

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cathy Penwell,	:	
Relator,	:	
v.	:	No. 11AP-936
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Amanda Bent Bolt Co.,	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on March 29, 2013

Reminger Co., L.P.A., and Kevin R. Sanislo, for relator.

Michael DeWine, Attorney General, and *Eric Tarbox*, for
respondent Industrial Commission of Ohio.

Hahn Loeser & Parks LLP, and *Douglas J. Suter*, for
respondent Amanda Bent Bolt Co.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Cathy Penwell, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her application for an additional award for an alleged violation of a specific safety requirement ("VSSR") and to enter an order granting a VSSR award.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(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 found the commission's application of the single-failure exception set forth in *State ex rel. M.T.D. Prods. v. Stebbins*, 43 Ohio St.2d 14 (1975), was not precluded, and the commission was not compelled to find that respondent, Amanda Bent Bolt Co., ("ABB"), failed to provide a proper guard on the hydraulic press relator was operating at the time of her injury. Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} No objections have been filed to the magistrate's findings of fact. After an independent review of the same, we adopt those findings of fact as our own.

I. RELATOR'S OBJECTIONS

{¶ 4} Relator has filed objections to the magistrate's decision as follows:

[I.] The Magistrate improperly theorized the commission's analysis of the facts and evidence to reject Penwell's argument that the one time malfunction defense is unavailable to the employer because that analysis is lacking from the commission's Order denying Penwell's VSSR.

[II.] ABB was previously aware that the hand pull guards could fail, and Tom Payne, the safety set-up man, knew that the cables could get wrapped around causing injury such that the employer should be prevented from using the one-time malfunction defense.

[III.] The Magistrate's analysis and conclusions about whether a set-up man needed to be present during Penwell's re-hooking of the safety cables after a company mandated policy is not supported by the record and the actual decision by the commission at issue on appeal.

{¶ 5} In her first objection, relator contends the magistrate reweighed the evidence and improperly made conclusions about the commission's analysis. Before the commission, relator advanced the same theory as she does here, i.e., that there is evidence ABB had prior knowledge of a safety device failure so as to preclude application of the one-time malfunction defense. The commission rejected relator's argument as it concluded this was a one-time malfunction. Contrary to relator's contention, the

magistrate did not reweigh the evidence but, rather, in addressing relator's argument, set forth plausible explanations regarding how the commission could have rejected relator's assertion that the evidentiary record demonstrated ABB's prior knowledge.

{¶ 6} Accordingly, relator's first objection is overruled.

{¶ 7} In her second objection, relator contends ABB cannot avail itself of the one-time malfunction defense because the evidence establishes the safety set-up man knew this safety-device failure could occur. In her third objection, relator contends the magistrate's analysis and conclusions pertaining to the need for a set-up man are not supported by the record. The issues raised in these two objections are essentially the same as those presented to and addressed by the magistrate. Though relator continues to argue the record contains evidence that ABB was aware of a safety-device failure and that ABB failed to properly guard the machine, for the reasons stated in the magistrate's decision, we do not find merit to relator's arguments.

{¶ 8} Accordingly, relator's second and third objections are overruled.

II. CONCLUSION

{¶ 9} 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, overrule relator's objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

*Objections overruled;
writ of mandamus denied.*

CONNOR and DORRIAN, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cathy Penwell,	:	
Relator,	:	
v.	:	No. 11AP-936
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Amanda Bent Bolt Co.,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on November 13, 2012

Reminger Co., L.P.A., and Kevin R. Sanislo, for relator.

Michael DeWine, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.

Hahn Loeser & Parks LLP, and Douglas J. Suter, for respondent Amanda Bent Bolt Co.

IN MANDAMUS

{¶ 10} In this original action, relator, Cathy Penwell, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her application for an additional award for an alleged violation of a specific safety requirement ("VSSR"), and to enter an order granting a VSSR award.

Findings of Fact:

{¶ 11} 1. On May 18, 2007, relator's left hand was crushed while she operated a hydraulic press at a factory operated by respondent Amanda Bent Bolt Co. ("ABB").

{¶ 12} 2. The industrial claim (No. 07-829590) is allowed for:

Crushing injury left hand; open wound left hand; crushing injury left second finger; crushing injury left third finger; crushing injury left fourth finger; amputation left third finger; multiple fracture left second finger; multiple fracture left fourth finger; amputation left second finger; prolong post traumatic stress; major depressive disorder single episode.

{¶ 13} 3. On August 21, 2008, relator filed an application for a VSSR award.

