

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Teresa A. McKinney, :
Relator, :
v. : No. 10AP-1170
[CSP of Ohio, LLC] and : (REGULAR CALENDAR)
Industrial Commission of Ohio, :
Respondents. :
:

D E C I S I O N

Rendered on December 6, 2012

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Theodore A. Bowman, for relator.

Vorys, Sater, Seymour and Pease, LLP, and Carl D. Smallwood, for respondent CSP of Ohio, LLC.

Michael DeWine, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, Teresa A. McKinney ("relator"), commenced this original action alleging that her employer, respondent CSP of Ohio, LLC ("company"), violated a specific safety requirement ("VSSR") entitling her to an additional award of workers' compensation benefits. Relator requests that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order that denied her a VSSR award and to enter an order granting her a VSSR award.

{¶ 2} This court assigned the matter to a magistrate pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision that included findings of fact and conclusions of law and a recommendation that this court deny the requested writ. The magistrate's decision is appended to this decision.

{¶ 3} For the reasons that follow, we adopt as our own the magistrate's decision, including the findings of fact and conclusions of law, and deny the requested writ of mandamus.

Relator's Objections

{¶ 4} Relator has filed two objections to the magistrate's decision. Both the commission and the company have filed memoranda contra. We summarize relator's objections as follows: (1) the magistrate should have found that the commission abused its discretion in finding that Ohio Adm.Code 4123:1-5-11(E)(1) through (6) did not apply to her claim, and (2) the magistrate should have applied the precedent established in *State ex rel. Advanced Metal Precision Prods. v. Indus. Comm.*, 111 Ohio St.3d 109, 2006-Ohio-5336, and found that her injury occurred in violation of Ohio Adm.Code 4123:1-5-11(E).

{¶ 5} In considering relator's objections, we are mindful that the Supreme Court of Ohio has characterized a VSSR award as a penalty. *State ex rel. Glunt Industries, Inc. v. Indus. Comm.*, 132 Ohio St.3d 78, 2012-Ohio-2125, ¶ 12, citing *State ex rel. Burton v. Indus. Comm.*, 46 Ohio St.3d 170, 172 (1989). The commission must, therefore, strictly construe a specific safety regulation in the employer's favor and all reasonable doubts concerning the applicability of a specific safety regulation must be resolved in the employer's favor. *Id.*

{¶ 6} Moreover, the commission has the discretion to interpret its own rules, including Ohio Adm.Code 4123:1-5-11(E). *State ex rel. Devore Roofing & Painting v. Indus. Comm.*, 101 Ohio St.3d 66, 2004-Ohio-23, ¶ 22, citing *State ex rel. Harris v. Indus. Comm.*, 12 Ohio St.3d 152, 153 (1984). If, however, the application of those rules to a unique factual situation gives rise to a patently illogical result, common sense should prevail. *Id.* This court may not issue a writ of mandamus in the absence of a finding that the commission abused its discretion. *State ex rel. V & A Risk Servs. v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 11AP-742, 2012-Ohio-3583, ¶ 18 ("Mandamus will not lie

to substitute a court's discretion for that of an administrative official unless the administrative official's refusal to perform the act constitutes an abuse of discretion.").

{¶ 7} Consistent with this precedent, the magistrate opined that the determinative question in this case is whether the commission's interpretation of the specific safety regulation at issue gives rise to a patently illogical result.

{¶ 8} In this case, the specific safety regulation at issue is Ohio Adm.Code 4123:1-5-11(E), which provides that every hydraulic or pneumatic press must be designed to prevent a worker's hands or fingers from entering the "danger zone" during the press's "operating cycle." As noted by the magistrate, Ohio Adm.Code 4123:1-5-01(B)(34) and (102) provide definitions for the terms "danger zone" and "press." In *Advanced Metal*, the court judicially defined the term "operating cycle" to include "both intentional and accidental *press activation* by the machine's operator." (Emphasis added.) *Advanced Metal* at ¶ 1.

{¶ 9} In its first objection, relator argues that the commission produced an illogical result when it determined that a die or mold, when installed in a press for the purpose of forming or shaping a specific object, is a separate and distinct machine rather than a part of the press. The commission determined that the operating cycle of press #5 to create the completed product was separate from the mold's operating cycle, which used the foot pedal to activate the ejection pin to allow removal of the completed product. Therefore, the commission determined that the mold was not operating as a press at the time of the injury. That conclusion was consistent with the employer's explanation as detailed in the December 17, 2008 investigative report of the Ohio Bureau of Workers' Compensation, Safety Violations Investigation Unit. That report described relator as stating that the accident occurred *just after the press had finished its cycle* and had come open, whereupon relator stepped on a foot pedal to activate the ejector that raised the completed product. The ejector failed to properly stay in the raised position until released by another worker, but instead slammed down on her hand as she reached in to remove the completed product.

{¶ 10} It is our responsibility to resolve all reasonable doubts concerning the applicability of Ohio Adm.Code 4123:1-5-11(E) in the employer's favor, and to defer to the commission's interpretation of its own specific safety regulations. In light of that

responsibility, we adopt the magistrate's conclusion that it was not patently unreasonable for the commission to determine that the operating cycle of the press was "separate and distinct" from the operating cycle of the ejector mechanism of the mold. We therefore overrule relator's first objection.

{¶ 11} In her second objection, relator contends that the precedent established in *Advanced Metal* controls this case. We disagree, as did the magistrate. The court in *Advanced Metal* defined the term "operating cycle" for purposes of Ohio Adm.Code 4123:1-5-11(E) to include "all operator-activated *press* activity." (Emphasis added.) *Id.* at ¶ 20. As discussed above, the commission found that operation of the press is distinct from operation of the ejector mechanism, and the commission's determination was not patently illogical or contrary to common sense. Accordingly, it was not unreasonable for the commission to determine that relator's injuries were not the result of operator-activated *press* activity, but rather the result of operator-activated *ejector* activity. We therefore overrule relator's second objection.

