

IN THE SUPREME COURT OF OHIO

State ex rel.	:	
John T. Mahoney,	:	
	:	Case No. 02-247
Appellee,	:	
	:	
v.	:	On Appeal from the Franklin
	:	County Court of Appeals, Tenth
Team America 3, Inc., <i>et al.</i> ,	:	Appellate District
	:	
	:	
Appellants.	:	

**AMICUS BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION
IN SUPPORT OF APPELLANT WANNER METAL WORX, INC.**

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PRELIMINARY STATEMENT

The American Subcontractors Association (ASA), the *Amicus Curiae* submitting this Brief, is a national organization representing the interests of approximately 5,000 subcontractor members who provide labor and materials on construction projects throughout the United States of America. More than 400 subcontractor firms located in Ohio are ASA members. Subcontractors perform approximately 80-90% of the work on commercial construction projects, like the public works project at issue in this case that will become the new home of the Ohio Supreme Court.

ASA's primary focus is the equitable treatment of subcontractors in the construction industry. ASA has acted in the interest of all subcontractors by promoting education, legislative action and by intervening in significant legal actions that affect the industry at large.

ASA and its members support the Appellant Wanner Metal Worx, Inc. (Wanner) in this appeal in its challenge to the sweeping and, we believe, inappropriate ruling of the Franklin County Court of Appeals, which held this subcontractor liable *ex post facto* for allegedly not providing enough overhead protection on a mobile scaffold. If this decision is not reversed, subcontractors and others in Ohio's construction industry utilizing scaffolding will be faced with impractical safety challenges well beyond the "state of the art" in the industry.

II. STATEMENT OF FACTS

Amicus Curiae ASA opts to omit this section and rely upon the Statement of Facts set forth in Appellant's Brief which is incorporated herein by reference.

III. ARGUMENT

A. Proposition of Law No. I:

The Commission had plenty of evidence to support its determination that Wanner did not violate *any* of the specific safety requirements cited by Mahoney.

ASA has long educated its subcontractor members, like Wanner, on the importance of jobsite safety. However, the penalty imposed on Wanner in this case by the Court of Appeals, in contravention of the findings of the Commission below and its own Magistrate, would not advance jobsite safety but instead simply impose an impractical or impossible overhead protection standard upon anyone using scaffolding on an Ohio construction site.

Wanner as a subcontractor was using the scaffolding provided by the general contractor Smoot. While the record is unclear whether the scaffolding was rented or owned by Smoot, it is undisputed that the hydro-mobile scaffold was "state of the art" and unaltered from its manufactured condition. Yet Wanner did not just place its workers on the scaffold without further safety instructions and precautions.

1. Mahoney Had Access to a Safety Belt and Lifeline.

Wanner took at least four measures to protect workers on the scaffold from the risk of falling debris. First, it is undisputed that Wanner provided Mahoney and its other workers with safety belts and a lifeline. (Supp. at pp. 41-42).

Therefore, Wanner did not violate the safety belt safety requirement in Ohio Adm. Code Chapter 4121:1-3-03(J)(1). Wanner satisfied its obligation by providing that equipment to Mahoney. It was Mahoney's responsibility to wear it. While Mahoney claimed there was nowhere to which he could "tie off" (Supp. at p. 47), the staff hearing officer found that Mahoney could have secured his lifeline on the scaffold itself. (Supp. at p. 48-49).¹

2. The Scaffolds Contained Guardrails and Toeboards on All Open Sides.

The scaffold Wanner utilized contained guardrails and toeboards on all open sides and ends of the platform. All three open sides not in contact with the face of the building contained factory made guardrails and toeboards to keep workers from falling as well as materials from falling off the scaffold and striking workers down below. The second (south) scaffold used by Smoot's workers contained this identical safety feature, in compliance with Ohio Adm. Code Chapter 4121:1-3-10(C)(4)(b). In fact, all such scaffolds are designed so that the non-open side of the scaffold facing the building is the only one without guardrails and toeboards.

