[Cite as *State ex rel. Internatl. Mulch Co., Inc. v. Indus. Comm.*, 2015-Ohio-865.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. International Mulch Company, Inc.,	:	
Relator,	:	No. 13AP-647
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and London R. Bankhead,	:	
Respondents.	:	

D E C I S I O N

Rendered on March 12, 2015

Hahn Loeser & Parks LLP, and *Douglas J. Suter*, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Nurenberg, Paris, Heller & McCarthy Co., L.P.A., *Ellen M. McCarthy*, *Brenda M. Johnson* and *Benjamin P. Wiborg*, for respondent London R. Bankhead.

IN MANDAMUS

BROWN, P.J.

{¶ 1} Relator, International Mulch Company, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its additional award to respondent London R. Bankhead for violations of specific safety requirements ("VSSR") and to enter an order denying the VSSR award.

{¶ 2} This matter was referred to a magistrate of this court, pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶ 3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the file, this court adopts the magistrate's decision as its own. Relator's request for a writ of mandamus is denied.

Writ denied.

TYACK and KLATT, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. International Mulch Company, Inc.,	:	
Relator,	:	
v.	:	No. 13AP-647
Industrial Commission of Ohio and London R. Bankhead,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 20, 2014

Hahn Loeser & Parks LLP, and *Douglas J. Suter*, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Nurenberg, Paris, Heller & McCarthy Co., L.P.A., Ellen M. McCarthy, Brenda M. Johnson and *Benjamin P. Wiborg*, for respondent London R. Bankhead.

IN MANDAMUS

{¶ 4} In this original action, relator, International Mulch Company, Inc. ("relator" or "International Mulch"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its additional award to respondent

London R. Bankhead ("claimant") for violations of specific safety requirements ("VSSR") and to enter an order denying the VSSR award.

Findings of Fact:

{¶ 5} 1. On May 10, 2011, claimant sustained a crushing injury to his right thumb, and he also injured the second, third, and fourth fingers of his right hand while employed as an inspector in a factory operated by International Mulch.

{¶ 6} 2. The industrial claim (No. 11-824100) was allowed.

{¶ 7} 3. On March 1, 2012, claimant filed an application for a VSSR award. In his application, claimant asserted that relator had violated Ohio Adm.Code 4123:1-5-05(C)(2) and (4).

{¶ 8} 4. By letter dated April 2, 2012, relator, through counsel, answered the VSSR application:

> [International Mulch] is not liable to Claimant because (1) [International Mulch] did not violate the above-referenced specific safety requirements; and (2) the alleged violations of the specific safety requirements did not cause Claimant's injury.
>
> First, [International Mulch] denies any violation of O.A.C. §4123:1-5-05, *et seq*. In this particular case, Claimant London Bankhead was a temporary employee who received training relating to his duties and responsibilities. The Claimant was trained to be on one particular side of the conveyor belt whereby he was inspecting mulch. In this instance, Mr. Bankhead was standing on the opposite side of where he was trained and failed to utilize the safety precautions that he was trained upon and instructed to follow. Moreover, it is important to note that the conveyor upon which Claimant alleges he was exposed was equipped with a means to directly disengage the conveyor from the power supply not only where he was trained to stand when conducting his task, but also where he was in fact standing when the accident occurred.
>
> [International Mulch] denies any violation of O.A.C. §4123:1-5-05(c)(4) [sic] because its equipment fully complies with the requirements of the Ohio Administrative Code. [International Mulch] further avers that Claimant was an overzealous temporary worker who was trying to exceed expectations to obtain a permanent position. By conducting

> his work in this manner, unbeknownst to [International Mulch], Claimant violated his training and the safety requirements set forth by [International Mulch].

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

{¶ 10} 6. On June 11, 2012, two SVIU investigators conducted an onsite investigation at the International Mulch plant where claimant was injured. The SVIU investigators met with plant manager Michel Zippert and relator's counsel. Investigator Gayle Luker took 18 photographs of the area where the injury occurred.

{¶ 11} 7. On June 7, 2012, investigator Luker obtained an affidavit executed by claimant. The affidavit avers:

> [One] I am the injured worker in this VSSR claim.
>
> [Two] I began working at International Mulch April 2011 as an inspector; this was my position at the time of my injury. My job duties included setting up the conveyor belt to make sure trash was out of the mulch.
>
> [Three] My training consisted [of] on the job training which lasted a matter of minutes and was performed by a supervisor. I never had training to explain the safe work practices of the conveyor belt. I understood my job duties at the time of my incident.
>
> [Four] I was required [to] wear rubber/cloth gloves at the time of the incident. Although I was not required to wear hearing protection I was wearing it at the time of my incident.
>
> [Five] At the time of the incident I was inspecting mulch on the conveyor belt. Garbage went down the line towards the area where mulch drops to the next conveyor belt. I went down to this area to remove the garbage so it would not jam the machine. My glove got caught in the machine which pulled my right hand into the steel wheel with teeth at the end of the conveyor belt. I had no means of disengaging the power so I pulled my hand out injuring my right thumb and two other fingers on the right hand.

