VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS

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A. Constitutional amendments regarding VSSR's

Article II, Section 35 of the Ohio Constitution empowers the Industrial Commission of Ohio to grant workers' compensation claimants an additional award in the amount of 15 to 50 percent of the maximum award of compensation established by law when a workers' compensation injury or death results from the employer's violation of a specific safety requirement. The abbreviated reference to this procedure in the Industrial Commission has become "VSSR". The relevant portion of Article II, Section 35 is as follows:

> Such board (the Industrial Commission of Ohio) shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the general assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in the constitution.

In addition to the constitutional authority for VSSR's, attention should be given to

the Ohio Revised Code Section 4121.13.1 which codified the Commission's power and authority to determine claims for VSSR. Special attention should also be given to Section 4121.47(B) which provides for claims filed after August 22, 1986 a penalty of up to $50,000.00 on employers who are found to have violated more than one specific safety rule with the same 24 month period.

B. Selection of the proper safety requirement

The history and subject matter of the Industrial Commission's safety codes are listed below:

O.A.C. 4121:1-1 (formerly IC-1 and Bulletin 110): Covering the Construction and Operation of Elevators, Power Dumbwaiters, Escalators, Manlifts and their Hoistways. (Effective Date: 12-1-79);

O.A.C. 4121:1-3 (formerly IC-3 and Bulletin 202): Relating to Construction and Demolition. (Revised Effective Date: 11-1-79);

O.A.C. 4121:1-5 (formerly IC-5 and Bulletin 203): Relating to All Workshops and Factories. (Significant revisions. Effective Date for Revisions: 1-1-86);

O.A.C. 4121:1-7 (formerly IC-7 and Bulletin 203.1): Relating to Foundries and Metal Castings. (Effective Date: 1-1-86);

O.A.C. 4121:1-9 (formerly IC-9 and Bulletin 203.2): Relating to Steel Mills, Coke Plants, Blast Furnaces and Rolling Operations. (Effective Date: 5-1-81);

O.A.C. 4121:1-11 (formerly IC-11 and Bulletin 203.3): Relating to Laundry Machinery and Operation; Drycleaning and Dyeing;

O.A.C. 4121:1-13 (formerly IC-13 and Bulletin 203.4): Relating to Rubber and Plastic Industries. (Effective Date: 1-1-82);

O.A.C. 4121:1-15 (formerly IC-15 and Bulletin 211): Relating to Potteries. (Effective Date: 1-1-86);

O.A.C. 4121:1-17 (formerly IC-17 and Bulletin 216): Relating to Window Cleaning. (Effective Date: 1-1-83);

O.A.C. 4121:1-19 (formerly IC-19): Relating to the Installation and

Maintenance of Electric Supply Lines and the Transmission and Distribution of Electric Power in Such Lines.

The foregoing is not an exhaustive list of the provisions which may qualify as "specific requirements" under Article II, Section 35 of the Constitution. The legislature may also enact "specific requirements". However, most workers' compensation claims involve provisions cited from one of the above listed safety codes promulgated by the Industrial Commission.

C. Safety violations must be specific

In State ex rel. Rae v. Industrial Commission (1939), 136 Ohio St. 168, the Court held that safety requirements do not prescribe a general course of conduct. Rather, a specific requirement is a provision which clearly forewarns the employer of its legal obligations. In State ex rel. Rate, the Court found that the Industrial Commission abused its discretion in finding a violation of a provision stating that tunnel contractors shall supply employees with such materials "as are necessary to keep their working places in a safe condition". The Court reasoned that this general provision:

> "does not impose a specific requirement but vests in the employer the power to exercise his judgment with respect to determining the question of necessity. The specific thing to be done is left to the judgment of the employer, as is also the method to be employed. Such a section cannot be said to be a specific requirement. It is the duty of the commission to prescribe such safety requirements as will forewarn the employer and establish a standard which he may follow". (Id. at 172-173).