Conclusion

{¶ 12} We have independently reviewed the record and overrule relator's two objections. Unless and until the commission adopts a specific safety regulation concerning hydraulic presses that includes within its scope separate equipment inserted into a press, or changes its interpretation of its current regulation in that manner, we are required to defer to the commission's current interpretation. That interpretation was within the range of a sound exercise of discretion.

{¶ 13} Having, therefore, found no errors on the face of the magistrate's decision, we adopt that decision as our own, including the findings of fact and conclusions of law contained in it, and deny the requested writ of mandamus.

Objections overruled; writ of mandamus denied.

BROWN, P.J., and CONNOR, J., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Teresa A. McKinney,	:	
Relator,	:	
v.	:	No. 10AP-1170
Continental Structural Plastics, Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on May 17, 2012

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and Theodore A. Bowman, for relator.

Vorys, Sater, Seymour and Pease LLP and Carl D. Smallwood, for respondent Continental Structural Plastics, Inc./CSP of Ohio, LLC.

Michael DeWine, Attorney General, Colleen C. Erdman and John Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 14} In this original action, relator, Teresa A. McKinney, 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 a VSSR award against respondent CSP of Ohio, LLC.

Findings of Fact:

{¶ 15} 1. On August 13, 2007, relator sustained traumatic amputations of the tips of her right third and fourth fingers while employed as a "de-flasher" on press number five at a plant operated at the time by Continental Structural Plastics, Inc. Apparently, CSP of Ohio, LLC ("CSP") is the successor to Continental Structural Plastics, Inc.

{¶ 16} 2. Relator, whose name at the time of the injury was Teresa A. Long, filed a claim for workers' compensation benefits. The industrial claim (No. 07-851101) was allowed by the commission.

{¶ 17} 3. On June 6, 2008, relator filed an application for a VSSR award.

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

{¶ 19} 5. On September 30, 2008, the SVIU investigator conducted an on-site investigation at the plant operated by CSP. On that date, the investigator obtained photographs of the press which he observed on that date.

{¶ 20} 6. On October 15, 2008, the investigator obtained an affidavit from relator which she executed on that date. The affidavit states:

[Two] I began my employment with Continental Structural Plastics on March 3, 2006[.] I was hired as a de-flasher and I was employed as a reliever at the time of my injury. I had been performing the job of reliever for approximately one year at the time of my injury[.] My job duties as a reliever involved relieving coworkers for their breaks[.] I relieved coworkers from various machines throughout the company during my normal work day[.] I received on-the-job training for my job duties as a reliever[.]

[Three] On August 13, 2007[,] I reported to work for third shift and checked the board for my job assignment[.] I saw that I would be relieving other coworkers throughout my shift[.] At approximately 12 00 a.m., I reported to Press #5 to relieve Nona Booze, de-flasher[.] Press #5 is a hydraulic press used in the compression molding of fenders for a Mercury Mountaineer[.] Nona only mentioned to me not to use the top cooling rack because of missing screws before she left for her break[.] Jeff Sheldon was assigned to the press as the press operator and he was placing the raw material into the press[.] My job was to remove the completed part from the press[.]

[Four] The press had just finished its cycle and came open[.] I stepped on the foot pedal to activate the ejector that raised the completed part[.] The ejector was supposed to stay in the raised position until the press operator hit a button on the control stand[.] I stepped off the foot pedal and as I was reaching into the press with both of my hands to remove the completed part, the ejector came slamming down and my middle and ringer fingers on my right hand were smashed between the part and the mold[.] I instinctively pulled my hand free from the press and Jeff Sheldon called for help[.] I saw another coworker driving by in a golf cart and I asked him to drive me to the first aid room[.] An ambulance was called and I was transported to Blanchard Valley Hospital for medical treatment.

[Five] The ejector on the press was supposed to stay in the raised position until the press operator hit a button on the control stand[.] The press was not setup this way at the time of my injury[.] The ejector stayed up like it was supposed to when I removed my foot from the foot pedal and then slammed down on my hand as I was removing the part[.] I had been relieving coworkers on press #5 for months and this was the first time the ejector then slammed down after removing my foot from the foot pedal[.] I found out after my injury that they were having problems with the setup of press #5 before I relieved the de-flasher[.] I was not warned of the problems with the setup of the press prior to my injury.

[Six] The press was not equipped with guards to prevent my hand from being trapped in between the part and the mold in the press[.] The press is equipped with safety lights and the press should not move when the light beam is broken[.] However, the safety lights failed to prevent my injury from occurring[.]

{¶ 21} 7. The investigator also obtained a so-called "incident report" that was prepared by CSP's Human Resources Supervisor Mark Senecal. The incident report states in part:

At approximately 12 30am on August 13th, 2007, I received a phone call from Jim Steele at the CSP North Baltimore location. He was calling to inform me that Teresa Long had cut some fingers off at press 5 and he was requesting that I come to the plant[.]

I arrived at the plant shortly after 1 am[.] I inquired as to the status of the injured worker[.] She had been transported by EMS to Blanchard Valley Regional Hospital[.] Her boyfriend had been notified and her belongings taken care of[.] I spoke with Brett Smith who provided the initial first aid to the injured worker[.] He stated that he was able to keep the employee fairly calm while they waited for the EMS by keeping her involved in the treatment he was administering, such as holding cold compresses over the injury[.]

