

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Catherine M. Donohoe,	:	
Relator,	:	
v.	:	No. 08AP-201
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and The Kenny Huston Co.,	:	
Respondents.	:	

D E C I S I O N

Rendered on March 30, 2010

Reminger Co., LPA, Patrick Kasson and Mick L. Proxmire, for relator.

Richard Cordray, Attorney General, and *Douglas R. Unver*, for respondent Industrial Commission of Ohio.

Lardiere Law Office, LLC, and *Christopher L. Lardiere*, for respondent The Kenny Huston Company.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶1} Relator, Catherine Donohoe ("relator"), is the surviving spouse of Patrick Donohoe ("decedent"), who was fatally injured in an industrial accident while employed by respondent, The Kenny Huston Company ("employer"). Relator filed this original action

seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying relator's application for an additional award for alleged violations of specific safety requirements ("VSSR"), and to either enter an award granting the application or remand the matter to the commission to fulfill its duty as the fact finder.

{¶2} This court referred the matter to a magistrate, pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The parties stipulated the pertinent evidence and filed briefs. The magistrate rendered a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate determined that the commission did not abuse its discretion by denying relator an additional award for a VSSR. The magistrate therefore recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator has filed timely objections to the magistrate's decision, which provide:

OBJECTION NO. 1: The Magistrate Erred In Failing to Find That It Was An abuse Of Discretion For The Industrial Commission To Require Direct Evidence And Refuse To Draw Inferences From The Evidence.

OBJECTION NO. 2: The Magistrate Erred In Failing To Find That Relator Produced Reliable And Substantial Evidence To Support Her Claim.

OBJECTION NO. 3: The Magistrate Erred In Failing To Address The Commission's Abuse Of Discretion In Applying The Wrong Legal Standard.

The commission and the employer have filed memoranda contra to relator's objections. Therefore, this matter is now before this court for a full, independent review.

{¶4} This case arises from a tragic accident that occurred on August 30, 2004 during the construction of a new firehouse at the Ohio National Guard in Springfield, Ohio. On that date, decedent was employed as a mason tender and was responsible for supplying mason layers with materials, including bricks and mortar. At the time of the accident, decedent was assisting Burt Selby and Todd Jenkins who were laying brick for the south vestibule parapet wall. Mr. Selby and Mr. Jenkins performed their work on a platform located on the inside of the parapet wall. As these two individuals began to run out of materials, they called for decedent. At some point, Mr. Jenkins heard what he thought sounded like a hard hat hitting the ground. After calling for decedent a few times and receiving no response, Mr. Selby and Mr. Jenkins went to check on decedent. At that point, they found decedent on the ground and struggling to breathe after having suffered a fall. There were no eyewitnesses to the fall.

{¶5} Minutes after the accident, government employees Mark Smith and Aldino Stazzone arrived at the accident site and observed that no access ladder was present. Instead, they observed an employee transporting a ladder to the accident site with a forklift. They also observed various work being performed to the scaffold in and around the south vestibule.

{¶6} During the VSSR hearing, Mr. Selby and Mr. Jenkins and Eric Albaugh testified that there was an access ladder for the platform located on the inside of the parapet wall. They also indicated that there was no reason for decedent to have been on or around the scaffold because it was not a part of their work area on the date of the accident.

{¶7} The parties submitted competing expert reports reconstructing the circumstances of decedent's fall. Specifically, in support of the VSSR application, Richard Hayes opined that there were no lifelines used despite working 15 feet off the ground, no ladder was present at the accident site, and the scaffold lacked proper guarding. As a result, Mr. Hayes concluded: "Mr. Donohoe's injury and ultimate death is a direct result of a fall from an unprotected or unguarded area of the scaffolding." (Stipulated Evidence, at 94.)

{¶8} On the other side, John R. Messineo, Jr. opined that he believed an extension ladder was in place, and, if it had become displaced, decedent could have requested for it to be replaced by Javier Rivera, the forklift operator. Additionally, Mr. Messineo opined that lifelines were not required because the extension ladder provided safe access to the platform located only 12 feet and 10 inches above the ground. Finally, he opined that the scaffold was in the process of being dismantled and should not have been used by decedent. Therefore, he concluded: "Patrick Donohoe's choice to improperly use the scaffolding outside the rear wall of the south vestibule as access to the work platform on August 30, 2004 was contrary to his training and Kenny Huston safety policies, and this was a cause of his fatal injury." (Stipulated Evidence, at 103-04.)

{¶9} The employer also submitted a report by Mari S. Truman, the purpose of which was to determine the height from which decedent fell. Given that the fall occurred near a concrete footer, Ms. Truman could not conclusively determine the height from which decedent fell. Specifically, she opined: "he either impacted the corner of the cement footer following a rear-fall from as low as 1 to 3 feet above standing height, or he

was, in fact, at a height of about 12 to about 15 feet when his fall began." (Stipulated Evidence, at 128.)

{¶10} In her report, Ms. Truman referenced an injury reconstruction analysis apparently performed by Sandra Metzler in December 2005. However, this reconstruction analysis was omitted from the stipulated evidence before this court.

