

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Ruscilli Construction Company, Inc.,
Relator,
v.
Industrial Commission of Ohio and David D. Barno,
Respondents.

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No. 09AP-1006
(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 2, 2010

Wiles Boyle Burkholder & Bringardner Co., LPA, J. Miles Gibson and Samuel M. Pipino, for relator.

Richard Cordray, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

Heinzerling & Goodman, LLC, and Mark Heinzerling, for respondent David D. Barno.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶1} Relator, Ruscilli Construction Company, Inc. ("relator" or "Ruscilli"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its award to respondent, David D. Barno ("claimant"), for relator's violation of a specific safety requirement ("VSSR").

{¶2} The court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion in granting claimant an additional award for a VSSR because there was some evidence in the record that the cover was constructed in a fashion that allowed it to be accidentally displaced. The magistrate further concluded this case was distinguishable from *State ex rel. Sheeley v. Indus. Comm.*, 10th Dist. No. 07AP-1011, 2008-Ohio-4547, because the cover in this case was "easily displaced," thereby resulting in claimant's injuries. Therefore, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator has filed the following two objections to the magistrate's decision:

[I] RELATOR OBJECTS TO THE MAGISTRATE'S FACTUAL FINDING "BASED ON CLAIMANT'S TESTIMONY, THERE IS SOME EVIDENCE IN THE RECORD THAT THE COVER PROVIDED BY RELATOR WAS NOT SO CONSTRUCTED THAT THE COVER COULD NOT BE ACCIDENTALLY DISPLACED".

[II] THE FACTS OF THIS CASE ARE NOT DISTINGUISHABLE FROM THE FACTS IN THIS COURT'S DECISION IN STATE EX REL. SHEELY V. INDUSTRIAL COMMISSION, 10TH DISTRICT NO. 07AP-10[1]1, 2008-OHIO-4547.

{¶4} In its first objection, relator argues the magistrate erred by substituting the phrase "not easily displaced" for the "cannot be accidentally displaced" language used in Ohio Adm.Code 4123:1-3-04(D)(1) and by assuming facts which are not supported by the evidence in the record. In its second objection, relator argues the magistrate improperly attempted to distinguish this case from *State ex rel. Sheely v. Indus. Comm.*, 10th Dist. No. 07AP-1011, 2008-Ohio-4547, by using a "lack of resistance test" to determine that relator had failed to comply with the applicable code provision.

{¶5} The magistrate's findings of facts are based in large part upon the findings of the Staff Hearing Officer ("SHO"). The SHO found claimant sustained injury on September 11, 2007, in the course of his employment when he removed a plywood board covering a hole on the floor at a construction site and fell several feet through the hole. Claimant testified he did not know the hole was present and that he was able to remove the board without resistance.

{¶6} The SHO further found claimant's injury was the result of relator's failure to effectively cover the hole as required by Ohio Adm.Code 4123:1-3-04(D)(1). This section applies to temporary conditions where there exists the danger of employees or materials falling through the floor, roof, wall opening or stairway at a construction site. It requires that any such opening be guarded. Specifically, Ohio Adm.Code 4123:1-3-04(D)(1) provides in relevant part:

(D) Openings. (1) Floor openings. Floor openings shall be guarded by a standard guard railing and toeboard or a cover with a safety factor of no less than two and so constructed that the cover cannot be accidentally displaced. * * *

{¶7} Citing to claimant's testimony, the SHO determined the hole was covered with only a single piece of plywood, but that relator's safety representative had testified it was standard practice to place two pieces of plywood over every hole and to boldly write the word "hole" on the top piece of plywood. The SHO found that if two pieces of plywood had been covering the hole, claimant would not have been injured. In addition, the SHO concluded the practice of using two inch nails to hold two pieces of plywood in place over a hole was not an effective way to guard the hole, given the depth of the boards and the limited amount of the nail that would remain available to secure the boards to the ground. Furthermore, the SHO determined that because the ground was compacted dirt that

could shift or become less secure due to weather conditions such as rain, the method used to guard the hole was ineffective.

{¶8} However, our review of the record of proceedings reveals relator's safety officer actually testified that it was standard practice to use just one layer of plywood. As a result, the nails only had to penetrate one layer of plywood and more of the nail could be inserted into the ground. Furthermore, the witness testimony appears to establish that the plywood was secured into the concrete floor, rather than into compacted dirt. The SHO appears to have incorrectly recalled this relevant and significant testimony of the witnesses and thus relied upon that incorrect testimony in reaching her conclusion that relator failed to use an effective method of guarding the hole. In turn, the magistrate appears to have relied upon much of the same inaccurate testimony.

{¶9} Furthermore, the magistrate's decision improperly places significant emphasis upon the fact that there is no testimony to establish that claimant "yanked" on the board and applies a different standard for guarding the hole: that the cover could not be "easily displaced," rather than "accidentally displaced."

