

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can a failure to request safety equipment act as a defense to a VSSR claim?

Ohio provides for an additional workers' compensation award ("VSSR") when a claimant can establish that an employer violated a specific safety requirement which proximately caused his injury. These awards, which are characterized as "penalties" against the employer for failing to follow established guidelines, often deal with guards and safety measures. Recently, the Supreme Court of Ohio was presented with a case involving a failure to provide safety equipment, with the question: Does a failure on the part of the employee to ask for safety equipment provide a defense?

State ex rel. Glunt v. Indus. Comm., 132 Ohio St.3d 78, 2012-Ohio-2125, concerned a claimant who was injured when electrical equipment he was working on exploded. It was not disputed that the claimant, an electrician, was not wearing any safety equipment, and with the exception of gloves, none was provided. There was disputed evidence as to the cause of the explosion, and what apparatus the claimant was authorized to work on at the time. The claimant later filed a VSSR application alleging a violation of OAC 4123:1-5-23(A), which requires employers to provide protective equipment if the equipment being worked on was not powered off. The employer argued that the provision did not apply because the cabinet which actually exploded was not "equipment to be worked on," and that it would have provided safety equipment if the claimant had asked for it. The SHO hearing the matter granted the application, concluding that the provision applied and that a failure to provide equipment was not excused by the claimant's failure to ask for it. The Tenth District affirmed on *mandamus*, prompting an appeal as of right to the Supreme Court of Ohio.

The Supreme Court affirmed, finding that the "equipment to be worked on" arguably included the panel that exploded, and that the employer failed to provide the equipment listed in the code. The Court also disposed of the employer's argument that the equipment was never requested, noting that the provision in question did not require only "requested" safety equipment, but instead imposed a "clear duty" on an employer to provide it. As to the employer's final argument - that the claimant would not have worn it because the claimant said in a statement that he did not need it for the task at hand - the Court found that this goes to the defense of "unilateral negligence," which is not available unless the employer complied with the specific safety requirements.

While the rationale is sound, this decision is troubling because of the facts. Facts in VSSR proceedings should be strictly construed in favor of the employer, and there were conflicting statements about the cause of the accident. In addition, the claimant was an electrician, and his judgment as to the "need" for safety equipment was ignored. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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