[Cite as *State ex rel. Redman v. Indus. Comm.*, 2011-Ohio-3299.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Nora Redman,	:	
Relator,	:	No. 10AP-107
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio et al.,	:	
Respondents.	:	

D E C I S I O N

Rendered on June 30, 2011

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

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Letson, Griffith, Woodall, Lavelle, Rosenberg Co. L.P.A., and *Edward L. Lavelle,* for respondent General Motors Corporation NAO Lordstown-Fabricating.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} In this original action, relator, Nora Redman, asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to

vacate its order denying her application for an additional award for alleged violations of specific safety requirements ("VSSR") and to enter an order granting the application.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that the commission properly found that relator did not establish violations of Ohio Adm.Code 4123:1-5-13(C)(7) or 4123:1-5-13(F)(1)(h). The magistrate also found that relator's failure to seek a rehearing prevented her from challenging the conduct of the hearing officer in a mandamus action. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶3} Relator now raises the following two objections to the magistrate's decision:

> 1. The Magistrate's decision as to O.A.C. 4123:1-5-13(F)(1)(h) is an abuse of discretion in that it nullifies the rule.
>
> 2. The Magistrate's decision as to O.A.C. 4123:1-5-13(C)(7) is an abuse of discretion because it nullifies the rule by redefining the actual language of the regulation and thereby ignoring all together key evidence of the violation.

{¶4} The objections raised by appellant fail to raise any new issues and simply reargue the contentions which were presented to, and sufficiently addressed by, the magistrate. Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore,

adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶5} Accordingly, relator's objections to the magistrate's decision are overruled, and the requested writ of mandamus is hereby denied.

Objections overruled;
writ of mandamus denied.

BROWN and DORRIAN, JJ., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Nora Redman,	:	
Relator,	:	
v.	:	No. 10AP-107
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on February 24, 2011

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

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Letson, Griffith, Woodall, Lavelle, Rosenberg Co. L.P.A., and *Edward L. Lavelle,* for respondent General Motors Corporation NAO Lordstown-Fabricating.

IN MANDAMUS

{¶6} In this original action, relator, Nora Redman, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her application for an additional award for alleged violations of specific safety requirements ("VSSR") and to enter an order granting the application.

Findings of Fact:

{¶7} 1. On August 15, 2007, relator sustained a crushing injury to her right foot which required surgical amputation of the foot. On that date, a co-worker driving a battery powered Hyster Fork Truck ran over relator's right foot as she was walking to a water fountain inside a plant operated by respondent General Motors Corporation ("General Motors" or "employer").

{¶8} 2. Following the allowance of the industrial claim (No. 07-854908), relator filed a VSSR application on December 28, 2007.

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

{¶10} 4. On March 26, 2008, the SVIU investigator conducted an on-site investigation at the General Motors plant where the accident had occurred. The investigator photographed the area where the injury occurred and the fork truck involved in the accident.

{¶11} 5. At the on-site visit, the SVIU investigator met with employer's counsel and employer's safety manager, Cynthia Davis. Also, the investigator interviewed relator's co-worker Terrance C. Zirke and obtained his affidavit executed March 26, 2008. The Zirke affidavit avers:

> [Two] General Motors Corporation hired me January 1973 in Production B. At the time of Ms. Redman's injury I was a team member. My job duties consisted of operating the fork lift, stacking parts, and inspecting the parts.
>
> [Three] On the day of Ms. Redman's injury I was backing up the Hyster fork lift. There were partial loads on one side of

the aisle. I was looking at the partial loads and I started to back up. I heard Ms. Redman yelling and I realized the two of us had collided.

[Four] I always look behind me and on both sides of me prior to backing up. I believe I looked prior to backing up when Ms. Redman's injury occurred. I did not see Ms. Redman prior to her injury occurring. I do not know where Ms. Redman was working prior to her injury occurring.

[Five] The fork lift I was operating at the time of Ms. Redman's injury was battery powered. The truck had lights on the front (head lights and yellow flashing lights). These activate automatically when moving forward. The truck has a break light and a blue flashing light on the back. The break light activates when the breaks are activated and the blue flashing light automatically activates when the truck is placed in reverse. All of the lights were working at the time of Ms. Redman's injury.

[Six] The truck also has a horn on the steering wheel. The horn is activated when there is a need such as when a person is walking and not paying attention. Very rarely is the horn activated because of the visual.

[Seven] There were not any problems with the brakes on the truck at the time of Ms. Redman's injury. We only drive the trucks for an hour. I do not remember exactly how long I had been driving the truck prior to Ms. Redman's injury occurring but I believe it may have been forty-five (45) minutes. I did not experience any problems at all with the brakes prior to her injury occurring. If there is a problem with the truck we do not drive the truck.

