[Cite as *State ex rel. Bob Marshall Ents., Inc. v. Indus. Comm.*, 2013-Ohio-943.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Bob Marshall Enterprises, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-816
Industrial Commission of Ohio and David S. Grim,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 14, 2013

Charles D. Smith & Associates, LLC, Charles D. Smith, and *Ryan E. Bonina*, for relator.

Michael DeWine, Attorney General, and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

Livorno and Arnett Co. LPA, John F. Livorno, and *Paul Travis*, for respondent David S. Grim.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, Bob Marshall Enterprises, Inc. ("relator"), filed an original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the application of respondent David S. Grim ("claimant") for an additional award for violation of a specific safety requirement ("VSSR") and to enter an order denying the application. Because we find that the magistrate correctly concluded that there was some evidence to support the commission's

order, we adopt the magistrate's decision as our own and deny the requested writ of mandamus.

{¶ 2} Relator employed claimant as a crane operator. On September 4, 2008, relator assigned claimant to operate a mobile crane at the construction site of a Wal-Mart store in Dublin, Ohio. After arriving at the construction site, claimant had a discussion with the site supervisor about the details of the crane lift. During this discussion, a fork lift operator set down a load of steel roof joists nearby. One of the joists fell onto claimant's right foot, causing injuries to his foot and great toe. A workers' compensation claim was allowed for the injuries to claimant's right foot and right great toe. On April 7, 2010, claimant filed an application for an additional VSSR award. As detailed more fully in the magistrate's decision, after a hearing before a staff hearing officer ("SHO"), the commission granted claimant's request for an additional VSSR award.

{¶ 3} This court referred the matter to a magistrate pursuant to Civ.R. 53(D) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ.

{¶ 4} Relator filed two objections to the magistrate's decision:

> OBJECTION 1: It was error for the Magistrate to find that the Industrial Commission was within its discretion to find that a foot hazard was reasonably foreseeable to Relator Bob Marshall Enterprises, Inc.
>
> OBJECTION 2: It was error for the Magistrate to conclude that the Industrial Commission was within its discretion to find that lack of foot protection caused Claimant's injury.

{¶ 5} Claimant also filed an objection to the magistrate's decision. Although claimant did not separately enumerate his objection, it appears that he asserts that the magistrate erred by concluding that the specific foot hazard that caused his injuries had to be foreseeable to relator.

{¶ 6} 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."

{¶ 7} In order to be entitled to a writ of mandamus, a relator must establish a clear legal right to the relief sought, a clear legal duty on the part of the respondent to perform the requested act, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 34; *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. No. 06AP-1223, 2008-Ohio-2835, ¶ 8. Generally, a clear legal right exists where an administrative agency abuses its discretion by entering an order not supported by any evidence on the record; however, when the record contains some evidence to support the agency's finding, there has been no abuse of discretion, and mandamus will not lie. *See State ex rel. Brown v. Indus. Comm.*, 13 Ohio App.3d 178 (10th Dist.1983).

{¶ 8} Claimant asserted that relator violated Ohio Adm.Code 4123:1-3-03(E), which requires that foot protection must be worn where an employee is exposed to machinery or equipment that represents a foot hazard or is handling material which represents a foot hazard. An employee seeking an award for a VSSR must prove that: (1) an applicable and specific safety requirement existed at the time of the injury; (2) the employer failed to comply with the requirement; and (3) the employer's noncompliance was the cause of the injury. *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶ 46. With respect to the second element of that test, the magistrate concluded that, in order for relator to have violated the rule, the foot hazard must have been foreseeable to relator. After reviewing the evidence, the magistrate concluded that the commission did not abuse its discretion by concluding that it was foreseeable that claimant would be exposed to machinery or equipment representing a foot hazard.

{¶ 9} In relator's first objection, it argues that the magistrate erred by finding that the commission did not abuse its discretion in finding that it was reasonably foreseeable that claimant would be exposed to machinery or equipment representing a foot hazard. Relator argues that safety requirements must be strictly construed in favor of an employer. Relator also claims that there was no evidence supporting the conclusion that it could have reasonably foreseen that claimant would be exposed to a foot hazard.

{¶ 10} The Supreme Court of Ohio has characterized a VSSR award as a penalty. *State ex rel. Glunt Industries, Inc. v. Indus. Comm.*, 132 Ohio St.3d 78, 2012-Ohio-2125, ¶ 12. The commission must strictly construe a specific safety regulation in the employer's favor and resolve all reasonable doubts concerning the applicability of a specific safety regulation in the employer's favor. *Id.* However, this rule of interpretation "permits neither the commission nor a reviewing court to construe the *evidence* of a VSSR strictly in the employer's favor." (Emphasis sic.) *Supreme Bumpers* at ¶ 70. Moreover, we may not reweigh the evidence considered by the commission but must uphold its decision so long as it is supported by some evidence. *Id.* at ¶ 71.

{¶ 11} Claimant was working as a crane operator at a construction site and was injured when a steel joist fell onto his foot. As set forth in the magistrate's decision, the evidence presented to the SHO demonstrated that, after claimant arrived at the construction site, it was necessary to have a discussion with the construction site supervisor about various details of the lifting that claimant would be performing with the crane. Claimant testified that, in his experience, this discussion would occur away from the crane, wherever the site supervisor was located on the construction site. By contrast, Craig Marshall, a witness called by relator, testified that a crane operator would have the construction site supervisor come over to the crane to have the discussion. The SHO weighed this competing evidence and must have been persuaded by claimant's testimony. Based on this evidence that it might be necessary for claimant to venture onto a part of the construction site away from the crane in order to speak with the site supervisor, the SHO concluded that claimant was exposed to machinery or equipment representing a foot hazard.

