[Cite as *State ex rel. Brammer v. Indus. Comm.*, 2010-Ohio-4608.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Todd A. Brammer,	:	
Relator,	:	
v.	:	No. 10AP-106
Industrial Commission of Ohio and Oxford Mining Company, LLC,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 28, 2010

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

Richard Cordray, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Lee M. Smith & Associates Co., LPA, Elizabeth P. Weeden and *Lee M. Smith*, for respondent Oxford Mining Company, LLC.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, P.J.

{¶1} Todd A. Brammer has filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to grant him an award for a violation of a specific safety requirement ("VSSR").

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we deny the requested relief.

{¶3} Counsel for Brammer has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. Counsel for Oxford Mining Company, LLC ("Oxford Mining"), Brammer's employer at the time of his injuries, has also filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Brammer was injured when he fell from an I-beam on the side of a coal crusher. He sought an award for a VSSR based upon the requirements of Ohio Adm.Code 4123:1-5-02(D) that platforms elevated six feet or more above the ground be guarded with standard railings and toe boards.

{¶5} Two major issues were argued previously. One is whether Brammer was working in a workshop or factory when he fell. The other is whether the I-beam from which he fell was six feet or more above the ground.

{¶6} The coal mining operation where Brammer was injured was an open-pit strip mine. Obviously Brammer was not indoors when he fell, so no factory was involved. "Workshop," has been defined to include outdoor areas which are fenced in. See *State ex rel. Petrie v. Atlas Iron Processors, Inc.* (1999), 85 Ohio St.3d 372.

{¶7} Counsel for Brammer argues that no enclosure whatsoever is required. At most, some means of restricting access to the job site by non-employees is required.

Counsel further argues that Oxford Mining complied with its statutory duties to restrict access to the open-pit mining site, as evidenced by the fact that Oxford Mining had recently passed an inspection.

{¶8} Counsel further argues that the issue of the height of the I-beam from which Brammer fell was never decided by the commission, so cannot be used as a basis for refusing an award for a VSSR.

{¶9} Counsel for the commission argues in response that Brammer had the duty to demonstrate limited access to the job site in order to establish a VSSR and simply failed to do so. Counsel for Oxford Mining reiterates the same.

{¶10} While it only seems logical that a mining company would restrict access to an open-pit mine, especially in light of a statutory duty to prevent trespassers, the Supreme Court of Ohio seems to require proof of some sort of physical barrier for a worksite to be considered a workshop. We are not at liberty to disregard that requirement with respect to generalized provisions of the Ohio Administrative Code such as the requirements for railings and toe boards. If the Supreme Court of Ohio wishes to expand the range of sites to be considered workshops, it may do so. We cannot do so without their guidance and approval.

{¶11} We, as a court, do not address the issues regarding the height of the I-beam on the side of the coal crusher from which Brammer fell. That is an evidentiary issue best addressed by the commission initially. The issue is not ripe for over review, in light of our findings with respect to workshops and factories.

{¶12} We overrule the objections to the magistrate's decision. We adopt the findings of fact and conclusions of law in the magistrate's decision and therefore deny the request for a writ of mandamus.

Objections overruled; writ denied.

BROWN and SADLER, JJ., concur.

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A P P E N D I X

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Relator,	:	
v.	:	No. 10AP-106
Industrial Commission of Ohio and Oxford Mining Company, LLC,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on June 7, 2010

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

Richard Cordray, *Attorney General, and* Sandra E. Pinkerton, *for respondent Industrial Commission of Ohio.*

Lee M. Smith & Associates Co., LPA, Elizabeth P. Weeden *and* Lee M. Smith, *for respondent Oxford Mining Company, LLC.*

IN MANDAMUS

{¶13} In this original action, relator, Todd A. Brammer, asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order which denied him an additional award for the violation of a specific safety

requirement ("VSSR") with his employer, Oxford Mining Company, LLC ("Oxford"), and ordering the commission to find that he did establish his entitlement to the award.

Findings of Fact:

{¶14} 1. Relator sustained a work-related injury on September 29, 2006, and his workers' compensation claim has been allowed for "SPRAIN THORACIC REGION; SPRAIN LUMBAR REGION; SPRAIN OF NECK."