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

{¶ 15} 5. On October 24, 2008, the SVIU investigator conducted an on-site investigation at the plant where the accident occurred. He met with several company representatives, including the Personnel Director, Polly Puterbaugh. The SVIU investigator also measured and photographed the press at which relator was injured.

{¶ 16} 6. On October 24, 2008, the SVIU investigator obtained an affidavit from relator which she executed on October 24, 2008. Relator's affidavit states:

[One] I am the claimant in the matter of this VSSR claim[.]

[Two] I obtained employment with the Amanda Bent Bolt Company December 15, 1988 and was hired as a press operator[.]

[Three] As a Press Operator my job duties were to run automotive and truck parts by bending, threading and cleaning them[.] Once this was done I would place the completed part into a container where they were taken to another section in the plant for process.

[Four] During my employment I was required to wear [sic] safety glasses, hearing protection, and sturdy leather work shoes[.] As an option employees were provided rubber work gloves, and cloth aprons as needed depending on the work being performed[.]

[Five] Also during my employment I was given hands-on press operator training that was conducted by an experienced employer, or set-up man[.] I would observe the person perform the job and after a while I would then

perform what I had been shown to do[.] There was no formal training orientation when it came to learning the press operation when I was hired[.]

[Six] During my employment there were once a month safety training that is conducted by the department foreman and once a year the training is conducted by Polly Pudderball [sic] along with an outside contracted trainer that would provide additional training as well[.]

[Seven] The safety training topics would [sic] various and covered many job safety task[s] as well as plant health and safety procedures[.] All training was conducted during my normal work shift and would be done in small groups at a time[.]

[Eight] On May 18, 2007 the date of my injury I was performing my normal job duties as a Press Operator. On this date I was piercing unit auto parts, the procedure was to take a part from the supply container and set it into the press machine by hand[.] Once this was done I would place it into the completed container and about every 15 minutes I would check to see that the specification for the parts were consistent[.]

[Nine] I had run the job for about 6 minutes while I was working and without any warning the press machine engaged and performed a full press cycle which caught my left hand and crunched it trapping me into the press[.]

[Ten] My hand was trapped in the press dye and I hollered for help three times before anyone responded to help me[.] At that time, Ed McCoy and Kevin Smith were the first responders to come to my aid. McCoy seeing was [sic] had happen stopped the machine by engaging the e-stop button[.] Both McCoy and Smith were holding onto me at the time and the press returned to its starting point[.]

[Eleven] I was still standing and connected to the arm pullbacks of the machine and was told to stay there until Logan EMS arrived[.] Once on the scene the EMS personnel removed me from the wrist pullbacks and moved me to be transported[.]

[Twelve] I was taken to Logan hospital, where I was then transported by Life flight to Riverside Medical Center located

in Columbus, Ohio[.] I was then admitted and treated for my injuries and released three days later.

[Thirteen] I feel that my injuries were caused do [sic] to the employers failure to provide proper machine guarding of the press machine that I was operating at the time that my injury occurred[.] As states in OAC 4123 1-5-01 (B) 105 4123 1-5-11 (E)[.]

(Emphasis sic.)

{¶ 17} 7. The SVIU investigator obtained a two-page "Accident Report Form" dated May 24, 2007 containing relator's signature. Under the pre-printed query "Describe in detail how accident happened," the following handwriting appears in the space provided: "Does not know what happened."

{¶ 18} 8. The SVIU investigator also obtained a two-page "Accident Analysis Report" completed and signed by Puterbaugh on May 24, 2007. Under the pre-printed query "Employers Statement To Accident," Puterbaugh wrote in her own hand:

[Left] side safety bar was bent up – speculation is safety cable wrapped around [left] side safety bar [and] bent it or [left] side safety bar was damaged by forklift.

{¶ 19} Under the pre-printed query "What Action Was Taken," Puterbaugh wrote in her own hand:

In the process of trying to make new side bars that cables will not wrap around[.]

{¶ 20} The SVIU investigator also obtained a copy of a handwritten statement from Thomas Payne dated May 21, 2007:

When I set Cathy's safetys I had to move her back 2 links on the safety chains. Her hands were even with each other. I watches her run 2 parts to make sure she could get the parts in and out of the die. I didn't notice anything out of the ordinary with the safety devies. When I set her safetys I set them to the point of operation. I was on setup for 3 months before I was trained on setting safetys. I worked with Gary Lama for approx. 3 months setting safetys before Dave ok'd me to set safetys on my own.

(Sic Passim.)

{¶ 21} The SVIU investigator also obtained a copy of ABB's 2007 annual Safety Training Material which states in part:

MECHANICAL POWER PRESS:

* * *

[Four] Pullback safety's must be inspected by operator & person setting safety's and the log **must** be signed & dated each time pullbacks are set[.]