{¶ 12} We reject relator's assertion that the effect of this decision is to require all employees anywhere near a construction site to wear foot protection in order for their employers to avoid VSSR liability. Rather, we conclude that, under the circumstances presented in this case, because the commission found persuasive claimant's testimony that it was necessary for him to venture onto this construction site where forklift operators were moving and setting loads of steel roof joists, it was not an abuse of discretion for the commission to conclude that it was foreseeable that claimant would be exposed to machinery or equipment representing a foot hazard.

{¶ 13} After reviewing the evidence, we conclude that claimant's testimony constitutes some evidence to support the commission's order and, therefore, the magistrate properly determined that the commission did not abuse its discretion in granting the VSSR award to claimant. Accordingly, relator's first objection is overruled.

{¶ 14} In relator's second objection, it argues that the magistrate erred by concluding that the commission did not abuse its discretion in finding that lack of foot protection caused claimant's injury. Relator argues that there was no evidence that foot protection would have lessened or reduced claimant's injury. The magistrate noted that claimant testified that he was familiar with steel-toed shoes and believed that such foot protection would have prevented or reduced his injuries. Relator argues that this testimony was insufficient to establish that lack of foot protection caused claimant's injury. However, despite citing evidence regarding the size and weight of the joist that fell on claimant's foot, relator does not cite to any evidence refuting claimant's testimony, such as evidence demonstrating that he would have been injured even if he had been wearing foot protection. We have previously held that an injured employee's statements may constitute some evidence supporting a commission finding on the proximate cause of an injury. *See, e.g., State ex rel. Glunt Industries, Inc. v. Indus. Comm.*, 10th Dist. No. 09AP-260, 2010-Ohio-4600, ¶ 9. In this case, the commission could rely on claimant's testimony in determining causation.

{¶ 15} Further, in a similar case, the Supreme Court of Ohio held that a "claimant [was] not required to additionally prove the extent to which foot protection would have eliminated or reduced his injuries." *State ex rel. S&Z Tool & Die Co. v. Indus. Comm.*, 84 Ohio St.3d 288, 290 (1999). Rather, it was sufficient that the claimant established that he was exposed to a foot hazard, that foot protection was required but not provided, and that he was injured. *Id.* In this case, claimant provided some evidence to establish each of these elements. Accordingly, relator's second objection is overruled.

{¶ 16} In the objection filed by claimant, he asserts that the magistrate erred in finding that the specific foot hazard that caused claimant's injuries had to be foreseeable to relator. Claimant argues that his job duties exposed him to various foot hazards, including a potential foot hazard from the outriggers on the crane, and that these hazards were foreseeable to relator. However, the Supreme Court of Ohio has rejected the idea of

granting a VSSR award for a potential foot hazard. *See State ex rel. US Airways, Inc. v. Indus. Comm.*, 90 Ohio St.3d 252, 256 (2000). "The commission has no authority to penalize an employer for failing to protect employees from foot hazards that have nothing to do with the claimant's injury." *Id.* Accordingly, claimant's objection is overruled.

{¶ 17} Following an independent review of the record, we find that the magistrate has properly determined the facts and applied the appropriate legal standard. Therefore, we overrule all of the objections filed by the parties and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's decision, we deny relator's requested writ of mandamus.

Objections overruled; writ denied.

TYACK and SADLER, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Bob Marshall Enterprises, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-816
Industrial Commission of Ohio and David S. Grim,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on September 20, 2012

Charles D. Smith & Associates, LLC, *Charles D. Smith*, and *Ryan E. Bonina*, for relator.

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

Livorno and Arnett Co. LPA, *John F. Livorno*, and *Paul Travis*, for respondent David S. Grim.

IN MANDAMUS

{¶ 18} In this original action, relator, Bob Marshall Enterprises, Inc. ("relator" or "Marshall Enterprises"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the application of

respondent David S. Grim ("claimant") for an additional award for violation of a specific safety requirement ("VSSR") and to enter an order denying the application.

Findings of Fact:

{¶ 19} 1. On September 4, 2008, claimant sustained a crush injury to his right great toe while employed as a crane operator for relator.

{¶ 20} 2. The injury occurred at the construction site of a Wal-Mart store located in Dublin, Ohio. At the time of injury, claimant had been assigned to operate a crane to lift steel roof joists for a new roof at the Wal-Mart store. While claimant was having a discussion with the site manager about the task he was about to perform, a fork lift operator dropped a load of steel lift joists from the fork lift. One of the roof joists fell onto claimant's right foot and great toe, causing the industrial injury. Claimant was not wearing foot protection at the time of the accident.

{¶ 21} 3. The industrial claim (No. 08-855125) is allowed for:

> Crush injury right hallux with open distal phalanx fracture; right great toe amputation; loss of use of right great toe.

{¶ 22} 4. On April 7, 2010, claimant filed an application for a VSSR award.