Brett, Jim Steele and I walked over to press 5[.] It had been secured with caution tape and I was told that no one had been allowed near it since the time of the injury[.] The mold in the press at the time was a Mountaineer fender[.] That particular mold has a slide mechanism on it that is used to eject the parts[.] I asked Brett to go up to the press and operate the foot pedal[.] When he depressed the foot pedal the slide came up[.] When he took his foot off of the pedal the slide came back down[.] I immediately recognized that this was not how the ejection system should have been set up[.] The slide should not come back down until a signal is sent from the T-stand which is farther away from the mold[.]

As part of the investigation, I took statements from Mike Greene, Nona Booze, Brett Smith, Jeff Sheldon and Jim Steele[.]

Nona Booze - I spoke with Nona shortly after the incident[.] She was assigned to the press as a Deflasher[.] She was feeling very bad and guilty about the injury[.] She stated that she had not mentioned to Teresa that the ejection on the press wasn't operating properly when Teresa came to relieve her[.] She did mention to her that she was not using the top cooling stand because the mounting screws were missing and she feared that it might fall and cause an injury[.] Nona stated that she recognized immediately, as she was pulling the first part out of the press at the start of the shift, that the ejection system was not set up properly[.] She also mentioned that there was an issue with the deflash stand which was taken care of by the production tender[.] She noted that she contacted her supervisor, Brett Smith about the ejection system and the cooling nest[.] He told her that he would get to her as soon as possible because he was working on an issue at press 1[.] While waiting for Brett, she and Jeff continued to run the press[.] After running several parts, Brett showed up and Nona pointed out the loose cooling nest. Brett told her not to use it until it was

repaired[.] She states that as she went to show Brett how the ejection system was working that he got another call and as he walked away he told her he'd contact maintenance to check it out[.] The press continued to run[.] Brett did not tell her to stop running and she did not ask if the press should be stopped[.]

* * *

Brett Smith - Brett states that he was notified by Nona early in the shift that the ejection system at press 5 wasn't operating properly because she had to hit the foot pedal for the ejectors to stay up[.] He states that he called Jim Steele on the radio to see if there was something Jim could do about it[.] Jim told him that he would take a look at it[.] Jim was already working on an issue at press 10[.] Brett states that the press was running when he went to talk to Nona about her concerns and that he observed numerous times, as he walked by, that the press continued to run[.] He stated to me that he did not recognize Nona's concern as a safety issue[.] He thought it was more of a convenience issue, that she was requesting the use of the T-stand over the use of the foot pedal[.] He states that he had observed the press running both ways in the past[.]

* * *

Observation - After reading their statements and interviewing both Nona and Brett, I do not feel that either one of them had an understanding of the seriousness of the issue identified by Nona[.] I do not think that Nona identified her concern as a serious safety issue, but more as a programming issue based upon her previous experience in running that particular job in that particular press[.] If she had recognized the seriousness of the issue more from a safety standpoint than from a programming standpoint then I'm sure she would have chosen to stop running[.] She is thought of as a very safety conscious employee[.] By the same token when Brett was notified of the programming issue by Nona it never crossed his mind that an employee safety was a part of the issue[.] Had he recognized it as a safety issue he would have stopped production[.] He only thought of it as an employee convenience issue[.]

As part of this investigation I collected the mold change documents from press 5 consisting of the Mold Setup Sheet and a Mold Change Checklist[.] The Mold Setup Sheet is specific to the LH Mountaineer Fender being set in press 5[.] Item 6 on this sheet addresses the Ejection Actuation

setup[.] Lifters are up by foot activation (and) down by safety stand[.] This is not how it was set up[.] It was set up with the lifters up by foot pedal and down by foot pedal[.] That is how the employee's fingers were injured[.] She released the foot pedal prior to having the part freed from the mold[.] As a result, her fingers were caught as the slide closed[.] Although the Mold Setup Sheet addresses the Ejection Setup, the Mold Change Checklist does not go into detail regarding the ejection system on molds with slides[.] It is generic to all mold changes[.] There is one item to check indicating only that the ejector pins are operational[.] In the case of the Mountaineer Fenders, and other fender jobs, that is not sufficient[.]

I also reviewed the Level 3 Tool Change Work Instruction[.] Under 6 0 of this work instruction regarding Mold Set responsibilities there are specific responsibilities for the maintenance supervisor and mold technician to sign off on[.] The maintenance supervisor has responsibility for the overall safety evaluation of the mold set and is required to do the safety sign-off[.] This did not occur[.] The sign-off was performed by the production supervisor for the items listed[.] The maintenance personnel who have previously performed the safety sign-off are no longer employed with CSP[.] The mold technician has shared responsibility for press programming and referencing[.] It appears that the press was prepared by the production tender and signed off[.]

Root Cause It is my belief that the change that should have been made to the ejection system on press 5, prior to it going into production, did not occur because the people who normally make that type of change were not present[.] The maintenance supervisor who used [sic] to review mold setups has left the company[.] The mold technician was not present on Saturday to ensure the proper programming of the press prior to startup, nor was a process engineer[.] Simply put, none of the right people were present to ensure the proper setup of the ejection system[.]

* * *

The default setting for press #5 has been changed to the "on" position in the press setup screen[.] Prior to this, the default was in the "off" position requiring it to be changed to activate the proper setup - the slide remains up until activated to go down by the safety stand[.] If the light curtain is broken, the slide immediately returns to the up position[.]

(Emphasis sic.)

{¶ 22} 8. On December 17, 2008, the SVIU investigator issued his report of investigation. The report states in part:

[Two] According to the information obtained during the investigation of this VSSR claim, Injured Worker Teresa A[.] Long was employed by Continental Structural Plastics as a reliever and the incident of record occurred on August 13, 2007[.] Ms[.] Long was in the process of removing an automotive fender from a press when her middle and ring fingers on her right hand were smashed between the part and the mold[.]