[Five] Double check/look at safety's – are they ok? Don't depend on safety's to pull you out of a die!

(Emphasis sic.)

{¶ 22} 9. On December 5, 2008, the SVIU investigator issued his report of investigation. Under "Discussion," the report states:

[Six] The Amanda Bent Bolt Company manufactures wire and wire products; manufactures bolts, nuts, rivets and washers which are used in various industry applications[.]

[Seven] Employer states that claimant has been an employee since December 15, 1988 and was hire[d] as a press operator[.] Her job duties were to produce various metal parts using a 75 Ton Bliss OBI Press[.] To perform this operation the operator is trained to secure their wrist into the pullback restraints which are connected to a pullback device[.]

[Eight] The operator then takes a metal part from a supply tray and places it into the press holder[.] Once the part is seated in place the operator then steps onto the foot peddle which engages the dye down on the metal part[.] As the ram of the press moves downward the wrist pullback engages and pulls the operator's hands clear of the dye area[.] The press completes a full cycle and then returns to its starting position[.]

[Nine] Employer also states that claimant had received on-the-job training from an experienced operator when she was hired[.] This training consisted of the claimant observing the operational process of the 75 Ton Bliss OBI Press and its safety features[.]

[Ten] Employer also states that once claimant had become familiar with the Bliss Press machine she was allowed to perform as the trainer observed her[.] After an assessment by the trainer claimant was then authorized to operate the 75 Ton Bliss OBI Press[.]

[Eleven] Employer further states that claimant was required to attend monthly safety meetings conducted by the department foreman and annual training that was conducted by the Human Resource Director, Polly Putervagh [sic][.]

[Twelve] Employer also states that it [sic] claimant was supplied with the following PPE, safety glasses, safety wrist straps and ear plugs[.] All employees are required to wear these items during their regular shifts[.] Each employee is given a Safety and Health Employee handbook[.] All employees are responsible for reviewing and understanding the material inside the manual.

[Thirteen] Employer states on May 18, 2007 the date of injury claimant was assigned to the 75 Ton Bliss OBI Press producing unit auto parts. Claimant [sic] standard operating procedure was to do a setup of the machine and the dye[.] Then attach the safety wrist straps to the pullback device prior to engaging the press machine using a foot peddle device[.]

[Fourteen] Employer contends that while claimant was performing her job duties her left hand was crunched in the dye of the press machine[.] At the time the injury occurred there were no eyewitnesses to the circumstances which caused the injury to the claimant[.]

[Fifteen] Co-workers in the general area heard the claimant cry out for help and shutdown the machine assisting her until the Logan County EMS arrived on the scene. Claimant was then transported to Logan Hospital where she was transported by Life-flight to Riverside Medical Center located in Columbus, Ohio.

[Sixteen] Employer contends that there was no violation of the specific safety regulations because claimant fully met the training requirements to operate the machine in a safe manner, was supplied and wearing the proper safety pullback devices at the time the injury occurred and that they were properly set on May 18, 2007[.]

[Seventeen] On October 24, 2008 BWC Investigator Hostin interviewed Cathy S. Penwell in regard to the VSSR claim she filed due to a work related injury she sustained at the Amanda Bent Bolt Company while performing her normal job duties.

[Eighteen] Investigator Hostin explained the procedures of the VSSR investigation and the Ohio Industrial Commission. After explaining the procedures Investigator Hostin interviewed the claimant and took her statement in the form of an affidavit.

{¶ 23} 10. On December 14, 2010, the VSSR application was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record.

{¶ 24} 11. At the hearing, relator testified under direct examination by her counsel. The following exchange is recorded between relator and her counsel:

Q. Okay. So you go over to Press Machine No. 885. When you go to the machine were you set up on your safeties?

A. Yes.

Q. And by the "safeties," I'm referring to the pullback guard.

A. Yes.

Q. So you were set up.

Who did the set up of you on that day, May 18, 2007?

A. Tom Payne.

Q. And when Mr. Payne did your set up did he have to do any adjustments?

A. Yes.

Q. And what did he adjust?

A. He pulled me back out of the dye.

Q. Okay. And so he pulled you back out of the dye.

Now, why did Mr. Payne have to pull you back out of the dye?

A. Because I had more reach than the person that ran it before me.

Q. Okay. And I believe the gentleman that ran the press before you, his name was Don Coe?

A. Yes.

Q. And that's C-O-E?

So essentially your arms are longer than Don's?

