[Cite as *State ex rel. Pennant Moldings, Inc. v. Indus. Comm.*, 2013-Ohio-3259.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Pennant Moldings, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-942
Industrial Commission of Ohio and Travis A. Tranner,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on July 25, 2013

Porter, Wright, Morris & Arthur, LLP, and *Christopher C. Russell*, for relator.

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

Agee, Clymer, Mitchell & Laret, Robert M. Robinson, Eric B. Cameron, Katherine E. Ivan, and *C. Russell Canestraro*, for respondent Travis A. Tranner.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Pennant Moldings, Inc. ("relator"), brings this original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the application of respondent Travis A. Tranner ("claimant") for an additional award for violation of a specific safety requirement ("VSSR") and to enter an order denying the application.

{¶ 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 has now rendered a decision and recommendation that includes findings of fact and conclusions of law, which is appended to this decision. The magistrate concluded that the commission abused its discretion by failing to address an issue before it and recommended that this court issue the requested writ of mandamus. Relator, claimant, and the commission have all filed objections to the magistrate's decision and the matter is now before us for our independent review.

{¶ 3} As reflected in the facts given in the magistrate's decision, the claimant was involved in a serious work-related accident on November 7, 2006 while operating a Rouselle mechanical power press, identified as press #329, in relator's stainless department. Claimant sustained a crushing injury to his left hand when press #329 spontaneously cycled. Claimant's industrial claim was allowed for left hand crushing injury; left hand amputation; and prolonged post-traumatic stress. Claimant subsequently filed an application for a VSSR award.

{¶ 4} Press #329 was equipped with a two-hand control device. The two-hand control device allowed the press to cycle only when the operator depressed both palm buttons on the two-hand control device at the same time. If the operator did not depress both buttons simultaneously, the press would not cycle. If the operator released their hand from one of the buttons before the press completed its downward stroke, the press would stop immediately. (Ison Affidavit, ¶ 2; Stip. Evid., 155.)

{¶ 5} Press #329 was a two-station die. After the press completed a cycle and returned to its resting position at the top of the machine, the operator would remove the part from the second die, move the part from the first die into the second die, and place a blank part into the first die. The operator then would begin a new cycle by depressing the two palm buttons on the two-hand control device. On November 7, 2006, claimant began operating press #329. Claimant activated the press by simultaneously depressing the two-hand control buttons, the press cycled, the upper die returned to the resting position, and claimant removed his hands from the two-hand control device. Claimant then attempted to align the part he had placed on the first die when, "without warning the press cycled, causing [claimant's] left hand to get caught between the upper and lower dies, thus resulting in [his] injury." (Tranner Affidavit, ¶ 9; Stip. Evid., 154.)

{¶ 6} After claimant filed his application for a VSSR award, the Safety Violations Investigative Unit ("SVIU") of the Ohio Bureau of Workers' Compensation conducted an investigation into the accident. The SVIU investigator obtained deposition transcripts from claimant's co-workers and an affidavit from Danny Ison, a maintenance employee for relator. Ison averred that the two-hand control device, the brake monitor, the anti-repeat mechanism, and the air clutch system on press #329 were all operating as they should both before and after the accident. Ison stated that he was unable to find anything wrong with press #329, explaining that he "cycled the press hundreds of times, * * * tried over and over to foul it up, to try to make it malfunction, and it never did." (Ison Affidavit, ¶ 7; Stip. Evid., 156.) Relying on the depositions of Lois Leisure, David Rhoads, Emma Dennis, and Michael Whitley, the SVIU investigator noted that "prior to November 7, 2006 (DOI) press # 329 (press in question) did malfunction in that press # 329 inadvertently double tripped or cycled during normal production and/or operation." (Stip. Evid., 150.)

{¶ 7} Following a hearing, a Staff Hearing Officer ("SHO") issued an order granting claimant's VSSR application. The SHO concluded that relator violated Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv), which provides for two-hand control devices as a means to protect a mechanical power press operator from reaching into the point of operation. The SHO held that a safety device "must be effective," and an "ineffective safety device does not meet the code because it does not provide the protection sought and required by the code." (SHO Decision, 2; Stip. Evid., 1172.) Relying on *State ex rel. M.T.D. Prods., Inc. v. Stebbins*, 43 Ohio St.2d 114 (1975), the SHO noted that a one time malfunction of a safety device cannot be the basis for a violation. The SHO found, relying on the deposition testimony of Emma Dennis and Lois Leisure, that press #329 had spontaneously cycled before claimant's November 7, 2006 injury and that relator had notice of the malfunction. The SHO concluded that:

> Based on the evidence noted above it is found the press cycled without the two hand control buttons having been pushed simultaneously, which it is not supposed to do according to Mr. Ison. Because it does not appear to have been activated due to accidental depression of the two hand control buttons as noted above, it is found it cycled due to a malfunction. Because a malfunction allowed the press to spontaneously cycle without the two hand palm control

> buttons having been pressed simultaneously, it is found this safety device was not effective. Because the Employer had been put on notice of a spontaneous cycling problem as noted above and failed to rectify the problem as evidenced by the malfunction on 11/07/2006 that caused the injuries of record, a violation of 4123:1-5-10 (D) (3) (a) (iv) is found. The Staff Hearing Officer also relies on State ex rel. Precision Thermo-Components, Inc. V. I.C., 10th Ct.App., 2011-Ohio-1333, No. 09AP-965, which appears to be on point factually and is found to support this decision.

(SHO Decision, 2; Stip. Evid., 1172.)

{¶ 8} The SHO ordered that an additional amount of compensation be awarded to claimant in the amount of 40 percent of the maximum weekly rate. The SHO also denied relator's request for rehearing.

