[Cite as *State ex rel. Neofotistos v. Indus. Comm.*, 2010-Ohio-2065.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Alexandre Neofotistos,	:	
Relator,	:	
v.	:	No. 09AP-712
Industrial Commission of Ohio and Allstate Painting & Contracting Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 11, 2010

Consolo O'Brien LLC, Terence K. O'Brien and *Sherri N. McComas*, for relator.

Richard Cordray, Attorney General, and *Eric J. Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, P.J.

{¶1} Alexandre Neofotistos filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order denying an award for an alleged violation of a specific safety requirement ("VSSR") and to compel the commission to enter a new order granting the award.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we grant a limited writ of mandamus to force the commission to revisit the merits of its order based upon a finding that a potential hazard existed. Specifically, the magistrate found "it was self-evident that the performance of sandblasting under a bridge carries a hazard from falling objects such as loose concrete."

{¶3} Counsel for the commission has filed objections to the magistrate's decision. Counsel for Alexandre Neofotistos has filed a memorandum in response. The case is now before the court for review.

{¶4} Alexandre Neofotistos is a well-trained, experienced sandblaster and painter. He was performing his trade while protected by a respirator and a sandblasting hood when a large piece of concrete from the deck of the bridge on which he was working fell and hit him in the head, causing severe injury. He was not wearing a hard hat or other protected headgear in addition to the respirator and sandblasting hood. The sandblasting hood does not contain a hard hat. Hard hats were available on site.

{¶5} The staff hearing officer who heard the case for the commission found that no evidence indicated the presence of a potential hazard from falling concrete. The magistrate found that the hazard was "self-evident." The commission attacks this finding in its objections, pointing out that for a VSSR under Ohio Adm.Code 4123:1-3-03(A) to be found, a known hazard must be present.

{¶6} Arguably working at a construction site in general involves risk from falling objects. However, the risks are not so clear as to constitute a known hazard for purposes of a VSSR. The Supreme Court of Ohio has repeatedly directed us to employ strict construction to specific safety requirements and to resolve ambiguities in favor of the employer and against finding a violation. Given that clear direction from the Supreme Court of Ohio, we cannot find a known hazard here unless we are willing to mandate the use of hard hats at all construction and road repair sites throughout Ohio. Strict construction of specific safety requirements does not allow this.

{¶7} The objections to the magistrate's decision are sustained. We adopt the findings of fact contained in the magistrate's decision, but not the conclusions of law. Based upon our mandated construction of Ohio Adm.Code 4123:1-3-03, we deny the request for a writ of mandamus.

Objections sustained; writ denied.

SADLER and FRENCH, JJ., concur.

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Industrial Commission of Ohio and Allstate Painting & Contracting Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on February 19, 2010

Consolo O'Brien LLC, Terence K. O'Brien and *Sherri N. McComas*, for relator.

Richard Cordray, Attorney General, and *Eric J. Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶8} In this original action, relator, Alexandre Neofotistos, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his application for an additional award for an alleged violation of a specific safety requirement ("VSSR"), and to enter an order granting a VSSR award.

Findings of Fact:

{¶9} 1. On August 16, 2005, relator was standing on a platform under a bridge that he had just sandblasted. While relator was waiting to paint, a piece of concrete dislodged from the bridge and struck him on the head and neck. At the time of the accident, relator was employed by Allstate Painting & Contracting Co.

{¶10} 2. The industrial claim (No. 05-856420) is allowed for "sprain of neck; contusion scalp (head); sprain right shoulder; significant post concussion syndrome with post traumatic vertigo; right C5-6 radiculopathy."

{¶11} 3. On May 16, 2007, relator filed a VSSR application, which prompted an investigation by the Safety Violations Investigation Unit ("SVIU") of the Ohio Bureau of Workers' Compensation ("bureau").