{¶10} For these reasons, we grant a limited writ of mandamus directing the commission to vacate its July 2009 order and remand this matter to the commission to adjudicate the application for VSSR and determine the facts, either based upon the record or, if necessary, by holding a new hearing.

Limited writ of mandamus granted.

TYACK, P.J., and FRENCH, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ruscilli Construction Company, Inc.,	:	
	:	
Relator,	:	No. 09AP-1006
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and David D. Barno,	:	
	:	
Respondents.	:	

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

Rendered on April 21, 2010

Gibson Law Office, and J. Miles Gibson; Wiles Boyle Burkholder & Bringardner Co., LPA, and Samuel M. Pipino, for relator.

Richard Cordray, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

Heinzerling & Goodman, LLC, and Mark Heinzerling, for respondent David D. Barno.

IN MANDAMUS

{¶11} Relator, Ruscilli Construction Company, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to grant its order which granted respondent, David D. Barno ("claimant"), an additional award for the violation of a specific safety

requirement ("VSSR") and ordering the commission to find that claimant is not entitled to that award.

Findings of Fact:

{¶12} 1. Claimant sustained a work-related injury on September 11, 2007 and his workers' compensation has been allowed for the following conditions: fracture condylar process of mandible; open fracture symphysis of body of mandible; fracture malar/maxillary-open; bilateral dislocation jaw-open; loss of tooth 9 trauma; loss of tooth 10 trauma; right perforation of tympanic membrane; unilateral mixed hearing loss; peripheral vertigo; right chronic mucoid otitis media simple.

{¶13} 2. September 11, 2007 was claimant's third day on the job at this particular work site. Claimant had obtained permission to arrive late that day, and when he arrived, the crew was on break. Claimant's supervisor directed him to remove scraps and other debris in an enclosed garage-type area. The scraps had been left behind by an HVAC contractor who had been working the preceding night. Using a wheelbarrow, claimant began picking up scraps, including scraps of plywood, placing them in the wheelbarrow, and dumping them in the dumpster. According to claimant's testimony, he noticed two three quarter inch sheets of plywood approximately three feet by three feet. Claimant loaded the first one in the wheelbarrow and dumped it. When he returned, claimant bent down to pick up the other piece of plywood which, unbeknownst to claimant, was covering a hole. As he picked up the piece of plywood, claimant fell into the hole and sustained his injuries. There were no witnesses to claimant's accident.

{¶14} 3. The other workers from whom statements were taken had been on the work site for months and knew the hole existed and was covered with a sheet of plywood. According to the testimony, the plywood was secured to the concrete floor with four nails.

Further, testimony indicated that the word "hole" was spray painted on the plywood. Apparently, the object was to secure the plywood in such a manner that it could not be pushed, kicked or slid off the hole. Workers, supervisors, and relator's corporate safety officer would kick occasionally the piece of plywood to be certain that it remained secured. It was not anticipated that anyone would attempt to lift up the piece of plywood.

{¶15} 4. Deborah Webb, relator's corporate safety officer, testified that a person would need to yank on this piece of plywood in order to lift it off the hole. Claimant testified that he bent over to pick up the piece of plywood and felt no resistance.

{¶16} 5. Exhibit 12 on page 29 of the stipulation of evidence was presented at the hearing. In that exhibit, it is apparent that the plywood cover had been walked across frequently and was dirty because the word "hole" is difficult to read.

{¶17} 6. In May 2008, claimant filed his application for an additional award for relator's VSSR. Claimant cited Ohio Adm.Code 4121:3-04(D)(1) which applies to temporary conditions where there is danger of employees or material falling through the floor, roof, wall openings or stairways, and requiring that those openings be guarded by a standard guard railing and toeboard or a cover.

{¶18} 7. Relator's motion was heard before a staff hearing officer ("SHO") on June 18, 2009. The SHO determined that claimant met his burden of proof and granted him a VSSR as follows:

It is further the finding of the Staff Hearing Officer that the Injured Worker's injury was the result of the Employer's failure to effectively cover the hole as required by 4123:1-3-04(D)(1), the Code of Specific Requirements of the Industrial Commission relating to construction.

The Injured Worker arrived at the job site to which he was assigned at 8:15 in the morning. He was instructed to get an industrial dumpster and load it with scrap wood. He came upon a piece of plywood laying on the ground and bent over to pick it up. He felt no resistance from the board when he

had both hands on it. Since nothing was written on it, he assumed it was ordinary scrap wood. As the Injured Worker began pulling the board away, he accidentally leaned forward and fell head-first down a manmade hole, sustaining the injuries of record.