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

{¶ 24} 6. On June 9, 2010, the SVIU investigator met with owner Bob Marshall and his attorney at the offices of Marshall Enterprises located in Grove City, Ohio. There, the investigator observed and photographed the crane that had been assigned to claimant on the date of injury.

{¶ 25} 7. On August 18, 2010, the SVIU investigator issued his report of investigation.

{¶ 26} 8. Earlier, on May 27, 2010, claimant executed an affidavit stating:

> [One] I am the injured worker in the matter of this VSSR claim[.]
>
> [Two] I was hired by Bob Marshall Enterprises on September 6, 2007 as a crane operator/[rigger] responsible for operating the assigned crane, signaling other crane operators and [rigging] loads[.]

[Three] When I was hired by Bob Marshall Enterprises, I was offered the following training by the company: on-the-job training (administered by a variety of employees) [rigging] training for one month; crane operation for two to three weeks[.]

[Four] After I began working for Bob Marshall Enterprises, I was not issued any personal protective equipment by the company[.] Hard hats were accessible on the job site, but they were beyond their expiration date[.] There was no personal protective equipment required by the company[.]

[Five] On the day of my injury, I was given the task of [traveling] to the Dublin, Ohio Wal-Mart to lift the roof joists for a new roof that was being installed on the building (no supervisor of the company on site)[.] It was approximately midnight, and I was setting up the assigned crane in the front parking lot of the store[.] It was dark and it was difficult to see as I worked in the parking lot[.] The forklift driver (unknown name, unknown company name that driver worked for) then approached me with multiple roof joists on the front forks of the forklift and attempted to place the joists on the ground, next to where I was standing[.] As the joists were set on the ground, the outer joist tipped over and landed on my right foot (joists were not banded together)[.] I was able to get my foot free but I needed medical attention. 9-1-1 was called and I was transported to Dublin Memorial Hospital to be treated for my injuries[.] I was not issued a written policy by my employer for the tasks involved in my injury or for site safety[.]

[Six] I believe that the causes of my injury were due to lack of issued personal protective equipment (steel toe shoes were not required by the employer)[.] I also believe that I was sent to work in a hazardous work environment (no site supervisor, forklift driver operating too fast, roof joists not banded together, no written policies for job tasks)[.]

* * *

[Ten] The equipment involved in my injury was a Grade-All or JLG manufactured forklift, which contained two forks on the front of the unit[.] This forklift contained one seat for the operator and controls for maneuverability[.] I did not hear an audible alarm on the forklift prior to my injury. I do not know if the forklift operator was certified by his employer to

> operate the lift[.] The steel roof joists were 600 to 800 pounds each[.] These joists were approximately 20 to 30 feet long and 10 feet tall[.]

{¶ 27} 9. On April 14, 2011, the VSSR application was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record.

{¶ 28} 10. At the hearing, claimant testified on direct examination as follows:

> Q. Tell the hearing officer what your job was. What were you doing for this company?
>
> A. Crane operator.
>
> Q. And tell us what -- what you did normally as the crane operator. Was it a fixed crane, portable crane?
>
> A. It was a mobile crane. You would take it to a job site and set it up.
>
> Q. So was the crane on the back of a truck?
>
> A. Correct. Moving truck crane.
>
> Q. So tell us, that day, what you did. You were assigned to go somewhere?
>
> A. Yeah. I was assigned to go to the Wal-Mart at Tuttle Crossing. Got there, set up the crane.
>
> Q. Okay. How do you set up the crane?
>
> A. You get it parked in the correct spot; and then there's outriggers that you have to shoot out, put cribbing underneath the outriggers.
>
> Q. Does that require you to get off -- out of the truck and do various things around the truck?
>
> A. Yes. You have to put the cribbing under the outriggers and then level it.
>
> Q. And then what happened after that as far as this injury? You put the outriggers out at that stage?

A. Yes. The crane was set up at the time, and I was having a job briefing with the site foreman at the time of the accident.

Q. And that's a normal part of your job?

A. Yes.

Q. And that was obviously outside of the -- off of the crane itself.

A. Yes.

Q. You have to be off there to talk to people and stuff?

A. Yes.

Q. And then this isn't a construction site area; is that correct?

A. It was, yes.

Q. Okay. And there's various things going on around there I assume. There's equipment being loaded and moved. I think you were talking about a forklift operator was around there.

A. The forklift operator was bringing roof joists to the site at the time, and he dropped one.

Q. And that's what fell over onto your foot?

A. Yes.

Q. * * * I assume on this construction site there was machinery and equipment because you said there was a forklift truck.

A. Yes. Absolutely.

Q. And there was other handling being done because you were lifting stuff?

A. Correct.

Q. And this material was heavy enough if it fell on your foot it could hurt your foot, correct?

A. Correct.

Q. And is this normally what happens when you're operating one of these cranes, that you're operating in a similar type area usually?

A. Most times it's some kind of construction, you know, environment.

Q. And these are areas where you do have -- are exposed to foot hazards --

A. Yes.

Q. -- things coming over on your foot?

Now, in this case, did he provide any type of foot protection, either steel-toe or anything else?

A. No.

Hearing Officer Matthews: Who is "he"?

Mr. Livorno: I'm sorry. The Employer in this case, Mr. Marshall.

A. No.

11. At the hearing, claimant testified on cross-examination as follows:

Q. You, in this conversation with the site foreman, had nothing to do with respect to the activities of the forklift driver, correct?