> [Six] The machine I was injured on was an electrical powered conveyor belt. It was not a chain, bucket or screw conveyor belt.
>
> [Seven] It was actuated by starting the on button located to the right of my work station.
>
> [Eight] The conveyor belt was approximately twenty feet in length. The on/off switch is located approximately in the middle of the conveyor belt; the on/off switch is approximately ten feet from my work station. There was no emergency stop button in the area where my injury occurred; the only way to stop the conveyor belt is to turn the machine off with the on/off switch. There was no means for me to disengage the power at the time of my injury.
>
> [Nine] I am not aware of any modifications done to the equipment prior to my incident or after.
>
> [Ten] In the area I was working at the time of my injury there was no guarding on the conveyor belt at the pinch point. The steel wheel with teeth which caught my glove was not guarded at the time of my incident.
>
> [Eleven] The equipment was not locked out or tagged out at the time of my incident. I was not aware of any lock out tag out procedures for this conveyor belt.
>
> [Twelve] When mulch would get stuck in the machine the company procedure was to go down and manually unclog the mulch. While unclogging the machine the procedure was to keep the power running.

{¶ 12} 8. On July 31, 2012, investigator Luker issued a report of investigation, stating:

> [Two] * * * The equipment involved was an electrically powered Loma System inclined conveyor belt (serial number KIMD 17863) actuated by a start button * * *. Mr. Zippert advised the only modification to the equipment was after the incident with Mr. Bankhead. Mr. Zippert advised the company replaced the belt with alligator clips so the gear (cog) would no longer be needed to pull the belt; the company made this modification for efficiency reasons * * *.

> [Three] At the time of the injury Mr. Bankhead was to be at the operator station inspecting mulch, described Mr. Zippert * * *. Mr. Bankhead was attempting to keep busy and moved to the other side of the conveyor belt to brush mulch from the conveyor, further described Mr. Zippert * * *. As he was brushing the mulch from the conveyor the cogged teeth on the gear caught his glove and thereby injured the fingers on his right hand * * *.
>
> [Four] Mr. Zippert explained there was no guarding around the gear at the time of Mr. Bankhead's incident * * *. Zippert explained there was an emergency stop button located within arm's length of Mr. Bankhead at the time of the incident * * *.
>
> [Five] It was stated by Mr. Zippert, the only time any person should be in the area where Mr. Bankhead was injured is if they are a supervisor or when equipment is locked and tagged-out for cleaning. At the time of the incident the equipment was not locked out or tagged out since it was not being cleaned, stated Mr. Zippert. It was further stated by Mr. Zippert training for Mr. Bankhead did not include lock out/tag out training, since it is only received by the maintenance department * * *.
>
> [Six] As reported by Mr. Zippert, the employer's policy and procedure for removing mulch as it gets stuck in the conveyor consists of turning off the machine and alerting the operator of the painting conveyor belt to shut their operation down * * *. It was further stated by Mr. Zippert that Mr. Bankhead was trained in the procedure but the company did not document it * * *. The employer does provide compressed air to remove mulch from conveyor * * *.
>
> [Seven] Mr. Zippert reported that there was a prior incident where a maintenance person had a similar incident prior to the incident involving Mr. Bankhead. Zippert explained, the maintenance person was brushing mulch off of the conveyor when his glove was caught by the teeth on the [sic]. The maintenance person did not sustain an injury during this incident * * *.
>
> [Eight] Mr. Zippert was not sure the exact date Mr. Bankhead began working at International Mulch because he was from a temporary agency. He was hired as an inspector and this was his position at the time of his injury * * *. His

> job duties entailed inspecting mulch for pieces which did not match and placing them in a bin, explained Mr. Zippert * * *. It was explained by Mr. Zippert, he believes Mr. Bankhead understood his job duties at the time of his injury. Mr. Zippert further explained Mr. Bankhead's training involved on-the-job training which lasted less than thirty minutes and was performed by a supervisor * * *. He was not required to wear any personal protective equipment at the time of his injury; he was provided with optional gloves made out of cloth and rubber * * *.
>
> [Nine] An affidavit was received from claimant London Bankhead on June 7, 2012 * * *.

{¶ 13} 9. On April 10, 2013, the VSSR application was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record.

{¶ 14} 10. At the hearing, during direct examination by his counsel, claimant was asked to view photograph number 5 among the 18 taken by investigator Luker. The photograph shows a man ("gentleman") standing at the inspector station where claimant was assigned to work on the date of injury. The photograph also shows an inclined conveyor that, at its lowest point, is nearest the inspector station. Claimant injured his right hand at a point near the top of the inclined conveyor. The conveyor obviously has two sides. During claimant's testimony, the side nearest the photographer was referred to as the near side of the conveyor. The side furthest from the photographer was referred to as the far side of the conveyor.

