[Cite as *State ex rel. Lott v. Indus. Comm.*, 2010-Ohio-2063.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. John H. Lott,	:	
Relator,	:	
v.	:	No. 09AP-407
Industrial Commission of Ohio and Juanita Patten (Patten Rubbish),	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 11, 2010

Mario Gaitanos, for relator.

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Blakemore, Meeker & Bowler Co., L.P.A., and *Michael B. Bowler*, for respondent Juanita Patten.

IN MANDAMUS

BROWN, J.

{¶1} Relator, John H. Lott, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio, to vacate its order denying him an additional award for violation of a specific safety requirement, and to enter an order granting such an award.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision, recommending that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, relator's requested writ of mandamus is denied.

Writ of mandamus denied.

BRYANT and CONNOR, JJ., concur.

_____

[Cite as *State ex rel. Lott v. Indus. Comm.*, 2010-Ohio-2063.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. John H. Lott,	:	
Relator,	:	
v.	:	No. 09AP-407
Industrial Commission of Ohio and Juanita Patten (Patten Rubbish),	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on February 16, 2010

Mario Gaitanos, for relator.

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Blakemore, Meeker & Bowler Co., L.P.A., and *Michael B. Bowler*, for respondent Juanita Patten.

IN MANDAMUS

{¶4} In this original action, relator, John H. Lott, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order

denying him an additional award for violation of a specific safety requirement ("VSSR"), and to enter an order granting a VSSR award.

Findings of Fact:

{¶5} 1. Relator sustained a work-related injury on June 2, 2007, and his claim has been allowed for "parietal hematoma/R w/deep coma, right; parieto-frontal hematoma/L w/deep coma, left; ant frontal lobe hemorrhagic CNTSNS/L, left; temporal lobe hemorrhagic CNTSNS/bilateral; traumatic brain INJ; contusion back head; atelectasis/bilateral; pleural effusion NOS bilateral."

{¶6} 2. On the day of his injury, relator was employed by Patten Rubbish ("employer") in Akron, Ohio, which was owned by Juanita Patten.

{¶7} 3. Relator was working with another employee, Willie King. The two men were driving the employer's 1984 Dodge one ton dump truck. The truck in question was "not a garbage truck but rather a dump truck and the trash would be thrown into the back of the truck."

{¶8} 4. Relator is unsure how he was injured. In his affidavit, relator stated:

> * * * I believe we were using the dump truck; this truck was not an actual garbage truck like you see at Republic or Waste Management Systems. The truck had wood or planks on the sides of the truck. * * *
>
> Normally I drove the truck from site to site. I drove the truck on the day of my injury; however I do not know where I went on the day of my injury or what happened.
>
> * * *
>
> When traveling from site to site Mr. King and I would ride in the cab of the truck. Neither of us rode on the back of the truck. The cab of the truck had a bench seat. * * *

> I do not know if my injury occurred as I was traveling in the truck or if we were stopped at a site. I do not remember if I got onto the back of the truck at all the day of my injury.

{¶9} 5. King was also uncertain how the injury happened. In his affidavit, King stated:

> * * * Although I did not observe Mr. Lott's injury occur, I do have pertinent information.
>
> I was working with Mr. Lott on the day of his injury picking up trash. We stopped at a pick up, I turned off the truck and got out of the truck to see if there was a pick up. I saw Mr. Lott go onto the back of the truck. I then heard a noise like something striking something. I went to the side of the truck and saw Mr. Lott lying on the ground.
>
> I do not know why Mr. Lott went up on the truck. He went inside the back of the truck; he may have been lifting the top.
>
> I believe the truck we were using on the day of Mr. Lott's injury was a Dodge small dump truck. We would throw the trash over the side of the dump truck.

{¶10} 6. Relator struck his head, presumably on the windshield of an adjacent parked car, and sustained the injuries allowed in this claim.

{¶11} 7. On October 17, 2007, relator filed a VSSR application. On his application, relator alleged the employer had violated Ohio Adm.Code "412[3]:1-5-13."

{¶12} 8. Later, relator amended his VSSR application alleging the following violation: "Personal Protective Equipment OAC 412[3] 1-5-17."

