[Cite as *State ex rel. Glunt Industries, Inc. v. Indus. Comm.*, 2010-Ohio-4600.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Glunt Industries, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-260
Industrial Commission of Ohio and Thomas E. Hamrick, II,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 28, 2010

Bricker & Eckler LLP, *Anne Marie Sferra* and *Jennifer A. Flint*, for relator.

Richard Cordray, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

Harrington, Hoppe & Mitchell, Ltd., and *Kevin P. Murphy*, for respondent Thomas E. Hamrick, II.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶1} Relator, Glunt Industries, Inc. ("relator"), commenced this original action requesting a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission" or "respondents"), to vacate its order granting the application of respondent, Thomas E. Hamrick, II ("claimant" or "respondents"), for an additional award

for a violation of a specific safety requirement ("VSSR"), and to either enter an order denying the VSSR application or remand the matter to the commission for a rehearing.

{¶2} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The parties filed a stipulated record and merit briefs. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In the decision, the magistrate recommended that this court deny relator's request for a writ.

{¶3} Relator has filed timely objections to the magistrate's decision. The commission and claimant have filed memoranda supporting the magistrate's decision. The matter is therefore before this court for a full, independent review.

{¶4} In its objections, relator presents the same substantive arguments previously raised before and cogently addressed by the magistrate. Relator first challenges the application of Ohio Adm.Code 4123:1-5-23(A) to the circumstances of this matter. Relator next challenges the evidence supporting the commission's finding of a violation of that section. Relator then challenges the evidence supporting the commission's finding on the issue of proximate cause. Finally, relator challenges the decision to deny a rehearing. Although the magistrate has already addressed these very issues, we will nevertheless further illustrate the portions of the record supporting the commission's findings.

{¶5} Claimant was hired as a maintenance employee for relator's entire plant. Having a 25-year history of working as an electrician, the primary duties of claimant's job centered on electrical work. In regards to such work, relator had a lockout/tagout policy in effect, whereby its employees were apparently never supposed to work on energized

equipment. If an employee violated this policy, he or she would be reprimanded. Nevertheless, claimant testified that some of his duties were performed on de-energized equipment, while other duties had to be completed on energized equipment. Claimant testified that he determined when it would be necessary to lockout/tagout on a particular project. Notably, when claimant was troubleshooting, or determining the cause of a problem, he had to work on energized equipment. Although he regularly worked on energized equipment, there is no indication that claimant was ever reprimanded for violating relator's lockout/tagout policy. In fact, claimant's supervisors and co-workers testified that they knew little to nothing about electrical issues and often deferred to claimant when presented with such issues. Based upon the record, it is clear that claimant had a certain degree of discretion in performing the duties of his position.

{¶6} On April 19, 2006, relator's entire plant experienced a power outage. One of claimant's supervisors, Mike Wilkes, instructed claimant to figure out why the plant lost power. This much is undisputed. The dispute, however, regards whether Wilkes provided further instruction for claimant to check the main breaker in the main electrical panel. Claimant contends he did, while relator denies such an instruction ever occurred. After reviewing these competing positions, the commission agreed with claimant. In relator's objections, it offers a lengthy recitation of the conflicting evidence on this issue before it presents the position: "Taking all of the evidence together – including Claimant's own testimony – it is clear that Claimant was *never* instructed to go to and/or check the main breaker at any time." (Objections, at 12.) (Emphasis sic.) In presenting this position, however, relator is clearly asking us to reweigh the evidence. At this stage in the proceedings, we are not permitted to do so. See *State ex rel. Supreme Bumpers v.*

Indus. Comm., 98 Ohio St.3d 134, 144, 2002-Ohio-7089, citing *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170, 172.

{¶7} Aside from the dispute over Wilkes's instructions, at the very least, Wilkes instructed claimant to determine the cause of the power outage without providing any further instruction. Based upon these instructions, claimant's duties were to troubleshoot the main electrical panel in order to determine the cause of the power outage. Claimant knew that the right side of the main electrical panel contained 440/480 volts, while the left side contained something more than that. According to his testimony, claimant considered anything more than 440/480 to be high voltage. Therefore, he knew the left side of the main electrical panel was high voltage. While he knew that relator's policy was to outsource high voltage work to subcontractors, he testified to the exigency of the situation when he stated, "my job [was] to get things back on line as fast as possible." (R. 341.) For this reason, claimant testified that he did not have the time to travel to relator's other plant to retrieve any safety equipment that may have been there. Based upon these circumstances, and in light of the discretion afforded to claimant in performing his duties, we find that it would have been reasonable for the commission to have inferred that the main breaker of the main electrical panel was to be worked on.

{¶8} Whether the commission reached the conclusion that the main breaker of the main electrical panel was "to be worked on" by way of a reasonable inference or through direct evidence, there is clearly evidence supporting such a finding. To the extent that relator seeks to inject the new terms "assigned," "tasked," "ordered" or "instructed" into Ohio Adm.Code 4123:1-5-23(A), we reject this position. " 'The [commission's] rules for specific safety requirements have the effect of legislative enactments[.]' " *State ex rel.*

Parks v. Indus. Comm., 85 Ohio St.3d 22, 25, 1999-Ohio-200, quoting *State ex rel. Miller Plumbing Co. v. Indus. Comm.* (1948), 149 Ohio St. 493, 496-97. By injecting new terms and requirements into Ohio Adm.Code 4123:1-5-23(A) as relator proposes, "we would encroach upon the commission's rule-making authority. It is not the duty of this court to legislate such a requirement where the promulgators of Ohio Adm.Code [4123:1-5-23(A)] have chosen not to do so." *State ex rel. Blair v. Indus. Comm.*, 10th Dist. No. 04AP-1134, 2005-Ohio-4351. As a result, we reject relator's suggestion that an employer must specifically order, instruct, or assign an employee to work on a specific piece of equipment as a prerequisite for potential VSSR liability under Ohio Adm.Code 4123:1-5-23(A). Furthermore, we overrule those objections relating to the applicability of Ohio Adm.Code 4123:1-5-23(A).

{¶9} Having found support for the commission's finding on the applicability of Ohio Adm.Code 4123:1-5-23(A), we next turn to the objections challenging the finding of a violation and the finding on proximate cause. Again, we note that the record contains evidence supporting the commission's decisions on these issues. Relator's safety coordinator, Gary Shells, testified that relator did not have any protective equipment suitable for high voltage work. Claimant echoed this sentiment when he indicated that the gloves that were at relator's plant, regardless of who provided them, were not suitable for high voltage work. Instead, the record reflects that hot sticks were suitable for high voltage work. Indeed, claimant testified that hot sticks can adequately determine whether there is electricity flowing through high voltage lines. Ohio Adm.Code 4123:1-5-01 confirms this by defining "hot line (live line) tools" as, "those tools which are especially designed for work on energized high voltage conductors and equipment." Finally, as the

magistrate correctly noted, claimant's statement to his co-worker that he should have used a hot stick is some evidence supporting the commission's finding on the issue of proximate cause. Having found some evidence in support of the commission's finding of a violation and also in support of the finding on the issue of proximate cause, we overrule relator's objections on these issues.