{¶ 15} 11. Claimant testified that he was injured on the near side of the conveyor where there was no "shut off." However, on the far side of the conveyor there is a "shut off."

{¶ 16} 12. During his direct examination, claimant was asked to describe his job duties. He answered:

> **And my job was to stand where -- I forgot his name, but stand where the gentleman is right here (indicating). And when the mulch comes out of the painting machine, it drops down onto my conveyor belt. And when it drops down to my conveyor belt, my job is to filter through to get the trash, try to get any metal. But if the metal gets past, then it drops it down.**

> **And at this time right here where the mulch comes out, I had let some plastic and stuff get by. And if the stuff gets by, then it goes and get back, they have to bring it back, cut it for me to open it up. At this time when I got -- when they showed me how to run the machine, anything goes by, our job is not -- they don't want the machines shutdown, unless it's an emergency or something or something is going on with the painting supply or something like that. My job is to stand here on this thing, the base, and get it before it goes down, drops down into going up the other belt, you know, try to pull the stuff out, the debris.**

(Tr. 7-8.)

{¶ 17} 13. During his direct examination, claimant was asked how often during his work day he had to "run down to the next conveyor * * * to take or remove pieces of trash." (Tr. 8.) Claimant responded:

> **I always do that. I mean, if I let something slip by me, you know, when the stuff comes out, I always run up there. If I see metal from where he's standing to the metal detector, I don't too much worry about that too much, because it drops down and goes around and drops down into a box, but when I see paper or some trash or something, you know, going up, I always run up there and get it.**

(Tr. 9.)

{¶ 18} 14. During his direct examination, claimant was asked to describe how the injury occurred:

> **When I ran up there to get it out, my hand, the teeth from the conveyor caught the tip of my glove. When it caught the tip of my glove, it took my hand through. It took my thumb through. And that's where these fingers, I'm on that side, and the way that I'm pulling it out is when it starts chewing up my thumb. That's how these two fingers had holes in them, because the teeth was riding in those when this was going through.**

(Tr. 11-12.)

{¶ 19} 15. During direct examination, the following exchange occurred between claimant and his counsel:

> Q. Your employer thinks this incident happened on the far side, on the other side of the conveyor.
>
> **A. No, I was right here on this side of the conveyor (indicating). For me, if some paper go through, for me to stop the paper from going over, I don't have time to run all the way around on either side to go to the other side of the machine. This is where I'm from right here where that's at to [sic] right here to the end of the tip.**
>
> Q. And you're talking about?
>
> **A. On the right side, on the side where the photographer is at**.
>
> Q. On photograph number five?
>
> **A. Yes.**
>
> Q. Do you ever work on the far side of the conveyor?
>
> **A. Only time we work on the far side of the conveyor is if they call or Mike calls a break or something like that, I got to go over there to cut off the metal machine; or if the paint machine goes out where it's not no product coming through, they have a hose that we spray the hose, you know, to clean up the floor just so we don't have idle time.**

(Tr. 14-15.)

{¶ 20} 16. During the hearing, plant manager Zippert testified. The following exchange occurred between relator's counsel and Zippert and then the hearing officer and Zippert:

> Q. Was Mr. Bankhead ever instructed that he was supposed to leave the operator's station and ever put his hands in the area of the conveyor system?
>
> **A. No. I mean, even if he has to go to the bathroom we have to have a replacement there. That's total**

quality control. We can't afford to have the customer, contractors, complain about contaminants when they buy the materials.

HEARING OFFICER: But what if he sees something, a contaminant, and he doesn't get it at h[i]s station? What's he supposed to do?

THE WITNESS: He's not supposed to leave.

HEARING OFFICER: What's he supposed to do? I don't want to know what he's not supposed to do. I want to know what he's supposed to do.

THE WITNESS: He is to stay there and watch the stuff in front of him.

HEARING OFFICER: Okay. If he misses something and something goes through, what is he supposed to do?

THE WITNESS: He can't do anything. I mean, our bagger will pick it up, you know, they see it going through. I mean, there is going to be contamination in the material, everyone knows that, because we can't -- the human system can't pick out all the contaminants.

Okay. He may take a few steps and try to grab a piece of plastic, but he's supposed to be standing there in front of him looking at the material as it goes by. If you go on running and try to grab something there, how much is going to go by while you're not standing there? That's why they are told to stay there in that spot. I can't -- I can let one piece of plastic go, but I can't let 10 pieces of contaminant go by while he's not there.

HEARING OFFICER: Is there really that much contaminant in there?

THE WITNESS: Yes.

HEARING OFFICER: He's pulling out of a lot of stuff?

