of air contaminants, i.e., concentrations which were known to be in excess of those which would not normally result in injury to an employee's health. Because the administrative code did not specify what concentration of various air contaminants constituted a hazardous concentration, the commission relied on OSHA's standards concerning what constituted a hazardous concentration of the various air contaminants present. This court found that the commission did not abuse its discretion in doing so.

{¶ 45} Relator also cites this court's decision in *Danstar Builders*. In that case, Donald Knight, Jr., died after falling to the ground from the roof of a house under construction. Knight's widow filed an application for an additional award for a VSSR alleging that Knight's death was the result of Danstar Builders' failure to provide lifelines, safety belts and lanyards, or catch platforms along the edge of the house's roof

as required by the Ohio Administrative Code. The commission granted the award and Danstar Builders filed a mandamus action in this court.

{¶ 46} Danstar Builders did not contest the commission's determination that they had failed to comply with specific safety requirements listed in the Ohio Administrative Code. Instead, Danstar Builders raised three arguments: (1) that Knight was an independent contractor working under the sole discretion of the general contractor and, as such, Danstar Builders was not the employer for purposes of a VSSR; (2) the commission abused its discretion by not addressing and accepting evidence that Knight's injuries were caused by his use of marijuana and not any failure on the part of Danstar Builders to follow specific safety requirements; and (3) that Danstar Builders' compliance with OSHA requirements was sufficient.

{¶ 47} It is the third argument which is relevant here. Danstar Builders admitted that it violated specific safety requirements in the Ohio Administrative Code. However, Danstar Builders sought to escape liability by contending that it had complied with OSHA requirements. That likewise is not the fact pattern here.

{¶ 48} In the present case, there are no administrative code provisions which apply to billboards or the outdoor advertising industry. In determining whether or not the administrative code provisions related to lifelines, safety belts, harnesses, and lanyards applied, the commission was unable to determine whether or not the code provisions were violated absent information concerning OSHA requirements and industry standards. The commission used that information as some evidence to determine that Lamar did not violate the specific safety requirements and utilizing that information was not an abuse of discretion.

{¶ 49} Relator's final argument is that the commission abused its discretion by considering his alleged negligence. The unilateral negligence of an employee is relevant if it is found that the employer has complied with the specific safety requirements. The unilateral negligence of an employee will only bar an award where the employer has first been found to be in compliance with the relevant safety code provisions. *See State ex rel. Frank Brown & Sons, Inc. v. Indus. Comm.*, 37 Ohio St.3d 162 (1988), and *State ex rel. Quality Tower Serv., Inc. v. Indus. Comm.*, 88 Ohio St.3d 190 (2000). As the Supreme Court of Ohio has noted, an employee's negligence in failing to protect himself

from injury due to an employer's VSSR will never bar recovery because specific safety requirements exist to promote a safe work environment and to protect employees against their own negligence, folly, and stupidity. Further, an employee's negligence will bar a VSSR award only where an employee deliberately removes a safety device or otherwise renders a compliant device non-compliant. *Frank Brown & Sons; State ex rel. Cotterman v. St. Marys Foundry*, 46 Ohio St.3d 42 (1989); and *State ex rel. Kenton Structural & Ornamental Iron Works, Inc. v. Indus. Comm.*, 91 Ohio St.3d 411 (2001).

{¶ 50} Relator is citing the law properly and argues that he did not deliberately circumvent any safety device nor did he refuse to use any safety equipment provided by Lamar. Instead, he asserts that he made the mistake of placing the ladder too far toward the edge of the billboard and not inside the ladder steps.

{¶ 51} Relator relies on *Cotterman*. In that case, Donald Cotterman and another employee were cleaning excess sand from a core suspended from an overhead crane. The core weighed approximately 4,700 pounds and was suspended by four chains, each chain having a load limit of 1,000 pounds, for a total limit of 4,000 pounds. Two of the hooks straightened, the core fell, and Cotterman was crushed. Cotterman's widow filed an application for a VSSR award which the commission denied. Ultimately, the Supreme Court of Ohio granted a writ of mandamus finding that the commission abused its discretion in not granting the award for the violation of a VSSR.

{¶ 52} The court specifically noted that great emphasis was placed on the fact that Cotterman was a supervisor and that it was Cotterman's responsibility to select the proper chains to meet the requirement that the employer provide chains which were sufficient to support the weight. The court noted that the commission had focused on Cotterman's status as a supervisory employee in denying an additional VSSR award. The court stated that the proper focus in determining whether a VSSR award should be granted remains on the employer. Thereafter, the court reiterated that, as a general rule, negligence or absent mindedness of the employee will not bar recovery for a VSSR award. The court found that there was no evidence in the record that Cotterman voluntarily chose the incorrect chain and noted that the commission had attributed his decision to human error. The court determined that a violation occurred because the

employer did not establish a means of accurately and precisely exhibiting the weight of the core and the appropriate chains to be used. Specifically, the court stated:

In State, ex rel. Morrissey, v. Indus. Comm. (1985), 18 Ohio St.3d 285, 287, 18 OBR 336, 338, 480 N.E.2d 810, 813, we held that an employer could not "delegate its liability for failure to comply with a specific safety requirement to a third party. * * *" Accordingly, we hold that the commission abused its discretion when it denied appellant's application for an additional award based on a VSSR.

The ultimate responsibility of providing a safe work environment lies with the employer and it cannot be delegated to a subordinate. In this case, St. Mary's Foundry must effectuate some means of accurately and precisely exhibiting the weight of the core and the appropriate chain sling to be used. St. Marys Foundry cannot simply turn this task over to a superintendent to select the right chain sling for each core. Providing a variety of chain slings is insufficient to show compliance with Ohio Adm.Code 4121:1-5-15(D)(2). Hence, St. Marys Foundry has violated the specific safety requirement and appellant is entitled to an additional award for a VSSR.

Cotterman at 48.

{¶ 53} *Cotterman* does not apply here. There was only one way in which the hook ladder could be affixed to the billboard. There was no guess work on the part of relator and relator did not have to make any determinations or calculations. Instead, relator had been taught to follow one specific procedure for setting up the ladder before he climbed the ladder and attached his lanyard to the ladder. The commission found that the evidence established that relator did not set up the ladder as he was taught. This is not a situation where the employer tried to avoid liability and there is no failure on the part of Lamar here. There was evidence that: the end stops were present; relator would have seen the end stops but for the fact that he did not look for them; relator understood the purpose of the end stops; relator was instructed to use the end stops; and relator did not properly place the feet of the ladder inside the end stops. There was nothing that Lamar could have done differently. As such, this fact pattern differs from that in *Cotterman*.

{¶ 54} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in failing to grant him the additional award for Lamar's VSSR and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

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).