

# OSC | 11

Ohio Safety Congress & Expo



## #426 Ohio's specific safety requirements and the plastic industry

Timothy Campbell, Esq.

Thursday, March 31, 2011  
3:45 to 4:45 p.m.



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OSC | 11  
Ohio Safety Congress & Expo

**Ohio's Specific Safety Requirements  
and the Plastic Industry**

Timothy C. Campbell, Esq.  
Hanna, Campbell & Powell, LLP  
P.O. Box 5521  
3737 Embassy Parkway  
Akron, Ohio 44334  
(330) 670-7312  
(330) 670-7441 Fax  
TCampbell@hcplaw.net

## **Ohio Specific Safety Requirements and the Plastic Industry**

### **A. Generally**

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- B. Time limit for filing.
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**4121-3-20 Additional awards by reason of violations of specific safety requirements****Effective: January 1, 2005**

(A) An application for an additional award of compensation founded upon the claim that the injury, occupational disease, or death resulted from the failure of the employer to comply with the specific requirement for the protection of health, lives, or safety of employees, must be filed, in duplicate, with the commission, within two years of the injury, death, or inception of disability due to occupational disease. The commission shall make available a form with which an application for an additional award by reason of a violation of a specific safety requirement may be made. Such applications should set forth the facts which are the basis of the alleged violation and shall cite the section or sections of the law or code of specific safety requirements which it is claimed have been violated. Such applications shall contain the claim number assigned by the bureau to the claim for compensation or benefits under Chapters 4123. and 4131. of the Revised Code.

(B) For the purpose of this rule "employer" shall be defined to include the customer employer of a temporary service agency or the client employer of a professional employer organization where the customer employer or client employer has the right of control as to the manner or means of performing the work.

(C)

(1)

(a) The claimant or the claimant's representative may amend the application to include any additional or alternative violation, provided the amendment is filed within two years following the date of injury, disability or death.

(b) The claimant or the claimant's representative may submit an amendment of the application for additional award for violation of a specific safety requirement beyond the expiration of two years following the date of injury, disability or death. Any such amendment must be submitted within thirty days of the receipt by the claimant or his counsel of the report of the investigation by the bureau into the alleged specific safety requirement violation. The claimant or the claimant's counsel may request an extension of this period for an additional thirty days. Such request must be submitted in writing within the original thirty-day period. If properly submitted, the commission shall notify both parties and their representatives of the granting of such request by mail. Such amendment shall set forth all specific safety requirements omitted from the application made prior to the expiration of the two-year period which the claimant alleges were the cause of the injury, disease or death, but which were omitted by reason of mistake or incompleteness. Copies of any such amendments shall be forwarded to the employer and its representatives as required by paragraph (B) (D) of this rule. Any such amendment shall not raise any unstated claim, but shall merely clarify a previously alleged violation.

(2)

(a) All amendments to an application for additional award for violation of a specific safety requirement filed after the investigation by the bureau shall be reviewed to determine if the amendment requires further investigation.

(b) The employer or its representative may object to an amendment to the application for additional award for violation of a specific safety requirement, which was filed beyond the two-year period on the grounds that the amendment raises a previously unstated claim. If such objection is filed within thirty days of the employer's receipt of the amendment, a staff hearing officer shall review the amendment, to determine the need for a re-investigation if the original investigation was conducted prior to the amendment.

(3) Whenever further investigation is performed by the bureau regarding an alleged safety violation, the receipt by the claimant or his counsel of such report shall commence the running of a further period for

submission of amendment or new evidence as if the re-investigation were the first investigation subject to the aforementioned provisions.

(D) Processing of applications for an additional award.

(1) Upon the filing of an application for an additional award with the commission, the commission shall send a copy of the application to the employer, customer employer of a temporary service agency or client employer of a professional employer organization and to its authorized representatives by mail.

(2) The commission shall notify the employer that this application, if granted, will result in the employer being billed directly for the amount of the award. The commission shall also notify the appropriate section of the bureau of the filing of the application. The employer has thirty days in which to file an answer unless the time is extended, for good cause shown, by a staff hearing officer for a period not to exceed an additional thirty days.

(3) The commission may assign an application for such award for investigation or for hearing without investigation. In the event that the application or answer raises legal issues the decision of which would dispose of the application (e.g., did the application cite a specific safety requirement, or was the application timely filed) the commission will assign the application for hearing without investigation. In the event that the claim is referred for investigation, after the investigation report is completed, the commission shall mail a copy of such report to each of the parties and their authorized representatives. At that time, the commission shall advise the parties that they have a designated period of time, not to exceed thirty days, in which to furnish additional proof that they may desire to offer. Within this period, either party may request in writing an extension of the time within which he may submit additional proof. Such requests shall be considered by a staff hearing officer and, if granted, written notice of the extension, not to exceed an additional thirty days, shall be sent to both parties and their representatives. Any such extension shall extend the time available for submission of additional proof equally to both parties, but there can only be one such extension.

(4) Unless otherwise directed by a staff hearing officer, at the end of the thirty day period after the mailing of the investigation report, or the sixty day period if an extension had been granted, all applications for an additional award shall be scheduled for a pre-hearing conference, with written notice provided to all parties of record and their representatives no less than fourteen days prior to the pre-hearing conference. Items the parties should be prepared to discuss at the pre-hearing conference include, but are not limited to:

- (a) Have the names and addresses for all parties and their representatives been listed correctly;
- (b) Have all parties received copies of the relevant documentary evidence on file;
- (c) Has either party requested a record hearing;
- (d) Has either party previously requested the issuance of a subpoena, and are there pending subpoena requests;
- (e) Are the parties considering or engaged in settlement negotiations;
- (f) Is an intentional tort court case pending; and
- (g) Any other procedural matter which needs to be addressed

The pre-hearing conference will conclude with the parties agreeing to the date and time for the scheduling of the merit hearing within the time frame specified by the staff hearing officer conducting the pre-hearing conference.

(5) Either party may request a record hearing but the request shall only be made from the date of filing of the application through the date of the pre-hearing conference. If a record hearing is held, the requesting party is responsible for securing the attendance of a court reporter. A stenographic transcript of any testimony offered shall be taken at the record hearing. The party requesting a record hearing shall pay for the

stenographic services and shall submit a copy of the transcript to the commission, as well as to the opposing party, within thirty days of the date of the hearing. Failure to file a copy of the transcript of the proceedings within the thirty-day period, or within such an extended period as may be granted by the staff hearing officer for good cause shown, shall not delay the rendering of the decision. If the party that requests a record hearing decides not to proceed with the record hearing, subsequent to the date that the request for record hearing was granted, that party shall promptly notify the opposing party and their representative, to avoid unfair surprise. If desired, the opposing party may then secure its own court reporter, so that the hearing may proceed as a record hearing. If a record hearing is held, both parties will be permitted to introduce new evidence at the hearing on the application. If no request is made for a record hearing, no new documentary evidence or testimony will be accepted at the hearing on the merits.

(6) Subpoena requests should be filed no later than the date of the pre-hearing conference. If a request for subpoena to obtain documents or information has been granted, copies of all the information obtained by the subpoena are to be submitted immediately to the commission upon its receipt by the party requesting the subpoena.

(7) If an intentional tort case is pending in court, and if both parties agree and make a request, the commission will hold further processing of the application for an additional award in abeyance, until one of the parties requests that processing be reinstated. If both parties do not agree, processing of the application will continue.

(8) Subsequent to the prehearing conference, or in cases where no prehearing conference is held, the claim shall be set for hearing with notices to the parties, their representatives and the bureau, at which time the arguments in favor of and opposed to granting the application will be heard.

(9) If, at any time, the staff hearing officer determines further investigation is necessary, the staff hearing officer will refer the claim for investigation requesting the specific data needed and notify the parties of the further investigation. When the supplemental investigation report is in the file, copies are to be mailed to each of the parties and their authorized representatives.

(10) Following the hearing, the staff hearing officer shall issue an order in conformity with rule 4121-3-09 of the Administrative Code.

(E) Within thirty days of the receipt of the order of the staff hearing officer deciding the issues presented by the application, either party has the right to file a motion requesting a rehearing. The party requesting a rehearing shall provide a copy of the motion for rehearing to the opposing party and its representative. The opposing party has thirty days in which to file an answer. A motion for rehearing is not to be adjudicated until the answer has been received or the expiration of the thirty-day period.

(1) If the motion for rehearing is filed, a staff hearing officer, after the expiration of the answer time, shall review the motion for rehearing under the following criteria:

(a) In order to justify a rehearing of the staff hearing officer's order, the motion shall be accompanied by new and additional proof not previously considered and which by due diligence could not be obtained prior to the prehearing conference, or prior to the merit hearing if a record hearing was held and relevant to the specific safety requirement violation.

(b) A rehearing may also be indicated in exceptional cases where the order was based on an obvious mistake of fact or clear mistake of law.

(2) If the motion for rehearing does not meet the criteria as outlined in paragraph (E)(1)(a) or (E)(1)(b) of this rule, the motion shall be denied without further hearing.

(3) If the motion for rehearing is granted, the staff hearing officer shall either:

(a) Set the claim for a hearing with notices on the merits of the application; or

(b) Refer the claim for investigation and after the report of investigation is filed then set the claim for a hearing on the merits of the application.

(4) Following the hearing the staff hearing officer shall follow the same procedure pertaining to the order as outlined in paragraph (D)(9) of this rule. Such order, shall be final. In no case shall a rehearing be granted from an order adjudicating a rehearing.

(5) The payment of the additional award shall be stayed during the pendency of the motion for rehearing.

(F)

(1) Joint application of the claimant and the employer, or the administrator in a case where the settlement proceeds are to be paid from the state insurance fund, on an agreed settlement shall be considered by a staff hearing officer without hearing. Such an application to settle a violation application shall be considered by a staff hearing officer either prior to the determination of the application for an additional award for violation of a specific safety requirement, or after such an application has been adjudicated, and such agreed settlements shall be processed in the same manner. If the staff hearing officer finds that the settlement is appropriate, the staff hearing officer shall issue an order approving it. If the staff hearing officer does not find the settlement to be appropriate in its present form, the staff hearing officer shall schedule a hearing with notices to all parties and their representatives where the matter of the proposed settlement is to be considered. Following the hearing, the staff hearing officer shall issue an order either approving or disapproving the settlement, and the order shall be final.

(2) When an application by the employer to settle its liability for the violation of a specific safety requirement is made, the matter will be set for hearing before a staff hearing officer with notice to the claimant, the employer, their respective representatives and to the bureau. Following the hearing, the staff hearing officer shall issue an order either approving or disapproving the employer's application for settlement.

(3) When an application is made by the employer to settle its future liability for the violation, the staff hearing officer shall obtain from the bureau the information of whether all assessments under the finding and order of the staff hearing officer have been paid. If not, the amount of these assessments must be added to any amount determined as the future liability of the employer. Thereafter, the matter will be set for hearing before a staff hearing officer with notice to the employer, the employer's representative, and the bureau. Following the hearing, the staff hearing officer shall issue an order either approving or disapproving the employer's application for settlement and the order shall be final.

(G) Every order adjudicating an application for additional award for violation of a specific safety requirement which finds such a violation against an employer still in business in Ohio, shall direct that the violation be corrected within a time period which the order shall specify. An employer which fails to comply with such a corrective order within the specified time shall be deemed to have violated a specific safety requirement for the purposes of section 4121.47 of the Revised Code.

(H) The commission shall maintain a list of additional awards granted, including findings of failure to comply with a corrective order. In the event of two such findings of violations of specific safety requirements during the same twenty-four month period, the staff hearing officer shall assess a civil penalty appropriate in light of the circumstances of the individual case in an amount not to exceed fifty thousand dollars. Among the factors the staff hearing officer shall consider in determining the amount of any such civil penalty are the size of the employer as measured by the number of employees, assets and earnings of the employer.

(1) If the two violations of specific safety requirements occur at the same workplace, the violations need not be of the same type or kind for a penalty to be assessed. However, if the two violations of specific safety requirements occur at two different workplaces owned, operated, managed, leased or otherwise controlled by the same individual, company or corporation, the violations must be for the same specific safety requirements.

(2) A penalty shall not be assessed solely for multiple violations which caused the same incident, nor for incidents where more than one employee was injured or killed, nor for a finding of a violation of a specific

safety requirement which was settled before the order became final because of the granting of a rehearing or during the pendency of a motion for rehearing.

(3) For the purpose of paragraph (H) of this rule: "workplace" shall mean all of a single contiguous fixed situs under the control of the employer where work is performed; or, if the violation took place at or en route to or from a work site to which the employer sent employees to perform work but which was not expected to remain indefinitely under the control of the employer, any work site or travel route to or along which employees based or supervised from the same site have been sent to perform work, including such base site.

(4) For purpose of paragraphs (G) and (H) of this rule, "specific safety requirement" shall mean the identical requirement, but this exception shall not prevent a penalty where the employer is found to have violated the provisions of two requirements in effect for different periods of time which cover the same matters, even though one of the requirements is stricter than the other.