{¶12} 4. On September 25, 2007, an SVIU investigator issued a written report with exhibits. The report states:

> 1. The on-site investigation was conducted on August 28, 2007 at Allstate Painting & Contracting, located at 1256 Industrial Parkway, Brunswick, Ohio. Present during the on-site investigation were Investigator Julia Riley, Investigator Thomas Christian, Owner Elias Kafantaris, Foreman Pete Toptsidis, and CFO Steve Spithas. * * *
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> 2. Mr. Kafantaris stated Mr. Neofotistos was hired at the beginning of summer in 2005 as a sandblaster / sprayer. Mr. Neofotistos' job duties included rigging bridges, sand-blasting, and painting[.] * * * Allstate Painting and Con-tracting did not provide any training to Mr. Neofotistos as he was hired through the union hall and the union provided training such as respiratory protection and fall protection, according to Mr. Kafantaris[.] * * *
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> 3. On the day of his injury, Mr. Neofotistos was working on a bridge on IS271 at SR422 in Cuyahoga County, Mr. Kanfantaris advised[.] * * * Mr. Neofotistos was sandblasting on a platform approximately fifteen (15) feet from the ground,

> under the bridge, when a piece of concrete came off of the deck of the bridge and struck Mr. Neofotistos. Mr. Kanfantaris described the concrete as approximately two (2) feet long and approximately one (1) foot wide[.] * * *
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> 4. Investigator Riley asked what personal protective equipment Mr. Neofotistos was required to wear at the time of his injury. Mr. Kanfantaris responded a respirator and sandblasting hood[.] * * * Mr. Kanfantaris further explained after the sandblasting and first coat of paint is completed, the sandblasting hood would be removed and a hard hat would take its place[.] * * * Investigator Riley inquired if there were hard hats on the job site and [sic] the time of the injury and if Mr. Neofotistos had access to these. Mr. Kanfantaris stated hard hats were located in an unlocked trailer and Mr. Neofotistos was aware of their location[.] * * *
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> 5. Mr. Kanfantari indicated to Investigator Riley an Ohio Department of Transporation (ODOT) Inspector was on site at the time of Mr. Neofotistos' injury and completed an incident report. Investigator Riley spoke with ODOT Inspector Neil Moscato on September 5, 2007. Mr. Moscato stated he was not at the job site when the injury occurred; nor did he prepare any report. Mr. Moscato understood Mr. Neofotisto[s]' injury occurred while he was inside of the containment. Employees are required to wear a blasting hood with a respirator when inside of the containment; the blasting hood is not and does not contain a hard hat.
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> 6. On August 23, 2007, Investigator Riley interviewed Alexandre Neofotistos via a conference call with Attorney O'Brien. An affidavit was prepared at that time and mailed to Mr. Neofotistos. Investigator Riley received the signed, notarized affidavit on September 24, 2007[.] * * *

{¶13} 5. Attached to the SVIU report as an exhibit is the September 18, 2007 affidavit of relator, stating:

> 2. All State Painting and Contracting hired me approximately two and one half months prior to my injury occurring. I was a sand blaster and painter at the time of my injury.
> 3. I had twenty-seven (27) years experience when I began working at All State Painting and Contracting. They did not provide me with any training. I received a lot of safety training from the union.

> 4. At the time of my injury[,] I was required to wear a sand blasting hood and respirator mask[.] I had on the sand blasting hood and respirator mask.
>
> 5. My injury occurred near Cleveland, Ohio at IS480 and I believe IS271. We were working on a bridge overpass sandblasting. We had finished the sandblasting. The steel had to cool down. We were waiting to paint; we were standing under the bridge on a platform. I had a container of paint next to me waiting to paint. I was wearing my sandblasting hood and respirator. A piece of concrete fell from the bridge and hit me in the head.

{¶14} 6. Following a June 26, 2008 hearing, a staff hearing officer ("SHO") issued an order denying the VSSR application. The SHO's order explains:

> It is the finding of the Staff Hearing Officer that the injured worker sustained an injury on 08/16/2005 as the result of a piece of concrete falling from a bridge onto the injured worker's head and neck.
>
> * * *
>
> Section 4123:1-3-03(A)(4) relates to personal protective equipment as required by employees on operations described in the rule in which there is a known hazard, recognized as injurious to the health or safety of the employee. The section provides for head protection for all operations where employees are required to be present in areas where a hazard to their head exists from falling or flying objects. This is a general scope section and does not describe a specific safety requirement. The type of protection required is not described, nor does the section establish the specific situation where a risk would be such to require head protection. The Staff Hearing Officer finds no violation of this section.
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> Section 4123:1-3-03(B)(1) defines head protection devices. This is a definition section. No specific safety requirement is set forth. The Staff Hearing Officer finds no violation of this section.
>
> Section 4123:1-3-03(G)(1) provides that the responsibility of the employer requires that whenever employees are re-

