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## INTERRELATIONSHIP BETWEEN OSHA INVESTIGATIONS / VSSR APPLICATIONS

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## OSHA Accident Reporting Requirements/Defenses

### I. OSHA Accident Reporting Requirements/Defenses

#### A. See 29 C.F.R. – 1904.39

1. Report fatalities within 8 hours.
2. Report in-patient hospitalization of a single employee, amputations, and/or eye loss incidents within 24 hours.
3. OSHA defines an in-patient hospitalization as “a formal admission to the in-patient service of a hospital or clinic for care or treatment.” An in-patient hospitalization that involves “only observation or diagnostic testing” need not be reported.
4. Amputation is defined as:

The traumatic loss of a limb or other external body part. Amputations include a part, such as a limb or appendage, that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; amputations of body parts that have since been reattached. Amputations do not include avulsions, enucleations, degloving, scalpings, severed ears, or broken or chipped teeth.

## B. OSHA Defenses

1. Best defense is compliance – Prima facie case must be established by OSHA. If no prima facie case, no citation.
  1. Cited standard is applicable.
  2. Employer failed to comply.
  3. Employees were exposed.
  4. Employer knowledge: actual or constructive
  5. In establishing its prima facie case, OSHA may utilize:
    - a. OSHA Field Operations Manual
    - b. Directives
    - c. Letters of interpretation
    - d. Multi-employer policy
2. Assuming the prima facie case has been established, certain affirmative defenses may be available.

3. Isolated Employee Misconduct

- a. One affirmative defense which may be raised by an employer is “unforeseen employee misconduct.” If an alleged violation results solely from the misconduct of an employee and an employer had taken all reasonable steps to prevent the condition or practice constituting the alleged violation, then employee misconduct may serve as a defense against that violation.
- b. Unpreventable Employee Misconduct or “Isolated Event.” The violative condition was:
  - i. Unknown to the employer; and
  - ii. In violation of an adequate work rule which was effectively communicated and uniformly enforced.
- c. The elements of the employee misconduct defense require an employer to prove that:
  - i. It had established work rules designed to prevent the violation;
  - ii. The work rules had been adequately communicated to its employees; and
  - iii. It had taken steps to discover violations; and
  - iv. It has enforced the rules when violations have been discovered.
- d. The employer should seek to develop a good set of work rules and safety policies which are both communicated to employees and enforced with progressive disciplinary measures. Moreover, an employer should perform regular and frequent inspections to determine whether employees are engaging in misconduct with regard to safety policies and rules.

#### 4. Infeasibility Defense

- a. According to the OSHA compliance manual, infeasibility/ impossibility is defined as follows: Impossibility: Compliance with the requirements of a standard is:
  - i. Functionally impossible or would prevent performances of required work; and
  - ii. There are no alternative means of employee protection.
- b. OSHA must prove both the technological and economic feasibility of particular engineering and administrative controls which it proposes in order to comply with certain standards.
  - i. The employer may then assert the affirmative defense that it is not technologically feasible to comply with a particular standard.
  - ii. The employer also has the burden of establishing that either an alternative protective measure was used or that there was no feasible measure available.

5. Greater Hazard

A. Per the OSHA compliance manual, the definition of the greater hazard defense is as follows:

- i. Greater Hazard. Compliance with a standard would result in greater hazards to employees than non-compliance and
  - There are no alternative means of employee protection; and
  - An application of a variance would be inappropriate.
- ii. The elements of the greater hazard defense are: the hazards of compliance are greater than the hazards of non-compliance; alternative means of protecting employees are unavailable; and, a variance application to OSHA would be inappropriate.

6. Lack of Control (aka the “Anning Johnson Defense”)

- a. The lack of control affirmative defense is especially applicable to multi-employer worksites.
- b. The elements of the lack of control defense are that a subcontractor did not create or control an OSHA violation; and, either did not know and could not with reasonable diligence have known the existence of a hazard, or knew of the hazard and protected its own employees by alternative realistic measures.
- c. The OSHA Field Inspection Manual states that an exposing employer shall not be cited if all of the following apply:
  - i. The employer did not create the hazard;
  - ii. The employer did not have the responsibility or the authority to have the hazard corrected;
  - iii. The employer did have the ability to correct or remove the hazard;
  - iv. The employer can demonstrate that the creating, controlling and/or correcting employers, as appropriate, have been specifically notified of the hazards to which its employees are exposed; and
  - v. The employer has instructed its employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it when the hazard was known or with the exercise of reasonable diligence could have been known.