{¶ 9} Under its findings of fact, the magistrate noted the affidavit of George Postmus. Postmus inspected press #329 shortly after claimant's injury and found several problems with the press, which created safety hazards. One such hazard was that the "liquid tight flex routed to the palm buttons was damaged and bent quite severely." (Postmus Affidavit, ¶ 5(a); Stip. Evid., 1114.) Postmus explained that the "damaged and bent liquid tight flex presented a safety hazard because it could send a false signal to the press and cause it to double cycle." (Postmus Affidavit, ¶ 6; Stip. Evid., 1114.) Gary Self, a maintenance employee for relator, similarly explained that if the liquid tight flex was severely bent, that could cause the press to cycle when it was not supposed to.

{¶ 10} In the magistrate's conclusions of law, the magistrate noted relator's assertion that the record did not contain evidence indicating that the two-hand control device had malfunctioned. The magistrate observed that, although the evidence regarding the liquid tight flex indicated that the two-hand control device had malfunctioned, the SHO's order failed to address this evidence. As such, the magistrate concluded that the commission abused its discretion by failing to address whether the alleged damage to the liquid tight flex caused the press to spontaneously cycle. The magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate its order granting claimant's VSSR application, and to enter a new order adjudicating the VSSR application consistent with the magistrate's decision.

{¶ 11} Each party objects to the magistrate's decision. Relator asserts the following objection to the magistrate's decision:

> WHILE THE MAGISTRATE WAS CORRECT IN RECOMMENDING THE ISSUANCE OF A WRIT OF MANDAMUS ORDERING THE INDUSTRIAL COMMISSION TO VACATE ITS ORDER GRANTING A VSSR AWARD, THE MAGISTRATE ERRED BY FAILING TO HAVE THE RECOMMENDED WRIT INSTRUCT THE INDUSTRIAL COMMISSION TO VACATE THE VSSR AWARD WITHOUT THE NECESSISTY OF ANY FURTHER PROCEEDINGS.

{¶ 12} The commission asserts the following objection:

> Where a Specific Safety Requirement mandates that a point of operation device on a mechanical power press shall protect the operator by stopping the press before the operator can place his hand in the press, there is no requirement that the commission identify what caused the press to begin its spontaneous motion, only that the safety device failed to stop the press before the operator can place his hand in the press.

{¶ 13} Claimant has also filed an objection, asserting that "the Magistrate erred in requiring the Industrial Commission to determine exactly how the safety device failed." (Claimant's objection, 2.) For purposes of this decision, we consider claimant's objection and the commission's objection to the magistrate's decision to be the same.

{¶ 14} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." A relator seeking a writ of mandamus must establish: " '(1) a clear legal right to the relief prayed for, (2) a clear legal duty upon respondent to perform the act requested, and (3) that relator has no plain and adequate remedy in the ordinary course of the law.' " *Kinsey v. Bd. of Trustees of the Police and Firemen's Disability and Pension Fund of Ohio*, 49 Ohio St.3d 224, 225 (1990), quoting *State ex rel. Consolidated Rail Corp. v. Gorman*, 70 Ohio St.2d 274, 275 (1982). "A clear legal right exists where the [commission] abuses its discretion by entering an order which is not supported by 'some evidence.' " *Id.*

{¶ 15} To prevail in a VSSR claim, a claimant must establish that the employer failed to comply with a specific safety requirement and that such failure resulted in injury.

State ex rel. Jeep Corp. v. Indus. Comm., 42 Ohio St.3d 83, 85 (1989). "The interpretation of a specific safety requirement is within the final jurisdiction of the commission." *State ex rel. Burton v. Indus. Comm.*, 46 Ohio St.3d 170, 172 (1989). We have consistently recognized and generally deferred to the commission's expertise in areas falling under its jurisdiction. *State ex rel. Hina v. Indus. Comm*, 121 Ohio St.3d 4, 2009-Ohio-250, ¶ 19.

{¶ 16} A specific safety requirement must "adequately apprise[] the employer of its duty towards employees." *Jeep Corp.* at 84. Because a VSSR award is a penalty to the employer, "it must be strictly construed, and all reasonable doubts concerning the interpretation of the safety standard are to be construed against its applicability to the employer." *Burton* at 172. Because the rule of strict construction concerns only the applicability of the specific safety requirement to the employer, it does not permit a reviewing court "to construe the *evidence* of a VSSR strictly in the employer's favor." (Emphasis sic.) *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶ 70. Moreover, the application of the strict-construction rule cannot justify an illogical result or one that is contrary to the clear intention of the code. *State ex rel. Maghie & Savage, Inc. v. Nobel*, 81 Ohio St.3d 328, 331 (1998).

{¶ 17} The Ohio Administrative Code provides that it is the "responsibility of the employer to provide and require the usage of 'point of operation guards' or properly applied and adjusted "point of operation devices" on every operation performed on a mechanical press." Ohio Adm.Code 4123:1-5-10(D)(1). Here, relator elected to use the two-hand control device on press #329 as a point of operation device. Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) required that the two-hand control device "protect the operator" by "[r]equiring application of both of the operator's hands to machine operating controls and locating such controls at such a safety distance from the point of operation that the slide completes the downward travel or stops before the operator can reach into the point of operation with his hands."

{¶ 18} The SHO initially determined that, because relator equipped the Rouselle press #329 with a two-hand control device, Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) applied to relator. (SHO Decision, 1; Stip. Evid., 1171.) The SHO then interpreted Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) to require that a press equipped with a two-hand

control device not be able to cycle without both hand controls being depressed simultaneously. (SHO Decision, 2; Stip. Evid., 1172) (stating that "the press cycled without the two hand control buttons having been pushed simultaneously, which it is not supposed to do," thus demonstrating that the "safety device was not effective").