The Commission certainly had evidence upon which to find that Wanner did not violate the rail requirement. The Commission cited photographs contained within the Bureau of Workers' Compensation investigation report, and the testimony of Mr. Vaughan to conclude that Wanner provided guardrails and toeboards on the three exposed sides of the scaffold not facing the building. The Commission did not abuse its discretion finding ambiguity at best regarding whether the scaffold side directly facing

¹ Assuming only for purposes of argument that Wanner somehow violated the safety belt requirement, the alleged violation did not *cause* Mahoney's injuries. All of Mahoney's injuries resulted from being struck by falling debris, while the safety belt requirement is to protect "employees exposed to hazards of falling." Ohio Adm. Code Chapter 4121:1-3-03(J)(1). Apparently witnesses testified that Mahoney did not even leave his feet when he was struck, let

the building is an “open” side as that term is used in the rail requirement. The Commission then correctly resolved the reasonable doubt regarding the interpretation of that safety requirement in favor of Wanner. State ex rel. Burton v. Indus. Comm. (1989), 46 Ohio St.3d 170. It therefore properly concluded that the scaffold side adjacent to the building is not an “open” side and, therefore, does not have to have guardrails and toeboards.

In support of his contention that the side of the scaffold adjacent to the building must be guarded, Mahoney relies upon Ohio Adm. Code Chapter 4121:1-3-04(B)(1) and (B)(2). His argument is misplaced in that the scope of Ohio Adm. Code Chapter 4121:1-3-04 is limited as follows:

(A) **Scope.** This rule shall apply to temporary conditions where there is danger of employees or material falling through floor, roof or wall openings or from stairways or runways.

First, it must be emphasized that Mahoney did not cite either Ohio Adm. Code Chapter 4121:1-3-04(B)(1) or (B)(2) in his original or in his amended VSSR application. Therefore, the Commission had no jurisdiction to find a violation of either requirement. Second, neither rule cited by Mahoney is applicable to the present case. Mahoney does not allege and, in fact, there is no evidence that there was any “hole” or “opening” in the scaffold. As recognized by the Magistrate after looking at the photos and considering the testimony, “the stone did not fall through anything.” (Magistrate Decision p. 10).²

alone fall off the scaffold and counsel for Mahoney admitted at hearing that Mahoney’s injuries were not caused by his alleged fall. (Supp. at pp. 52-54, 121 and 130).

² Assuming only for purposes of argument that the scaffold on which Mahoney was working when he was injured did not comply with the rail requirement, the Commission nonetheless had evidence upon which to deny Mahoney’s VSSR application. Like the safety belt requirement, the rail requirement was adopted to protect workers, themselves, from the hazard of falling off scaffolds. As noted above, the Commission had evidence to support its decision not only that Mahoney did not fall from the scaffold, but that even if he did, he was not injured as a result of the fall. In fact, counsel for Mahoney admitted the lack of causal connection at hearing (Supp. at p. 121). Mahoney failed to argue before the Court of Appeals that a lack of guardrails and/or toeboards, if found, proximately caused any injury, and admitted in his brief to the Court of Appeals that the alleged violation of this safety requirement was not the

3. A “Safe Zone” Was Created Between Scaffolds.

Third, Wanner not only provided toeboards (on the adjacent Smoot or south scaffold) as overhead protection but also a “safe zone” between the two scaffolds so that they would not be in close proximity to one another. (Workers on the north scaffold were not to work on the southern end when workers on the south scaffold were working on the northern end of the scaffold). In fact, if you look at the photos and consider that the scaffolding is placed on the ground and rises vertically up and down the face of the building, there is no way one scaffold could be physically located directly overhead of the other. As the Magistrate appreciated, “while the north scaffold was operating at a lower level than the south scaffold, the north scaffold was not underneath the south scaffold.” (Magistrate Decision p.9).

Therefore, the Commission properly found that toeboards and plywood barriers, erected on the scaffold adjacent to and above the north scaffold upon which Mahoney was working when he was injured, afforded Mahoney overhead protection as required by Ohio Adm. Code Chapter 4121:1-3-10(C)(12) (hereinafter the “overhead protection requirement”). Both the toeboards and plywood barriers block debris which otherwise could fall onto workers on the lower scaffold. Thus, they constitute additional forms of overhead protection provided by Wanner. Indeed, counsel for Mahoney conceded, at hearing, that “the toeboard provides a certain measure of protection from something being kicked off the [upper] scaffold.” (Supp. at p. 81). It also should be noted that OSHA standards concerning “falling object protection” expressly include toeboards. (Supp. at pp. 148-150). Each of those measures provided workers on the scaffold below

