

SPRINGFIELD SAFETY COUNCIL

SPRINGFIELD, OHIO

AUGUST 8, 2023

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ATTORNEYS

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OSHA VS. VSSR

JURISDICTION ENFORCEMENT

Federal-DOL

- Inspection upon probable cause.
Does not require an accident.

State of Ohio-BWC

- Application for additional award filed by W/C claimant

ABATEMENT PENALTY

- Yes
- Serious
0 - \$15,625
- Repeat/Willful
0 - \$156,259

- Yes
- 15%-50% of max benefit rate in year of injury for all indemnity paid to claim
- No
- Second violation w/in 24 months of prior VSSR-additional penalty of up to \$50,000

INSURANCE FOR PENALTY REQUESTED VIOLATIONS

- No
- Repeat citation
0 - \$156,259
- Failure to abate
0 - \$15,625/day

OSHA STANDARDS & SPECIFIC SAFETY STANDARDS

You must be in compliance with both.

- **OSHA violations are prosecuted by the U.S. D.O.L. - OSHA**
- **Specific Safety Requirement violations are prosecuted by injured worker and decided by the Industrial Commission.**

OSHA

- **Inspection**



- **Citation - Informal Conference - Settlement**



- **Notice of Contest ? Complaint ? Settlement**



- **Hearing**



- **Appeal to OSHRC**



- **Appeal to U.S. Circuit Court of Appeals**

VSSR

- **Injury**
↓
- **Application alleging VSSR ☐ Settlement**
↓
- **Investigation by BWC**
↓
- **Investigation Report ☐ Settlement**
↓
- **Additional Evidence/Record Hearing**
↓

- **Hearing scheduling conference ☐ settlement**
↓
- **Hearing**
↓
- **Request for Rehearing**
↓
- **Appeal to 10th District C/A Franklin County**

OSHA

Strict liability - must only prove violation of standard & seriousness of violation

SSR

Claimant must prove -

- 1. Alleged standard violated applied to machine or job.**
- 2. Violation occurred.**
- 3. Violation was proximate cause of injury.**

OSHA

Two basic areas of coverage

- **General industry**
 - **Includes some specific industries.**
- **Construction**

**Also covers some special industries
i.e. agriculture, maritime, etc.**

General Duty Clause

COVERAGE OF GENERAL & SPECIFIC INDUSTRIES

4121:1-1	Operation of Elevators
4121:1-3	Construction
4121:1-5	All Workshop & Factories
4121:1-7	Metal Casting
4121:1-9	Steel Mills
4121:1-11	Laundering & Dry Cleaning
4121:1-13	Rubber & Plastic Industries
4121:1-17	Window Cleaning
4123:1-21	Fire Fighting
No General Duty Clause	

EXAMPLE OF DIFFERENCES

Fall protection - flat roofs

OSHA - Safety harnesses, guardrails, safety nets, warning lines + safety monitors, or safety monitors alone for small areas

OHIO SSR - Safety harnesses, guardrails, safety nets

DIFFERENCE

OSHA PPE — Employer must provide & make employees wear PPE.

SSR PPE — Employer must provide, up to employee to wear, unless otherwise specified.

OSHA - Standards contain record keeping or training requirements (in over 100 stds.).

Ohio SSR - Few requirements for record keeping or training.

- No General Duty Clause.

OSHA

- **De minimis — \$0 penalty, no abatement**
- **Other Than Serious — \$0-\$15,625 penalty + abatement**
- **Serious — \$0-\$15,625 + abatement**
- **Willful — \$0-\$156,259 + abatement**
- **Repeat — \$0-\$156,259 + abatement**
- **Failure to abate — \$15,625/day + abatement**
- **Criminal sanctions for willful-death**

PENALTY

15-50% of maximum benefit rate available in year of injury.

2023 max rate = \$1,149/wk.

15% x \$1,149 = \$172.35/wk x 52 = \$8,962.20

50% x \$1,149 = \$574.50/wk x 52 = \$29,874.00

No experience period for VSSRs

Penalty applies to all indemnity payments

LOSS OF USE

Loss of thumb - \$68,940

Loss of finger - \$17,235 to \$40,215

Loss of Arm - \$258,525

Loss of hand - \$201,075

OSHA & VSSR

Because of complexity, implications of case law, and potential exposure to liability, employer should involve counsel IMMEDIATELY.

PROCEDURE

1. **Application for VSSR must be filed within 1 year of date of injury.**
 - **Must set forth facts forming basis of violation.**
 - **Must list specific safety requirements allegedly violated.**
 - **Specific section need not be listed if facts related are sufficient to put employer on notice.**
 - **Use counsel**
 - **Raise legal issues**

**State ex rel Thompson v. I/C, 36 Ohio. St. 3d 199
(1988)**

- 2. Employer denies violation in writing.**
- 3. Division of Safety & Hygiene will request information from employer, including documents.**
- 4. Division of Safety & Hygiene conducts investigation.**
 - Counsel should be present.**
 - Care needs to be exercised.**
- 5. Claimant may amend application within 30 days of receipt of investigator's report.**

- 6. Opportunity to submit evidence or request a record hearing.**
- 7. Prehearing conference**
- 8. Hearing – Only opportunity to submit evidence if record hearing requested.**

POST-HEARING

Either aggrieved party may request a rehearing must show:

- **obvious mistake of fact,**
- **clear mistake of law, or**
- **new additional proof, not previously considered and which by due diligence could not have been obtained before the merit hearing.**

Motion must be filed within 30 days of receipt of order.