The Injured Worker cites O.A.C. 4121:3-04(A) and (D)(1), regarding the protection of floors and guarding of openings. The rule applies "... to temporary conditions where there is danger of employees or material falling through floor, roof or wall openings..." He specifically cites paragraph (D)(1) which states: "floor openings shall be guarded by a standard guard railing and toeboard or cover. Standard guard railing and toeboard shall be provided on all exposed sides...."

Based upon the Injured Worker's testimony, it is found that the hole was only covered with a single piece of plywood that had no indication on or around it that a hole was underneath. The Employer's safety representative presented pictures of a board that had the word "HOLE" written on it in large red letters. She stated that it is the Employer's custom to put two pieces of plywood over every hole, with the top piece having the word "hole" written boldly and clearly on it.

It is found that if two pieces of plywood were over the hole, the Injured Worker would not have fallen through, since he only lifted one piece. Further, whether or not the word "hole" was written on the plywood, it did not serve to deter the Injured Worker from picking it up. The picture that the Employer submits at hearing (exhibit A) contains the word "hole" on it, but it is not clearly visible because of the many shoes, boots, and equipment pieces that have partially obscured the word.

The Employer further stated that the two pieces of plywood were nailed in place with two-inch nails. Again, this is not found to be an effective way of guarding the hole. Each board was approximately 5/8" deep, which means that two of them would take up 1 1/4" of a 2" nail. Approximately 3/4" of the nail was left to secure the boards to the ground. Considering that the ground was merely compacted dirt that could shift because of the hole adjacent to it, or that a rainy day could cause the ground to be less secure than usual, it is found that the plywood cover of a hole that was big enough for a man to fall through was ineffective. It is noted that the picture of a plywood board (in exhibit A) does not have any holes at the corners where nails were once used to secure it.

Based upon the foregoing findings, it is found that the Employer violated O.A.C. 4123:3-04(D)(1).

{¶19} 8. Relator filed a motion for rehearing arguing the following:

1) Contrary to the Notice of Award, the Employer did not state that two pieces of plywood were nailed over openings in the floor as standard safety practice (rather, the Employer's witnesses testified only 1 board would be used); and

2) Contrary to the Notice of Award, the Employee intentionally removed a safety device (i.e., pulling up a nailed board) that was the sole and proximate result of his injury, as opposed to any Violations of O.A.C. §4121:3-04(A) and (D)(1).

{¶20} 9. Relator's motion for rehearing was denied by order of the commission mailed September 24, 2009.

{¶21} 10. The day after, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶22} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶23} In order to establish a VSSR, a claimant must prove that: (1) there exists an applicable and specific safety requirement in effect at the time of the injury; (2) the employer failed to comply with the requirements; and (3) the failure to comply was the proximate cause of the injury in question. *State ex rel. Trydle v. Indus. Comm.* (1972), 32 Ohio St.2d 257.

{¶24} The interpretation of a specific safety requirement is within the final jurisdiction of the commission. *State ex rel. Berry v. Indus. Comm.* (1983), 4 Ohio St.3d 193. Because a VSSR is a penalty, however, it must be strictly construed, and all reasonable doubts concerning the interpretation of the safety standard are to be construed against its applicability to the employer. *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170. The question of whether an injury was caused by an employer's failure to satisfy a specific safety requirement is a question of fact to be decided by the commission subject only to the abuse of discretion test. *Trydle*; *State ex rel. A-F Industries v. Indus. Comm.* (1986), 26 Ohio St.3d 136; *State ex rel. Ish v. Indus. Comm.* (1985), 19 Ohio St.3d 28.

{¶25} In this mandamus action, relator argues that the commission abused its discretion by granting claimant an additional award for a VSSR. Relator argues that the commission impermissibly added its own requirement to the code by requiring that the word "hole" should have been visible, that the commission's order is contrary to this court's decision in *State ex rel. Sheely v. Indus. Comm.*, 10th Dist. No. 07AP-1001, 2008-Ohio-4547, and that claimant's injuries were caused by his own unilateral negligence when he removed the plywood, which otherwise complied with the code, from the opening in the floor.

{¶26} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶27} The code section at issue here, Ohio Adm.Code 4123:1-3-04 provides, in pertinent part:

(A) Scope.

This rule shall apply to temporary conditions where there is danger of employees or material falling through floor, roof or wall openings or from stairways or runways.

* * *

(D) Openings.

(1) Floor openings.

Floor openings shall be guarded by a standard guard railing and toeboard or a cover with a safety factor of no less than two and so constructed that the cover cannot be accidentally displaced.

{¶28} The code requires that relator guard the opening in the concrete floor in either one of two ways: (1) by providing a standard guard railing and toeboard or (2) providing a cover with a safety factor of no less than two and so constructed that the cover cannot be accidentally displaced.