{¶11} After presiding over a hearing on June 19, 2007, a staff hearing officer ("SHO") denied the VSSR in an order that provided:

The facts indicate that no one saw the decedent fall, no one has knowledge where he was when he fell ie., did he fall from the scaffold or did he fall climbing up/down the scaffold. Furthermore, no one knows why he was where he was at the time of his fall. The two other workers present on the date and time of this fatal injury could not provide this information (See Burt Selby transcript page 47 and Todd Jenkins transcript page 67). There was evidence presented that he was bringing the two workers cans of soda from the trailer below, but that was merely speculative. Consequently, the decedent-widow can not prove by a preponderance of the evidence that there was a violation of a specific safety requirement, if there was a violation, which section was violated and whether that violation caused the decedent's death. As such, the instant application for a violation of the specific requirement is denied.

All evidence was reviewed and considered.

(Stipulated Evidence, at 4.)

{¶12} Upon relator's motion for rehearing, the commission held:

Given the lack of eye witness evidence and the conflicting evidence submitted by the parties, it was not a clear mistake of law for the Staff Hearing Officer to conclude that the widow-claimant had not met her burden.

(Stipulated Evidence, at 1.)

{¶13} The instant matter presents the unique scenario where relator alleges multiple safety violations, a number of which could have caused decedent's injuries and resultant death, while no one witnessed decedent's fall.

{¶14} We note the similarities between the instant matter and the case of *State ex rel. Shelly Co. v. Steigerwald*, 121 Ohio St.3d 158, 2009-Ohio-585. In *Shelly*, a decedent's widow sought a VSSR award for several alleged safety violations. Id. at ¶1. The decedent in *Shelly* died on the scene of an accident after having been run over by a seven-ton service vehicle traveling in reverse at one-to-two miles per hour. Id. at ¶1-4. There were no witnesses to the accident. Id. at ¶5. As a result, the record lacked witness testimony regarding the issue of whether the vehicle's reverse signal alarm was working at the time of the accident, in accordance with the requirements of Ohio Adm.Code 4121:1-3-06(D)(2)(a). Basing her decision primarily upon post-accident vehicle inspections, the staff hearing officer granted a VSSR award after finding that the alarm was not working at the time of the accident. Id. at ¶14. After the commission denied a motion for rehearing, Shelly Company sought a writ of mandamus based partly upon the commission's reliance upon the post-accident reports. Id. at ¶15, 27. Our court denied the writ, and on review, the Supreme Court of Ohio noted:

This case is, by necessity, built upon inference, because no one witnessed the accident and no one can definitively state that the backing alarm was working or not working when the mishap occurred. The commission has substantial leeway in evaluating the evidence before it and drawing inferences from it. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936; *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, 817 N.E.2d 880, ¶34. That authority encompasses VSSR cases[.]

Id. at ¶28. The *Shelly* court then referenced *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, wherein the Supreme Court of Ohio held:

This court has never required direct evidence of a VSSR. To the contrary, in determining the merits of a VSSR claim, the commission or its [staff hearing officer] like any factfinder in any administrative, civil, or criminal proceeding, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence.

Shelly at ¶29, citing *Supreme Bumpers* at ¶69, citing *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170, 172. Finally, the *Shelly* court referenced the case of *State ex rel. Gilbert v. Indus. Comm.*, 116 Ohio St.3d 243, 2007-Ohio-6096, to emphasize the importance of preserving the commission's evidentiary discretion and authority. Id. at ¶31-35.

{¶15} While *Shelly* and the instant matter present similarities regarding the extent of the evidence available, our legal analysis begins at the diametrically opposite starting point. That is, where *Shelly* presented the issue of whether the commission abused its discretion by relying on post-accident reports, in the instant matter, relator argues that the commission abused its discretion by refusing to choose amongst the various post-accident reports.

{¶16} We share the magistrate's view on this issue and refuse to issue a broad rule requiring the commission to limit its findings to only those positions posed by competing experts. Such a rule would necessarily impede upon the substantial leeway afforded to the commission in weighing the evidence and drawing inferences. To accept relator's position would require a deviation from the well-established principles set forth in *Supreme Bumpers*, *Gilbert*, and *Shelly*.

{¶17} However, in her first objection, relator also argues that the commission failed to consider and analyze evidence. (Relator's objections, at 2-4; Relator's Merit Brief, at 6.) Based upon the commission's order underlying this matter, we find this argument to be meritorious.

{¶18} "In any order of the Industrial Commission granting or denying benefits to a claimant, the commission must specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision." *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203, at syllabus. The commission need not cite evidence it has considered and rejected; nor must it explain why it finds certain evidence to be unpersuasive. *State ex rel. Scouler v. Indus. Comm.*, 119 Ohio St.3d 276, 2008-Ohio-3915, ¶15, citing *State ex rel. DeMint v. Indus. Comm.* (1990), 49 Ohio St.3d 19, 20; see also *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252, 1996-Ohio-321. However, a reviewing court will not "search the commission's file for 'some evidence' to support an order of the commission not otherwise specified as a basis for its decision." (Emphasis removed.) *Noll* at 204, citing *State ex rel. Cox v. Indus. Comm.* (1981), 67 Ohio St.2d 235.