{¶10} Finally, we will consider relator's objection regarding the refusal to grant a rehearing. Relator argues that the commission committed an obvious mistake of fact and ignored pivotal evidence in support of its motion for rehearing. We disagree and find that the foregoing analysis on relator's other objections resolves this issue. Accordingly, we overrule relator's objections on the refusal to grant a rehearing.

{¶11} After an examination of the magistrate's decision, as well as an independent review of the record and relevant law, we conclude that the magistrate has sufficiently discussed and determined the issues raised by relator. We therefore overrule relator's objections to the magistrate's decision and adopt the appended decision as our own, including the findings of fact and conclusions of law set forth therein. As a result, we deny relator's request for a writ of mandamus.

Objections overruled; writ denied.

BRYANT and SADLER, JJ., concur.

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A P P E N D I X

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Industrial Commission of Ohio and Thomas E. Hamrick, II,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on January 22, 2010

Bricker & Eckler LLP, *Anne Marie Sferra* and *Jennifer A. Flint*, for relator.

Richard Cordray, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

Harrington, Hoppe & Mitchell, Ltd., and *Kevin P. Murphy*, for respondent Thomas E. Hamrick, II.

IN MANDAMUS

{¶12} In this original action, relator, Glunt Industries, Inc. ("relator" or "Glunt"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its order granting the application of respondent Thomas E. Hamrick, II ("claimant"), for an additional award for a violation of a specific safety requirement ("VSSR"), and to enter an order denying the VSSR application.

Findings of Fact:

{¶13} 1. In February 2005, claimant was hired by relator to work as a maintenance mechanic at one of its plants located in Warren, Ohio, and known as the Dana Street facility. Prior to his hire, claimant had approximately 25 to 28 years experience as an electrician.

{¶14} Some 14 months into his employment, on April 19, 2006, claimant was electrocuted and sustained severe burns and other injuries. The accident occurred at the plant's main power cabinet sitting on an elevated platform or catwalk about 15 to 20 feet above the production floor. At the time of the accident, claimant was trying to determine the cause of a power outage at the plant. To reach the main power cabinet, one must use a scissor lift or ladder to access the roof of the plant's cafeteria and then climb a ladder to the catwalk.

{¶15} The main power cabinet has access panels on its left and right sides. The right side of the cabinet provides 480 volts. The left side provides 4160 volts.

{¶16} On the date of injury, following a brief verbal communication from his supervisor, Michael Wilkes, regarding the power outage, claimant retrieved his 600 volt electrical meter, a screw driver and flashlight and then climbed up to the main power cabinet. While he was working alone on the main power cabinet, an explosion occurred and his clothes caught fire.

{¶17} After the explosion, relator engaged an outside contractor, Valley Electrical, to repair the high voltage side (left side) of the main power cabinet. The 480 volt side (right side) was not in need of repair.

{¶18} 2. On March 26, 2007, claimant filed a VSSR application alleging that his industrial injuries resulted from relator's violation of a specific safety rule—Ohio Adm.Code 4123:1-5-23(A). The rule requires an employer to provide protective equipment approved for the voltage involved unless the electrical conductors or equipment to be worked on are isolated from all possible sources of voltage or are effectively grounded.

{¶19} 3. The VSSR application prompted an investigation by the Safety Violations Investigative Unit ("SVIU") of the Ohio Bureau of Workers' Compensation ("bureau").

{¶20} 4. On July 3, 2007, the SVIU investigator issued her written report ("SVIU report").

{¶21} 5. According to the SVIU report, the investigator conducted an on-site investigation at the Glunt plant on June 14, 2007. Glunt's president, Dennis Glunt, and plant manager, Gary Shells, were present during the on-site investigation. Also present was Glunt's counsel. The SVIU report states in part:

> 2. During the on-site investigation, Investigator * * * viewed and photographed the electrical panel involved in Mr. Hamrick's injury[.] * * * The electrical panel is located in the ceiling area of the * * * facility. Mr. Glunt explained the electrical panel had four thousand one hundred and sixty (4160) volts of electricity. When speaking with witness Donald Hawkes[,] it was discovered the left side of the electrical panel contained four thousand one hundred and sixty (4160) volts of electricity and the right side of the electrical panel contained four hundred and eighty (480)

volts of electricity[.] * * * Mr. Glunt was not aware of the voltage in the right side of the panel until Mr. Hawkes revealed this information. Mr. Glunt stated Mr. Hamrick gained access to the area of the electrical panel via a ladder he retrieved in the facility[.] * * * After Mr. Hamrick's injury occurred Valley Electric was contracted to repair fuses in the electric panel.

3. Mr. Glunt reported Mr. Hamrick was a maintenance person responsible for repairing equipment at the Dana Street facility at the time of his injury[.] * * * Mr. Hamrick was provided with safety orientation and training provided from a company contracted by Glunt Industries. Mr. Glunt explained Mr. Hamrick did not receive training for his specific job duties as he had prior experience and had his journeyman electrician's card when he was hired[.] * * * Mr. Hamrick was required to wear steel toes [sic] shoes, safety glasses, and no loose clothing at the time of his injury[.] * * * Mr. Glunt stated Mr. Hamrick also should have been wearing the provided electrical gloves[.] * * *

4. Investigator * * * inquired if Mr. Hamrick was provided with rubber sleeves, hot line tools, line hose, line guardes, insulator hoods, blankets, access boards, or hot sticks. Mr. Glunt responded the electrical gloves were equipped with rubbers [sic] sleeves[.] * * * The other equipment was not provided to Mr. Hamrick as he was not required to work with energized equipment[.] * * * Any work involving voltage above four hundred and eighty (480) volts was contracted to another company[.] * * * Mr. Glunt went on to explain Mr. Hamrick was required to de-energize the electric and then lock out and tag out the electrical panel with his lock and tags prior to performing work[.] * * *

5. Investigator * * * asked if Mr. Hamrick had ever accessed or performed work on the involved electrical panel prior to the day of his injury. Mr. Glunt stated the only electrical panel Mr. Hamrick had accessed in the performance of his duties prior to the day of his injury was the four hundred and eighty volt panel located on ground level directly below the panel involved in his injury[.] * * *

6. Mr. Glunt did not know if the involved electrical panel was equipped with a lock when Mr. Hamrick's injury occurred[.] * * * He did not believe the electrical panel was marked with the required personal protective equipment required to gain

> access to the electrical panel * * * but did believe the panel was marked with the voltage[.] * * *
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> 9. Investigator * * * interviewed witness Hank Joy during the on-site investigation. * * * Mr. Joy stated the power to the facility went out on the day of Mr. Hamrick's injury. Mr. Hamrick went up to the electric panel located near the ceiling and Mr. Joy heard a boom. Mr. Joy went up to the electrical panel and put the fire out and helped Mr. Hamrick down. Mr. Joy heard Mr. Hamrick say, "How stupid of me, can not believe I did not use a hot stick." Mr. Joy did not know if Mr. Hamrick was provided with hot sticks or what hot sticks were. Previously[,] Investigator * * * asked Mr. Glunt if Mr. Hamrick had been provided with hot sticks among other equipment. Mr. Glunt had responded Glunt Industries Inc. had not provided Mr. Hamrick with hot sticks.
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> 10. * * * Valley Electrical accessed the main 4160, cleaned the area from the arc flash and changed the high voltage fuse in the main disconnect switch. Valley Electrical provided Investigator * * * with an invoice for the services they performed[.] * * *
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> 12. On June 15, 2007[,] Investigator * * * attempted to contact witness Mike Wilkes. A message was left for Mr. Wilkes; as of the writing of this report he had not responded to the message.