7. Employer Affirmative Defense Checklist:

- a. Clear management commitment to employees' safety and health;
- b. Written programs to address hazards
- c. Training that addresses hazards and abatement strategies:
- d. Frequent and regular inspections;
- e. Discipline and accountability procedures.



## II. OSHA Investigation as Precursor to Pursuit of State of Ohio Violation of a Specific Safety Requirement (VSSR)

- A. As the name suggests, a VSSR occurs when an employer violates a specific safety requirement (or rule) that is designed to protect the lives, health, and safety of employees and such violation proximately results in an injury. *See* Ohio Rev. Code § 4121.47.
1. Article II, § 35 further provides that “[N]o action shall be taken away from any employee when the injury, disease or death arises from *failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees.*”
  2. VSSRs are not covered as part of a liability insurance policy and/or through a state-funded employer’s premium.
- B. Ohio Rev. Code § 4121.47
1. O.R.C. Section 4121.47(A) provides, in part, “No employer shall violate a specific safety rule adopted by the administrator of workers’ compensation pursuant to § 4121.13 of the Rev. Code or an act of the general assembly to protect lives, health, and safety of employees pursuant to § 35 of Article II, Ohio Constitution . . .”
  2. Furthermore, and in the event that more than one violation occurs within a 24-month period, R.C. § 4121.47 provides for potential additional civil penalties. A penalty in some amount up to a maximum of \$50,000.00 can be further levied. The Commission must base its decision upon the size of the employer, measured by the number of employees, its assets, and its earnings.
  3. In that regard, an employer assessed two VSSRs in the same plant, or in different plants but involving the same machine, within a 24-month period can be fined up to \$50,000.00:
    - a. The penalty assessed is over and above the amount of the VSSR;
    - b. The employer may appeal a fine into Court of Common Pleas; and
    - c. Settled VSSRs will *not* be considered for penalty purposes.

C. VSSRs are penalties.

1. A VSSR award is a direct charge to the employer. It is not covered by a state funded employer's premiums. The award is added to a state fund employer's semi-annual premium payments for state fund employers, and the self-insured employer must pay the additional award directly.
2. Liability for a VSSR award extends throughout the life of the claim. In the case of a state-funded employer, the liability extends beyond the five-year experience rating period after which a claim would ordinarily have no direct effect upon the state-funded employer's workers' compensation premium. This makes a VSSR a potentially expensive long-term problem.
3. When the Industrial Commission finds a VSSR violation, it issues an order to correct the problem within set time limits. Failure to correct can be the basis for a repeat VSSR violation.

D. VSSR Code Sections

1. Most specific safety requirements have been drafted by the Industrial Commission and all are found in the Ohio Administrative Code. The safety requirements are organized by industry and apply only to a particular industry. An employer is typically only bound by the requirements of an industry in which it conducts business.
2. A VSSR occurs when a state safety rule, or a state statute (other than the statutes requiring the employer to maintain a safe workplace) is violated. The specific safety requirements by industry as promulgated by the Industrial Commission are:

| <u>Ohio Administrative Code</u> | <u>Industry</u>   |
|---------------------------------|---|
| 4123:1-1                        | Operation of Elevators  |
| 4123:1-3                        | Construction  |
| 4123:1-5                        | All Workshops & Factories   |
| 4123:1-7                        | Metal Castings  |
| 4123:1-9                        | Steel Mills   |
| 4123:1-11                       | Laundering & Dry Cleaning   |
| 4123:1-13                       | Rubber & Plastic Industries   |
| 4123:1-17                       | Window Cleaning   |
| 4123:1-19                       | Installation and Maintenance of Electric Supply<br>Lines and Transmission and Distribution of<br>Electric Power in Such Lines |
| 4123:1-21                       | Personal Protection Clothing and Equipment for Fire Fighting  |

3. The foregoing is not an exhaustive list of the provisions which may qualify as “specific requirements” under Article II, Section 35 of the Constitution. Prior statutes or regulations may also play a part in determinations. (See Part II – E, Grandfather Clause).