A. Correct.

Q. So in other words, the forklift driver went, picked up the bar joists with the forklift, correct?

A. It was a roof joist, yes.

Q. Roof joist, steel joist?

A. Yes.

Q. And moved that roof joist with the forklift, correct?

A. Correct.

Q. And you had no role whatsoever in those activities as it relates to picking up the bar joist -- the roof joist with the forklift, correct, operating that forklift, correct?

A. No. I had nothing to do with operating the forklift.

Q. And then the operator of the forklift came by and set those joists down, correct?

A. Correct.

Q. You had no input or any activity on your part as far as the operator for Bob Marshall Crane with respect to the forklift driver dropping those roof joists?

A. I'm not sure I'm understanding. As far as did I have any --

Q. As operating that equipment.

A. Yeah. I didn't operate any of the equipment at all, no.

Q. And you, as your role as an operator, had no involvement whatsoever in the dropping of those bar joists on the ground?

A. No.

Q. You were conversing with the superintendent to discuss the activities that needed to be done for that day, correct?

A. Correct.

Q. And that superintendent was overall supervisor of that entire job site, correct?

A. Correct.

Q. Now, the supervisor -- In other words, when you said you have to get out of the crane and set up, in other words, get the outriggers in place, correct?

A. Okay. Yes.

Q. And when you're putting those outriggers in place, you're in the crane operating the crane? You're on the crane? You're not outside of the crane?

A. Not when I'm -- To put the cribbing down, I have to go to be outside of it; but as far as -- The controls are not in the cab anyways. They're on the back of the crane. But, yeah, you have to be there to shoot them out, and then you have to put the cribbing underneath of them.

Q. So as far as -- The cribbing is just your -- that's your boarding or whatever so you have these outriggers, for the hearing officers benefit.

A. Correct.

* * *

Q. * * * You said you were talking with the -- the site foreman?

A. Yes.

Q. He was briefing you?

A. Yes.

Q. And along the same time, you said that the forklift driver approached you with the bar joist?

A. The forklift -- Yeah. I mean, the forklift came into -- you know, came towards us and set down the roof joist.

Q. And you were doing no job activity with respect to handling the roof joists?

A. No, sir.

12. At the hearing, claimant testified on redirect examination as follows:

Q. You do understand how steel-toes work? You've worn them before?

A. Yes.

> Q. In this case, is it your opinion that they would have either prevented your injuries or lessened your injuries?
>
> A. I believe so, yes.

{¶ 29} 13. At the hearing, claimant testified on examination by the hearing officer as follows:

> Hearing Officer Matthews: So it's typical of your job to arrive on the site, ask the site supervisor where to set up the crane, and then you set up the crane where they tell you, where they instruct you to set it up, correct?
>
> The Witness: Well, I discuss with them where we're lifting and that kind of thing and then make a decision as to where the best place to set up the crane would be.
>
> Hearing Officer Matthews: And do you make it with the site supervisor together, that decision where to set the crane up?
>
> The Witness: Yes.
>
> Hearing Officer Matthews: So together, you confer about where to put the crane?
>
> The Witness: Correct.
>
> Hearing Officer Matthews: And generally, after you set up the crane, what is, then, your typical, standard -- What do you do then?
>
> The Witness: I discuss with the site supervisor what's being lifted, who's going to be signaling, where they're going to be located, where the lift is going to, who's going to be rigging the equipment, that kind of thing.
>
> * * *
>
> Hearing Officer Matthews: When you ask who is going to rig it up and how, have you rigged product?
>
> The Witness: Yeah. I worked as a rigger, yes.
>
> Hearing Officer Matthews: Is it typical as a crane operator also to rig product?

The Witness: No. Never.

* * *

Hearing Officer Matthews: And how close did the forklift operator come to you before he stopped?

The Witness: Ten feet, maybe.

Hearing Officer Matthews: Okay. And then he set the load down?

The Witness: Correct.

Hearing Officer Matthews: So the load was how far from you when he set it down?

The Witness: Within ten feet.

Hearing Officer Matthews: And the supervisor -- the site supervisor was present and saw where the forklift operator set the load down?

The Witness: Yes.

Hearing Officer Matthews: Did the site supervisor order the forklift operator to stop then and there and put the load down there?

The Witness: I'm sorry?

Hearing Officer Matthews: Did the site supervisor, while you were conversing, see the forklift operator come approach you? Did the site supervisor tell the forklift operator, "Stop. Put the load here"?

The Witness: No.

Hearing Officer Matthews: So the forklift operator did that on his own?

The Witness: Correct.

{¶ 30} 14. At the hearing, claimant testified on further redirect examination:

Q. The discussion that you have with the work supervisor, is that usually done outside the crane on the ground or wherever?

A. Absolutely.

Q. It's not done in your crane?

A. Correct.

Q. The cribbing that you put out, what does that actually consist of? What is it?

A. It's wood.

Q. Big wood?

A. Big wood boards, yes.

Q. Is it heavy?

A. Relatively.

Q. If you drop one of those and smash your foot, would it cause damage?

A. I would think so, yes.

Q. And you handle those all the time?

A. Yes, every time.

{¶ 31} 15. At the hearing, claimant testified on recross examination as follows:

Q. And as far as you conversing with the site supervisor, you could have conversed with the site supervisor anywhere within this parking lot area that was the construction site?