[Eight] The trucks are inspected at the beginning of every shift by the first driver of the truck. The first driver completes an inspection card. The second driver checks the inspection card. During the inspection the brakes, lights, horn, steering wheel, and lifts are some of the items that are checked. If there is a problem during this inspection the operator notifies the supervisor and the truck is taken out of service.

[Nine] The area Ms. Redman's injury occurred is the CD/line area. This area is an open space and where we set our empty racks. There were not very many racks in this area

> when the injury occurred as we were just finishing a run. There was nothing that would have prevented Ms. Redman from seeing the truck.
>
> [Ten] The area where Ms. Redman's injury occurred is an area where employees walk through. I do not believe a supervisor would say anything to an employee walking through this area. At the time of Ms. Redman's injury the only place there were designated walkways were at the main aisle.
>
> * * *
>
> [Twelve] I have operated company lift trucks since approximately 2004. I received lift truck training prior to operating the lift trucks. The training consisted of safety training on a computer. This covered basics of the truck and how it operated. After each section on the computer there were questions I had to answer and the training video would stop if the question was answered wrong and the topic would be readdressed. We then had practical training where we practiced lifting, stacking loads, and driving the truck. We were observed when we were operating the vehicle and evaluated during this time.
>
> [Thirteen] During the training I was informed both the operator and pedestrians are responsible for area awareness. Prior to operating the lift trucks I was taught as a pedestrian I was to make eye contact with the truck operators to make sure they were aware I was in the area.
>
> [Fourteen] Prior to Ms. Redman's injury I had never struck any object with a truck or had any near misses.
>
> [Fifteen] After Ms. Redman's injury I took a refresher course for operating the lift trucks.
>
> [Sixteen] Ms. Redman was part of the A10 team at the time of her injury. I believe that as a part of this team Ms. Redman would have operated the company lift trucks and would have also gone through the lift truck training.

{¶12} 6. Later, the SVIU investigator interviewed relator and obtained her affidavit executed April 21, 2008. Relator's affidavit avers:

[Two] General Motors hired me October 3, 1977 as an assembly worker. I was an inspector at the time of my injury. My job duties included inspecting products off the line and taking the product off the line for the inspection.

[Three] I was provided with on the job training from an experienced employee. I was shown what to look for during my inspections. The training lasted three (3) days. I understood how to perform my job duties at the time of my injury.

* * *

[Five] At the time of my injury I was in the press room. I was on my way to get water from the water fountain. Terry (last name unknown) was operating a lift truck; he was taking a rack to the line. When I first saw Terry he was picking up a rack to the left of where I was walking. I was approximately forty (40) feet away from where Terry was. The next thing I knew the lift truck ran over my right foot.

[Six] My injury occurred at the CD Line in the press room. I walked from under the elevated area and started walking through the work area to the water fountain. There were racks stacked on the outside of the area I was walking through but there were not any racks stacked in the area where my injury occurred. There were not any view obstructions in this area. There is not any reason why Terry should not have seen me.

[Seven] Terry came from my left when the lift truck struck me. I was looking at the water fountain and I was thinking about water because I was thirsty. I had my safety glasses on and did not see the lift truck coming toward me from my left side. The safety glasses cut down the periphery view.

[Eight] I do not know the make of the lift truck. The lift truck was battery operated. All of the lift trucks are number[ed]; however I do not know the number of the lift truck involved in my injury. The lift truck was moving in reverse at the time of my injury. I did not hear any audible signal prior to my injury occurring. The audible signals (back up beeper) had been removed from all of the lift trucks which were used to service the lines. The lift truck involved in my injury was used to service the lines. I started working in the press room area in

1999 and none of the trucks being used to service the line had audible signals from 1999 until my injury occurred. They have not replaced the audible signals since my injury occurred.

[Nine] The lift trucks they removed the audible signal from had horns. To my knowledge the horns worked. I do not have any reason to believe the horn on the lift truck involved in my injury did not work. The horns are required to be sounded when backing up, going forward, and any time the lift truck is going to be moved. Prior to my injury I did not hear the horn sounded. The employees would sometimes sound the horn prior to making movements. The horn was mostly sounded [sic] to acknowledge pedestrians or to say hello. The supervisors would not say anything if an employee made a movement with the lift truck without sounding the horn first. I am not aware of any employee being disciplined for not sounding the horn prior to moving the lift truck.

[Ten] The lift truck had front lights and a rotating blue light hanging down from the cage on the back of the lift truck. I do not know if these were working at the time of my injury. If they were working, they did not catch my attention.

