[Cite as *State ex rel. Durbin v. Indus. Comm.*, 2012-Ohio-664.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Joann Durbin,	:	
Relator,	:	
v.	:	No. 10AP-712
Industrial Commission of Ohio and Kokosing Construction Co., Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on February 16, 2012

Portman, Foley & Flint, LLP, and *Frederic A. Portman*, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Garvin & Hickey, LLC, and *Michael J. Hickey*, for respondent Kokosing Construction Co., Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Joann Durbin, the surviving spouse of Steven Durbin ("decedent"), requests a writ of mandamus ordering respondent, Industrial

Commission of Ohio ("commission"), to vacate its orders denying her application for an additional award for alleged violations of specific safety requirements ("VSSR"), and to enter a VSSR award against respondent Kokosing Construction Co., Inc. ("Kokosing" or "respondent").

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate concluded that relator failed to establish that she was entitled to a rehearing under Ohio Adm.Code 4121-3-20(E). Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} Relator now raises the following four objections to the magistrate's decision:

> [1.] The Magistrate erred by failing to distinguish between a Motion for Re-Hearing of a Staff Hearing Officer's Safety Violation Decision filed pursuant to Ohio Adm. Code. 4121-3-20(E), and a Motion requesting that the Industrial Commission exercise its power of continuing jurisdiction, under R.C. 4123.52, after a discovery of fraud.
>
> [2.] The Magistrate erred when he misconstrued Relator's Complaint as a request for a writ due to the Industrial Commission's failure to grant a re-hearing under Ohio Adm. Code 4121-3-20(E) rather than a Complaint that the Industrial Commission should have exercised continuing jurisdiction to reconsider the safety violation application on the basis of fraud.
>
> [3.] The Relator did no[t] fail to exercise "due diligence" when she did not subpoena a witness who made a sworn statement by affidavit. A lack of due diligence is not relevant when asking the Commission to exercise its power of continuing jurisdiction when an allegation of fraud is made.
>
> [4.] The Magistrate's decision regarding the claimed safety violations is tainted, as was the Staff Hearing Officer's

> decision, by their reliance on statements that Relator claims are fraudulent.

{¶ 4} None of the objections challenge the magistrate's findings of fact, and upon an independent review of the same, we adopt them as our own. As noted in the findings of fact, after the staff hearing officer ("SHO") denied relator's VSSR application, relator moved for rehearing on April 28, 2005 and filed supplemental motions for rehearing on May 10 and May 23, 2005. These motions were made pursuant to various sections of Ohio Adm.Code 4121-3-20. Relator's requests were denied, and on December 16, 2005, relator requested the commission to exercise continuing jurisdiction on the basis of fraud. Construing this motion as one for reconsideration raising two issues, i.e., continuing jurisdiction and VSSR, the three-member commission denied relator's request. This mandamus action followed.

{¶ 5} Though listed as four separate objections, relator treated them as one in the memorandum in support of objections. Therefore, this court will do likewise.

{¶ 6} Relator asserts that her mandamus complaint does not challenge the commission's order denying the motion for rehearing, but, rather, challenges the commission's refusal to exercise continuing jurisdiction on the basis of fraud. Therefore, relator contends the magistrate incorrectly addressed the merits of her claim, and further contends that it was "unnecessary and a mistake" for the magistrate to determine whether the commission abused its discretion under Ohio Adm.Code 4121-3-20(E). (Relator's Objections, 3.)

{¶ 7} We find relator's argument spurious given the allegations raised in both relator's complaint and merit brief. In her mandamus complaint, after reciting the procedural history, including the August 11, 2005 denial of the motion for rehearing and

the August 30, 2007 denial of the motion for reconsideration, relator alleges *only* "that the decision of Respondent Industrial Commission to deny her VSSR Re-Hearing violates OSC [sic] 4121-3-20(E)(1)(a) and (b) and constitutes a gross abuse of discretion." (Complaint, 2.) The words "continuing jurisdiction" and "fraud" do not appear in any capacity in relator's complaint.

{¶ 8} Moreover, relator's merit brief raises two assignments of errors:

> [1.] THE INDUSTRIAL COMMISSION OF OHIO ERRED AND ABUSED ITS DISCRETION WHEN IT REFUSED TO GRANT RELATOR'S MOTION FOR REHEARING OF THE STAFF HEARING OFFICER'S DECISIONS DENYING HER APPLICATION FOR AN AWARD FOR VIOLATIONS OF A SPECIFIC SAFETY REQUIREMENT.
>
> [2.] THE RELATOR IS ENTITLED TO A WRIT OF MANDAMUS.

(Relator's Brief, 1, 10.)

{¶ 9} The issues presented by relator in the merit brief before the magistrate are that the SHO made obvious mistakes of fact and law when he found no violations of "Ohio Administrative Codes 4121:1-3-13(C)(2); 4123:1-3-13(C)(4)(a) and (b); 4121:1-3-13(D)(1), (2), (3), and 4121:1-3-13(E)(1), (2), (3) and (4)" (Relator's Brief, 1), and abused his discretion when he denied relator's request for rehearing pursuant to "OAC Section 4121-3-20(E)(1)(a)." The merit brief also addresses the merits of the requests for rehearing filed on April 28, May 10, and May 23, 2005, wherein relator argued she was entitled to a rehearing based on newly discovered evidence and obvious mistakes of fact of law. Relator's merit brief then reasserts that "the Industrial Commission's failure to grant a rehearing based on newly discovered evidence was a clear abuse of discretion and a violation of OAC 4121-3-20(E)(1)(a)." (Relator's Brief, 10.) Thus, we find no merit to

relator's assertion that "[t]he sole issue raised by the Complaint is whether the Commission abused its discretion by not invoking its continuing jurisdiction when it was offered proof of 'fraud,' not whether a Re-Hearing should have been granted under OAC 4121-20(E) where the word fraud does not exist." (Relator's Objections, 5.)