A. Yes.

Q. And so Tom had to set you back, I believe, is it two lengths?

A. I don't remember.

Q. Okay. So he had to set you back, which means if you have a longer reach than Mr. Coe your hands would be in the pinch area?

A. Yes.

Q. So did Tom have you reach your hands out?

A. Yes.

Q. And then he essentially pulled your hands back by doing some lengths upon the machine?

A. Yes.

Q. So no matter how far you would reach your hands would not be in the area?

A. No.

Q. Okay. Now, when Tom had you reach your hands out, was the press ram down?

A. Yes. It was down to the pinch point.

Q. So essentially, he would, I guess you call it jog the machine down?

A. Yes.

Q. Okay. So that way -- so the machine is jogged down and your hands would not be in that area?

A. No.

Q. Okay. So after Tom set your safeties did you then start running the parts?

A. I ran five and checked them.

(Tr. 21-24.)

{¶ 25} 12. At the hearing, Tom Payne testified under cross examination by relator's counsel:

Q. Okay. And, Mr. Payne, if you would, just tell us generally what is your job title there at Amanda Bent Bolt?

A. I'm a Set Up Man.

Q. A Set Up Man.

And does that mean you're in charge of making sure a person's safeties are set up correctly?

A. Yes.

Q. And were you the Set Up Man for Press No. 885 on the day of Ms. Penwell's injury, on May 18th, 2007?

A. Yes.

Q. Now, Mr. Payne, you executed a witness statement. Is that your handwriting there (indicating)?

A. Yes, it is.

Q. And that's dated May 21, 2007?

A. Yes.

Q. Who asked you to write that letter (indicating)?

A. Uhm, I believe it was the guy that came in to do the investigation on the accident.

* * *

Q. Now, let's talk a little bit about your witness statement there.

Press Machine No. 885, it's equipped with safety pull backs, correct?

A. Yes.

Q. And in order to set the safety pull backs you've got to link -- there are some links at the top and then they go through some cables and attach to a person's wrist?

A. Yes.

Q. And then in order to set the cables you've got to make sure you've got to jog the machine down, yes?

A. Yes.

Q. And then you have the person reach out?

A. Yes.

You check the pinch points on the dyes, and they vary depending on which dye it is.

Q. Okay. So on May 18, 2007, you set Cathy Penwell's safety devices --

A. Yes.

Q. -- on Machine No. 885?

A. Yes.

Q. And at that time, according to your statement there, they were properly set?

A. Yes.

Q. And how many parts did you watch her run before you left the area?

A. Two, maybe three --

Q. Okay.

A. -- which is about normal, because you want to make sure that the operators can get the parts in and out of a dye and still be able to run it. So that's a normal --

Q. Okay. Do you remember what Press Machine No. 885 looked like at the time of Cathy's injury on May 18th, 2007?

A. Yes.

Q. Okay. Did it look like this, Tom, as we see in this black and white photograph there (indicating)?

A. With the safety bar bent up? No.

When I first set her safeties that was straight (indicating).

Q. Okay. So the safety bar was not bent up?

A. Right.

Not to my -- I mean -- and I think I would have noticed it, because I had to stand on top of the tubs that were there to move the chains, clip on the chains for her safeties.

* * *

Q. Okay. When you set Ms. Penwell's safety cables that morning on May 18th, 2007, did you make sure that the cables were not wrapped around the bar on the left-hand side?

A. Yes.

Q. Okay. And is that contained anywhere in your report there (indicating)?

A. Uhm, no.

Q. Okay. Now, was that because you -- do you remember that specifically or are you just assuming that?

A. No.

I mean -- I mean, yeah. Because you always check to make sure there is nothing wrapped around when you're setting your safeties, because if you don't then that can throw everything off and make it so they can get hurt.

(Tr. 105-08.)

{¶ 26} 13. Polly Puterbaugh testified at the hearing. The following testimony is recorded:

HEARING OFFICER CROMLEY: And there is -- in the color photographs there is the one picture of the bar off the machine, which shows the welds broken, right?

THE WITNESS: Uh-huh. Yes. Yes.

HEARING OFFICER CROMLEY: Is the thought that that weld was broken at the time of her injury, or that that happened before her injury, or --

THE WITNESS: To me if that cable wrapped and broke that weld that's what made her --

After she was injured we had somebody go out to the machine and hook up the safeties to see how the safeties were set. The hands weren't even anymore. They were like this, they were offset (demonstrating.)

Her left hand reach was in further because the bar was bent up.

So we're assuming that the bar bent, then she ran another part afterwards, which -- and she went to take the part out and for some reason tripped the pedal.