[Eleven] I do not know if there were any problems with the braking system at the time of my injury. I do not believe Terry attempted to brake and could not. The line I normally work at take the equipment out of service until repairs have been made. There have been instances when equipment has been left in service when it needed repaired; this did not occur often.

[Twelve] I do not know if Terry was trained or authorized to operate the lift truck at the time of my injury. I had operated the company lift trucks prior to my injury. I had completed eight (8) hours of training one time in approximately 2003 or 2004. The training consisted of watching a video, taking a test, and two (2) hours of hands on experience. I had operated the lift trucks prior to being trained on the lift trucks. I had operated the trucks for approximately a week prior to my training. I had been scheduled for the training but due to my job duties I had to operate the truck prior to the training.

> [Thirteen] I do not know if Terry had been involved in any other incidents or near misses with a lift truck prior to my injury. If any employee struck an object or had a near miss while operating the lift truck, the company would send the employee back to training.
>
> [Fourteen] The lift trucks are inspected the first hour of every shift by the employee operating the truck at that time. There is a check off list the employee is required to fill out. Some of the items on the list are the lift, lights, horn, brakes, and the cell. The employee would check the items on the list and check them off as they see they are working during the inspection. I do not know if this was performed on the lift truck involved in my injury.
>
> * * *
>
> [Sixteen] The area in which my injury occurred was a normal area for pedestrian traffic. The company did not have any restrictions for pedestrians not to be in this area. I accessed this area frequently to perform my job duties. The lift trucks are used in and among the work areas.

{¶13} 7. On April 29, 2008, the SVIU investigator issued her report of the investigation. The report states:

> [Three] Ms. Davis advised Ms. Redman's injury occurred within a work area which was designated for loading and unloading * * *; there was a pedestrian walkway Ms. Redman could have used. Ms. Davis further advised Terrance Zirke was positioning the lift truck to pick up an empty basket, as Mr. Zirke started to back up Ms. Redman walked behind the lift truck * * *.
>
> [Four] At the time of Ms. Redman's injury the involved lift truck was equipped with a blue flashing light on the back of the lift truck and lights on the front of the truck * * *. The lift truck was not equipped with an audible reverse signal Ms. Davis reported * * *. The lift truck was equipped with a horn which Mr. Zirke indicated is rarely activated but is used when a pedestrian is walking and not paying attention * * *. The blue flashing light automatically activates when the lift truck is placed in reverse and was in proper working order at the time of the injury * * *, Ms. Davis further reported. The lift

> trucks are inspected at the beginning of each shift by the first operator using the lift truck * * *. There had not been any reported problems with the brakes prior to the injury and the lift truck was inspected after the injury and was found to be in proper working order * * *.
>
> [Five] Ms. Davis revealed Mr. Zirke had been provided with lift truck training prior to Ms. Redman's injury. The training consisted of classroom training and forty (40) hours of on the job training for the lift truck. Mr. Zirke was retrained on September 14, 2007 as a result of the incident * * *. Ms. Davis further revealed employees are retrained every three (3) years for the lift trucks they operate and after any near miss or accident. Mr. Zirke had not been involved in any near misses or incidents prior to Ms. Redman's injury, according to Ms. Davis * * *.
>
> [Six] Ms. Redman was hired October 3, 1977 and was a Product Team Member at the time of her injury, the employer informed Investigator Riley. This position rotated and was responsible for operating the lift trucks, unloading parts, performing quality inspections, and loading blanks on the line * * *. Ms. Redman received on the job training and safety training for the position. She also received lift truck training which consisted of classroom training and practical training on the lift trucks she would operate * * *.

{¶14} 8. On October 28, 2009, relator's VSSR application was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record.

{¶15} 9. Following the hearing, the SHO issued an order denying the VSSR application. The SHO's order states:

> The Injured Worker's first rule in which she contends that the Employer violated is Ohio Adm. Code 4123:1-5-13(C)(7). Said sections reads as follows:
>
> > (C) General requirement for motor vehicles and mobile mechanized equipment.
> >
> > (7) All motor vehicles operating within the confines of the owner's property, shall be equipped with an

> audible or visual warning device, in an operable condition, activated at the operator's station.

The Injured Worker contends that the Employer was obligated under Ohio Adm. Code Section 4123:1-5-13(C)(7) that the equipment used i.e. tow motor be equipped with a visual warning device; emphasizing the word "visual" and noting that since said warning device was not visual to the injured worker on the date of injury at the time of injury, said section had been violated.

The Employer contends that the requirement of Ohio Adm. Code Section 4123:1-5-13(C)(7) was applicable and had been met as the tow motor which hit the Injured Worker was equipped with a blue flashing light which automatically activates when the tow motor is placed in reverse noting that it was in proper working order at the time of injury herein. The Employer also contends that the blue flashing light is visible as it hangs down from the cage on the back of the tow motor.