{¶15} 2. Relator's injury occurred when he was employed by Oxford at an open-pit coal strip mine in Lisbon, Ohio. Relator was assigned to a large coal crushing machine and his two main duties were shoveling coal from around the crusher and helping to perform routine maintenance on the machine, which included regular greasing of fittings on the crusher and attached equipment.

{¶16} 3. In September 2008, relator filed a motion seeking an additional award for Oxford's violation of Ohio Adm.Code 4123:1-5-02(D) which provides that elevated platforms six feet or more above the ground shall be guarded with standard railings and toe boards.

{¶17} 4. According to relator's affidavit, his injury occurred as follows:

> On 29 September, 2006, I was told by my Supervisor Dave Darinburger [sic] to grease the ball bearings of the coal crusher machine. The coal crusher machine consists of a hopper and conveyer. Coal is poured into the hopper of the machine and it is crushed into smaller pieces. The crushed coal then falls from the hopper onto a conveyer where it is conveyed to a pile. Due to the dust and wear and tear on the coal crusher machine the ball bearings of the machine need to be greased throughout the day. I had only greased the ball bearings on the coal crusher machine for approximately one to two weeks prior to my injury on 29 September, 2006. I was not shown a method how to grease the ball bearings, I was only shown the location of the different grease points on the coal crusher machine. I was required to use a hand held

> grease gun to grease the bearings. The hand held grease gun consisted of an approximately one foot long hose and an approximately one and half foot long metal tube with a hand pump. At the time of my injury I was in the process of greasing fittings located behind a horizontal I-beam that made up part of the frame of the coal crusher. The Horizontal I-beam is located on the outside of the hopper area. The bottom of the horizontal I-beam frame was approximately the height of the top of my head, approximately 6 feet from the ground. The top of the horizontal I-beam was approximately 7 to 8 feet from the ground. I could not grease the fittings from the ground. I was required to climb up the wheel of the coal crusher machine to access and grease the fittings located on the backside of the horizontal I-beam frame. At the time of my injury I had finished greasing a fitting and moving to the next fitting while standing on the horizontal I-beam. To access the next fittings I was required to step around a vertical I-beam that was part of the frame. The vertical part of the I-beam was attached to the horizontal I-beam. As I was stepping around the vertical I-beam I fell approximately 8 feet from the top of the horizontal I-beam causing my injuries. After I fell after I laid on the ground and was unable to move from my waist down. I yelled to Jack Best, an Oxford Mining Company Mechanic, and he came over and called an ambulance. I was then taken to the hospital.

{¶18} 5. The Ohio Bureau of Workers' Compensation Safety Violations Investigation Unit ("SVIU") investigated to determine whether the injury was caused by Oxford's violation of a specific safety requirement. Before the investigation began, SVIU Investigator Adam Fries was informed by Oxford that the coal crusher involved in relator's injury had been scheduled to be scrapped in late 2008; however, the coal crusher had caught fire and had been taken out of service. Oxford was able to show Investigator Fries photographs of the coal crusher after it had been taken out of service and moved to a different location. Investigator Fries was able to photograph a similar coal crusher in operation at the mine.

{¶19} 6. Investigator Fries submitted his report dated February 9, 2009. Within the discussion portion, Investigator Fries provides the following relevant information:

> **Relator's Responsibilities**
>
> The coal crushing operation is made up of two people, the crusher attendant/operator and a laborer. At the time of his injury Todd Brammer was working as the laborer (Exhibit 7). The crusher attendant is responsible for using the front end loader to load the raw coal into the feeder hopper of the coal crusher. The crusher attendant also loads the road trucks with the crushed coal for delivery to the customer. The laborer's two primary duties are to keep the coal crusher well greased and to keep the area around the crusher free of debris and coal that has spilled from the machine.
>
> **Day of Injury**
>
> At the time of Todd Brammer's injury he was in the process of greasing fittings located below the feeder hopper on the trailer frame of the coal crusher (Exhibit 4). The coal crusher was not running at the time of Todd Brammer's injury. To access and grease the fittings Todd Brammer was standing on a horizontal steel I-beam that makes up part of the trailer frame of the coal crusher (Exhibit 4). According to an engineered drawing of the Coal Crusher by Eagle Crusher Co., the horizontal steel I-beam Todd Brammer fell from is labeled as the Trailer Frame Weldment (Exhibit 8). Each side of the frame of the feeder hopper area consists of one large horizontal steel I-beam running the length of the hopper (Exhibit 4). Three smaller vertical steel I-beams are attached to the large horizontal I-beam and make up the rest of the support frame of the feeder hopper (Exhibit 4). The grease fittings Todd Brammer was greasing at the time of his injury were located behind the area where the vertical I-Beams are attached to the large horizontal I-Beam (Exhibit 4). Todd Brammer was using a hand held grease gun to grease the fittings (Exhibit 4). After greasing a fitting while standing on the horizontal I-beam Todd Brammer was stepping around one of the vertical I-beams to grease the next fitting when he fell from the horizontal I-beam to the ground causing his injuries.
>
> **Affidavits**