E. Additional sources of VSSR evidence.

1. Federal Occupational Safety and Health Administration (OSHA) records;
  - a. OSHA citations often find their way into Industrial Commission VSSR cases. In State ex rel. Kenton Structural & Ornamental Iron Works v. Indus. Comm. (2001), 91 Ohio St.3d 411, the Ohio Supreme Court held that the Industrial Commission could rely upon OSHA citations issued to an employer in assessing an appropriate penalty for a VSSR violation.
  - b. Moreover, in Kenton, the Industrial Commission also relied upon factual portions of OSHA's fatality inspection, with the approval of the Ohio Supreme Court.
  - c. Will the OSHA record create a roadmap to establish a VSSR violation:
    - i. OSHA investigation files are obtainable through a Freedom of Information (FOIA) request. The file obtained will be redacted.
    - ii. OSHA's new expanded reporting requirements, effective January 1, 2015, will create more of a record for far more types of cases/incidents than in the past.
2. Periodic Industrial Commission Safety and Hygiene Reports including those requested in advance by the employer;
3. State and Federal Environmental Protection Agency records;
4. State Fire Marshal's records;
5. Local right to know statutes.
6. Ohio Frequenter Statutes
  - a. O.R.C. § 4101.11 – duty of employer to protect employees and frequenters.
  - b. O.R.C. § 4101.12 – duty of employer to furnish safe place of employment
7. State of Ohio Fatality Inspections (commenced January 1, 2010)

### III. Elements of a VSSR

#### A. Safety Violations Must Be Specific

1. In State ex rel. Rae v. Industrial Commission (1939) 136 Ohio St. 168, the Court held that safety requirements do not prescribe a general course of conduct. Instead, a specific requirement is a provision which clearly forewarns the employer of its legal obligation.
2. In State ex rel. Trydle v. Industrial Commission (1972), Ohio St.2d 257, the Court added that a safety requirement meets the threshold test of **specificity** when the requirement contemplates: (1) a **specific** business or **specific** instrument; (2) when it requires the employer to act in a **specific** manner; and (3) when it requires a **specific** and definite action that plainly apprises an employer of its legal obligations to its employees.

B. Evidentiary Elements of a VSSR

1. There must be three criteria established for a VSSR action to be sustained. First, there must be an applicable and specific safety requirement enacted by the Industrial Commission or the General Assembly. Second, the employer must fail to comply with the specific safety requirement. Third, the condition created by the employer's failure to comply must be the proximate cause of the compensable injury. State ex rel. Whitman v. Indus. Comm. (1936), 131 Ohio St. 375; State ex rel. Bayless v. Indus. Comm. (1990), 50 Ohio St.3d 148.
2. In addition, the claimant must prove that the alleged violation is not only specific to the incident but that the requirement applies to the appropriate industry.
3. If the rule cited is both specific and applicable to the appropriate industry, it must then be determined whether the employer complied with that safety requirement.
4. Finally, there must be proof of proximate cause between the violation and a claimant's injury.
5. Because of the penalties imposed, all specific requirements must be strictly construed in favor of the employer. See Whitman, above.

#### IV. VSSR Defenses

##### A. Corporate Status of Employer

1. A parent corporation is not liable for its subsidiary which violates a specific safety requirement, even if it is wholly owned.
2. The parent corporation is liable, however, where the other entity is a division or subdivision of the parent. State ex rel. Lewis v. Indus. Comm. (1986), 23 Ohio St.3d.