Clearly the evidence shows that there was no violation of said code section. Terrance C. Zirke the tow motor operator's affidavit as well as all testimony at hearing indicate that all of the lights including the blue flashing light was working at the time of the Injured Worker's injury. There was no evidence indicating otherwise. Furthermore, based upon the photographs taken from the Bureau of Workers' Compensation Investigation Unit regarding the tow motor in question, indicates that the blue flashing light was clearly visible as it is placed on top of the tow motor, hanging down from the cage on the back of the tow motor. Compliance with Ohio Adm. Code Section 4123:1-5-13(C)(F) only mandates that either the tow motor be equipped with an audible or visual warning device in operable condition. Clearly, noting that the tow motor having a blue flashing light hanging down from the cage on the back of the tow motor, which was properly working at the time of injury which is all the rule requires, no such violation of Ohio Adm. Code Section 4123:1-5-[13](C)(7) can be found.

Injured Worker's second and final subsection in which she alleges as being violated is Ohio Adm. Code Section 4123:1-5-13(F)(1)(h) which reads as follows:

(F) Powered industrial trucks

(1) General requirements

(h) Only employees who have been trained and are authorized by their employer shall be required to operate a powered industrial truck.

The Injured Worker contends that the Employer was obligated under Ohio Adm. Code Section 4123:1-5-13(F)(1)(h) to properly train all their tow motor operators noting and implying that the tow motor operator that struck the Injured Worker Mr. Terrance C. Zirke was not operating the tow motor properly as trained and as thus violated said section.

The Employer contends that the requirement of Ohio Adm. Code Section 4123:1-5-13(F)(1)(h) was applicable and was met as the tow motor operator that struck the Injured Worker Terrance Zirke was trained to operate the tow motor as all tow motor operators at the facility including Mr. Zirke had completed eight hours of tow motor training, watched a video, had passed a test, and performed two hours of hands-on experience prior to the injury which took place on 08/15/2007.

Clearly the evidence shows that there was no violation of said code section. Terrance Zirke's own affidavit indicates that he received and completed tow motor training prior to the Injured Worker's accident. He further indicates in said affidavit that said training required him to complete safety training on the computer, practical training where he was tested and evaluated in lifting, stacking loads and driving the fork truck. Again there is no evidence to the contrary or that he was not trained to operate a tow motor. Compliance with Ohio Adm. Code 4123:1-5-13(F)(1)(h) only mandates that the tow motor operator be trained prior to being authorized to operate said equipment. Clearly noting that Terrance Zirke, having completed tow motor training which is all the rule requires, no such violation of Ohio Adm. Code 4123:1-5-13(F)(1)(h) can be found.

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

{¶17} 11. On December 22, 2009, another SHO mailed an order denying the motion for rehearing:

> It is hereby ordered that the Motion for Rehearing filed 11/17/2009 be denied. The Injured Worker has not submitted any new and relevant evidence nor shown that the order mailed 11/05/2009 was based on an obvious mistake of fact or on a clear mistake of law.

{¶18} 12. On February 4, 2010, relator, Nora Redman, filed this mandamus action.

Conclusions of Law:

{¶19} Three issues are presented: (1) whether the commission abused its discretion in determining that relator failed to prove a violation of Ohio Adm.Code 4123:1-5-13(C)(7) relating to an "audible or visual device," (2) whether the commission abused its discretion in determining that relator failed to prove a violation of Ohio Adm.Code 4123:1-5-13(F)(1)(h) relating to authorization to operate a powered industrial truck, and (3) whether the hearing officer's conduct of the hearing requires this court to order a new hearing.

{¶20} The magistrate finds: (1) the commission did not abuse its discretion in determining that relator failed to prove a violation of Ohio Adm.Code 4123:1-5-13(C)(7), (2) the commission did not abuse its discretion in determining that relator failed to prove a violation of Ohio Adm.Code 4123:1-5-13(F)(1)(h), and (3) relator failed to exhaust his available administrative remedies with respect to the issues he attempts to raise here regarding the conduct of the hearing.

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

{¶22} Chapter 4123:1-5 of the Ohio Administrative Code is captioned "Workshop and Factory Safety."

{¶23} Thereunder, Ohio Adm.Code 4123:1-5-13 is captioned "Motor vehicles, mobile mechanized equipment, and marine operations."

{¶24} Ohio Adm.Code 4123:1-5-13(C) provides "General requirements for motor vehicles and mobile mechanized equipment." Thereunder, the following specific safety rule is provided:

> (7) All motor vehicles operating within the confines of the owner's property shall be equipped with an audible or visual warning device, in an operable condition, activated at the operator's station.