Ohio Industrial Commission

Notification of Violation of Specific Safety Requirement Letter

Claim Number:

PCN: 2090991

To Interested Parties:

You are hereby notified that on 04/08/2009, the injured worker filed an Application for Additional Award for Violation of Specific Safety Requirement(s), under the provisions of Article II, Section 35, of the Ohio Constitution. A copy of said Application is attached. If you desire to submit an answer, your answer should be filed in duplicate not later than thirty (30) days after receipt of this letter to:

Industrial Commission of Ohio  
VSSR Unit  
30 West Spring Street, 7th Floor  
Columbus, OH 43215-2233

Please note that filing in the BWC claim file does not assure receipt of your answer by the Industrial Commission.

The VSSR Application may be reviewed by a Staff Hearing Officer to determine whether it should be referred for investigation (for example, was the Application timely filed). The investigation will be conducted by the BWC Safety Violations Investigation Unit at the earliest possible date. Both the injured worker and the employer will be furnished with a copy of the investigation report and of any additional proof obtained. In the thirty (30) day period after the report is mailed out, either party may file additional evidence, request a thirty (30) day time extension, or request that the matter be heard as a record hearing. This procedure is more fully explained in Industrial Commission Rule 4121-3-20. At the end of this thirty (30) day period, the claim file and VSSR Application will be reviewed by a Staff Hearing Officer and, if appropriate, a mandatory pre-hearing conference will be arranged and scheduled.

All interested parties will be duly notified as to the date, time and place of this pre-hearing conference. IN ORDER TO AVOID ANY POSSIBLE OMISSION IN PROPER NOTIFICATION TO THE PARTIES, YOU ARE URGED TO PROVIDE THE NAME AND ADDRESS OF YOUR CURRENT REPRESENTATIVE(S).

If it is found, upon hearing, that the injury, disease or death did result from violation(s) of a specific safety requirement(s), the Constitutional provision authorizes the addition of an award of compensation payable under the Ohio Workers' Compensation Act. The Additional award may range from 15% to 50% of the maximum weekly compensation payable for the year in which the injury, disease or death occurred, regardless of the actual rate of compensation received by the injured worker elsewhere in the claim, and is based on the number of weeks of other types of compensation the injured worker has received, and/or may in the future receive, in the claim. This award is within these limitations, and an employer is billed dollar-for-dollar for any VSSR award found to be payable.

VSSR Claims Examiner  
Industrial Commission

Typed by: dlb

Ohio Industrial Commission

**Notification of Violation of Specific Safety Requirement Letter**

Claim Number:

Enclosure(s) (Copy of Application)

Date Mailed: 04/09/2009

The parties and representatives below have been sent this correspondence.  
If you are not an authorized representative of one of the parties, please  
notify the Industrial Commission.

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NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY  
REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB  
SITE AT [www.ohioic.com](http://www.ohioic.com). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK  
I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE  
OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

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Timothy C. Campbell  
Direct Dial 330.670.7312  
Direct Fax 330.670.7441  
E-mail TCampbell@hcplaw.net



HANNA,  
CAMPBELL  
& POWELL, LLP  
ATTORNEYS AT LAW

3737 Embassy Parkway  
P.O. Box 5521  
Akron, Ohio 44334  
Office 330.670.7300  
Fax 330.670.0977

VSSR Claim Examiner  
Industrial Commission of Ohio  
VSSR Unit  
30 West Spring Street, 7<sup>th</sup> Floor  
Columbus, OH 43215-2233

Re: Claim No.  
Claimant:  
DOI:  
Employer:  
Issue: VSSR

Dear Sir or Madame:

This is to advise that my office was recently retained by the Employer of record, \_\_\_\_\_, to assist its third party administrator, \_\_\_\_\_, in administration/defense of an Application for Additional Award for Violation of a Specific Safety Requirement which was recently filed on behalf of \_\_\_\_\_ in the above-referenced claim.

As such, I would appreciate it if you would update your records so as to reflect that my firm has been retained by the Employer of record..

In addition, please accept this correspondence as the Employer's answer to Claimant's application. With respect thereto, please be advised that the Employer denies that the Ohio Administrative Code provisions cited on Claimant's application apply to it's nature of business and/or to the operation that Claimant was performing at the time of injury. We also deny that the cited provisions apply to the equipment Claimant involved in Claimant's injury.

In the event that it is subsequently determined that the cited or any other regulations do apply to the Employer's nature of business and/or the equipment that Claimant was involved in Claimant's injury, the Employer denies the existence of violation of regulation.

Finally, the Employer also denies the necessary causal connection between the alleged violation of any applicable provision and the resulting injuries of record.

As always, I would appreciate it if you would forward a copy of this letter to the BWC's Safety Violations Investigation Unit and/or ask the Investigator assigned to this matter to contact me so as to schedule his or her on-site investigation.

Should you have any questions, be in need of additional information, or would like to discuss anything further at this time, please do not hesitate to contact me. Thank you.

Very truly yours,

Timothy C. Campbell

TCC/tas

<<HCP #527540-v1>>



**INFORMATION REQUEST FORM**

CLAIM NO: \_\_\_\_\_ CLAIMANT: \_\_\_\_\_ EMPLOYER \_\_\_\_\_

**EMPLOYER:** *The following applicable information is being requested and should be completed by the employer and/or their representative. This information can be submitted to the Safety Violations Investigation Unit at the address above or given to the investigator during the on-site visit. Check off each item you are submitting, sign, and return this form with the items submitted. If any item is not available or does not apply, indicate with 'N/A' instead of a checkmark. The items requested on this form do not in any way limit your right to submit additional information during the 30 day period allowed at a later time.*

CHECK ✓	ITEM#	DESCRIPTION
		<b><u>PLEASE SUBMIT SINGLE SIDED COPIES DO NOT STAPLE ANY PAGES</u></b>
	1	COPY OF EMPLOYER'S ACCIDENT OR INJURY REPORT.
	2	COPY OF OSHA FORM #300; 300A and/or 301.
	3	WRITTEN DESCRIPTION OF INJURY SITE, INCLUDING EQUIPMENT OR MACHINERY INVOLVED IN THE INJURY OF RECORD.
	4	DATE OF PURCHASE OF EQUIPMENT/MACHINERY. MUST BE DOCUMENTED BY COPY OF PURCHASE ORDER, INVOICE OR NOTARIZED STATEMENT.
	5	MANUFACTURER, MODEL AND SERIAL NUMBER OF EQUIPMENT OR MACHINERY INVOLVED.
	6	WRITTEN DESCRIPTION OF USE/OPERATION OF EQUIPMENT OR MACHINERY INVOLVED. Example: mechanical/hydraulic forming machine. Folds, forms & glues plastic coated paperboard food trays for the fast food industry.
	7	WRITTEN DESCRIPTION OF CONSTRUCTION SITE/AREA WHERE INJURY OCCURRED. Example: trench/excavation 30" wide x 60" deep, in hard dry clay, for the installation of a twelve (12) inch water pipe.
	8	COPIES OF MAINTENANCE RECORDS FOR EQUIPMENT OR MACHINERY INVOLVED IN THE INJURY OF RECORD. (Should include records for the time period 6 months prior to the injury of record and any post-injury machinery repairs).
	9	PROVIDE LIST OF EQUIPMENT SUPPLIED BY THE EMPLOYER TO THE INJURED WORKER AND THE EQUIPMENT SUPPLIED BY THE WORKER.
	10	PROVIDE TRAINING DOCUMENTS OF DECEDENT/INJURED WORKER. Example: certificates, licenses, programs completed, etc.
	11	PROVIDE NAMES, ADDRESSES, AND PHONE NUMBERS OF ALL PERSONS NAMED AS WITNESSES OR MAKE WITNESSES AVAILABLE TO THE INVESTIGATOR AT THE TIME OF THE ON-SITE INVESTIGATION.
	12	EMPLOYER'S FEDERAL TAX IDENTIFICATION NUMBER
	13	ADDITIONAL INFORMATION / DOCUMENTATION

The checked items listed above are included with this form \_\_\_\_\_  
 Employer/Representative Date

This investigator has received the above checked information \_\_\_\_\_  
 Investigator Date

Ohio Industrial Commission

VSSR Investigative Report Letter

Claim Number:

PCN: 2090991

To Interested Parties::

You will find enclosed a copy of the report, submitted by the Bureau of Workers' Compensation Safety Violations Investigation Unit, in connection with the investigation of the Injured Worker's IC-8/9 Application for Additional Award for Violation of Specific Safety Requirement(s).

Under the provisions of the Industrial Commission Rule 4121-3-20, both the Injured Worker and the Employer are given thirty (30) days after receipt of the above report in which to file any additional proof, to request a thirty (30) day time extension, or request a record hearing. If no additional proof is submitted within the time specified, the claim will be prepared for a pre-hearing conference and a hearing before a Staff Hearing Officer.

IN ORDER TO AVOID ANY POSSIBLE OMISSIONS IN PROPER NOTIFICATION OF THE PARTIES, PLEASE PROVIDE THIS OFFICE WITH THE NAME AND ADDRESS OF YOUR CURRENT REPRESENTATIVE(S), IF DIFFERENT FROM THAT SHOWN BELOW. Also, an extra copy of the report is provided when this office does not have a record of whether a party is represented. The extra copy is to be sent to any representative the Injured Worker or the Employer may have as soon as possible.

Industrial Commission of Ohio  
VSSR Unit  
30 West Spring Street, 7th Floor  
Columbus, Ohio 43215-2233

All interested parties will be contacted concerning the scheduling of the pre-hearing conference in approximately thirty-five (35) to forty-five (45) days.

VSSR Claims Examiner  
Industrial Commission

Typed by: plv

Enclosure(s) (Copy of BWC VSSR Investigation Unit)  
Date Mailed: 02/10/2010

The parties and representatives below have been sent this correspondence. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

*State of Ohio*  
*Bureau of Workers' Compensation*  
*Safety Violations Investigation Unit*

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REPORT OF INVESTIGATION

TO THE INDUSTRIAL COMMISSION OF OHIO:

THIS CLAIM HAS BEEN INVESTIGATED TO DETERMINE WHETHER THE  
OCCUPATIONAL INJURY, DISEASE, OR DEATH OF THE CLAIMANT WAS CAUSED  
BY THE EMPLOYER'S VIOLATION OF A SPECIFIC SAFETY REQUIREMENT

CLAIM NUMBER:

CLAIMANT:

CLAIMANT'S REPRESENTATIVE:

EMPLOYER:

EMPLOYER'S REPRESENTATIVE:

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CODES CITED:

4123:1-3-03 (J)(1)  
4123:1-3-03 (B)(2)  
4123.1-3-03 (B)(3)  
4123 1-3-03 (B)(7)  
4123-1-3-03 (L)(1)

CLAIM NO. :  
CLAIMANT :  
EMPLOYER :

### DISCUSSION:

1. A typical on-site visit with the employer was not conducted during the investigation of this VSSR claim, however Investigator Medina did conduct an on-site visit of the location where the injury occurred after meeting with the injured worker.
2. The injury occurred during a contracted job which involved removing old paint and rust from some highway bridges around the Columbus, Ohio area and repainting the steel beams on those highway bridges. Some of the equipment used in the job belonged to other contractors and some was leased. As well, the injury occurred when a tractor-trailer, hauling a piece of equipment passed underneath the bridge being worked on, and it snagged one of the working cables supporting the scaffolding from which the injured worker, was working on. It was not feasible to meet with the employer as this equipment was not available, no witnesses were available, the employer had not yet gathered and prepared the information from the SVIU Information Request, and no further information could be ascertained from such a meeting than could be obtained by the employer submitting the requested information during the 30-day period after the Report of Investigation is submitted.
3. Investigator Medina met with on February 23, 2009. A very lengthy interview was conducted with at that time. described the type of work he was doing at the time of his injury and provided a description of the job-site and equipment. During the meeting, Investigator Medina obtained some satellite photos of the area where the work was being done. The images were obtained from Microsoft Virtual Earth and Google Maps – Streetview. With those photos, was able to provide a very detailed description of his location, the direction of travel of the truck that struck the cable and the layout of the worksite and equipment.
4. When asked about personal protective equipment (PPE), told Investigator Medina he was wearing a safety harness and lanyard (which he provided himself) at the time of his injury, but he also said there were no life lines on the job site for him to connect his lanyard to. further stated the only cables in use were the three “working” cables, which were supporting the scaffold, and it was a violation of OSHA regulations to tie-off to the working cables. OSHA Subpart L § 1926.451(g) has several sections that cover this topic.
5. An affidavit was obtained from during that meeting, providing his sworn testimony regarding the circumstances of his injury of record. Refer to Exhibit 1. During the meeting with, he also provided a couple of names to Investigator Medina of persons of interest, whom might be able to provide additional information pertinent to this VSSR claim investigation.
6. Investigator Medina was able to make telephone contact with both of those persons. One of the persons advised he was never at the involved job site and was only vaguely aware that an injury had occurred. That person was unable to provide any pertinent information regarding the injury to and therefore his name has been withheld.
7. The second person, was supervisor at the time of the injury. Investigator Medina conducted a telephonic interview with on February 25, 2009. However, refused to provide “a written statement” or sworn testimony, stating to Investigator Medina, he still works in the industry and “word gets around”, so he didn’t want to hurt any future chances for employment in the industry. The following information is what provided during the telephonic interview.

had only been on that job site for about two weeks and had arrived there approximately three to five days prior to the incident. On the day of the injury, was working nearby and had observed him approximately ten to twenty minutes before the incident, but he did not see the incident occur. had moved the pick board over to the outer edge of the bridge and began setting up to start grinding. There was three support cables in which the pick board was connected to and supported