[Three] This Investigator observed and obtained additional photographs of the involved Williams-White Moline 750-ton press. It is a Model SH750-108-60 with Serial Number G-4244-A. The press is hydraulically powered and it is located in Department 0150[.] According to records submitted by the employer, the involved press was put into service in 1978 and has been labeled press #5. The employer stated the involved press was being utilized to form left hand fenders for Mercury Mountaineers at the time of the incident of record.

[Four] The employer stated the mold in the press at the time of the incident of record was equipped with a slide mechanism to raise the completed part for manual removal. The employer further stated the slide mechanism was originally configured to be activated by a foot pedal and lowered by activating a button on a T-stand. The employer indicated it was discovered during the internal investigation of the incident that the press had been improperly setup[.] The employer further indicated the setup of the press at the time of the incident permitted the slide mechanism to lower once an employee removed their foot from the foot pedal, which was the root cause of the injury of record.

* * *

[Six] On October 15, 2008 this Investigator met with Injured Worker Teresa A. Long and obtained an affidavit. Ms. Long stated she began her employment with Continental Structural Plastics on March 3, 2006. She further stated she was hired as a de-flasher and had been performing the job of reliever for approximately one year at the time of her injury. Teresa A. Long indicated her job duties as a reliever involved relieving coworkers for their breaks. Ms. Long continued she relieved coworkers from various machines throughout the company during her normal work day[.] She further indicated she received on-the-job training for her job duties as a reliever.

{¶ 23} 9. On June 9, 2009, Mark Senecal executed an affidavit stating:

[Two] I am responsible for providing direction and support, evaluating compliance with company policy and regulatory standards for all Continental Structural Plastics and subsidiary locations, including the North Baltimore (Ohio) Plant.

[Three] I make this affidavit in response to the application for benefits for Violation of Specific Safety Requirement (VSSR) filed by Teresa A. Long-McKinney ("claimant"). I have personal knowledge of the facts contained in this affidavit and if called will so testify.

[Four] I am familiar with the North Baltimore facility where claimant was employed in 2007. I have reviewed the claimant's VSSR application, the VSSR Report of Investigation Letter dated December 17, 2008 ("Report of Investigation") containing claimant's affidavit dated October 15, 2008, wherein claimant describes an injury occurring on August 13, 2007, while she was working at Press No. 5.

[Five] As the Report of Investigation demonstrates, Press No. 5 is a Williams-White Moline 750-ton hydraulic press bearing Model SH750-108-60 with a Serial No. G-4224-A [sic]. Press No. 5 is located at the North Baltimore (Ohio) Plant, and was placed in service in 1978.

[Six] At the time of this accident in August 2007, Press No. 5 was constructed and guarded to prevent the hands or fingers of the operator from entering the area where material is actually positioned and work is being performed during the closing cycle of the press. Press No. 5 was then and remains

equipped with a "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. The two-hand control is the subject of Photograph 16, and is clearly visible on Photograph No. 3; and on Photograph 31 attached to the Report of Investigation. The two-hand control required the operator to depress and hold buttons depressed until the press closed.

[Seven] In August 2007 Press No. 5 was also equipped with a light curtain guard on the front and rear of the press. The light curtain guard is a second means or method which will provide safeguards, preventing the hands or fingers of the operator from entering the danger zone during the operating cycle. A part of the light curtain is visible on Photograph No. 15 attached to the Report of Investigation.

[Eight] At the time of claimant's accident on August 13, 2007, Press No. 5 contained a separate tool, a compression mold, for a Ford 2001 U152 Mountaineer Front Fender (Mountaineer Front Fender Mold) supplied by Weber Manufacturing Ltd. To my understanding, the term "mold" is not defined separately in the Code governing workshops and factories. The term mold is defined as "a cavity that is designed to form desired final shapes and sizes." A mold can be a sophisticated piece of machinery with multiple parts. This mold was manufactured in August 1999 and acquired in approximately July 2000, or roughly twenty (20) years after Press No. 5 was placed in service. This mold is an independent piece of machinery; molds are placed in or removed from various hydraulic presses depending upon the production requirements. The mold had an ejection system designed to raise and detach the part from the mold cavity so the part could be removed from the mold.

[Nine] From time to time, and on August 13, 2007, this Mountaineer Front Fender Mold would have been located in Press No. 5. The mold was removed from Press No. 5 on September 3, 2008, so that it was not part of Press No. 5 on the date the investigator visited Continental Structural Plastics on December 17, 2008.

[Ten] I understand that claimant was injured after Press No. 5 had "finished its cycle" and returned to an open position. Claimant's injury was not caused by the Press moving. Press No. 5 was open when the claimant reached in to remove the

part. The press did not move, and the ram did not descend, while claimant was removing the part.

[Eleven] Instead, as claimant described her injury, she was injured when an ejector, a part of the mold, descended and injured her fingers.

[Twelve] I understand that claimant also has cited certain portions of Ohio Administrative Code Section 4121:1-13-04 related to "Other rubber and plastic processing machines." This Ford 2001 U152 Mountaineer Front Fender Mold was a compression mold. I have reviewed this section. The hazard sought to be prevented by these guarding requirements is the hazard presented by the press closing and injuring an operator. As noted above, Press No. 5 was equipped with a "Two-hand control" – an actuating device which requires the simultaneous use of both hands to depress buttons during press closing. The two-hand control is clearly visible on Photograph Nos. 16, 3 and 31 attached to the Investigation Report. The two-hand control required the operator to depress both buttons until the press closed.

[Thirteen] Neither Press No. 5, nor the Ford 2001 U152 Mountaineer Front Fender Mold, was involved in injection molding or blow molding at the time of claimant's accident. This was not an injection or blow molding process; the Ford 2001 U152 Mountaineer Fender was manufactured in a compression molding operation.