{¶ 10} In *State ex rel. Hackenburg v. Indus. Comm. of Ohio*, 10th Dist. No. 06AP-938, 2007-Ohio-4181, ¶ 3, the relator filed objections to the magistrate's decision and argued the commission abused its discretion when it relied on a report of a specific doctor. However, because the relator in that case failed to raise the issue before the magistrate, and, instead, first raised the argument in objections to the magistrate's decision, this court concluded the relator waived such argument. Similarly, in *State ex rel. Advantage Tank Lines v. Indus. Comm. of Ohio*, 10th Dist. No. 03AP-584, 2004-Ohio-3384, ¶ 12, this court held that issues being raised for the first time on objections to the magistrate's decision without having first appeared in the complaint were not properly before the court. *See also State ex rel. Bellamy v. Pinkerton, Inc.*, 10th Dist. No. 05AP-1308, 2006-Ohio-5870, ¶ 4 (magistrate did not err in addressing only the issues raised in the complaint and merit brief as opposed to new issues raised in a reply brief); *State ex rel. Smith v. Indus. Comm. of Ohio*, 10th Dist. No. 84AP-274 (Aug. 29, 1985) (no error in magistrate not addressing issues the relator failed to raise in the complaint or merit brief).

{¶ 11} Though relator's objections assert the magistrate erred in not addressing her contentions that the commission failed to exercise continuing jurisdiction on the basis of fraud, the issue was not raised by relator in either her complaint or merit brief. In accordance with *Hackenburg* and *Advantage Tank Lines*, we conclude relator waived the

issue by presenting it for the first time in the objections to the magistrate's decision. Consequently, relator's objections are overruled.

{¶ 12} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, overrule relator's objections to the magistrate's decision, and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

Objections overruled;
writ of mandamus denied.

CONNOR and DORRIAN, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Relator,	:	
v.	:	No. 10AP-712
Industrial Commission of Ohio and Kokosing Construction Co., Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on October 12, 2011

Portman, Foley & Flint, LLP, and *Frederic A. Portman*, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Garvin & Hickey, LLC, and *Michael J. Hickey*, for respondent Kokosing Construction Co., Inc.

IN MANDAMUS

{¶13} Relator, Joann Durbin, is the surviving spouse of Steven Durbin ("decedent") who was killed in an industrial accident. In this original action, relator requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its orders denying her application for an additional award for

alleged violations of specific safety requirements ("VSSR"), and to enter a VSSR award against respondent Kokosing Construction Co., Inc. ("Kokosing" or "respondent").

Findings of Fact:

{¶14} 1. On September 15, 2003, while employed by Kokosing, decedent was killed when one side of a trench wall collapsed on him.

{¶15} 2. Kokosing, a self-insured employer, certified the death claim (No. 03-861151) and has paid benefits to relator under the claim.

{¶16} 3. On April 16, 2004, relator filed an application for a VSSR award. In her application, relator alleged that Kokosing had violated ten specific safety requirements related to construction safety and more particularly, to trenches and excavations.

{¶17} 4. The application prompted an investigation by the Safety Violations Investigative Unit ("SVIU") of the Ohio Bureau of Workers' Compensation ("bureau"). On July 21, 2004, the SVIU investigator issued a report which states in part:

> 1. On June 29, 2004, this Investigator conducted an on site investigation at Kokosing Construction Company Inc. ("Kokosing"), 17531 Waterford Road, Fredericktown, Ohio 43019.
>
> 2. During the aforesaid on site investigation, this Investigator received documents from Kokosing that had been previously requested. Included in these documents are training documents for Steven Durbin and Jason Matthews, examples of training, and job site violations. * * * Furthermore, this Investigator received a copy of drawings of the trench dimensions completed by Dave Mattson of Kokosing. These drawings were completed after the injury to Mr. Durbin.
>
> 3. At the conclusion of the on site investigation, this Investigator scheduled a meeting with Kokosing to have Jason Matthews, co-worker of Steven Durbin, available for an interview. On July 16, 2004, this Investigator met with Jason Matthews at Kokosing, 17531 Waterford Road,

Fredericktown, Ohio 43019. * * * This Investigator secured an affidavit from Mr. Matthews regarding his knowledge of the injury to Mr. Durbin.

* * *

6. Also on July 16, 2004, [Kokosing's counsel] gave this Investigator a copy of a traffic vibration study taken by Edward Walter.

7. On June 23, 2004, this Investigator went to the site of the trench collapse that involved Mr. Durbin and Mr. Matthews. The location is 1661 Hebron Road, Heath, Ohio 43056 directly in front of the Nations Rent. * * * In an attempt to pinpoint the area of the trench, this Investigator requested that employees of Nations Rent show this Investigator the area. The area is located just north of the Nations Rent entrance on the west side of State Route 79. The trench location measured by this Investigator to be twenty seven (27) feet from State Route 79.

* * *

11. On June 10, 2004, this Investigator contacted the Ohio Department of Transportation ("ODOT") District 5, 9600 Jacksontown Road SE, Jacksontown, Ohio 43030. This Investigator initially left a voicemail for Cindy Brown, district spokeswoman, regarding the ODOT District 5 investigation into the trench collapse on State Route 79. Ms. Brown transferred this Investigator to Wayne Brown, District 5 safety coordinator. Mr. Brown returned this Investigator's call on June 11, 2004 and stated that ODOT did not complete an investigation regarding this incident. Mr. Brown stated that the ODOT job site contact was deployed in the military and that the notes from this employee could not be obtained. Mr. Brown did state that the area where Mr. Durbin and Mr. Matthews were working was previously disturbed soil and that the area had previously been backfilled.

12. This Investigator received a copy of the Heath Police Department report * * * on or about June 22, 2004. * * * The police report only lists Jason Matthews as a witness and did not take any type of statement from Mr. Matthews regarding his knowledge of the incident.

> 13. This Investigator did not receive any additional information for witnesses for this claim file. Therefore, the only affidavit taken by this Investigator was that of Jason Matthews.