{¶13} 9. The Ohio Bureau of Workers' Compensation ("bureau") Safety Violations Investigation Unit investigated the accident. According to the report, the employer informed the investigator that relator "had worked for Patten Rubbish on and off for approximately six (6) years as a laborer responsible for picking up trash." Relator "was not provided with any training * * * and was required to wear a hard hat, safety glasses,

heavy work shoes, and a safety vest at the time of his injury." The investigator spoke with Lieutenant Johnston of the Akron Fire Department. Lieutenant Johnston provided the following information:

> * * * [T]he fire department did not take any photographs or statements when they responded to the scene. * * * [T]he truck was backed into the parking lot and the side of the truck was approximately two (2) to two and one half (2 ½) feet from the side of a mid sized car. The truck had wooden rails. Lieutenant Johnston did not recall any hard hat in the area when fire personnel arrived. Lieutenant Johnston could not provide any further information.

{¶14} 10. Relator's application was heard before a staff hearing officer ("SHO") on January 26, 2009. At the hearing, relator clarified that he was specifically alleging violations of Ohio Adm.Code 4123:1-5-13(F)(1)(d) and 4123:1-5-17(G)(1)(a)(i). Ohio Adm.Code 4123:1-5-13(F)(1)(d) pertains to motor vehicles and the cited provision requires that trucks not be altered, but be maintained as originally received from the manufacturer. At the hearing, relator argued that the employer had modified the truck by adding wooden side rails. Relator asserted that the proximate cause of his fall was the loose wooden side rails. The SHO determined that the evidence did not support a violation:

> * * * According to Ms. Riley's report, Ms. Patten, owner of the company, denied making any modifications. Also, the Akron Fire Department and Akron Police Department responded to the injury. However neither department took photographs, collected statements, or prepared reports.
>
> Unfortunately, based on the Injured Workers' affidavit, the Injured Worker does not recall the specific mechanism of injury. Paragraph nine of the Injured Worker's affidavit indicates "I do not know if my injury occurred as I was traveling in the truck or if we were stopped at a site. I do not

> remember if I got onto the back of the truck at all the day of my injury".
>
> Moreover, Mr. King, the Injured Worker's co-worker, indicates in his affidavit that he did not observe the injury. Mr. King notes he saw the Injured Worker go onto the back of the truck, heard a noise, and saw the Injured Worker lying on the ground. Mr. King also notes he does not know the reason the Injured Worker went to the back of the truck.
>
> Clearly, the specific mechanism of injury remains unknown.
>
> The Injured Worker's counsel requests that the Industrial Commission infer that the injury resulted from a loose wooden side rail. Although, the Injured Worker does reference a loose plank on the truck in his affidavit, there remains a lack of evidence that the Employer altered or modified the truck in violation of Ohio Administrative Code Section 412[3]:1-5-13 (F) (1) (d). The affidavits of the Injured Worker and Mr. King are silent on the issue of the alleged modification.

{¶15} 11. Ohio Adm.Code 4123:1-5-17(G)(1)(a)(i) pertains to workshop and factory safety and specifically to head and hair protection. It appears that relator argued that the employer failed to provide him with protective headgear. The SHO determined that relator did not meet his burden of proof, stating as follows:

> * * * Mr. King's affidavit is silent on the issue of head protection. The Injured Worker's affidavit is equivocal. Although the Injured Worker indicates in paragraph number four that he was not required to wear any personal protective equipment, he further notes that he wore a hard hat and safety glasses when he went to the dump. The Injured Worker's affidavit is silent on the issue of whether the named Employer <u>provided</u> him with protective headgear.
>
> The Injured Worker's counsel references the report of Ms[.] Riley. Ms[.] Riley notes in paragraph nine that she spoke with Akron Fire Department Lieutenant William Johnston, a responder to the scene. Lieutenant Johnston did not recall any hard hat in the area when fire department personnel arrived at the scene of the injury. However, Ms[.] Riley also notes that no photographs or statements were prepared by

> the Akron Fire Department relative to the industrial injury. Thus, the mere fact that Lieutenant Johnston does not recall a hard hat at the scene, is not dispositive of the requirement that the instant Employer provided protective headgear.

