

[Cite as *State ex rel. Hickerson Excavating, Inc. v. Kottenbrock*, 2011-Ohio-1887.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Hickerson Excavating, Inc., :
Relator, :
v. : No. 10AP-92
John B. Kottenbrock and Industrial : (REGULAR CALENDAR)
Commission of Ohio, :
Respondents. :
:

D E C I S I O N

Rendered on April 19, 2011

Bugbee & Conkle, LLP, Gregory B. Denny, and Mark S. Barnes, for relator.

Larrimer & Larrimer, and Thomas L. Reitz, for respondent Kottenbrock.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Hickerson Excavating, Inc. ("Hickerson"), filed an original action in mandamus asking this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that granted the

application of respondent John B. Kottenbrock ("claimant") for an additional award for violations of specific safety requirements ("VSSR"), and to enter an order denying claimant's application.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ.

{¶3} No party has filed objections to the magistrate's findings of fact, and we adopt them as our own. In brief, while employed by Hickerson, claimant was working inside a trench when the wall of the trench collapsed and injured him. The claim was allowed for multiple injuries. Claimant filed an application for a VSSR award, contending that Hickerson failed to meet applicable safety requirements.

{¶4} After a hearing, a staff hearing officer ("SHO") of the commission determined that Hickerson had violated six specific safety requirements. Accordingly, she granted to claimant a VSSR award of an additional 15 percent of the maximum weekly rate of compensation. Relator thereafter filed this mandamus action.

{¶5} The magistrate concluded that the commission did not abuse its discretion by making the award. Specifically, the magistrate found the following: (1) the commission did not abuse its discretion by finding that the trench was subjected to vibrations from the operation of machinery nearby; (2) the commission did not abuse its discretion by finding that the track hoe operator did not bench back the top of the trench; and (3) the commission did not abuse its discretion by finding that the trench was more

than five feet deep at the point of claimant's injury. Hickerson has filed objections to the magistrate's conclusions.

{¶6} First, Hickerson contends that the magistrate erred by concluding that the commission did not abuse its discretion by finding that the trench was subjected to vibrations. We disagree. While Hickerson contends that there is no evidence of vibrations, we note that there is evidence of employees operating a track hoe (or excavator) and a Bobcat in close proximity to the trench.

{¶7} For example, in his affidavit, claimant states that Dino Muntz was removing dirt from the trench with a track hoe. At the hearing, claimant testified that Muntz was operating the track hoe, which had a bucket that was three feet wide, about 10 to 15 feet away from him, with the bucket coming toward him. He also testified that a Bobcat was used to place stone in the bottom of the trench, as the trench was dug. The Bobcat stayed about two to three feet back from the trench as claimant was working inside it and then approached the trench when stone was needed.

{¶8} Hickerson contends that, without any direct evidence that the equipment caused vibrations, there can be no finding of a violation of Ohio Adm.Code 4123:1-3-13(C)(2), which requires that precautions be taken where trenches are subjected to vibrations from the operation of machinery. We agree with the magistrate, however, that the SHO could reasonably infer that the equipment, which was operated very close to the trench, caused vibrations. We also disagree with Hickerson's contention that the SHO did not enunciate the evidence supporting the finding of vibrations. The SHO's order explained the basis for the finding, i.e., the location and operation of the track hoe

and Bobcat near the trench. Therefore, we overrule Hickerson's objections regarding Ohio Adm.Code 4123:1-3-13(C)(2).

{¶9} Hickerson also contends that the magistrate erred by concluding that the commission did not abuse its discretion by finding that the trench was at least five feet deep. We conclude, however, that we need not address this issue.

{¶10} As the magistrate noted, the commission applied the minimum penalty, i.e., 15 percent of the weekly allowance. See Section 35, Article II, Ohio Constitution (providing that, when a VSSR is found, "such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added" to the award). Here, we have already concluded that the commission did not abuse its discretion by finding one violation. Because the SHO applied the minimum award, any additional findings of error would not change the outcome. Therefore, we decline to address Hickerson's additional objections, we decline to adopt the remainder of the magistrate's decision, as it is unnecessary, and we overrule Hickerson's remaining objections as moot.