A. Not really, because I needed to be able to see where my signalman was going to be. I needed to see where the lift was going to, where the material was going to get set down, that kind of thing.

Q. But in other words, you just happened to be standing in that particular area? You could have been 10, 15 feet, north, south, east, west of where you were conversing and still be

able to see where you were going to pick up your load and where you were going to drop your load, correct?

A. Yeah. I suppose that's probably --

Q. In other words, there was not a spot marked on that construction site and said, "This is where you have to stand to converse with the site supervisor"?

A. No. I went to where he was. That's where he was.

Q. And it just happened to be in -- where you were standing having this conversation, correct?

A. Correct.

Q. And it was unforeseen by you where the forklift driver was going to place his materials?

A. Correct.

Q. And on your typical job site when you are working as an operator for Eastland, when you would have conversations with the site superintendent, who usually is with the other contractor, you would have these conversations in no particular spot, correct?

A. Correct. There's nothing said as to where you have to do that.

Q. But it would be safe to say, though, that you would look to an area to have your conversations that would be outside of a traffic area where there was equipment moving; is that true?

A. Yeah. I mean, you're not going to stand right in front of moving equipment.

Q. And you've been trained as far as your experience in the construction business as an operator to be aware of moving, heavy equipment --

A. Yes.

Q. -- and stay away from moving, heavy equipment?

A. Yes.

> Q. And, in fact, the best protection against moving, heavy equipment is to stay away, correct?
>
> A. Correct.
>
> Q. Similar to how they handle the exposure to the swing radius of a crane? The means of avoiding that hazard is to stay away, correct?
>
> A. Correct.
>
> Q. The means of avoiding that hazard is not to don some personal protective equipment. It's to basically to stay away from the moving equipment, correct?
>
> A. Correct.

{¶ 32} 16. At the hearing, relator called Craig Marshall to testify on its behalf. Craig Marshall is Bob Marshall's son who has operated cranes for relator since 1999. Craig Marshall replaced claimant at the construction site after the accident occurred.

{¶ 33} On direct examination, Craig Marshall testified as follows:

> Q. Any supervisor on the job site as far as Eastland Crane?[1]
>
> A. No. There's never -- There's no supervisor there.
>
> Q. And the role of -- In other words, Eastland Crane's operator on that site?
>
> A. He is the supervisor. He is responsible for setting that crane up safely. He's also responsible for picking the load safely. If he sees something he doesn't like or sees that's unsafe, he needs to shut down the operation of that crane.
>
> Q. So in other words, there's another contractor on a site, and the other contractor is actually hooking the air conditioning unit or the steel joists?
>
> A. Correct.
>
> Q. And if you or -- you, as the operator for Eastland, if you see something that you feel is unsafe --

[1] Apparently, relator does business as Eastland Crane. However, relator does not indicate this in its brief.

A. You just shut it down. They can't just tie a rope around it, and you lift it up, the rope breaks and falls and -- You know, you have to say what you think is good and what you think is not.

Q. Any -- And as far as setting up of a crane, I take it that's one of the operator's job duties obviously?

A. Uh-huh.

Q. And is that a yes?

A. Yes.

Q. Any other job responsibilities of the operator for Eastland Crane when they go to a job site beyond operating the crane?

A. No. Just operating the crane.

Q. In other words, it's the operator of the Eastland Crane. Would they go on a job site where there's some tearing down or rebuilding, any type of demolition activity?

A. Absolutely not. That's not the type of work we do.

Q. Any type of construction-related activity where the operator would be, well, assisting in moving any materials, by hand that is?

A. No.

Q. Is the Eastland Crane operator, when they're out there, are they responsible for rigging or hooking up of any, by hand that is --

A. No.

Q. -- or unhooking of any load that they're lifting?

A. No.

* * *

Q. So Eastland always just sends out the operator to the job site?

A. Correct[.]

Q. And that operator's job duty is to operate the crane?

A. Absolutely.

Q. And beyond that, that's the contractor who contacted Eastland Crane -- that contractor provides the man power to move materials, hook materials, lift materials, by hand that is?

A. Yes.

{¶ 34} 17. At the hearing, the hearing officer questioned Craig Marshall:

Hearing Officer Matthews: * * * Do you always have the site supervisor come toward the crane to talk to them? Do you personally?

The Witness: Oh, yeah, absolutely.

Hearing Officer Matthews: So you tell the site supervisor to come over and discuss whatever you need to do about the job site by the crane?

The Witness: Yeah.

* * *

Q. Now -- And the reason, as far as you having the site supervisor come by, is that because the crane is set up, the crane is operating?

A. Absolutely. I wouldn't have the crane out and then get off the crane and go talk to somebody, you know, because then you would have to put it all back down, shut the crane off.

Q. And, I take it -- Were you at the Wal-Mart job site the day that Mr. Grim --

A. Yes. I was the operator that went out there that night to replace Mr. Grim.

Q. And what -- what -- How was the crane in that -- when you got there?

A. When I got there that night, the boom was straight in the air off the back of the crane. The crane was running and in operation and no operator around.

Q. And in that situation, according to the safety standards and the Eastland Crane operators are supposed to handle it, where should the operator have been?