{¶25} Ohio Adm.Code 4123:1-5-13(F) provides the caption "Powered industrial trucks." Ohio Adm.Code 4123:1-5-13(F)(1) provides the caption "General requirements." Thereunder, the following specific safety rule is provided:

> (h) Only employees who have been trained and are authorized by their employer shall be required to operate a powered industrial truck.

{¶26} It is well-settled that a VSSR award is deemed a penalty to the employer subject to the rule of strict construction with all reasonable doubts concerning the interpretation of the safety standard to be construed against the applicability of the standard to the employer. *State ex rel. Watson v. Indus. Comm.* (1986), 29 Ohio App.3d 354; *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170.

{¶27} It is also firmly established that the determination of disputed factual situations as well as the interpretation of a specific safety requirement is within the final jurisdiction of the commission, and subject to correction in mandamus only upon a

showing of an abuse of discretion. *State ex rel. Roberts v. Indus. Comm.* (1984), 10 Ohio St.3d 1; *State ex rel. Allied Wheel Products, Inc. v. Indus. Comm.* (1956), 166 Ohio St. 47; *State ex rel. Volker v. Indus. Comm.* (1996), 75 Ohio St.3d 466.

{¶28} Of course, the commission's authority to interpret its own safety rules is not unlimited. Strict construction does require that the commission's interpretation be reasonable. *State ex rel. Martin Painting & Coating Co. v. Indus. Comm.* (1997), 78 Ohio St.3d 333, 342. The commission may not effectively rewrite its own safety rules when it interprets them. *State ex rel. Lamp v. J.A. Croson Co.* (1996), 75 Ohio St.3d 77, 81.

Ohio Adm.Code 4123:1-5-13(C)(7)

{¶29} The Hyster Fork Truck at issue was equipped with a blue flashing light that was automatically activated when the vehicle was placed in reverse gear. The blue flashing light was located on the back of the vehicle. The vehicle also had a horn that could be freely activated by the driver. However, the fork truck did not have a so-called "backup alarm beeper" that would automatically activate when the vehicle was placed in reverse.

{¶30} For compliance with Ohio Adm.Code 4123:1-5-13(C)(7), General Motors relied exclusively upon the blue flashing light. The reason for choosing a "visual warning device" rather than an "audible" device was explained at the hearing during the testimony of Cynthia Davis. Davis testified that the area where relator worked on the date of her injury is designated a "high noise area" of the plant where the employees are required to wear hearing protection.

{¶31} During the hearing, relator testified that she did not see a blue flashing light prior to being struck by the fork truck.

{¶32} During direct examination by her counsel, relator testified:

> Q. Okay. In the investigative report they mention a blue light. Is that what we're talking about?
>
> A. Yes.
>
> Q. That particular light, if you're standing behind the forklift, let's say ten feet and your back is to the forklift, can you even discern that there is a blue light there?
>
> A. No.
>
> Q. Does it shine in such a way that there's enough either ambient light out of the light or any other reflection off of anything around it that let's you know the light is even there?
>
> A. No.
>
> * * *
>
> Q. Did you ever see any kind of blue light prior to being hit?
>
> A. No.
>
> Q. Did you have any warning at all that he was even there?
>
> A. No.

(Tr. 17, 24.)

{¶33} Also, relator responded to questions from the hearing officer:

> HEARING OFFICER: Did it have a blue light?
>
> [RELATOR]: Yes.
>
> HEARING OFFICER: It says or; okay? It did. Was it working?
>
> [RELATOR]: I don't know.

HEARING OFFICER: Operable condition.

[RELATOR]: I don't know because I didn't see it.

(Tr. 18.)

{¶34} Moreover, in her affidavit, relator avers:

[Seven] Terry came from my left when the lift truck struck me. I was looking at the water fountain and I was thinking about water because I was thirsty. I had my safety glasses on and did not see the lift truck coming toward me from my left side. The safety glasses cut down the periphery view.

* * *

[Ten] The lift truck had front lights and a rotating blue light hanging down from the cage on the back of the lift truck. I do not know if these were working at the time of my injury. If they were working, they did not catch my attention.

{¶35} According to relator:

The long and short of the Staff Hearing Officer's decision is that if there is any light on the tow motor and it is working, that is all the regulation requires. In reality, the regulation requires something completely different. * * *

* * *

It does not say, as interpreted by the Staff Hearing Officer, any shining light. It requires a "warning device". Common sense therefore dictates that any such device must inherently be able to "warn" in order to be a "warning device". The essential question is not whether a light is present and working, but whether it warns, or even has the ability to warn. * * *

* * *

The mere presence of a blue light on a tow motor cannot be construed as a "visual warning device", if it cannot be seen under normal operating conditions. The inquiry as to whether the visual warning device requirement has been met does not end by asking the simple question, "is there a light on the

> machine, and is it turned on". The blue light must have the capability of providing a warning and, in order to do that, it must have the capability of being seen.