HEARING OFFICER CROMLEY: So the bar would have had to have been bent between the time when Mr. Payne set the distance and when the injury occurred, right?

THE WITNESS: Correct.

HEARING OFFICER CROMLEY: Okay. And maybe still in trying to understand this color photo No. 4, which has the machine guard on the site there --

THE WITNESS: Right.

HEARING OFFICER CROMLEY: -- that shows of the arm sticking straight out.

THE WITNESS: Correct.

HEARING OFFICER CROMLEY: Is the thought that the cable was like wrapped around this metal arm somehow (indicating)?

THE WITNESS: Yes. That it looped.

The bars come out beside of you and you're working here (indicating).

If you let enough slack in that it could possibly loop. That's the only thing we could come up with that would break that weld.

HEARING OFFICER CROMLEY: So the thought is that one of the times that she unhooked to do her inspection or get other parts or whatever, when she put the strap back on it was looped?

THE WITNESS: Not necessarily.

It may have happened when she tripped the machine.

Because I think she would have noticed if it was looped around when you hook back up. That's something that you do constantly there. You're unhooking and hooking back up and you would notice if that was looped. She just would.

HEARING OFFICER CROMLEY: If she is standing right here in front of the machine and she reaches to her left and puts this on to her left wrist, she would have noticed then that it was looped (indicating)?

THE WITNESS: I think so, if it was. Yes, I think she would have.

What I'm saying is when she was operating the machine is when I think it looped.

HEARING OFFICER CROMLEY: Now -- okay. Another variation there.

If it was looped wouldn't that have taken up more slack in the cable such as her hand wouldn't have gotten as close to the point?

THE WITNESS: Right. That's correct.

HEARING OFFICER CROMLEY: But we know that the injury happened. We know her hand got caught in the machine.

THE WITNESS: Yes.

(Tr. 90-94.)

And it had to happen after the bar was bent up. After it looped, tripped the pedal it bent the bar and then she continued to run --

HEARING OFFICER CROMLEY: Okay. So --

THE WITNESS: -- or to operate the machine.

HEARING OFFICER CROMLEY: So you're thinking the bar would have been bent at some point in time, be it one minute or five minutes before the tripping when her hand was caught?

THE WITNESS: Before. Correct.

{¶ 27} 14. At the hearing, relator testified regarding her affidavit executed October 24, 2008:

Did you look over this document in its entirety before signing it (indicating)?

A. No.

Q. Now, in this affidavit it talks about -- it's Paragraph No. 9. It says you had run the job for about six minutes, while you were working and without any warning the press engaged

and performed a full press cycle, which caught your left hand and crunched it, trapping you into the press.

Now, do you dispute that paragraph there, No. 9?

A. Yes.

I tripped the machine.

Q. Okay. So you tripped the machine?

A. Yes.

Q. The machine itself just didn't cycle without warning, you as the operator told the machine to work?

A. Yes.

(Tr. 56-57.)

{¶ 28} 15. Following the December 14, 2010 hearing, the SHO issued an order denying the VSSR application. The SHO's order explains:

It is the finding of the Staff Hearing Officer that the Application for Violation of a Specific Safety Requirement be denied for the reason that there was no violation of the cited code section.

All evidence on filed [sic] has been reviewed, including the transcript from the hearing conducted on 12/14/2010.

It is found that the Injured Worker was a press operator, and that she had been employed with this Employer since 1978 [sic]. On the date of injury, 05/18/2007, at around 2:00 p.m., the Injured Worker was assigned to work on a 75 [T]on Bliss OBI Press. This press was set up to punch two holes in a piece of metal which was to be used in the automotive industry. The operator would put a piece in the press and cycle the press by way of a foot pedal. The press would come down, punch two holes in the piece, and then go back up. See color photo #7 in the SVIU report. The operator would then remove the piece and put a new piece in the press, and repeat the process.

The press involved herein was equipped with a pull-back restraint system. Two cables, one for each hand of the

operator, were attached to the top of the press. A safety bar was also attached to each side of the press, and the operator wore wrist restraints which were attached to the cables. By way of a pulley system, when the ram descended, the cables would pull the operator's hands away from the point of operation. (See color photo #5). When the ram went back up, the operator was then able to reach into the point of operation and switch the parts.

The Employer had specially trained employees who would be called to set up or adjust the cables and wrist restraints whenever a worker first started operating a press for the day. This adjustment was performed by placing the press in the "jog" mode, and bringing the press to a closed position. The operator would have the wrist restraints on and the cables clipped to the restraints, and would extend his or her hands forward. While in this position, the set up person would adjust the cables so that the operator's hands could not enter the danger zone.