(Emphasis sic.)

{¶16} The SHO determined that relator did not meet his burden of proving that the employer violated the cited specific safety requirements and denied his application.

{¶17} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶18} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶19} In order to establish a VSSR, a claimant must prove that: (1) there exists an applicable and specific safety requirement in effect at the time of the injury; (2) the employer failed to comply with the requirements; and (3) the failure to comply was the

proximate cause of the injury in question. *State ex rel. Trydle v. Indus. Comm.* (1972), 32 Ohio St.2d 257.

{¶20} The interpretation of a specific safety requirement is within the final jurisdiction of the commission. *State ex rel. Berry v. Indus. Comm.* (1983), 4 Ohio St.3d 193. Because a VSSR award is a penalty, a specific safety rule must be strictly construed, and all reasonable doubts concerning the interpretation of the safety standard are to be construed against its applicability to the employer. *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170. The question of whether an injury was caused by an employer's failure to satisfy a specific safety requirement is a question of fact to be decided by the commission subject only to the abuse of discretion test. *Trydle*; *State ex rel. A-F Industries v. Indus. Comm.* (1986), 26 Ohio St.3d 136; *State ex rel. Ish v. Indus. Comm.* (1985), 19 Ohio St.3d 28.

{¶21} For the reasons that follow, it is this magistrate's decision that this court deny relator's request for a writ of mandamus.

{¶22} Relator first asserted that the employer violated Ohio Adm.Code 4123:1-5-13(F)(1)(d), which provides:

> Trucks shall not be altered so that the relative positions of the various parts are different from what they were when originally received from the manufacturer, nor shall they be altered either by the addition of extra parts not provided by the manufacturer or by the elimination of any parts, except as provided in paragraph (F)(1)(e) of this rule. Additional counterweighting of fork trucks shall not be done unless authorized by the truck manufacturer.

{¶23} Relator had to demonstrate not only that the employer had altered the truck, but that the alteration was the proximate cause of his injuries. However, as the SHO

stated, the mechanism of relator's accident remains unknown. The only other person present that day, King, did not observe relator's accident. Thus, relator was unable to meet his burden of proving that the truck was altered and that the alteration was the proximate cause of his injury. The commission did not abuse its discretion in so finding.

{¶24} Relator also alleged a violation of Ohio Adm.Code 4123:1-5-17(G)(1)(a)(i). As noted previously, that chapter pertains to workshop and factory safety. Based upon the evidence presented here, it is apparent that relator's injuries did not occur in a workshop or factory setting. In any event, the Ohio Administrative Code section in question provides:

> Whenever employees are required to be present where the potential hazards to their head exists from falling or flying objects, or from physical contact with rigid objects, or from exposures where there is a risk of injury from electric shock, employers shall provide employees with suitable protective headgear.

{¶25} In his affidavit, relator stated that he was not required to wear any personal protective equipment; however, he also indicated that he wore a hardhat and safety glasses when they went to the dump. Further, relator stated that he was not wearing a hardhat or safety glasses at the time of his injury. In his affidavit, King made no mention of hardhats or safety glasses. According to the employer, relator was required to wear a hardhat, safety glasses, heavy work shoes, and a safety vest. When asked, Lieutenant Johnston could only say that he did not recall finding a hardhat in the area when they responded to the injury.

{¶26} Relator was required to establish there was a potential hazard to his head or having his head come in contact with rigid objects. Further, relator was required to

establish that the employer failed to provide him with a hardhat. Lastly, relator was required to prove that the lack of a hardhat was the proximate cause of his injuries. As the SHO stated, relator's affidavit is equivocal. On the one hand, relator stated that he wore a hardhat and safety glasses when he went to the dump, but never indicated whether or not the employer had provided the hardhat and safety glasses. Further, the fact that the fire department did not find a hardhat at the scene is not sufficient to support a finding that the employer had failed to provide the required safety equipment. Thus, assuming that this code provision would apply here, relator's evidence was insufficient to support the finding of a violation.

{¶27} Relator has not demonstrated that the commission abused its discretion when it denied him an additional award for the alleged violation of a specific safety requirement. Accordingly, 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).