[Cite as *State ex rel. Precision Thermo-Components, Inc. v. Indus. Comm.*, 2011-Ohio-1333.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Precision Thermo-Components, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-965
Industrial Commission of Ohio and Crystal L. Tucker,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 22, 2011

Christopher S. Clark, for relator.

Michael DeWine, Attorney General, and *John R. Smart,* for respondent Industrial Commission of Ohio.

David Lancione & Associates, LLC, David Lancione, and *Nicholas E. Eusanio,* for respondent Crystal L. Tucker.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, Precision Thermo-Components, Inc., commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order granting the application of respondent Crystal L. Tucker for an

additional award for violation of a specific safety requirement and to enter an order denying the application.

I. Facts and Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, appended to this decision. In his decision, the magistrate concluded the requested writ of mandamus should be denied, because Tucker's affidavit and the statement of Tammy Dee, Supervisor, provide the commission with "some evidence" to support its finding that relator had been forewarned of the press' malfunctioning safety device prior to Tucker's industrial injury on the press.

II. Objection

{¶3} Relator filed an objection to the magistrate's conclusions of law. Relator identifies the issue central to its objection: "The issue before this Court is whether there was 'some evidence' that Relator was on notice of a prior malfunction involving this press."

{¶4} Relator premises its argument on the Supreme Court of Ohio's opinion in *State ex rel. MTD Products v. Stebbins* (1975), 43 Ohio St.2d 114, 118, where the court "observed that the safety rule at issue 'does not purport to impose absolute liability for an additional award whenever a safety device fails. The regulation does not forewarn the employer that, in addition to providing a safety device, the safety device must also be completely failsafe.' " (Mag. Dec., ¶26, quoting *MTD Products, Inc.*) As *MTD Products* explained, "[t]he fact that a safety device that otherwise complies with the safety

regulations failed on a single occasion is not alone sufficient to find that the safety regulation was violated." Id. The magistrate thus recognized the question at issue in Tucker's application "before the commission was whether relator had ever been forewarned of the malfunction on the date of injury by a prior malfunction of the safety device." (Mag. Dec., ¶29.) The magistrate observed the commission, in determining relator had been forewarned, relied on two pieces of evidence: Tucker's May 21, 2008 affidavit and Dee's May 21, 2008 handwritten statement.

{¶5} Relator presents in its objection virtually the same argument addressed in its brief to the magistrate. In resolving the issue, the magistrate properly determined the commission could rely on evidence of prior malfunction found in Tucker's affidavit and Dee's statement. Although relator asserts neither piece of evidence meets the standard for properly considered evidence, the magistrate correctly noted the commission is not bound by the usual formal rules of evidence or procedure.

{¶6} Given the relaxed evidentiary parameters, the magistrate properly concluded Dee's statement and Tucker's affidavit are "some evidence" supporting the commission's decision that relator had prior knowledge of the press' malfunctioning safety device, as the statement and affidavit "present indicia of credibility." (Mag. Dec., ¶42.) Most notably, the magistrate pointed out that "Tammy Dee was one of relator's supervisors who would have an interest in obtaining accurate and reliable information regarding work activity at the plant where she worked. Moreover, there is corroboration between claimant's affidavit and Tammy Dee's statement." Id.

{¶7} In the final analysis, the magistrate rightly concluded the evidence on which the commission relied was properly considered; the weight the commission ascribed to it was within the commission's discretion. Accordingly, the magistrate appropriately determined the commission had some evidence of a prior malfunction on which to rely in its additional award for violation of a specific safety requirement. Relator's objection is overruled.

III. Disposition

{¶8} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objection overruled;
writ denied.

FRENCH and DORRIAN, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Precision Thermo-Components, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-965
Industrial Commission of Ohio and Crystal L. Tucker,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on November 17, 2010

Christopher S. Clark, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

David Lancione & Associates, LLC, David Lancione and *Nicholas E. Eusanio*, for respondent Crystal L. Tucker.