[Fourteen] Photographs 7 through 11 and 27 through 30 attached to the Report of Investigation depict the mold. On the date of the investigation, Continental Structural Plastics supplied to the Investigator a copy of the Asset Inventory Sheet that shows the Mountaineer Front Fender Mold was first acquired, installed and placed in service in approximately July 2000.

{¶ 24} 10. Following a June 10, 2009 hearing which was recorded and transcribed for the record, a staff hearing officer ("SHO") issued an order granting a VSSR award. The SHO's order of June 10, 2009 states:

It is the order of this Staff Hearing Officer that the Injured Worker was employed on 08/13/2007 by the Employer as a reliever for a deflasher and that she sustained an injury in the course and scope of her employment while she was in the process of removing an automotive fender from a press when

her middle and ring fingers on her right hand were smashed between a part and the mold.

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 guard the mold portion of the press as required by Ohio Administrative Code Chapter 4123:1-5-11(E), the Code Section relating to Hydraulic or Pneumatic Presses.

The Injured Worker was injured on 08/13/2007 when she was in the process of removing an automotive fender from a press when her middle and long [sic] fingers on her right hand were smashed between the part and the mold. The press involved was a Williams-White Moline 750-ton press, model SH750-108-60 with serial number G4244-A (referred to as press number 5). The press is hydraulically powered and it is located in department 0150. According to the records submitted by the Employer, the involved press was put into service in 1978. The press was being utilized to form left hand fenders for Mercury Mountaineers at the time of the incident of record. The mold in the press, at the time of the incident, was equipped with a slide mechanism to raise the completed part for manual removal. The slide mechanism was originally configured to be activated by a foot pedal and lowered by activating a button on a T-stand. The uncontroverted evidence indicates that the press had been improperly set-up at the time of the incident of record. The set-up of the press at the time of incident permitted the slide mechanism to lower once an employee removed their foot from the foot pedal, which was the root cause of the injury of record. The Employer indicated that the involved press was immediately taken out of service after the incident of record and the mold set-up sheet and mold change checklist were reviewed and revised before the involved press was placed back into service.

There is no dispute that the injury occurred due to the improper set-up of the mold set-up.

The Employer's sole argument is that the Code Section cited by Injured Worker, Section 4123:1-5-11(E) pertaining to Hydraulic Presses, is inapplicable in this case as the Employer contends that the press was properly guarded and that the Code Section cited does not pertain to molds specifically.

* * *

The Hearing Officer finds the 1977 version of 4121:1-5-11(E) is applicable as the machine Injured Worker was injured on was placed into service in 1978.

Section (E) of 4121:1-5-11 indicates that 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. Accepted methods of guarding are listed: a fixed barrier guard, a gate guard, a two-hand control, a pull guard, a restraint or hold back guard or 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 already specified.

The Hearing Officer finds that if the mold portion of the machine was properly set-up, the applicable Code Section would have been met and the machine would have been properly guarded. The uncontroverted evidence is that press number 5 is a hydraulic press and that the press is equipped with a two-hand control device that required the simultaneous use of both hands outside the danger zone during the entire closing cycle of the press. Further, the press was equipped with a light curtain that guarded the machine and insured that the press would not close during the closing cycle of the press. If the beam was interrupted, the press would reverse itself. The Employer's contention is that because the press complied with Ohio Administrative Code Section (E)(3) of having a two-hand control and Ohio Administrative Code Section (6) providing other practices, means or methods proving safeguards that the Code Section has been met. The Hearing Officer finds however, that the press number 5 was equipped, at the time of injury, with a mold.

The Hearing Officer finds that the mold was not separate and apart from the press as contended by the Employer. The facts supporting this are: (1) [T]he press and the mold were not separate pieces. There were no separate operating manuals submitted to the file. The mold and press were physically attached and found to be part of a single integrated system. (2) All the evidence in the record described the mold as being a "component of the press" and not a separate machine. (see affidavit of Mark K.J. Senecal,

number 8, wherein he indicates "at the time of claimant's accident on August 13, 2007, press number 5 contained a separate tool, a compression mold..."). (3) [T]he Employer's own incident report describes the injury occurring on "press number 5" (as opposed to occurring on a molding machine) and describes the problem as occurring due to "the ejection system" of the press being set-up improperly. (4) [T]he ejector mechanism that raised the completed part was supposed to be controlled by both deflasher (who would depress the foot pedal to raise the mold) and the press operator (who would hit the button on the control stand of the press to lower it). When the press was properly set-up, the mold was not to be an independent piece of machinery controlled by one person. According to these facts, the Hearing Officer finds the weight of the evidence supports that the mold was part of the press. As such, the Code Section pertaining to hydraulic or pneumatic presses applies.

According to the mold set-up sheet and the mold change checklist and the incident report created by Mr. Senecal, the uncontroverted evidence is that the ejection activation set-up was supposed to be set-up with "lifters up by foot activation and down by safety stand." It was not set-up this way at the time of the injury. Rather, the machine was set-up with lifters up by foot pedal and down by foot pedal. This is how the Injured Worker's fingers were injured. She released the foot pedal prior to having the part freed from the mold. As a result, her fingers were caught as the slide closed. Therefore, the Hearing Officer finds that if the mold were set-up properly, Ohio Administrative Code Section (E)(6) providing that "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..." would have been met. Specifically, the deflasher would have activated the lifting mechanism by depressing the foot pedal and after she got the part out, a second person would have activated a second control to lower the mechanism.

The Hearing Officer finds that no violation can be found for an [sic] one time malfunction of safety equipment when such was not foreseeable. State ex. rel MTD Products v. Stebbins (1975) 43 Ohio St. 2d 114. The Court found that in safety equipment malfunction cases the decision depends 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 Employer and that 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 an awareness on the part of the Employer that the machine was set-up improperly. Further, the evidence supports that the Employer was, in fact, aware of the malfunction of the machine.