On the date of injury, this cable adjustment was performed for the Injured Worker by Thomas Payne. His statement on file and his testimony shows that he did adjust the safety chains or cables, and that he then watched her run two parts to confirm that the adjustment was correct. He then left the area. The Injured Worker's testimony (transcript pages 22-23) was that Mr. Payne did properly adjust the pullbacks so that her hands could not reach into the point of operation. As a quality control practice, the press operators were required to run five parts and then to stop and check to make sure that the holes were being punched in the correct place. This quality control check required the operator to unhook the cables from their wrists, check the part, and then hook themselves back up. See color photo #6 for the pullback cable clip which the operators used to hook up to the wrist restraints. The set up man did not have to be present whenever the operator would unhook and hook back up during the rest of the shift, because the initial adjustment would remain correct.

The evidence and testimony shows that the Injured Worker ran her five parts, stopped and performed her quality control check, and then hooked herself back up and began running more parts. She is not clear how long she operated the press until the accident occurred, except that she did not run very many more parts. Her statement to the SVIU investigator

was that she had run the job for about 6 minutes when "...without any warning the press machine engaged and performed a full press cycle which caught my left hand and crunched in trapping me into the press."

There is no evidence that the press double-tripped or that there was any other mechanical defect with the press. The Employer's investigation after the accident showed that the left safety arm that the cable ran through was damaged, in that the weld was broken where the arm attached to the press. (See color photo #8). As a result of this weld being broken, the safety arm was sticking up in the air, not sticking straight out from the press. (Compare color photo #4 with black and white photo #3). The Employer's investigation showed that the bar being bent up threw off the adjustment of the left safety cable, allowing the Injured Worker's left hand to extend farther than her right hand, into the point of operation. (See black and white photo #6). Both Mr. Payne and the Injured Worker testified that they would have noticed the safety bar being bent up and out of position if it had been in that condition when the Injured Worker first hooked up to the safety cables that day. The Injured Worker does not have a good recollection of events immediately preceding her injury, and the Employer theorizes that the cable may have been wrapped around the left safety bar at some point prior to the injury, causing the bar to be bent up so that the left cable would no longer act to pull the Injured Worker's left hand out of the point of operation during the operating cycle. (Transcript pages 91-94).

The Injured Worker has alleged violation of two Ohio Administrative Code provisions. No violation of O.A.C. 4123:1-5-01(B) (105) is found, as that section is definitional in nature, and does not state a specific safety requirement.

Further, no violation of O.A.C. 4123:1-5-11(E) is found. The press herein was a hydraulic press, and one of the acceptable ways to guard the press, per (E) (4), is to provide pull guards "... 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." It is not disputed but that this press did have properly functioning pull guards in place when the Injured Worker started working on it on the day of injury. In the few minutes from when Mr. Payne adjusted the pull guards to when the injury occurred, the left safety arm was bent up, allowing the

Injured Worker's left hand to enter the point of operation during a regular operating cycle. It is well settled that the safety requirement does not require that a safety device be completely failsafe. The testimony at hearing was that the Employer had never seen or been advised of a safety arm being bent up in the manner that was present in this claim. This was a one-time malfunction of the pullback system. On the facts present in this claim, a violation of O.A.C. 4123:1-5-11(E) has not been established. The request for a finding of a violation of a specific safety requirement in this claim is therefore denied.

{¶ 29} 16. Relator moved for rehearing pursuant to Ohio Adm.Code 4121:1-3-2(C).

{¶ 30} 17. On April 14, 2011, another SHO mailed an order denying the motion for rehearing. The order explains:

It is hereby ordered that the Motion for Rehearing filed 03/15/11 be denied. The Injured Worker has not submitted any new and relevant evidence nor shown that the order mailed 02/12/2011 was based on an obvious mistake of fact or on a clear mistake of law.

{¶ 31} 18. On May 13, 2011, on a two-to-one vote, the three-member commission mailed an order denying relator's request for reconsideration.

{¶ 32} 19. On October 28, 2011, relator, Cathy Penwell, filed this mandamus action.

Conclusions of Law:

{¶ 33} Two issues are presented: (1) whether the commission's application of *State ex rel. M.T.D. Prods. V. Stebbins*, 43 Ohio St.2d 14 (1975), single-failure exception was precluded by evidence that ABB repeatedly informed its press operators not to trust or depend upon the pullback guards to pull their hands away from the dye to avert injury, and (2) whether ABB failed to guard the press with the pull guard method by failing to provide a "set-up" person to assist the press operator in unhooking and rehooking the pullback guards during ABB's mandated quality inspection that occurred after the initial safety set-up.