{¶29} As noted in the findings of fact, there were no witnesses to claimant's accident. Claimant testified that he bent over, lifted up the cover, felt no resistance, and then fell through the opening. By comparison, relator's employees testified that they routinely kicked the cover to make sure it would not slide off the hole, and Ms. Webb testified that the only way she had ever seen one of these covers removed (but not this one) was when a worker yanked on it. Nothing in claimant's testimony indicates that he yanked on the cover. Based upon claimant's testimony, there is some evidence in the

record that the cover provided by relator was not "so constructed that the cover [could not] be accidentally displaced." This, in and of itself, supports the commission's findings.

{¶30} Relator first argues that the commission impermissibly added its own requirement to the code by requiring that the employer clearly label the cover with the word "hole." The magistrate disagrees with relator's characterization of the commission's order. Through testimony and statements, relator's employees repeatedly emphasized the fact that the cover was not only nailed down but that the word "hole" was spray painted on the cover in bright orange paint so that it would be visible. Although Exhibit 12 is a black and white photograph and would not demonstrate that the lettering was orange, the commission found, and this magistrate agrees, that the word "hole" is rather obscured. The magistrate finds that the SHO was merely addressing one of the arguments relator made indicating that claimant should have realized there was a hole under the piece of plywood. Nothing in the commission's order indicates that the commission was requiring that the word "hole" be written on this or any other cover in order to comply with the code provisions.

{¶31} Relator also contends that the commission's decision is contrary to this court's decision in the *Sheely* case. For the reasons that follow, this magistrate disagrees.

{¶32} In *Sheely*, the injured worker was part of a work crew constructing a concert stage at Crew Stadium. During construction, workers placed pieces of plywood over holes in the stage floor where roof supports would eventually go. In order to cover openings on stage right, where work was taking place, the injured worker and a co-worker were directed to remove plywood from stage left and carry it to stage right. The injured worker and his co-worker lifted a plywood cover in order to move it; the injured worker

became distracted by something behind him and stopped momentarily; his co-worker continued to move; the injured worker was pulled off balance and fell into the hole they had just uncovered. The commission denied the injured worker's request for an additional award for a VSSR and this court agreed.

{¶33} In finding no violation, the commission first found that Ohio Adm.Code 4123:1-3-04(D)(1) had been met by the employer. The hole was covered. Second, the commission determined that the removal of the covering was necessary in order to proceed to the next phase of construction. Further, the commission found that there was no way for the employer to guard the opening between the time the plywood cover was removed and taken to the other side. Upon review, this court agreed with the commission's reasoning.

{¶34} Paramount to the decision in *Sheely*, the commission found that the employer had complied with the code requirements: the hole had been properly covered. Second, the commission determined that removal of the cover was necessary and that while the injured worker's injury was unfortunate, it was an accident, neither the employer's nor the injured worker's fault.

{¶35} Contrary to relator's assertions, the facts in *Sheely* are not analogous to the facts in the present case. In *Sheely*, the hole was properly guarded in the first instance as required by the code. In this case, the commission found that the opening was not properly guarded and that relator did not comply with the code section. In *Sheely*, two workers were required to remove the cover, i.e., it was not easily displaced. In the present case, claimant testified that he lifted up the cover with no resistance. Here, the cover was easy to displace and claimant did in fact, easily displace the cover and sustain his injuries. In *Sheely*, it was necessary to remove the cover in order to proceed with

construction. In the present case, it was not necessary to remove the cover. Instead, the cover needed to stay in place. The two cases are very different and the commission's decision in this case is not contrary to our holding in *Sheely*.

{¶36} Lastly, relator cites *State ex rel. Frank Brown & Sons v. Indus. Comm.* (1988), 37 Ohio St.3d 162, and argues that claimant's injuries were caused by his own unilateral negligence negating any specific safety code violations by relator. However, in *State ex rel. Martin Painting & Coating Co. v. Indus. Comm.*, 78 Ohio St.3d 333, 1997-Ohio-45, the court specifically stated that the holding from *Brown* only applies where an otherwise compliant device has been rendered non-compliant by the claimant's deliberate action. In the present case, although relator presented testimony that one would need to yank on the cover to remove it, no one witnessed claimant's accident. Claimant himself testified that he did not know there was a hole, he leaned over, picked up the cover, felt no resistance, and fell through the hole. Because there was some evidence in the record from which the commission specifically found that relator did not comply with the safety requirements and through claimant's testimony himself, the holding from *Brown* does not apply here.

{¶37} Respondents argue that relator did not raise the issue of unilateral negligence at the commission level and, therefore, cannot raise it here. Relator asserts the issue was raised tangentially by inference and that is sufficient. Because relator has not asserted that the commission abused its discretion by not making a finding of unilateral negligence, respondents appear to be correct. In any event, as above stated, there was some evidence that relator did not comply with the requirements first. Relator's unilateral negligence argument fails.

{¶38} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in granting claimant an additional award for the relator's violation of a specific safety requirement and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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