{¶11} In conclusion, following our independent review of the record in this matter, we adopt the magistrate's findings of fact as our own. We also adopt the magistrate's conclusions of law, up to and including paragraph 47 on page 20 and also paragraphs 101 and 102 on page 40. We decline to adopt paragraphs 48 through 100, as they are unnecessary to our resolution of this matter, and we strike those paragraphs from the decision. Accordingly, we deny the requested writ.

*Objections overruled;
writ denied.*

KLATT and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Hickerson Excavating, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-92
	:	
John B. Kottenbrock and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

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

Rendered on December 22, 2010

Bugbee & Conkle, LLP, Gregory B. Denny and Mark S. Barnes, for relator.

Larrimer & Larrimer, and Thomas L. Reitz, for respondent John B. Kottenbrock.

Richard Cordray, Attorney General, Stephen D. Plymale and Charissa D. Payer, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶12} In this original action, relator, Hickerson Excavating, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the application of respondent John B. Kottenbrock ("claimant")

for an additional award for violations of specific safety requirements ("VSSR"), and to enter an order denying the application.

Findings of Fact:

{¶13} 1. On October 12, 2006, claimant was severely injured in the course of and arising out of his employment with relator. On that date, the wall of a trench collapsed while claimant was working inside the trench.

{¶14} 2. The industrial claim (No. 06-867839) is allowed for:

Fracture pubis, closed, left; fracture of sacrum/coccyx, closed; fracture ischium, bilateral, closed; non-union fracture ischial rami, left; bilateral sacroiliac joint arthritis, bilateral; aggravation of pre-existing degenerative disc disease at L2, 3, 3, 5, S-1, bilateral.

{¶15} 3. On October 8, 2008, claimant filed an application for a VSSR award.

{¶16} 4. The VSSR application prompted an investigation by the Safety Violations Investigative Unit ("SVIU") of the Ohio Bureau of Workers' Compensation ("bureau").

{¶17} 5. On December 22, 2008, SVIU Investigator Thomas E. Christian issued a report with exhibits.

{¶18} 6. The SVIU report states in part:

[One] The on-site investigation was conducted on December 11, 2008 located at Hickerson Excavating[.] * * * Present during the on-site meeting were Investigator Thomas Christian, Hickerson Truck driver Ted Blunk and Hickerson Foreman Dino Muntz[.] * * *

[Two] Hickerson Excavating is a company located in Findlay, Ohio handling underground water pipe and storm sewer installations as well as general excavating projects[.]

[Three] After the on-site, Investigator Christian visited the site of the injury, located at Easter Tire Company Findlay, Ohio[.] * * * Mr[.] Muntz stated that he was at the site when the injury occurred, but he did not witness the events of the incident[.] Mr[.] Muntz stated that Mr. Kottenbrock was injured while working inside of a four (4) foot deep trench * * *, excavated for the installation of a storm sewer line. Mr. Muntz further revealed that, without warning, the trench collapsed and buried one of Mr[.] Kottenbrock's legs[.] * * *

[Four] * * * Mr. Muntz disclosed that Mr[.] Kottenbrock is responsible for checking grade, laying pipe, installing water lines, grading stone and assisting the site foreman * * *. Investigator Christian asked Mr[.] Muntz where he was positioned at the time of the injury to Mr[.] Kottenbrock[.] Mr[.] Muntz advised Investigator Christian that he was operating a track hoe, approximately thirty (30) feet from Mr[.] Kottenbrock, while facing the trench[.] * * * Investigator Christian asked Mr[.] Muntz if water was observed at the base of the trench, prior to the injury[.] Mr[.] Muntz stated that he does not remember if water was observed in the trench[.] * * *