In addition to relator's affidavit, Investigator Fries obtained affidavits from David E. Derenburger, the daytime foreman at the Lisbon Oxford Coal Mine, and Charlie Blevins, an employee.

Derenburger Affidavit

Todd Brammer was hired in Spring, 2006. He was hired to work as a Lube Man. The Lube Man's job is to operate the lube truck. The lube truck is a truck with gasoline, lubrications, and other materials that travels around the job-site and is used to lubricate, refuel and perform general preventive maintenance on the equipment at the job-site. Todd Brammer was hired to take over for Oxford Mining Lube Man, Brian Buckley, who was being promoted. Brian Buckley would have performed the majority of Todd Brammer's Lube Man training. The training lasted approximately 2 weeks and consisted of Brian Buckley and other Oxford Mining equipment operators supervising Todd Brammer to ensure he was performing [h]is Lube Man duties properly.

As part of his duties as the Lube Man Todd Brammer was required to lubricate and grease the different fittings of the coal crusher machine located at the job-site. The coal crusher machine can be greased either by hand, using a handheld grease gun, or using the air powered grease gun attached to the lube truck. To access the grease fittings of the coal crusher the lube man would either use a step ladder located in tool shed on the job-site or by standing on the bumper of the lube truck. When greasing the fittings with the hand held pump the fittings can be reached either using the step ladder located in the tool shed or by pulling up a pick up truck and standing in the bed of the truck. The grease fittings can be accessed while standing on the ladder. The Lube Man is not required nor does he have to stand on the frame of the coal crusher to access the grease fittings. I have never told anyone to stand on the frame to grease the fittings of the coal crusher.

A couple of months prior to Todd Brammer's injury it was decided by the company that Todd Brammer was under performing as the Lube Man and he was given a job as a laborer working on the coal crusher. Todd Brammer's job duties as the laborer working on the coal crusher required him to grease the fittings, perform preventative maintenance,

and shovel any coal that spilled from the machine. I trained and closely supervised Todd Brammer for approximately one week on his duties as the coal crusher machine laborer. The training consisted of me pointing out the different areas of the coal crusher and how the machine operates. Todd Brammer also received training on how to grease the coal crusher when he worked as a Lube Man.

* * *

After Todd Brammer was taken for medical attention myself and Charlie Belvins [sic], Oxford Mining Coal Crusher Operator, took photographs and measurements of the injury site. The measurement form [sic] the part of the frame where Todd Brammer fell to the ground was approximately just over 5 feet.

I have never instructed anyone to grease the fittings of the coal crusher by standing on the frame of the machine. I do not recall ever seeing Todd Brammer standing on the frame of the coal crusher to grease the fittings.

Blevins' Affidavit

* * * Although I did not directly witness the injury I have pertinent information regarding this investigation.

I am a coal crusher operator at the Lisbon Mine jobsite the job-site where the injury to Todd Brammer occurred. I started running the Lisbon Mine coal crusher in July, 2005.

I have run coal crusher machines since the 1970's. I have greased the coal crusher numerous times since the 1970's. I have never needed to climb onto back area of the coal crusher to grease the machine fittings. The back area of the machine is the area where the injury to Todd Brammer occurred. When I am required to grease the fittings of the coal crusher I use a step ladder that is stored in the job-site tool shed, to access the fittings. The coal crusher support beam where the grease fittings were located was approximately at my eye level, and I am 5 feet, 10 inches tall.