6. The SVIU investigator obtained an affidavit from claimant executed June 6, 2007, stating:

> 1. I am the injured worker in this VSSR claim.
>
> 2. Glunt Industries Inc. hired me in February 2004 as an electrician. At the time of my injury I was an electrician. My job duties consisted of setting up equipment, repairing and installing anything electrical.
>
> 3. I was not provided with any training from Glunt Industries. When I started at Glunt Industries[,] I had twenty-five (25) years experience as an electrician. I served as an apprentice

as [sic] WCI Steel and attended schools. I have my apprenticeship papers.

4. At the time of my injury[,] I was required to wear safety glasses and steel toe boots. Glunt Industries provided me with the safety glasses; I had to provide the steel toe boots. I was wearing safety glasses and steel toe boots at the time of my injury.

5. I do not remember what happened except there was an explosion. I do remember the plant lost power. Mike Wilkes (assistant supervisor) told me to check why we lost power. I went to the main breaker coming into the plant to see why the plant had lost power. I do not remember what I did once I got to the main breaker. I do not remember what side of the breaker I had accessed or if I did access the breaker at the time of my injury.

6. The main breaker was located near the center of the building approximately twenty (20) feet in the air. I had worked on this main breaker approximately twice before. I had installed an air compressor and had to add power to the breaker for the air compressor. The other time I was hooking up a ground lead. Both of these occasions were approximately one (1) month prior to my injury. Both of these occasions[,] I worked on the small breaker located on the right side of the box inside of the box.

7. The company did not provide me with nor did they have rubber gloves with protectors, rubber sleeves, hot line tools, a line hose, line guards, insulator hoods, blankets, or access boards. I had never requested these items from the company.

8. I was never told by management not to access the breaker box involved in my injury on the day of my injury or any other day.

9. I believe the side of the breaker box I usually accessed had 440 volts. I have been told the side of the breaker box involved in my injury had 4700 volts at the time of my injury.

10. I was never given any instruction or training for the main breaker box. I was never provided with any information from the company as to what type of lines were running into the main breaker box or what the voltage was from the time I started at Glunt Industries until the time of my injury.

> 11. There was not any type of markings on the breaker box to indicate the amount of voltage, instructions for the breaker box, or safety precautions.
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> 12. There was not any type of marking or instruction on the outside of the breaker box indicating the type of personal protection required when accessing the breaker box.
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> 13. There was not any type of marking on the breaker box which advised employees to stay out of the breaker box or the employee would need management's permission to access the breaker box.
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> 14. There was not any lock on the breaker box to prevent employees from accessing the breaker box.

7. The SVIU investigator obtained an affidavit from Donald E. Hawkes, stating:

> 1. I am a witness in this VSSR claim. Although I did not observe Mr. Hamrick's injury occur, I do have pertinent information.
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> 2. Glunt Indsutries Inc. hired me November 24, 2005 as a welder. At the time of Mr. Hamrick's injury I was a shop supervisor. My job duties included making sure production is running, supervising employees, and making sure employees are wearing the proper personal protective equipment. I was not Mr. Hamrick's supervisor; however[,] if something needed repaired I would tell him. If I saw Mr. Hamrick performing in an unsafe manner I would advise him to stop.
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> 3. Mr. Hamrick went through safety orientation which included the company safety program. This safety training was conducted by an outside company. Mr. Hamrick told me he was a journeyman electrician and had worked Warren Consolidated (I believe) in electrical maintenance. I started working at the Dana St. facility of Glunt Industries in March or April of 2006 and worked as a fellow employee (not in the maintenance/electrical department) with Mr. Hamrick until his injury occurred. Mr. Hamrick seemed knowledable [sic] with his maintenance and electrical duties during this time.
>
> 4. Mr. Hamrick was required to wear steel toe boots, safety glasses, leather gloves, and no loose clothing at the time of

his injury. Mr. Hamrick was wearing these items at the time of his injury.

5. The power in the Dana St. facility went out on the day of Mr. Hamrick's injury. Mr. Hamrick checked the electric panel on the floor area. I went next door to a neighboring company to see if they had lost power; this company also lost power. I came back into the Glunt Industries facility and observed Mr. Hamrick on another electrical panel near the ceiling, the 480 volt side of the panel. I told Mr. Hamrick the power was out all over and to come down. Mr. Hamrick told me to call Ohio Edison. I walked away to call Ohio Edison and as I was approximately fifty (50) feet away I heard the boom.

6. Mr. Hamrick accessed the electrical panel near the ceiling via a ladder. Mr. Hamrick retrieved this ladder from another area within the facility. The electrical panel involved in Mr. Hamrick's injury had 4160 volts. This was marked on the outside of the electrical panel. I do not know if there was anything else marked on the outside of this panel as I have never been up there. I am not aware of Mr. Hamrick accessing the involved panel prior to the day of his injury.

7. Also in the area of the involved electrical panel is a side (right side) with 480 volts. I have observed Mr. Hamrick on the right side of the panel prior to the day of his injury; however[,] I do not know what he was doing. When I came back from next door, Mr. Hamrick was standing at the 480 side of the electrical box.

8. Mr. Hamrick was provided with rubber gloves with protectors, these are kept in the maintenance shed in a cabinet. The maintenance shed was Mr. Hamrick's office and he had access to this equipment. I do not know when Mr. Hamrick was required to wear the rubber gloves with protectors.

9. I do not know if Mr. Hamrick was provided with rubber sleeves. The rubber gloves with protectors went to just below the elbow. I do not know what hot line tools are or if Mr. Hamrick was provided with these. I do not know if Mr. Hamrick was provided with a line hose, line guards, insulator hood, blanket, or access boards. Mr. Hamrick would have been provided with any equipment he requested. I do not [know] if Mr. Hamrick had requested hot line tools, line hose, line guards, insulator hood, blanket, or access boards.

> 10. Mr. Hamrick had meters for checking the voltage on different machines. I do not know if the company provided these meters or if Mr. Hamrick purchased them on his own.
>
> 11. Glunt Industries Inc. has a lock out tag out program which required Mr. Hamrick to shut the electrical panel off and then lock out and tag out the panel prior to working on the electrical panel. Mr. Hamrick was provided with his own locks and tags. I had observed Mr. Hamrick lock out and tag out equipment/electrical panels when required.
>
> 12. Mr. Hamrick was not required to work on the 4160 volt side of the electrical panel. I would call the plant manager who was [to] call a contractor. Company employees were not to access or perform work on the 4160 volt side of the electrical panel.