THE WITNESS: It's shredded tires, so you're having stones. These are coming from another plant. There are cigarette butts, there's plastic. There's even bullets from people taking target practice at tires, you know, whatever tires would pick

> up on the road and whatever is built in from the plant that shreds the tires, so I mean, we have some --
>
> HEARING OFFICER: So if you miss stuff, it's okay.
>
> THE WITNESS: It's going to happen and they understand it, yeah.

(Tr. 23-25.)

{¶ 21} 17. Towards the end of the hearing, claimant explained to the hearing officer that if he had been on the far side of the conveyor as relator asserts, he would have to have used his right hand across his body or, if he had used his left hand, his left hand would have been injured. The following exchange occurred between claimant and the hearing officer:

> MR. BANKHEAD: If I was hurt on that side on that conveyor standing right there, yes, there is shut-off valves and there is plugs that I can use to kick my feet out. Now, if I'm on that side picking it out, that means I would have to cross, do this hand, I could do this hand to get it out. But, I would have to cross this way and that means my clothes could have went through the conveyor or anything. I was on the other side. That's exactly where I was at.
>
> HEARING OFFICER: Okay. I think I understand what you're saying. All right. But you probably use your left, I see, because left hand would make more sense.
>
> MR. BANKHEAD: Or if I used my left hand, that would have gotten messed up. I was on the side where the pictures was taken and I used my right hand. That's how I got chewed up. That's the side I'm supposed to be on. I'm not supposed to be on the other side. If the trash is going up, for me to run all the way around or go underneath the machine, do you know how much debris is passing by me while I'm on the other side of the machine? I can't do that.

(Tr. 31-32.)

{¶ 22} 18. Following the April 10, 2013 hearing, the SHO issued an order granting the VSSR application and the requested additional award. The SHO's order explains:

> 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 an inspector; that the Injured Worker sustained an injury in the course of and arising out of employment when his right thumb and right hand was pulled into a conveyor when the belt caught his glove and pulled his thumb into the teeth of the machine.
>
> It is further the finding of the Staff Hearing Officer that the Injured Worker's injury was the result of the fact that there was no shut off button within reach of the pinch point at the time of the accident and that the teeth of the machine were unguarded as required by 4123:1-5-05(c) [sic] and 4123:1-5-05(c)(2), (4) [sic] Ohio Administrative Code, the Code of Specific Requirements of the Industrial Commission relating to workshops and factories.
>
> The Injured Worker began working for this employer through a temporary agency about five weeks before he was injured. The Injured Worker's job was to stand at the inspector's position, quality control, filter through the rubber mulch as it comes out of the painting machine and drops onto a conveyor belt and remove trash contaminants such as wood, stones, cigarette butts and plastic from the rubber mulch (from shredded tires) coming out of the dryer system. When some trash gets past the Injured Worker, he is not to stop the machine unless it's an emergency. The Injured Worker stated that he was to get large contaminants before it drops into another machine. The Employer's witness stated that he was not to leave the area although he may take a few steps and try to grab a piece of plastic (transcript p. 24) but he can't let contaminants go by when he's not there. The accident happened when the Injured Worker reached up to get a piece of plastic before it dropped down to go into the next conveyor that removes metal that was not removed by the magnetic drums. It is not disputed that this area was not guarded [a]nd the teeth of the machine caught his glove pulling his hand into the machine, chewing up his thumb.
>
> The following code sections were alleged to have been violated:
>
> 4123:1-5-05(c) [sic] and 4123:1-5-05(c)(2) [sic], (4) Auxiliary equipment.

(C) Power-driven conveyors - chain, bucket, belt, hook and screw.

* * *

(2) Conveyors exposed to contact.

All conveyors, where exposed to contact, shall be equipped with means to disengage them from their power supply at such points of contact.

(4) Pinch (nip) points.

Pinch points created by travel of conveyor belts over or around end, drive and snubber, or take-up pulleys of chain conveyors running over sprocket wheels shall be guarded or a means shall be provided at the pinch point to disengage the belt or chain from the source of power.

The Employer's position as indicated in their answer filed on 04/02/2012 was that this accident was the result of an overzealous temporary employee who was trying to exceed expectations to obtain a permanent position. That even if Ohio Administrative Code 4123:1-5-05(C) was violated that the violation did not cause the injury, and that the claim is barred by employee's misconduct because he failed to utilize the training provided by respondent [sic].

According to the investigator's exhibit 1, the Injured Worker's training consisted of on the job training that lasted less than 30 minutes and was conducted by a supervisor. Investigator's exhibit 4, the employer's information form - provide training documents of Injured Worker, states only "Verbal instructions." Based on this evidence the hearing officer finds that the Employer's on the job training was not sufficient to provide the employer with the defense of unilateral negligence by the employee.