Following Additional Evidence

> Investigator Fries identified certain photographs, including the following:
>
> Attached to the horizontal I-beam that makes up the frame of the coal crusher are hydraulic legs that are used to stabilize and level the coal crusher. (Exhibit 4). According to an engineered drawing of the Coal Crusher by Eagle Crusher Co., the hydraulic legs are labeled as the Axle Riser Assembly (Exhibit 8). The employer provided Investigator Fries with photographs taken as part of the company injury report of the measurement of the height of the horizontal I-beam to the ground taken shortly after Todd Brammer's injury (Exhibit 5). According to the photographs the measurement of the height of the horizontal I-Beam to the ground was approximately 5 feet. The man taking the measurement in the photograph is Oxford Mining Foreman David Derenburger, who is 5 feet, 8 inches tall.

{¶20} 7. A hearing was held before a staff hearing officer ("SHO") on October 10, 2009. Derenburger testified that he had never seen relator standing on the I-beam to grease the machine and that was not the way it was ordinarily done. According to Derenburger, Oxford kept a ladder in a nearby tool shanty which could be used to grease the fittings or, at other times, employees would back the company truck up to the machine and get in the back of the truck to grease the fittings. (Tr. 152.) Derenburger identified photographs taken of the machine and explained that the machine was leveled and made more stationary by the use of one or more six to eight inch blocks. (Tr. 159.) Lastly, Derenburger identified a photograph of him actually measuring the distance from the ground to the top of the I-beam. According to Derenburger's testimony, he is approximately 5 feet 8 inches tall and the I-beam was approximately five feet off the ground. (Tr. 163.) On cross-examination, Derenburger was asked why the EMS personnel indicated that relator had fallen from a height of between six to eight feet. Derenburger did not have an explanation.

{¶21} Relator also testified before the SHO. Relator specifically testified that Derenburger never instructed him to use a ladder to grease the fittings and that, while there was a ladder available the day he started, a bulldozer had run over it and, in spite of relator's request, Oxford had not replaced it. (Tr. 189-91.) Relator also testified that he is 5 feet 10 inches tall and that the bottom of the I-beam was at head level to him. As such, although he never measured it, relator believed the top of the I-beam to be more than six feet. (Tr. 193.) Lastly, relator testified that Derenburger had seen him grease the machine while standing on the I-beam more than once. (Tr. 195.)

{¶22} Ron Garrett, the foreman, testified that the machine was stabilized/leveled on eight-inch blocks. (Tr. 201.) He also testified that he was the one who took the picture of Derenburger measuring the distance from the ground to the top of the I-beam. (Tr. 202-04.)

{¶23} Lastly, Charlie Blevins, the loader operator and crusher operator also testified. Blevins pointed to the grease fittings which relator was responsible for greasing. (Tr. 214.) Blevins testified that he had greased those fittings for years and always stood on something in order to reach the fittings. He testified that one needed to be approximately two feet off the ground to reach the fittings. (Tr. 214-15.)

Closing Arguments

{¶24} As the hearing ended, counsel for relator argued that the crusher is stationary, it could be placed inside a building, the I-beam is obviously a working platform, and the I-beam is obviously higher than six feet tall. Counsel for Oxford argued that the mine is not a workshop or a factory and that there is no proof in the record that the I-beam is greater than six feet high.

{¶25} 8. Ultimately, the SHO concluded that Ohio Adm.Code 4123:1-5-02(D) did not apply.

Relevant Code Provisions

Ohio Adm.Code 4123:1-5-02(D) reads as follows:

(D) Elevated platforms, runways, and walkways

(1) Guarding.

(a) Elevated platforms, runways, and walkways six feet or more above floor or ground level shall be guarded with standard railings and toeboards. All elevated runways, platforms, and walkways regardless of height, located over or adjacent to water, machinery, open vats, open soaking pits or open tanks shall be provided with standard railing and toeboards.

* * *

Ohio Adm. Code 4123:1-5 which are specific safety requirements of the Industrial Commission relating specifically to Wor[k]shops and Factories states in its scope and definition section in part:

(A) . . . The specific requirements of this code are requirements upon an employer for the protection of such employer's employees and no others, and apply to all workshops and factories subject to the Workers' Compensation law.