[Five] * * * Investigator Christian asked Mr[.] Muntz if he benched the trench prior to the injury[.] Mr[.] Muntz revealed that he did not bench the trench[.] Investigator Christian asked Mr[.] Muntz if a trench box was used [at] the time of the injury[.] Mr[.] Muntz stated that a trench box was not necessary since the trench was less than four (4) feet deep[.] * * * Mr[.] Muntz further revealed that he shored back the trench, one (1) foot down from the top edge of the trench[.] Investigator Christian asked Mr[.] Muntz if he utilized a trench jack or trench bracing prior to the injury[.] Mr[.] Muntz advised that no trench jack or bracing were used[.] * * * Investigator Christian asked Mr[.] Muntz if he tested the soil prior to the excavation of the trench[.] Mr[.] Muntz disclosed that he did not test the soil prior to the injury[.]

[Six] * * * Investigator Christian asked Mr[.] Muntz where the track hoe was positioned in relation to the edge of the trench[.] Mr[.] Muntz stated that the track hoe was several feet from the edge of the trench[.] Investigator Christian asked Mr[.] Muntz where the spoil [sic] pile was placed during the excavation[.] Mr[.] Muntz revealed that the dirt

was immediately placed inside of a dump truck, positioned behind the track hoe[.] Investigator Christian asked Mr[.] Muntz if cars, trucks or heavy machinery were parked next to the trench[.] Mr[.] Muntz stated that no cars, trucks or heavy equipment were positioned next to the involved trench[.] * * *

[Seven] * * * Investigator Christian asked Mr[.] Muntz for the distance from the main road to the involved trench[.] Mr[.] Muntz stated that that trench was approximately three hundred (300) feet from the main road[.] * * *

[Eight] Investigator Christian asked Mr[.] Muntz to describe when an excavation would require a trench box to be used[.] Mr[.] Muntz revealed that if a trench was five (5) feet or greater in depth * * *, or if a trench was of considerable distance * * *, then a trench box would need to be used[.] * * *

[Nine] The equipment involved in the injury to Mr[.] Kottenbrock was a Koboco 200 track hoe (with a three (3) foot bucket), purchased used (unknown date or invoice), a dump truck (unknown manufacturer, date, purchase or invoice) as well as a 2001 manufactured Bobcat, purchased new (unknown date or invoice)[.] No trench box, trench jack or bracing was available at the time of the injury[.] One (1) fiberglass extension ladder (unknown manufacturer, date, purchase or invoice) was placed inside of the trench[.] The trench involved in the injury to Mr[.] Kottenbrock was approximately thirty-nine (39) inches wide, fifty-five (55) feet long and four (4) feet deep[.] The type of soil, from the trench, was grainy (clay) but was not tested[.] * * *

* * *

[Eleven] Mr[.] Kottenbrock was hired by Hickerson Excavating (unknown date) as a laborer, responsible for assisting the foreman on work sites[.] Mr[.] Muntz stated that Mr[.] Kottenbrock was given on-the-job training (administered by senior staff members) which was on-going to the date of his injury[.] * * *

[Twelve] On December 10, 2008 Investigator Christian interviewed and obtained a signed affidavit from John Kottenbrock[.] * * *

[Thirteen] On December 11, 2008 Investigator Christian interviewed and obtained a signed affidavit from Todd Muntz[.] * * *

{¶19} 7. Attached to the SVIU report as an exhibit is claimant's affidavit executed December 10, 2008:

[Two] I was hired by Hickerson in June of 2003 as a laborer, responsible for running machinery, shoveling and raking duties, installing pipe into the ground, fixing water lines and grading off parking lots[.]