CLAIM NO. :  
CLAIMANT :  
EMPLOYER :

by [redacted] was wearing a safety harness and lanyard that day and at the time he was injured OSHA regulations prohibit workers from connecting their fall protection to support cables, but [redacted] DID HAVE a couple of lifelines set up on the jobsite each day, including that day [redacted] states he saw [redacted] tied off to the life line just before he started setting up for the grinding job, but then he disconnected when he started moving to the outer edge of the bridge [redacted] also stated there was no life line out on the outer edge and [redacted] could not tie off to the support cables, so he probably had a hard time finding a place to tie off to [redacted] stated, but he wanted to reiterate, there were at least a couple of lifelines set up on the bridge [redacted] stated, regarding the support cables sagging or hanging down – he recalls the support cables were not clamped up like they should have been, but he does not remember them hanging down very low either

8. As part of the VSSR claim investigation, on February 24, 2009, BWC Special Investigators Anthony Medina and Thomas M. Hostin drove to the exact site where the injury occurred. It was at that time that Investigators Hostin and Medina noticed the directions/information provided by [redacted] in paragraph 6 of his affidavit (see Exhibit 1), was in error. The two highways, Rt 33 and Interstate 270 are reversed. But, this in no way hindered locating the exact area where the incident occurred. With [redacted]'s descriptions using the satellite photos the exact area was very easily determined.
9. While on-site, Investigators Medina and Hostin viewed the area and took a few additional photographs, as well as some digital video footage which simply depicts the worksite location [redacted] describes how the pick board type scaffold was secured with the cables in paragraph 9 of his affidavit and notes that two of the three cables were underneath the bridge. So, the first couple of photographs taken by Investigator Medina depict the area underneath the bridge, to indicate what the area looks like where those cables were located
10. Also, [redacted] was grinding the steel beam underneath the bridge in order for it to be repainted. The last photos so the steel beam, under the bridge, in the exact area where the incident occurred and the photos depict the new paint as well. This is both the area where the pick board scaffold was located and the area near where the third "working" cable, supporting the pick board was located – running horizontally and parallel with the bridge.
11. Investigator Medina obtained two height measurements of this worksite area. The first measurement was from the asphalt to the bottom of the steel beam. The second measurement was from the asphalt to the bottom of the cement/concrete bridge (refer to photographs #5 and #6 in Exhibit 3). Investigator Medina obtained the measurements using a Hilti PD 32 Laser Range Meter. Each of the measurements was verified by Investigator Hostin. The distance from the ground/asphalt to the bottom of the steel beam was measured at seventeen feet, one-eighth inch (17', 1/8"). The distance from the ground/asphalt to the bottom of the concrete bridge was measured at nineteen feet, eleven and three-fourths inches (19', 11 3/4").
12. In speaking with Attorney [redacted], who will be submitting the employer's responses in writing at a later date, Attorney [redacted] advised Investigator Medina the employer's position is that the cable in question was not the problem or cause of the incident, but the passing truck was overloaded, or rather the load was too high and was above the legal limit.

#### EXHIBITS:

1. Affidavit of [redacted], obtained by Investigator Medina. (2 pages)
2. Two Microsoft Virtual Earth satellite photos and one Google Maps Streetview photo, submitted by Investigator Medina. (3 pages)
3. Six digital photographs, taken by Investigator Medina. (3 pages)

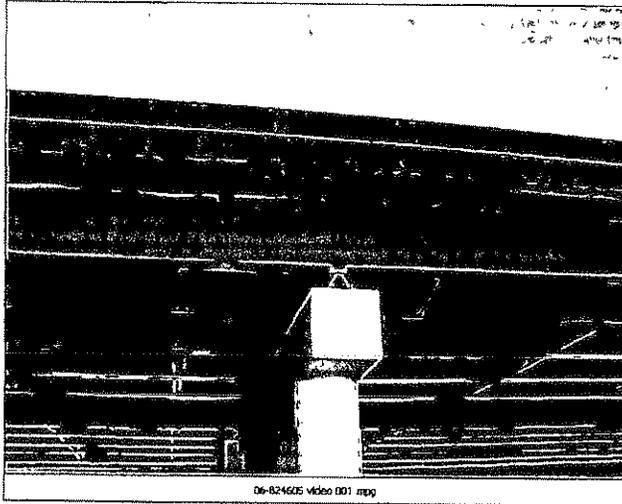
CLAIM NO. :  
CLAIMANT :  
EMPLOYER :

**SVIU VIDEO CLIPS:**

Insert the CD-ROM disc into any computer loaded with Microsoft Word/Office version 97 or later (or install the included Microsoft Word Reader) Go to "My Computer", and then open the CD-ROM drive. Locate and open the Report of Investigation (ROI) and double-click on the video image, or use the blue hyperlink to play the video clip.

**Note** If the videos do not play inside of the report, they can be accessed directly from the Videos folder on the CD-ROM disc.

For better performance, copy the folders/files from the CD to your hard disk drive, and then view the files from the local hard disk drive.



**Video # 1**

Video footage of the worksite location where [redacted] was working and fell, when the scaffold collapsed after the support cable was struck by a passing truck.

[Click here to play the video in a separate media player.](#)

Respectfully submitted,

*Anthony Medina*  
Anthony Medina  
Special Investigator

Supervisor's Initials WLG

STATE OF OHIO  
BUREAU OF WORKERS' COMPENSATION  
SAFETY VIOLATIONS INVESTIGATION UNIT

In the matter of the claim of

Claim Number

v

3

**Affidavit of**

State of  
County of

Name:

Home Address:

Location Affidavit Taken:

I, upon my oath, depose and state that the following statement is the truth to the best of my knowledge

- 1 I am the injured worker/claimant in the matter of this VSSR claim
- 2 I was hired by in (approximately) April of 2006 as a sandblaster and painter. However, I have worked for the same person who owns/owned for approximately ten years prior to being hired by his company, was previously the Superintendent of, located at, Ohio. I worked as a sandblaster and painter at those previous jobs as well.
- 3 My job duties as a sandblaster/painter at included, but were not limited to suiting up in a full, sealed, self-contained breathing apparatus suit, with full mask, fed with purified air, and equipped with an air powered sand blasting gun. I would use the sand blaster to blast old paint from bridges. Sometimes working from heights as high as three hundred feet to four hundred feet (300' to 400') above ground. After that, I would similarly suit up to re-paint the bridges.
- 4 This work required a great deal of dexterity, strength, and nerve (working from heights, on platforms and scaffolds). The work also required annual re-training, respirator fit testing, and yearly qualifications, provided by the union.
- 5 On the date of my injury, I was performing grinding operations instead of sandblasting or painting. Grinding operations, power washing, painting, and blasting were my primary job duties. Grinding operations involve wearing similar personal protective equipment and using tools to grind/bezel down pointed surfaces to meet State of Ohio standards and so that the paint will adhere to the surface.

\_\_\_\_\_  
Affiant

Sworn to and subscribed before me this

\_\_\_\_\_  
Anthony Medina, Special Investigator

SVIU Exhibit #: 1

Page 1 of 2

Claim #: \_\_\_\_\_

- 6 At the time of my injury, we were working on the Rt 33 overpass (over Interstate 270), south of Columbus, Ohio I was standing on a pick board type of support or scaffold system on the north side of the Rt 33 bridge over the northbound lane of Interstate 270 and was performing grinding operations
- 7 \_\_\_\_\_ did not provide me with a JLG or similar type of scissors lift, which is commonly used in the industry for that type of work Nor, did \_\_\_\_\_; have ODOT close any lanes of traffic and/or have the Ohio Highway Patrol on hand to slow any of the lanes of traffic
- 8 I was wearing my own safety harness and lanyard, which I had used on other job tasks – where I did have tie off points But during this job task, \_\_\_\_\_ DID NOT provide me with any life lines or tie off points for which I could tie off my lanyard to Alternately, a safety net could have been used, but was not provided either
- 9 The pick board type plank support systems I was standing on was supported by three working cables There were two cables on the inside part of the bridge, which were out of my reach, and there was another working cable which was closer to the side of the bridge I was working on
- 10 There were two immediate problems with the working cable at the side of the bridge from where I was working First, is there was NO C-clamp installed at/near the middle of the cable to keep in from sagging/dangling over the traffic on the highway underneath it Second, it is a violation of OSHA regulations to use any of the “working” cables as life lines/tie-off points
- 11 During the time I was standing on the pick board/plank type platform scaffold system, performing my grinding duties, a semi-truck came traveling down the highway, passing under the bridge at a high rate of speed
- 12 That semi-truck struck the working outer working cable which was not secured in any way with a C-clamp, and was dangling down over the lanes of traffic (this is the same working cable that supported my working platform, from where I was required to work without any type of fall protection for personal fall arrest system) When the truck struck this cable, it completely knocked down the work platform and caused me to fall approximately thirty feet (30’) to the asphalt below
- 13 Investigator Medina showed me several aerial and street view photographs of the area, from which I indicated the areas where I was working and fell