Relevant Cases

* * * The Staff Hearing Officer finds that in order to find said rule applicable, the injury must have occurred in a setting that is sufficient to classify it as a "workshop" or "factory." The Staff Hearing Officer notes that even through [sic] the codes have not defined statutorily, administratively, or judicially the terms "workshop" or "factory," a "workshop" and "factory" would be defined as a place located within some form of structural enclosure, State ex rel. Waugh v. Indus. Comm. (1997), 77 Ohio St.3d 453. Blacks Law Dictionary (4 Ed. Rev. 1968) 1781, defines "workshop" as "within the Workers' Compensation Act, a room or place wherein power

driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise."

Pursuant to State ex rel. Burma Farms v. Indus. Comm. (1994), 69 Ohio St.3d 111, it was held that the code sections 4123:1-5 were applicable by stating a "farm" in and of itself is not considered nor constitutes a "workshop" but instead found that the Injured Worker was injured in a "workshop" located on the farm, essentially looking at whether there was some sort of enclosure, i.e., specific boundary where the accident occurred. The Injured Worker contends that because the Lisbon mine job site where the injury occurred is a "place" utilizing the requisite machinery and labor, it constitutes a workshop.

Clearly, the evidence shows that the Injured Worker's injury did not occur in a "workshop" or "factory." The Staff Hearing Officer finds that the Employer was in the business of mining coal. The coal crushing machine, the machine in question, is a machine that can be moved and is moved from job site to job site and is placed in a flat area near the mine that is being stripped. The Injured Worker's occupation as a laborer whose primary duty was to keep the coal crushing machine well greased, and in the process of greasing a fitting, fell off a horizontal I-beam while stepping around one of the vertical I-beams to grease the next fitting. The Injured Workers' injury in this case did not occur indoors but rather outdoors in a flat area right outside the mining area. The Staff Hearing Officer notes the coal crushing machine, the machine in question, nor the Oxford Mining Company were in a fenced in area, or enclosed in any manner. There was no evidence indicating otherwise.

The Injured Worker cites State ex rel Petrie v. Atlas LRO Processors, Inc. (1999), 85 Ohio St. 3d 372, and State ex rel. Parks v. Indus. Comm. (1999), 85 Ohio St.3d 22, as two exceptions to the above stated rule. The Staff Hearing Officer finds both precedents are inapplicable to the case at hand. In Petrie, the Court found Ohio Adm. Code 4121:1-5 was applicable as said injury occurred in a fenced in area quoting that the fence "set forth the boundaries of work activity" serving to "keep unauthorized non-employees out" while in Parks, the Court found Ohio Adm. Code 4121:1-5 was also applicable as the code section cited regarding utility/tree trimming protections outlined in Ohio Adm. Code 4123:1-5-23(E), activities that are obviously conducted

> outdoors, and which regulates only the utility/tree trimming industry. Clearly, as indicated above, the injury did not occur in a fenced in area, nor is the code section cited as being violated a specialized regulation which regulates the mining industry.
>
> In sum, the Staff Hearing Officer specifically finds that since the injury did not occur in a "workshop" or "factory" as outlined in Ohio case law, no such violation of Ohio Adm. Code 4123:1-5-02(D) can be found.

{¶26} The SHO denied relator's application for an additional award for Oxford's violation of a specific safety requirement based on relator's affidavit, the SVIU report prepared by Investigator Fries, the evidence in the file, all the evidence presented at hearing, and the application of the cited cases.

{¶27} 9. Relator filed a request for rehearing but raised no new arguments. However, in response to Oxford's memorandum opposing rehearing, relator cited R.C. 1567.05, a trespassing statute which prohibits people, other than employees of a mine and those permitted by law, to enter any mine or the property without the consent of the owner. Relator argued that he made a prima facie showing that this situation met the requirements of *State ex rel. Petrie v. Atlas Iron Processors, Inc.* (1999), 85 Ohio St.3d 372, because there were boundaries to the mine. (R.C. 1567.05 is entitled "Trespassing prohibited" and prohibits non-mine employees or others permitted by law from entering any mine or going on the property connected with any mine without the consent of the owner and only when accompanied by a guide.)