“primary cause” of his injuries. Therefore, Mahoney’s failure to prove the proximate causation element renders further analysis of any other elements of his VSSR cause of action unnecessary. State ex rel. Bayless v. Indus. Comm. (1990), 50 Ohio St.3d 148.

with some degree of protection from hazards overhead, particularly since there was no hazard *directly* above the scaffold on which Mahoney was working. (Magistrate Decision p. 9). Rather, the hazard arose from the adjacent south scaffold, and that was exactly where Wanner focused most of its safety precautions. The toeboards, plywood barrier and “safe zone” all constitute barriers between the hazard and the scaffold on which Mahoney was working.

The Court of Appeals admits that these measures are “legitimate safety precautions,” but nevertheless indicates that they are not enough “overhead protection.” (Court of Appeals Decision p. 3). However, as the Commission noted in its order, the methods utilized by the employer need not be foolproof. State ex rel. M.T.D. Products, Inc. v. Stebbins (1975), 43 Ohio St.2d 114. Rather, such methods need only provide reasonable safety for employees. Id., at 84. It appears the Court of Appeals merely reweighed the evidence and substituted its own judgment for that of the Commission, contrary to law. State ex rel. Teece v. Indust. Comm. (1981), 68 Ohio St.2d 165.

4. A Hardhat and Three Other Independent Means Provided Overhead Protection.

The Commission cited four different types of overhead protection provided by Wanner that were sufficient to satisfy the overhead protection requirement. In addition to the “safe zone,” toeboards and plywood barriers referenced above, Mahoney admits he was wearing a hardhat on the date of injury. A hardhat is the generally accepted measure of protection from falling debris overhead. Indeed, OSHA standards provide that where employees are working in areas where there is a possible danger from falling objects, they are to be “protected by protective helmets” (hardhats). Section 1926.100(a), Title 29, C.F.R.

The crux appears to be that the Court of Appeals decided that a hardhat was not adequate overhead protection because a worker could be struck on areas of the body other than his or her head. (Court of Appeals Decision p.3). Yet this is always the case whether the worker is working on a scaffold, on a scissors lift or on the ground. Body armor is not required by the Ohio Administrative Code, OSHA rules or generally accepted safety practices in the industry. While a hardhat is not bombproof or foolproof, it is a uniformly and generally accepted method of overhead protection. Ohio Adm. Code Chapter 4121:1-3-10 did not require the best cutting edge overhead protection available at any price, it simply requires some overhead protection be available to provide reasonable safety for employees.

The problem is that Court of Appeals appears to have read into the overhead protection requirement an obligation that simply is not there -- that the employer put planking or other plywood directly over the scaffold.³ However, the only relevant Ohio Administrative Code section cited by Mahoney in his VSSR application, the overhead protection requirement, contains no such obligation. The drafters of the Ohio Administrative Code certainly could have included such an obligation to place plywood roofs and sidewalls for all mobile scaffolds, such as the one on which Mahoney was working, but they chose not to do so. Of course, it is not the province of the Court of Appeals, or this Court, to correct any perceived deficiency in the Ohio Administrative Code.

As a practical matter, mobile scaffolds like the ones utilized here do not have plywood roofs and likely couldn't move vertically if they did because of the way they are

³ The Court of Appeals was mistakenly concerned about falling objects knocking a worker from the scaffold (ignoring the safety belt and lifeline, guardrail and toeboard protection) and the undisputed fact that Mahoney was not knocked from the scaffold.

constructed. (The scaffold moves hydraulically up and down on the multi-story vertical columns).

The Court should be aware of the broad impact this case will have on Ohio construction employers. The Court of Appeals Decision constitutes a radical departure from the contemporary safety standards employed in the construction industry. Those standards have arisen largely from OSHA regulation. Under OSHA rules, construction employers have not been required to put rigid roofs on scaffolds (or other aerial work platforms for that matter). Rather, construction employers have been given discretion in determining appropriate overhead protection, and the industry has generally accepted hardhats as a sufficient means of “overhead protection” from debris that may fall from above on any active construction site. In this case, Wanner acted appropriately, as the Commission and Magistrate found, in providing several legitimate means of overhead protection in compliance with the general overhead protection requirement. This Court should not substitute its judgment for that of the Commission and legislate a new standard for overhead protection after the fact.