> quired to be present in areas where the potential hazard mentioned in paragraph (A)(4) are present, employees shall provide them with suitable protective headgear. When required, employers shall provide accessories designed for use with protective headgear and which are suitable for their intended purpose.
>
> Section 4123:1-3-03(G)(2) details the specific requirements for headgear if such protection is required.
>
> The injured worker's counsel cited to the portion of (A)(4) that requires head protection where employees are required to be present in areas where a hazard to their head exists from a falling object.
>
> When reading the above sections together, the Staff Hearing Officer finds no violation of a specific safety requirement. The injured worker was a bridge sandblaster/painter. At the time of his injury, he was on a scaffold sandblasting a bridge to prepare the bridge for painting. He was wearing his respiratory protective gear. While he was sandblasting, a chunk of concrete dislodged from the bridge and struck the injured worker in the head and neck.
>
> The specific safety sections provide that employers are required to provide protective headgear where the potential hazard from a falling object exists. The Staff Hearing Officer does not find a violation of this section. No evidence was provided to establish that the potential hazard from a falling object existed. Although the injured worker was struck by a chunk of concrete that fell from a bridge, the Staff Hearing Officer finds no evidence that the employer could or should have known that a piece of the bridge could dislodge and result in a falling object. Therefore, the Staff Hearing Officer finds the employer was not required to provide protective headgear. Consequently, the type of headgear required is rendered moot.
>
> The Staff Hearing Officer finds no violation of a specific safety requirement. This finding and order are based on the report of the investigator, the evidence in file and the evidence adduced at hearing.

{¶15} 7. Relator moved for rehearing.

{¶16} 8. On October 15, 2008, another SHO mailed an order denying rehearing.

{¶17} 9. On July 22, 2009, relator, Alexandre Neofotistos, filed this mandamus action.

Conclusions of Law:

{¶18} The issue is whether the commission abused its discretion in holding there was no evidence of a "potential hazard" within the meaning of Ohio Adm.Code 4123:1-3-03(G)(1) such that the employer could be held liable for failure to provide protective headgear under the specific safety rule.

{¶19} Finding that the commission abused its discretion, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶20} Ohio Adm.Code Chapter 4123:1-3 is captioned: "Construction Safety." Thereunder, Ohio Adm.Code 4123:1-3-03 is captioned: "Personal protective equipment." Ohio Adm.Code 4123:1-3-03(A) is captioned: "Scope," and provides:

> The requirements of this rule relate to the personal protective equipment listed immediately below, as required for employees on operations described in this rule in which there is a known hazard, recognized as injurious to the health or safety of the employee.

{¶21} Ohio Adm.Code 4123:1-3-03(A)(4) provides:

> Head and hair protection—includes all operations where employees are required to be present in areas where a hazard to their head exists from falling or flying objects, or from physical contact from rigid objects[.] * * *

{¶22} Ohio Adm.Code 4123:1-3-03(G) provides:

> (G) Head and hair protection.
>
> (1)Responsibility.
>
> (a) Employer.

> (i) Whenever employees are required to be present in areas where the potential hazard mentioned in paragraph (A)(4) of this rule are present, employers shall provide them with suitable protective headgear or hair enclosures.

{¶23} It can be noted that Ohio Adm.Code 4123:1-3-03(A)'s scope provision states that the specific rules are applicable when there is a "known hazard" recognized as injurious to the health and safety of the employee.

{¶24} Contrasting somewhat with the scope provision, Ohio Adm.Code 4123:1-3-03(G) speaks of a "potential hazard" mentioned in paragraph (A)(4) where paragraph (A)(4) uses the word "hazard" without either adjective, i.e., "known" or "potential."

{¶25} In the order of June 26, 2008, the SHO finds no evidence of a "potential hazard" from a falling object and then also finds "no evidence that the employer could or should have *known* that a piece of the bridge could discharge." (Emphasis added.) Apparently, the SHO incorporated or combined the scope provision concept of "known hazard" with the "potential hazard" concept of the safety rule at issue. It can be noted that relator concedes here that the terms "potential hazard" and "known hazard" present a "distinction without a difference." (Reply brief, at 2.)