{¶28} 10. Relator's application for rehearing was denied because relator had not submitted any new and relevant evidence nor had he shown that the order was based on an obvious mistake of fact or on a clear mistake of law.

{¶29} 11. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶30} Relator raises a single issue in his mandamus action: the Industrial Commission abused its discretion by finding that Ohio Adm.Code 4123:1-5-02(D) did not apply because his accident did not occur in either a workshop or a factory.

{¶31} For the reasons that follow, this magistrate concludes that the commission did not abuse its discretion by finding that Ohio Adm.Code 4123:1-5-02(D) did not apply.

{¶32} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶33} 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.

{¶34} 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 is a penalty, however, it 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.

{¶35} Ohio Adm.Code Chapter 4123:1-5 applies to "workshop and factory safety." Neither the Ohio Revised Code nor the Ohio Administrative Code provides definitions for either "workshop" or "factory." However, this court is not without guidance. In *State ex rel. Buurma Farms, Inc. v. Indus. Comm.* (1994), 69 Ohio St.3d 111, Delia C. Lybarger was severely injured while moving vegetables from a tank to a conveyor belt. Lybarger's jacket became caught in the conveyer's unguarded drive belt. It was undisputed that the closest shut off switch was approximately ten feet from her workspace and that the conveyor belt had no guarding or other protection.

{¶36} Lybarger sought an additional award for a VSSR citing former Ohio Adm.Code 4121:1-5-05(C)(2) and (4). The commission found that Lybarger had established a VSSR finding that the farm on which Lybarger worked did not, in and of itself, constitute a "workshop," but instead found that Lybarger was injured in a "workshop" located on the farm:

> "* * * The [Franklin County Appellate] Court in State ex rel. York Temple Country Club v. Industrial Commission of Ohio [(Apr. 18, 1985), Franklin App. No. 84AP-818, unreported] relied on Black's Law Dictionary to find [that a 'workshop' is] '* * * a room or place where power driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise.' The location of claimant's accident was in a place, a 3 sided building with a permanent roof, concrete floor and ceiling light fixtures where power driven machinery was employed. Essentially the court was looking toward an enclosure in which the accident occurred. [Ohio Adm.Code Chapter] 4121:1-5 further applies here because the nature of claimant's employment was not in an open boundless field, but within specific boundaries of a fixed building which

> contained a conveyor to pack and load products which were the end result of farm labors." (Emphasis added.) * * *

Id. at 112.

{¶37} The employer sought relief in mandamus; however both this court and the Ohio Supreme Court upheld the commission's finding stating:

> * * * The commission, contrary to appellant's representation, did not broadly rule that appellant's farm was a "workshop." It found that the farm contained a particular building that was a "workshop." Limiting our review to this narrower finding, we discern no abuse of discretion.

Id. at 113.

{¶38} Three years later, the Ohio Supreme Court released its decision in *State ex rel. Waugh v. Indus. Comm.*, 77 Ohio St.3d 453, 1997-Ohio-252. In that case, Wardell L. Waugh was injured while cutting grass on the grounds of a wastewater treatment facility. He was not wearing protective foot gear at the time and the lawnmower severed two of his toes.

{¶39} Waugh alleged a violation of former Ohio Adm.Code 4121:1-5-17(E) which required that foot protection be provided when an employee is exposed to machinery which presents a foot hazard. Waugh argued that the facility was a "place" and thus qualified as a "workshop."

{¶40} The commission determined that the area surrounding the facility where Waugh was mowing did not meet the definition of "workshop."

{¶41} Waugh pursued relief through mandamus; however, both this court and the Supreme Court of Ohio denied the requested writ. The Supreme Court set out Waugh's argument:

> * * * Waugh contends that Ohio Adm.Code Chapter 4121:1-5 also applies to workplaces without structural boundaries by seizing on the "room or place" language. * * *

(Emphasis sic.) Id. at 455.