8. The SVIU investigator obtained an affidavit from Wayne D. Redd, stating:

> 1. I am a witness in this VSSR claim.
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> 2. Glunt Industries Inc. hired me April 2006 as a painter. This was my position at the time of Mr. Hamrick's injury.
>
> 3. On the day of Mr. Hamrick's injury the power went out. We congregated in the area under the electrical panel which is located on the ceiling. We were waiting to see what was going to happen with the electricity. Don Hawkes, supervisor, said it was Ohio Edison's problem. I do not know if Mr. Hamrick heard Mr. Hawkes say this or not. I do not know where Mr. Hamrick was when Mr. Hawkes said this. The facility was quiet at this time. I saw Mr. Hawkes walk out the door; I believe he went to a company next door to see if their power was out.
>
> 4. I then saw Mr. Hamrick climbing a ladder going toward the electrical panel in the ceiling. I heard a boom and I heard Mr. Hamrick say something. I looked up and saw Mr. Hamrick on the right side of the panel. I heard another boom and saw Mr. Hamrick on fire at the left side of the electric panel.
>
> 5. From the time I saw Mr. Hamrick climbing the ladder until the time I heard the first boom was just a short period, maybe five minutes or less.

> 6. Mr. Hamrick took a tester with him when he went up to the electrical panel. I am not sure what it was, I just know it was to test something. I do not know if Mr. Hamrick had any gloves on.

{¶22} 9. On February 28, 2008, claimant's deposition was taken in the VSSR claim. The deposition was recorded and transcribed for the record.

{¶23} 10. On July 30, 2008, the VSSR application was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record.

{¶24} 11. Following the July 30, 2008 hearing, the SHO issued an order granting claimant's application for a VSSR award. The SHO's order explains:

> It is the finding of the Staff Hearing Officer that the Injured Worker's injury was the result of the Employer's failure to provide protective equipment approved for use around electrical conductors as required by Ohio Administrative Code Section 4123[:]1-5-23(A), the code of specific requirements of the Industrial Commission relating to personal protective equipments when used around possible sources of voltage.
>
> On the date of injury herein, the plant, Glunt Industries, experienced a power outage. Immediately thereafter, the Injured Worker's supervisor, Mike Wilkes, instructed the Injured Worker, who was the maintenance electrician for Glunt Industries, to check out the main breaker in the main power cabinet to ascertain why the plant had lost power. The Injured Worker's accident occurred when there was an explosion in the main breaker as he was attempting to access the main power cabinet, causing the injuries of record herein.
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> * * *
>
> The Injured Worker's * * * rule which he contends that the Employer violated is Ohio Administrative Code Section 4123[:]1-5-23(A). Subsection (A) indicates examples of protective equipment that needs to be provided by the employer when workers are exposed or are required to work around electrical conductors and possible sources of voltage. Said rule reads as follows:

Electrical conductors and equipment

(A) Unless the electrical conductors or equipment to be worked on are isolated from all possible sources of voltage or are effectively grounded, the employer shall provide protective equipment approved for the voltage involved, such as rubber gloves with protectors, rubber sleeves, hot lined tools, line hose, line guards, insulator hoods, blankets, and access boards. Employer [sic] shall be instructed in the use of such tools and equipment and, when working on or when working within contact distance of an energized conductor, shall use such tools and equipment.

The Injured Worker contends that the Employer was obligated under Ohio Administrative Code Section 4123[:]1-5-23(A) to provide suitable protective equipment to the Injured Worker on the day of his injury because at the time of the injury the Injured Worker was required to ascertain the cause of a power outage by inspecting the main breaker cabinet located on an elevated platform above the production floor.

The employer contends that the requirement of Ohio Administrative Code Section 4123[:]1-5-23(A) was not applicable or that said rule had been complied with under the circumstances of the Injured Worker's injury. The Employer bases this contention on a three fold argument. First, the Employer contends that the rule was not violated as they would have provided the Injured Worker with whatever safety equipment he needed or requested to perform his job, noting that the Injured Worker was an experienced electrician and would in fact be in a better position to know what equipment would be needed in order to perform his job. Second, the Employer contends that they never required him nor requested him to work on or perform any electrical repairs with electrical components having current above 480 volts as it was their policy that all electrical work exceeding said voltage would be handled by outside contractors hired by Glunt Industries. Third, the Employer contends that the evidence on record indicates that the injury occurred as a result of the Injured Worker's own unilateral negligence by failing to properly adhere to company safety directives by locking out and tagging out the main breaker on the date of injury herein which in their opinion was the proximate cause of the injuries noting and submitting evidence at the hearing that the Injured Worker was properly trained in the company safety program regarding lockout/tagout procedures.

> The Staff Hearing Officer specifically finds that the Employer was in violation of the requirement set forth in Ohio Administrative Code Section 4123[:]1-5-23(A) mandating that it provide suitable protective equipment to the Injured Worker and, as such, all three contentions as stated above are specifically rejected and the reasons for such is more fully explained below. All the evidence on file, particularly the Safety Violations Investigation Unit Report, affidavits, as well as, the testimony presented at hearing supports a finding that the Employer did not provide any protective equipment to the Injured Worker on the date of injury for his work involving ascertaining the source of the power outage. There can be no question, that accessing the main breaker during a power outage would create a situation that would expose workers to electrical conductors that are not isolated from all possible sources of voltage.
>
> The Employer's first contention that said rule would not be applicable as they would have provided the Injured Worker with whatever safety equipment he needed or requested to perform his job is specifically rejected. Compliance with Ohio Administrative Code Section 4123[:]-1-5-23(A) is not premised upon the employee's duty or his/her responsibility to request equipment needed for a particular job. Said rule merely indicates that the Employer shall provide such protective equipment where an employee is exposed to electrical conductors or equipment.
>
> The Staff Hearing Officer finds that the Employer's second and third contentions will be discussed together as both contentions are premised upon the Employer's defense of negligence as to said VSSR liability. The Employer's second and third contentions that is based upon the Injured Worker's own negligence by not following instructions as he was not required to work on any electrical systems above 480 volts and that said injury occurred due to the Injured Worker's own unilateral negligence by failing to follow proper safety directives by properly locking out said breaker. Said contentions as previously indicated are also both specifically rejected. The Staff Hearing Officer finds the sole purpose of a violation of a specific safety requirement is to protect injured workers from their own negligence. The Staff Hearing Officer finds that an employee's negligence in failing to protect himself from an injury due to an employer's violation of specific safety requirement will never bar recovery because "specific safety requirements exist to promote a

safe work environment and to protect employees against their own negligence and folly." State ex rel. Colterman vs. St. Mary's Foundry (1989), 48 Ohio State 3d 42; State ex rel. Pressware International Inc. vs. Indus. Comm. (1999), 85 Ohio State 3d 284, 288; State ex rel. Quality Tower Service Inc. vs. Indus. Comm. (2000), 88 Ohio State 3d 190. The Staff Hearing Officer finds the critical issue in any violation of a specific safety requirement claim as regards to a negligence or a unilateral negligence defense is always whether the employer complied with the specific requirement and only after it is found that the employer has met the code requirement can the injured worker's negligence bar a violation of a specific safety requirement.