In State ex rel. Trydle v. Industrial Commission (1972), 32 Ohio St. 2d 257, the Court held that a safety requirement meets the threshold test of specificity when the requirement contemplates (1) a specific business or specific instrument; (2) when it requires the employer to act in a specific manner; and (3) when it requires any specific and definite action that plainly apprises an employer of his legal obligations to his employee.

D. Elements of a VSSR

There must be three (3) elements established prior to an award for a safety

violation.

1. There must be an applicable and specific safety requirement enacted by the Industrial Commission or the General Assembly.

2. The employer must fail to comply with the specific safety requirement.

3. The condition created by the employer's failure to comply must be the cause of the compensable injury.

State ex rel. Whitman v. Industrial Commission (1936), 131 Ohio St. 375. Note, there is a two (2) year statute of limitations for VSSR's pursuant to Ohio Revised Code Section 4123.84 and Industrial Commission Rule 4120-3-20(A).

Not only must the claimant prove that the alleged violation is specific but also that the requirement applies to the appropriate industry. Because of the penalties imposed, specific requirements must be strictly construed in favor of the employer. See, State ex rel. Whitman v. Industrial Commission (1936), 131 Ohio St. 375.

If the Rule cited is both specific and applicable to the appropriate industry, it must then be determined whether or not the employer complied with that safety requirement. It is not sufficient that the injury itself proved the machine or operation was in violation of a specific requirement. The fact that a safety device that otherwise complies with the safety regulations failed on a single occasion is not alone sufficient to find the safety regulation was violated. State ex rel. M.T.D. Products, Inc. v. Stebbins (1975), 43 Ohio St. 2d 114.

Finally, there must be proof of proximate cause between the violation and a claimant's injury. The concept of proximate cause has recently been explained by the Supreme Court in State ex rel. Brown & Sons v. Industrial Commission (1988), 37 Ohio St. 3d 162. An employee's removal of a safety device on a scaffold was found to be the cause of his injury and the result of his own unilateral negligence regardless of any technical violation of a VSSR and, hence, an award was precluded. See, also, Northern Petrochemical v. Industrial Commission (1991), 61 Ohio St. 3d 453. See, State ex rel. Fiberlite v. Industrial Commission (1988), 36 Ohio St. 3d 202. The Court in Fiberlite held that violations for specific safety requirements are part of the exclusive jurisdiction of the Industrial Commission and, hence, the mandamus "some evidence" rule applies. See the facts of Fiberlite and ask, "Was there negligence on the part of the claimant?".

The Supreme Court has held that ordering an employee to take specific action to comply with the safety code fulfills an employer's obligation under the safety code even if the employee disobeys that order and does not take the action which would have brought the employer into compliance with the code. State ex rel. Quality Tower Service, Inc. v. Industrial Commission (2000), 88 Ohio St.3d 190.

However, the recent case of Cotterman v. St. Mary's Foundry (1989), 46 Ohio St. 3d 42, held that an employer does not escape liability for violations of specific safety requirements by giving a supervisory employee the responsibility to comply with such safety requirement. The ultimate responsibility remains with the employer. In this case, the Plant General Manager was killed as a result of a violation of a specific safety requirement that appears to have been caused by the General Manager's own negligence.

In State ex rel. Cincinnati Drum Service v. Industrial Commission (1990), 52 Ohio St. 3d 135, the Court rejected an employer's attempt to distinguish between accidental and intentional conduct. There, an employee intentionally put his hand inside a vee belt and pulley and stated that if the design of a specific safety standard was to protect employees from their own negligence, folly or stupidity, the language should have been so drafted. The dissent went on to state that the proximate cause of the injury was not that the belt was unguarded but, rather, the intentional conduct of the employee in sticking his hand in the pulley.

Where compliance with a safety violation is difficult and burdensome, compliance by the employer is still required. Practical inconvenience does not excuse non-compliance with a specific safety requirement. State ex rel. Mosser Construction v. Industrial Commission (1991), 61 Ohio St. 3d 445.