A. He should have been up on the deck of the crane operating it.

Q. Now, with respect to Mr. Grim, after the project, did you -- was he disciplined in any way?

A. Yes. I believe he was verbally disciplined by the -- by the boss.

Q. And for what reason?

A. For leaving that crane unattended and walking out in the middle of the parking lot to talk to somebody.

{¶ 35} 18. On cross examination, Craig Marshall testified:

Q. *** You said -- this calls for a safety inspection. It goes through all of these things that you have to do. You have to check the hooks, check the hook for proper safety latch, ropes, hoses, sheafs, oil. This all requires you get off the vehicle, correct?

A. Uh-huh.

Q. So when you go in and you're getting ready to lift something and you're doing these inspections, you're off the crane? It's not like you're always on that crane, correct?

A. Well, yeah. The safety inspection is done with the boom in the rack and outriggers up. That's done when you get there.

Q. When you get there. So when you get there, you are required to be in this construction area out there, because you don't even have your safety tape up yet, so people could come right up to it at that stage?

A. Uh-huh.

> Q. So you are walking around and doing stuff in this construction site? Because we are in a construction site no matter what they do, they isolate the crane as best they can, but it's still a construction site, right?
>
> A. Uh-huh.
>
> Q. You have to say yes.
>
> A. Yes.
>
> Q. So there is construction activity going on around you, at least it has to be until you put your caution tape up, correct?
>
> A. Yes.
>
> Q. Do you wear safety toe or steel-toed shoes or anything like that?
>
> A. No, I don't.
>
> Q. None are provided by Marshall; is that correct?
>
> A. No, not safety shoes.
>
> Q. Or any type of foot protection?
>
> A. No foot protection.

{¶ 36} 19. Following the April 14, 2011 hearing, the SHO issued an order granting the VSSR application. The SHO's order explains:

> In order for an Injured Worker to prevail in their request for a VSSR award, an Injured Worker must demonstrate that: (1) the cited code section applies to the circumstances of the employment being performed at the time of the injury; (2) the code section was violated by non-compliance with this mandate; and (3) the violation is the proximate cause of the incident. The Injured Worker's failure to prove any of these three elements will result in denial of the request for additional allowance. The Hearing Officer finds that the Injured Worker has demonstrated that the cited code section 4123:1-3-03(E) does apply to the circumstances of employment being performed at the time of the injury. This code section was violated as the Employer failed to provide

foot protection to the Injured Worker. The Hearing Officer further finds that the failure to provide foot protection to the Injured Worker is the proximate cause of the Injured Worker's injury.

It is the order of the Staff Hearing Officer that the Injured Worker was employed on the date of injury noted above, by the Employer as a crane operator; that the Injured Worker sustained an injury in the course of and arising out of employment when a forklift operator at the construction site dropped a steel roof joist from the forklift. The steel roof joist fell onto the Injured Worker's right foot and right great toe.

It is further the finding of the Staff Hearing Officer that the Injured Worker's injury was the result of the Employer's failure to provide foot/toe protection as required by O.A.C. 4123:1-3-03(E), the Code of Specific Requirements of the Industrial Commission relating to when the Employee is exposed to machinery or equipment that represents a foot hazard or where an Employee is handling material which presents a foot hazard.

* * *

The Hearing Officer * * * finds a violation of O.A.C. 4123:1-3-03(E). According to the personal protective equipment safety violation rule, an Employer shall make available to the Employee foot protection where an Employee is exposed to machinery or equipment that represents a foot hazard or where an Employee is handling material which presents a foot hazard.

At the time of the injury, the Injured Worker was working as a crane operator at a construction site where a Wal-Mart store was being built. The Injured Worker and Construction Site Foreman were discussing who would signal him (the crane operator), where the riggers would be placed and where the steel roof joists were to be placed when a forklift operator carrying steel roof joists drove the forklift toward him and one of the steel roof joists fell off the front of forklift and landed on the Injured Worker's right foot causing his injuries. The Injured Worker sustained a crush injury to the right hallux with open distal phalanx fracture, a right great toe amputation, and a loss of the right great toe.

The Hearing Officer finds a violation of O.A.C. 4123:1-3-03(E), which relates to foot protection during construction activities. The Hearing Officer finds the Injured Worker was engaged in construction activities at the time of this industrial injury. Specifically, the Injured Worker was performing construction activities and was planning to erect a steel roof truss to the top of Wal-Mart building. The Injured Worker informed the Bureau of Workers' Compensation Safety Violation Unit Investigator that none of the roof joists which were on the forklift were banned together. The forklift operator was moving roof joists and was placing the joists on the ground next to where he was standing when one of the joists fell from the front fork of the forklift and landed on the Injured Worker's right foot. Per the Bureau of Workers' Compensation Safety Violation Investigation report, the employer did not provide personal protective equipment other than expired hard hats.

At the time of the industrial injury, the Injured Worker was discussing the work which needed to be performed on the job site with the Construction Site Foreman when the forklift operator was transporting and moving the roof joists on the front of the forklift. One of the roof joists fell off the forklift and landed on the Injured Worker's right foot. The Hearing Officer finds that it was normal procedure for the Injured Worker to discuss: where the material would be hoisted to, who was banding the material, and who would perform signaling before operating the crane. The Injured Worker also discussed with the Construction Site Foreman what objects were to be lifted, where the material was being moved to, the weight of the material, and who was going to rig up the material. The Injured Worker testified that he does not rig material when he is working as crane operator.

