

THE ABC'S OF VSSR'S

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WHAT IS A VSSR?

A VSSR or Violation of Specific Safety Requirement is an additional workers' compensation award of benefits paid to eligible injured workers.

Legal Authority:

Article II, Section 35, Ohio Constitution, provides:

[The Industrial Commission] shall have full power and authority to determine whether or not an injury, disease, or death 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**, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final.

WHO IS ELIGIBLE?

- An injured worker who has a recognized workers' compensation claim may be eligible to receive an additional award of compensation if the injury occurred as a result of the employer's violation of a specific safety requirement (VSSR) as outlined in the Ohio Administrative Code.

WHAT IS IT WORTH?

- An additional award can range from 15 percent to 50 percent of the maximum allowable weekly compensation rate granted to the injured worker during the life of the claim.
- Corrective action may be ordered where a violation has been proved and an additional civil penalty of up to \$50,000 may be imposed for multiple violations occurring within same 24-month period.

CALCULATION OF AWARD:

- a. Formula
- b. Example

WHAT ARE THE APPLICABLE SAFETY REQUIREMENTS?

VSSR Codes: The Industrial Commission has promulgated specific safety regulations for the following industries:

- | | |
|-----------|--------------------------------|
| 4123:1-1 | The Operation of Elevators |
| 4123:1-3 | Construction Industry |
| 4123:1-5 | All Workshops and Factories |
| 4123:1-9 | Steel Mills |
| 4123:1-11 | Laundering and Dry-cleaning |
| 4123:1-13 | Rubber and Plastics Industries |
| 4123:1-15 | Potteries |
| 4123:1-17 | Window cleaning |
| 4123:1-19 | Electrical Supply Lines |
| 4123:1-20 | Firefighting |

OTHER SAFETY REQUIREMENTS

In addition to the specific safety codes, other statutes and administrative rules may form the basis for a VSSR award.

WHAT ARE THE ELEMENTS FOR ESTABLISHING A VSSR?

To obtain a VSSR award the claimant must establish the following elements:

1. An applicable safety requirement in existence at the time of the injury;
2. The employer failed to comply with the requirement; and
3. The employer's non-compliance with the requirement caused the injury.

LEGAL RULES FOR VSSRs

1. BURDEN OF PROOF:

The burden is on the Claimant to establish all elements of a VSSR by a preponderance of the evidence.

2. DATE OF INJURY CONTROLS:

The Claimant must cite an applicable and specific safety requirement in existence at the time of injury.

3. SAFETY-RELATED OBJECTIVE:

Safety requirement must be enacted by General Assembly or Industrial Commission to protect safety of "employees." See State, ex rel. Tryde v. Indus. Comm. (1972), 32 Ohio St. 2d 257; State, ex rel. Roberts, v. Indus. Comm. (1984), 10 Ohio St.3d 1 (Code of Federal Regulations (e.g., OSHA regulations) are not specific safety requirements because they are not enacted by General Assembly or Industrial Commission of Ohio).

4. REASONABLE CONSTRUCTION:

VSSR standards must be construed reasonably. Where application of specific safety requirement gives rise to a "patently illogical result, common sense must prevail." State, ex rel. Harris, v. Indus. Comm. (1984), 12 Ohio St.3d 152.

5. REASONABLE SAFETY:

Purpose of safety requirements is to promote reasonable, not absolute, safety. State, ex rel. Jeep v. Indus. Comm. (1989), 42 Ohio St.3d 83.

6. STRICT CONSTRUCTION:

A VSSR is a penalty, and, therefore, "all reasonable doubts concerning the interpretation of the specific safety requirement must be construed against its applicability to the employer." State, ex rel. Arce v. Indus. Comm. (2005), 105 Ohio St.3d 90 at ¶19 (emphasis added); State, ex rel. Lange, v. Indus. Comm. (2006), 111 Ohio St.3d 563, 566 at ¶19-20.

7. OSHA COMPLIANCE:

Compliance with OSHA codes may be irrelevant. See, State, ex rel. Danstar Builders, Inc. v. Indus. Comm. (2006), 108 Ohio St.3d 316 at ¶¶5, 13 (Compliance with OSHA regulation permitting slide guards on roof held immaterial where slide guards are not an approved means of protection under the Ohio Adm. Code).

**THE ANATOMY OF A
VSSR CLAIM**

**1. WORKERS' COMPENSATION
CLAIM APPLICATION**

- Claim is allowed
- Compensation is awarded
- Additional allowances

2. VSSR APPLICATION

- IC 8/9 Form
- Must be filed within 2 years of injury
- Description of injury, witnesses and applicable VSSR Code Sections. Claimant must cite specific codes or information that is sufficient to put employer on notice. See State, ex rel. Kirby, v. S.G. Loewendick & Sons, Inc. (1992), 64 Ohio St.3d 433
- Notification to Relevant Parties

3. EMPLOYER'S ANSWER

- Employer must file an Answer within 30 days of notification

4. NOTIFICATION OF INVESTIGATION

- The BWC's Safety Violations Investigation Unit (SVIU) assigns a special investigator to conduct an impartial investigation of the VSSR allegations. The SVIU then notifies all parties (injured worker, employer, legal representatives, etc.) in writing about the pending investigation and initiates contact with the involved parties.