{¶18} 5. Presented as an exhibit to the SVIU report is the affidavit of Jason D. Matthews executed July 16, 2004:

> 1. I am a witness in the above-referenced VSSR claim. Kokosing Construction Company ("Kokosing") hired me approximately 1996 as an operator apprentice. At the time of Mr. Durbin's injury, I was employed as an operator. My general job duties include, but are not limited to: operate a track hoe or rubber tire backhoe.
>
> 2. On the date of Steven Durbin's injury, I was operating a rubber tire backhoe. I had to dig a ditch so that Mr. Durbin and I could reroute a service line for a property on State Route 79 in Heath, Ohio. The length of the ditch was several hundred feet with a width of six (6) feet at the top and two (2) feet at the bottom. I had utilized the method of benching for this particular ditch. The ditch was [sic] had a depth of approximately five (5) feet. The spoil pile was kept at least two (2) feet from the edge of the ditch. After I completed the ditch, Mr. Durbin and I got into the ditch so that we could connect service line. We were in the ditch approximately ten (10) minutes when one (1) side of the ditch wall collapsed.
>
> 3. I was facing Mr. Durbin when the collapse occurred. Prior to the collapse, I did not hear any type of noise that would have alerted Mr. Durbin and I of the collapse. I immediately exited the ditch to get assistance. The wall on my side of the ditch did not collapse.
>
> 4. At the time of Mr. Durbin's injury, there was traffic on State Route 79. I do not recall the exact traffic pattern. There was not very much construction traffic in the area of our ditch. Kokosing was working further south on State Route 79 at the time the trench collapsed.
>
> 5. I was the employee that classified the soil in the area where Mr. Durbin and I were working. I classified the soil as Class B. I picked up a sample of the soil and determined that the soil had enough clay in it to be classified as Class B. After

> classifying the soil, I determined that benching would be the best method.
>
> 6. I had received numerous training class/courses regarding trenching/excavation and soil classification. I received my training through Kokosing and the union, Operating Engineers Local 18. I also have eight (8) years field experience. Soil Classification is part of my daily job duties.
>
> 7. Kokosing provides a weekly safety meeting on the job site every Monday morning. After this meeting, each employee takes a test on the subject. Furthermore, Kokosing has daily meetings regarding safety and other job related topics. We have these meetings at every job site.
>
> 8. Kokosing requires employees to wear: steel-toed boots and hard hats. There are other situations where employees would be required to wear additional personal protective equipment. At the time Mr. Durbin and I were working in the ditch we were wearing steel-toed boots, hard hats, and either a safety vest or orange colored shirt. The safety vest and/or orange colored shirt were required because the job site was near a roadway.

{¶19} 6. On November 17, 2004, a commission staff hearing officer ("SHO") held a prehearing conference pursuant to Ohio Adm.Code 4121-3-20(C)(4). The record contains a "Pre-Hearing Conference Checklist" that was completed by the SHO on November 17, 2004. Item IV of the checklist asked "Does either party plan to subpoena witnesses?" In response to the query, the SHO wrote "No."

{¶20} 7. Following the November 17, 2004 prehearing conference, the SHO mailed a "Post Prehearing Conference Letter":

> The items on the pre-hearing conference checklist were addressed, and additional time for the parties to pursue settlement negotiations was not requested. As a result, the hearing on the merits of the injured worker's VSSR application will be scheduled for 02/03/2004 as a record hearing at 10:00 a.m., at the office of the Industrial Commission in Columbus.

{¶21} 8. Following an April 16, 2004 hearing, an SHO issued an order denying the VSSR application.[1] The SHO's order explains:

> It is the finding of the [SHO] that the Application for Violation of a Specific Safety Requirement be denied for the reason that the widow-claimant has not met the burden of demonstrating that the employer was in violation of any specific safety requirement applicable to it.
>
> The [SHO] has reviewed the evidence on file and bases this decision on the evidence and reasons specifically cited in the following findings.
>
> The deceased claimant was fatally injured on 09/15/2003 while working as a laborer for the named construction company. At the time of his accident, the decedent was working down in a trench that a co-worker, Jason Matthews, had previously excavated with a backhoe. The trench had been excavated for purposes of rerouting a sewer line. While both the decedent and Matthews were down in the trench, one side of the trench wall collapsed, resulting in the decedent's death.
>
> In her IC-9 Application, the widow-claimant alleges violations of Ohio Administrative Code ("OAC") 4123:1-3-13(C)(2) pertaining to precautions to be taken against slides or cave-ins where trenches or excavations are adjacent to backfilled trenches or excavations or where they are subject to vibrations; 4123:1-3-13(C)(4)(a) and (b) pertaining to the placement of materials excavated from a trench or excavation; 4123:1-3-13(D)(1), (2), and (3) pertaining to means of protection against moving ground or cave-ins of the faces and sides of trenches; and 4123:1-3-13(E)(1), (2), (3), and (4) pertaining to the means of guarding the walls and faces of excavations and who should design those means.
>
> OAC 4123:1-3-13(C)(2) addresses precautions necessary to prevent slides or cave-ins of trenches and excavations under two specific circumstances: 1) where trenches or excavations are adjacent to backfilled trenches or excavations; and 2) where trenches or excavations are subjected to vibrations from railroad or highway traffic, machinery, or any other

[1] The order indicates that a court reporter was present. However, the stipulated record filed by the parties to this action does not contain a transcript of the hearing.

source. The [SHO] first finds a lack of persuasive evidence to support a finding that the trench in which the decedent was working at the time of his fatal accident was adjacent to a backfilled trench or excavation. In this regard, the widow-claimant relies on Paragraph 11 of the Bureau of Workers' Compensation Investigator's report, wherein the investigator states that in a phone conversation with Wayne Brown, Ohio Department of Transportation ("ODOT") District 5 Safety Coordinator, it was indicated that the area in which the decedent and Matthews were working was previously disturbed soil and had been backfilled. However, the investigator's report further indicates that in the same conversation Brown stated that ODOT did not complete an investigation regarding the decedent's accident and that the notes of the individual identified as the agency's job site contact were unavailable. Given the lack of an ODOT investigation of the accident and the unavailability of the notes of the relevant individual of that agency, the [SHO] finds insufficient evidence to support a finding that the decedent's trench was adjacent to a backfilled trench or excavation.

Second, the [SHO] relies on the 06/29/2004 report from Dr. Edward Walters & Associates, Inc., Vibrations and Sound Consultants, which indicates that testing done on 06/08/2004 at the accident location demonstrates that vibrations from traffic on State Route 79, adjacent to that location, did not cause or contribute to the trench cave-in on 09/15/2003. The [SHO] finds no persuasive evidence in the record to support a finding that any railroad track was near the accident location or that other machinery with the potential of causing vibrations was operating near the site. In addition, the widow-claimant presented no specific evidence that vibrations from any source caused or contributed to the fatal accident. For these reasons, the [SHO] finds no violation of OAC 4123:1-3-13(C)(2).

