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Question: Is Judical Deference to Administrative Agencies Going Away in Ohio?

by Don Drinko

It has long been the case that when reviewing administrative decisions, courts defer to an administrative agency's findings of fact and application of its own regulations. However, during the last several years, the extent of that deference is generally thought to be on the decline, both at the federal level (Loper Bright Enterprises v. Raimondo) and in Ohio (TWISM Enterprises LLC v. State Board of Registration for Professional Engineers and Surveyors.) In 2025, that trend spread to workers' compensation, where a decision by the Supreme Court of Ohio (Berry v. Industrial Commission) held that the Ohio Constitution does not require courts to defer to the Industrial Commission's legal interpretations of safety laws and administrative rules.

In Ohio workers' compensation, it is almost axiomatic that the Industrial Commission is the ultimate finder of fact. Dating back to its creation in 1911, the Industrial Commission was authorized to conduct hearings on disputed issues, to make findings of fact, and to apply its regulations. At all levels of the administrative process, the Industrial Commission was vested with authority to make determinations of fact and law, including the evaluation of evidence and the credibility of witnesses, and courts were instructed to give deference to those determinations. Decisions other than those concerning "extent of disability" – i.e.. how much compensation is paid – are subject to de novo court appeals pursuant to R.C. 4123.512, where deference is not an issue. However, appeals of "extent of disability" decisions are limited to mandamus actions in the Tenth District Court of Appeals. This type of appeal involves a much more stringent "abuse of discretion" standard, with determinations being upheld in the presence of "some evidence" to support it. State ex rel. Mobley v. Indus. Comm., 1997-Ohio-181. At the mandamus level, courts were still instructed to give deference to the Industrial Commission as the ultimate arbiter of fact and interpreter of regulations. Recently, in a case involving an alleged violation of a specific safety requirement (VSSR), the Supreme Court of Ohio has called into question the role of the Industrial Commission as the ultimate arbiter of fact.

Berry v. Industrial Commission, Slip Op. 2025-Ohio-4720, decided on October 16, 2025, concerned whether a specific provision of the Ohio Administrative Code (OAC), and whether its violation proximately caused an injury. A short primer on VSSR claims: these are administrative proceedings conducted within the workers 'compensation system in which a claimant alleges that the employer's violation of a specific safety requirement, as adopted in the Ohio Administrative Code, was the proximate cause of her injury. VSSR actions are authorized by the Ohio Constitution, and can result in an award of "enhanced" benefits of between 15 and 50% of the total compensation paid. They are also much more predominant in serious claims, including death claims. The award is a type of "punitive damages" meant both to compensate claimants who are injured by violations of safety rules, and to deter employers from violating them. Claimants file a VSSR application alleging the OAC provisions that were violated, and an investigation is conducted by the BWC's Safety Violation Investigation Unit (SVIU.) The matter proceeds to a hearing before an SHO, and if an award of VSSR benefits is made, the only appeal is by virtue of a mandamus action. It is also notable that, because of the punitive nature of an award, factual and legal determinations must be construed in favor of the employer.

In Berry the claimant was injured while working for a utility-connection company. While the claimant was working in a trench near an operating excavator, a section of asphalt detached and struck him on his right side. The trench in question was not supported by any shoring or bracing. The result was a serious workers' compensation claim that included several injuries, including a fractured pelvis and several lumbar disc injuries. The claimant applied for a VSSR award, alleging that the employer violated three sections of the Ohio Administrative Code, the most important of which provided when shoring on the sides of an excavation is required. The matter proceeded to a hearing, where an SHO denied the application, finding that because the excavator in use was not a "power shovel," the cited rule was not applicable. The SHO further found that the company had not violated the provision because other equipment that was on site – a dump truck and a mini excavator – were not "near the edge of the trench" so as to trigger the shoring requirement. The claimant appealed to the Tenth District for a writ of mandamus, arguing that the "power shovel" determination was irrelevant to the question of whether the provision applied.

A magistrate for the Tenth District made findings of fact and conclusions of law, recommending that the court deny the writ. In essence, although the magistrate found that the rejected provision probably did apply, the SHO had not abused her discretion as there was "some evidence" that the employer had not violated the rule. The claimant objected, and after some additional briefing, the Tenth District rejected its own magistrate and issued a writ ordering the Industrial Commission to make a VSSR award to the claimant. It agreed with the claimant that the SHO had made a "clear mistake of law" in determining that the large excavator behind which the claimant was walking did not trigger the need for shoring. More importantly, citing its previous decision in In re Application of Alamo Solar I, LLC. 2023-Ohio-3778, the court found that it was no longer obligated to defer to the Industrial Commission's

interpretation of specific safety requirements, and whether they applied to a given set of facts. In sum, the court found that the SHO had made clear mistake of law in interpreting the code provision, and that no deference was required to that error. A majority of the three-judge panel also found that the SHO had abused her discretion, the basis for its order to issue a VSSR award. Each party filed appeals to the Supreme Court.

The Supreme Court rejected decades of precedent and affirmed the panel's decision to vacate the SHO order, but chose to limit the writ. Rather than remanding the matter back with instructions to make an award, the Supreme Court issued a limited writ ordering the Industrial Commission to vacate the portion of the order finding that the code section in question did not apply, but to proceed to the factual determination whether the rule was violated and if so, whether that violation proximately caused the claimant's injuries. While citing the deference normally given to factual determinations by the Industrial Commission, the Supreme Court stated that the interpretation of safety rules, and whether they apply to specific set of facts, is a different animal, and not subject to such deference. It found that courts must independently interpret these provisions, whether they apply to the industry and work at issue, and whether they apply to the actions of the employee at the time of the injury.

Since it was issued, the long term impact of Berry has yet to be determined, but it could be profound. First, it could represent a shift – seen very clearly at the federal level in Loper Bright Enterprises – of courts reducing the deference normally given to the findings of all administrative agencies. While the court in Berry argued that there was a distinction between findings of fact and interpretation of code sections, there is very little about VSSR claims that is "cut and dried." It is also without question that Berry, unlike some of the other decisions where administrative findings are questioned, will have a much greater negative impact on employers, who will be forced to litigate this issue twice. Even if a provision is determined to apply, the determination of proximate cause necessarily requires determinations of both law and facts. At a minimum, the impact will likely mean more VSSR actions, more novel interpretations of OAC provisions, and the complete relitigating of VSSR actions when determinations are made at the administrative level that rules do not apply.