{¶ 19} The SHO relied on *M.T.D. Prods.* and *State ex rel. Precision Thermo-Components, Inc. v. Indus. Comm.*, 10th Dist. No. 09AP-965, 2011-Ohio-1333, to support its order granting the VSSR application. In *M.T.D. Prods.*, the Supreme Court of Ohio held that "[t]he fact that a safety device that otherwise complies with the safety regulations failed on a single occasion is not alone sufficient to find that the safety regulation was violated." *Id.* at 118. The safety rules do not "purport to impose absolute liability" on an employer, as the regulations do not require "that, in addition to providing a safety device, the safety device must also be completely failsafe." *Id.* Known as the "single failure exception to the specific safety requirement," *M.T.D. Prods.* holding immunizes employers from liability when an employee is injured by the first-time failure of a safety device. *State ex rel. Moore v. Indus. Comm.*, 29 Ohio App.3d 239, 243 (10th Dist.1985). *See also State ex rel. Taylor v. Indus. Comm.*, 70 Ohio St.3d 445, 447 (1994); *State ex rel. Pressware Internatl., Inc. v. Indus. Comm.*, 85 Ohio St.3d 284, 290 (1999) (referring to the employer's "immunity under *M.T.D.*").

{¶ 20} Where an employer has prior knowledge of the malfunctioning safety device, however, the single failure exception is inapplicable. *Precision Thermo-Components* at ¶ 4, 6. In *Precision Thermo-Components*, the molding machine at issue was equipped with a sliding door and "[t]he [machine] was not supposed to activate with the door open." *Id.* at ¶ 16. Yet, while the sliding door was open, the machine cycled, causing the employee's injury. *Id.* The magistrate concluded that, although the employer provided the sliding door as the code required, "that safety device malfunctioned and caused the industrial injury." *Id.* at ¶ 29. Accordingly, the magistrate held that "[u]nder the M.T.D. Products single failure exception, the question before the commission was whether relator had ever been forewarned of the malfunction on the date of injury by a prior malfunction of the safety device." *Id.* at ¶ 29. Because the evidence demonstrated that the employer had prior knowledge of the malfunctioning safety device, there was

some evidence to support the commission's order granting the VSSR application. *Id.* at ¶ 6.

{¶ 21} In *State ex rel. Carlton v. Indus. Comm.*, 6 Ohio St.3d 433 (1983), an employee was injured by a press equipped with "[s]weep guards," which prevent an operator's hands from entering the danger zone during the operating cycle by sweeping the operator's hands away from the danger zone when the ram on the press descends. The claimant's co-worker in *Carlton* reported to the foreman "that, on two occasions, the ram [on the press in question] had descended suddenly without being activated and that the sweep guards responded so slowly that he almost caught his hands in the die area." *Id.* The claimant then began to operate the press and, when the ram descended "without being activated, * * * and the sweep guards did not respond in time to sweep [the claimant's] hands from the danger zone," the claimant was injured. *Id.* at 434. The court held that under *M.T.D. Prods.* the "controlling fact bec[ame] whether [the employer] had notice of any of the sweep guard's previous failures." *Id.* at 435. Because the co-worker had notified the foreman regarding the malfunction, there was evidence that the employer had notice of the safety devices previous failures. *Id.*

{¶ 22} In both *Precision Thermo-Components* and *Carlton*, the courts found that the respective safety devices had malfunctioned, but did not require further identification of the specific mechanical event which caused the safety device to fail. In both cases, the determinative facts demonstrated that a safety device did not function as the code required, the claimant was injured by the safety device's failure, and the employer had notice of the malfunctioning safety device. Here, the SHO found that relator had notice before claimant's November 7, 2006 injury that press #329 had spontaneously cycled without activation of the two-hand control device. Accordingly, the issue in the instant case resolves to whether a press which cycles spontaneously without the operator depressing the two-hand control buttons amounts to a malfunction of the safety device provided for in Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv).

{¶ 23} Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) requires application of both of the operator's hands to the two-hand control buttons, which must be located at the appropriate safety distance from the point of operation, such that the ram on the press completes its downward travel or stops before the operator can reach their hand into the

point of operation. Here, claimant was able to reach into the point of operation before the press completed its downward cycle or stopped. Relator argues that Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) "has no applicability once the slide of the press completes its downward travel and starts up again or comes to rest at the top." (Relator's memorandum contra commission's objection to the magistrate's decision, 4 ("Relator's memorandum contra").) Thus, relator argues that Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) is "only applicable once the operator initiates the cycle by pushing the two-hand control buttons." (Relator's memorandum contra, 4.)

{¶ 24} Relator's interpretation of Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) is contrary to the clear intention of the code. The title of section (D)(3) is "[s]afeguarding the point of operation." "The primary purpose of the requirement that [a] press be guarded is to avoid injury to the hands of the operator by making sure that they will not be in the danger zone when the ram descends." *State ex rel. Aspinwall v. Lancaster*, 10th Dist. No. 86AP-261 (Aug. 6, 1987). "The prevention of injury to the operator's hands may be accomplished by * * * a device which requires both of the operator's hands to be out of the danger zone for the press to be activated (such as a two-hand control device)." *Id.* When the ram on a machine with a two-hand control device is able to descend without the operator depressing the palm buttons on the two-hand control device, the two-hand control device is wholly ineffective. To find that Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) only applies when the operator's hands are on the two-hand control buttons, but not when the ram spontaneously descends without activation from the two-hand control buttons, would vitiate the safety purpose of section (D)(3)(a)(iv), which is to protect the operator by ensuring that their hands are not in the point of operation when the ram descends.

{¶ 25} Relator further asserts that it did not violate Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) because there was no evidence in the record demonstrating that "the spontaneous cycle by the mechanical power press had anything to do with a defect with the hand-control device." (Relator's memorandum contra, 3.) This argument, however, ignores the fact that the two-hand control device controls when the press is able to cycle. Ison explained in his affidavit that "[t]he two hand control will only allow the press to cycle if the two buttons are depressed at the same time. If one or both of the buttons are not depressed, the press will not cycle." (Ison Affidavit, ¶ 2; Stip. Evid., 155.) Thomas R.