OAC 4123:1-3-13(C)(4)(a) and (b) require that excavated material or other material be placed a minimum of twenty-four inches from the top edge of a trench or excavation; in the alternative to such placement, the employer may use barriers or other effective retaining devices to prevent

excavated or other materials from falling into the trench or excavation. The [SHO] finds conflicting evidence on file as to the distance from the edge of the trench in question the excavated material had been placed. Determination of this issue is unnecessary, however, because the [SHO] finds no persuasive evidence on file to support a finding that any alleged violation of 4123:1-3-13(C)(4) caused or contributed to the decedent's death. The 07/16/2004 affidavit of Jason Matthews states that one side of the trench wall collapsed upon the decedent, with no indication that any of the excavated material beside the top edge of the trench also came down into the trench. Consistently, the 02/02/2005 affidavit from Mark Huggins, Chief of the Heath Fire Department, indicates that when he arrived at the accident scene he observed that "the west wall of the trench had collapsed...." The 02/02/2005 affidavit of Tina Miller, an EMT called to the scene after the accident had occurred, indicates that "the excavated soil was left on the rim of the trench." Because the requirements of 4123:1-3-13(C)(4) are intended to protect workers from excavated material itself falling back into a trench or excavation, the [SHO] finds those requirements inapplicable to the facts of this claim. As such, the [SHO] finds no violation of 4123:1-3-13(C)(4).

OAC 4123:1-3-1[3](D)(1), (2), and (3) address means of protection from moving ground or cave-ins of the faces and sides of trenches. There is a conflict in the evidence on file as to the depth of the trench in question. However, the [SHO] finds that determination of that issue is unnecessary, based on the analysis of the cited code sections and evidence in the record as set forth below.

Specifically, (D)(1) provides as follows:

> "The exposed faces of all trenches more than five feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. (See appendix table 13-1.)"

The [SHO] finds that the employer was in compliance with the requirements of 4123:1-3-13(D)(1). The 07/16/2004 affidavit of Jason Matthews states that he was the employee

who classified the soil in the area he and the decedent were working on 09/15/2003, that he had determined that the soil had sufficient clay in it to be classified as Class B, that he had determined for this type of soil benching of the trench would be the best means of protection, and that he had operated the backhoe and excavated the trench using benching. The [SHO] finds that benching of the soil, as described in the affidavit of Mr. Matthews and depicted in Exhibit 18 of the investigator's report, served as an "other equivalent means of protection" allowed for in the above-quoted requirement. As such, the [SHO] finds no violation of 4123:1-3-13(D)(1).

The [SHO] finds the requirement of 4123:1-3-13(D)(2) inapplicable to the facts of this claim. By its terms, the protective methods against cave-ins specified therein are applicable to trenches in unstable or soft material. Based on the affidavit of Mr. Matthews, the Emergency Medical Service report form completed by Tina Simon of the Heath Fire Department, the narrative statement from Det. Rardain of the Heath Police Department included in Exhibit 7 of the investigator's report, and the excerpt from the September 16, 2003 edition of the Newark Advocate included in Exhibit 8 of the investigator's report, the [SHO] finds that the soil of the trench wall at issue consisted of sufficient amounts of clay so as not to be properly classified as "unable or soft material." As such, the [SHO] finds no violation of 4123:1-3-13(D)(2).

OAC 4123:1-3-13(D)(3) states as follows:

> "Sides of trenches in hard compact soil, including embankments shall be shored or otherwise supported when the trench is more [than] five feet in depth and eight feet or more in length. In lieu of shoring, the sides of the trench above the five-foot level may be sloped to preclude collapse, but shall not be steeper than a one-foot rise to each one-half foot horizontal."

The [SHO] finds that the employer was in compliance with the requirement set forth in (D)(3). Based on the previous findings regarding the nature of the soil of the trench involved in the accident, the affidavit of Mr. Matthews, and

the drawing included in Exhibit 18 of the investigator's report, the [SHO] finds that the benching technique used by Mr. Matthews in the excavation of the trench "otherwise supported" the sides of the trench. In addition, Exhibit 18 supports a finding that the benching was at a rise/horizontal ratio of one foot rise to one foot horizontal, a ratio stricter than that set forth in the cited requirement. Accordingly, the [SHO] finds no violation of OAC 4123:1-3-13(D)(3).

OAC 4123:1-3-13(E)(1) provides as follows:

> "The wall and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means. (See appendix Table 13-1 and Table 13-2.)"

The [SHO] finds that the employer was in compliance with the requirement set forth in (E)(1). Based again on the affidavit of Mr. Matthews and the drawing included in Exhibit 18 of the investigator's report, the [SHO] finds that the benching technique used by Mr. Matthews in the excavation of the trench constituted "some other equivalent means" of guarding the walls and face of the trench. As such, the [SHO] finds no violation of OAC 4123:1-3-13(E)(1).

OAC 4123:1-3-13(E)(2) states as follows:

> "Supporting systems, i.e. piling, cribbing, shoring, etc., shall be designed by a qualified person and shall meet accepted engineering requirements."

The [SHO] finds that the employer was in compliance with the requirement set forth in (E)(2). The [SHO] finds that the benching technique used in the excavation of the trench, as referenced above, is reasonably construed as falling within the "etc." term included in the cited requirement. In addition, the [SHO] finds that Mr. Matthews was a "qualified person" to perform the soil test at the site of the trench at issue and to utilize a benching technique when he excavated the trench. The [SHO] relies on Mr. Matthews[’] affidavit wherein he indicates that he had taken numerous training classes/courses regarding trenching, excavation, and soil classification, that he had at the time eight years of field

experience, and that soil classification was part of his daily activities. In addition, noting that the term "qualified person" in (E)(2) is not defined in the OAC, the [SHO] finds that the employer's training documentation, included in the investigation report as Exhibits 21 through 27, supports a finding that Mr. Matthews was a person qualified to perform soil classification and to decide that benching was the method of protection to use for the trench involved in the accident. Accordingly, the [SHO] finds no violation of OAC 4123:1-3-13(E)(2).

OAC 4123:1-3-13(E)(3) provides as follows:

> "Excavations sloped to the angle of repose shall be flattened when an excavation has water conditions, silty materials, loose boulders, and areas where erosion, deep frost action, and slide planes appear."