##### B. Employer Authority to Alter or Correct

1. In order for an employer to be held liable for a VSSR, it is not enough to show that one of its employees was injured as a result of a violation. It must also be shown that it was the employer itself that violated the requirement.
2. An employer who owns or is responsible for the condition or maintenance of a device used by its employee is an “employer” for purposes of a VSSR.
3. Further, the “*authority to alter or correct*” is the primary factor in determining who was the responsible party.
4. As such, an employer who neither owns nor is responsible for the condition and maintenance of a device used by his employee in performing work is not the “employer” comprehended by Ohio Const. Art. II, § 35 (*i.e.*, temporary employee issue – see below)

C. Control in Temporary/Leased Employee Environment

1. In State ex rel. Newman v. Indus. Comm. (1997), 77 Ohio St.3d 271, injured workers of a temporary employment agency filed VSSR claims for injuries they received while working for agency at its customer's worksites. The Industrial Commission refused to take action on the pending applications filed against customer companies. The workers instituted a complaint for mandamus, requesting that the appellate court compel the Commission to take jurisdiction over the pending applications and to "investigate, hear and determine" the claims against the customer companies. The Referee for the Franklin County Court of Appeals granted the writ and the court of appeals adopted the Referee findings. The customer companies appealed as of right.
2. The Supreme Court held that "customer companies of temporary service agencies are 'employers' subject to claims for violations of specific safety requirements." (Newman at syllabus). In reaching its decision, the Court relied on Daniels v. MacGregor Co. (1965), 2 Ohio St.2d 89, which concluded that the entity which controls the manner or means of performing the work is also the "employer" regardless of whether the entity paid a premium into the State Insurance Fund.
3. Post Newman, the legal test for employer/employee relationship determination in both the temporary employee as well as the general contractor/subcontractor scenario is whether the employer in question had "*the authority to alter or correct*" the equipment or site that was the subject of a specific safety requirement.



- D. Single Failure Rule. The fact that a safety device that otherwise complies with the safety regulations has failed on a single occasion is not alone sufficient to find that the safety regulation was violated. State ex rel. Genzler Tool & Die Corp. v. Indus. Comm. (1985), 18 Ohio St.3d 103.
- E. Unilateral Negligence
1. A VSSR award may be precluded by the unilateral negligence on the part of the claimant. Only those acts within the employer's control should serve as the basis for establishing a VSSR award. State ex rel. Frank Brown & Sons, Inc. v. Indus. Comm. (1988), 37 Ohio St.3d 162.
  2. The claimant's unilateral failure to follow the employer's safety rules and failure to utilize safety equipment provided by the employer offers a defense to a VSSR claim. State ex rel. Quality Tower v. Indus. Comm. (2000), 88 Ohio St.3d 190; State ex rel. Frank Braun & Sons, Inc. v. Indus. Comm. (1988), 37 Ohio St.3d 152; State ex rel. Danstar Builders (2005), Ohio App. LEXIS 340 (Franklin Cty. 2005).
  3. As to that issue, an employer's safety training, supply of safety equipment to the employees and overall safety record can have an impact on a VSSR award.

F. The Grandfather Clause

1. The effective date of each requirement is very important. “Installation or constructions built or contracted for prior to the effective date (shown at the end of each rule) of any requirement shall be deemed to comply with the provisions of these requirements if such installations or constructions comply either with the provisions of these requirements or with the provisions of any applicable specific requirement which was in effect at the time contracted for or built.” *See* O.A.C. § 4123:1-5-01(A). *See also* State ex rel. Ohio Mushroom Co. v. Indus. Comm. (1989), 47 Ohio St.3d 59.
2. Note, however, that if machinery or equipment has been substantially modified, the date of modification will control for purposes of application of a specific safety requirement.

## V. VSSR Hearings

- A. VSSR applications are ultimately heard by a Staff hearing Officer (SHO) at the Industrial Commission office which is the home office for the claim file.
- B. When a claim is heard, the Staff Hearing Officer will decide:
  - 1. Whether the cited violation applies to the incident and injury which are the subject of the claim.
  - 2. Whether there was a violation.
  - 3. Whether the violation proximately caused the claimant's injury.
  - 4. The claimant has the burden of proof and must have all three issues decided in his or her favor by the hearing officer. If the hearing officer determines that a VSSR award will be made, the hearing officer will then consider the percentage penalty.
  - 5. As such, evidence and argument should also be submitted to the hearing officer as to aggravation or mitigation of the amount of any percentage penalty which is to potentially be awarded.
- C. VSSR hearings are unpredictable. Unlike a court of law, the Rules of Evidence are not binding in Industrial Commission or BWC proceedings. See, e.g., O.R.C. Section 4123.10. See also State ex rel. Danjanck v. Indus. Comm. (1994), 69 Ohio St.3d 693 (held that the Industrial Commission is exempt from following the formal rules of evidence). Baxter v. Indus. Comm. (1939), 44 Ohio App.3d 539 (held that Industrial Commission has discretion to ascertain truth of claim by what it considers reliable evidence, even evidence that is hearsay).