It is not disputed that the pinch point where the injury occurred was not guarded. The hearing officer findings [sic] that the failure to have a guard at the pinch point is a violation of the above section and that this was a proximate cause of the accident.

The Employer argued that there was a shut off button within reach of where the operator is normally situated for this [sic] regular duties and that the Injured Worker was not to leave

> his station but the Employer's witness also testified (transcript p. 23) that "we can't afford to have the customer, contractors, complain about contaminants when they buy the materials." The Employer's witness did not actually see the accident although he came to the scene of the accident shortly afterward.
>
> There is a factual dispute as to which side of the conveyor the Injured Worker was on when he was injured. The Employer's witness believes that the Injured Worker was on the far side of the machine where there is a shut off device within reach and the Injured Worker insists that he was on the near side of the machine where there is no device to shut off the machine. Based on the mechanism of injury, the Injured Worker would have had to have had his arms crossed to have been on the side of the conveyor that the Employer's witness said he was on. If the Injured Worker was on the far side of the conveyor, the Injured Worker's shirt sleeve and not his glove would most likely have been grabbed by the teeth of the machine. Also, the accessibility from the workstation is much more difficult going to the far side. The fact that the Employer's incident report that was filled out by the Employer's witness (Ameritemps - Supervisor's report of investigation) dated 05/12/2011, two days after the accident does not mention which side of the machine the Injured Worker was on, leads the hearing officer to conclude that the Injured Worker was on the near side of the conveyor when injured, out of reach of any shut off device at the time he was injured. The hearing officer therefore finds that the Injured Worker could not shut off the machine when he got his glove caught in the teeth of the machine because there was no shut off button within reach and that this was a violation of the above listed code section and was a proximate cause of the accident.

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

{¶ 24} 20. On July 3, 2013, another SHO mailed an order denying relator's motion for rehearing. The SHO's order explains:

> It is hereby ordered that the Motion for Rehearing filed 05-31-2013 be denied. The Employer has not submitted any new and relevant evidence nor shown that the order issued 05/01/2013 was based on an obvious mistake of fact or on a clear mistake of law.

> The weighing of evidence and factual determinations and credibility are within the sole discretion of the Hearing Officer. Therefore, it is found the Employer has not demonstrated a clear mistake of fact.
>
> The case of State ex rel. Scott v. Uniroyal, Inc., (1986), 5 Ohio St.3d 35, involves a different code section (IC-5-03.07) that deals with "Machinery Control" and not conveyors and, therefore, is not on point or applicable in this case. Further, the case of State ex rel. Ford v. Industrial Commission (1993), 67 Ohio St.3d, requires means to disengage the power when exposed in the performance of the regular assigned duties. It does not require means to disengage only at the normally situated location or assigned operator's station. The Hearing Officer indicates in the third paragraph that the Injured Worker was performing his assigned or regular duties, removing a trash contaminate (plastic), when the injury occurred. Therefore, it is found the Employer has not demonstrated a clear mistake of law.

{¶ 25} 21. On July 25, 2013, relator, International Mulch Company, Inc., filed this mandamus action.

Conclusions of Law:

{¶ 26} Three issues are presented: (1) did the commission abuse its discretion in determining a violation of Ohio Adm.Code 4123:1-5-05(C)(2) when it is undisputed that claimant was injured upon leaving his inspector station where relator had provided a power disconnect button and an emergency stop button within easy reach of the inspector while at the inspector station; (2) did the commission abuse its discretion in determining a violation of Ohio Adm.Code 4123:1-5-05(C)(4); and (3) did the commission abuse its discretion in determining that the unilateral negligence defense did not apply?

{¶ 27} The magistrate finds: (1) the commission did not abuse its discretion in finding a violation of Ohio Adm.Code 4123:1-5-05(C)(2), even though it was undisputed that claimant was injured upon leaving his inspector station where relator had provided a power disconnect button and an emergency stop button within easy reach of the inspector while at the inspector station; (2) the commission did not abuse its discretion in determining a violation of Ohio Adm.Code 4123:1-5-05(C)(4); and (3) the

commission did not abuse its discretion in determining that the unilateral negligence defense did not apply.

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

Basic VSSR Law

{¶ 29} It is well-settled that a VSSR award is deemed a penalty to the employer subject to the rule of strict construction with all reasonable doubts concerning the interpretation of the safety standard to be construed against the applicability of the standard to the employer. *State ex rel. Watson v. Indus. Comm.*, 29 Ohio App.3d 354 (10th Dist.1986); *State ex rel. Burton v. Indus. Comm.*, 46 Ohio St.3d 170 (1989).

{¶ 30} It is also firmly established that the determination of disputed factual situations as well as the interpretation of a specific safety requirement is within the final jurisdiction of the commission, and subject to correction in mandamus only upon a showing of an abuse of discretion. *State ex rel. Roberts v. Indus. Comm.*, 10 Ohio St.3d 1 (1984); *State ex rel. Allied Wheel Prods., Inc. v. Indus. Comm.*, 166 Ohio St. 47 (1956); *State ex rel. Volker v. Indus. Comm.*, 75 Ohio St.3d 466 (1996).