The Staff Hearing Officer finds that the isolation of electrical conductors from all possible sources of voltage is clearly the duty and responsibility of the employer if the employer wants to avoid the duty to provide protective equipment. Furthermore, the Staff Hearing Officer finds that the employer cannot shift its responsibility to its employee by simply instructing its employee to isolate the electrical conductors himself prior to contacting energized conductors. To hold otherwise would give a patently unreasonable interpretation to Ohio Administrative Code 4123[:]1-5-23(A) that would effectively place the burden of providing a safe working environment solely upon the employee. State ex rel. Coffman v. Industrial Commission (2005), WL736638 (Ohio Appeals 10th District).

Furthermore, the Staff Hearing Officer finds Ohio Administrative Code Section 4123[:]1-5-23(A) imposes a duty to provide protective equipment in all instances where the equipment to be worked on will not be isolated from all possible sources of voltage. The Staff Hearing Officer finds that the employer avoids liability not by isolating the equipment from all sources of voltage, but by providing protective equipment. Compliance with Ohio Administrative Code Section 4123[:]-1-5-23(A) is not met by merely instructing its employees in a procedure to isolate equipment to be worked on from all possible sources of voltage. The employer, as required by the plain language of the regulation, shall provide protective equipment should there be any possibility that an employee will encounter equipment to be worked on that is not so isolated. State ex rel. Coffman v. Industrial Commission (2005), WL736638.

> Clearly, the evidence undisputably shows that the Employer did not provide the Injured Worker with any protective equipment when being exposed to electrical conductors and, therefore, did not comply with the applicable safety requirement on the date of injury herein.
>
> Based upon the signed affidavit and testimony at hearing of the Injured Worker, Thomas Hamrick, signed affidavit and testimony at hearing from Donald E. Hawks [sic], Plant Manager, and signed affidavit and testimony from Wayne D. Redd, the Injured Worker's co-worker, all indicate that at the time of injury, that the Injured Worker was not provided with any protective equipment as outlined in the above stated rule. Therefore, based upon the evidence, it is found that the Employer was in violation of this subsection as of the date and time of the Injured Worker's injury.
>
> It is further found that the Employer's violation of Ohio Administrative Code Section 4123[:]1-5-23(A) was the proximate cause of the injury. If some sort of means were provided to protect the Injured Worker during the assessment [sic] of the panel regarding the power outage, the injury most likely would not have occurred and, therefore, the injury was the proximate result of the Employer's failure to provide such equipment.
>
> It is, therefore, ordered that an additional award of compensation be granted to the Injured Worker in the amount of 25% of the maximum weekly rate under the rule of State ex rel. Engle vs. Indus. Comm. 142 Ohio State 425.
>
> It is further the finding of the Industrial Commission that no order requiring a correction of the violation found herein is appropriate for the reason the violation no longer exists.

{¶25} 12. Relator moved for rehearing pursuant to Ohio Adm.Code 4121-3-20(E). In its motion, relator claimed that the SHO's order of July 30, 2008 contains clear mistakes of law and fact. Relator also claimed that it had new and additional proof not previously considered and which by due diligence could not be obtained prior to the July 30, 2008 hearing. In that regard, relator submitted the affidavit of Mike Wilkes executed September 3, 2008, stating:

> 1. I was formerly a contract employee for Glunt Industries, Inc. and supervised employees including Thomas Hamrick.
>
> 2. That I am familiar with the claims of the claims of Mr. Hamrick regarding his work place injury of April 19, 2006.
>
> 3. That I never instructed Mr. Hamrick to work on or in the electrical panel in question as he now claims.
>
> 4. That I was not contacted by the Industrial Commission or its investigator at any time for my statement regarding the accident of Mr. Hamrick.
>
> 5. That on the date set for hearing in this matter, I was working outside of the State of Ohio.
>
> 6. That my recollection of the event is that I specifically told Mr. Hamrick not to work on the box in question and after I heard Don Hawkes tell Mr. Hamrick to get down, I also told Mr. Hamrick to get down that it was an Ohio Edison problem.

(Emphasis sic.)

{¶26} 13. On October 15, 2008, another SHO mailed an order denying relator's motion for rehearing. The order explains:

> * * * The Employer has not submitted any new and relevant evidence nor shown that the order of 07/30/2008 was based on an obvious mistake of fact or on a clear mistake of law.
>
> The employer has not demonstrated that due diligence was used in unsuccessfully seeking a statement from Michael Wilkes. There is no evidence as to when Mr. Wilkes left the employ of Grunt [sic] Industries, nor any record of complaint regarding the sufficiency of the investigation.
>
> Next, the travel records between Plant #1 and Plant #2 are not relevant as there is no evidence that protective equipment was provided at the other location. The presentation of this evidence also ignores the time sensitivity of the situation, per Mr. Hamrick's testimony at the hearing.
>
> The request for rehearing complains that the merit hearing was abbreviated and all evidence not reviewed. The transcript of hearing, however, reflects that the Hearing Officer was willing to listen to all that was said and was

> willing to continue the hearing to a second day. Upon conclusion of the hearing, no objection was voiced that any evidence was not brought forth, was rejected, or that any more time was required.
>
> Regarding the award, the Hearing Officer granted an additional award of 25%. This figure is within the Industrial Commission's discretion.
>
> Finally, the remaining arguments contained within the request for rehearing do not lead to the conclusion that an obvious mistake of fact or clear mistake of law occurred. The transcript documents the testimony that the gloves on site were in fact supplied by Mr. Hamrick himself. This is not an exceptional case warranting a rehearing.

{¶27} 14. On March 13, 2009, relator, Glunt Industries, Inc., filed this mandamus action.

Conclusions of Law:

{¶28} Four issues are presented: (1) whether the "electrical conductors or equipment" upon which claimant was injured were "to be worked on" within the meaning of Ohio Adm.Code 4123:1-5-23(A), the specific safety rule relator was found to have violated; (2) whether the commission abused it discretion in determining that relator violated the safety rule by failing to provide protective equipment; (3) whether there is evidence that relator's violation of the safety rule proximately caused the industrial injuries; and (4) whether the commission abused its discretion in denying relator's motion for rehearing.

{¶29} Turning to the first issue, Ohio Adm.Code 4123:1-5 sets forth specific safety rules applicable to "Workshop and Factory Safety." Thereunder, Ohio Adm.Code 4123:1-5-23(A) provides:

> Unless the electrical conductors or equipment to be worked on are isolated from all possible sources of voltage or are

> effectively grounded, the employer shall provide protective equipment approved for the voltage involved, such as rubber gloves with protectors, rubber sleeves, hot line tools, line hose, line guards, insulator hoods, blankets, and access boards. Employees shall be instructed in the use of such tools and equipment and, when working on or when working within contact distance of an energized conductor, shall use such tools and equipment.

{¶30} Ohio Adm.Code 4123:1-5-23(B) provides definitions applicable to the above safety rule. Ohio Adm.Code 4123:1-5-23(B)(1) states: " 'Access board (hot board)': a platform designed to be fastened to a pole or structure and having dielectric properties equal to dry wood."

{¶31} Ohio Adm.Code 4123:1-5-23(B)(77) states: " 'Hot line (live line) tools': those tools which are especially designed for work on energized high voltage conductors and equipment."

{¶32} According to relator, the evidence of record undisputedly shows that, at the time of injury, claimant was not "assigned," "tasked" nor "authorized" to work at the main power cabinet where the electrocution occurred. Relator alleges that claimant was working "outside the scope of [his] duties" at the time of his industrial injury. (Relator's brief, at 14.)