5. REQUEST FOR INFORMATION

- The SVIU sends a form requesting certain information from the employer. During the course of the investigation, the special investigator may require additional information from the parties involved.
- Immediate submission of information may be advisable in some situations but is not required.

6. SVIU FIELD INVESTIGATION

- The SVIU performs an onsite investigation
- Employer's legal counsel may (and should) be present during onsite visit
- Opening conference
- View of accident site and machinery, if applicable (photographs and video are taken)

SVIU INVESTIGATION cont'd

- Employee interviews and affidavits
- Review of relevant documentation (injury reports, investigation reports, manufacturer's manuals, training documents, pertinent safety policies, purchase and maintenance information)
- Claimant and Claimant's witnesses will be interviewed (usually after onsite visit).

7. SVIU REPORT

- The special investigator, upon completion of the investigation, will file a Report of Investigation and place it in the VSSR claim folder before any IC hearing occurs.
- Report contents: summary, affidavits, color photographs with written explanations or description, video, pertinent documents submitted to SVIU by employer and injured worker. Materials forwarded in written form and on CD-Rom.

8. SUBMISSION OF ADDITIONAL EVIDENCE

- The parties have the right to submit additional evidence within 30 days of receiving the SVIU Report. (Extensions are permitted if requested.)
- The parties may request a record hearing within 30 days of receiving the SVIU Report.
- Record Hearing v. Non-Record Hearing?

9. PRE-HEARING CONFERENCE

- Select hearing date
- Request for extra time
- Discovery issues (subpoenas)
- Court reporter
- Settlement
- Narrow the applicable Code provisions

10. VSSR HEARING

- Pre-hearing Brief
- Witness Testimony
- Affidavits
- Expert Witness Testimony
- Objections

11. POST-HEARING CONSIDERATIONS

- Filing of Transcript
- Post-Hearing Brief

12. REQUEST FOR REHEARING

- Prerequisite for Mandamus Action
- Filed within 30 days
- Reviewed by another Deputy Staff Hearing Officer or Full Commission
- Brief in support is essential
- Grounds

13. MANDAMUS ACTION

- Complaint filed with Tenth District Court of Appeals
- Must show "abuse of discretion" (e.g. mistake of law or finding of fact without supporting evidence). Lange, supra, at ¶16
- "Some Evidence" Rule: Industrial Commissions findings will be affirmed if supported by "some evidence" See State, ex rel. Mahoney v. Team Am. 3, Inc. (2003) 99 Ohio St.3d 532 at ¶13; Lange, supra, at ¶16.

**TIPS FOR HANDLING
VSSR CLAIMS**

**TIP NO. 1:
INVESTIGATE PROMPTLY AND PRESERVE
EVIDENCE**

1. Query: Is this accident likely to result in a VSSR?
 - a. Amputation?
 - b. Electrocutation?
 - c. Fall?
 - d. Severe burn?
 - e. Hospitalization?
 - f. Was there a code violation?

- 2. Gather Evidence Immediately
 - a. Retain Legal Counsel! "Privilege" has its benefits. Consider the role of privilege and attorney work product doctrine
 - b. Pictures, videos, measurements
 - c. Witness statements/affidavits
 - d. Claimants: send litigation hold letter
 - e. Claimants: request visit

- 3. Consider impact of an OSHA Investigation
 - a. F.O.I.A. request
 - b. Failure to challenge OSHA citations
 - c. Impact of abatement certification
 - d. Timing of F.O.I.A. request is important

- TIP NO. 2:
CHALLENGE ALLOWANCE OF CLAIM
AND COMPENSATION**
- 1. Goal: Keep down number of weeks of compensation paid
 - 2. Non-compensable injury and other defenses:
 - a. Course and scope of employment?
 - b. Employee or independent contractor?
 - c. Abandonment?
 - d. Under the influence of alcohol or drugs?

- 3. Post-allowance defenses
 - a. PPD/scheduled loss awards
 - b. Wage loss

- 4. Create record of how injury occurred

- TIP NO. 3:**
PREPARE FOR SVIU ONSITE VISIT
- 1. Early intervention by legal counsel is the key
 - 2. Develop strategy
 - 3. Prepare witnesses
 - 4. Assemble critical documents

- TIP NO. 4:**
RESEARCH APPLICABLE CODE SECTIONS AND CASES

KEY DEFENSES

1. Employer has complied with regulation
e.g. Personal protective equipment (PPE)
was provided. Compare OSHA rule.

3. Grandfather clause applies
4. Safety requirement is unconstitutionally vague
or general
5. Employer does not engage in activities within
the scope of the specific safety code
6. Violation was not the "proximate cause" of the
accident

7. Employer did not have appropriate control over machinery or process

8. No "Known Hazard" where claim involves personal protective equipment (PPE)

9. Violation would create an unreasonable or "patently illogical" result

10. Accident was caused by employee's "unilateral negligence"

11. The "Exposed to Contact" Defense: Machinery must be guarded where the machine operator is "exposed to contact." The Code defines "exposed to contact" as follows:

"Exposed to contact": the location of the material or object which, during the course of operation, is accessible to an employee in the performance of his or her regular or assigned duty."