Huston, a professional engineer, similarly explained that "when a mechanical power press features a two-hand control device, it should not cycle unless an operator simultaneously depresses both hand buttons for a prescribed period of time." (Huston Affidavit, ¶ 16; Stip. Evid., 1092.) Claimant's injury was directly the result of a malfunction of the subject safety device, because the ram on press #329 was able to descend without the operator depressing the two-hand control buttons simultaneously.

{¶ 26} The SHO interpreted Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv) to mean that a press equipped with a two-hand control device should not be able to cycle unless the two-hand controls are pressed simultaneously. We defer to the commission's interpretation, which is reasonable and supported by the record evidence. Regardless of the precise mechanical reason for the malfunction, when press #329 was able to cycle without the two-hand control buttons being simultaneously depressed, the two-hand control device failed to function as the code required. Pursuant to *M.T.D. Prods.*, *Precision Thermo-Components* and *Carlton*, a VSSR award is appropriate when the evidence demonstrates that an employee was injured by the failure of the safety device, and the employer had prior notice that the safety device was not functioning as the code required. Here, the failure of the two-hand control device to function as required caused claimant's injury. Accordingly, the remaining question is whether relator had notice of the two-hand control devices' previous failures.

{¶ 27} As noted in the SHO's order, Emma Dennis saw press #329 spontaneously cycle in the summer of 2006, informed the maintenance department and her supervisors of the spontaneous cycle, and was told that "there was nothing wrong with [press #329], to go ahead and run it." (Dennis Depo., 51; Stip. Evid., 204.) Lois Leisure similarly testified that she saw press #329 "double cycle one time" during the summer of 2006, explaining that maintenance worked on the press and told Leisure the press had been fixed. (Leisure Depo., 9, 22-23; Stip. Evid., 220-21.) The evidence further demonstrates that, although the maintenance department was supposed to conduct monthly inspections on press #329, no monthly inspection had occurred from May through November 2006. (Stip. Evid., 487-523.) (Self Depo., 10; Stip. Evid., 963.) Following claimant's injury, relator received several violations from the Occupational Safety and Health Administration for, among other reasons, allowing operators "to continue to

operate the #329 press after it came down on an operator on or about July 2006, prior to November 7, 2006 accident" (Stip. Evid., 445.) and because proper "[m]aintenance and repair was not performed on the part revolution mechanical power press #329 Rouselle." (Stip. Evid., 444.) Accordingly, the evidence demonstrated that before claimant's injury relator was aware that press #329 had spontaneously cycled without the two-hand control buttons being depressed, and permitted employees to continue to operate press #329 without identifying and fixing the problem which was causing the spontaneous cycle. Based on the foregoing, there was some evidence to support the SHO's order.

{¶ 28} The magistrate's conclusions of law find that the commission abused its discretion by failing to address the evidence regarding the alleged damage to the liquid tight flex. However, *M.T.D. Prods.*, *Precision Thermo-Components*, and *Carlton* demonstrate that a VSSR award is appropriate where a safety device's failure causes an employee's injury and the employer had notice before the injury of the malfunctioning safety device. Because the SHO cited evidence demonstrating that relator had notice prior to claimant's injury that press #329 had previously cycled without activation of the two-hand control device, the SHO was not further required to address the evidence regarding the liquid tight flex.

{¶ 29} Following independent review, pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts, and we adopt them as our own. For the reasons set forth in this decision, however, we reject the magistrate's conclusions of law. Instead, we conclude the commission did not abuse its discretion in granting claimant's VSSR application because relator had prior notice of the malfunctioning safety device. As such, we sustain the commission's and claimant's objections to the magistrate's decision, overrule relator's objection to the magistrate's decision, and deny relator's request for a writ of mandamus.

Commission's and claimant's objections sustained;
relator's objection overruled;
writ denied.

SADLER and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Pennant Moldings, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-942
Industrial Commission of Ohio and Travis A. Tranner,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on October 31, 2012

Porter, Wright, Morris & Arthur, LLP, and *Christopher C. Russell*, for relator.

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

Agee, Clymer, Mitchell & Laret, Robert M. Robinson, Eric B. Cameron, Katherine E. Ivan, and *C. Russell Canestraro*, for respondent Travis A. Tranner.

IN MANDAMUS

{¶ 30} In this original action, relator, Pennant Moldings, Inc. ("relator" or "Pennant") requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the application of respondent Travis A. Tranner ("claimant") for an additional award for violation of a specific safety requirement ("VSSR") and to enter an order denying the application.

Findings of Fact:

{¶ 31} 1. On November 7, 2006, claimant sustained a crush injury to his left hand while operating a mechanical power press for relator.

{¶ 32} 2. The industrial claim (No. 06-874889) is allowed for:

> Left hand crushing injury; left hand amputation; proglonged post-traumatic stress.

{¶ 33} 3. The mechanical power press had a two-station die. After the press completes a cycle and returns to its resting position, the operator removes the part from the second die and places it on a nearby table. He then removes the part from the first die and places it into the second die. He then puts a blank part into the first die before starting a new cycle by depressing the two palm buttons.

{¶ 34} 4. At the time of his injury, claimant was loading a part into the first die when the press unexpectedly cycled, crushing his left hand.

{¶ 35} 5. On July 24, 2008, claimant filed an application for a VSSR award.

{¶ 36} 6. Earlier, relator filed an intentional tort action against Pennant in the Clinton County Court of Common Pleas. Numerous depositions were taken of various witnesses in the common pleas court action.

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

{¶ 38} 8. On October 28, 2008, the SVIU investigator visited the site of the accident at the facility operated by Pennant. The investigator took photographs and videos of the Rousselle mechanical power press (#329) upon which claimant was injured.

{¶ 39} 9. The SVIU investigator obtained two affidavits. Danny Ison executed his affidavit on October 31, 2008. Claimant executed his affidavit on November 6, 2008.