The Hearing Officer finds a violation of O.A.C. 4123:1-3-03(E), a specific safety rule regarding personal protective equipment, specifically, foot protection. The Injured Worker was exposed to machinery or equipment which represents a foot hazard, namely, the forklift which was moving when the roof joists fell off the front of the forklift and onto the Injured Worker's right foot.

It is therefore ordered that an additional award of compensation be granted to the Injured Worker in the amount of 15 percent of the maximum weekly rate under the

> rule of State ex rel. Engle v. Indus. Comm. (1944), 142 Ohio St. 425.

{¶ 37} 20. Relator moved for rehearing pursuant to Ohio Adm.Code 4121-3-20(C).

{¶ 38} 21. On August 18, 2011, another SHO mailed an order denying rehearing.

{¶ 39} 22. On September 23, 2011, relator, Bob Marshall Enterprises, Inc., filed this mandamus action.

Conclusions of Law:

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

{¶ 41} Chapter 4123:1-3 of the Ohio Adm.Code is captioned "Construction Safety."

{¶ 42} Ohio Adm.Code 4123:1-3-01 is captioned "Scope and definitions." Ohio Adm.Code 4123:1-3-01(B)(5) provides the following definition:

> "Equipment" means and includes all machinery, tools, mechanical devices, derricks, hoists, conveyors, scaffolds, platforms, runways, ladders and related safeguards and protective construction used in connection with construction operations.
>
> Ohio Adm.Code 4123:1-3-01(B)(20) provides:
>
> "Protective equipment" means any appliance used or required to be used to prevent injury to employees.

{¶ 43} Ohio Adm.Code 4123:1-3-03 is captioned "Personal protective equipment."

{¶ 44} Ohio Adm.Code 4123:1-3-03(A) is captioned "Scope." It states:

> The requirements of this rule relate to the personal protective equipment listed immediately below, as required for employees on operations described in this rule in which there is a known hazard, recognized as injurious to the health or safety of the employee.

{¶ 45} The specific safety rule at issue here is former Ohio Adm.Code 4123:1-3-03(E). The rule provides:

> (E) Foot (toe) protection.
>
> Foot protection shall be made available by the employer and shall be worn by the employee where an employee is exposed to machinery or equipment that represents a foot hazard or

> where an employee is handling material which presents a foot hazard.

{¶ 46} The issue here is whether the commission abused its discretion in determining that, on the date of injury, claimant was exposed to machinery or equipment that represented a known foot hazard. Although former Ohio Adm.Code 4123:1-3-03(E) uses the term "foot hazard," the magistrate reads that rule in accordance with Ohio Adm.Code 4123:1-3-03(A)'s use of the term "known hazard." That is, for an employer to have violated the rule at issue, the employer must have known of the foot hazard.

{¶ 47} Analysis begins with the observation that the actual existence of a foot hazard at the time and place of injury cannot be seriously disputed. The operation of a forklift loaded with heavy steel roof joists near the presence of the claimant who was having a discussion with the site supervisor obviously presented a foot hazard. The real issue before the commission was whether the foot hazard was reasonably known to relator when it sent claimant out to the construction site without foot protection. Or as relator puts it, whether the foot hazard was "foreseeable" to relator.

{¶ 48} In *State ex rel. Burchfield v. Printech Corp.*, 83 Ohio St.3d 169 (1998), the Supreme Court of Ohio had occasion to determine whether the commission had abused its discretion in determining that a specific safety rule, former Ohio Adm.Code 4121:1-5-17(E), was inapplicable to the factual scenario there. Repealed effective November 1, 2003, former Ohio Adm.Code 4121:1-5-17(E) read identical to former Ohio Adm.Code 4123:1-3-03(E) at issue here. However, the repealed rule was found under a chapter of the Ohio Adm.Code relating to workshops and factories.

{¶ 49} Relator cites and discusses *Burchfield* for authority in support of its request for a writ of mandamus. Accordingly, discussion of *Burchfield* may be helpful.

{¶ 50} Jayne E. Burchfield was employed as a "bindery technician" for Printech Corporation. *Id.* at 169. As part of her duties, Burchfield would pick up books, walk four to five steps, and place the books in a box that was resting on a wooden skid. On the date of injury, Burchfield was putting books into a box when a co-worker inadvertently lowered the skid onto Burchfield's foot.

{¶ 51} In *Burchfield*, the commission found that Burchfield's job did not present a clear foot hazard, thus rendering the safety rule inapplicable.

{¶ 52} The commission's order explained:

> [The safety rule] does not impose a clear requirement upon this employer to provide foot protection. Operating a binding machine in a publishing facility does not present a clear foot hazard. The claimant testified she was unaware of any other similar foot injuries at the facility. Additionally, per the testimony of the claimant and the accident report completed by Robert Black, the skid should not have been raised off the floor. This was an unforeseeable sequence of events and the employer was not on notice that a foot hazard existed for this claimant.

Id. at 169.

{¶ 53} Burchfield filed a mandamus complaint in this court. Following this court's denial of the writ, Burchfield appealed as of right to the Supreme Court of Ohio.