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

{¶ 32} Specific safety requirements are intended to protect employees against their own negligence and folly as well as provide them a safe place to work. *State ex rel. Cotterman v. St. Marys Foundry*, 46 Ohio St.3d 42, 47 (1989).

{¶ 33} The unilateral negligence defense to VSSR liability derives from *State ex rel. Frank Brown & Sons, Inc. v. Indus. Comm.*, 37 Ohio St.3d 162 (1988), in which an employer was exonerated from VSSR liability because an employee had removed part of a scaffold that had been required by a specific safety requirement. *State ex rel. Quality Tower Serv., Inc. v. Indus. Comm.*, 88 Ohio St.3d 190, 192 (2000).

{¶ 34} However, a claimant's alleged negligence is a defense only where the employer has first complied with relevant safety requirements. *State ex rel. Hirschvogel, Inc. v. Miller*, 86 Ohio St.3d 215, 218 (1999). A claimant's negligence bars a VSSR award only where the claimant deliberately renders an otherwise complying device noncompliant. *State ex rel. R.E.H. Co. v. Indus. Comm.*, 79 Ohio St.3d 352, 355, (1997); *Martin Painting* at 339.

Two Specific Safety Rules at Issue and Two Significant Cases

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

> Ohio Adm.Code 4123:1-5-01(B) provides definitions.
>
> Thereunder, Ohio Adm.Code 4123:1-5-01(B)(47) currently provides:
>
> "Exposed to contact": the location of the material or object which, during the course of operation, is accessible to an employee in performance of the employee's regular or assigned duty.
>
> Ohio Adm.Code 4123:1-5-01(B)(70) currently provides:
>
> "Guarded": means that the object is covered, fenced, railed, enclosed, or otherwise shielded from accidental contact.
>
> Ohio Adm.Code 4123:1-5-01(B)(94) currently provides:
>
> "Pinch, nip, or shear point": the point or points at which it is possible to be caught between the moving parts of a machine, or between the material and the moving part or parts of a machine.

{¶ 36} Ohio Adm.Code 4123:1-5-05 is captioned "Auxiliary equipment."

{¶ 37} Thereunder, 4123:1-5-05(C) is captioned "Power-driven conveyors - chain, bucket, belt, hook and screw."

{¶ 38} Thereunder, the two specific safety rules at issue here are found at Ohio Adm.Code 4123:1-5-05(C)(2), and (4).

{¶ 39} Ohio Adm.Code 4123:1-5-05(C)(2) provides:

> Conveyors exposed to contact.

> All conveyors, where exposed to contact, shall be equipped with means to disengage them from their power supply at such points of contact.
>
> Ohio Adm.Code 4123:1-5-05(C)(4) provides:
>
> Pinch (nip) points.
>
> Pinch points created by travel of conveyor belts over or around end, drive and snubber, or take-up pulleys of chain conveyors running over sprocket wheels shall be guarded or a means shall be provided at the pinch point to disengage the belt or chain from the source of power.

{¶ 40} In *State ex rel. Ford v. Indus. Comm.*, 67 Ohio St.3d 121 (1993), the Supreme Court of Ohio had occasion to address the definition of the term "exposed to contact" as that term was used at former Ohio Adm.Code 4121:1-5-05(C)(2), a safety rule now found at Ohio Adm.Code 4123:1-5-05(C)(2).

{¶ 41} Noting that neither "accessible" nor "course of operation" is defined by statute or administrative rule, the *Ford* court held that the interpretation of those terms is within the commission's final jurisdiction. The *Ford* court stated that Ohio Adm.Code 4121:1-5-05(C)(2) will not apply if the accident occurred in a spot that was not accessible during the course of operation.[1]

{¶ 42} In upholding the commission's determination that denied the VSSR application, the *Ford* court explained:

> In this case, decedent was killed inside an enclosed conveyor. If the conveyor and its attached drag buckets had been moving at the time, decedent could not have entered the enclosure. *Only* if the conveyor was *first* stopped could decedent have gained access to the area in which he died. Given the commission's duty to strictly construe specific safety requirements in the employer's favor [citation omitted], the commission did not abuse its discretion in finding that a location which is accessible only during cessation of operation was not "accessible" in the "course of operation," and was not made so merely because the conveyor *subsequently* started running. The commission did not err in refusing to construe the disputed safety

[1] Effective November 1, 2003, Ohio Adm.Code 4123:1-5-05 contains provisions of former Ohio Adm.Code 4121:1-5-05.

> requirement in its most literal, and liberal sense- *i.e.,* the conveyor was "accessible" because decedent was there and in the "course of operation" because it was on.