{¶42} The court disagreed with *Waugh's* interpretation and stated:

> * * * Our definition refers to a place wherein the relevant power machinery and manual labor is employed, not whereat these activities occur. The court of appeals in State ex rel. York Temple Country Club, Inc. v. Indus. Comm. (Apr. 18, 1985), Franklin App. 84AP-818, unreported, recognized this small but significant distinction and, adopting its referee's reasoning, concurred that "the 'shop' portion of 'workshop' connotes some form of enclosure." The York court therefore concluded that a claimant's injury by an errant golf ball while working at a golf course driving range had not occurred in a workshop. We find this logic compelling, as is manifest from our decisions in Buurma Farms, Wiers Farms, and State ex rel. Double v. Indus. Comm. (1992), 65 Ohio St.3d 13, 599 N.E.2d 259 (construction site does not constitute a workshop).

(Emphasis sic.) Id. at 455-56.

{¶43} The Supreme Court of Ohio further examined the applicability of the workshops and outdoor activities in *State ex rel. Parks v. Indus. Comm.* (1999), 85 Ohio St.3d 22. In that case, Joseph J. Parks was employed by the city of Toledo as a tree service worker and he sustained an electrical shock from a power line while trimming a storm-damaged tree.

{¶44} Parks applied for an additional award for VSSRs alleging that the city of Toledo had failed to comply with Ohio Adm.Code 4121:1-5-23(E)(1) and (2) which require employers in the "electric utility and clearance and tree-trimming industries" to provide insulated gloves or other protective measures when employees are trimming trees around electrical power lines.

{¶45} The commission denied Parks' application because he was not injured in a workshop or factory. On further appeal, the Supreme Court found that the regulations applied. The court noted that Ohio Adm.Code 4121:1-5-23(E)(1) and (2) are specific safety regulations that apply to acts which "cannot practicably be performed indoors." The court noted further:

> * * * The risk presented by the combination of clearing tree limbs in the vicinity of power lines rarely, if ever, occurs indoors. Thus, imposing the general "workshop or factory" limitation on the rule regulating this activity would essentially eliminate the application of the entire provision.

Id. at 25.

{¶46} Finding that activities which are regulated in Ohio Adm.Code 4121:1-5-23(E) and are obviously conducted outdoors must be considered an exception to the rule that Ohio Adm.Code 4121:1-5 protects activities occurring indoors in workshops or factories; the court concluded:

> With this construction of the rule, we can reconcile today's decision with Buurma Farms and Waugh, the cases that are most analogous, despite having reached the opposite result. Buurma Farms and Waugh establish that, where specific safety requirements regulate activites that can be performed indoors or outdoors, the Ohio Adm.Code 4121:1-5-01(A) workshops and factories restriction limits an employer's reasonable expectations of liability to VSSRs that are committed indoors. However, the rule must be different where activity is regulated but cannot be performed indoors. In that case, the employer cannot reasonably expect exemption because Ohio Adm.Code 4121:1-5-01(A) does not apply exclusively to workshops and factories.

(Emphasis sic.) Id. at 26.

{¶47} Also in 1999, the court issued its decision in *Petrie*. In that case, the employer's business involved the sorting of scrap metal and processing which was

performed within a fenced-in compound. Petrie caught his glove between the wheel and the belt of a moving conveyor and his left index finger was completely severed. The commission denied his request for an additional award for a VSSR because Ohio Adm.Code Chapter 4121:1-5 did not apply. This court agreed.

{¶48} However, the Ohio Supreme Court found that *Petrie* did establish a VSSR as follows:

> * * * Ohio Adm.Code Chapter 4121:1-5 covers "workshops and factories." Claimant proposes that the scrapyard's perimeter fencing was a structural enclosure sufficient to classify it as a "workshop" and render Ohio Adm.Code Chapter 4121:1-5 applicable. We agree.
>
> The fence, in this case, indeed set forth the boundaries of work activity. It also served to keep unauthorized nonemployees out, and, in so doing, established its confines as a place accessible only to employees for the purpose of carrying out the company's business.

Id. at 373.

{¶49} In a case similar to the one currently before this court, the Ohio Supreme Court issued a decision in *State ex rel. Johnson v. Hilltop Basic Resources, Inc.*, 95 Ohio St.3d 36, 2002-Ohio-1624. In that case, the employer's business was an open-pit sand and gravel mine and plant. Emmett L. Johnson, Jr. was cleaning build-up of material from a fluted self-cleaning counter-weight pulley when the conveyor was turned on without any warning. Johnson sought an additional award for the employer's violation of a specific safety requirement which the commission denied. The commission found that Ohio Adm.Code Chapter 4121:1-3 was inapplicable because the employer was not in the construction business nor was the location of Johnson's injury a construction site. Further

the commission found Ohio Adm.Code Chapter 4121:1-5 inapplicable because Johnson worked as a plant maintenance man outdoors.