(Relator's brief, at 14-16;emphasis sic.)

{¶36} Notwithstanding relator's argument, the magistrate does not find an abuse of discretion.

{¶37} To begin, while relator's failure to see the blue flashing light prior to her accident is indeed a factor for the commission to consider in determining whether the employer complied with the safety rule, it need not be conclusive on the matter, as relator here seems to suggest.

{¶38} Relator's argument is undermined by the hearing officer's reliance upon the photographs of the fork truck taken by the SVIU investigator at the on-site visit. Reliance upon the photographs indicates that, contrary to relator's assertion, the SHO considered more than just the undisputed fact that there was a flashing blue light that was in working order at the time of the accident. In fact, the SHO noted in his order that the photographs indicate that "the blue flashing light was clearly visible as it is placed on top of the tow motor, hanging down from the cage on the back of the tow motor."

{¶39} The commission, through its SHO, like any fact finder in any administrative, civil or criminal proceeding, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence. *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶69.

{¶40} As the employer points out here, the purpose of specific safety requirements is to provide reasonable, not absolute safety for employees. *State ex rel. Jeep v. Indus. Comm*. (1989), 42 Ohio St.3d 83, 84. Thus, that the safety device at issue

failed to actually warn and prevent the accident does not mandate a finding of a failure to comply with the safety rule.

{¶41} Based upon the above analysis, the magistrate concludes that the commission did not abuse its discretion in finding that the employer did not violate Ohio Adm.Code 4123:1-5-13(C)(7).

Ohio Adm.Code 4123:1-5-13(F)(1)(h)

{¶42} As it turns out, relator had also been trained by her employer to operate a fork truck (forklift).

{¶43} During direct examination, relator testified:

> Q. Okay. Before you began operating a forklift in that system, that team system, did they give you any training on the forklift?
>
> A. Yes.
>
> Q. What kind of training did they give you?
>
> A. We had three days of training where we went off site and we learned the fundamental of the forklift, we learned the rules and regulation and we learned how to operate the forklift itself.
>
> Q. Okay. Did they actually have you running the forklift for a period of time; and, if so, how long?
>
> A. Yes. And it was in a designated area. We ran the forklift in a designated area, and that took a day.
>
> Q. Okay. So at the end of the three days did you get certified to run the forklift?
>
> A. Yes.
>
> Q. And thereafter did you run a forklift on a daily basis?
>
> A. Yes.

Q. Okay. As part of that training process in operating this forklift, did you ever operate a forklift either on the job as a team member or during the training that had a back-up beeper?

A. No.

Q. Okay. So none of the forklifts that you're now operating have a back-up beeper; is that correct?

A. Correct.

Q. Okay. During the course of being trained on a forklift, did they teach you anything about using the horn on the forklift?

A. Yes.

Q. What did they teach you about using the horn?

A. The horn was supposed to be used when you back up, when you're coming to an intersection, when you see pedestrian in the area, you supposed to blow your horn and let them know you coming.

* * *

Q. * * * Nora, with respect to the -- you then began operating this forklift; is that right?

A. Yes.

Q. When you began operating this forklift, did you always hit the horn when you backed up?

A. No.

Q. Did you ever do it?

A. No.

Q. Why didn't you do it?

A. It was never enforced.

Q. Did you begin doing it and were ever told by a supervisor not to do it?

A. Yes.

Q. When did that happen? Tell us about that.

A. We was -- A10 was working and CD was working and we was, you know, in and out because of the tight area and we would blow the horn and we would make noise and the foreman asked us to stop blowing the horn.

HEARING OFFICER: Okay.

Q. So you're backing up now without blowing the horn; is that correct?

A. Yes.

Q. The other members of your team, did they blow the horn when they backed up?

A. No.

Q. Ever?

A. No.

Q. In the two years that you worked as a team before you were injured, did you ever hear a team member blow the horn when they backed it up?

A. Not a team member. A person that was on the lane that was a truck driver, they would blow their horn.

Q. Okay. Did you also work on composite teams where you would work with other members on kind of ad hoc teams that were put together to do other jobs?

A. Yes.

Q. When you did that, when you were working with other team members on ad hoc jobs, did anybody ever blow the horn when they backed it up?

A. No.

Q. On the day that you were hurt, were you on a regular team or were you on an ad hoc team?

A. I was on an ad hoc team.

Q. So the members of -- the man that ran over you who was the team member wasn't a regular team member with you; is that correct?