{¶33} Apparently, relator interprets the term "to be worked on" as a requirement that the employee be "assigned," "tasked" or "authorized" to work on the electrical conductors or equipment in order for the rule to be applicable. (Relator's brief, at 13.) Even though the rule does not employ the terms used by relator here, the magistrate shall, nevertheless, address relator's factual assertion that the record fails to support a finding that claimant was "assigned," "tasked" or "authorized" to work at the main power cabinet, or that such work was "outside the scope of [his] duties." Id. at 14.

{¶34} In his affidavit executed June 6, 2007, taken by the SVIU investigator, claimant avers: "Mike Wilkes (assistant supervisor) told me to check why we lost power. I went to the main breaker coming into the plant to see why the plant had lost power."

{¶35} In his deposition taken February 28, 2008, the following exchange was recorded between claimant and relator's counsel:

> Q Do you remember that day?
>
> A Just when Mike told me to check out that breaker. Check it out why we didn't have no power.
>
> Q Okay. Tell me about what happened. You were at work. Was there power when you arrived at work?
>
> A Yeah.
>
> Q And at some point in the day you lost power?
>
> A Right.
>
> Q Okay. And Mike said, can you find out why we don't have power?
>
> A Right.
>
> Q Okay. What did you do?
>
> A I went to the main breaker that come into the building.
>
> Q Okay. Was the whole building out or just part of the building?

{¶36} Here, relator asserts: "But no witness, affiant or document indicates that Wilkes told Claimant specifically to check out the main breaker." (Relator's brief, at 24.) Based upon this erroneous factual assertion regarding the record, relator suggests that the SHO abused his discretion in finding that Wilkes instructed "[claimant] to check out the main breaker in the main power cabinet to ascertain why the plant had lost power." Relator is simply incorrect regarding the record. The SHO's finding indicating that Wilkes

specifically instructed claimant to check out the main breaker is indeed supported by some evidence in the record.

{¶37} Albeit, during the July 30, 2008 hearing, claimant's testimony regarding Wilkes' instructions on that day indicates that the instruction was less specific. For example, during his direct examination at the hearing, the following exchange was recorded:

> Q What happened when the power went out?
>
> A Mike told me to go see what happened.
>
> Q Mike would be - -
>
> A Mike Wilkes.
>
> Q He was one of your supervisors?
>
> A Right.
>
> Q Mike wanted you to go see what's going on and why there is no power?
>
> A Right.

{¶38} However, later on during the hearing, claimant described his job at the time of injury as that of "troubleshooter."

{¶39} Claimant's stated belief that, on the date of injury, he was instructed to be the "troubleshooter" is further supported by the hearing testimony of Hawkes:

> Q Did any management employees tell him to work on that panel raised in the area?
>
> A No.
>
> Q When you said you asked him to check the 480 panel - - we are talking about Investigator's Exhibit 1 - - there is a blue post on the bottom here, and it looks to be electrical; is that the panel - -

> A He went to that one first. I didn't even tell him to check that one 'cause I don't know nothing about electric. * * *

{¶40} Hawkes' testimony indicates that, during the power outage, Hawkes deferred to claimant's expertise as an electrician because Hawkes himself knew "nothing about electric."

{¶41} In further support of its argument that claimant failed to show that he was injured by equipment "to be worked on," relator points to claimant's testimony that he was never instructed to work on voltage above 440/480, and that he was not hired to service the main electrical line coming into the plant.

{¶42} Relator's argument presupposes that claimant was electrocuted on the high voltage side of the main power cabinet, and not on the 440/480 side of the cabinet. While claimant steadfastly denied that he attempted to access the high voltage side on the date of injury, clearly, the record fully supports relator's supposition here that claimant was electrocuted by the high voltage side.

{¶43} Agreeing with the theory that claimant was electrocuted by the high voltage side, and that claimant is mistaken in his denial that he accessed the high voltage side, we cannot ignore the undisputed fact that claimant had previously worked on the 440/480 side of the main power cabinet when he installed an air compressor about one month before his industrial accident, and that he did so with the apparent approval of his supervisors. At the very least, there is no evidence that claimant was disciplined or admonished when he accessed the 440/480 side of the main power cabinet when installing the air compressor. Clearly, the record undisputedly shows that claimant had been previously authorized to access the 440/480 side of the main power cabinet.

{¶44} We also cannot ignore the exigency created by the sudden and unexpected power outage at the plant. There is evidence that Wilkes instructed claimant to determine why the plant had lost power and that he was to check out "that breaker." (Claimant's depo. 37.) We cannot ignore claimant's testimony that the power outage suddenly cast him into the position of a troubleshooter because he was the electrician in the plant. Under these circumstances, this magistrate cannot say that claimant acted unexpectedly in accessing the high voltage side to determine the cause of the power outage.

{¶45} Based upon the above analysis, the magistrate concludes that both sides of the main power cabinet, that is, the high voltage side and the 440/480 side, were "to be worked on" within the meaning of the specific safety rule at issue.

{¶46} As earlier noted, the second issue is whether the commission abused its discretion in determining that relator violated the specific safety requirement regarding protective equipment.

{¶47} It should be noted that the safety rule does not require the employer to provide protective equipment when electrical conductors or equipment are isolated from all sources of voltage.

{¶48} At the hearing, relator took the position, under the rule, that it was not required to provide protective equipment of any kind while claimant worked on the main power cabinet because relator had a company policy requiring that all equipment be deenergized and then locked out and tagged out before the employee worked on the equipment to be inspected or repaired. In the words of relator's counsel at the hearing's conclusion:

> * * * Our position is we don't require people to work on energized equipment and certainly do not require them to

> work on this high voltage. All our low voltage is capable of being locked out and tagged out to prevent these type of incidents. If it is locked out and tagged out, you are not working with an energized source, and, hence, you don't need safety equipment working with a deenergized source.

{¶49} Counsel's concluding remarks were premised upon the hearing testimony of plant manager Shells who was also relator's safety coordinator:

> Q It's my understanding that there is a lockout/tagout requirement in that safety program.
>
> A Yes.
>
> Q Can you tell me why that is there?
>
> A Lockout/tagout is to deenergize sources so that equipment and other things can be worked on in a safe manner.
>
> Q Is that a requirement for all employees?
>
> A Yes.
>
> Q Is there disciplinary action for working on energized sources?
>
> A Yes.
>
> Q Do you provide lockout/tagout equipment to the employees?
>
> A Yes; we do.
>
> Q Is there ever instances where you require employees to work on energized sources? Is that the policy of Glunt?
>
> A No.
>
> Q Okay. And what is the policy if a piece of equipment is energized, whether it be hydraulically, electronically or otherwise; is it - -
>
> A Lock the energy source out before maintaining your work on it.
>
> Q Okay. Would Mr. Hamrick have been required to lockout and tagout equipment he worked on?

A Yes.

{¶50} Relator's position that the safety rule did not require it to provide protective equipment to the claimant on the date of his injury while he worked on the main power cabinet is totally undermined by the factual circumstances leading to the industrial injury in this case.