FURTHER AFFIANT SAYETH NAUGHT

Sworn to and subscribed before me this

\_\_\_\_\_  
Affiant

\_\_\_\_\_  
Anthony Medina, Special Investigator

SVIU Exhibit #: 2

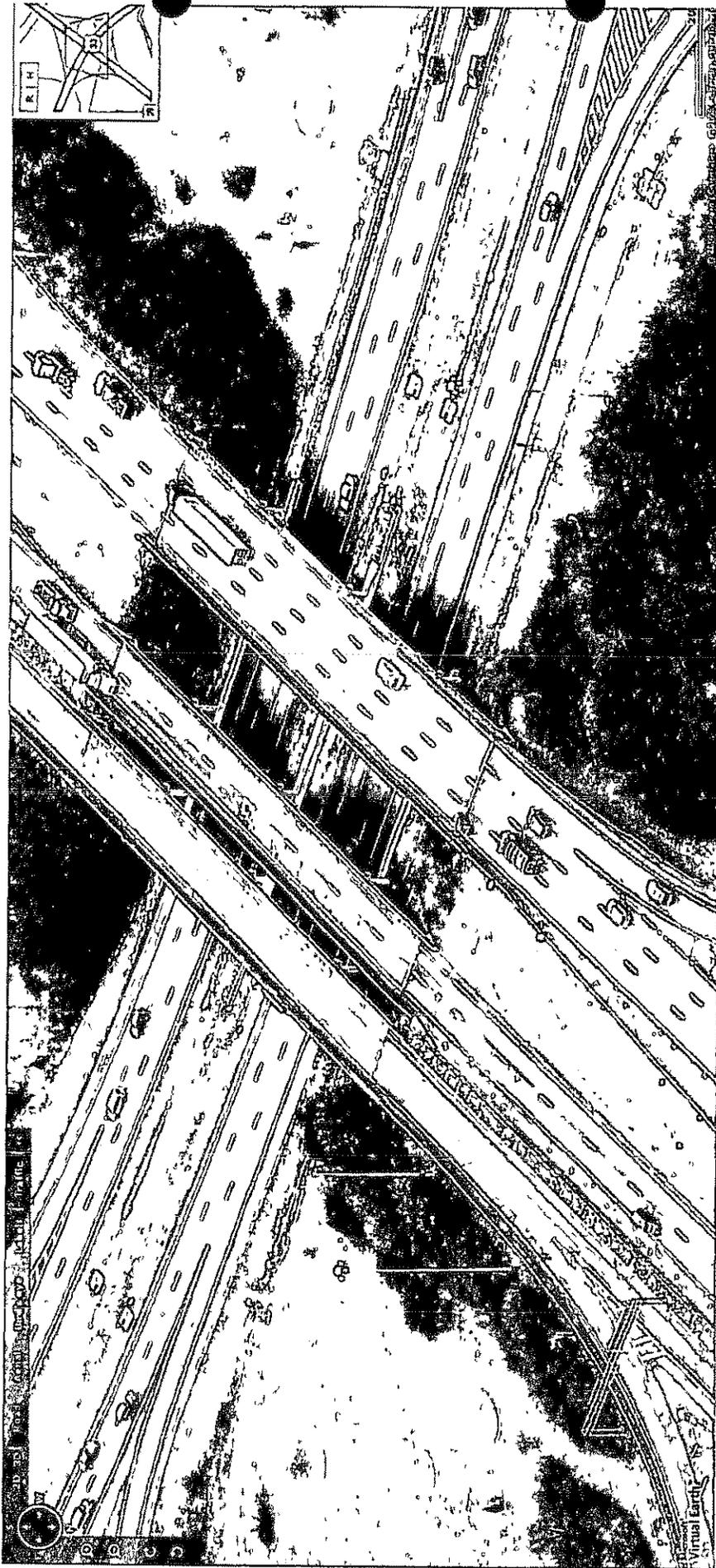
Claim #: \_\_\_\_\_



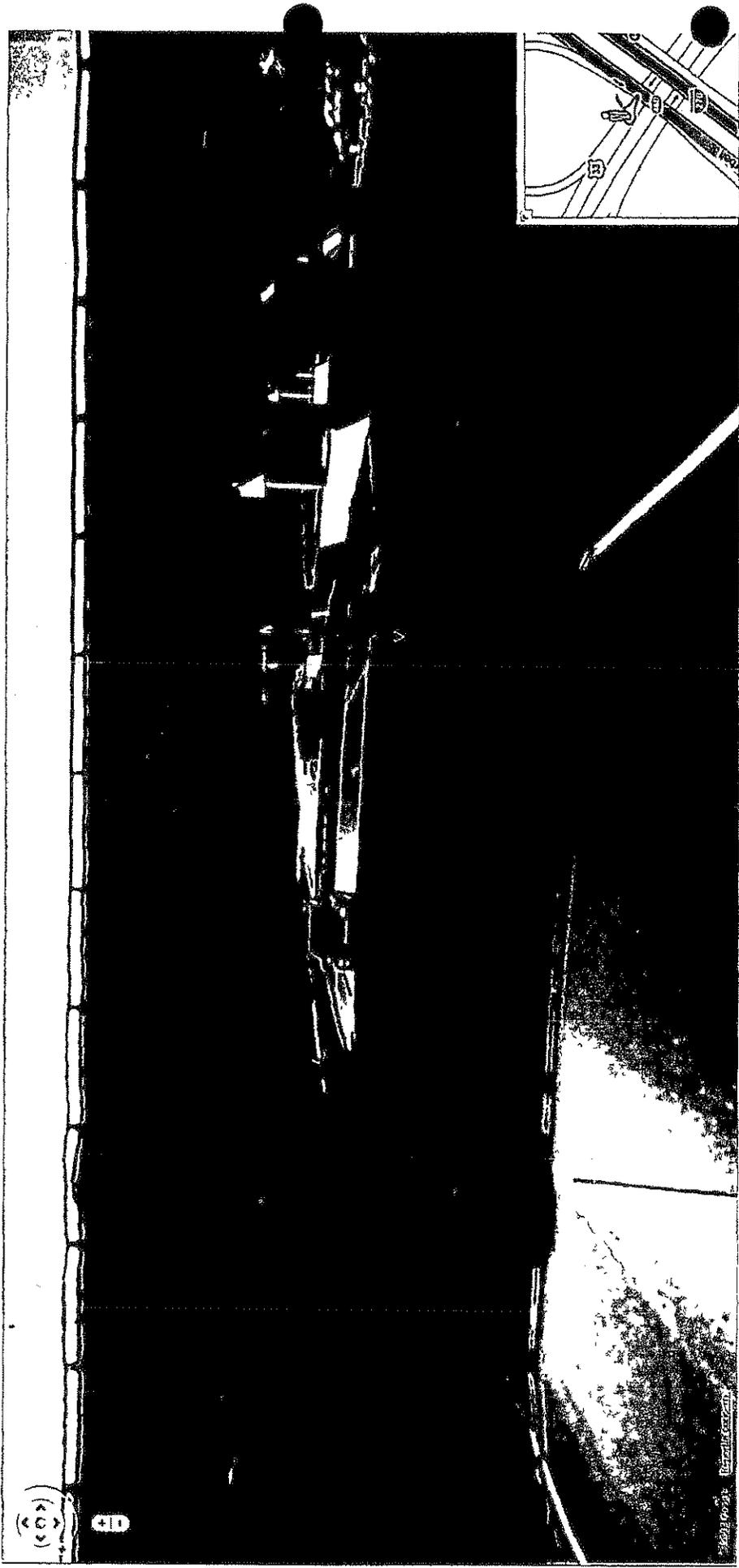
This satellite photo, obtained from Microsoft Virtual Earth, depicts State Route 33 westbound (running left to right) and eastbound (running right to left). The overpass depicted here is Interstate 270. The two separated lanes to the left of the photo are I-270 southbound. The other, 4-lane highway overpass, to the right is I-270 northbound.

The open field at the top, right corner of this photo is where Rolf Jung indicated he and his co-workers parked their vehicles each day during the job.

The red arrow indicates the area where Rolf Jung indicated, on this photo, he was working from a plank type scaffold -- performing grinding work on the side of the bridge prior to painting. He was over the left lane on the westbound side of State Route 33.



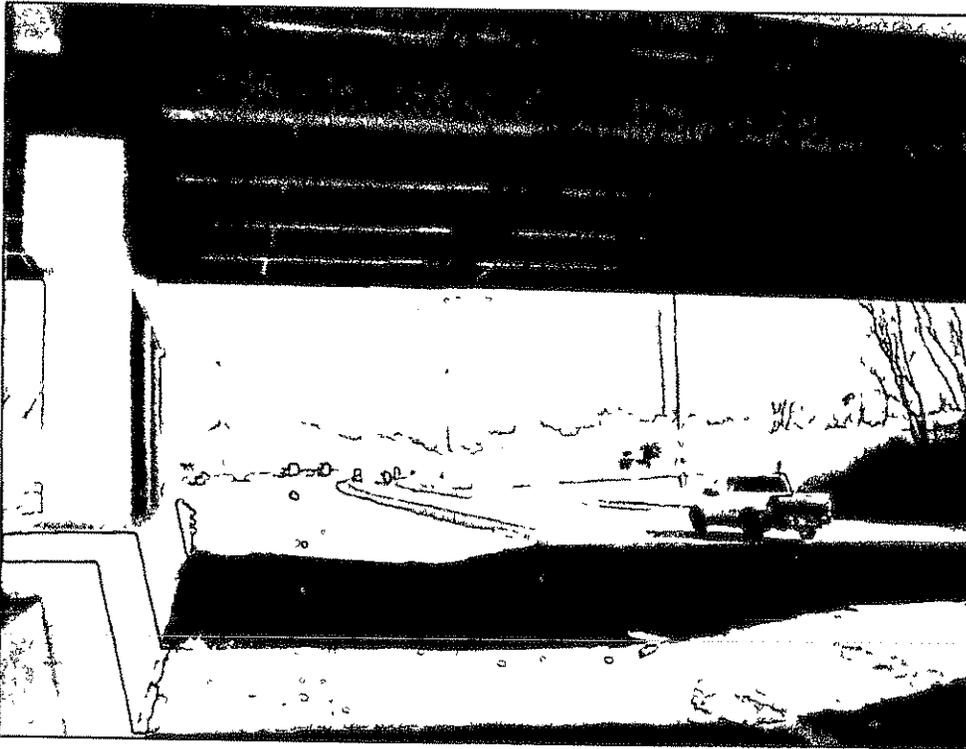
Another view of the area depicted in the previous satellite photo



This photo was obtained from Google Maps Streetview. The area depicted here is taken from State Route 33 westbound – looking back at the Interstate 270 northbound over pass where [redacted] was working at the time of the injury to [redacted] was working from a plank which was secured to the side of the bridge with three (3) "working" cables running parallel with the I-270 bridge [redacted] was working above the left lane (indicated with the red arrow) when the injury occurred and was grinding certain areas of the bridge in preparation for painting.

The "working" cables, according to [redacted] s testimony, were hanging/dangling over the highway because [redacted] had not clamped the cables up near the middle of the sag. Also, according to [redacted] s testimony, while he was on the plank scaffold, a truck that was hauling a "Bobcat" was traveling westbound on SR-33 and passed under this overpass, and while passing underneath, the Bobcat snagged that last "working" cable, closest to the outer edge where [redacted] was working. This resulted in the truck pulling the cable, knocking the scaffold down, and causing [redacted] to fall to the asphalt below.

The employer's position is that the load on the truck was over the legal height limit, which is why it caught the cable.

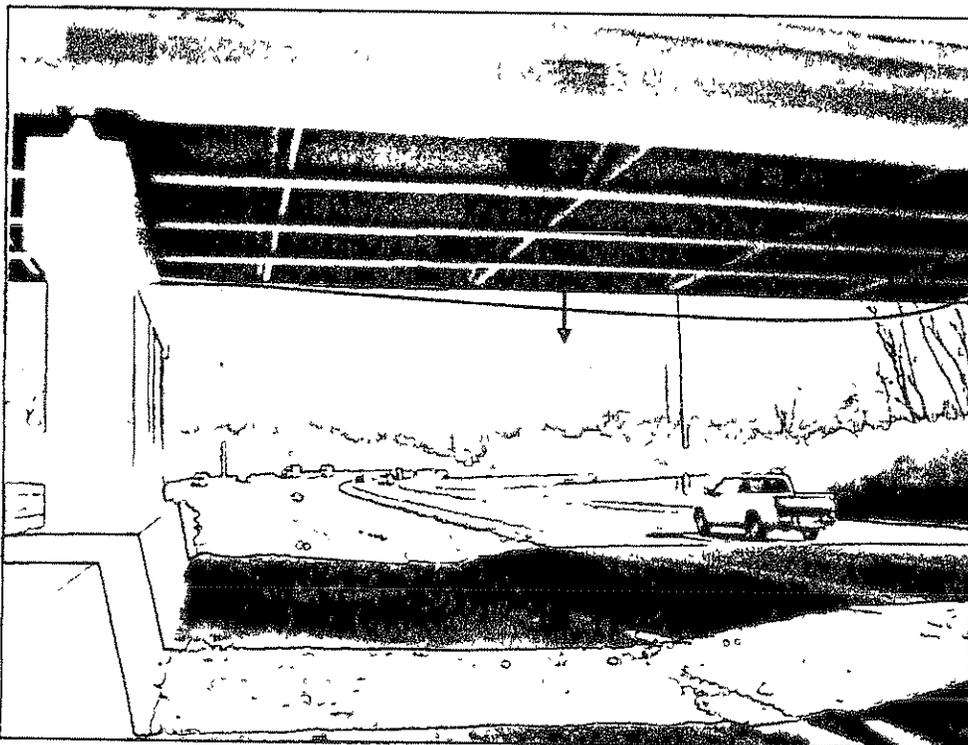


**Photograph # 1**

Photo depicts the view from underneath I-270 northbound, looking at SR-33 westbound

This is the area where [redacted] was working when his injury occurred (Outer edge of the bridge )

A plank type scaffold was used, which was secured with three (3) "working" cables running parallel with the I-270 bridge



**Photograph # 2**

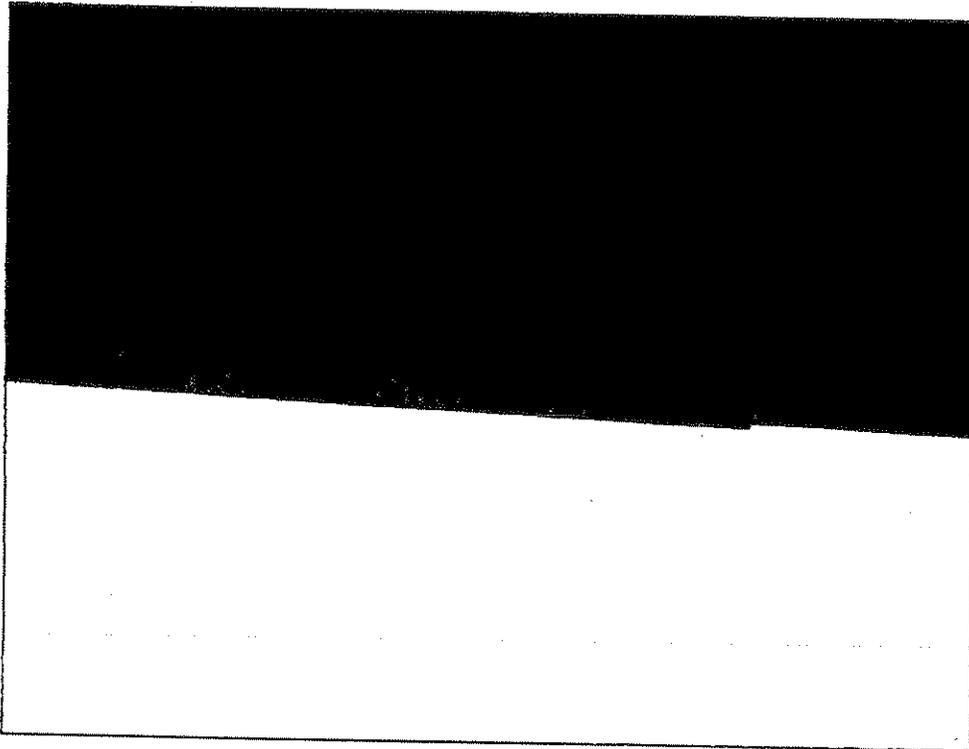
Same as Photo #1 The pickup truck shown in this photo shows the direction of travel, and probable lane the semi tractor-trailer vehicle was traveling at the time of the incident occurred

The red line vaguely indicates (for informational purposes) the area/direction the last-outer "working" cable, of the three cables, was located The blue arrows indicate the general area where [redacted] was working and then fell