According to the incident report completed by Mr. Senecal (Human Resource General Supervisor), the mold in press number 5 was changed out on Saturday, August 11th, and ran production on second shift under the same improper set-up. Further, Jim Steele informed Brett Smith, on the date of injury, that "the press 6 (sic) ejectors were not working properly" (see statement Jim Steele, exhibit 9, SVIU report). Further, the evidence from Nona Booze (deflasher) was that she informed Jeff Sheldon (press operator) that the ejection system was not set-up right (see statements Nona Booze, exhibit 7, SVIU report). The incident report goes on to implicate that the improper set-up occurred because "the people who normally make the type of change were not present." The maintenance supervisor who used [sic] to review mold set-ups had left the company. The mold technician was not present on the date of injury to ensure proper programming of the press prior to start up, nor was the process engineer. The Hearing Officer finds the preponderance of the evidence, therefore, indicates that * * * the Employer should have been aware that there was a good chance that a malfunction would occur.

(Emphasis sic.)

{¶ 25} 11. CSP moved for rehearing pursuant to Ohio Adm.Code 4123-3-20(E).

{¶ 26} 12. On October 28, 2009, another SHO mailed an order denying rehearing.

{¶ 27} 13. On November 10, 2009, CSP moved for reconsideration and the exercise of continuing jurisdiction.

{¶ 28} 14. On August 28, 2010, the three-member commission mailed an interlocutory order stating:

It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear

mistake of fact in the orders from which reconsideration is sought, and clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged that the Staff Hearing Officer order, issued 08/12/2009, impermissibly expanded the safety requirements to include a separately controlled "mold" within the definition of "press," and by doing so failed to strictly construe requirements in favor of the Employer. It is further alleged that the Staff Hearing Officer order, issued 08/12/2009, specifically found that the press complied with the safety requirements, and that the injury did not result from any violation of any safety provision that applied to the press.

Based on these findings, the Industrial Commission directs that the Employer's request for reconsideration, filed 11/10/2009, is to be set for hearing to determine whether the alleged mistakes of fact and law as noted herein are sufficient for the Industrial Commission to invoke its continuing jurisdiction.

In the interest of administrative economy and for the convenience of the parties, after the hearing on the question of continuing jurisdiction, the Industrial Commission will take the matter under advisement and proceed to hear the merits of the underlying issue(s).

The Industrial Commission will thereafter issue an order on the matter of continuing jurisdiction under R.C. 4123.52. If authority to invoke continuing jurisdiction is found, the Industrial Commission will address the merits of the underlying issue(s).

This order is issued pursuant to State ex rel. Nicholls v. Indus. Comm. (1988), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and in accordance with Ohio Adm.Code 4121-3-09.

{¶ 29} 15. On September 21, 2010, the commission heard CSP's November 10, 2009 motion. The hearing was recorded and transcribed for the record.

{¶ 30} 16. Following the September 21, 2010 hearing, on November 18, 2010, the commission mailed its unanimous decision that exercises continuing jurisdiction and

then denies the VSSR application. The commission's September 21, 2010 order (mailed November 18, 2010) explains:

09/21/2010 – After further review and discussion, it is the finding of the Industrial Commission that the Employer has met its burden of proving that the Staff Hearing Officer order, issued 08/12/2009, contains a clear mistake of fact. Specifically, the Staff Hearing Officer erroneously determined that the injury allowed herein was proximately caused by inadequate guarding of a hydraulic press. However, as more fully explained below, the evidence supports that the injury was proximately caused by the improper set-up of a mold and the movement of the mold's slide mechanism/ejector pin during the mold's operation cycle, and not during the operation cycle of the press. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St. 3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St. 3d 320, and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, in order to correct this error. The Employer's request for reconsideration, filed 11/10/2009, is granted. The Staff Hearing Officer orders issued 10/28/2009 and 8/12/2009, are vacated.

It is the order of the Commission that the IC-8/9, Application for Additional Award for Violation of Specific Safety Requirement in a Workers' Compensation Claim, filed 06/06/2008, be denied.

The Injured Worker sustained amputation injuries to the tips of her right third and fourth fingers on 08/13/2007. The Injured Worker was employed as a reliever and she had just assumed the duties of a co-worker on hydraulic Press #5, a Williams-White Moline 750-ton Press SH750-108-60, Serial No. SN G-4244-A ("Press #5"). Press #5 was placed into service in 1978 and was used, on the date of injury, to form left hand Mercury Mountaineer fenders with a Mountaineer Front Fender Mold. This mold was placed into service in July, 2000, and weighed 36,830 pounds.

Press #5 is equipped with a two-hand control, which requires the simultaneous use of both hands outside of the danger zone during the closing cycle of the press. Press #5 is also equipped with a light curtain guard, which will stop the operation cycle of the press if the plane is broken. The mold

is equipped with a hydraulic ejection system designed to raise and detach the completed fender from the mold cavity.

Press #5 is operated by two employees – a press operator and a de-flasher. The press operator places material into the press and activates the press' closing cycle via a two-hand control. A timer mechanism determines the length of the operating cycle and opens the press upon its completion. The de-flasher then steps on a foot pedal to activate the mold's ejector slide mechanism, which raises the fender, and the de-flasher reaches into the press to remove the fender. Ideally, if set up correctly, the ejector pin would have remained in the up position until activated to descend by the press operator, who pushes a button on a T-stand.

On the date of injury, however, the mold in Press #5 was improperly programmed. After completion of the press' operating cycle and its full ascension to the open position, the Injured Worker, working as the de-flasher, stepped on the foot pedal to raise the fender for removal. Rather than remaining up until activated by the T-stand button, the mold's ejector pin descended when the Injured Worker removed her foot from the foot pedal. As a result, the Injured Worker's third and fourth fingers on her right hand were smashed between the fender and the mold.