{¶51} Claimant testified at hearing that the power cabinet had to be kept in an energized mode in order for him to determine the cause of the power outage. As claimant put it to relator's counsel at hearing: "I'm saying I have to have it energized when I troubleshoot stuff. When I am removing something, I lockout/tagout; but when I am troubleshooting, I have to have things energized."

{¶52} In short, if claimant's testimony is accepted that the power cabinet had to be kept in an energized mode for him to troubleshoot for the cause of the power outage, relator's position that the safety rule did not require it to provide protective equipment is totally undermined.

{¶53} Notwithstanding its position that the rule did not require it to provide any protective equipment, relator apparently takes a fallback position that it had provided claimant with protective gloves.

{¶54} In his June 14, 2007 affidavit, Hawkes states: "Mr. Hamrick was provided with rubber gloves with protectors, these are kept in the maintenance shed in a cabinet." At hearing, Hawkes testified that claimant was provided rubber gloves that were kept in a safety bag. At hearing, claimant testified that relator never gave him "any sort of electrical type gloves." Relator testified that the gloves photographed by the SVIU investigator

were actually purchased by him at a garage sale, but they were not suitable for working on high voltage.

{¶55} Whether or not relator actually provided claimant with protective gloves is not a question that truly needed to be determined in this VSSR claim because there is no evidence in the record that protective gloves of any kind would have prevented claimant's electrocution and the severe burns over his body.

{¶56} At the hearing, claimant testified that Glunt never provided him with hot line tools, a line hose, a line guard, insulator hood, blanket or an access board—items specifically mentioned in the safety rule at issue. This testimony was largely un-disputed. In fact, under questioning by the hearing officer, Hawkes testified that he did not know what "rubber sleeves" were. Explaining that he is not an electrician, Hawkes also could not describe hot line tools, a line hose or line guard.

{¶57} During questioning by the hearing officer, Shells stated that he would "have to check with maintenance" to answer the hearing officer's question as to what kind of protective equipment was provided.

{¶58} Relator argues that it was an abuse of discretion for the SHO to state in his order that "the evidence undisputedly shows that the Employer did not provide [claimant] with any protective equipment."

{¶59} According to relator, there was a dispute about whether relator provided claimant with protective gloves and, thus, the SHO's statement is in error.

{¶60} The magistrate agrees that the SHO's statement is overbroad because it includes protective gloves which were in dispute. However, that error is not fatal to the commission's VSSR award. Again, even if it were to be found that relator provided

claimant with protective gloves, there is no evidence in the record that protective gloves would have prevented claimant's electrocution and the severe burns over his body.

{¶61} Relator contends that it cannot be held to have violated the safety rule until claimant establishes the specific protective equipment that was necessary for the work being performed at the time of his injury. According to relator, because claimant testified that no protective equipment was necessary when work was to be performed on the 440/480 voltage, he has failed to show that relator violated the safety rule by failing to provide protective equipment under the rule. The magistrate disagrees with relator's position.

{¶62} To begin, it is clear that claimant was injured on the high voltage side, not the 440/480 side. Therefore, claimant's testimony that no protective equipment was needed when working on the 440/480 side is largely irrelevant.

{¶63} Moreover, there was some evidence, if not substantial evidence, that the availability of a "hot stick" would have prevented the industrial injury. During the hearing, claimant was questioned by the hearing officer:

> Q Do you know what a hot stick is?
>
> A Yeah.
>
> Q What is a hot stick?
>
> A It shows on high voltage if it's - - if there is electricity in the line.
>
> Q Okay. Were you ever given a hot stick when you worked at the company?
>
> A No.
>
> Q Do you know if there were any hot sticks located at Glunt Industries in April of 2006?

> A There might have been at the other plant, not where I worked.

{¶64} During cross-examination by relator's counsel, the following exchange was recorded:

> Q I specifically asked you, if you had been accessing the left side, which we established as the high voltage side, would you have used different tools. And you told me, I believe; yes. Is that still your statement today?
>
> A Yes.
>
> Q Okay. Those tools would have been what, hot sticks?
>
> A Probably a lot of stuff.
>
> Q Like what?
>
> A Depends on what you are going in there to do.
>
> Q Okay. But you weren't doing that type of work at Glunt; correct?
>
> A What?
>
> Q High voltage.
>
> A No.
>
> Q But from your experience in working in the mill, you would have used different tools then; correct?
>
> A Oh, yeah.

{¶65} Relevant here is the report of the SVIU investigator regarding her interview of witness Hank Joy during the June 14, 2007 on-site investigation. According to the SVIU report:

> Investigator * * * interviewed witness Hank Joy during the on-site investigation. * * * Mr. Joy stated the power to the facility went out on the day of Mr. Hamrick's injury. Mr. Hamrick went up to the electric panel located near the ceiling and Mr. Joy heard a boom. Mr. Joy went up to the electrical panel and put the fire out and helped Mr. Hamrick down. Mr.

> Joy heard Mr. Hamrick say, "How stupid of me, can not believe I did not use a hot stick." Mr. Joy did not know if Mr. Hamrick was provided with hot sticks or what hot sticks were. Previously[,] Investigator * * * asked Mr. Glunt if Mr. Hamrick had been provided with hot sticks among other equipment. Mr. Glunt [had] responded Glunt Industries Inc. had not provided Mr. Hamrick with hot sticks.

{¶66} Claimant's statement to Joy that he should have used a hot stick is indeed some evidence that use of a hot stick would have prevented the industrial accident.

{¶67} The SHO's order of July 30, 2008 does not specify what kind of protective equipment could have prevented the electrocution injuries had it been provided. Under the circumstances here, it was not essential that the SHO make a finding that a hot stick should have been provided by Glunt. Clearly, gloves, if they were provided, were inadequate. Relator conceded that no other kinds of protective equipment set forth in the rule were provided.

{¶68} Based upon the above analysis, the magistrate concludes that the commission did not abuse it discretion in finding that relator violated the specific safety requirement.

{¶69} Turning to the third issue, it is settled law that 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, 149.

{¶70} According to relator, the SHO's entire analysis on proximate cause is found in the following paragraph in the order:

> It is further found that the Employer's violation of Ohio Administrative Code Section 4123[:]1-5-23(A) was the proximate cause of the injury. If some sort of means were provided to protect the Injured Worker during the assess-

> ment [sic] of the panel regarding the power outage, the injury most likely would not have occurred and, therefore, the injury was the proximate result of the Employer's failure to provide such equipment.

{¶71} According to relator, there is no evidence to support a finding that relator's violation of the specific safety rule was the proximate cause of claimant's industrial injuries. Relator points out that claimant did not submit expert testimony to explain the cause of the explosion. Relator points out that claimant himself does not seem to know why he was injured.

{¶72} Relator's argument on proximate cause ignores the key evidence of record. Relator's main defense to this VSSR claim was that claimant was not authorized to work on the high voltage side of the main power cabinet and, thus, relator was not required to provide protective equipment for claimant's protection while he accessed the high voltage side. Relator also argued at the hearing that claimant was required by company policy to deenergize any equipment he might be working on and, thus, relator was not required to provide any protective equipment.