12. The "Within Easy Reach" Defense. Emergency shut-off controls required by O.A.C. Rule 4123:1-5-05(D)(1) need not be "within easy reach of every position in which operator could find himself around machine." State, ex rel. Harris v. Indus. Comm. (1984), 12 Ohio St.3d 152; State ex rel. Scott v. Uniroyal, Inc. (1986), 25 Ohio St.3d 35.

TIP NO. 5:
**SCHEDULE A COURT REPORTER FOR
VSSR HEARING OR ALLOWANCE
HEARINGS.**

1. Don't have to request a "record hearing" to have a court reporter present
2. Key: Preserve the record for rehearing and mandamus if necessary

TIP NO. 6:
**FAILURE TO CONSIDER THE EFFECT OF
VSSR ON OTHER PROCEEDINGS**

1. Impact of VSSR on intentional tort and other civil litigation and vice-versa
2. Impact of OSHA citation and contest proceedings on VSSR
3. Settlement Issues (Failure to include VSSR or workers' compensation claim in tort settlements)

TIP NO. 7:
**UTILIZE OSHA CODES, INVESTIGATION
DOCUMENTS, CITATIONS AND OTHER
SAFETY RESOURCES**

1. The OSHA Investigation file
2. OSHA codes and interpretations
3. Other Safety Resources
 - Division of Safety & Hygiene Manuals
 - National Consensus Standards (ANSI)

**TIP NO. 8:
RETAIN A SAFETY EXPERT**

1. Usually money well spent
2. Key to explaining the Codes

**TIP NO. 9:
UTILIZE COMPANY SAFETY MANUALS,
PROGRAMS AND TRAINING
DOCUMENTS.**

1. Unilateral negligence defense
2. Training rosters, quizzes
3. Evidence of "good faith" and impact on award
4. Effective cross-examination of company witnesses using written safety policies and procedures.

EXAMPLES:

- a. New Hire Checklists
- b. New Hire Safety Training Acknowledgement
- c. Employee Handbook Policies
- d. Safety Policy Acknowledgement
- e. Safety Training Agenda and Attendance Roster
- f. Handouts and Quizzes
- g. Disciplinary Warnings and Action

TIP NO. 10:
CLAIMANTS SHOULD CONSIDER FILING AN INTENTIONAL TORT LAWSUIT

1. Discovery opportunities
2. Additional settlement leverage
3. Delay

TIP NO. 11:
CLAIMANTS SHOULD TAKE ADVANTAGE OF SUBSEQUENT REMEDIAL MEASURES

1. Catch 22 for companies: anything they do to fix or improve safety on a machine or procedure could backfire.
2. OSHA inspection may compel company to fix machine or equipment and improve safety procedures.
3. F.O.I.A. abatement certification letter.

TIP NO. 12:
EMPLOYERS SHOULD ALWAYS REMIND THE HEARING OFFICER THAT LIBERAL CONSTRUCTION DOES NOT APPLY

**TIP NO. 13:
CLAIMANTS SHOULD ATTACH KEY
DOCUMENTS TO VSSR APPLICATION**

1. OSHA citations
2. Abatement letters

**TIP NO. 14:
AVOID CLAIMANT SETTLEMENT
MISTAKES**

1. Don't settle until you see the results of the SVIU investigation report.
2. Questionable claims should be settled early.

**TIP NO. 15:
AVOID EMPLOYER SETTLEMENT
MISTAKES**

1. Failure to settle egregious cases (i.e. higher percentage awards)
2. Additional penalty of up to \$50,000 for two or more violations
3. Global settlement of VSSR and intentional tort lawsuit – failure to consider BWC lien.

THE FUTURE OF VSSR's IN OHIO

Problem: The Ohio VSSR codes are woefully out of date. They do not always take into account new safety technologies or devices. They are often inconsistent with, or less comprehensive than the OSHA standards. They are too focused on heavy manufacturing and construction, and they do not address new hazards created by new and growing industries (e.g. health care). The Code sections are also, on the whole, poorly written and nearly impossible to understand.

Proposed Solution: Revoke the current VSSR codes and replace them with legislation adopting the Code of Federal Regulations used by OSHA (e.g. 29 CFR §1910 and 1926). Adopting and incorporating the OSHA Codes into Ohio law would create the following benefits:

1. Better written, easier to understand requirements.
2. Consistency

3. Current and more effective safety requirements.

4. A voluminous and more reliable resource for interpretation of safety codes through Occupational Safety and Health Review Commission (OSHRC) decisions and OSHA e-tools, memoranda, directives and letters (e.g. See www.OSHA.gov).

Another Solution: Create a defense whereby compliance with OSHA codes is an accepted defense to a VSSR claim.

CONCLUSION
