

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

QUESTION: Is a claimant's failure to follow an employer's safety policies a valid defense to a VSSR award?

Ohio law permits a claimant to apply for additional benefits when he can establish that an injury was caused by his employer's violation of a specific safety requirement ("VSSR"). A VSSR award is intended to penalize employers for failing to comply with safety requirements, and only those acts within the employer's control can serve as the basis for establishing a VSSR. *State ex rel. Frank Brown & Sons, Inc. v Indus. Comm.*, 37 Ohio St. 3d 162 (1988). Recently, the Supreme Court of Ohio considered a challenge to a VSSR award from an employer who alleged that the proximate cause of the injury was the claimant's failure to follow explicit safety requirements, and whether that failure was a valid defense to a VSSR claim.

State ex rel. Ohio Paperboard v Indus. Comm., Slip Opinion No. 2017-Ohio-9233, involved a claimant who worked in a recycled-paper mill. The claimant was a mechanic who was performing maintenance on a conveyor, which was switched from operational mode to maintenance mode. The claimant and another worker followed the company's required lock-out/tag-out procedures and shut down the machine, and also removed a guard. At some point, the claimant, in an attempt to remove wires that were stuck underneath a gear, unlocked and activated the conveyor and reached in to grab wires, causing his hand to be caught in the machine. A workers' compensation claim was allowed for "left-hand amputation and replantation, major depressive disorder, and total loss of use of the left hand." The claimant then filed a VSSR application, alleging that the employer failed to comply with regulations requiring guards, emergency shut-off buttons, and a means to disengage power. A staff hearing officer issued an award, over the objection of the employer, finding that the claimant was an "operator" and that he was exposed to an unguarded pinch point. The employer contested the claim, alleging he was not an "operator" and the guard had been removed and the machine energized in violation of policy. The employer appealed the award to the Tenth District Court of Appeals, who affirmed, prompting an appeal as of right to the Supreme Court of Ohio.

The Supreme Court reversed, finding that the employer complied with the specific safety requirements at issue. The Court agreed that there was evidence to support the finding that the claimant was an "operator," but found that the employer had established that its safety training and policies required that the conveyor be locked/tagged out and de-energized before maintenance is performed. The conveyor had emergency-stop buttons located within reach of the "operator," (while in operational mode) and pinch points were guarded during normal operation. When the machine was undergoing maintenance, the employer's protocol required that the conveyor be shut down and de-energized, and rules intended to protect employees while the conveyor was operating do not apply during maintenance activities. The claimant's failure to follow the company's safety protocol was the proximate cause of the injury, and therefore a VSSR award should not have been granted.

The employer in *Ohio Paperboard* did all that it could to comply with applicable regulations, and the Court found that it could not and should not be penalized for a claimant's decision to disregard its safety policies. It is also significant that, unlike a normal claim, the benefit of the doubt is afforded to employees in VSSR proceedings.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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