(Emphasis sic.) (*Id.* at 122-23.)

{¶ 43} In *State ex rel. Go-Jo Industries v. Indus. Comm.,* 83 Ohio St.3d 529 (1998), the Supreme Court of Ohio upheld a commission determination that the employer had violated former Ohio Adm.Code 4121:1-5-05(C)(2).

{¶ 44} In *Go-Jo,* the Supreme Court states the facts as follows:

> On August 21, 1990, appellee-claimant, Rodney L. Gist, was employed as a "lead operator" of a machine for appellant, Go-Jo Industries. The process to which claimant was assigned involved the packaging of powdered soap products. The process started with a Protopak machine that filled plastic bags with soap. The bags were then put on a conveyor belt and transported to a work table. There, workers inserted small nozzles into the bags. Once the task was completed, the bags were transferred to a second conveyor, which carried them to a machine called the Jones Cartoner ("Cartoner"). The Cartoner had several functions. It unfolded a product carton, dropped the soap bag into it, and then sealed the carton. Cartons were moved within the Cartoner by a transport system. This system had a gear drive and plastic lugs or fingers that were attached to a chain that was inside the machine. Cartons were advanced by indexing the fingers via a brake clutch.
>
> As lead operator of the Cartoner, claimant had many duties, including ensuring that product requirements and quotas were met. Towards this end, there was testimony that claimant had been instructed to keep the production line moving "no matter what." In order to do so, it was imperative to immediately remove from the Cartoner partially opened L-shaped cartons.
>
> The Cartoner had a photoelectric sensor that was to stop the machine when it detected an L-carton. The sensor on this particular Cartoner had a history of occasionally failing to detect L-cartons. On such occasions, claimant had seen supervisors remove L-cartons by hand without first stopping the machine, in order to eliminate downtime.

> At the time of injury, the line was experiencing an unusually high number of L-cartons. For this reason, claimant positioned himself at what he considered from experience and observation of superiors to be a strategic place on the line to watch for L-cartons. Claimant spotted an L-carton and reached into the Cartoner to remove it. Before he could withdraw his hand, the transport system indexed. Lacking an accessible means of stopping the machine, claimant had his hand pulled into the system, resulting in the injury of record.

Id. at 529.

{¶ 45} In *Go-Jo*, the Supreme Court indicates that the employer concedes that there was no power disengagement device at the location where claimant was injured. *Id*. at 533.

{¶ 46} Briefly, the *Go-Jo* court explains why the *Ford* case does not require the court to vacate the commission's VSSR award:

> The basis for our decision in *Ford* is inapplicable here. The decision in *Ford* did not rest on the mere fact that the conveyor was enclosed. Our decision instead was based on the inaccessibility of the disengagement device during the course of operation. Here, the location of the accident was readily accessible to claimant during the course of the Cartoner's operation. Thus, the circumstances that excused a violation of Ohio Adm.Code 4121:1-5-05(C)(2) in *Ford* do not exist here.

Id. at 535.

First Issue

{¶ 47} With respect to the determination of whether relator is liable for violation of Ohio Adm.Code 4123:1-5-05(C)(2), the main issue before the SHO at the April 10, 2013 hearing was whether claimant was "exposed to contact" as defined by Ohio Adm.Code 4123:1-5-01(B)(47). Specifically, the issue before the SHO was whether the injury occurred during the course of operation at a location accessible to an employee in the performance of his regular or assigned duty.

{¶ 48} More specifically, the issue was whether claimant was in the performance of his regular or assigned duty. There was no real dispute that the location of the injury was accessible to claimant during the course of operation.

{¶ 49} As to whether claimant was in the performance of his regular or assigned duty at the location of his injury, the evidence was conflicting. Thus, the commission was required to weigh the conflicting evidence and render a determination on the question. That determination pitted the testimony of claimant against plant manager Zippert.

{¶ 50} On June 11, 2012, during the onsite investigation, as reported by SVIU investigator Luker, Zippert stated: "[T]he only time any person should be in the area where Mr. Bankhead was injured is if they are a supervisor or when equipment is locked and tagged-out for cleaning." It is undisputed that claimant's job did not require him to lock out/tag out and thus, he was not trained in this procedure.

{¶ 51} On April 10, 2013, during his hearing testimony, Zippert testified that claimant was supposed to stay at the inspector station, and he was not authorized to leave his station to grab contaminants that had passed him by at the inspector station. In fact, Zippert offered a detailed explanation as to why it was important to the production process for the inspector to stay at his station. As Zippert rhetorically asked: "If you go on running and try to grab something there, how much is going to go by while you're not standing there?" (Tr. 24.)

{¶ 52} Regardless of the logic in Zippert's explanation, logic does not necessarily answer the question of what claimant reasonably perceived his job assignment to be at the time of his injury.