{¶ 34} The magistrate finds: (1) the commission's application of the *M.T.D. Prods.* Single-failure exception was not precluded by evidence that ABB repeatedly

informed its press operators not to trust or depend upon the pullback guards, and (2) the commission was not compelled to find that ABB failed to guard the press with the pull guard method by failing to provide a "set-up" person to assist the press operator in unhooking and rehooking the pullback guards following the initial set-up.

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

{¶ 36} Turning to the first issue, relator points to evidence in the record, largely undisputed, that ABB repeatedly informed its press operators not to trust or depend upon the pullback guards to pull their hands away from the dye to avert injury.

{¶ 37} During relator's own hearing testimony, under direct examination by her counsel, the following exchange occurred:

Q. Okay. Now, when you would have these safety meetings would you guys get handouts or was it just, you know, here is what the company wants you to know?

A. It was verbal.

Q. Okay. So it was just all verbal from the foreman, Dave Hankinson?

A. Yes.

* * *

Q. Now, in these safety meetings did Dave Hankinson or anybody else from Amanda Bent Bolt ever tell you or all of the employees to not rely upon the safety pullbacks to pull your hands out of a machine?

A. Yes.

Q. Okay. And how often did they tell you to do that?

A. At every safety meeting.

Q. Every safety meeting.

So at every safety meeting they, meaning Amanda Bent Bolt or the foreman, told the employees "do not rely upon the safety pullbacks to pull your hands out of a machine?"

A. Yes.

Q. And do you know why they told you that?

A. No.

(Tr. 42-43)

{¶ 38} The record contains ABB agendas for monthly safety meetings scheduled during the years 2006 and 2007. Those agendas uniformly state in part:

We are going to remind every operator that you are not to rely on the safety pullbacks to pull your hands out of a machine. You need to take your hands out of the pinch point when tripping the machine.

{¶ 39} At the December 14, 2010 hearing, Puterbaugh testified on re-cross examination: p. 138-39

Q. During your testimony and questioning by Mr. Suter over here you had talked about how with the safeties that you can't trust them, that they can fail. Was there something in there about that?

A. We tell everybody not to trust them. It's a mechanical device.

Q. Okay. So you tell all of your employees not to trust the safety devices?

A. The pullbacks, yes, not to put your hands in there and trip the pedal.

(Tr. 98-99.)

{¶ 40} Puterbaugh also testified under direct examination:

Q. Okay. Tell us just generally for Mr. Cromley's benefit the kind of orientation and safety training that a new Press Operator would receive at Amanda Bent Bolt.

A. Well, I do the orientation and the safety training for new hires.

And, uhm, it's about a four-hour orientation and about half of it is safety training.
I instruct them on, you know, how safeties work.

I take them on a shop tour and show them, you know, the proper procedures.

I tell them, you know, you don't check safeties to see if they work, don't put your hands in there and trip the pedal. It's a mechanical device. Even if you check it daily it can fail at times. You don't -- you can't trust that.

(Tr. 84-85.)

{¶ 41} Relator also points to the testimony of Payne during cross examination by relator's counsel:

Q. Are you aware of Amanda Bent Bolt telling its employees not to rely upon the safety pull backs to get their hands out of a dye?

A. Yes.

Q. Okay.

A. That's part of the safety meeting. Don't trip the press with your hand in a pinch point and don't count on the safeties to pull you back, because they're mechanical and they can fail.

(Tr. 113.)

{¶ 42} According to relator, the above noted evidence regarding ABB's warnings to its press operators shows that ABB had "prior knowledge" that the pullback guards could fail to pull hands from the dye to avert injury. Moreover, relator argues here that this evidence undisputedly shows that ABB failed to provide a guard:

Based on the continual statements from ABB Co. during its safety meetings and what was told to its employees by management on a continual basis regarding the ineffectiveness of the hand pull guards, ABB Co. should not now be able to avail itself under the protections of the Code by saying that they guarded Machine No. 885. If ABB Co. truly hand [sic] concerns about the propensity or chance of the hand pull guards to fail because they were a mechanical device, then ABB Co. should have considered the other suitable methods under O.A.C. §4123:1-5-11(E) to guard the hands of its operators.

(Emphasis sic.) (Relator's brief, at 16.)

{¶ 43} Relator's argument lacks merit. Analysis begins with ABB's response to relator's argument:

Like any good comprehensive operator safety training, operators should be trained to never assume that a safety device will never fail and should never become complacent and perform an unsafe act. To equate this type of safety training as an admission by the employer that the employer knew that the safety devices on Machine No. 885 would someday fail goes against the entire notion of workplace safety.