IN MANDAMUS

{¶9} In this original action, relator, Precision Thermo-Components, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to

vacate its order granting the application of respondent Crystal L. Tucker ("claimant") for an additional award for violation of a specific safety requirement ("VSSR"), and to enter an order denying the application.

Findings of Fact:

{¶10} 1. On August 1, 2006, claimant severely injured her left hand in the course of her employment with relator.

{¶11} 2. The industrial claim (No. 06-849686) is allowed for "left carpal tunnel syndrome, early complicated trauma left, nec; crushing injury of left hand; 2nd degree burn left hand, nos; joint contracture of left hand, second, third, fourth and fifth fingers."

{¶12} 3. On February 4, 2008, claimant filed an application for a VSSR award.

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

{¶14} 5. On July 21, 2008, the SVIU special investigator issued a report with exhibits.

{¶15} 6. The SVIU report states in part:

> 3. According to the employer, the machine involved in the incident of record was a hydraulically-powered WellTec TTI 90C2 injection molding machine internally identified as PTC press I10 at the time of the incident. The employer further stated the involved injection molding machine was purchased new in approximately 1994. The employer indicated the involved injection molding machine was taken out of service after the incident of record because they were unable to duplicate the issue that caused the incident. The employer further indicated the involved machine was scraped in the fourth quarter of 2007. Therefore, this

> Investigator was unable to obtain photographs of the injection molding machine involved in the incident of record.
>
> 4. The employer stated the incident of record occurred due to a malfunction with the involved WellTec injection molding machine. The employer further stated the involved press was equipped with an interlocked access door and a drop bar to prevent the mold from closing while an operator was working inside the machine. The employer indicated they were unable to determine which safety feature malfunctioned so the press was removed from service as a precautionary measure.
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> * * *
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> 6. On May 21, 2008 this Investigator met with Injured Worker Crystal L. Tucker and obtained an affidavit. Ms. Tucker stated she began her employment with Precision Thermo Components on November 8, 2004 and held the position of quality inspector at the time of her injury. She further stated her job duties as a quality inspector involved inspecting parts as they came off the presses and to check parts to ensure they were up to quality standards.

{¶16} 7. Among the exhibits to the SVIU report is an affidavit executed by claimant on May 21, 2008:

> 2. I began my employment with Precision Thermo Components on November 8, 2004. I was hired as a quality inspector and I held this position at the time of my injury. My job duties as a quality inspector involved inspecting parts as they came off the presses and to check parts to ensure they were up to quality standards. I received basic on-the-job training for my job duties as a quality control inspector.
>
> 3. On August 1, 2006 I was performing my normal job duties as a quality inspector. I reported to work at approximately 7:00 a.m. and I began to perform my quality inspector duties by checking the presses to make sure the parts were up to standards. At approximately 10:30 a.m., I arrived at press #10 and began to check the parts. The company was producing plastic industrial nuts with press #10 and there would often be a cavity stuck. I was trained to get the cavity

> out when this occurred and this is what I was doing at the time of my injury.
>
> 4. I hit the emergency stop button on the control panel and I placed press #10 in semi-automatic mode prior to opening the sliding door to check the parts. This is when I noticed that one of the cavities was stuck. I reached with my left hand to get the cavity out and the press cycled with the mold closing on my hand. I tried to open the mold with the button on the control panel but it would not open. I screamed for help and Shawn Bagley, machine tech, came running over and he attempted to open the mold but it would not open. Shawn then got a crowbar and attempted to pry the mold open but was unable to get it open. Charlie Gibson, machine tech, arrived at the press and helped Shaw try to get the mold open but it still would not open. My left hand remained trapped in the mold of the press and was being burned from the heat of the mold and hot oil for approximately fifteen to twenty minutes. My coworkers were eventually able to get the mold to open and I was able to remove my hand from the machine. An ambulance was called and I was transferred to Lima Memorial Hospital for medical treatment.
>
> 5. Press #10 was equipped with a sliding door that had to be slid to the left to stop the machine from running and to gain access to the mold. I slid the door to the left prior to reaching into the press. The press was not supposed to activate with the door open.
>
> 6. I did not personally have any similar incidents with press #10 prior to my injury but there had been reports of press #10 cycling with the door open. Charlie Gibson and Donald Klinker, mold technician, both had experiences with press #10 cycling while the door was open prior to the date of my injury. Tammy Dee, supervisor, and company management knew about press #10 cycling with the door open but did not correct the problem.