{¶26} In *State ex rel. Taylor v. Indus. Comm.*, 70 Ohio St.3d 445, 1994-Ohio-445, decedent Gregory Taylor was instructed by his employer to air-blast ceiling beams in a barn at the Ohio State Fairgrounds. To do so, decedent used a motorized scissor lift called a "Mite-E-Lift." The Mite-E-Lift was topped by a work platform that was surrounded by a toe board and guardrails that were 42 inches high. The platform was accessed via a gate with a latching spring hinge that locked automatically upon closure.

{¶27} On the date of the industrial accident, Taylor was found dead on the barn floor. The Mite-E-Lift was found elevated to 24 feet and the gate was observed

swinging outward. State Highway Patrol investigators reported that the gate locking mechanism failed to operate. Taylor's foreman indicated that, to his knowledge, the lock/latch mechanism on the lift had always worked properly and had never previously malfunctioned.

{¶28} Taylor's widow successfully filed a workers' compensation death claim. She later applied for a VSSR award. Following the commission's denial of the award, the widow-claimant filed a mandamus action.

{¶29} Several specific safety rules were at issue in the *Taylor* case. One of those rules was former Ohio Adm.Code 4121:1-3-10(C)(3) which stated:

> "Any scaffold including accessories, such as braces, brackets, tresses, screw legs, ladders, etc., damaged or weakened from any cause shall be immediately repaired or replaced."

Id. at 447.

{¶30} Citing *State ex rel. M.T.D. Prod., Inc. v. Stebbins* (1975), 43 Ohio St.2d 114, the *Taylor* court held that a violation of Ohio Adm.Code 4121:1-3-10(C)(3) cannot be sustained without evidence of prior malfunction and employer awareness thereof. *Taylor* at 447.

{¶31} Another safety rule at issue in *Taylor* was former Ohio Adm.Code 4121:1-3-03(J)(1) which required an employer to provide lifelines, safety belts, and lanyards under certain circumstances when the operation being performed is more than 15 feet above ground or above a floor or platform. The court held that former Ohio Adm.Code 4121:1-3-03's scope provision applied to the safety rule so that lifelines, safety belts, and lanyards were required when there was a known hazard.

{¶32} The *Taylor* court held:

> We, therefore, find that Ohio Adm.Code 4121:1-3-03(J)(1) requires the use of safety belts on operations above fifteen feet only if employees are actually at risk of falling. We decline to adopt appellant's assertion that since decedent indeed fell, he was obviously exposed to a hazard of falling. To do so effectively imposes a strict liability on employers in the event of a fall, contrary to *M.T.D., supra*.
>
> The platform at issue was enclosed by guardrails. The exposure to falling that existed despite this precaution—indeed the fall itself—was attributable to the gate lock's unanticipated malfunction. To find that the employer violated Ohio Adm.Code 4121:1-3-03(J)(1) is to essentially penalize Martin for its inability to predict the device's first-time failure.

Id. at 448-49.

{¶33} Here, the commission relies on *Taylor* to support its finding of a lack of a "potential hazard."

{¶34} According to the commission, because there is no evidence that another employee had ever been injured by concrete falling from the bridge prior to the industrial injury at issue here, there can be no finding of a known hazard in relator's case. The magistrate disagrees with the commission's position and finds that the commission's reliance on *Taylor* is misplaced.

{¶35} Significantly, in *Taylor*, one of the safety rules at issue required the employer to repair or replace a damaged or weakened scaffold and its accessories. In *Taylor*, it could not be known that the gate-locking mechanism was in need of repair or replacement unless there was evidence of a prior malfunction. Likewise, it could not be known that there was a need for lifelines, safety belts, and lanyards when there was a guardrail present on the platform and in the absence of evidence of prior malfunction of the gate-locking mechanism.

{¶36} By way of contrast, in this case, it was self-evident that the performance of sandblasting under a bridge carries a hazard from falling objects such as loose concrete.

{¶37} Here, it was an abuse of discretion for the commission to hold that there was no evidence of a potential hazard from falling objects.

{¶38} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its order to the extent that it holds that Ohio Adm.Code 4123:1-3-03(G) was not violated due to a lack of evidence of a potential hazard, and to enter a new order consistent with this magistrate's decision that adjudicates relator's VSSR claim that a violation of Ohio Adm.Code 4123:1-3-03(G) proximately caused relator's industrial injuries.

/s/Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).