A. Correct.

Q. Did he blow the horn at all before he ran over your foot or leg?

A. No.

Q. Now, did you ever see any supervisor either write someone up or discipline someone for driving a forklift backing it up and not hitting the horn?

A. Never.

Q. Never happened?

A. Never.

(Tr. 14-15, 20-23.)

{¶44} During her direct examination, safety supervisor, Cynthia Davis testified about the training that Zirke received prior to the accident at issue:

Q. --I think it's been established, but just for the record, Mr. Zerkey [sic] went through training and was properly trained according to the General Motors Joint Health and Safety Training Guide; is that correct?

A. That's correct.

Q. And is his statement to the training -- briefly explain the training. What happens when these people are trained?

A. It's a formal training done in our safety training area, which is an enclosed area. It's done for three days. Part of it computer, part of it hands-on. At the end of that three-day period the person is back out on the floor. Now, to continue that training there's a 40-hour on-the-job training requirement that the individual has to do that a supervisor certifies that the person has completed 40 hours of on-the-job training different areas of the plant to drive the fork. At that point in time they are given a license.

We also have a mandatory recertification of a fork truck license every three years. So everybody is trained initially in the basic class and then every three years to maintain their certification, their license for the in-plant driving they are trained every three years.

Q. At the time of this accident Mr. Zerkey's [sic] training was still current?

A. That's correct.

Q. He didn't have to be recertified?

A. That is correct.

Q. And there's training records that we've supplied the investigator that in fact show he was trained; correct?

A. That's correct.

Q. And even though I was the one that said it, the material that's used in this training, that is put together by both the UAW and General Motors National Joint Committee and Health and Safety?

A. That is correct.

Q. And the same training is used in all General Motors plants?

A. That's correct.

Q. And was there any record of Mr. Zerkey [sic] ever being involved in an accident or collision prior to this incident?

A. There was no record of him being involved in any incidents.

Q. In accord with General Motors policy, after this accident was he required to be retrained?

A. Yes, he was.

(Tr. 43-45.)

{¶45} According to relator:

The Hearing Officer totally ignores the language of the regulation itself, which states, "Only employees that have been trained and are authorized…"

The Staff Hearing Officer's * * * interpretation focuses only on initial training. He reads out of the regulation entirely the words, "and are authorized".

The legal error of a Staff Hearing Officer applying only part of the language of the regulation and ignoring the rest, which does not suit his interpretation, is demonstrated directly by the facts of this case, facts which the Record shows the Staff Hearing Officer simply chose to ignore.

First, unlike the rest of the Lordstown Complex, none of the tow motors in the press room area had any back up beepers; therefore, for the most dangerous operation of a forklift, namely, backing up, the only "audible warning device" would be the operator beeping the horn.

Second, recognizing the dangerousness of backing up without an audible warning, it is uncontested that G.M.'s initial training to all team members emphasized beeping the horn at all times when backing up.

* * *

It must be presumed that during the forty hour on the job training period before the operator is given a license and officially authorized by G.M. to operate the equipment, the prospective operator beeps his horn every time he backs it up, as required by the formal training in the safety area. If not, a supervisor could not "certify" he was properly trained and given a license.

> Third, the uncontested evidence is that the operators must be retrained if they fail to operate a forklift as initially trained.
>
> Fourth, the uncontested evidence from Nora Redman was that, after the initial training, her supervisor ordered he[r] to stop using the horn when backing up, thereby immediately retraining her on the plant floor to do the opposite of what she was "trained and certified (authorized)" to do, and further, all other team members also failed to blow the horn on backing up for years.
>
> * * *
>
> In conclusion, two things are evident with respect to the Staff Hearing Officer's decision interpreting, and applying the training regulation. First, the Staff Hearing Officer issued his decision before the transcript was even available. He therefore had already made up his mind prior to the Record hearing that training means initial training and no more. This is contrary to all of the uncontradicted evidence as to G.M.'s own training program, including the initial three day program, forty hour on the job program before certification and, most important, the requirement for retraining if supervisors recognize that the operators were not following the training in the actual job performance. With respect to Nora Redman's injury, since there is no backup beeper on the tow motor the only "audible warning device" on this forklift would therefore be when the operators are beeping the horn on backing up. Since they are "retrained" on the plant floor not to beep the horn by the same supervisors who initially license them to blow the horn, any initial training is immediately nullified. The Staff Hearing Officer's * * * decision that training and authorization ends with initial training is simply illogical. It totally ignores a major purpose of the training requirement, namely, to prevent co-workers from being run over when the tow motors are backed up in plant areas where others are working. It further amounts to the kind of interpretational rewriting, and nullification of the regulation which is an abuse of discretion * * *.

(Relator's brief, at 11-14.)