The [SHO] finds insufficient evidence in the record to support a finding that the provisions of (E)(3) are applicable to the facts of this claim. No specific evidence of the existence of silty materials or loose boulders in the excavation at issue was presented, nor was there specific evidence as to erosion, deep frost action, or slide planes. In addition, the [SHO] notes that the term "water conditions" is not defined in the OAC. As to that particular prerequisite to the applicability of (E)(3), the evidence consists of the widow-claimant's testimony at hearing that it had rained the entire weekend before the decedent's accident, as well as the morning of the accident. Accepting this testimony as true, the [SHO] nonetheless finds insufficient evidence that a "water condition" existed at the excavation on 09/15/2003 such as to trigger the requirements of the cited rule. As such, the [SHO] finds no violation of OAC 4123:1-3-13(E)(3).

OAC 4123:1-3-13(E)(4) states that sides, slopes, and faces of all excavations must meet accepted engineering requirements and specifies the techniques by which the requirement is to be met. Included in the list of means is benching, the method utilized in relation to the excavation at issue. Based on the affidavit of Mr. Matthews and Exhibit 18 included in the investigation report, the [SHO] finds that the employer was in compliance with this requirement as well. Accordingly, the [SHO] finds no violation of OAC 4123:1-3-13(E)(4).

> For the reasons set forth above, the [SHO] finds that the widow-claimant has not met the burden of demonstrating that the employer violated any provisions of the OAC applicable to it. Therefore, the IC-9 Application filed 04/16/2004 is denied.

{¶22} 9. On April 28, 2005, relator moved for rehearing pursuant to Ohio Adm.Code 4121-3-20(E). In her memorandum in support of rehearing, relator alleged that the SHO's order of April 16, 2004 was based upon obvious mistakes of fact and clear mistakes of law. The motion and memorandum filed April 28, 2005 did not allege the existence of any new and additional proof under Ohio Adm.Code 4121-3-20(E)(1)(a).

{¶23} 10. On May 10, 2005, relator filed what she captioned as a "Supplemental Motion for Rehearing." The motion states:

> Among the grounds for granting a re-hearing is newly discovered evidence that could not have been discovered pre-hearing. Attached hereto as additional evidence is new evidence that there was no benching on either side of the ditch and that the soil pile is on top of area where it fell on the decedent. Also, enclosed is Mr. Blumenthal's letter that describes a deposition of Jason Mat[t]hews who now admits to incompetency regarding safety oversight in a trench as well as no benching experience within OSHA standards. The aforementioned admission impeaches the evidence submitted by the employer wherein Mr. Mat[t]hews' competency was promoted.

{¶24} 11. On May 23, 2005, relator filed what she captioned as a "Supplemental Motion for Rehearing." Along with the so-called supplemental motion, relator submitted the deposition transcript of Jason Matthews. Matthews' deposition had been taken on May 3, 2005 in an intentional tort action pending in the Licking County Court of Common Pleas. Relator's May 23, 2005 supplemental motion states:

> Claimant requested a re-hearing within the 30 day period required by Rule O.A.C. 4121-3-20(C). Claimant has previously filed a supplement to the Motion for Re-Hearing

> attaching thereto newly discovered evidence that was not previously available.
>
> Claimant is hereby supplementing her motion with the deposition of Jason Mat[t]hews. This deposition contains testimonial evidence and admissions that were previously hidden from claimant and could not be discovered until after hearing and/or within the 30 day period imposed by Rule. It would be an injustice to the claimant if evidence, not previously available and hidden by the employer, were not considered in determining whether a re-hearing is warranted. The SHO relied heavily on the reported action and statements of Jason Mat[t]hews, many of which he disavowed in the attached deposition. The highlighted portions of the transcript underscore this new evidence.

{¶25} 12. On August 11, 2005, another SHO mailed an order denying relator's April 28, 2005 motion for rehearing as well as the so-called supplemental motions:

> It is hereby ordered that the motion for rehearing filed 04/28/2005 be denied. The injured worker has not submitted any new and relevant evidence nor shown that the order of 02/03/2005 was based on an obvious mistake of fact or on a clear mistake of law.
>
> The original request for rehearing is based on an obvious mistake of fact or on a clear mistake of law. This [SHO] finds no obvious mistake of fact or clear mistake of law in the order of 02/03/2005. Therefore, the request for a rehearing filed on 04/28/2005 is denied.
>
> The Injured Worker submitted supplemental requests to the motion for rehearing on 05/10/2005 and 05/23/2005. Both requests were submitted beyond the (30) day period to file a motion for rehearing and both requests allege new evidence as the reason for a rehearing. The [SHO] finds that 4121-3-20(E)(1)(a) requires the motion for rehearing shall be accompanied by new and additional proof. The [SHO] finds no grant of any extension to submit new evidence beyond the (30) day filing period. Consequently, the [SHO] finds no jurisdiction to the two supplemental request[s] that were submitted beyond the (30) day filing period.

{¶26} 13. On December 16, 2005, relator moved that the commission exercise its continuing jurisdiction over the denial of the motion for rehearing and the so-called supplemental motions. With its motion, relator submitted the deposition transcript of David C. Mattson. Mattson's deposition had been taken on October 20, 2005 in the intentional tort action pending in the Licking County Court of Common Pleas.

{¶27} 14. On August 30, 2007, construing relator's December 16, 2005 motion as one for reconsideration, the three-member commission mailed an order denying relator's December 16, 2005 motion.

{¶28} 15. On July 29, 2010, relator, Joann Durbin, filed this mandamus action.

Conclusions of Law:

{¶29} Under Ohio Adm.Code 4121-3-20(E), the commission can grant a rehearing in either of two circumstances: (1) the timely submission of "new and additional proof" as defined by the rule, or (2) where the order was based upon "an obvious mistake of fact or clear mistake of law." Here, relator alleges the existence of both circumstances under the rule in support of a writ of mandamus.

{¶30} With respect to the first circumstance, the issue is whether the commission abused its discretion in refusing to order a rehearing of the VSSR application based upon the deposition transcripts of Jason Matthews and David Mattson which relator claims were "new and additional proof."

{¶31} With respect to the second circumstance under the rule, relator challenges each commission determination as to the alleged violations of the ten specific safety requirements. Relator claims as to each commission determination that there is an obvious mistake of fact and/or clear mistake of law.