(Respondent ABB's brief, at 13.)

{¶ 44} In the magistrates view, ABB's succinct response correctly answers relator's argument. It is simply good safety policy to never assume that a safety device will never fail.

{¶ 45} Moreover, it is the commission that weighs the evidence before it. Clearly, it was within the commission's fact finding discretion to determine that ABB's warnings to its press operators was not evidence that ABB had prior knowledge that the pullback guards on the Bliss Press that injured relator were about to fail or were at risk of failing beyond the normal risk of failure that is inherent in all safety devices.

{¶ 46} Clearly, ABB's demonstrated awareness that all its safety devices inherently carry a risk of failure cannot be a basis for finding that ABB was forewarned that the pullback guards on the Bliss Press would fail.

{¶ 47} As earlier noted, the second issue is whether ABB failed to guard the press with the pull guard method by failing to provide a "set-up" person to assist the press operator in unhooking and rehooking the pullback guards during the employer mandated quality control inspection that occurred after the initial set-up.

{¶ 48} 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.*, 29 Ohio App.3d 354 (1986); *State ex rel. Burton v. Indus. Comm.*, 46 Ohio St.3d 170 (1989).

{¶ 49} 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.*, 10 Ohio St.3d 1 (1984); *State ex rel. Allied Wheel Products, Inc. v. Indus. Comm.*, 166 Ohio St. 47 (1956); *State ex rel. Volker v. Indus. Comm.*, 75 Ohio St.3d 466 (1996).

{¶ 50} 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.*, 78 Ohio St.3d 333, 342 (1997). The commission may not effectively rewrite its own safety rules when it interprets them. *State ex rel. Lamp v. J.A. Croson Co.*, 75 Ohio St.3d 77, 81 (1996). The SHO's order of December 14, 2010 answers this issue as follows:

The set up man did not have to be present whenever the operator would unhook and hook back up during the rest of the shift, because the initial adjustment would remain correct.

{¶ 51} In *State ex rel. Frank Brown & Sons, Inc. v. Indus Comm.*, 37 Ohio St.3d 162 (1988), it was held that a regulation providing that the poles, legs, or uprights of scaffolds should be plumb and securely and rigidly braced to prevent swaying and displacement, does not impose a duty on the employer of constant surveillance over equipment.

{¶ 52} In *State ex rel. Quality Tower Service, Inc. v. Indus. Comm.*, 88 Ohio St.3d 190 (2000), the court succinctly summarizes the holding of *Brown*:

Brown held that (1) employers can be subject to VSSR penalties for "only those acts within the employer's control," and (2) a specific safety requirement does not impose a duty of "constant surveillance" just by requiring a securely and rigidly based scaffold.

Id. at 192.

{¶ 53} *Brown* and *Quality Tower* compel a similar interpretation of the rule at issue here that requires guarding of the hydraulic press using one of the acceptable methods enumerated in the rule.

{¶ 54} As previously noted, Ohio Adm.Code 4123:1-5-11(E) 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:

* * *

(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.

{¶ 55} The safety rule at issue fails to address training or supervision related to an employee's use of the pull guards. However, that is not to say that the rule can be interpreted to allow the employer to issue pull guards in the absence of any training and supervision in the safe use of the pull guards. But again, the rule simply fails to specify any training or supervision that must accompany use of the pull guards. Under such circumstances, the standard of reasonableness must apply. That is, the rule must be read to require the employer to provide reasonable training and supervision in the use of pull guards.

{¶ 56} Here, undisputedly, the employer did provide some training and supervision on the use of the pull guards through the set-up person, Payne. But relator claims that, under the rule, Payne was required to be present at the press when relator was required to unhook the pull guards and then rehook them at the time of the quality control inspection.

{¶ 57} The record shows that Payne correctly adjusted the pullbacks to fit relator's body size and reach. He then watched her run two or three parts in the press before leaving the press area. Relator claims that Payne should have stayed at the press and been available to supervise the unhooking and rehooking of the pull guards during the quality control procedure.

{¶ 58} It was the commission's call as to whether Payne's supervision or lack thereof was reasonable under the circumstances. Moreover, that the accident happened is not, by itself, sufficient to compel the conclusion that Payne's supervision was so unsatisfactory and that ABB failed to guard the press.

{¶ 59} Given the commission's authority to interpret the specific safety requirement at issue, and to apply the interpretation to the facts supported by the

record, this magistrate cannot say that it was unreasonable for the commission to conclude that Payne did not have to be present when relator was required to unhook and rehook the pull guards.

{¶ 60} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
KENNETH W. MACKE

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).