{¶46} Thus, relator asserts as fact that during the formal three-day training period, Zirke must have been told to always sound the horn before driving the fork truck in

reverse. Then, after being certified by his employer to operate a fork truck, Zirke was allegedly ordered by his supervisors on the plant floor not to sound the horn before driving in reverse. (It should be noted that Zirke did not testify at the hearing.) According to relator, when Zirke obeyed his supervisors by not sounding his horn before driving in reverse, his formal training was effectively nullified and he was no longer authorized to operate the fork truck under the safety rule.

{¶47} This tortured argument lacks merit. To begin, the commission was not required to find relator's testimony credible that she was trained by her employer to always sound the horn of the fork truck prior to driving in reverse. Nor was the commission required to infer from relator's recollection of her formal training what Zirke was trained to do or not to do. In short, contrary to relator's assertion, there is no presumption that the General Motor's fork truck training required the drivers to sound the horn before driving in reverse.

{¶48} Moreover, even if the commission were to accept as fact that General Motor's employees were instructed to sound the horn before driving a fork truck in reverse, and that the instruction was later countermanded by supervisors, it does not follow from the language of the safety rule that employer authorization to operate the truck is nullified. The rule simply does not address the matter being asserted here by relator.

{¶49} In short, relator attempts unsuccessfully to read a lot into the specific safety rule that just is not there.

The Hearing Officer's Conduct of the Hearing

{¶50} The record shows that the hearing before the SHO on the instant matter was scheduled for October 28, 2009 at 1:30 p.m. At the outset of the hearing, the SHO told counsel that he was scheduled to begin another hearing on another matter at 2:30 p.m. and, thus, the hearing on the instant matter would end at 2:30 p.m.

{¶51} Following the hearing officer's addressing the preliminary matters, relator's counsel was permitted direct examination of relator.

{¶52} The transcript clearly shows that the hearing officer allowed the direct examination of relator to go on for quite some time. Finally, the SHO indicated that it was time for employer's counsel to proceed with his witness. At that point, relator's counsel stated his objection "that I don't get to ask her anymore questions." Then relator's counsel told the hearing officer: "And I have another witness too."

{¶53} After this exchange, employer's counsel was allowed direct examination of Cynthia Davis. Then relator's counsel was permitted cross-examination of Davis.

{¶54} Following his cross-examination of Davis, relator's counsel addressed the hearing officer:

> [RELATOR'S COUNSEL]: Understand, I would proffer another witness who worked alongside Nora, testify exactly to what she just said and then some.
>
> HEARING OFFICER: Fine. Make your argument.
>
> [EMPLOYER'S COUNSEL]: Would she testify that there was no blue strobe light? Would she testify that they weren't trained?
>
> [RELATOR'S COUNSEL]: I said that she would testify just --

> [EMPLOYER'S COUNSEL]: She would testify to the blue strobe light and she would testify that they were trained; correct?
>
> [RELATOR'S COUNSEL]: She would testify --
>
> [EMPLOYER'S COUNSEL]: Correct? Is that two things she could testify to?
>
> [RELATOR'S COUNSEL]: She would testify --
>
> [EMPLOYER'S COUNSEL]: Is it?
>
> [RELATOR'S COUNSEL]: Do you mind?
>
> [EMPLOYER'S COUNSEL]: It's a simple yes or no question, * * *.
>
> [RELATOR'S COUNSEL]: She would testify to the fact -- she would testify to the fact that unless you're looking directly at that blue light, very close to it, you can't even see it's there.
>
> HEARING OFFICER: All right. You got anything else you want to add? I got to move on.
>
> [RELATOR'S COUNSEL]: No.

(Tr. 54-55.)

{¶55} Following the above exchange, the hearing officer permitted counsel to make their concluding or final arguments.

{¶56} The transcript of the October 28, 2009 hearing clearly shows that, if relator's counsel had further relevant testimony to elicit from relator herself, no proffer of such further testimony was made at the hearing.

{¶57} Moreover, the record contains a seven page memorandum from relator's counsel in support of relator's motion for rehearing. A review of that memorandum indicates that relator's counsel did not raise as an issue on rehearing his objection

regarding eliciting further testimony from relator herself nor did relator's counsel raise as an issue the proffer of testimony regarding another witness.

{¶58} Because relator failed to raise these issues in her motion for rehearing, she is precluded from raising them here in mandamus. Relator's failure to seek administrative rehearing on the issues regarding the elicitation of further hearing testimony constitutes a failure to exhaust an available administrative remedy which bars review of those issues in mandamus. *State ex rel. Koch v. Indus. Comm.*, 63 Ohio St.3d 747, 1992-Ohio-101, rehearing denied, 64 Ohio St.3d 1433.

{¶59} Accordingly, for all of 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).