{¶ 40} 10. Claimant's affidavit avers:

> [One] That I am the claimant in the above referenced VSSR matter and was employed by my employer, Pennant Moldings, Inc., as "stainless department crew" and was employed by my employer for approximately four (4) days. I did return to work at my employer approximately three (3) or four (4) months after I sustained my injury and attempted to perform light duty. However, due to psychological problems suffered from being in the immediate area of the

injury site, I was only able to perform the task of light duty for half of the work day[.]

[Two] On the day I sustained my injury I was performing my work related duties in the "stainless department" and was in the process of operating the press in question – the press in question was a "Rousselle" mechanical press, press # 329. The press in question had been set-up at the time of my hire to operate in "single stroke" and was activated by a two-hand control device – the two hand control device was affixed at the front of the press. I do not know the model or serial number(s) of the press in question.

[Three] On my first day of hire I was provided with Company Orientation (approximately one and half hours) and then I was assigned by a Pennant Moldings, Inc. supervisor (cannot recall his name) to operate the press in question located in the stainless department.

[Four] The supervisor walked with me and another new hire (cannot recall his name) to the press in question and at such time we did meet with a full-time Pennant Moldings, Inc[.] employee/press operator (cannot recall his name), who did provide us with approximately five (5) minutes of hands-on training[.] The press operator ran approximately a dozen parts (flat pieces of metal sheets) – the part(s) were about two and half feet in length, approximately one foot in width and one eighth inch in thickness. The supervisor was not in the immediate area.

[Five] After the press operator completed approximately five minutes of demonstration in the operation of the press in question, he instructed me and the other new hire to begin the task of running the parts on the presses located in the "cell" – the cell included the press in question, a smaller "Rousselle" press and a conveyor with free spinning rollers[.]

[Six] I did begin the operation of the press in question as instructed by the press operator and continued the operation of this press during the course of my employment (approximately four days).

[Seven] On the day I sustained my injury I did arrive at work and began the operation of the press in question – the press was already set-up and in the "on" position.

> [Eight] I did manually place a part onto the die number 1 (point of operation), activated the press by engaging, simultaneously, the two-hand control buttons causing the upper die to cycle – my hands remained on the buttons of the two-hand control device until the upper die returned to the resting position. I would then remove the part from die number 1 and place same onto die number 2, then repeat the process, then remove the part from die number 2 and place same onto the parts table, then repeat the process.
>
> [Nine] At the time I sustained my injury, the upper die was in the resting position and while standing at the front of the press, I did attempt to align the part on die number 1 with my left hand, when without warning the press cycled, causing my left hand to get caught between the upper and lower dies, thus resulting in my injury – when my left hand got caught the upper die returned to the resting position[.]

{¶ 41} 11. The affidavit of Danny Ison avers:

> [One] I have worked for Pennant as a maintenance employee since 1999[.]
>
> [Two] The Rouselle 329 ("329") on which Travis Tranner was injured on November 7, 2006 had a two hand control[.] The two hand control will only allow the press to cycle if the two buttons are depressed at the same time[.] If one or both of the buttons are not depressed, the press will not cycle[.] If one or both of the buttons are released before the press has completed downward stroke, the press will stop immediately. The two hand control was operating as it should both before and after the accident[.]
>
> [Three] I installed the brake monitor on the press sometime before the accident. I'm not certain when I installed the brake monitor[.] The brake monitor is a cam. As the brakes wear and go past a certain point, the monitor will cause the press to stop and the press will not start again until the operator physically restarts it[.] Lights will also indicate that there is a problem if the brakes wear and go past a certain point[.] The brake monitor was operating as it should both before and after the accident[.]
>
> [Four] There is an anti-repeat mechanism on the press[.] When the palm buttons are pushed in and they are held in that pushed-in position, the press won't cycle again until both buttons are released and then both are pressed again.

> The mechanism is concurrent which means both buttons have to be pushed together at the same time (within a fraction of a second) to operate the press[.] If the operator lets off of even just one button, when the ram comes down, the press automatically goes to inch mode, and the operator has to hold both buttons down to get the ram back on top[.] The anti-repeat mechanism was operating as it should both before and after the accident[.]
>
> [Five] The press has an air clutch system with dual air valves on top. When both buttons are depressed, the signal is sent to the control[.] The Triad basically says everything is okay and ready to go, so it sends a double signal to air valve[.] This is because the air valve has two coils on it, and both coils must receive an electric signal to function and open[.] When air valves open, the signal automatically goes to the brake and automatically puts air into clutch. There is a rubber bladder in the clutch which gets a little bit of air in it to push fiber discs again[st] metal clutch plates, resulting in the power of the fly wheel powering the press[.] The press is a part revolution press, which means it can be stopped anywhere. The air clutch system was operating as it should both before and after the accident[.]
>
> [Six] The weight of the dies together were 942 lbs[.]
>
> [Seven] After the accident, I inspected and ran the press along with Mike Whitley, Rob Rowland, and Mike Barney. We inspected all parts of the press, including the bladder, the brakes, the clutch[.] We cycled the press hundreds of times[.] We tried over and over to foul it up, to try to make it malfunction, and it never did[.] We let the buttons off over and over; we ran it hard and ran it easy; we ran it in continuous mode and all modes[.] We could not get it to show any problems or to malfunction[.] It worked fine. We locked it out that night and it hasn't been in production since then.
>
> [Eight] We have never found anything with the press that could have caused the accident.
>
> [Nine] I am not aware of any modifications to the press after Mr[.] Tranner's accident[.]

{¶ 42} 12. The SVIU investigator also obtained the deposition transcripts generated in the intentional tort action.

{¶ 43} 13. On January 12, 2009, the SVIU investigator issued his report of investigation.