SVIU Exhibit # : 3

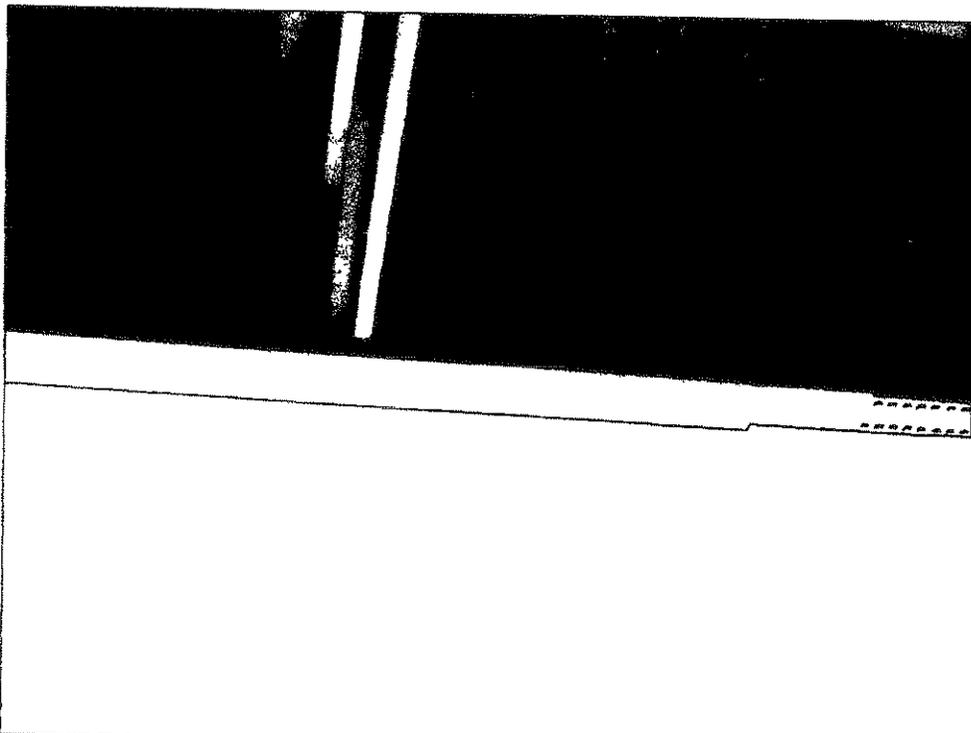
Claim # : \_\_\_\_\_

CLAIM #  
CLAIMANT  
EMPLOYER



**Photograph # 3**

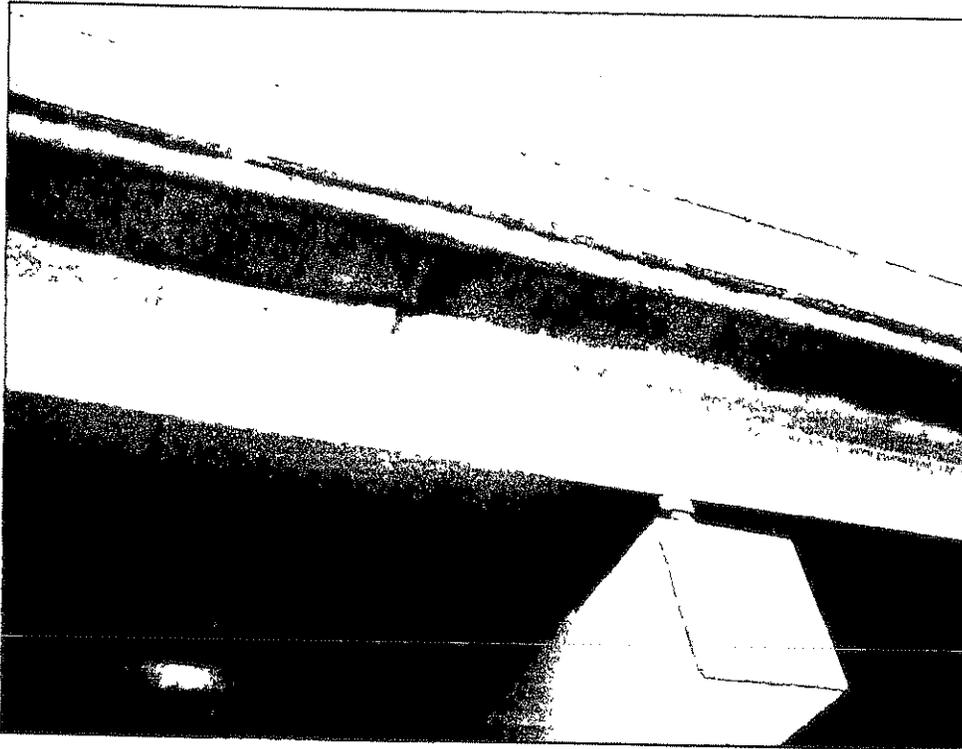
Photo depicts a closer view of the inner area of the edge of the I-270 bridge where [redacted] was performing grinding work, in preparation for painting



**Photograph # 4**

Same as Photo #3

Due to the bright sunlight, dark shadows were created underneath the bridge. This photo is an enhanced copy of photograph #3 to better view the underneath of the work area

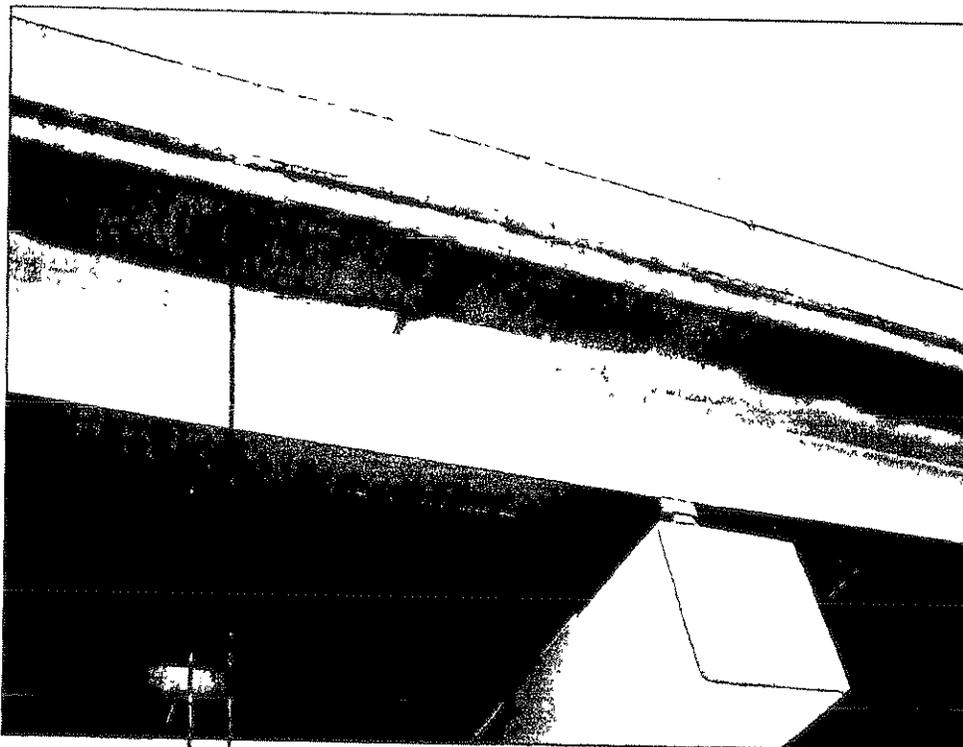


**Photograph # 5**

This photo depicts the actual work area on the Interstate 270 northbound bridge, where \_\_\_\_\_ was working from a plank type scaffold

\_\_\_\_\_ was performing grinding work on the steel beam shown here in preparation for painting

Also refer to the aerial satellite photos for a better perspective of this exact location, as well as the digital video footage included on the CD-ROM disc



**Photograph # 6**

Same as photo #5. Two height measurements were obtained of this area. The measurements were taken from the asphalt to the bottom of the steel beam and from the ground to the bottom of the concrete bridge

The measurements were taken by Investigator Medina using a Hilti PD 32 Laser Range Meter and were verified by Investigator Thomas M. Hostin during the taking of the measurements

The height from the asphalt to the bottom of the steel beam was measured at 17', 1/4". The height to the concrete was measured at 19', 11 3/4"

Ohio Industrial Commission

Notice of VSSR Pre-hearing Conference

Claim Number:

Claim(s):

PCN:

To Interested Parties:

This is to provide notice to all interested parties and their representatives that a pre-hearing conference on the matter of Injured Worker's IC-8/9 Violation of Specific Safety Requirement(s) application filed 04/08/2009, has been scheduled at:

STREET: 161 S. High St., Suite 301  
ROOM: 7  
FLOOR: 3rd  
CITY: Akron, Oh 44308

On Thursday,

This mandatory pre-hearing conference is being scheduled to ensure that this matter is ready to proceed on the merits. The claim file will be available and the items on the enclosed Pre-Hearing Conference Checklist will be addressed by the presiding Staff Hearing Officer.

As one of the purposes of this pre-hearing conference is to determine the date, time and place for the violation of specific safety requirements hearing, the parties and especially their representatives, if any, must be present and prepared to commit to a hearing date twenty-one (21) to seventy-five (75) days from the pre-hearing conference. In the event of ongoing settlement negotiations, a subsequent definite date may be appropriate. After a hearing date is set, continuance requests due to settlement negotiations will not be considered.

In the event a party or representative does not attend the pre-hearing conference, a hearing date within the time period mentioned above will be selected at the discretion of the Staff Hearing Officer conducting the conference.

Please call Chris Kuzmik at 330-643-1441 with any questions.

Typed by: ck

Debra Lynch  
Staff Hearing Officer

Ohio Industrial Commission  
**Notice of VSSR Pre-hearing Conference**

Claim Number:

PRE-HEARING CONFERENCE  
CHECKLIST

- I. ADDRESSES CORRECT?
- A. Injured Worker
  - B. Injured Worker's representative
  - C. Employer
  - D. Employer's representative
  - E. Additional counsel for Injured Worker
  - F. Additional counsel for Employer
- II. HAVE THE PARTIES RECEIVED THE FOLLOWING?
- A. Copy of initial application
  - B. Employer response
  - C. Investigation report with any attached evidence
  - D. Supplemental evidence from:
    - 1. Injured Worker
    - 2. Employer
  - E. Amended application, if any, and Employer response, supplemental investigation report, and supplemental evidence, if any.
  - F. Industrial Commission letter explaining settlement procedure.
- III. HAS EITHER PARTY REQUESTED A RECORD HEARING?
- IV. DOES EITHER PARTY PLAN TO SUBPOENA WITNESSES?  
(If so, be prepared to provide names, addresses and relevance of testimony sought)
- V. ARE THE PARTIES CONSIDERING/ENGAGED IN SETTLEMENT NEGOTIATIONS?
- A. If so, how much additional time (i.e. thirty (30) to sixty (60) days) is needed to conclude the negotiations.
- VI. IS THERE ANY REASON WHY THIS MATTER SHOULD NOT BE SET FOR HEARING ON THE MERITS, OR ARE THERE ANY OTHER PROCEDURAL MATTERS TO BE ADDRESSED AT THIS TIME?
- \*\*\*NOTE\*\*\*both parties are responsible for being aware of whether an intentional tort case is pending in court and, if so, whether further processing of the IC-8/9 application should be held in abeyance at this time.
- VII. DETERMINE DATE, TIME AND PLACE FOR HEARING.  
Date Mailed: 06/19/2010

The parties and representatives below have been sent this correspondence. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

The Industrial Commission of Ohio  
**NOTICE OF HEARING**

Claims to be heard:

LT-ACC-OSIF-COV

This notice is sent to you for your information. YOU ARE URGED TO BE PRESENT AND TO INTRODUCE ALL TESTIMONY AND EVIDENCE PERTINENT TO YOUR POSITION ON THIS MATTER. YOU SHOULD BRING PHOTO IDENTIFICATION AS IT MAY BE REQUIRED FOR SECURITY PURPOSES. You will not be reimbursed for expenses incurred in coming to this hearing unless a subpoena has been issued for your attendance. NO CONTINUANCE TO BE GRANTED UNLESS REQUESTS ARE MADE IN COMPLIANCE WITH OHIO ADMINISTRATIVE RULE 4121-03-09.

Please Report To:

STREET: 2130 E Wheeling Ave  
ROOM: 1  
FLOOR: 1st  
CITY: Cambridge, OH 43725  
on Tuesday,

\*\* Directions on the reverse side of this notice \*\*

ISSUES TO BE HEARD:

1) VSSR-Merits Of Application-Record Hearing

Hearing to be held before a Staff Hearing Officer.

The parties and representatives below have been sent this notice of hearing. If you are not an authorized representative or if the representatives listed for you are incorrect, please notify the Industrial Commission at (740)435-4000 IMMEDIATELY to provide the correct information. Providing this information promptly will allow the Industrial Commission to mail notices to the correct parties and possibly avoid having to reset this hearing at a later date.

The Industrial Commission of Ohio  
**NOTICE OF HEARING**

Claims to be heard:

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NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT [www.ohioic.com](http://www.ohioic.com). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

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Notice Mailed 9/10/2009

2081201 plv/plv

NOTICE20

Page 2

CLAIM NUMBER: \_\_\_\_\_

Address on VSSR is new

SOCIAL SECURITY #: \_\_\_\_\_

Injured Worker's Address		Employer's Address	
NAME	PHONE ( )	NAME	
ADDRESS		ADDRESS	
CITY, STATE, ZIP CODE	COUNTY	CITY, STATE, ZIP CODE	PHONE ( )
Injured Worker's Representative's		Employer's Representative's	
NAME		NAME	

This agreement entered into this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, by and between \_\_\_\_\_, "Injured Worker", and \_\_\_\_\_, the "Employer" at \_\_\_\_\_ state of \_\_\_\_\_.