In the area of personal protective gear, it is the employer's responsibility to provide the equipment but it is the employee's responsibility to wear it. The Ohio Supreme Court has held that there is no safety violation liability for an employer that provides the required personal protective gear (in that case, fall protection which would have saved the employee's life) even though the employees never wore them. State ex rel. Mayle v. Industrial Commission (1999), 86 Ohio St.3d 74. In the Mayle case, supra, the company did not have the personal protective gear at the job site but the Court held that it had met it obligation to its employees by simply having the gear available to the employees at the company's shop.

E. Procedure

The Industrial Commission's jurisdiction to consider an alleged violation of a specific safety requirement is triggered by the filing of the application. This VSSR Application must be filed within two (2) years after the injury date. Once the Application is filed, the

Commission notifies the employer which then has thirty (30) days to file an answer to the Application.

Thereafter, the Commission refers the matter for investigation by one of the Commission's Investigators. Rule 4121-3-20(D) states:

> The Commission may assign an application for award for investigation or for hearing without investigation if the application or answer raises legal issues the decision of which would dispose of the application.

The Commission's Investigator typically will visit and photograph the site of the claimant's injury and will interview witnesses listed on the claimant's application and any additional witnesses made available by the employer. The special investigator then summarizes his interviews in a written affidavit form and prepares a report to the Industrial Commission. Upon mailing of the report, the Commission notifies both parties that they have thirty (30) days to submit additional proof. Note, Rule 4121-3-20(D) provides:

> If no request is made for such a hearing, no new evidence will be accepted at the hearing on the application.

After the thirty (30) days for submission of new evidence has expired, Rule 4121-3-20(E) gives three (3) options to the Staff hearing Officer assigned to the case. These options are:

1. Where a formal hearing has been requested and appears necessary, such a hearing for taking of testimony will be scheduled;

2. Where a formal oral hearing has not been requested, the claim is set for hearing at which time arguments in favor of each side may be given but, in theory, no new proof can be submitted; and, finally,

3. The Staff Hearing Officer may refer the claim for further investigation and request a supplemental investigation report.

After a decision is issued, either party may file a motion requesting a rehearing pursuant to Industrial Commission Rule 4121-3-20(G). This motion must be filed within thirty (30) days of the receipt of the Commission's order. Rule 4121-3-20(G) sets out two (2) criteria for review of such motions for rehearing:

1. In order to justify a rehearing of the Commission's order, the motion shall be accompanied by new and additional proof not previously considered and relevant to the specific safety violation.

2. A rehearing may also be indicated in exceptional cases where the order was based on an obvious mistake of fact.

There is no right of appeal of an unfavorable VSSR application. Hence, the losing party may only seek judicial relief through a complaint for writ of mandamus. The Courts will not interfere with a Commission decision on VSSR where there is "some evidence" to justify the decision. See, State ex rel Dodson v. Industrial Commission (1980), 66 Ohio St. 2d 408.

F. Consideration as to extent of penalty

In State ex rel. Jeep Corporation v. Industrial Commission (1989), 42 Ohio St. 3d 83, the Court held relevant factors as to extent of the penalty are injury severity, egregiousness of a violation or a machine's inherent dangerousness.

The following are items considered as to the extent of the penalty.

1. How blatant the particular violation is.

2. Safety experiences with the employer both with the Industrial Commission Division of Safety & Hygiene and the Occupational Safety and Health Administration of the Federal Government.

3. Maintenance records.

In addition, a factor that is often considered, even though it should not be, is the extent of the claimant's injuries. Factors such as whether or not the injury is a bloody and gory one and whether or not the injury causes serious impairment to the claimant's ability to support himself.

G. Additional sources of evidence

1. Federal Occupational Safety & Health Administration records;

2. Periodic Industrial Commission Safety & Hygiene Reports including those requested in advance by the employer;

3. The State and Federal Environmental Protection Agencies;

4. The State Fire Marshall's Office; and

5. In communities with a right-to-know statute, the local Fire Department.

H. Terms of Art

The difference between forming and bending.