{¶17} 8. Among the exhibits to the SVIU report is a handwritten statement from Tammy Dee dated May 21, 2008:

> I Tammy Dee was the 1st Shift SuperVisor for PTC [and] Crystal Tucker was on[e] of my lead-ops. As a lead-op one

> of our duties was to go to the presses when they alarmed [and] get into the press to get parts unstuck from the mold. Spray the molds [and] get the press restarted. If you were unable to do this then we called a mold tech. Donny Klinkler was one of the mold techs. Press 10 was an automatic press most of the time. This meant that you had to go into the press to pull your parts out. When the door is open the mold should never shut. They were having problems with this press doing what it wanted. Donny came over to work on it [and] while he was in there the press started to close. Donny got his hand out in time. This was then reported to maint[enance]. Guy Veroff was head of maint[enance]. They looked at the press [and] found nothing wrong. So they continued to run it. I got put on 2nd Shift a few days later for awhile. My 1st day on 2nd shift come to find out that Crystal had got her hand caught in this same mold that was said to have nothing wrong. Well the press was shut down for maint[enance] to go through it to find out what had happened. Now they find 3 safety factors not working in the press. So it was pulled from the floor. * * *

{¶18} 9. Following a March 31, 2009 hearing, a staff hearing officer ("SHO") issued an order finding a violation of Ohio Adm.Code 4123:1-5-11(E) and granting a VSSR award:

> It is the order of the Staff Hearing Officer that the Injured Worker was employed on the date of injury noted above by the Employer as an operator; and that the Injured Worker sustained an injury in the course of and arising out of employment when she was removing scrap from an injection molding machine when the mold closed on her left hand.
>
> It is further the finding of the Staff Hearing Officer that the Injured Worker's injury was the result of the failure of the Employer to properly rectify a malfunction of a safety feature as required by Section 4123:1-5-11(E), the Code of Specific Requirements of the Industrial Commission relating to Hydraulic or Pneumatic Presses.
>
> The Injured Worker was injured on 08/01/2006 when she was removing scrap from an injection molding machine when the mold closed on her left hand. The machine

involved was a hydraulically-powered WellTec TTI 90C2 injection molding machine, internally identified as PTC press 110 [sic], at the time of the incident. The injection molding machine was purchased new by the Employer in approximately 1994. The Employer indicated that the involved injection molding machine was taken out of service after the incident of record because they were unable to duplicate the issue that caused the incident. The Employer further indicated the involved machine was scrapped in the fourth quarter of 2007. There is no dispute that the incident of record occurred due to a malfunction involved with the WellTec injection molding machine. The press was equipped with the inter-locked access door and a drop bar to prevent the mold from closing while an operator was working inside the machine.

Injured Worker's injury occurred while she was performing her normal job duties as a quality inspector on 08/01/2006. She began to perform her quality inspector duties by checking the presses to make sure the parts were up to standards. At approximately 10:30 a.m. she arrived at Press No. 10 and began to check the parts. She indicated the company was producing plastic industrial nuts with Press No. 10 and there would often be a cavity stuck. Injured Worker was trained to get the cavity out when this occurred, and this was what she was doing at the time of her injury. Injured Worker hit the emergency stop button on the control panel and placed Press No. 10 in semi-automatic mode prior to opening the sliding door to check the parts. Injured Worker then noticed that one of the cavities was stuck, she reached with her left hand to get the cavity out, and the press cycled with the mold closing on her hand. She tried to open the mold with the button on the control panel but the mold would not open. She screamed for help and a machine technician came running over and attempted to open the mold but the mold would not open. The machine technician got a crowbar and attempted to pry the mold open but was unable to get [the] mold open. Her left hand hand [sic] remained trapped in the mold of the press and was burned from the heat of the mold and hot oil for approximately 15 to 20 minutes. Eventually, her co-workers were able to get the mold open and she was able to remove her hand from the machine.

