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Gallagher Sharp Shop Talk: Workers' Compensation

Question: How is the "abuse of discretion" standard applied to a determination that an employer failed to provide the necessary safety equipment?

When an employee is injured and files a workers' compensation claim, Ohio law provides for an additional award to the claimant if he or she can demonstrate that the injury resulted from the employer's violation of a specific safety requirement. These "VSSR" claims are investigated by the BWC and afforded a single hearing before a Staff Hearing Officer ("SHO"), who hears evidence and issues an order. There is no appeal as of right to these awards, so the aggrieved party must demonstrate an "abuse of discretion" through a writ of *mandamus*. To what extent will a reviewing Court consider evidence presented to support the award?

The Supreme Court of Ohio considered this question in *State ex rel. R.A.M.E., Inc. v. Industrial Commission*, 124 Ohio St.3d 431, 2010-Ohio-575, which involved a claimant who was injured after falling off a roof. The claimant was not wearing a safety harness and alleged that R.A.M.E. committed a violation of OAC 4123:1-3-03 because it did not provide him with his own harness. (The claimant had brought his brother's harness to the job site, although he apparently was not wearing it.) There was conflicting testimony as to whether safety harnesses were provided by the employer. The matter went to hearing, and an SHO found a violation and issued an award, stating that there would be "no reason that the claimant would seek to borrow a safety harness if his employer had provided one." On *mandamus*, the Tenth District Court of Appeals upheld the VSSR award, but on a different basis, citing a portion of the claimant's deposition testimony (never cited by the SHO or argued at the hearing) that the employer requested a "deposit" for the harness, and therefore did not "provide" one under the OAC. The employer appealed this decision.

The Supreme Court reversed, found an "abuse of discretion" had occurred, and remanded the case for another hearing. The Court flatly rejected the SHO's reasoning, stating that it could conceive of several reasons why an employee would borrow someone else's harness, including familiarity, comfort, or convenience. The Court also rejected the Tenth District's reliance on evidence that was not considered at the hearing, noting that the claimant did not present evidence of a "deposit" requirement at the hearing and the SHO did not mention it. The Court remanded the claim for further handling, noting that "credibility may be a key issue," and that the determination of credibility is solely within the discretion of the Industrial Commission.

The "abuse of discretion" standard is among the most difficult to satisfy, and the Court's decision in *R.A.M.E.* is extraordinary because it is a straightforward and direct application of this standard. Simply put, the Court applied a "common sense" test, and found the SHO's reasoning lacking.

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