{¶ 53} To the SVIU investigators, Zippert stated that claimant's training was "on-the-job training which lasted less than thirty minutes." The SHO found that the training was insufficient.

{¶ 54} Apparently, claimant perceived his job duties much differently than did Mr. Zippert. When asked by his counsel at hearing: "How often during the course of a single work day do you have to run down to the next conveyor * * * to take or remove pieces of trash," claimant responded: "I always do that." (Tr. 8-9.)

{¶ 55} Clearly, based upon the claimant's testimony, there was some evidence to support the commission's determination that claimant's regular or assigned duty included catching debris on the inclined conveyor that escaped his watch at the

inspector station. It is the commission that weighs the evidence. This court will not reweigh the evidence in this mandamus action.

{¶ 56} There was also conflicting evidence as to whether claimant was injured on the near side of the conveyor or the far side. It is undisputed that there was no means to disengage the conveyor from its power supply at the point of claimant's injury if the injury occurred on the near side of the conveyor as claimant asserted.

{¶ 57} It was relator's position in defense of the VSSR application that claimant was injured on the far side of the conveyor and, thus, there would be no safety violation even if claimant's assigned duty extended to removal of contaminants on the inclined conveyor. The SVIU report states: "Zippert explained there was an emergency stop button located within arm's length of Mr. Bankhead at the time of the incident." While not so stated in the SVIU report, it is clear from the record that Zippert was referring to the emergency stop button located on the far side of the conveyor.

{¶ 58} As earlier noted, Zippert's testimony conflicts with claimant's testimony on the question of which side of the conveyor claimant was positioned at the time of his injury.

{¶ 59} Again, it is the commission that weighs the evidence. Clearly, claimant's testimony was some evidence supporting the commission's determination that claimant was injured while positioned on the near side of the conveyor where there was no means for disengagement of the power supply.

Second Issue

{¶ 60} The second issue is whether the commission abused its discretion in determining a violation of Ohio Adm.Code 4123:1-5-05(C)(4) regarding the guarding of pinch (nip) points.

{¶ 61} In his order of April 10, 2013, the SHO finds:

> It is not disputed that the pinch point where the injury occurred was not guarded. The hearing officer findings [sic] that the failure to have a guard at the pinch point is a violation of the above section and that this was a proximate cause of the accident.

{¶ 62} It can be noted that, unlike Ohio Adm.Code 4123:1-5-05(C)(2), Ohio Adm.Code 4123:1-5-05(C)(4) does not use the term "where exposed to contact."

{¶ 63} Citing *State ex rel. Scott v. Uniroyal, Inc.*, 25 Ohio St.3d 35 (1986), and *State ex rel. Harris v. Indus. Comm.*, 12 Ohio St.3d 152 (1984), relator suggests that Ohio Adm.Code 4123:1-5-05(C)(4) requires that the injured worker be the operator of the machinery at issue. However, unlike the specific safety rules at issue in *Scott* and *Harris*, the rule at issue here does not require an operator of the machinery. Therefore, whether or not it can be said that claimant was the operator of the machinery upon which the injury occurred is not relevant.

{¶ 64} Accordingly, relator has failed to show that the commission abused its discretion in determining a violation of Ohio Adm.Code 4123:1-5-05(C)(4).

Third Issue: Unilateral Negligence Defense

{¶ 65} Analysis begins by returning to the two paragraphs of the SHO's order of April 10, 2013 that addressed the unilateral negligence defense:

> The Employer's position as indicated in their answer filed on 04/02/2012 was that this accident was the result of an overzealous temporary employee who was trying to exceed expectations to obtain a permanent position. That even if Ohio Administrative Code 4123:1-5-05(C) was violated that the violation did not cause the injury, and that the claim is barred by employee's misconduct because he failed to utilize the training provided by respondent [sic].
>
> According to the investigator's exhibit 1, the Injured Worker's training consisted of on the job training that lasted less than 30 minutes and was conducted by a supervisor. Investigator's exhibit 4, the employer's information form - provide training documents of Injured Worker, states only "Verbal instructions." Based on this evidence the hearing officer finds that the Employer's on the job training was not sufficient to provide the employer with the defense of unilateral negligence by the employee.

{¶ 66} Notwithstanding the commission's stated basis for rejecting the unilateral negligence defense, there is simply no evidence in the record upon which the commission could find unilateral negligence.

{¶ 67} As the case law makes abundantly clear, any alleged negligence is a defense only when the employer has first complied with relevant safety requirements. *Hirschvogel.* Here, relator did not deliberately render an otherwise complying device non-compliant. *R.E.H. Co.* Relator failed to place a means for disengaging the power supply at a point of contact where claimant was exposed to contact. Under such circumstances, relator cannot successfully argue unilateral negligence.

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

/S/ MAGISTRATE
KENNETH W. MACKE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).