The Injured Worker, while working for the Employer, received work-related injuries on or about \_\_\_\_\_ which resulted in a claim being filed by Injured Worker for the payment of Workers' Compensation benefits and medical services, being claim # \_\_\_\_\_, which has been allowed for the following conditions: \_\_\_\_\_

After filing of the original claim, Injured Worker filed an application for additional award for violation of specific safety requirement(s) on claiming that Employer violated one or more requirement(s) of the specific safety requirements of the Ohio Industrial Commission and / or the Bureau of Workers' Compensation, and that such violation resulted in His/Her injury as allowed above, and

The parties now desire to make a full and complete lump sum settlement of the Injured Workers' application, subject to the approval of the Industrial Commission, as follows:

Employer promises and agrees to pay Injured Worker a lump sum of \_\_\_\_\_, and Injured Worker agrees to accept said sum of \_\_\_\_\_ from Employer in full and complete settlement and satisfaction of Injured Worker's application for an additional award of benefits based on lost wages compensation because of the claimed violation of a specific safety requirement(s) based on injuries sustained on or about \_\_\_\_\_.

Injured Worker agrees and understands that by accepting this lump sum payment, he / she releases and forever discharges Employer, the Industrial Commission, the Bureau of Workers' Compensation and the Ohio State Workers' Compensation Insurance Fund from any and all claims or demands, present or future, that might otherwise be made against Employer because of Employer's claimed violation of a specific safety requirement.

Injured Worker shall sign or cause to be signed such other instruments including a receipt and release, as may be necessary to complete this settlement agreement. This agreement shall be submitted to the Industrial Commission of Ohio for approval, and Employer shall not pay the agreed amount until this agreement shall have been approved by the the Industrial Commission and made a matter of record in the Claim.# \_\_\_\_\_. This agreement to settle the claimed safety violation is not an admission of responsibility by the Employer.

Nothing in this agreement shall be construed to settle or release Injured Worker's claim for regular Workers' Compensation benefits to which he may be lawfully entitled for injuries he received on or about \_\_\_\_\_. This agreement is not intended to change any other legal relationships between Injured Worker and Employer. It is the intention of the parties that this settlement cover only the application for additional benefits because of the claimed violation of a specific safety requirement which Injured Worker filed on \_\_\_\_\_.

The parties have signed  
this agreement at the time and place stated.

Injured Worker's signature	Employer's signature
Witnesses signature	Witnesses signature

**WAIVER**

Both Injured Worker and Employer have a right to a hearing on this agreement, and are also entitled to a full and complete investigation of the facts and circumstances of the claimed violation. By signing below, both Injured Worker and Employer waive this hearing and notice of hearing, and request immediate end of any investigation now in progress.

Injured Worker's signature	Employer's signature
Witnesses signature	Witnesses signature

RELEASE/RECEIPT

, CLAIMANT

v.

, EMPLOYER

CLAIM NO.

WHEREAS, a dispute arose between \_\_\_\_\_ and \_\_\_\_\_ with respect to \_\_\_\_\_ work-related injury of \_\_\_\_\_ while in the employ of \_\_\_\_\_ ; and

WHEREAS, on or about \_\_\_\_\_ filed with the Industrial Commission of Ohio an Application for Additional Award for Violation of Specific Safety Requirement; and

WHEREAS, the parties reached an agreement and settlement of any and all rights to which \_\_\_\_\_ has or claims to have against \_\_\_\_\_ because of the alleged violation of a specific safety requirement for the sum of \_\_\_\_\_ 00/100 Dollars (\$ \_\_\_\_\_ ); and

WHEREAS, in Order dated \_\_\_\_\_ , the Industrial Commission of Ohio approved the settlement agreement between \_\_\_\_\_ and \_\_\_\_\_ filed with the Industrial Commission on \_\_\_\_\_

NOW THEREFORE, in consideration of the sum of \_\_\_\_\_ 00/100 Dollars (\$ \_\_\_\_\_ ) as well as other valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the undersigned, \_\_\_\_\_ , for himself, his heirs, executors, administrators, assigns, predecessors, and parents does hereby remise, release and forever discharge MUNROE, INC., its directors, principals, officers, stockholders, employees, agents, insurers, successors, and assigns, from any and all claims, demands, rights, debts, actions and causes of action, of whatsoever nature or type, whether legal or equitable, which he has or

may claim to have, as of the date of this agreement or in the future arising out of  
alleged violation of a specific safety requirement in connection with industrial  
injury of .

IN WITNESS WHEREOF, I have voluntarily executed this Release/Receipt in the  
presence of the below-named witnesses on this \_\_\_\_ day of \_\_\_\_\_, 2010.

IN THE PRESENCE OF:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

APPROVED:

\_\_\_\_\_  
Attorney for

\_\_\_\_\_  
Attorney for

## Chapter 4123:1-13 Rubber and Plastic Industries

### 4123:1-13-01 Scope and definitions.

#### (A) Scope.

The purpose of these safety requirements is to provide reasonable safety for life, limb and health of employees. In cases of practical difficulty or unnecessary hardship, the Ohio bureau of workers' compensation may grant exceptions from the literal provisions of these requirements or permit the use of other devices or methods when, in the opinion of the industrial commission, equivalent protection is thereby secured.

These specific requirements supplement those of Chapter 4123:1-5 of the Administrative Code, "Specific Safety Requirements of the Ohio Bureau of Workers' Compensation Relating to All Workshops and Factories," and are minimum requirements of an employer for the protection of such employer's employees and no others and apply to the rubber and plastic industries where crude, synthetic, or reclaimed rubber or plastics are processed.

Equipment used in the laboratory varies greatly from manufacturing equipment in size, speed, and height and is specifically excepted from the detailed provisions of these requirements; however, equivalent protection shall be provided.

Installations or constructions built or contracted for prior to the effective date of any requirement shall be deemed to comply with the provisions of these requirements if such installations or constructions comply either with the provisions of these requirements or with the provisions of any applicable specific requirement which was in effect at the time contracted for or built.

#### (B) Definitions.

(1) "Approved" means accepted or certified by a nationally recognized testing agency, such as "Underwriters' Laboratories," "Factory Mutual Engineering Corporation," or a responsible governmental agency.

(2) "Bite" ("nip point") means the point of meeting between any two in-running rolls.

(3) "Calender" means a machine equipped with two or more metal rolls revolving in opposite directions and used for continuously sheeting or plying up rubber or plastic compounds and for frictioning or coating fabric with rubber or plastic compounds.

(4) "Danger zone" means the point of operation where a known critical hazard exists.

(5) "Factor of safety" means the ratio between the ultimate breaking stress and the working stress of the material, structure or device. For example, the term "factor of safety of four" means that the material, structure or device shall be constructed of such strength that the maximum load will be one-fourth the designed ultimate breaking load. Where other factors of safety appear, they shall apply in the same manner. The standards of the "American Society for Testing Materials" shall be used in determining the strength of material except as otherwise provided herein.

(6) "Guard" means the covering, fencing, railing, or enclosure which shields an object from accidental contact.

- (7) "Guarded" means that the object is covered, fenced, railed, enclosed or otherwise shielded from accidental contact.
- (8) "Mill" means a machine consisting of two adjacent, heavy rolls, set horizontally, which revolve in opposite directions (i.e., toward each other as viewed from above) used for the mechanical working of rubber or plastic.
- (9) "Operator" means any employee assigned or authorized to work at the specific equipment.
- (10) "Pinch point" ("shear point") means any point at which it is possible to be caught between the moving parts of a machine, or between the moving and stationary parts of a machine, or between the material and the moving part or parts of a machine.
- (11) "Point of operation" means the point or points at which the material is placed in or removed from the machine.
- (12) "Securely fastened" means that the object or thing referred to shall be substantially fixed in place.
- (13) "Safety trip" means a device for stopping the travel of rolls when the device is actuated in an emergency.
- (14) "Shall" is to be construed as mandatory.
- (15) "Substantial" means construction of such strength, of such materials, and of such workmanship that the object will withstand the wear, usage, or shock for which it is designed.

Effective: 03/15/2010

R.C. 119.032 review dates: 07/28/2009 and 07/01/2014

Promulgated Under: 119.03

Statutory Authority: 4121.12, 4121.121, 4121.13, Const. Art. II, Section 35

Rule Amplifies: 4121.13

Prior Effective Dates: 4/1/64, 1/1/82, 12/1/2004

### **4123:1-13-02 Mills.**

(A) Mill roll height.

All mills shall be installed so that the top of the operating rolls is no less than fifty inches above the level on which the operator stands, irrespective of the size of the mill. This distance shall apply to the actual working level, whether it be at the general floor level, in a pit, or on a platform.

(B) Mill emergency stop controls.

(1) Safety trip control.

A safety trip control shall be provided in front and in back of each mill to stop the mill when it is tripped. It shall be accessible and shall operate readily on contact. The safety trip control shall be one of the following types or a combination thereof.

(a) Pressure-sensitive body bars.

Installed at front and back of each mill having a roll height of forty-six inches or more, these bars shall operate readily by pressure of the mill operator's body.

(b) Safety trip rod.

Installed in the front and in the back of each mill and located within two inches of a vertical plane tangent to the front and rear rolls. The trip rods shall be within easy reach of the operator but no more than seventy-two inches above the level on which the operator stands. The trip rods shall be accessible and shall operate readily whether the rods are pushed or pulled.

(c) Safety trip wire cable or wire center cord.

Installed at the front and back of each mill and located within two inches of a vertical plane tangent to the front and rear rolls. The cables shall be within easy reach of the operator but no more than seventy-two inches above the level on which the operator stands. The trip wire cable or wire center cord shall operate readily whether cable or cord is pushed or pulled.

(d) Fixed guards.

Where a safety trip rod, safety trip wire cable, or wire center cord is used, a fixed bar across the front and one across the back of the mill approximately forty inches vertically above the working level and twenty inches horizontally from the crown face of the roll shall be used.

(2) Other equipment.

All other equipment, such as a mill divider, support bars, spray pipes, feed conveyors, strip knives, etc., shall be located in such a manner as to avoid interference with access to or operation of safety devices.

(C) Protection by location.

Where a mill is so installed that employees cannot normally reach through, over, under, or around to come in contact with the roll bite or be caught between a roll and an adjacent object, then, provided such elements are made a fixed part of a mill, safety control devices listed in paragraph (B) of this rule shall not apply.

(D) Trip and emergency switches.

All trip and emergency switches shall not be of the automatically resetting type, but shall require manual resetting.

(E) Emergency stopping limits.

(1) Determination of distance of travel.

All measurements on mills shall be taken with the rolls running empty at maximum operating speed. Stopping distances shall be expressed in inches of surface travel of the roll from the instant the emergency stopping device is actuated.

(2) When tripped by the emergency stopping device all mills, irrespective of the size of the rolls or their arrangement (individually or group-driven), shall stop within a distance, as measured in inches of

surface travel, no greater than one and one-half per cent of the peripheral no-load surface speeds of the respective rolls as determined in feet per minute. (See "Figure 1.")

Figure: Mill Stopping Distances for Various Roll Speeds

For Figure - To obtain the appendix, table, image, etc. please call LSC's ERF Helpdesk at 614-387-2078 or send an email to erfhelpdesk@lsc.state.oh.us.

Eff (Amended) 4-1-64; 1-1-82

Rule promulgated under: RC Chapter 119.

Rule authorized by: RC 4121.131, Const. Art. II, Section 35

R.C. 119.032 review dates: 07/28/2009 and 07/01/2014

### **4123:1-13-03 Calenders.**

(A) Calender safety controls.

(1) Safety trip, face.

A safety trip rod, cable, or wire center cord shall be provided across each pair of in-running rolls, extending the length of the face of the rolls. It shall be readily accessible and shall operate whether pushed or pulled. The safety tripping devices shall be located within easy reach of the operator and no more than seventy-two inches above the level on which the operator stands.

(2) Safety trip, side.

On both sides of the calender and near each end of the face of the rolls, there shall be a cable or wire center cord connected to the safety trip. These lines shall be no more than twelve inches from the faces of the respective rolls and no less than two inches from the calender frame. They shall be anchored to the frame no more than six inches from the floor or operator's platform and shall operate readily when pushed or pulled.

(B) Protection by location.

Where a calender is so installed that employees cannot normally reach through, over, under, or around to come in contact with the roll bite or be caught between a roll and an adjacent object, then, provided such elements are made a fixed part of a calender, safety control devices listed in paragraph (A) of this rule shall not apply.

(C) Trip and emergency switches.

All safety trip and emergency switches shall not be of the automatically resetting type, but shall require manual resetting.

(D) Stopping limits for calenders.

(1) Determination of distance of travel.

Measurements on calenders shall be taken on the drive roll. All measurements shall be taken with the rolls running empty at maximum operating speed. Measurements shall start when the safety device is tripped.

(2) Stopping limits.

(a) All calenders, irrespective of size of the rolls or their configuration, shall stop within a distance, as measured in inches of surface travel, no greater than one and three-quarters per cent of the peripheral no-load surface speeds of the respective calender rolls as determined in feet per minute. (See "Figure 2.")

(b) Where speeds above two hundred fifty feet per minute, as measured on the surface of the drive roll are used, stopping distances of more than one and three-quarters per cent are permissible. Such stopping distances shall be subject to engineering determination.

Figure: Calender Stopping Distances for Various Roll Speeds

For Figure – To obtain the appendix, table, image, etc. please call LSC's ERF Helpdesk at 614-387-2078 or send an email to erfhelpdesk@lsc.state.oh.us.