The parties have indicated that Press No. 10 was equipped with a sliding door that had to be slid to the left to stop the machine from running and to gain access to the mold. Injured Worker slid the door to the left prior to reaching into the press. The press was not not [sic] supposed to activate with the door open.

* * *

4121:1-5-11(E) dealing with hydraulic or pneumatic presses, is found to be the applicable Code Section in this case. The Section states:

Every hydraulic or pneumatic (air-powered) press shall be constructed, or shall be guarded, to prevent the hands or fingers of the operator from entering the danger zone during the operating cycle. Acceptable methods of guarding are:

(1) "Fixed barrier guard"

(2) "Gate guard"

(3) "Two-hand control" or

(6) Other practices, means or methods which will provide safeguards preventing the hands or fingers of the operator from entering the danger zone during the operating cycle and which are equivalent in result to one of the types specified above.

The Hearing Officer finds that the evidence in the record supports that the injection molding machine that Injured Worker was working on was equipped with an inter-locked access door and a drop bar to prevent the mold from closing while the operator was working inside the machine. Therefore, the Hearing Officer finds the Employer met the requirement of 4121:1-5-11(E)(2) of providing a Gate Guard. The Hearing Officer finds the inter-locked access door and drop bar comply with the requirement of a "moveable gate operated with a tripping device to interpose a barrier between the operator and the danger zone and to remain closed until the down stroke has been completed."

However, the Hearing Officer finds that there was a history of a malfunction of this safety feature which the Employer failed to rectify and further finds that as a result of the Employer's failure to rectify the safety feature, Injured Worker's injury occurred. Injured Worker's affidavit submitted to the Safety Investigator indicated that she did not personally have similar incidents with Press No. 10 prior to her injury, but there had been reports of Press No. 10 cycling with the door open. She indicated that Charlie Gibson and Donald Klinker, mold technicians, both had experiences with Press No. 10 cycling while the door was open, prior to the date of her injury. Tammy Dee, supervisor in company management, knew about Press No. 10 cycling with the door open, but did not correct the problem. The Hearing Officer also relies upon the statement of Tammy Dee contained in the file, dated 05/21/[2]008, which indicated "They were having problems with this press doing what it wanted." "Danny [sic] came over to work on it and while he was in there the press started to close. Danny [sic] got his hand out in time. This was then reported to maintenance. Guy Veroff was head of maintenance. They looked at the press and found nothing wrong. So they continued to run it. I got put on second shift a few days later for a while. My first day on second shift come to find out that Crystal had got her hand caught in this same mold that was said to have something wrong…the press was shut down for maintenance to go through it to find out what had happened. Now they find three safety factors not working in the press. So it was pulled from the floor."

The Hearing Officer finds that no violation can be found for a one-time malfunction of safety equipment when such was not foreseeable. State ex rel. M.T.D. Products v. Stebbins (1975) 43 Ohio St. 2d 114. The Court found that in safety equipment malfunction cases, the decision will depend upon the factual determination of whether there was a one-time malfunction that the Employer had no reasonable basis to expect, whether or not the evidence showed a prior history of malfunctions and/or problems with the Employer and they should have been aware of the problems, and whether or not, for some other reason, the Employer should have been aware that there was a good chance that a malfunction would occur. The Hearing Officer finds that the evidence contained in the record supports that there was more than