The Commission correctly pointed out in its order that “overhead protection” is not defined in Ohio Adm. Code Chapter 4121:1-3-10, nor does that Code section offer specific examples of what type of protection must be provided. It gives no specific guidance to construction employers. The lack of an exact definition creates ambiguity as to precisely what constitutes “overhead protection” under that rule. “All reasonable doubts concerning the interpretation of a specific safety standard are to be construed against its applicability to the employer” because a VSSR award is a penalty. Burton, at p. 172. Rather than strictly construe the overhead protection requirement, the Court of

Appeals interpreted it liberally by reading into it obligations completely foreign to the construction industry.

B. Proposition of Law No. II:

The Court of Appeals' Interpretation of the Overhead Protection Requirement Violates the Constitutional Mandate that a Safety Regulation be a Specific Requirement.

Article II, Section 35 of the Ohio Constitution states, in relevant part, that the Commission must determine whether the injury resulted “because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees.” In State ex rel. Holdosh v. Indus. Comm. (1948), 149 Ohio St. 179, this Court stated the term “specific requirement” as used, in Article II, Section 35 of the Ohio Constitution,

...embraces such lawful, specific and definite requirements or standards of conduct as are prescribed by statute or by orders of the Industrial Commission, and which are of a character plainly to apprise an employer of his legal obligation toward his employees.

Id., at the Syllabus.

The overhead protection requirement is not at all specific. Rather, it only generally requires employers to provide overhead protection, without defining that term or giving examples of such protection. In the absence of a specific requirement, Ohio employers are not aware of their legal obligation toward their workers, nor can they know what actions they must take in order to comply with the safety requirement.⁴ It is in this context that the Court of Appeals apparently grafted onto the general overhead protection requirement a specific obligation that Wanner (and presumably all Ohio employers) place planking or other plywood directly over mobile scaffolding. That specific obligation

might only be achieved by the construction industry at great cost (i.e. if all newly fabricated mobile scaffolding were redesigned and constructed with a roof overhead and side walls) and simply is not contained in the current overhead protection requirement. Wanner or any other subcontractor buying, leasing or borrowing a modern “state of the art” hydro-mobile scaffold should not have to modify the scaffold as it moves from a supply lot to a jobsite anymore than a driver should be required to make field alterations to a new car to ensure its safety when he drives it off the sales lot onto the open road.

If there was a *specific* requirement in the Code that mandated overhead plywood or planking, then Wanner would have had an opportunity to attempt to implement that standard and all bidders would have had an opportunity to include that cost in their bids in working on the Ohio Supreme Court renovation project. However, no warning was given to Wanner or other subcontractors that hardhats, and the additional safety measures it employed, were not enough “overhead protection.”

IV. REQUEST TO PARTICIPATE IN ORAL ARGUMENT

This case has assumed tremendous import for the entire construction industry. Accordingly, ASA respectfully requests that the Court approve its participation in argument, which has the consent of Appellant Wanner pursuant to Sct R IX, Section 6. ASA’s participation in oral argument would take place within the time allocated to Appellant Wanner.

V. CONCLUSION

For the reasons stated above, ASA, on behalf of its members and as amicus curiae respectfully asks this Court to vacate the Court of Appeals Decision and deny Appellee Mahoney’s request for a writ of mandamus. The Commission had plenty of evidence to

⁴ As the Magistrate stated in her September 6, 2001 Decision” . . . a specific safety requirement must be specific

support its denial of a VSSR award and, therefore, did not abuse its discretion. Any contrary decision not only subjects Appellant Wanner to an *ex post facto* standard that could not have been anticipated by any reasonable and responsible safety minded subcontractor, but will send the Ohio construction industry in general and scaffold manufacturers and suppliers in particular into turmoil as they attempt to deal with a vague and impractical standard for overhead protection.

Respectfully submitted,

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enough to plainly appraise an employer of his legal obligations towards his employees per the case law of State ex rel. Frank Brown and Sons, Inc. v. Indus. Comm., (1988), 37 Ohio St. 3d 162.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Brief was sent this _____ day of April, 2002 by ordinary United States mail, postage prepaid, to the following:

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APPENDIX

Supreme Court Notice of Appeal of Appellant Industrial Commission
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