Eff (Amended) 4-1-64; 1-1-82

Rule promulgated under: RC Chapter 119.

Rule authorized by: RC 4121.131, Const. Art. II, Sec. 35

R.C. 119.032 review dates: 07/28/2009 and 07/01/2014

### **4123:1-13-04 Other rubber and plastic processing machines.**

(A) Extruders, strainers and tubing machines.

(1) Manually fed extruders, strainers and tubing machines shall have a hopper so designed as to allow a distance of no less than ten inches from the top edge of the hopper to the highest point of the screw or worm of the extruder, strainer or tubing machine.

(2) Rotating knives that may be located at the discharge end of extruders, strainers and tubing machines shall be guarded with interlocks provided to shut off the power if the guard is opened or removed.

(B) Rubber and plastic cutters.

(1) Cutters – circular cut-off power knives or blades.

Circular cut-off power knives or blades, used to cut rubber or plastic stock to length, shall be guarded.

(2) Manually fed guillotine bale cutters.

All manually fed guillotine bale cutters shall be equipped with a two-hand continuous control or a one-hand continuous control so located that the operator cannot reach the control and the danger zone at the same time.

(C) Wind-ups and power driven auxiliary rolls or drums.

Wind-ups, power driven auxiliary rolls or drums and festoon rolls, around which material travels, when exposed to contact, shall be provided with readily accessible safety trips or devices to disengage them from their immediate source of power.

(D) Hose winding machines.

Hose winding machines shall have a clutch or starting treadle running the full length of the machine so that the machine will stop automatically when the clutch or starting treadle is released.

(E) Curing or vulcanizing equipment.

An interlocking device shall be provided to prevent the admission of water, steam, or pressure into the unit before it is fully closed and locked to prevent the unit from being opened while it is under any residual pressure.

(1) Tire vulcanizers.

(a) Single or dual tire vulcanizers, which open and close by electrical power, shall be equipped with a safety bar or other mechanical sensing device installed at or across the front of the curing unit which will prevent the closing motion of the unit should the bar or other safety device be activated by contact with any portion of the employee's body as the unit closes.

(b) Brakes.

Brake capacity shall be sufficient to stop the motion quickly and capable of holding the moving parts at any point in their travel. Where friction brakes, equipped with release devices, are provided for stopping or holding moving parts of a press, postcure inflator, or accessories, they shall be set with compression springs and released by electrical, pneumatic, or mechanical means. Brakes that require electrical or pneumatic power to apply a holding force shall not be used.

(2) Horizontal curing units (vulcanizers).

A locking device shall be provided on doors in the open position to prevent them from closing accidentally on employees working underneath.

(3) Platen presses.

(a) Inserting or removing molds.

Molds shall be provided with lugs or handles for use when inserting or removing the molds from the platen presses by hand, otherwise a hook shall be provided for the purpose.

(b) Track stops.

Where tracks are used with platen presses they shall be equipped with stops to prevent the molds from being pulled or pushed off the tracks.

(c) Work tables.

(i) Stops.

Work tables used with platen presses ranging in sizes up to and including twenty-four inches wide by twenty-four inches long shall be equipped with stops to prevent the molds from being accidentally pulled off the front of the bench.

(ii) Size.

Work tables used with platen presses shall be no smaller than the press platens.

(4) Molding machines.

(a) Compression and transfer molding.

Compression and transfer molding machines shall be equipped with either:

(i) A metal gate which, when closed, completely encloses the molding area between the two front tie rods or side columns of the press and between the fixed and moving platens of the press and which is interlocked so that the press will not operate unless the gate is closed, or

(ii) Two-hand controls which must remain depressed during press closing.

(b) Injection and blow molding.

(i) The molding area of injection and blow molding machines shall be guarded by an interlocked safety door or gate with an insert of safety glass, impact-resistant plastic, or expanded metal.

(ii) Moving parts of the machine and mold not guarded by the safety door or gate shall be guarded by fixed or interlocked guards.

R.C. 119.032 review dates: 07/28/2009 and 07/01/2014

Promulgated Under: 119.03

Statutory Authority: 4121.12, 4121.121, 4121.13

Rule Amplifies: 4121.13, Const. Art. II, Sec. 35

Prior Effective Dates: 4/1/64, 1/1/82

2005 Ohio App. LEXIS 4575,\*;2005 Ohio 5083

State ex rel. Berman Industries, Inc., Relator, v. The Industrial Commission of Ohio and Bruce Shields,  
Respondents.

No. 04AP-1254

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2005 Ohio 5083; 2005 Ohio App. LEXIS 4575

September 27, 2005, Rendered

**SUBSEQUENT HISTORY:** Application granted by, Cause dismissed by State ex rel. Berman Indus.  
v. Indus. Comm., 2006 Ohio 6464, 2007 Ohio 4, 2007 Ohio LEXIS 2 (Ohio, Jan. 4, 2007)

**DISPOSITION:**

[\*1] Objections overruled; writ denied.

**COUNSEL:** Dinsmore & Shohl, and George B. Wilkinson, for relator.

Jim Petro, Attorney General, and Dennis H. Behm, for respondent Industrial Commission of Ohio.

Gary A. McGee, for respondent Bruce Shields.

**JUDGES:** BRYANT, J. PETREE and KLATT, JJ., concur.

**OPINION BY:** BRYANT

**OPINION**

(REGULAR CALENDAR)

DECISION

IN MANDAMUS

ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

Relator, Berman Industries, Inc., commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its award to respondent Bruce Shields for

relator's violation of a specific safety requirement ("VSSR").

Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) In his decision, the magistrate concluded that "(1) because relator failed to administratively challenge the applicability of the safety rule to the industry at which it was engaged this court cannot review relator's argument or claim in that regard; (2) the record [\*2] supports the commission's determination that claimant was injured on a 'compression and transfer' molding machine; and (3) relator's claim that the 40 percent penalty is being unlawfully calculated against claimant's working wage loss award is not ripe for review in this action." (Magistrate's Decision, P18.) As a result, the magistrate determined the requested writ should be denied.

Relator has filed objections to the magistrate's conclusions of law. While not setting forth a specific objection, relator's filing takes issue with the magistrate's determination that relator is engaged in an industry subject of the administrative rules at issue. The magistrate, however, addressed relator's contention at length, properly concluding relator's failure to raise the issue before the Industrial Commission bars this court from considering the issue in the first instance in mandamus proceedings. For the reasons set forth in the magistrate's decision, the objections are overruled.

Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, [\*3] we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, the requested writ of mandamus is denied.

*Objections overruled;*

*writ denied.*

PETREE and KLATT, JJ., concur.

## **APPENDIX A**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Berman Industries, Inc., Relator, v. The Industrial Commission of Ohio and Bruce Shields,  
Respondents.

(REGULAR CALENDAR)

No. 04AP-1254

MAGISTRATE'S DECISION

Rendered on June 28, 2005

*Dinsmore & Shohl*, and *George B. Wilkinson*, for relator.

*Jim Petro*, Attorney General, and *Dennis H. Behm*, for respondent Industrial Commission of Ohio.

*Gary A. McGee*, for respondent Bruce Shields.

IN MANDAMUS

In this original action, relator, Berman Industries, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its award to respondent Bruce Shields ("claimant") for relator's violation of a specific safety requirement ("VSSR").

Findings of Fact:

1. On October 24, 2000, claimant sustained severe crushing type injuries to [\*4] his right hand and forearm while employed as a machine operator for relator. The industrial claim is assigned claim number 00-556163.
2. On June 3, 2002, claimant filed a VSSR application alleging multiple violations of specific safety requirements. Among the list of safety rules allegedly violated was the guarding requirement relating to molding machines set forth at Ohio Adm.Code 4123:1-13-04(E)(4)(a)(i) and (ii) (formerly Ohio Adm.Code 4121:1-13-04[E][4][a][i] and [ii]) at issue in this action.
3. In August 2002, relator, through counsel, filed its answer to the VSSR application, stating:

The employer hereby denies that it violated any applicable safety codes or regulations in connection with claimant's October 24, 2000 injury.

Specifically, the two alleged safety code violations cited in claimant's application do not apply to the industry or machinery that allegedly involved claimant's underlying industrial injury.

4. It is not clear from the answer why it refers to "the two alleged safety code violations cited" when the VSSR application alleged many more code violations. Also, the answer [\*5] did not actually specify the two code violations cited that relator was answering.

5. The VSSR application prompted a commission investigation into the accident. The commission's investigative report is dated December 6, 2002.

6. On July 22, 2003, the VSSR application was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record. At the hearing, Mr. Dolph Berman, the owner and president of Berman Industries, Inc., testified.

7. Following the hearing, the SHO issued an order finding that relator had violated the guarding requirement relating to molding machines set forth at Ohio Adm.Code 4123:1-13-04(E)(4)(a)(i) and (ii) (formerly Ohio Adm.Code 4121:1-13-04[E][4][a][i] and [ii]) and that the violation was the proximate cause of claimant's industrial injuries. The SHO assessed a penalty against relator "in the amount of 40 percent of the maximum weekly rate under the rule of 'State ex rel Engle v. Industrial Commission', 142 Ohio St. 425, 52 N.E.2d 743." The SHO's order states in part:

Mr. Bruce Shields was employed as a machine operator at Berman Industries. [\*6] On 10/24/2000 Mr. Shields was operating a hydraulic vacuum compression molding machine making plastic easter eggs when a part got stuck to the top platen of the machine. The injured worker went to the control panel turned off one button and four switches which would turn off the platens and run out both of the heaters. After doing this the injured worker put his hand into the machine to remove the part and while doing so the platens came together injuring his hand and arm.

\* \* \*

The Hearing Officer finds that the machine in question was a hydraulic vacuum compression molding machine. The machine produces plastic parts by sucking plastic over molds which are attached to a [sic] platens and the platens then come together to cut the product.

\* \* \*

The Hearing Officer finds that the machine in question is a compression molding machine based on the testimony of Mr. Berman at hearing. Therefore, the above noted section applies. The evidence is undisputed that at the time that the molding machine was installed and at the time of the injured worker's injury, there was no gate on the machine which when closed completely encloses the molding area and prevents the press [\*7] from operating unless the gate is closed.

The Hearing Officer further finds no evidence that the machine was equipped with two hand controls which must remain depressed during press closing.

Therefore, based on this evidence, it is found that the employer was in violation of this subsection as of the date of the injured worker's injury.

It is further found that the employer's violation of OAC 4121-13-04(E)(4)(a)(i) and (ii) was the proximate cause of the injured worker's injury. If the machine was properly guarded so that the injured worker could not insert his hands or fingers into the danger zone of the point of operation or the machine had two handed controls the injured worker's injuries most likely would not have occurred. Therefore, the Hearing Officer finds that the injury was the proximate result of the employer's failure to have any guard in place as of the date of the injured worker's injury.

8. Relator moved for rehearing pursuant to Ohio Adm.Code 4121-3-20(C).

9. In its memorandum in support of rehearing, relator's counsel wrote:

The Commission's order constitutes an abuse of discretion for [\*8] the following reasons:

1. The machine on which the claimant was working does not constitute a hydraulic vacuum compression molding machine as contemplated by O.A.C. Sections 4121:1-13-04(E)(4)(a)(i) and (ii), and the guarding requirements of these code sections do not apply to the machine which claimant was operating on October 24, 2000.

\* \* \*

1. The machine in question does not constitute a hydraulic vacuum compression molding machine and cannot be subject to the guarding requirements for such machines.

Initially, it should be emphasized that the machine on which the claimant was working on October 24, 2000 is a highly specialized and virtually unique machine tool. It is primarily a vacuum based molding machine that takes continuous chain-fed rolled plastic, heats it up, then uses the vacuum process to conform the heated plastic to the shape of a mold, generally forming it into plastic bowls, toy easter eggs, or plastic plates and trays.

The molds are attached to two platens that slowly come together, creating a vacuum seal which is the "force" that conforms the plastic into the shape of the mold being used.

\* \* \*

The machine is not a \* \* [\*9] \* compression molding machine, a transfer molding machine, or a compression and transfer molding machine \* \* \* that \* \* \* fits into any of the applicable safety code sections contained with the Ohio Administrative Code.(Emphasis sic.)

10. On March 13, 2004, another SHO mailed an order denying rehearing.

11. On November 23, 2004, relator, Berman Industries, Inc., filed this mandamus action.

#### Conclusions of Law:

Relator presents three arguments in support of a writ of mandamus: (1) the safety rule it was found to have violated is not applicable to the industry in which relator was engaged at the time of injury; (2) the machine in question is not a "compression and transfer" molding machine within the meaning of the safety rule it was found to have violated; and (3) the 40 percent penalty is being unlawfully calculated against claimant's working wage loss award.

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The magistrate finds: (1) because relator failed to administratively challenge the applicability of the safety rule to the industry at which it was engaged this court cannot review relator's argument or claim in that regard; (2) the record supports the commission's [\*10] determination that claimant was injured on a "compression and transfer" molding machine; and (3) relator's claim that the 40 percent penalty is being unlawfully calculated against claimant's working wage loss award is not ripe for review in this action.

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

Chapter 4123:1-13 is captioned "Rubber and Plastic Industries." Ohio Adm.Code 4123:1-13-01(A) sets forth the scope of the specific requirements under Chapter 4123:1-13 stating:

These specific requirements supplement those of Chapter 4121:1-5 of the Administrative Code, "Specific Safety Requirements of the Industrial Commission of Ohio Relating to All Workshops and Factories," and are minimum requirements of an employer for the protection of such employer's employees and no others and apply to the rubber and plastic industries where crude, synthetic, or reclaimed rubber or plastics are processed.