{¶ 44} In his report, the SVIU investigator noted that press #329 did malfunction prior to November 7, 2006, i.e., the date of injury.

{¶ 45} Citing the deposition testimonies of Lois Leisure, David Rhoads, Emma Dennis and Michael Whitley, the SVIU investigator concluded that, prior to the date of injury, the press "inadvertently double tripped or cycled during normal production and/or operation."

{¶ 46} 14. On May 12, 2011, the VSSR application was heard by a staff hearing officer ("SHO"). Apparently, the hearing was not recorded.

{¶ 47} 15. Following the hearing, the SHO issued an order granting the VSSR application. The SHO found a violation of Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv). The order explains:

> The SIUV [sic] investigation report, page 3, states that the machine in question was a mechanical power press and was being operated with a two palm button control/two-hand control device. The 10/31/2008 affidavit of Danny Ison states the two hand control will only allow the press to cycle if the two buttons are depressed at the same time.
>
> Rule 4123:1-5-10 covers Mechanical Power Presses. Subsection (D) covers safeguarding the point of operation, while subsection (D) (3) covers point of operation devices. Subsection (D) (3) (a) states the point of operation devices shall protect the operator by: and lists a number of options that can be use[d] to protect the operator, one of which is subsection (iv) dealing with two hand control devices. The rule does not require the use of all the possible methods, just that one of the methods be used. The Injured Worker's affidavit and Mr. Ison's affidavit indicate that two hand control buttons were provided. Therefore, subsection (D) (3) (a) (iv) is found to apply. Since the press did have the required two hand control buttons, this requirement was initially met.
>
> However, the Injured Worker's affidavit of 11/06/2008 indicates that he put a part into the press and activated the press by pressing the two-hand control buttons simultaneously and keeping his hands on the buttons until the upper die returned to the resting position. With the die

up in the resting position, he placed his left hand in the zone of operation to align the part when the press cycled without warning down onto his hand, catching his hand between the upper and lower dies. Based on this description of the accident it appears the press cycled once and then came to a stop at the normal resting point as it is supposed to and then spontaneously cycled.

Since the [I]njured [W]orker had one hand in the point of operation when the press cycled, it could not have been caused by a simultaneous pressing of the palm buttons. Further, since photographs one and two of the SIUV [sic] investigation report show rings around the palm buttons to prevent accidental contact and depression (1-18-10 George Wharton, page 5) and shows the control buttons on the sides of the control panel and not in the front where photograph 61 from the Employer indicates the operator stands, it is found that no accidental depression of the palm buttons is indicated. Based on this it is found the press malfunctioned when it cycled down onto the Injured Worker's hand.

Pursuant to M.T.D. Products v. Stebbins (1975), [43 O.S.2d 114], the provided safety device must be effective. Clearly, an ineffective safety device does not meet the code because it does not provide the protection sought and required by the code. In M.T.D. Products the Ohio Supreme Court held that a one time malfunction is not a basis for finding a violation because the Employer has not been forewarned of the possibility of a failure of the safety device.

However, M.T.D. Products only applies when there has been no previous malfunction. In this case both Lois Leisure (transcript pg. 19) and Emma Dennis (transcript pages 26, 27, 43, and 49 through 51) state the press in question (#329) had malfunctioned prior to 11/07/2006. Ms. Dennis defines this as a spontaneous cycle. She states that she told maintenance about the problem and was told by them that there was nothing wrong with the machine and to go ahead and run it (transcript pg. 51). Ms. Dennis also states she was told of another such incident by Greg Hutton who stated it spontaneously cycled on him and he reported it to someone in maintenance (transcript pages 30 through 32). Therefore, it is found the Employer was on notice of a spontaneous cycle problem before the injury of record.

Based on the evidence noted above it is found the press cycled without the two hand control buttons having been

> pushed simultaneously, which it is not supposed to do according to Mr. Ison. Because it does not appear to have been activated due to accidental depression of the two hand control buttons as noted above, it is found it cycled due to a malfunction. Because a malfunction allowed the press to spontaneously cycle without the two hand palm control buttons having been pressed simultaneously, it is found this safety device was not effective. Because the Employer had been put on notice of a spontaneous cycling problem as noted above and failed to rectify the problem as evidenced by the malfunction on 11/07/2006 that caused the injuries of record, a violation of 4123:1-5-10(D) (3) (a) (iv) is found. The Staff Hearing Officer also relies on State ex rel. Precision Thermo-Components, Inc. V. I.C., 10th Ct.App., 2011-Ohio-1333, No. 09AP-965, which appears to be on point factually and is found to support this decision.
>
> The Injured Worker's representative did not go through each specific code section cited and stated they did not have evidence of what caused the malfunction. Instead he argued that the two hand safety device failed because it did not prevent the Injured Worker's hand from being in the zone of operation when the press spontaneously cycled. Since none of the other specific code sections alleged were specifically addressed and no evidence argued that they were the cause of the malfunction, no violation of any other section is found.
>
> It is therefore ordered that an additional amount of compensation be granted to the Injured Worker in the amount of 40 percent of the maximum weekly rate under the rule of State ex rel. Engle v. Indus. Comm.[,142 Ohio St. 425 (1944)].

{¶ 48} 16. On July 19, 2011, relator moved for rehearing pursuant to Ohio Adm.Code 4121-3-20(E).

{¶ 49} 17. On August 23, 2011, another SHO mailed an order denying rehearing. The SHO's order explains:

> It is hereby ordered that the Motion for Rehearing filed 07/19/2011 be denied. The Employer has not submitted any new and relevant evidence nor shown that the order of 05/13/2011 was based on an obvious mistake of fact or on a clear mistake of law.
>
> Specifically, it is found that the Staff Hearing Officer fully evaluated the evidence, the case law, and the cited VSSR

> code provisions. The Staff Hearing Officer found that a point of operation device, the two-hand control button system, was present. However, this safety device was not effective, due to a history of machine malfunction, which the Employer was on notice of, due to evidence of prior spontaneous cycling. It has not been shown that the Staff Hearing Officer order is based on a clear mistake of law, and the request for a VSSR rehearing must be denied, per the provisions of Ohio Administrative Code 4121-3-20 (E) (1).