The IC-8/9 alleges the Employer violated Ohio Adm.Code 4123:1-5-11 (E) (1) through (6), Ohio Adm.Code 4123:1-13-04 (E) (4) (a) (i) and (ii), and Ohio Adm.Code 4123:1-13-04 (E) (4) (b) (ii). The Injured Worker withdrew from consideration those allegations pertaining to Ohio Adm.Code 4123:1-13-04 (E) (4) (a) (i) and (ii) and Ohio Adm.Code 4123:1-13-04 (E) (4) (b) (ii) and they are accordingly dismissed.

The only remaining allegation concerns Ohio Adm.Code 4123:1-5-11 (E), which pertains to hydraulic or pneumatic presses and provides:

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:

[One] Fixed barrier guard – an enclosure to prevent hands or fingers from entering the danger zone;

[Two] 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;

[Three] 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;

[Four] 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;

[Five] 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;

[Six] 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.

It is undisputed that Press #5 is a hydraulic press and that it contains appropriate guards to protect the operator's hands and fingers from the danger zone during the operating cycle, down stroke, and closing cycle. It is the finding of the Commission that the Mountaineer Front Fender Mold had an operating cycle separate and distinct from the operating cycle of Press #5. Specifically, Press #5's operating cycle began with the press operator's use of the two-hand control, and ended when the press returned to the opened position. The mold's operating cycle began with the de-flasher's use of the foot pedal, and ended when the ejector pin returned to the down position. It is further the finding of the Commission that Ohio Adm.Code 4123:1-5-11 (E) (1) through (6) only require protection from the press' operating cycle, and not from the mold's operating cycle, so no safety violation exists.

Accordingly, it is the Commission's finding that the mold was not operating as a press at the time of injury, and therefore is not subject to the safety provision applicable to a press. This finding is based upon the Safety Violations Investigation Unit (SVIU) report, dated 12/17/2008, and particularly the video and pictures depicting the operation of Press #5 and the Mountaineer Front Fender Mold. The Commission

further bases this decision upon the affidavit from Mark Senecal, dated 06/09/2009, and Mr. Senecal's testimony. Specifically, Mr. Senecal explained that Press #5 and the Mountaineer Front Fender Mold were produced by separate manufacturers; that the Mountaineer Front Fender Mold was placed into service approximately twenty (20) years after Press #5; and that molds are placed in or removed from various presses depending upon production requirements. Mr. Senecal further described the ejection pin/slide mechanism of the Mountaineer Front Fender Mold. While most molds do not contain a removal mechanism, Mr. Senecal indicated the Mountaineer Front Fender Mold contained a hydraulic ejection system, which was separate from Press #5 and remained with the Mountaineer Front Fender Mold.

A safety requirement violation is in the nature of a penalty against the Employer and must be strictly construed, with any reasonable doubts to be construed against applying it to the Employer. State ex rel. Burton v. Indus. Comm. (1989), 46 Ohio St.3d 170. Ohio Adm.Code 4123:1-5-11(E) (1) through (6) neither applies to molds (as such is not enumerated therein) nor protects operators from dangers separate from the operating cycle, down stroke, or closing cycle of a press. Because the injury was proximately caused by the movement of the ejection pin, which was part of the Mountaineer Front Fender Mold, and not any operation of the press which remained unmoved in the open position, the IC-8/9, filed 06/06/2008, is denied.

{¶ 31} 17. On December 20, 2010, relator, Teresa A. McKinney, filed this mandamus action.

Conclusions of Law:

{¶ 32} The main issue is whether the commission abused its discretion in determining that the injury was not caused by a violation of Ohio Adm.Code 4123:1-5-11(E) which required that the hydraulic press shall be guarded to prevent the hands or fingers of the operator from entering the danger zone during the operating cycle.

{¶ 33} At issue is the commission's order of September 21, 2010 that exercises continuing jurisdiction and then denies the VSSR application on the merits of the application. However, relator does not challenge the commission's exercise of continuing jurisdiction. Only the commission's merit determination is under review in this action.

{¶ 34} It is undisputed that the injury was caused by a descending mold ejector pin when relator removed her foot from the foot pedal.

{¶ 35} The commission determined that the operating cycle of the mold was "separate and distinct" from the operating cycle of the press and, thus, relator was not injured by the operating cycle of the press. On that basis, the commission held that CSP did not violate Ohio Adm.Code 4123:1-5-11(E) which pertains only to hydraulic and/or pneumatic presses.

{¶ 36} Finding no abuse of discretion with the commission's decision, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 37} Ohio Adm.Code 4123:1-5 sets forth specific safety rules applicable to workshop and factory safety.

{¶ 38} Ohio Adm.Code 4123:1-5-01(B) sets forth the following definitions:

(34) "Danger zone": the point of operation where a known hazard exists.

* * *

(70) "Guarded": means that the object is covered, fenced, railed, enclosed, or otherwise shielded from accidental contact.

* * *

(102) "Press": a powered machine that shears, punches, forms, or assembles metal or other material by means of cutting, shaping, or by combination dies attached to slides. A press consists of a stationary bed or anvil, and a slide (or slides) having a controlled reciprocating motion toward and away from the bed surface, the slide being guided in a definite path by the frame of the press.

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

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

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.

{¶ 41} Here, the commission was called upon to interpret the safety rule that requires guarding of hydraulic presses. That is, the commission was called upon to determine whether the mold became a press when it was used with the press under the circumstances here. Upon analysis set forth in its order of September 21, 2010, the commission determined that the mold was not a press subject to the Ohio Adm.Code 4123:1-5-11(E) guarding requirement for presses.