> one malfunction with this machine. Further, the evidence supports that the Employer was, in fact, aware of the malfunction of the machine.
>
> Finally, the Hearing [O]fficer finds that the Employer should have been aware that there was a good chance that a malfunction would occur. This finding is supported by the statement of Injured Worker's supervisor contained in the file, which indicates that the press had been operating incorrectly in the past and that the Employer had had someone try to work on the machine. According to Ms. Dee's affidavit, it was while, the person was working on the machine that it cycled incorrectly. She indicates that the press closing improperly was reported to maintenance. Further she indicates that maintenance looked at the press again and found nothing wrong. Therefore, the decision was made to continue running the press. Therefore, the Hearing Officer finds that the preponderance of the evidence supports that the Employer was aware of prior malfunction and aware of the chance for a malfunction to likely occur again.
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> * * *
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> The Hearing [O]fficer orders that 40% of the maximum weekly rate award is granted for the violation found in this case.
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> * * *
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> The finding and order are based upon the affidavits in file from Injured Worker and Tammy Dee and the report of Fred M. Freeman, Special Investigator for the Bureau of Workers' Compensation and evidence in file.

{¶19} 10. Relator moved for rehearing pursuant to Ohio Adm.Code 4121-3-20(E).

{¶20} 11. On July 30, 2009, another SHO mailed an order denying relator's motion for rehearing.

{¶21} 12. On October 15, 2009, relator, Precision Thermo-Components, Inc., filed this mandamus action.

Conclusions of Law:

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

{¶23} Ohio Adm.Code 4123:1-5 sets forth specific safety rules applicable to "Workshop and Factory Safety."

{¶24} Ohio Adm.Code 4123:1-5-11 is captioned: "Forging machines, other power machines and machine tools, hydraulic and pneumatic presses, and power press brakes."

{¶25} Ohio Adm.Code 4123:1-5-11(E) is captioned: "Hydraulic or pneumatic presses." Thereunder, it states:

> Every hydraulic or pneumatic (air-powered) press shall be constructed, or shall be guarded, to prevent the hands or fingers of the operator from entering the danger zone during the operating cycle. Acceptable methods of guarding are:
>
> (1) "Fixed barrier guard"—an enclosure to prevent hands or fingers from entering the danger zone;
>
> (2) "Gate guard"—a movable gate operated with a tripping device to interpose a barrier between the operator and the danger zone and to remain closed until the down stroke has been completed;
>
> (3) "Two-hand control"—an actuating device which requires the simultaneous use of both hands outside the danger zone during the entire closing cycle of the press;
>
> (4) Pull guard-attached to hands or wrists and activated by closing of press so that movement of the ram will pull the operator's hands from the danger zone during the operating cycle;

> (5) Restraint or hold-back guard—with attachments to the hands or wrists of the operator to prevent hands or fingers entering the danger zone during the operating cycle;
>
> (6) Other practices, means or methods which will provide safeguards, preventing the hands or fingers of the operator from entering the danger zone during the operating cycle and which are equivalent in result to one of the types specified above.

{¶26} In *State ex rel. M.T.D. Products, Inc. v. Stebbins* (1975), 43 Ohio St.2d 114, 118, the court observed that the safety rule at issue "does not purport to impose absolute liability for an additional award whenever a safety device fails. The regulation does not forewarn the employer that, in addition to providing a safety device, the safety device must also be completely failsafe."

{¶27} Noting that the purpose of the safety regulation is to provide reasonable safety for employees, the court states "[t]he fact that a safety device that otherwise complies with the safety regulations failed on a single occasion is not alone sufficient to find that the safety regulation was violated." Id.

{¶28} Citing *M.T.D. Products*, this court, in *State ex rel. Moore v. Indus. Comm.* (1985), 29 Ohio App.3d 239, 243, refers to the "single failure exception to the specific safety requirement rule." The *M.T.D.* "exception" has been repeatedly the subject of VSSR cases. *State ex rel. Gentzler Tool & Die Corp. v. Indus. Comm.* (1985), 18 Ohio St.3d 103; *State ex rel. Taylor v. Indus. Comm.*, 70 Ohio St.3d 445, 1994-Ohio-445.