{¶ 50} 18. The SHO's order of May 12, 2011 cites to page five of the January 18, 2010 report of George J. Wharton. Mr. Wharton is a mechanical engineer who was asked by Pennant to prepare a report addressing whether Pennant had violated any specific safety requirements of the Ohio Administrative Code.

{¶ 51} On the first page of his 18-page report, Mr. Wharton states:

> Background
>
> On November 7, 2006, Mr. Travis Tranner was working as a press operator at Pennant Moldings in Sabina, OH. Near the end of his shift, Mr. Tranner was loading a stainless blank part into the first station of the press when the press reportedly cycled spontaneously while Mr. Tranner was reaching in to adjust the position of the part. Mr. Tranner suffered injuries to his left hand as a result of this incident.
>
> Based on the description of the incident by Mr. Tranner, he had transferred a part out of station 2 of the press, moved a part from station 1 to station 2, and was loading a part into station 1 when the press came down, crushed his hand, and returned to the top stop. This described a complete single cycle, not a failure to stop at the top or a double cycle. A double cycle would be when the press is triggered once, completes a cycle but fails to stop at the top, and completes a second cycle.
>
> Repeated testing after the incident and during my inspection failed to cause the press to double cycle, or to cycle spontaneously.

On page five of the report, Mr. Wharton states:

> Press 329 had two-hand controls located at the front of the press. The buttons for the two hand control were guarded by ring guards as shown in Figures 3 and 4 to prevent

> unintended operation. There was no violation of this requirement.

{¶ 52} 19. In defense of this mandamus action, the commission cites and quotes portions of the evidentiary record that are not cited or quoted in the SHO's order of May 12, 2011.

{¶ 53} 20. Here, the commission cites to the affidavit of George Postmus executed February 10, 2009. The affidavit avers:

> [One] My name is George Postmus and I am employed by BCN Technical Services, Inc. as a field service technician.
>
> [Two] In my capacity as a field service technician, I perform inspections, troubleshoot problems, and perform repairs and maintenance on power presses; including Rouselle power presses similar to the Rouselle model 10 K 100, serial number 23270, which injured an employee at Pennant Moldings, Inc. in November 2006.
>
> [Three] I have performed inspections, troubleshot problems, and performed repairs and maintenance on power presses for the last 35 years.
>
> [Four] On November 16, 2006, I inspected the Rouselle model 10 K 100, serial number 23270, at Pennant Moldings, Inc. in Sabina, Ohio.
>
> [Five] In the course of my inspection, I found several problems with the Rouselle that created safety hazards, including the following:
>
> a. The liquid tight flex routed to the palm buttons was damaged and bent quite severely;
>
> * * *
>
> [Six] The damaged and bent liquid tight flex presented a safety hazard because it could send a false signal to the press and cause it to double cycle.

{¶ 54} 21. Here, the commission cites to the November 22, 2006 letter of Dan VanDongen, Field Service Manager of BCN Technical Services, Inc. Addressed to Pennant, the letter states:

> Here are the results of the press evaluation George Postmus performed 11/16/06. The press evaluated is a Rouselle model 10 K 100, serial number 23270.
>
> The wiring in general was inspected. The liquid tight flex routed to the palm buttons has been damaged and bent quite severely. A guard for the liquid tight flex should be installed on the front of the press.

{¶ 55} 22. Here, the commission cites to the August 6, 2008 deposition testimony of Gary N. Self taken in the intentional tort action. On the date of the deposition, Self was employed by Pennant in its maintenance department, a position Self had held for about four years.

{¶ 56} At pages 42, 43, and 44 of his deposition transcript, the following exchange occurred between Self and claimant's counsel:

> Q. What is the liquid tight flex?
>
> A. We call it seal tight. Your wires run through it.
>
> Q. What is the purpose of the seal tight?
>
> A. Protect them wires.
>
> Q. And your understanding is that those would be the wires that are hooked up to the palm buttons?
>
> A. Yes.
>
> Q. So those would be the wires that are conveying a message from the palm buttons to the rest of the press to cycle down?
>
> A. Yes.
>
> Q. All right. And did you have the understanding before Travis' injury that if there was something wrong with the liquid tight flex, in other words, if it was bent severely, that that could interfere with the signal from the palm buttons to the rest of the press?
>
> A. If it damaged the wires inside, yes.
>
> Q. Okay. And did you have the understanding before Travis was injured that if this liquid tight flex was bent severely, that it needed to be replaced or fixed?

A. Yes.

Q. And the reason that it would need to be fixed or replaced would be for employee safety?

A. Yes.

Q. Because if the wires connected to the palm buttons are not working properly, that could cause the press to not work properly; is that right?

A. Yes.

Q. In other words, it could cause it to potentially cycle when it wasn't supposed to cycle?

A. It could.

{¶ 57} 23. Here, the commission cites to the August 6, 2008 testimony of Robert G. Rowland taken in the intentional tort action. Rowland was Pennant's maintenance manager on the date of the industrial injury.

{¶ 58} At pages 56, 57, and 58 of his deposition transcript, the following exchange occurred between Rowland and claimant's counsel:

Q. Okay. And when we're talking about the liquid tight flex, what are we talking about?

A. That's what – it's more or less flexible conduit that the wires is encapsulated in[.]

Q. Okay. And if that is connected to the palm buttons, is that basically what's carrying the signal to the remainder or to the rest of the press when the palm buttons are depressed?

A. That's correct.

Q. In other words, if I am working on a 329 and I press the palm buttons, it's that liquid tight flex and what's encased inside of it that's sending the signal to the rest of the press to cycle?