Relator argues here that it was not involved in the rubber or plastic industries "where crude, synthetic, or reclaimed rubber [\*11] or plastics are processed." Relator claims that it is, however, subject to the specific safety requirements set forth at Chapter 4121:1-5 relating to all workshops and factories. Thus, relator argues that the commission cannot lawfully find that it has violated Ohio Adm.Code 4123:1-13-

04(E)(4)(a)(i) and (ii) because that safety rule is inapplicable to the industry in which relator was engaged at the time of injury.

The transcript of the July 22, 2003 hearing before the SHO reveals that relator's counsel failed to argue relator's claim presented here that relator was not engaged in the industry to which the safety rule at issue is applicable. Moreover, relator's motion for rehearing fails to make this claim or defense to the VSSR application. However, relator argues here that it preserved its right to present its claim in this mandamus action by its answer to the VSSR application.

The magistrate finds that relator's failure to pursue this issue or claim administratively bars this court from addressing it de novo in this action. State ex rel. Quarto Mining Co. v. Foreman (1997), 79 Ohio St.3d 78, 1997 Ohio 71, 679 N.E.2d 706, is instructive. [\*12] In *Quarto*, the employer brought a mandamus action to challenge the commission's award of permanent total disability compensation. The commission did not address a retirement issue that was suggested on the record but was never pursued administratively by the employer. In mandamus, the employer argued that "the issue raises itself by virtue of being manifest in the record." Quarto, at 81. The *Quarto* court rejected the employer's position and refused to address the retirement issue, explaining:

"Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." Goldberg v. Indus. Comm. (1936), 131 Ohio St. 399, 404, 6 Ohio Op. 108, 110, 3 N.E.2d 364, 367. See, also, State ex rel. Moore v. Indus. Comm. (1943), 141 Ohio St. 241, 25 Ohio Op. 362, 47 N.E.2d 767, paragraph three of the syllabus; State ex rel. Gibson v. Indus. Comm. (1988), 39 Ohio St. 3d 319, 320, 530 N.E.2d 916, 917 (rule that issues not previously raised are waived is applicable in an appeal from a denial of a writ of mandamus). Nor do appellate courts have to consider an error which the complaining party [\*13] "could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." State v. Williams (1977), 51 Ohio St.2d 112, 117, 5 O.O.3d 98, 101, 364 N.E.2d 1364, 1367.

These rules are deeply embedded in a just regard for the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error. Id., 51 Ohio St.2d at 117, 5 O.O.3d at 101, 364 N.E.2d at 1367. See, also, State v. Driscoll (1922), 106 Ohio St. 33, 38-39, 1 Ohio Law Abs. 277, 138 N.E. 376, 378.

The employer, however, essentially seeks a dispensation or relaxation of these rules in proceedings before the commission. [\*14] However, there is nothing about the [purpose of workers' compensation legislation

or the character of the proceedings before the commission that would justify such action. As Professor Larson explains, "evidentiary and procedural rules usually have an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case." 2B Larson, Workmen's Compensation Law (1996) 15-4, Section 77A.10. Thus, "when the rule whose relaxation is in question is more than a merely formal requirement and touches substantial rights of fair play, the relaxation is no more justified on a compensation appeal than on any other. *Such a rule is that forbidding the raising on appeal of an issue that has not been raised below* \* \* \*." (Emphasis added.) *Id.* at 15-101, 15-103, Section 77A.83. (The term "below" is used broadly by Professor Larson to include issues not raised at the administrative level. *Id.* at 15-103 to 15-116, fn. 46, Section 77A.83.)

In a well-reasoned decision, the California appellate court in **Bohn v. Watson (1954), 130 Cal. App. 2d 24, 37, 278 P.2d 454, 462**, applied these rules to proceedings before the Real [\*15] Estate Commissioner of Los Angeles County. The court refused to consider an issue not raised administratively, despite the fact that the lower court, upon an action for a writ of mandate, considered the issue. The court held that the issue was not properly injected into the claim by virtue of the lower court's consideration. In so holding, the court aptly explained:

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"It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial *de novo*, on expanded issues, in the reviewing court. \* \* \* The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play. Had [appellant] desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, and the hearing officer might have made appropriate findings thereon. [\*16] " (Citations omitted.) See, also, **Foster v. Bozeman City Comm. (1980), 189 Mont. 64, 68, 614 P.2d 1072, 1074** ("The facts do not permit us to extricate [relator] from the situation he helped to create."); **Shakin v. Bd. of Med. Examiners (1967), 254 Cal. App. 2d 102, 111, 62 Cal.Rptr. 274, 282**; **Harris v. Alcoholic Beverage Control Appeals Bd. (1961), 197 Cal. App. 2d 182, 187, 17 Cal.Rptr. 167, 170-171**.

To do as the employer suggests would not only deny the claimant a meaningful opportunity to respond, but would also conflict with the court's directive that "[the commission] is not to be regarded as an adversary of the claimant as in other litigation." **Miles v. Elec. Auto-Lite Co. (1938), 133 Ohio St. 613, 616, 11 O.O. 339, 341, 15 N.E.2d 532, 534**. It would also open the door to forcing an already overworked commission to comb the files of every PTD case in search of issues that could potentially be raised by both sides at the hearing table. In addition, it would waste judicial and administrative resources by permitting a party to secure another bite at the PTD apple based upon the commission's failure to consider [\*17] an issue or correct an error upon which the party remained silent. **Id. at 81-83**.

Clearly, under the rule set forth in Quarto, relator has waived any right to pursue this issue here because relator failed to pursue the issue administratively.

The magistrate also specifically rejects relator's argument that its answer to the VSSR application preserved its right to pursue the issue here. As the Quarto court states, in quoting the California appellate court in Bohn v. Watson (1954), 130 Cal. App. 2d 24, 278 P.2d 454, the rule also precludes a litigant from making only a perfunctory or skeleton showing in the administrative proceedings and thereafter obtaining a de novo review on expanded issues in the reviewing court.

At best, relator's answer could be described as raising the issue in a perfunctory manner. The answer itself is vague as to the issue. Again, the transcript of the hearing discloses that the issue was not pursued by relator's counsel. Also, the issue was not pursued by relator's counsel on the motion for rehearing. Clearly, relator simply failed to raise or pursue the issue administratively.

Notwithstanding [\*18] its failure to pursue the issue administratively, relator argues that the failure of respondents to plead an affirmative defense, such as waiver, in their answers to the complaint filed in this action means that respondents have waived their right to assert relator's failure to pursue the issue administratively. The magistrate disagrees.

It is settled law that in order for a writ of mandamus to issue, relator must demonstrate: (1) that he has a clear legal right to the relief prayed for; (2) respondents are under a clear legal duty to perform the acts requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. State ex rel. Berger v. McMonagle (1983), 6 Ohio St.3d 28, 29, 6 Ohio B. 50, 451 N.E.2d 225.

It is the relator in a mandamus action who has the burden of showing that he lacks a plain and adequate remedy in the ordinary course of the law. It is the relator in a mandamus action who has the burden of showing that he has exhausted his administrative remedies. State ex rel. Buckley v. Indus. Comm., 100 Ohio St. 3d 68, 2003 Ohio 5072, 796 N.E.2d 522.

In its complaint, relator failed to allege that it lacked a plain [\*19] and adequate remedy at law or that it had exhausted its administrative remedies. If relator had so pled, respondents would have presumably denied the allegations. Relator's own failure to properly plead this action does not translate into a waiver by respondents of an element of mandamus to be proven by relator. See *Buckley*.

In short, the pleadings notwithstanding, relator's failure to administratively pursue the issue raised here precludes this court from considering the issue de novo in this action.

The magistrate also disagrees with relator's contention that the claim it failed to pursue administratively but attempts to raise here is a challenge to the commission's subject matter jurisdiction over VSSR claims.

See Civ.R. 12(H)(3). Clearly, the commission has subject matter jurisdiction over VSSR claims. See State ex rel. Eaton Corp. v. Lancaster (1988), 40 Ohio St.3d 404, 410, 534 N.E.2d 46 (the commission has subject matter jurisdiction over total disability determinations under R.C. 4123.56 and 4123.58).

Section 35, Article II, Ohio Constitution, provides the [\*20] commission subject matter jurisdiction over VSSR claims. State ex rel. Haines v. Indus. Comm. (1972), 29 Ohio St. 2d 15, 278 N.E.2d 24. Contrary to relator's suggestion, the commission's subject matter jurisdiction over the VSSR claim is not dependent upon the commission finding a specific safety code violation that can withstand any challenge as to its factual applicability to the industrial injury.

The second argument presented by relator challenges the commission's finding under Ohio Adm.Code 4123:1-13-04(E)(4)(a) that the machine that injured claimant was a "compression and transfer molding machine."

According to relator:

Given that only five or six of these machines were ever made, it is doubtful that this particular code section was intended to apply to this particular machine. Moreover, there is nothing in the description of this thermoformer machine which suggests that it is a compression and transfer molding device. While those terms are not defined in the regulations, compression would seem to indicate that there was some pressure placed on the plastic to cause it to change shape. That is, of course, not [\*21] the case here. This is a situation where the plastic is heated, then a vacuum shapes it and then it is cut. There is no compression whatsoever involved in the thermoformer: merely a heated piece of plastic being pulled into a mold by vacuum and then cut.(Relator's brief at 8.)

As previously noted, Mr. Berman testified at the VSSR hearing on July 22, 2003. Mr. Berman was extensively questioned about the machine by employer's counsel and claimant's counsel.

During his direct examination by relator's counsel, Mr. Berman agreed that the machine was a "molding machine." (Tr. at 72.) He also agreed that "the platens compress on this machine." (Tr. at 76.)

During re-cross-examination by claimant's counsel, Mr. Berman denied that it is a "compression and transfer molding machine." (Tr. at 84.) However, he later clarified:

Q. But it's a molding type machine for plastic; is that correct?

A. It's a particular - - It's called vacuum, so it's not injection molding.(Tr. at 85.)

Under re-direct examination by relator's counsel, the following exchange occurred:

Q. \* \* \* If there was stuck plastic in a platen [\*22] in the die mold and if you utilized the wooden block to prevent the platen from closing, would it matter what length of tool you utilized in removing the stuck plastic?

A. No.

Q. Because the molds could not compress with the wooden block in place?

A. Correct.

\* \* \*

Q. Well, the molds may have anywhere from four to eight or more product, so as the sheet enters the mold there are multiple products that are created after the *vacuum compression* occurs, so there is always going to be a front edge of that portion of the sheet plastic that runs through the machine and I guess I'm asking: Is it more likely than not would all of the product come loose if the front edge of the machine -- front edge of the plastic was pried out?

A. I think there are so many variable that I --

Q. You don't really know?

A. I don't have an answer for that question. (Tr. at 98-99; emphasis added.)

Following re-direct examination by relator's counsel, the following exchange occurred among the hearing officer, relator's counsel and Mr. Berman:

HEARING OFFICER \* \* \*: I have one question: I want to know what kind of machine this is, so that [\*23] I have a clear understanding of what sections I'm going to look at under the code, and is there any documentation or any evidence that can be pointed to which could assist me in this issue?

[Relator's counsel]: Yes and no. And the reason it's a difficult question is that only five of these machines were ever created. This was not a mass produced machine tool or product, and that's to the best of our knowledge from Mr. Berman's experience in purchasing. Very few of them exist in the world or at least in the United States. As best we can tell the proper description of this would be both a hydraulic and pneumatic.

MR. BERMAN: It's not pneumatic, it's vacuum.

[Relator's counsel]: It's a hydraulic vacuum *compression* thermal molding machine. It's a combination of various factors. I don't believe it's accurate to refer to it as a compression molding machine under 4121-1-13-04 because there is hydraulic components to it. I don't think it's accurate to refer to it solely as a hydraulic press, because there's the vacuum *compression* component to it.(Tr. at 100-101; emphasis added.)

While relator asserts here that "there is no compression whatsoever [\*24] involved in the thermoformer," the record overwhelmingly negates relator's assertion. Mr. Berman and his counsel repeatedly conceded that the machine produced compression.

Clearly, relator's second argument lacks merit.

For its third argument, relator claims that the 40 percent penalty imposed for the VSSR violation is being unlawfully calculated against claimant's working wage loss award.

Apparently, relator has not administratively challenged the calculation of the VSSR penalty to be paid on claimant's working wage loss award. There is no order of the commission in the record showing that the commission has ruled on this issue. Given that relator has not moved the commission for review of this issue, it would be premature for this court to address the issue here. In short, any issue relating to the proper calculation of the penalty to be paid is not ripe for review in mandamus. See State ex rel. Elvria Foundry v. Indus. Comm. (1998), 82 Ohio St.3d 88, 1998 Ohio 366, 694 N.E.2d 459; State ex rel. Avalon Precision Casting v. Indus. Comm., Franklin App. No. 04AP-558, 2005 Ohio 2297.

Accordingly, for all the above reasons, it is [\*25] the magistrate's decision that this court deny relator's request for a writ of mandamus.

Kenneth W. Macke

KENNETH W. MACKE, MAGISTRATE