{¶29} As determined by the commission, although relator provided the "gate guard" described at Ohio Adm.Code 4121:1-5-11(E), that safety device malfunctioned and caused the industrial injury. Under the *M.T.D. Products* single failure exception, the

question before the commission was whether relator had ever been forewarned of the malfunction on the date of injury by a prior malfunction of the safety device. The commission determined that relator had been forewarned by a prior malfunction of the safety device and, thus, could not successfully claim the protection of the *M.T.D. Products* single failure exception. In rendering its determination that relator had been so forewarned, the commission relied upon two pieces of evidence—claimant's May 21, 2008 affidavit and the May 21, 2008 handwritten statement of Tammy Dee.

{¶30} According to relator, neither of those documents provide the "some evidence" needed to support the commission's determination. The magistrate disagrees.

{¶31} Relator challenges the evidentiary value of these statements:

> The statement of Ms. Dee is both vague and non-specific. In reviewing the un-notarized, un-witnessed and un-dated statement attributed to Ms. Dee, it is immediately apparent that she had no first-hand or specific knowledge as to whether or not an actual malfunction in the safety feature had occurred previous to Respondent's injury. She was not Respondent's supervisor when the injury occurred as she was working on another shift. Ms. Dee does refer to an incident involving a Danny (Donny) Klingler, but there is no indication that Ms. Dee actually witnessed the incident or was informed of the incident by Mr. Klingler himself. There is also no indication that she had been informed by anyone in a position of authority of the facts surrounding any prior incident or that she had referenced any documentation that would suggest that she had any credible knowledge of the facts related to any prior malfunction, or any facts related to how or whether the Employer was placed on notice of any malfunction. * * *

(Relator's brief, at 8.)

{¶32} Relator also challenges the evidentiary value of claimant's affidavit:

> This statement by Respondent makes no indication as to how she knew about any prior malfunctions. There is no indication that she either observed any prior incidents directly or spoke with either Mr. Gibson or Mr. Klinker in regard to these alleged occurrences. It would appear that this statement merely mirrors the contents of Ms. Dee's statement.

(Relator's brief, at 9.)

{¶33} Relator's challenges are answered by R.C. 4123.10 and the cases that have applied the statute.[1]

{¶34} R.C. 4123.10 provides: "The industrial commission shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure."

{¶35} Supplementing the statute, Ohio Adm.Code 4121-3-09 sets forth the commission's rules regarding the conduct of hearings. Ohio Adm.Code 4121-3-09 provides:

> (A) Proof and discovery.
>
> (1) In every instance the proof shall be of sufficient quantum and probative value to establish the jurisdiction of the commission to consider the claim and determine the rights of the injured worker to an award. Proof may be presented by affidavit, deposition, oral testimony, written statement, document, or other forms of evidence.

{¶36} Helpful here is a reference to Evid.R. 602 captioned "Lack of Personal Knowledge":

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[1] Presumably, the "Donald Klinker" identified in claimant's May 21, 2008 affidavit and the "Donny Klinkler" identified in the May 21, 2008 statement of Tammy Dee are the same person. In its brief, the "Donny Klinkler" identified in the May 21, 2008 statement of Tammy Dee is identified by relator as "Mr. Klingler." (Relator's brief, at 8.) Below, the magistrate shall identify this person as "Klinker" which conforms to the identification used in claimant's affidavit.