{¶32} The magistrate finds that relator failed to submit "new and additional proof" under the rule. The magistrate also finds that relator has failed to successfully challenge the commission's determinations as to each alleged violation as an obvious mistake of fact and/or clear mistake of law.

{¶33} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶34} Turning to the first issue, i.e. whether the deposition transcripts constitute "new and additional proof," Ohio Adm.Code 4121-3-20(E) states:

> Within thirty days of the receipt of the order of the [SHO] deciding the issues presented by the application, either party has the right to file a motion requesting a rehearing. The party requesting a rehearing shall provide a copy of the motion for rehearing to the opposing party and its representative. The opposing party has thirty days in which to file an answer. A motion for rehearing is not to be adjudicated until the answer has been received or the expiration of the thirty-day period.
>
> (1) If the motion for rehearing is filed, a [SHO], after the expiration of the answer time, shall review the motion for rehearing under the following criteria:
>
> (a) In order to justify a rehearing of the [SHO]'s order, the motion shall be accompanied by new and additional proof not previously considered and which by due diligence could not be obtained prior to the pre-hearing conference, or prior to the merit hearing if a record hearing was held and relevant to the specific safety requirement violation.
>
> (b) A rehearing may also be indicated in exceptional cases where the order was based on an obvious mistake of fact or clear mistake of law.
>
> (2) If the motion for rehearing does not meet the criteria as outlined in paragraph (E)(1)(a) or (E)(1)(b) of this rule, the motions shall be denied without further hearing.

{¶35} Analysis begins with the observation that the SHO's order mailed August 11, 2005 denying relator's motion for rehearing did not address the question of whether the two deposition transcripts were "new and additional proof" under Ohio Adm.Code 4121-3-20(E)(1)(a). Rather, the SHO determined that he had "no jurisdiction" to consider the May 10 and May 23, 2005 supplemental motions because those motions and their accompanying evidence were belatedly filed after the expiration of the 30-day period provided by the rule. The SHO further stated that he "finds no grant of any extension to submit new evidence beyond the (30) day filing," perhaps suggesting that the 30-day period can be extended upon a timely request for good cause shown.

{¶36} In the magistrate's view, this court need not address the question of whether the SHO correctly determined that, under the circumstances, he had no authority to extend the 30-day filing period. This is so because it is clear from the record that the two deposition transcripts cannot meet the definition of "new and additional proof" under Ohio Adm. Code 4121-3-20(E)(1)(a).

{¶37} Clearly, with respect to the two deposition transcripts, relator did not meet the test of "due diligence." As early as July 21, 2004, the date of the SVIU report, Jason Matthews was known to be a crucial witness to the industrial accident and the VSSR application. Matthews' affidavit executed July 16, 2004 indicates that it was Matthews who dug the trench in which decedent was killed, and, in fact, Matthews was working in the trench with decedent when the trench wall collapsed.

{¶38} Again, as early as July 21, 2004, the date of the SVIU report, David Mattson was known to be an important witness to the VSSR application because the

report indicates that Mattson, a Kokosing employee, completed drawings of the trench after the accident.

{¶39} Ohio Adm.Code 4121-3-20(D) provides:

> (4) Unless otherwise directed by a [SHO], at the end of the thirty day period after the mailing of the investigation report, or the sixty day period if an extension had been granted, all applications for an additional award shall be scheduled for a pre-hearing conference, with written notice provided to all parties of record and their representatives no less than fourteen days prior to the pre-hearing conference. Items the parties should be prepared to discuss at the pre-hearing conference include, but are not limited to:
>
> * * *
>
> (d) Has either party previously requested the issuance of a subpoena, and are there pending subpoena requests;
>
> (e) Are the parties considering or engaged in settlement negotiations;
>
> (f) Is an intentional tort court case pending; and
>
> (g) Any other procedural matter which needs to be addressed.
>
> * * *
>
> (6) Subpoena requests should be filed no later than the date of the pre-hearing conference. If a request for subpoena to obtain documents or information has been granted, copies of all the information obtained by the subpoena are to be submitted immediately to the commission upon its receipt by the party requesting the subpoena.
>
> (7) If an intentional tort case is pending in court, and if both parties agree and make a request, the commission will hold further processing of the application for an additional award in abeyance, until one of the parties requests that processing be reinstated. If both parties do not agree, processing of the application will continue.

{¶40} Notwithstanding the provisions of the rule regarding subpoena requests, at the November 17, 2004 prehearing conference, relator failed to request subpoenas for the appearances of Matthews and Mattson at the February 3, 2004 hearing on the VSSR application. Relator's failure to request subpoenas for the appearance of Matthews and Mattson at the VSSR hearing is a clear failure of due diligence, undermining relator's assertion that the depositions taken in the common pleas court after the VSSR hearing can be viewed as "new and additional proof" under the rule.

{¶41} Moreover, that on December 16, 2005, relator sought the exercise of the commission's continuing jurisdiction does not change the conclusion that there was no abuse of discretion in the commission's August 11, 2005 denial of the motion for rehearing. Nor did the commission abuse its discretion in refusing to exercise its continuing jurisdiction.

{¶42} The commission's continuing jurisdiction under R.C. 4123.52 is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 1998-Ohio-616.

{¶43} The *Nicholls* court suggests that new and changed circumstances also encompasses the rule regarding previously undiscoverable evidence. See also *State ex rel. Keith v. Indus. Comm.* (1991), 62 Ohio St.3d 139.

{¶44} In its December 16, 2005 motion for the exercise of continuing jurisdiction, relator asserts that the deposition transcripts of Matthews and Mattson demonstrate fraud. According to relator, Matthews "signed affidavits he and Kokosing knew to be false." Also, relator asserts that Mattson, who attended the February 3, 2005

hearing, admits in his deposition "that the trench was cut too deep," but he allegedly failed to disclose this information to Kokosing's attorney at the VSSR hearing.

{¶45} Whether or not the deposition transcripts actually support relator's allegations of fraud is not an issue before this court in this action. Relator cannot bootstrap the deposition transcripts into evidence that must now be considered when the deposition transcripts do not constitute a prerequisite to the exercise of continuing jurisdiction, such as new and changed circumstances, nor do they constitute "new and additional proof" under the rule. In short, given relator's lack of due diligence, she is in no position to argue that the deposition transcripts show fraud.