{¶19} In the instant matter, the commission used the absence of eyewitness testimony as the basis for its decision. Indeed, the commission cited the testimony of Burt Selby and Todd Jenkins in support of the finding that no one knew the circumstances of decedent's fall. Because these individuals lacked direct knowledge, the SHO found that relator "can not" prove her VSSR claim. Such a finding is troubling, particularly in light of the omission of any reference to the expert reports detailing the circumstances of decedent's fall.

{¶20} These circumstances are similar to those presented in *Scouler*, in which the commission denied temporary total disability compensation based upon the insufficiency of the evidence. *Id.* at ¶1, 8. The staff hearing officer's order referenced the evidence of record but omitted any reference to a questionnaire completed by Dr. Paul Gutheil, the claimant's attending physician. *Id.* at ¶15. The order also generally provided: "All relevant evidence was reviewed and considered." *Id.* at ¶17. The Supreme Court of Ohio expressed concern over these circumstances by holding, "the tenor of the commission's order is that there is no evidence that certifies disability before September 20, 2005. But Dr. Gutheil's responses do allege disability prior to that date, so it is important that the commission also consider that document." *Id.* at ¶17. Accordingly, the court remanded the matter to the commission to consider that issue. *Id.* at ¶18.

{¶21} In the instant matter, upon reviewing the order issued by the commission, the magistrate cited *DeMint* and *Lovell* to support his finding that the commission had considered and rejected as unreliable the expert reports submitted in this matter. In this regard, we must respectfully depart from the magistrate's interpretation of the SHO's order. A more detailed order would have prevented such a departure on our part.

{¶22} It is true that we must presume the regularity of the commission's proceedings. *Lovell* at 252, citing *State ex rel. Brady v. Indus. Comm.* (1990), 28 Ohio St.3d 241. Within this presumption lies "a second presumption – that the commission indeed considered all of the evidence before it." *Lovell* at 252. This presumption, however, is refutable. See *State ex rel. Fultz v. Indus. Comm.*, 69 Ohio St.3d 327, 1994-Ohio-426; see also *Scouler*, *supra*.

{¶23} Again, the commission's order omits any reference to the various expert reports. Although *DeMint* and *Lovell* do not require such, we believe the tenor of the SHO's order is that relator was incapable of proving her VSSR claim in the absence of eyewitness testimony. Clearly, the case law does not support such a requirement. See *Supreme Bumpers* at ¶69, citing *Burton* at 172.

{¶24} Rather than agreeing with the magistrate's finding that the commission considered the reports and found them to be unreliable, we believe the commission did not consider the reports at all in the absence of supporting eyewitness testimony. By reciting the uncertainty surrounding decedent's fall based upon the absence of witnesses, the commission suggests that there was no evidence supporting relator's claim. Indeed, it held that relator "can not" prove her VSSR claim. We therefore find *Scouler* to be directive.

{¶25} Clearly, the Richard Hayes expert report was evidence supporting a VSSR award. The SHO's order in this matter gives every indication that Mr. Hayes's report was never considered. We do not believe our analysis constitutes a reweighing of this evidence where the commission has yet to weigh this evidence in the first instance.

{¶26} Based upon the foregoing analysis, we believe relator's first objection has some merit. While we refuse to require the commission to choose amongst competing experts, we believe the commission abused its discretion when it never considered evidence.

{¶27} Additionally, as a procedural matter, we overrule relator's second and third objections to the magistrate's decision. The arguments presented in these objections are specious at best. Although we reached a different legal conclusion, the magistrate

applied the proper some-evidence standard rather than a "reliable and substantial" standard proposed by relator. Additionally, we find no prejudice in the SHO's failure to quote word-for-word the standard for proving a VSSR claim. We find no merit to relator's argument in this regard.

{¶28} Based upon the foregoing, we sustain in part relator's first objection and overrule objections two and three. As such, we adopt the findings of fact issued by the magistrate and modify the conclusions of law in accordance with the foregoing decision. We therefore issue a writ of mandamus ordering the commission to vacate its order denying relator's application for a VSSR and to reconsider the VSSR application in a manner consistent with this decision.

*Objections sustained in part;
overruled in part; writ granted.*

BRYANT and KLATT, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

State ex rel. Catherine M. Donohoe,	:	
Relator,	:	
v.	:	No. 08AP-201
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and The Kenny Huston Co.,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 12, 2009

Reminger Co., LPA, Patrick Kasson and Mick L. Proxmire, for relator.

Richard Cordray, Attorney General, and Douglas R. Unver, for respondent Industrial Commission of Ohio.

Lardiere Law Office, LLC, and Christopher L. Lardiere, for respondent The Kenny Huston Company.