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

{¶37} Also helpful is a reference to Evid.R. 801(C): " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶38} *State ex rel. Roberts v. Indus. Comm.* (1984), 10 Ohio St.3d 1, 4-5, is controlling. In that case, Charles G. Roberts was industrially injured in the course and scope of his employment with Mobile Industrial Services of Ohio, Inc. ("Mobile"). On the date of injury in 1977, Roberts lost consciousness and fell into a solvent while cleaning a tank car. Roberts' application for a VSSR award was denied by the commission and he therefore filed a mandamus action. In that action, Roberts challenged the evidentiary sufficiency of an affidavit executed by Daniel Conkey, a Mobile representative. Roberts argued that the commission erred in considering the Conkey affidavit. Rejecting Roberts' argument, the court explains:

> * * * An affidavit of Daniel Conkey, the employer's representative, details that appellant was trained in tank car cleaning and concomitant safety procedures, including the ventilation of a tank car before and during the cleaning procedure. Moreover, the record demonstrates that ventilation equipment was available, as was a water blaster, neither of which was utilized by appellant. The investigative report also contains photographic exhibits of the safety equipment at the job-site, instruction procedures for tank car cleaning, invoices demonstrating Mobile's purchase of related safety equipment, and the work order for the tank car appellant was cleaning * * *.

> * * *
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> Appellant next argues that the commission erred in considering the affidavit of Daniel Conkey, submitted on behalf of Mobile. In his affidavit, Conkey first states that he was not a witness to appellant's injury. He then recites company policy regarding safety procedures to be employed when cleaning railroad tank cars, and that appellant received extensive training in this area and should have been using a water blaster and the proper ventilating equipment when cleaning the interior walls of the car.
>
> Specifically, appellant contends that Conkey's affidavit should not have been considered by the commission based on Evid.R. 602 and 801(C) which involve, respectively, witnesses testifying on matters about which they have no personal knowledge, and hearsay. Essentially, appellant seeks to have this court apply technical rules of evidence to proceedings conducted before the commission. Appellant's contention, however, does not reflect the law applicable to workers' compensation proceedings in Ohio.
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> * * *
>
> By its unequivocal terms, R.C. 4123.10 grants the commission considerable discretion regarding the evidence which it considers, thus negating appellant's argument that Conkey's affidavit was improperly considered, assuming, *arguendo*, the applicability of Evid.R. 602 and 801(C). Moreover, this court has previously recognized that by virtue of R.C. 4123.10, the commission is vested with the authority to admit and consider materials of a quasi-evidentiary nature. * * *

{¶39} While relator does not directly invoke or cite to Evid.R. 602, his argument, nevertheless, appears premised at least in part upon that evidence rule. Presumably, when relator argues that Tammy Dee lacks "first hand or specific knowledge" of the malfunction, relator is, in effect, arguing that Tammy Dee lacks "personal knowledge" of the malfunction.

{¶40} Apparently, Tammy Dee does lack personal knowledge of the incident involving Klinker. However, that she does not inform us as to how she obtained information regarding the incident does not destroy the evidentiary value of her written statement under the circumstances here.

{¶41} The above analysis, based upon *Roberts*, is equally applicable to relator's challenge to claimant's affidavit. That claimant does not inform us as to how she obtained information regarding the Klinker incident does not destroy the evidentiary value of claimant's affidavit. *Roberts*.

{¶42} While claimant and Tammy Dee do not have personal knowledge of the Klinker incident, the affidavit and statement present indicia of credibility. Tammy Dee was one of relator's supervisors who would have an interest in obtaining accurate and reliable information regarding work activity at the plant where she worked. Moreover, there is corroboration between claimant's affidavit and Tammy Dee's statement.

{¶43} Significantly, relator does not claim here that it had no recourse to determine the accuracy and reliability of the contents of claimant's affidavit and Tammy Dee's statement. The two persons (Charlie Gibson and Donald Klinker) identified in claimant's affidavit as having had experiences with Press No. 10 cycling while the door was open prior to the date of claimant's injury were both employees of relator. Tammy Dee was an employee of relator. Presumably, in the absence of any claim from relator to the contrary, relator could have directly inquired of those persons as to the accuracy of the information provided in claimant's affidavit and Tammy Dee's statement.

{¶44} Clearly, under the circumstances here, claimant's affidavit and Tammy Dee's statement provide the commission with "some evidence" to support its finding that relator had been forewarned of a malfunctioning safety device prior to the industrial injury at issue here.

{¶45} 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).