{¶46} Given the above analysis, it is clear that the commission did not abuse its discretion in refusing to order a rehearing of the VSSR application or in refusing to exercise continuing jurisdiction.

{¶47} As previously noted, relator also challenges each commission determination as to the alleged violations of the ten specific safety rules at issue based upon alleged obvious mistakes of fact and/or clear mistakes of law.

{¶48} Currently, Ohio Adm.Code 4123:1-3 is captioned "Construction Safety."[2]

{¶49} Thereunder, Ohio Adm.Code 4123:1-3-13 is captioned "Trenches and excavations." Thereunder, Ohio Adm.Code 4123:1-3-13(B) provides definitions:

> (2) "Angle of repose" means the greatest angle above the horizontal plane at which material will lie without sliding.

[2] Effective November 1, 2003, former Ohio Adm.Code 4121:1-3-13 was redesignated as Ohio Adm.Code 4123:1-3-13. Thus, on the date of the industrial fatality, i.e., September 15, 2003, the Construction Safety Code was designated as 4121:1-3-13. On relator's VSSR application filed April 16, 2004, relator alleges violations under the pre-November 1, 2003 designation of the Construction Safety Code. The SHO's order of February 3, 2005 uses the new designation for the Construction Safety Code without objection from any party to the VSSR proceeding. Accordingly, the magistrate shall refer to the Construction Safety Code under the new designation effective November 1, 2003.

> * * *
>
> (4) "Excavation" means any manmade cavity or depression in the earth's surface, including its sides, walls, or faces, formed by earth removal and producing unsupported earth conditions by reasons of the excavation. If installed forms or similar structures reduce the depth-to-width relationship, an excavation may become a trench.
>
> (5) "Hard compact soil" means all earth materials not classified as unstable.
>
> * * *
>
> (9) "Sides," "walls," or "faces" means the vertical or inclined earth surfaces formed as a result of trenching or excavation work.
>
> * * *
>
> (11) "Trench", when used as a noun, means a narrow excavation made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench at the bottom is no greater than fifteen feet.
>
> * * *
>
> (14) "Unstable soil" means earth material, that because of its nature or the influence of related conditions, cannot be depended upon to remain in place without extra support, such as would be furnished by a system of shoring.

{¶50} Ohio Adm.Code 4123:1-3-13(C) is captioned "General requirements." Thereunder, Ohio Adm.Code 4123:1-3-13(C)(2) provides:

> Additional precautions by way of shoring and bracing shall be taken to prevent slides or cave-ins where trenches or excavations are made in locations adjacent to backfilled trenches or excavations, or where trenches or excavations are subjected to vibrations from railroad or highway traffic, the operation of machinery, or any other source.

{¶51} Ohio Adm.Code 4123:1-3-13(C)(4) is captioned "Material placement." It provides:

> (a) Excavated material or other material shall be placed a minimum of twenty-four inches from the top edge of the trench or excavation.
>
> (b) As an alternative to the clearance prescribed in paragraph (C)(4)(a) of this rule, the employer may use effective barriers or other effective retaining devices in lieu thereof in order to prevent excavated or other materials from falling into the trench or excavation.

{¶52} Ohio Adm.Code 4123:1-3-13(D) is captioned "Trenches." Thereunder, ten enumerated paragraphs set forth ten specific rules pertaining to trenches. Three of those rules are pertinent here:

> (1) The exposed faces of all trenches more than five feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. (See appendix "Table 13-1").
>
> (2) Sides of trenches in unstable or soft material, five feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. (See appendix "Table 13-1" and "Table 13-2").
>
> (3) Sides of trenches in hard compact soil, including enbankments, shall be shored or otherwise supported when the trench is more than five feet in depth and eight feet or more in length. In lieu of shoring, the sides of the trench above the five-foot level may be sloped to preclude collapse, but shall not be steeper than a one-foot rise to each one-half-foot horizontal.

{¶53} Ohio Adm.Code 4123:1-3-13(E) is captioned "Excavations." Thereunder, nine enumerated paragraphs set forth nine specific safety rules pertaining to excavations. Four of those rules are pertinent here:

> (1) The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other

> equivalent means. (See appendix "Table 13-1 and Table 13-2").
>
> (2) Supporting systems, i.e. piling, cribbing, shoring, etc., shall be designed by a qualified person and shall meet accepted engineering requirements.
>
> (3) Excavations sloped to the angle of repose shall be flattened when an excavation has water conditions, silty materials, loose boulders, and areas where erosion, deep frost action, and slide planes appear.
>
> (4) Sides, slopes, and faces of all excavations shall meet accepted engineering requirements by scaling, benching, barricading, rock bolting, wire meshing, or other equally effective means.

Ohio Adm.Code 4123:1-3-13(C)(2)

{¶54} Again, Ohio Adm.Code 4123:1-3-13(C)(2) provides a specific safety rule:

> Additional precautions by way of shoring and bracing shall be taken to prevent slides or cave-ins where trenches or excavations are made in locations adjacent to backfilled trenches or excavations, or where trenches or excavations are subjected to vibrations from railroad or highway traffic, the operation of machinery, or any other source.

{¶55} Obviously, in order to obtain a commission finding that Kokosing violated Ohio Adm.Code 4123:1-3-13(C)(2), relator had to prove, inter alia, that the trench in which decedent was killed was adjacent to a backfilled trench or excavation or that the trench in which decedent was killed was subjected to vibrations from sources such as the traffic on State Route 79.

{¶56} The SHO found "insufficient evidence to support a finding that the decedent's trench was adjacent to a backfilled trench or excavation." Apparently, at the February 3, 2005 hearing, relator relied upon paragraph 11 of the SVIU report which describes a July 11, 2004 telephone conversation between the SVIU investigator and

Wayne Brown who is said to be "District 5 Safety Coordinator" for ODOT. According to the SVIU report, "Mr. Brown did state that the area where Mr. Durbin and Mr. Matthews were working was previously disturbed soil and that the area had previously been backfilled."

{¶57} The SHO rejected Mr. Brown's statement as unreliable "[g]iven the lack of an ODOT investigation of the accident and the unavailability of the notes of the relevant individual of that agency."