IN MANDAMUS

{¶29} Relator, Catherine M. Donohoe, is the surviving spouse of Patrick Donohoe ("decendent") who died as a result of an industrial accident. In this original action, relator requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying relator's application for an additional award for alleged violations of specific safety requirements ("VSSR"), and to enter an order granting the application.

Findings of Fact:

{¶30} 1. On August 30, 2004, decedent sustained fatal injuries while employed as a mason tender at a construction site. Decedent's employer, respondent The Kenny Huston Company was involved in the erection of a new fire house at the Ohio National Guard 178th Fighter Wing located at Springfield, Ohio. Decedent's fatal injuries occurred when he fell to the ground near scaffolding that had been erected by the employer.

{¶31} 2. On January 5, 2005, the Ohio Bureau of Workers' Compensation ("bureau") allowed the death claim. As the surviving spouse, relator was found to be wholly dependent upon decedent for her support at the time of his death.

{¶32} 3. On January 27, 2006, relator filed a VSSR application alleging multiple violations of specific safety rules.

{¶33} 4. Earlier, on September 1, 2004, the Occupational Safety and Health Administration ("OSHA") began an investigation into the accident. Following OSHA's completion of its investigation on October 18, 2004, the director of OSHA's Cincinnati area office, Richard T. Gilgrist wrote to relator on January 20, 2005:

* * * Patrick's work would include, but was not limited to, ensuring that the masons laying brick were supplied with materials such as bricks and mortar in order to do their job. On the day of the accident, Patrick and the masons were

engaged in laying up a brick wall at a discrete section of the new fire house commonly referred to as the "south vestibule". The south vestibule was located on the south/south-west portion of the exterior building wall. Tubular welded frame scaffolding was set up along that exterior wall and extended past the south vestibule opening. This portion of the vestibule was at an elevated working height approximately 15 feet 2 inches above the lower ground level. This area had temporary planking, utilizing scaffold boards, which served to completely cover and protect that area except at the access location where a ladder was utilized to access the work area. OSHA's investigation established that a ladder was placed inside, and extended against the exterior wall and up through the planked area. However, in the absence of eye witnesses and following extensive interviews, OSHA could not establish whether Patrick fell while climbing the end frames of the scaffolding or during traversing from the scaffolding to the top of the exterior wall, or while in the area near the unprotected portion of the exterior vestibule performing work. Our investigation indicated that it is unlikely that Patrick fell while using the ladder in that the ladder was placed on the inside of the building. The ladder was positioned approximately 10 feet away and around the corner from the location where Patrick fell and was found after the accident.

{¶34} 5. In June 2005, by a settlement agreement, the employer resolved all OSHA citations relating to the August 30, 2004 accident.

{¶35} 6. In April 2006, the bureau's safety violations investigations unit ("SVIU") began an investigation of the industrial accident.

{¶36} 7. In August 2006, the SVIU investigator obtained affidavits from Mark K. Smith and Aldino R. Stazzone, who were government employees on the date of the accident.

{¶37} 8. The affidavit of Smith, executed August 11, 2006, states:

The first I heard about the accident was approximately 3:15pm On 30 August 2004 from the state maintenance supervisor, Al Wermter, I'm not sure how he knew or found out about it.

I grabbed our digital camera and asked my co-worker Al Stazzone if he could come with me to the job site to see what was going on.

We arrived on the job site at 3:22 pm, by this time Mr. Donahoe was removed from the accident site and was being transported to an area of the aircraft ramp where there was a care flight inbound to pick him up.

I asked one of the base firefighters where the accident occurred, they pointed out the area to myself and Mr. Stazzone. I asked the firefighter when they were notified of the accident, he told me it was 2:58 pm when they first learned of the accident.

Mr. Stazzone and I observed at this time an extension ladder being brought to the accident site by a Hispanic laborer who worked with the Kenny Huston masonry company. He was transporting it to the area with a Lull fork lift. He placed the ladder on the ground and left. A few minutes later the QBS foreman Larry Vogt came to the accident site and picked up the ladder and placed it inside the area under where the masons had been working.

After the accident, I observed a lot of work being done to the scaffolding system, toe boards being installed, end blocks being installed, etc. I told Larry Vogt that it was probably not a good idea to be doing anything to the job site at this time. Larry Vogt told me that the scaffolding was under construction.

{¶38} 9. The affidavit of Stazzone, also executed August 11, 2006, states:

On 30Aug04, at approximately 3:20PM, Mark Smith, Fire Department Project Construction Manager, was notified that an accident occurred at the project site.

At approximately 3:25PM, I accompanied Mark Smith to the project site. It was determined that a masonry laborer fell from scaffolding on the south side of the Fire Department building, and was being Life-Flighted by helicopter to the hospital.

At the project site, on the south side of the building, I observed sections of scaffolding where two levels and three levels of scaffolding were in place. The scaffolding had wood

planks in place, but none of the scaffolding had safety railing or a ladder in place.

I also observed blood on the ground, located next to a concrete foundation below the scaffolding. A hard-hat was also on the ground, a few feet from where it appeared that the accident occurred.