{¶ 54} Affirming this court's judgment, the *Burchfield* court explained:

> Claimant "does not dispute that, in and of itself, the operation of a binding machine does not present a clear foot hazard." She nevertheless argues that there were other potential foot hazards that mandated compliance with the safety requirement. This argument is unpersuasive.
>
> Claimant's proposed foot hazards are too nebulous. It is not that they are not possible. To the contrary, using claimant's examples, they exist everywhere. That claimant could drop a book on her foot or that something else conceivably could fall on it is assuredly not the type of hazard envisioned by the Administrative Code's authors as requiring protection. If it were, *every* employer would be required to supply its employees with safety shoes should a drawer fall from a desk or a desk chair roll over toes.
>
> Turning to [*State ex rel. Trydle v. Indus. Comm.*, 32 Ohio St.2d 257 (1972)] we cannot envision how an employer would be plainly apprised that the possibility of a foot injury that exists as a part of everyday life—both at and away from work—imposed upon it the legal obligation to provide safety shoes. Coupled with [*State ex rel. Burton*, 46 Ohio St.3d 170 (1989)]'s underlying strict construction directive, we hold that the commission did not abuse its discretion in finding that Ohio Adm.Code 4121:1-5-17(E) was not violated.

(Emphasis sic.) *Id. at* 170-71.

{¶ 55} As relator correctly points out, the safety rule at issue, requires foot protection under either of two circumstances. One, foot protection is required "where an employee is exposed to machinery or equipment that represents a foot hazard" or two, foot protection is required "where an employee is handling material which presents a foot hazard." Former Ohio Adm.Code 4123:1-3-03(E).

{¶ 56} Here, only the first circumstance is pertinent. That is, the commission's finding of a violation is premised solely upon the finding that claimant was "exposed to machinery or equipment that represents a foot hazard." *Id.* The commission did not find that claimant was "handling material which presents a foot hazard." *Id.*

{¶ 57} According to relator, the accident causing claimant's foot injury was an "unforeseeable sequence of events" as the commission's order found in the *Burchfield* case. *Burchfield* at 169.

{¶ 58} In large part, relator's "lack of foreseeability" argument is premised upon the testimony of Craig Marshall and the assumption that the commission found that testimony credible. Relator essentially ignores claimant's testimony and seems to presume that claimant's testimony is unreliable.

{¶ 59} According to relator, claimant's job duties at the Wal-Mart construction site did not involve a foreseeable exposure to machinery or equipment representing a foot hazard because allegedly claimant was supposed to remain in or at the crane while having his discussion with the site manager.

{¶ 60} The testimonies of claimant and Craig Marshall were in conflict as to whether the crane operator was permitted to leave his crane to talk to the site manager.

{¶ 61} As claimant testified on recross examination, on the date of injury, he went to where the site manager was located to discuss the task he was about to perform. Claimant testified "I went to where he was." Earlier, on redirect examination, claimant was asked whether the discussion with the "work supervisor" usually occurs "outside the crane on the ground or wherever." Claimant responded "absolutely." Claimant also testified as to the extent of the conversation he needed to have with the site manager:

> I discuss with the site supervisor what's being lifted, who's going to be signaling, where they're going to be located, where the lift is going to, who's going to be rigging the equipment, that kind of thing.

{¶ 62} On the other hand, answering a question from the hearing officer, Craig Marshall indicated that he always has the site supervisor come toward the crane to talk. As the hearing officer put it:

> Q. So you tell the site supervisor to come over and discuss whatever you need to do about the job site by the crane?

{¶ 63} Thus, claimant and Craig Marshall presented two very different procedures to be followed when talking to the site manager.

{¶ 64} It is the commission and its hearing officers that weigh the evidence. In mandamus, this court does not re-weigh the evidence for the commission.

{¶ 65} Apparently, the SHO was persuaded by claimant's testimony that relator should have known that the job to be performed by its crane operator might require him to have a discussion with the site manager away from the crane and at the construction site where foot hazards exist.

{¶ 66} Thus, the commission did not abuse its discretion in determining that claimant was exposed to machinery or equipment that represents a foot hazard within the meaning of the safety rule.

{¶ 67} Relator also contends that there is no evidence to support a finding that foot protection, such as steel toed shoes, would have prevented or lessened the injury. However, relator does point to claimant's testimony on redirect examination:

> Q. You do understand how steel-toes work? You've worn them before?
>
> A. Yes.
>
> Q. In this case, is it your opinion that they would have either prevented your injuries or lessened your injuries?
>
> A. I believe so, yes.

{¶ 68} In the magistrate's view, claimant's testimony is indeed some evidence upon which the commission can rely to support a finding that foot protection, such as steel toed shoes, would have prevented or lessened the injury.

{¶ 69} In *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, the court states:

> This court has never required direct evidence of a VSSR. To the contrary, in determining the merits of a VSSR claim, the commission or its SHO, like any factfinder in any administrative, civil, or criminal proceeding, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence.

Id. at ¶ 69.

{¶ 70} It was the claimant who witnessed his own injury. He experienced the steel roof joist falling onto his foot. Certainly, claimant would be in a position to testify whether steel toed shoes might have prevented or lessened his injury, particularly when he has worn such shoes in the past and is thus familiar with such shoes.

{¶ 71} In the magistrate's view, the SHO could rely upon his own common sense in determining that claimant's testimony is proof that foot protection, such as steel toed shoes, would have prevented or lessened the injury.

{¶ 72} 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
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).