Either aggrieved party may then file a petition for writ of mandamus in 10th District Court of appeals or state Supreme Court.

MISCELLANY

- ▶ **Safety regulation that applies is the one in effect when equipment was purchased (grandfather clause). Not available with OSHA.**

Scope provision:

“ Installations or constructions built or contracted for prior to the effective date 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 either with the provisions of these requirements or with the provisions of any applicable specific safety requirement which was in effect at the time contracted for or built.”

Does not apply to moving vehicles.

MISCELLANY (CONT'D.)

State ex rel. Colliver v. I/C, 84 Ohio St. 3d 476 (1999)

- ▶ Defend all aspects of workers' compensation claim, even beyond the experience period as long as VSSR is not resolved.
- ▶ Employer not liable for VSSR if its employee is injured on a machine which is owned, operated, and maintained by another, so long as the employer has no authority to take corrective action.

MISCELLANY (CONT'D.)

- ▶ **Temporary employees – Employer using the temporary employee is liable for any safety requirement violation that causes an injury to the employee. State ex rel. Newman v. I/C, 77 Ohio St. 3d 271 (1997).**
- **The temporary service agency still administers the claim.**

- ▶ **Employee unilateral negligence – If the accident and injury is caused by an employee’s unilateral negligence, he/she will be precluded from receiving an award.**

State ex rel Brown & Son v. I/C, 37 Ohio St. 3d 162 (1988).

State ex rel Quality Power Service v. I/C, 88 Ohio St. 3d 190 (2000).

- ▶ **First time failure of a safety device will not result in a VSSR award. Supreme Court has acknowledged that purpose of safety requirements is to provide reasonable, not absolute safety.**

State ex rel Jeep Corp. v. I/C, 42 Ohio St. 3d 83 (1989)

- **But repeated failure of same device will result in award.**

- ▶ **Safety requirement awards are deemed to be additional compensation to employee, but a penalty as to employer. Therefore, safety requirements are construed in favor of the employer.**

State ex rel Prefinish Metals v. I/C, 39 Ohio St. 3d 314 (1988).

- ▶ **Many requirements mandate that the employer “provide” safety equipment to employees. In order to comply, the equipment must be on the site and the employees must know it is there and that they may use it.**

State ex rel. Toledo Neighborhood Housing Service, Inc. v. I/C, 92 Ohio St. 3d 229 (2001)

- **OSHA citation and settlement may be used as evidence in a VSSR proceeding if they are a final order.**
- **Always be represented in a VSSR proceeding.**
- **Be aware of your rights.**

ADDITIONAL CIVIL PENALTIES

Two VSSRs for the same safety violation within 24 months may result in an additional \$50,000 penalty no matter where they occur.

Two VSSRs of different safety requirement at the same facility within 24 months can result in a \$50,000 civil penalty.

ACCIDENT INVESTIGATION

**Employees to report accident as soon as possible –
within 24 hours (?)**

Who is in charge?

- **Plant Manager / Site Superintendent**
- **Safety Director / Site or regional Safety Director**
- **Corporate Representative (?)**
- **union (?)**

FIRST STEPS

- **Aid for injured employee**
- **Secure scene**
- **Separate witnesses from each other and the rest of the employees at site**
- **Evaluate situation**

FIRST STEPS (CONT'D.)

- **Notify Counsel**
 - Fatality - to scene
 - OSHA Reportable
 - Potential VSSR
 - OSHA recordable (?)
- **Notify OSHA**
 - On advice of Counsel
 - Fatality - 8 hours
 - Hospitalization - 24 hours
 - Loss of eye/amputation - 24 hours

**ATTORNEY-CLIENT PRIVILEGE – OR –
Everything in investigation will be discoverable**

ON DAY OF ACCIDENT

- **Interview witnesses**
- **Photographs of scene (MANY)**
- **Secure physical evidence**
- **Preserve any equipment/machinery which has a proximate cause for injury**

WITNESS INTERVIEWS

- **Quite/comfortable location**
- **By 2 supervisors or other members of team**
- **DO NOT record**
- **DO NOT ask leading questions**
- **DO NOT threaten or try to intimidate witnesses**
- **Have witness sign statement in front of other interviewer**

PRESERVE EQUIPMENT/MACHINERY

Possible additional legal action by employer or injured worker

INVESTIGATION FOLLOW-UP

- **Keep notes, etc. in draft form until reviewed by counsel**
- **Determine root cause**
- **Lessons learned**

QUESTIONS?

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