At approximately 3:30PM, I observed a masonry Laborer place a ladder on the south side of the building with a Rough-Terrain (RT) fork-lift. I then observed Larry Vogt, QBS Project Superintendent place the ladder on the opposite side of the wall of where the accident occurred.

{¶39} 10. On September 8, 2006, the SVIU investigator issued a report. The final paragraph of the report states:

In reviewing the submitted information in this file, the facts reflect, the fatally injured worker was in the process of entering or exiting the area next to the scaffold. In the depositions taken from the workers on the roof area, they heard a scraping sound before they found the worker laying on the ground, next to the scaffold. Photographs taken at the time of the fall, show pop cans resting up on the pulpit [sic] area of the side of the building, just above the area where the workers body was found on the ground. These cans were removed in the other photographs taken after this injury. Both Mr. Smith and Mr. Stazzons [sic] affidavits state, the scaffold, which was in place at the time of this fall, had no type of safety railing or any type of an access ladder. They state, an access ladder was brought to the area after this fall, along with company personal [sic] making changes to the scaffold.

{¶40} 11. In support of her VSSR application, relator submitted the affidavit of Richard Hayes executed June 4, 2007. Mr. Hayes is the president of Hayes Environmental Services, Inc., a consulting firm specializing in OSHA regulation compliance. The Hayes affidavit states:

7. There is no indication of the use of lifelines despite a working area above 15 feet. 4121:1-3-03(J)(1); 4121:1-5-03(D)(1)(c)(iii).

8. It is my opinion that no ladder was present at the time of the fall. The fall line would not allow for a ladder to be present in this location. The fall line is consistent with Mr. Donohoe's falling from the scaffolding.

9. The scaffolding extended upward over 10 feet and proper or adequate guarding of open sides was not in place at the time of the fall. 4121:1-3-04(H)(1)(a) and (2)(a); 4121:1-5-03(D)(1)(c)(i). This is confirmed by OSHA Violation Citation 1 Item 4.

10. There was no ladder or equivalent safe access to the scaffold at the time of the fall. 4121:1-3-10(C)(9). This is confirmed by OSHA Violation Citation 2 Item 1 and Base Daily Inspection Report of 8/30/04.

11. The free end of the fall line from the scaffold was not guarded. 4121:1-3-10(C)(18). This is confirmed by OSHA Violation Citation 1 Item 4.

12. Mr. Donohoe's injury and ultimate death is a direct result of a fall from an unprotected or unguarded area of the scaffolding.

{¶41} 12. In defense of the VSSR application, the employer submitted a report, dated June 14, 2007, from Mari S. Truman who presents as a "Biomechanical Expert" employed by Robson Forensic, Inc. ("Robson"). In the introductory paragraph of the 14-page report, Truman states: "The purpose of this investigation is to determine, from a bioengineering standpoint, if the injuries sustained by Donohue [sic] are consistent with a fall from standing height, from above 15' or from an intermediate height."

{¶42} On pages 13 and 14 of the report, Truman renders findings:

(3) Donohue's [sic] skull fracture and brain injuries are due to head impact with substantially rigid object. The injuries are consistent with a single rear to front blow.

(4) Donohue's [sic] comminuted /extended occipital skull fracture and brain injuries is consistent with an unprotected, un-resisted rear concentrated blow with a cement corner contact in fall at or just above standing height.

(5) Donohue's [sic] fracture pattern is also consistent with a fall from a height of about 12 to 15 feet onto a semi-rigid flat surface.

(6) Based upon my analysis, there is insufficient information to rule out a fall from just a few feet above standing height.

* * *

(8) Donohue's [sic] severe head injuries indicate that he either impacted the corner of the cement footer following a rear -fall from as low as 1 to 3 feet above standing height, or he was, in fact, at a height of about 12 to about 15 feet, when his fall began.

{¶43} 13. In defense of the VSSR application, the employer submitted the affidavit of John R. Messineo, Jr., executed June 18, 2007. Messineo is an Ohio licensed professional engineer employed by Robson. In his nine-page affidavit, Messineo specifically responds to the Hayes affidavit submitted by relator. The Messineo affidavit states:

7. Bert Selby, Todd Jenkins, and Eric Albaugh testified that on the day of the incident Kenny Huston masons and mason tender (Patrick Donohoe) were working at two locations, first on the north side of the building (sic. north vestibule) and then later that day on the south side of the building (sic. south vestibule). * * *

8. Kenny Huston employees had previously built a work platform to lay the brick for the south vestibule parapet wall by placing wooden planks across bar joists that had been previously installed by others. The incident occurred in the vicinity of the south vestibule. According to Bert Selby, Todd Jenkins and Eric Albaugh, access to this work platform, on the day of the incident for Kenny Huston employees, including Patrick Donohoe, was by way of an extension ladder placed beneath the bar joists on the inside wall of the south vestibule. This extension ladder extended through a hatchway in the wooden planking thereby providing Kenny Huston employees, including Patrick Donohoe access to the work platform to lay the brick veneer for the parapet wall. The bar joists supporting the work platform are top bearing and the working surface of the work platform would therefore

have been no more than 12'-10" above the ground surface. An extension ladder can provide proper and safe access to a work platform 12'-10" above the ground surface. The parapet wall that the Kenny Huston employees (including Donohoe) were working on at the time of the incident was approximately 13 feet away from the outside face of the south wall of the south vestibule. The scaffolding in question was located outside (south) of the south wall of the south vestibule.

