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

Question: What can we do when a hearing officer simply gets the facts wrong?

Like courts, the Industrial Commission "speaks" through its orders. Problems sometimes arise when the narrative portion of these orders contains factual or legal errors. Earlier this year, the Supreme Court of Ohio considered an appeal involving an employer who contested an IC order that contained significant mistakes of both fact and law, both of which directly impacted the resulting decision.

State ex rel Ruscilli Constr. Co., Inc. v. Industrial Commission, 132 Ohio St.3d 18, 2012-Ohio-1588, involved an employee who fell through a hole in a floor at a construction site. The claimant lost his balance after picking up a sheet of unmarked plywood that was covering the hole. The claimant later filed an application seeking additional compensation for violation of a specific safety requirement ("VSSR") claiming that the board was not properly affixed or marked. The employer vigorously defended the VSSR action, producing evidence consistent with regulations, that the plywood was firmly affixed to the floor with special nails ("Hilti pins") and the word "HOLE" was written on the board in large red letters. The Staff Hearing officer ("SHO") hearing the appeal sided with the claimant, issuing a long narrative opinion containing the basis for the decision. The employer sought reconsideration, claiming the order contained mistakes, and on appeal, the Tenth Appellate District granted a writ of *mandamus*, finding that the order contained two significant mistakes of fact, and ordered reconsideration and an amended order. The claimant then appealed as of right to the Supreme Court of Ohio.

The Supreme Court affirmed, finding at least <u>four</u> significant factual or legal errors, each of which concerned an issue critical to the claim. Most significantly, the SHO misquoted the applicable safety provision, the sole basis for the application. Further, the SHO's order mistakenly stated that method of fastening was not sufficient for a "dirt" floor (the floor was made concrete), that the claimant said that there was only one sheet of plywood (he said there were two) and that the Company had deviated from its "customary" practice (it didn't). In affirming the reversal, the Court concluded that the result was a "narrative that has no basis in fact, and an analysis premised on findings that lack evidentiary support."

Other than the firmness of the rebuke, the best point to take from *Ruscilli* is the importance of demanding a record hearing. VSSR claims are heard by a single hearing officer, making a record vital. I personally recommend having a court reporter present at all hearings where testimony is factually critical. 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.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp

1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com

Adam P. Sadowski, Esq.
Gallagher Sharp
420 Madison Avenue, Suite 1250
Toledo, OH 43604
Direct Dial: 419.241.4864
asadowski@gallaghersharp.com