* * *

[Five] On the day of my injury, I was given the task of installing a pipe into a trench and attaching it to a catch basin. This work site was located at Easter Tire Company (Rt 224 in Findlay)[.] I climbed into the trench so that I could measure the grade of the trench where stone was placed. Dino Muntz was operating a track-hoe as he was removing dirt from the trench and placing it into a truck for disposal. As I was working in the trench, I heard someone yell "Look out"! I turned around and observed the dirt below the blacktop (visible on the trench wall) drop six to eight (6 to 8) inches[.] The entire wall then caved in on one side of the trench and fell towards me, striking me on the left side of my pelvis[.] * * *

[Six] I believe that the cause (s) of my injury were [sic] due to: no trench box at the site of the injury[.] I also believe that the soil was not tested on the site to detect the type of soil that we were working with. * * * At the time of my injury, the ladder that was inside of the trench was at least thirty (30) feet from me, preventing me from having an emergency exit from the trench.

* * *

[Nine] The area where my injury occurred was located at Easter Tire Company in Findlay (parking lot)[.] The size of the trench was (forty-two to forty-eight (42 to 48)[]) inches wide, five to six (5 to 6) feet deep, and approximately fifty (50) feet long[.] The soil type was compacted clay soil from the parking lot and it was located approximately two hundred

fifty (250) yards from the closest road (no railroad in the area)[.] Hickerson Excavating did not have a trench box, timbers, cross braces or a trench jack on site[.] The trench was not shored or braced at the time of the injury, the walls of the trench were completely vertical[.] * * *

[Ten] Prior to my injury, I detected water at the base of the trench[.] This water created a mixture with the clay (muck)[.] Prior to my injury, Dino Muntz was removing the muck with a track hoe while I was inside of the trench[.]

{¶20} 8. Also attached to the SVIU report as an exhibit is the affidavit of Todd

Muntz:

[Two] I was hired by Hickerson in 1996 as a truck driver. At the time of the injury to Mr. Kottenbrock, I held the title of laborer/mechanic (unknown start date). My duties consisted of working on the equipment, installing pipe and shoveling stone in trenches.

* * *

[Four] On the day of the injury, I was working with Mr. Kottenbrock and witnessed the events that led to his injury. We were working at Easter Tire Company (parking lot) and we were installing a storm sewer in the parking lot (edge of trench was approximately fifty to seventy (50 to 70) yards from the main road) [sic]. John had just finished installing the stone in the trench and I informed him to get out of the trench until we were ready to install the pipe. John told me that he was o.k. and would remain in the trench. Approximately ten (10) minutes later, the side of the trench caved in towards Mr. Kottenbrock, the bank of the soil striking him on the side of his body. One of Mr. Kottenbrock's legs was covered by soil, trapping him in the trench. Dino Muntz then removed the dirt from his leg. 9-1-1 was called and paramedics (unknown jurisdiction) responded and transported him to the hospital.

* * *

[Eight] The equipment at the involved site, at the time of the injury was: an excavator (Kobelco 200) positioned approximately ten (10) feet from the involved trench, one (1)

Bobcat, (1) one Mack manufactured dump truck, positioned behind the excavator and one (1) service vehicle. I do not recall if the following items were on site at the time of the injury: trench box, bracing or trench jack.

[Nine] The area where the injury occurred was Easter Tire Company parking lot, located in Findlay. The involved trench was approximately fifty to seventy (50 to 70) yards from the main road. Staff members that were present at the time of the injury were: John Kottenbrock, Dino and Todd Muntz and possibly one other person (unknown name).

[Ten] The size of the involved trench was approximately twenty-five to thirty feet (25 to 30) feet long, three (3) feet wide and four (4) feet deep. Approximately (8 to 10) eight to ten inches of the sides of the bank were shored back for the involved trench. The soil that was in the trench was previously undisturbed clay. I do not recall any signs of the trench wall cracking prior to the injury. The soil may have been moist but I do not recall any standing water at the base of the trench, prior to the injury. The soil that was removed from the trench was immediately placed inside of a dump truck (located behind the track hoe).

{¶21} 9. Also attached to the SVIU report are several photographs taken by Investigator Christian at the job site. Aside photograph #3, Investigator Christian wrote:

Illustrated in this photograph is a height measurement, from the bottom of the storm drain to the top of the drain cap[.]