9. Had the extension ladder placed beneath the bar joists on the inside wall of the south vestibule become displaced in some manner it would have been improper for Kenny Huston employees, including Donohoe, to use the scaffolding outside the rear wall of the south vestibule as access to the work platform. Had the extension ladder placed beneath the bar joists on the inside wall of the south vestibule become displaced in some manner the masons and/or mason tender (Donohoe) could have requested the Lull operator (Javier Rivera) on the ground to replace it. This could have been easily accomplished since Rivera was regularly providing work material to the Kenny Huston employees on the work platform and was in regular contact with the workers on the work platform at the south vestibule.

* * *

13. Patrick Donohoe was provided proper access to the work platform, but he chose to improperly use the scaffolding outside the rear wall of the south vestibule as access to the work platform on August 30, 2004, and this was a cause of his fatal injury. Patrick Donohoe's choice to improperly use the scaffolding outside the rear wall of the south vestibule as access to the work platform on August 30, 2004 was contrary to his training and Kenny Huston safety policies, and this was a cause of his fatal injury.

14. Todd Jenkins testified [20: 8-10] that the scaffolding outside the south vestibule was in the process of being dismantled and that this scaffolding was not needed by Kenny Huston employees to do their work on the parapet wall an [sic] August 30, 2004 [45:13] and [46:3].

15. On August 30, 2004, the scaffold in question was in the process of being dismantled and was not for use by Kenny Huston masons and mason tender (Donohoe). Donohoe was not required by his employer to use the scaffold in question

and was provided a proper access (extension ladder through the hatch in the planks on the bar joists) to his work station at the parapet wall above the south vestibule. The following VSSR's have therefore been improperly applied:

* * *

16. Item #7 of the Hayes' affidavit is without technical basis since the scaffolding in question was not required by Kenny Huston employees, including Patrick Donohoe, to perform the work at the south vestibule. Lifelines would not have been required for the proper and safe use of an extension ladder to reach a working platform 12'-10" above the ground surface.

17. Item #8 of the Hayes' affidavit is contrary to testimony by Bert Selby, Todd Jenkins and Eric Albaugh, that access to the south vestibule work platform, on the day of the incident for Kenny Huston employees, including Patrick Donohoe, was by way of an extension ladder placed beneath the bar joists on the inside wall of the south vestibule. This extension ladder extended through a hatchway in the wooden planking thereby providing Kenny Huston employees, including Patrick Donohoe, proper and safe access to the work platform to lay the brick veneer for the parapet wall above the south vestibule.

18. Item #9 of Hayes' affidavit is without technical basis since the scaffolding in question was not required by Kenny Huston employees, including Patrick Donohoe, to perform their work at the south vestibule on August 30, 2004.

19. Item #10 of Hayes' affidavit is contrary to testimony by Bert Selby, Todd Jenkins and Eric Albaugh, that access to the work platform, on the day of the incident for Kenny Huston employees, including Patrick Donohoe, was by way of an extension ladder placed beneath the bar joists on the inside wall of the south vestibule. This extension ladder extended through a hatchway in the wooden planking thereby providing Kenny Huston employees, including Patrick Donohoe access to the work platform to lay the brick veneer for the parapet wall above the south vestibule.

20. Item #11 of Hayes' affidavit is without technical basis since the scaffolding in question was not required by Kenny Huston employees, including Patrick Donohoe, to perform their work at the south vestibule on August 30, 2004.

{¶44} 14. On June 19, 2007, relator's VSSR application was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record.

{¶45} 15. Following the June 19, 2007 hearing, the SHO issued an order denying the VSSR application. The SHO's order explains:

It is the finding of the Staff Hearing Officer that the decedent was employed on the date of injury noted above by the employer as an apprentice/laborer and that the decedent sustained an injury in the course of and arising out of employment on said date which resulted in death when he fell striking his head.

It is the finding of the Staff Hearing Officer that the Application for Violation of a Specific Safety Requirement filed 01/27/2006 is denied for the reason that the widow-claimant has not met her burden of demonstrating a violation of a specific safety requirement.

In order for the widow-claimant to prevail and [sic] her request for a VSSR award, she must demonstrate that:

- 1) The cited code section applies to the circumstances of the employment being performed at the time of the injury;
- 2) The code section was violated by non-compliance with its mandates; and
- 3) The violation is the proximate cause of the decedent's death in this case.

The widow-claimant's failure to prove any one of these three elements results in the denial of the request for the additional award. As a finding of a VSSR code is a penalty to the employer, any discrepancies in the interpretation of the code are to be liberally construed in favor of the employer and against its applicability to the application.

