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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Is “impossibility” an affirmative defense to a Violation of a Specific Safety Requirement (VSSR)?

A VSSR award is a component of a workers' compensation claim whereby “enhanced” benefits are granted if a claimant can establish that an injury was caused by an employer's failure to comply with a specific provision of the Ohio Administrative Code (“OAC”). For many years, many Ohio employers have presented arguments that VSSR claims should be subject to an “impossibility” defense: in essence, that an employer should be permitted to argue that it was “impossible” for the employer to comply with the regulation. *See State ex rel. Mosser Constr., Inc. v Indus. Comm.*, 61 Ohio St. 3d 445 (1991). However, the Supreme Court of Ohio has never explicitly recognized this defense, in most cases finding that compliance with the code would be “difficult but not impossible,” *Id.* Recently, the Supreme Court was again asked whether an employer should be permitted to invoke “impossibility” as a complete defense to a VSSR claim.

State ex rel. Jackson Tube Serv., Inc. v Indus. Comm., 2018-Ohio-3892, concerned an electrician who was reinstalling a fly wheel on a large cut-off machine, utilizing a crane and a sling to suspend the part when the sling broke, dropping the fly wheel onto the claimant and breaking both of his legs. A workers' compensation claim was filed, and the claimant subsequently filed an application for a VSSR award, alleging the violation of numerous O.A.C. provisions relating to hoisting of equipment. During a hearing the claimant testified that it was his “understanding” that the manufacturer had actually built a fixture that would have allowed the part to be replaced without hoisting, while the employer argued that they were unaware of any alternative way to perform the repair. A Staff Hearing Officer granted a VSSR award, and the employer subsequently filed a motion for re-hearing based upon a “obvious mistake of fact or law.” The employer submitted an affidavit from the manufacturer stating that it did not in fact manufacture a mechanism to release the fly wheel in any other way, that it was not aware of any such device, and that unbolting and tipping the machine would also be impossible. The Industrial Commission denied the motion and the Tenth District Court of Appeals denied a writ of *mandamus*, prompting an appeal to the Ohio Supreme Court.

The Supreme Court reversed, finding that both that impossibility can be a defense to a VSSR claim and that the employer had established the defense. Adopting the standard used by Federal Courts in OSHA cases, the Court held that to establish “impossibility” as an affirmative defense to a VSSR award, an employer must show (1) that it would have been impossible to comply with a specific safety requirement, or that compliance would have precluded the performance of the work; and (2) that no alternative means of employee protection existed or were available. In this case, the Court found that the employer produced evidence that compliance with the applicable code section was impossible, and concluded that the employer had met its obligations under the defense. The Court also found that the Industrial Commission abused its discretion in granting the VSSR award based upon speculative testimony regarding the existence of alternate means from the claimant, which turned out to be wrong. In a dissent, Justice O'Connor argued that the testimony of the employee, while erroneous, nonetheless constituted “some evidence” to support

its decision, and that that the employer should not have been permitted to introduce additional testimony after the fact.

When considering presenting an “impossibility” defense, an employer should be careful to distinguish between that which is “impossible” and that which is “very difficult.” There is still a large amount of authority finding that means which are “very difficult” can still result in a violation of a specific safety requirement, and thus, enhanced benefits.

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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