Note Height measurement is five (5) feet[.]

Note According to Mr[.] Muntz, the ground beneath the drain sewer contains base rock[.] The concrete pad (noted with blue arrows) also tapers towards the drain cap[.] This results in a trench depth of five to six (5 to 6) feet at the time of the injury[.]

{¶22} 10. Aside photograph #5, Investigator Christian wrote:

Depicted in this photograph is a width measurement for the involved trench[.]

Note: Width of the trench was approximately sixty-six (66) inches, areas of the trench vary[.]

Note: Mr[.] Muntz disclosed that he utilized a bucket on the track-hoe that was three (3) feet wide[.] This would only allow for fifteen (15) inches, on each side of the trench, for sloping[.]

{¶23} 11. On July 11, 2009, claimant executed an affidavit:

With respect to my statement in which I described climbing into the trench to measure the grade, I would like to note that I stand five feet eight inches tall. While standing in the trench, when looking right to left, I could not see outside of the trench. Clearly, this would mean that the distance between the bottom of the trench and the top of the trench was more than five feet high.

{¶24} 12. On July 15, 2009, a staff hearing officer ("SHO") heard the VSSR application. The hearing was recorded and transcribed for the record.

{¶25} 13. Following the July 15, 2009 hearing, the SHO issued an order granting the VSSR application. Six safety violations were found and an additional award in the amount of 15 percent was granted. The SHO's order explains:

It is the finding of the Staff Hearing Officer that the Injured Worker was employed on the date of injury noted above, by the Employer as a laborer in an excavation company and that the Injured Worker sustained an injury in the course of and arising out of employment when the sidewalls of an excavation trench caved in fracturing his pelvis and injuring his low back.

It is further the finding of the Staff Hearing Officer that the Injured Worker's injury was the result of a lack of use of trench boxes or other shoring or bracing to prevent slides or cave-ins of the embankments of the trench. The Staff Hearing Officer finds a violation of Ohio Admin. Code 4123:1-3-13(C)(2)(D)(1)(2)(3)(7) and (9) of the Code of Specific Safety Requirements of the Industrial Commission relating to trenches and excavations.

It is therefore ordered that an additional award of compensation be granted to the Injured Worker in the amount of 15 percent of the maximum weekly rate under the rule of State ex rel. Engle v. Indus. Comm. (1944), 142 Ohio St. 425.

* * *

The Staff Hearing Officer finds the Injured Worker was working in a trench both grading soil and stone at the time of the injury herein. The Staff Hearing Officer finds the dispute herein rests on the depth of the trench in which the Injured Worker was working. The Staff Hearing Officer finds the most empirical evidence on file are the measurements taken by the Special Investigator for the Industrial Commission which indicate that the height of the catch basin or storm drain, which was installed the day before the Injured Worker's injury, was five feet in depth. However, pursuant to all the testimony on file, beneath that five feet of depth, there is at least four to six or more inches of stone used to level the bottom of the trench and used as a base to set the concrete catch basin on. Therefore, the Staff Hearing Officer finds that the level of the trench, even at the site of the catch basin, was over five feet in depth.

In addition, the Staff Hearing Officer finds that there was a flow grade from that catch basin down to the other end of the trench. The measurements on this vary in the factual evidence on file. The Employer alleges it was two to two and one-half inches per one hundred feet was the decline grade. However, the Employer also acknowledges that the other catch basin in the parking lot was at least a foot lower than the first as a result of a slope in the lot itself. Therefore, the Staff Hearing Officer finds since the Injured Worker was not at the catch basin site at the time of the injury, but was at least a few feet away from that area following the decline grade of the trench, the Injured Worker was in a trench well over five feet in height.