The following code violations are cited in this case: Rule 4121:1-3-03(J)(1); 4121:1-3-04(H)(1)(a); 4121:1-3-04(H)(2)(a); 4121:1-3-10(C)(4)(a); 4121:1-3-10(C)(4)(b); 4121:1-3-10(C)(9); 4121:1-3-10(C)(13); 4121:1-3-10(C)(18); and 4121:1-5-03(D)(1)(c)(i), (iii).

In the present case the decedent fell and hit his head, thereby causing his death. The facts indicate that no one saw the decedent fall, no one has knowledge where he was when he fell ie., did he fall from the scaffold or did he fall climbing up/down the scaffold. Furthermore, no one knows why he was where he was at the time of his fall. The two other workers present on the date and time of this fatal injury could not provide this information (See Burt Selby transcript page 47 and Todd Jenkins transcript page 67). There was evidence presented that he was bringing the two workers cans of soda from the trailer below, but that was merely speculative. Consequently, the decedent-widow can not prove by a preponderance of the evidence that there was a violation of a specific safety requirement, if there was a violation, which section was violated and whether that violation caused the decedent's death. As such, the instant application for a violation of the specific requirement is denied.

All evidence was reviewed and considered.

{¶46} 16. Relator moved for rehearing pursuant to Ohio Adm.Code 4121-3-20(C).

{¶47} 17. On September 27, 2007, another SHO mailed an order denying the motion for rehearing:

It is hereby ordered that the motion for rehearing filed 08/28/2007 be denied. The Widow-Claimant has not submitted any new and relevant evidence nor shown that the order of 06/19/2007 was based on an obvious mistake of fact or on a clear mistake of law.

Given the lack of eye witness evidence and the conflicting evidence submitted by the parties, it was not a clear mistake of law for the Staff Hearing Officer to conclude that the widow-claimant had not met her burden.

{¶48} 18. On March 11, 2008, relator, Catherine M. Donohoe, filed this mandamus action.

Conclusions of Law:

{¶49} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶50} We begin with a review of the multiple specific safety rules the violation of which relator alleged to be the proximate cause of the injuries and death of Patrick Donohoe.

{¶51} Ohio Adm.Code 4123:1-3¹ sets forth specific safety rules applicable to employees engaged in construction activity.

{¶52} Ohio Adm.Code 4123:1-3-03 is captioned "Personal protective equipment."

{¶53} Thereunder, Ohio Adm.Code 4123:1-3-03(J) is captioned "Safety belts, lifelines and lanyards."

{¶54} The first of the safety rules at issue, Ohio Adm.Code 4123:1-3-03(J)(1) provides:

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[.] * * *

{¶55} Ohio Adm.Code 4123:1-3-04 is captioned "Floors, stairways, railings, overhead protection and guarding of open-sided floors, platforms and runways."

{¶56} Ohio Adm.Code 4123:1-3-04(A) sets forth the "Scope":

This rule shall apply to temporary conditions where there is danger of employees or material falling through floor, roof or wall openings or from stairways or runways.

{¶57} Ohio Adm.Code 4123:1-3-04(H) is captioned "Guarding of open-sided floors, platforms and runways."

{¶58} Thereunder, the following two safety rules at issue are set forth:

(1) Open-sided floors or platforms.

¹ Formerly Ohio Adm.Code 4121:1-3.

(a) Standard guard railing and toeboards shall be provided on every open-sided floor or platform six feet or more above adjacent floor or ground level, except where there is entrance to a ramp, stairway or fixed ladder.

* * *

(2) Runways.

(a) Standard guard railings and toeboards shall be provided on all open sides of runways four feet or more above floor or ground level.

{¶59} Ohio Adm.Code 4123:1-3-10 is captioned "Scaffolding."

{¶60} Ohio Adm.Code 4123:1-3-10(C) is captioned "General requirements for all scaffolds."

{¶61} Thereunder, the following five specific safety rules are set forth:

(4) Guardrails and toeboards.

(a) Scaffolds having one horizontal dimension of less than forty-five inches, shall have standard guardrails installed on all open sides and ends of the platform when more than four feet above the ground or floor.

(b) Standard guardrails and toeboards shall be [sic] installed on all open sides and ends of platforms more than ten feet above the ground or floor, except on needle beam scaffolds and floats.

* * *

(9) An access ladder or equivalent safe access shall be provided for all scaffolds.

* * *

(13) Reasonable care shall be taken to maintain all scaffold surfaces free of debris and slippery substances.

* * *

(18) The free ends of fall lines from scaffolds shall be guarded.

{¶62} Ohio Adm.Code 4123:1-5-03 is captioned "Ladders and scaffolds."

{¶63} Thereunder, Ohio Adm.Code 4123:1-5-03(D) is captioned "Scaffolds" and Ohio Adm.Code 4123:1-5-03(D)(1) is captioned "Stationary scaffolds."

{¶64} Thereunder, Ohio Adm.Code 4123:1-5-03(D)(1)(c) is captioned "Guarding."