{¶50} Six days later, the *Petrie* decision was released and Johnson moved for a rehearing which the commission denied.

{¶51} Johnson filed a mandamus action and this court adopted the decision of its magistrate and issued a writ ordering further consideration on the applicability of Ohio Adm.Code Chapter 4121:1-5 in light of the *Petrie* decision.

{¶52} The employer appealed and the Supreme Court upheld this court's decision. The court noted that the commission premised its finding that Ohio Adm.Code Chapter 4121:1-5 did not apply *solely* on the fact that Johnson was hurt outdoors. Citing *Petrie,* the court stated that the commission's simple reasoning was no longer appropriate and issued a writ of mandamus ordering the commission to reconsider the applicability of Ohio Adm.Code 4121:1-5 in light of the *Petrie* decision.

{¶53} In the case currently before this court, relator asserts that the evidence establishes that the workshop and factory resolutions apply because the mine was located within a fenced area, was under the jurisdiction of the Ohio Department of Resources, Division of Mineral Resources Management Mining Safety Service Inspection Agency and was inspected by that agency, the photos of the crusher involved in the incident were taken at a site other than the original mine site and other photographs were of a similar crusher at a different mine site.

{¶54} Although relator contends that the SVIU report and the transcript establish that the area was contained within a fence, relator does not cite to any portion of the stipulated record. After thoroughly reading the report of investigation and the transcript,

the magistrate finds that relator never presented evidence that the area was fenced in nor did relator ever make that argument. Simply put, there is no evidence in the record that there was fencing which would constitute a structural enclosure sufficient to classify it as a "workshop." In this regard, relator failed to meet his burden of proof.

{¶55} Relator's second argument, that the mine is under the jurisdiction of the Ohio Department of Resources Division of Mineral Resources Management Mining Safety Service Inspection Agency does not require a finding that there actually was any fencing. As set out in the findings of fact, R.C. 1567.05 prohibits trespassing at mines and prohibits people other than employees and those permitted by law to enter a mine or property connected with the mine without the consent of the owner and only when accompanied by a guide. Relator cannot use this to prove that there was a fence. Further, relator did not raise this issue until his motion for rehearing. Given the complete lack of evidence that there was any fencing, the magistrate finds the commission did not abuse its discretion by finding that the *Petrie* decision did not apply.

{¶56} Lastly, there was testimony in the record concerning the photographs, the specific crushers in those photographs, and the locations at which those photographs were taken. The Investigation Report specifically references a photograph showing that the measurement of the height of the horizontal I-beam to the ground was approximately five feet and indentifying the man in the photograph as David Derenburger, who was approximately five feet eight inches tall. Affidavits provided by both Derenburger and Blevins further confirm that the I-beam was approximately five feet from the ground. The only evidence that suggests otherwise is the statement contained in relator's affidavit that "the top of the horizontal I-beam was approximately 7 to 8 feet from the ground" and

statements in the EMS report indicating that relator fell from a height of approximately six feet.

{¶57} It must be remembered that questions of credibility and the weight to be given evidence are clearly within the discretion of the Industrial Commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. In the present case, the commission considered the evidence and concluded that relator's injuries did not occur within the confines of a "workshop" or "factory" and Ohio Adm.Code 4123:1-5-02(D) did not apply. Further, relator failed to present evidence that the area was enclosed by a fence in order to come under the exception set forth in *Petrie.* Lastly, because the area was neither a "workshop" nor "factory," the commission never considered the height of the I-beam. However, there is some evidence in the record which would establish that the I-beam was less than six feet and would provide an additional reason why Ohio Adm.Code 4123:1-5-02(D) was inapplicable.

{¶58} Based on the foregoing, it is this magistrate's decision that the commission did not abuse its discretion by finding that relator had not established that Oxford violated Ohio Adm.Code 4123:1-5-02(D) and the commission did not abuse its discretion by denying relator's application for an additional award for Oxford's violation of a specific safety requirement.

/s/Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).