{¶58} Here, relator simply asserts that "[t]he SHO's decision to disregard the finding of ODOT that the soil was previously disturbed and backfilled is disappointing." (Relator's brief at 5.) That is hardly an argument for this court to find an abuse of discretion on the part of the commission.

{¶59} Needless to say, it is the commission that weighs the evidence before it. It was well within the commission's factfinding authority to reject Mr. Brown's statement as unreliable. In short, the commission's determination that relator failed to prove that decedent's trench was adjacent to a backfilled trench or excavation is not an abuse of discretion.

{¶60} The SHO also determined that relator presented no evidence that vibrations from any source caused or contributed to the fatal accident. The commission relied upon the June 29, 2004 report from Dr. Edward J. Walter and Associates, Inc. which reports a traffic vibration study regarding the State Route 79 reconstruction project which relator does not challenge here.

{¶61} In short, with respect to the commission's determination regarding relator's allegation of a violation of Ohio Adm.Code 4123:1-3-13(C)(2), there are no mistakes of fact and there are no mistakes of law.

Ohio Adm.Code 4123:1-3-13(C)(4)(a) & (b)

{¶62} Again, Ohio Adm. Code 4123:1-3-13(C)(4)(a) and (b) states:

> (a) Excavated material or other material shall be placed a minimum of twenty-four inches from the top edge of the trench or excavation.
>
> (b) As an alternative to the clearance prescribed in paragraph (C)(4)(a) of this rule, the employer may use effective barriers or other effective retaining devices in lieu thereof in order to prevent excavated or other materials from falling into the trench or excavation.

{¶63} The SHO cogently observed that Ohio Adm.Code 4123:1-3-13(C)(4) is intended to protect the worker from the excavated material falling back into the trench or the excavation. The SHO noted that, in his affidavit, Jason Matthews stated that one side of the trench wall collapsed upon decedent with no indication that any of the excavation material also came down into the trench. The SHO also noted that, in her affidavit, EMT Tina Miller indicates that excavated soil was left on the rim of the trench.

{¶64} The SHO conceded the existence of conflicting evidence as to the distance between excavated material and the trench edge. However, the SHO had no need to resolve the conflicting evidence. Given his finding that decedent was not injured or killed by falling material that had been excavated, any violation of Ohio Adm.Code 4123:1-3-13(C)(4)(a) and (b) cannot be the proximate cause of the injury or fatality.

{¶65} Here, relator simply points to the OSHA report alleging that "the employer did not ensure that the spoil pile was located at least two feet away from the edge of the

trench" but the OSHA report is hardly an argument for a finding that the commission abused its discretion.

{¶66} Again, the OSHA report itself, even if accepted by the commission, does not address the proximate cause issue.

{¶67} In short, with respect to the commission's determination regarding relator's allegation of a violation of Ohio Adm.Code 4123:1-3-13(C)(4)(a) and (b), there are no mistakes of fact and no mistakes of law.

Ohio Adm.Code 4123:1-3-13(D)(1), (2) & (3)

{¶68} Analysis begins with the observation that the three safety rules are applicable only if the trench is five feet or more in depth. Here, the SHO found that the evidence as to the depth of the trench was in conflict. The SHO found that it was unnecessary to determine trench depth because, as to each safety rule, relator had failed to prove other elements of the specific rule at issue.

{¶69} Here, relator seems to suggest that it was an abuse of discretion for the SHO to refuse to make a finding that the trench depth was five feet or more. According to relator, "[t]he evidence submitted at hearing was overwhelming that the ditch was deeper than 5 feet." (Relator's brief at 7.) Relator then goes on to point out evidence showing that the trench was five feet or more in depth.

{¶70} Clearly, it was not an abuse of discretion for the SHO to refuse to determine trench depth from the conflicting evidence when there are other bases for determining that the alleged violations cannot produce a VSSR award.

{¶71} Relator does not challenge the bases for determining that Kokosing did not violate Ohio Adm.Code 4123:1-3-13(D)(1), (2), and (3).

{¶72} With respect to Ohio Adm.Code 4123:1-3-13(D)(1), the SHO relied upon the Matthews' affidavit to find that Matthews had appropriately used benching as "some other equivalent means of protection." Relator does not challenge this finding, and thus the SHO's determination that no violation occurred must stand.

{¶73} With respect to Ohio Adm.Code 4123:1-3-13(D)(2), the SHO observed that the rule is applicable only to "sides of trenches in unstable or soft material." The SHO determined that the soil of the trench wall consisted of sufficient amounts of clay such that it could not be classified as "unstable or soft material." Relator does not challenge this finding, and thus, the SHO's determination that no violation occurred must stand.

{¶74} With respect to Ohio Adm.Code 4123:1-3-13(D)(3), the SHO determined that Kokosing was in compliance because Matthews had appropriately used benching. Relator does not challenge this finding, and thus the SHO's determination that no violation occurred must stand.

{¶75} Based upon the above analysis, the magistrate concludes that there are no mistakes of fact and no mistakes of law with respect to the commission's determination that the three safety rules, Ohio Adm.Code 4123:1-3-13(D)(1), (2), and (3), were not violated.

Ohio Adm.Code 4123:1-3-13(E)(1), (2), (3) & (4)

{¶76} In her brief, relator addresses the commission's findings regarding the four safety rules:

> If the SHO had not committed an obvious mistake of fact by finding that the trench was not deeper than 5 feet, Table 13-1 would have revealed that the employer did not employ the requisite systems to prevent the catastrophe that occurred. That the SHO did not find a violation of (E)(1), (E)(2), and (E)(4) is an obvious mistake of fact and law.

> There is nothing in the SHO's decision that shows that the employer was in compliance with the requirements of Tables 13-1 and 13-2.

(Relator's brief at 8-9.)

{¶77} This is not an argument upon which this court can find for relator. To begin, the SHO did not find that the trench depth was less than five feet. As previously noted, the SHO did not determine trench depth. Relator fails to explain how Table 13-1 supports her challenge to the commission's determination that Kokosing did not violate any of the safety rules found at Ohio Adm.Code 4123:1-3-13(E)(1), (2), (3), and (4).

{¶78} Thus, relator has not shown a clear mistake of fact or a clear mistake of law with respect to any of the commission's findings.

{¶79} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ *Kenneth W. Macke*
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

> Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).