{¶65} Thereunder, the following safety rule is set forth:

(i) Standard guard railing and toeboards shall be provided on the unprotected sides of all stationary scaffolds which are ten feet or more above the ground[.] * * *

* * *

(iii) When it is not practicable to install and use standard guard railing for employee protection on scaffolds, as required by this paragraph, safety belts which are properly secured to a lanyard and lifeline or a safety net properly installed, may be used instead of standard guard railings.

{¶66} To successfully assert a VSSR, a claimant must establish that the employer's violation of a specific safety requirement proximately caused his or her injury. *State ex rel. Bayless v. Indus. Comm.* (1990), 50 Ohio St.3d 148. It is the claimant's burden to show that the employer's failure to provide a safety device required by a rule is the proximate cause of the injury. *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 251, 1996-Ohio-321 (citing *Bayless*).

{¶67} Because an award for a VSSR is a penalty against the employer, all reasonable doubts regarding the applicability of the requirement must be resolved in the employer's favor. *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170. This principle is often called the rule of strict construction. See *State ex rel. Carder v. Indus. Comm.*, 94 Ohio St.3d 165, 2002-Ohio-344.

{¶68} In *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, at ¶ 69, the court states: "[I]n determining the merits of a VSSR claim, the commission or its SHO, like any factfinder in any administrative, civil, or criminal proceeding, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence."

{¶69} The *Supreme Bumpers* court also warned that the strict construction rule does not apply in resolving factual disputes: "It is a rule of statutory, not evidentiary, interpretation, devised only as a guide to interpreting the specific requirements of a safety standard in VSSR claims." *Id.* at ¶ 70.

{¶70} The *Supreme Bumpers* court set forth the principles governing questions of fact in VSSR claims:

* * * [T]he claimant has the burden of proving a VSSR by a preponderance of the evidence, the commission alone is responsible for evaluating the weight and credibility of the evidence, and this or any other reviewing court may not reweigh the evidence, but must instead uphold the commission's decision so long as it is supported by "some evidence." * * *

Id. at ¶ 71.

{¶71} Here, citing *Supreme Bumpers*, relator argues that the commission failed an alleged duty to draw reasonable inferences from the evidence before it, and particularly from the reports of the experts, to render a definitive determination of how the accident occurred.

{¶72} As the commission's orders explain, the hearing officers found that relator had failed to prove by a preponderance of the evidence which rules were violated and that a violation proximately caused the death of decedent. The SHO's order of June 19,

2007 states that "no one has knowledge where [decedent] was when he fell" and "no one knows why he was where he was at the time of his fall."

{¶73} The SHO's order of September 27, 2007 denying a rehearing, states: "Given the lack of eye witness evidence and the conflicting evidence * * * it was not a clear mistake of law for the Staff Hearing Officer to conclude that the widow-claimant had not met her burden."

{¶74} According to relator, the commission "disregarded" the expert testimony or the expert evidence. (Relator's brief 5.) According to relator, because the experts opined as to how the accident may have occurred, the commission was under a duty to determine which opinion as to the factual circumstances of the accident would be relied upon. According to relator, the commission was duty-bound "to make a choice" among the expert opinions presented. (Relator's brief 5.) Given that the experts presented opinions as to how the accident occurred, relator concludes that the commission's finding that relator failed her burden is not supported by some evidence in the record. The magistrate disagrees with relator's arguments.

{¶75} The commission is not required to accept the evidence from one party as persuasive while rejecting the evidence from the other party. While that is often the case with commission decisions, the commission is not always under a duty to make a choice between conflicting evidence. Because it is the duty of the commission to weigh all the evidence submitted to it, the commission is free to reject all of the expert opinions before it as not being persuasive, even when those opinions are conflicting.

{¶76} Because it is the claimant who has the burden of proof in a VSSR proceeding, the commission is free to determine that the claimant has not met claimant's

burden simply because the commission is not persuaded that the evidence proves the elements of claimant's case for a VSSR award. *State ex rel. Thomas v. Indus. Comm.* (1989), 42 Ohio St.3d 31. (The commission's denial of compensation for "lack of credible medical evidence" was supported by some evidence.)

{¶77} When the commission determines that none of the conflicting expert opinions are persuasive, that does not mean that the commission has failed to consider the expert evidence as relator here suggests. The commission is not required to list the evidence it has considered nor is it required to list the evidence it has rejected. See *Lovell*. Because there is a presumption of regularity that attaches to commission proceedings, the commission's failure to list the evidence considered or rejected does not imply that the commission has failed its duty to consider and weigh that evidence.

{¶78} Here, the commission explained why it found that relator had failed to meet her burden to prove by a preponderance of the evidence the elements of a VSSR including proximate cause. The lack of an eyewitness to the accident rendered the expert opinions unreliable. This does not imply that expert opinions can never be persuasive when there is an absence of an eyewitness to an accident. It simply means that in this case, the commission exercised its discretion in weighing the expert evidence before it and determined that the expert evidence was not persuasive to meet relator's burden of proof.

{¶79} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke

KENNETH W. MACKE
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).