A. That's right.

> Q. Okay. And if that is damaged and bent quite severely, does that present a hazard to the employee working on the machine?
>
> A. It could[.]
>
> Q. And the hazard could be that that signal could be misinterpreted by the remainder of the press?
>
> A. Yes, it could.
>
> Q. In other words, it could get the signal that it needs to cycle again potentially?
>
> A. Yeah, it could.

{¶ 59} 24. Here, the commission cites to the March 18, 2009 affidavit of George Wharton that was apparently filed in the intentional tort action. In the affidavit, Wharton avers:

> Of the alleged defects on press #329 described by George Postmus in his affidavit, the only problem that could potentially cause a press to cycle inadvertently was the damaged liquid-tight conduit. An inadvertent cycle could only be caused by damage to the liquid-tight conduit if there was a simultaneous electrical short in both palm button circuits. The absence of damage to the insulation on the wires in the palm button circuits made this failure mode impossible.

{¶ 60} 25. On November 1, 2011, relator, Pennant Moldings, Inc., filed this mandamus action.

Conclusions of Law:

{¶ 61} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 62} Ohio Adm.Code 4123:1-5 sets forth specific safety requirements for workshops and factories. Thereunder, Ohio Adm.Code 4123:1-5-10 is captioned "Mechanical power presses."

{¶ 63} Ohio Adm.Code 4123:1-5-10(D) is captioned "Safeguarding the point of operation." Thereunder, Ohio Adm.Code 4123:1-5-10(D)(1) is captioned "General requirements." Thereunder, Ohio Adm.Code 4123:1-5-10(D)(1)(a) provides:

> It shall be the responsibility of the employer to provide and require the usage of "point of operation guards" or properly applied and adjusted "point of operation devices" on every operation performed on a mechanical press.

{¶ 64} Ohio Adm.Code 4123:1-5-10(D)(3) is captioned "Point of operation devices." Ohio Adm.Code 4123:1-5-10(D)(3)(a) states: "Point of operation devices shall protect the operator by."

Thereunder, six different operation devices are listed in the alternative.

Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv), at issue here, provides:

> Requiring application of both of the operator's hands to machine operating controls and locating such controls at such a safety distance from the point of operation that the slide completes the downward travel or stops before the operator can reach into the point of operation with his hands.

{¶ 65} According to relator, on the date of injury, press #329 "spontaneously cycled for unknown reasons, causing [claimant's] injury." (Relator's brief, at 2.)

Relator further asserts:

> [T]here is no evidence that the two-hand control device ever malfunctioned or was in any way defective. While there is evidence that the 329 press spontaneously cycled previously for unknown reasons, there is no evidence and the Staff Hearing Officer did not find that the malfunction had anything to do with a defect in the two-hand control device.
>
> * * *
>
> In contrast here, there is no evidence that the two-hand control device malfunctioned at any time and there is no evidence that it malfunctioned at the time of Tranner's injury. On the contrary, the SHO found no defect in the device and everyone concedes that they have no evidence of what caused the malfunction.

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

{¶ 66} Relator's challenge to the commission's VSSR award here is premised upon its factual assumption that there is no evidence in the record showing that the two-hand control device itself malfunctioned at the time of the injury. But relator's assumption is countered by a substantial amount of evidence that the commission points to in this

action. Unfortunately, the SHO's order of May 12, 2011 fails to address this evidence or the issue presented by this evidence.

{¶ 67} Relator contends here that the evidence is undisputed that relator complied with the specific safety rule at issue by providing an effective two-hand control device and that the device was never shown to have caused the industrial injury. That is, relator contends that the cause of the injury was undisputedly a press malfunction that is unknown or unexplained.

{¶ 68} Given the alleged lack of proximate cause, relator concludes that the commission abused its discretion by entering a VSSR award. *See State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250 (1996); *State ex rel. Bayless v. Indus. Comm.*, 50 Ohio St.3d 148 (1990).

{¶ 69} The commission explained its finding of a violation of the safety rule relating to the two-hand control device as follows:

> Because a malfunction allowed the press to spontaneously cycle without the two hand palm control buttons having been pressed simultaneously, it is found this safety device was not effective.

{¶ 70} Relator argues that Ohio Adm.Code 4123:1-5-10(D)(3)(a)(iv), i.e., the two-hand control device rule, does not require that the device prevent any malfunction of the press such as a spontaneous unexpected cycling of the machine. Thus, relator concludes that the specific safety rule at issue fails to apprise relator that it must guard against such malfunction. *See State ex rel. Trydle v. Indus. Comm.*, 32 Ohio St.2d 257 (1972); *State ex rel. Burt v. Indus. Comm.*, 87 Ohio St.3d 175 (1999).

{¶ 71} Given relator's factual presumption that there is no evidence in the record showing that the two-hand control device itself malfunctioned at the time of the injury, relator's arguments regarding proximate cause and the safety rules' failure to apprise may seem persuasive. But the persuasiveness of relator's arguments is seriously undermined by the commission's failure to address a key issue before it.

{¶ 72} It is well settled that the commission abuses its discretion when it fails to address an issue that has been placed before it. *State ex rel. Peabody Coal Co. v. Indus. Comm.*, 66 Ohio St.3d 639 (1993) citing *State ex rel. Gen. Am. Transp. Corp. v. Indus. Comm.*, 49 Ohio St.3d 91 (1990).

{¶ 73} Here, the commission abused its discretion by failing to address an issue before it. That is, the commission failed to determine whether the alleged damage to the "liquid tight flex" that connected the two-hand control device to the press caused the press to spontaneously cycle on claimant's left hand on the date of injury. *See State ex rel. Donohoe v. Indus. Comm.*, 10th Dist. No. 08AP-201, 2010-Ohio-1317.

{¶ 74} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its order granting a VSSR award, and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the VSSR application.

/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).