- D. Following the hearing, the Staff Hearing Officer submits recommendations to the Industrial Commissioners who may either approve, adopt or modify the recommendations at it deems appropriate. The Industrial Commission typically approves the recommendation of its Staff Hearing Officer.
- E. A VSSR award penalty is based on the maximum rate of compensation which is payable in the claim. For example, the maximum compensation rate for 2013 is \$837.00 per week. Therefore, if a claimant is injured in 2013 and the maximum 50% penalty is awarded, the claimant will receive an additional \$418.50 per week, for each week the claimant receives temporary total disability compensation, even though his or her actual rate of compensation may be far less. VSSR awards apply to all compensation paid in a claim including living maintenance and wage continuation.
- F. Considerations as to the Extent of Penalty
- a. How blatant the particular violation is;
  - b. The number of violations;
  - c. The safety experiences of the employer with the Industrial Commission Division of Safety & Hygiene and/or OSHA;
  - d. The Employer's maintenance records;
  - e. A factor that is often considered even though it should not be is the extent of the claimant's injuries. Issues such as whether the injury is particularly gory or debilitating and/or whether the incident caused serious impairment to the claimant's ability to support himself/herself will often be taken into account.
- G. VSSR Order where applicable will require corrective action.
- a. Failure to correct can create second violation.
  - b. As referenced, can trigger the "repeat" civil penalty.

VII. Post Hearing Procedures

- A. Within 30 days of receipt of the Industrial Commission's order, either party may request a rehearing. The opposing party has 30 days to respond. The motion for rehearing should be accompanied by new and additional proof not previously considered; and which by due diligence could not have been obtained prior to the hearing.
- B. An order finding a violation of a specific safety requirement and making a VSSR award is not appealable to the Common Pleas Court. However, the party against whom the VSSR application is decided, may file a petition for a writ of mandamus in the Court of Appeals, Franklin County, Ohio.
- C. Normally the Court of Appeals typically will not interfere with a Commission decision on a VSSR where there is "some evidence" to justify the decision. *See State ex. rel. Dodson v. Industrial Commission* (1980), 66 Ohio St.2d 408.

VIII. Settlement Issues

- A. A VSSR application may be settled at any time, either before or after the application is determined. The claimant and employer must submit an application for the approval of any settlement of a VSSR to the Industrial Commission for approval. The settlement application will be reviewed by a Staff Hearing Officer who will make recommendations to the Industrial Commission.
- B. When an intentional tort is also pending, settlement inquiries should be global in nature (meaning the VSSR and tort suit should be explored for settlement purposes in tandem).

## Biographical Information

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Brian is a Director and Principal, and one of the Firm's original founders. He oversees the Firm's workers' compensation and OSHA practices. Primarily, he supervises the management, defense, and administration of workers' compensation matters for over 1,400 of the Firm's clients. In addition, Brian is highly regarded in this field for his unique abilities in aiding both state-funded and self-insured companies to reduce overall workers' compensation liabilities and expenditures.

Since the Firm's inception, Brian has been the driving force behind the development of workers' compensation group rating plans and programs. He oversees all actuarial analyses for group projections and directs the claims administration for all new group members.

Brian is a frequent lecturer for the National Business Institute and regularly conducts seminars relating to OSHA workplace safety, workers' compensation claim defense, and legal ethics. Brian has also authored numerous articles relating to Ohio's workers' compensation statutes, OSHA regulations, as well as potential state and federal safety-related statutory changes.

### **Experience & Education**

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