{¶73} But relator failed to persuade the commission that claimant was not authorized to access the high voltage side of the power cabinet during the power outage of April 19, 2006. Also, relator failed to persuade the commission that claimant could somehow troubleshoot for the power outage by deenergizing the main power cabinet. Given this scenario, it is clear that relator made no effort to provide protective equipment that might have prevented electrocution at the high voltage side in the main power cabinet because it believed it was not required to do so.

{¶74} Relator seems to suggest that the commission was required to specify in its order the one item of protective equipment that would have prevented claimant's

electrocution on the high voltage side. However, the safety rule at issue does not require a specific item of equipment to be provided. The rule can be satisfied by the employer providing "protective equipment approved for the voltage involved." The rule then suggests specific protective equipment that may be used if that equipment is approved for the voltage involved.

{¶75} Clearly, the commission's failure to specify the type of protective equipment that would have prevented the industrial injury does not render a failure of proximate cause.

{¶76} In any event, claimant himself opined specifically as to the type of protective equipment that he believed would have prevented the industrial injury. Immediately following the explosion, as he was being helped at the injury site, claimant stated to co-worker Joy that he should have used a hot stick. Claimant's statement to Joy is evidence that, had relator provided a hot stick, the injury could have been prevented. Claimant's statement to Joy is key evidence showing that relator's violation of the safety rule proximately caused the injury.

{¶77} Turning to the fourth issue, Ohio Adm.Code 4121-3-20(E) provides:

> (1) If the motion for rehearing is filed, a staff hearing officer, after the expiration of the answer time, shall review the motion for rehearing under the following criteria:
>
> (a) In order to justify a rehearing of the staff hearing officer's order, the motion shall be accompanied by new and additional proof not previously considered and which by due diligence could not be obtained prior to the prehearing conference, or prior to the merit hearing if a record hearing was held and relevant to the specific safety requirement violation.

> (b) A rehearing may also be indicated in exceptional cases where the order was based on an obvious mistake of fact or clear mistake of law.
>
> (2) If the motion for rehearing does not meet the criteria as outlined in paragraph (E)(1)(a) or (E)(1)(b) of this rule, the motion shall be denied without further hearing.

{¶78} As earlier noted, in its motion for rehearing, relator submitted the affidavit of Wilkes as new and additional proof under Ohio Adm.Code 4121-3-20(E)(1)(a).

{¶79} As earlier noted, the SVIU report states: "On June 15, 2007[,] Investigator Riley attempted to contact witness Mike Wilkes. A message was left for Mr. Wilkes; as of the writing of this report he had not responded to the message."

{¶80} In its memorandum in support of its motion for rehearing, relator's counsel argues that the affidavit of Wilkes is new and additional proof under the rule:

> At the time of the investigation of the matter, and prior to the investigatory meeting, the Employer, Special Investigator Julia Riley was fully aware of the Injured Worker's assertion that *"Mike Wilkes, (assistant supervisor) told me to check why we lost power."* Despite having known of the potential and crucial evidence that could have been obtained from the witness and former employee (*"Wilkes"*), Investigator Riley made only one phone call to attempt to contact Mr. Wilkes, obtain his address and/or obtain his statement. Had the Investigator persisted to obtain crucial evidence, doing so would have greatly assisted the Employer in its efforts to find the witness and obtain his testimony for the merit hearing.
>
> Had the Commission's Investigatory [sic], with her vast resources and powers of the State, actually located the Mr. Wilkes and obtained his statement, the witness location might have been known to the Employer to allow for the issuance of a subpoena to him to compel his attendance at the hearing. One phone can call [sic] hardly be considered an effort to interview the key witness to the Injured Worker's alleged claim.
>
> The Investigator erred in failing to collect relevant evidence from Mr. Wilkes, especially in light of the fact that the Injured Worker has based his entire claim upon the purported

> instructions of Mike Wilkes. Mike Wilkes['] testimony must be considered new and previously unavailable evidence that must be presented to the Commission at a rehearing for a full and fair adjudication of all claims in this matter.
>
> Furthermore, the Employer, through due diligence, was unable to contact, locate and/or subpoena the former employee (Wilkes) prior to the pre-hearing as his address was unknown. No successful contact with the witness (Wilkes) was established until just one day prior to the subject hearing and after consultation with Injured Worker's counsel. The witness was reached on a cell phone with a 724 prefix (Pennsylvania).
>
> Despite several attempts to contact the witness since the hearing, he has not answered the number on which he was previously contacted. Apparently[,] the Injured Worker did have information regarding the whereabouts of the witness prior to the merits hearing, however[,] this was not provided to the Employer and likely not to the Commission's investigator as she makes no reference to attempting to contact Mr. Wilkes in her report.
>
> In discussing the matter with Mr. Wilkes on the day prior to the hearing, counsel was informed that he did not speak to the commission investigator, that he was working outside the state of Ohio and denied instructing the Injured Worker to check the power as alleged by the Injured Worker. Only recently was the Employer able to find Mr. Wilkes and obtain his version of events for the Injured Worker[']s claim. * * *
>
> The testimony of Mike Wilkes must be considered new evidence warranting a rehearing in this matter. Prior to the time set for the hearing[,] Mr. Wilkes was apparently absent from the State of Ohio and working out of this State. Due to the witness' absence from the State and then unknown location, no subpoena compelling his attendance could be issued prior to the subject hearing. Mr. Wilkes has pertinent, relevant and important testimony in this matter. With sufficient notice, the Employer believes it can compel the attendance of the witness as new evidence for a rehearing.

(Emphasis sic; footnote omitted.)

{¶81} In the SHO's order denying rehearing, the SHO explains why it is found relator fails to demonstrate due diligence:

> The employer has not demonstrated that due diligence was used in unsuccessfully seeking a statement from Michael Wilkes. There is no evidence as to when Mr. Wilkes left the employ of Grunt [sic] Industries, nor any record of complaint regarding the sufficiency of the investigation.

{¶82} The SHO identified relator's failure to disclose when Wilkes left relator's employ as a reason for denial of the motion for rehearing. Indeed, the SHO was factually correct in identifying relator's failure to disclose when Wilkes left the employ of Glunt. Moreover, relator's failure to disclose a key fact upon which the "due diligence" determination can be made is a valid basis to deny the motion for rehearing.

{¶83} The SVIU investigator's on-site visit occurred on June 14, 2007. The next day, the investigator attempted unsuccessfully to contact Wilkes. We do not know, because relator has failed to tell us, whether Wilkes was still employed at Glunt on June 15, 2007. We are simply told by relator's counsel in his memorandum filed September 5, 2008, that "[o]nly recently was the Employer able to find Mr. Wilkes."

{¶84} Presumably, while Wilkes was employed by Glunt, he would have been readily available to relator for obtaining a statement regarding the events of April 19, 2006 or, at the very least, available for relator's subpoena. Relator cannot successfully argue for due diligence when relator is only willing to discuss relator's "recent" efforts at contacting Wilkes after he had left relator's employ.

{¶85} Moreover, relator cannot successfully argue for due diligence by attempting to shift the due diligence burden to the SVIU investigator.

{¶86} Clearly, under the circumstances here, the commission did not abuse its discretion in finding that relator failed to demonstrate due diligence in obtaining the affidavit of Wilkes.

{¶87} 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).