{¶ 42} In reviewing the commission's interpretation of the safety rule, a few principles should guide this court.

{¶ 43} Specific safety requirements must be sufficiently specific to "plainly * * * apprise an employer of his legal obligation toward his employees." *State ex rel. Lamp v.*

J.A. Crosen Co., 75 Ohio St.3d 77, 78 (1996), quoting *State ex rel. Trydle v. Indus. Comm.*, 32 Ohio St.2d 257, 261 (1972).

{¶ 44} Because a VSSR award results in a penalty, specific safety requirements must be strictly construed in the employer's favor. *Lamp* at 78, citing *State ex rel. Burton v. Indus. Comm.*, 46 Ohio St.3d 170 (1989).

{¶ 45} The application of the strict construction rule cannot, however, justify an illogical result or one that is contrary to the clear intention of the code. *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶ 47, citing *State ex rel. Maghie & Savage, Inc. v. Nobel*, 81 Ohio St.3d 328, 331 (1998).

{¶ 46} The commission has the discretion to interpret its own rules; however, where the application of those rules to a unique factual situation gives rise to a patently illogical result, common sense should prevail. *Supreme Bumpers* at ¶ 53, citing *Maghie & Savage* and *State ex rel. Harris v. Indus. Comm.*, 12 Ohio St.3d 152, 153 (1984).

{¶ 47} Relator cites to a line of cases in which the courts have had to determine whether the use of a device at the time of injury or the device's design or construction governs the applicability of the specific safety rule. *State ex rel. Cleveland Wrecking Co. v. Indus. Comm.*, 35 Ohio St.3d 248 (1988) (the commission properly found that the boom of a crane was being used as a scaffold at the time of the injury); *State ex rel Volker v. Indus. Comm.*, 75 Ohio St.3d 466 (1996); (the commission properly found that the ladder at issue was a stepladder and its construction controlled); *State ex rel. Dibble v. Presrite*, 85 Ohio St.3d 275 (1999); (in addressing how the interlock was supposed to work, the commission ignored how it did work on the date of injury).

{¶ 48} In *Volker*, the court states:

In some cases, equipment use has determined the applicability of a specific safety requirement. See, e.g., *State ex rel. Cleveland Wrecking Co. v. Indus. Comm.* (1988), 35 Ohio St.3d 248, 520 N.E.2d 228; *State ex rel. Pre Finish Metals, Inc. v. Indus. Comm.* (1988), 39 Ohio St.3d 314, 530 N.E.2d 918; and *State ex rel. Weich Roofing, Inc. v. Indus. Comm.* (1990), 69 Ohio App.3d 281, 590 N.E.2d 781. In others, the commission has been guided by the equipment's construction. See, e.g., *McArthur Lumber & Post Co., Inc. v. Indus. Comm.* (1983), 6 Ohio St.3d 217, 6 OBR 289, 452 N.E.2d 1269. We cannot, therefore, state that a single

standard governs all questions of specific safety requirement applicability.

In this instance, the commission found that construction was a better indicium than use in determining whether the ladder in question was a "stepladder." We do not find that the commission's decision was abuse of discretion.

Id. at 469. Citing the cases, relator posits:

What the commission's order fails to address or appreciate is that a mold is inoperable outside a press. Of course molds are made independently of presses and are installed and removed as production requires. Without being installed and in use in a press, however, a mold cannot perform any function in the manufacturing process. A press is likewise incapable of production activity without a mold or die installed in it corresponding to the part being produced. As a matter of function, a mold necessarily becomes and functions as a part of a press when it is installed and used in that press for the purpose of producing a product. It is its use or function in the process for which the press is used – not the circumstances of its manufacture or its interchangeability with other molds or dies – which determines whether O.A.C. 4123:1-5-11(E) is applicable to it.

(Relator's brief, at 10-11.)

{¶ 49} The question before this court is not whether relator submits a reasonable alternative analysis of the issue that faced the commission. That is so because it is the commission that has the discretion to interpret the safety rule at issue.

{¶ 50} Rather, the only question here is whether the commission's interpretation gives rise to a patently illogical result. *Supreme Bumpers*.

{¶ 51} In the magistrate's view, the commission's analysis in its September 21, 2010 order presents a logical analysis explaining why the commission held that the mold is not a press. The commission's analysis is focused upon an examination of the operating cycles of the mold and press. In turn, the analysis of the operating cycles is premised upon the June 9, 2009 affidavit of Mark Senecal which provides the requisite some evidence supporting the commission's analysis. The commission found that the operating cycles are "separate and distinct." While relator disagrees with the commission's analysis, that disagreement does not demonstrate an abuse of discretion even if relator's alternative analysis can be viewed as also reasonable.

{¶ 52} Relator also cites to *State ex rel. Advanced Metal Precision Prods. v. Indus. Comm.*, 111 Ohio St.3d 109, 2006-Ohio-5336, ¶ 20, wherein the court held:

[T]hat the term "operating cycle" in former Ohio Adm.Code 4121:1-5-11(E) encompasses all operator-activated press activity, whether intentional or accidental.

According to relator:

Raising the ejector mechanism is, beyond argument, "operator-activated press activity." So, too, is lowering the ejector mechanism after the finished part has been removed. Here, however, relator's removal of her foot from the foot pedal unexpectedly and accidentally caused the ejector mechanism to close on her fingers. Relator was injured as a direct result of the operator-activated - albeit accidental and unexpected – press activity of closing the ejector mechanism.

(Relator's brief, at 15.)

{¶ 53} Relator's position is clearly not "beyond argument." The "operator-activated press activity" involved in *Advanced Metal* is not the operator-activated activity at issue here. There was no mold involved in *Advanced Metal*. Clearly, relator's reliance upon *Advanced Metal* is misplaced.

{¶ 54} 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).