The Staff Hearing Officer finds that 4123:1-3-13(C)(2) specifically indicates "This [sic] additional precaution[s] by way of shoring and bracing shall be taken to prevent slides or cave-ins [where] or [sic] trenches or excavations are made in locations adjacent to the [sic] backfill[ed] trenches or excavations, or where trenches or excavations are subject to

vibrations from railroad, highway traffic, the operation of machinery, or any other source." This Staff Hearing Officer finds that while the track hoe was approximately fifteen to twenty feet away from the trench while operating, the bucket did go into the trench creating vibrations in the trench zone. In addition, the Bobcat was pulling up virtually alongside the trench to shake stone into the trench for providing a firmer surface and grading. As a result, the Staff Hearing Officer finds that there was the operation of machinery nearby this excavation and precautions should have been taken for shoring or bracing.

This Staff Hearing Officer does not find persuasive the testimony of Mr. D. Muntz that he benched back the top of the trench approximately one foot down and six to eight inches back to prevent the top from falling in. This is not supported by the fact that the excavation was performed in a blacktop parking lot. The blacktop had been cut the previous day for removal for the trench and was approximately forty-two to forty-eight inches wide. The track hoe bucket was thirty-six inches in length [sic]. In addition, the Injured Worker testified at hearing that the edge of the blacktop came completely to the edge of the trench, and when the wall did cave in, he could look back under the blacktop a foot or so where the wall had caved and see the underside of the asphalt. As a result, the Staff Hearing Officer finds the asphalt was not peeled back approximately six to eight inches from the trench or stepped or benched down one foot to prevent slides or cave-ins on this trench.

Further, pursuant to Table 1-3 of 4123:1-3-13, the approximate angle of repose for the sloping of the side of an excavation for average soils is one-to-one or forty-five degrees. There is no evidence or testimony, factual or otherwise, that the side of the trench was graded to forty-five degrees.

The Staff Hearing Officer also finds a violation of 4123:1-3-13(D)(1)(2)(3)(7) and (9). The Staff Hearing Officer finds that there is no dispute in the file whatsoever that there were no trench boxes used at this site to shore the sides of the trench. The Staff Hearing Officer refers back to the prior finding that the trench was, indeed, greater than five feet deep at the location of the injury. Also, the Employer, Mr. D. Muntz, the track hoe operator, specifically indicated during

the course of the hearing, which is referenced on Transcript Page 82 at Line 8 through 14, that they do not use the trench boxes for trenches unless they are six feet or more in depth. From the transcript:

Mr. Denny: "And what is the depth that you utilize trench boxes in?"

Mr. Muntz: "Usually six feet or more."

Mr. Denny: "OK.["

Mr. Muntz: "In depth."

Therefore, the Employer itself indicates that it is violation of 4123:1-3-13(D)(1)(2)(3)(7) and (9). These sections collectively indicate that for trenches more than five feet high, they must [be] shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees are exposed to moving ground or cave-ins. As previously indicated in this order, the trench was not sloped back for sufficient degree of ordinary soil at forty-five degrees and there is no dispute that no trench boxes or shoring materials were used in this trench.

The Staff Hearing Officer finds that the type of soil being trenched herein was clay but it had not been tested for stability, moisture content, or any other stability factor. Therefore, based upon the factual evidence relied upon herein, as well as the Employer's own statement that trench boxes are not used unless the trench is greater than six feet, the Employer is in violation of these sections of 4123:1-3-13.

{¶26} 14. Relator moved for rehearing pursuant to Ohio Adm.Code 4121-3-20(E).

{¶27} 15. On December 2, 2009, another SHO mailed an order denying the motion for rehearing:

* * * The Employer has not submitted any new and relevant evidence nor shown that the order mailed 09/29/2009 was based on an obvious mistake of fact or on a clear mistake of law.

{¶28} 16. On February 1, 2010, relator, Hickerson Excavating, Inc., filed this mandamus action.

Conclusions of Law:

{¶29} Three main issues are presented: (1) whether the commission abused its discretion in finding that the trench was subjected to vibrations from the operation of machinery—a prerequisite to finding a violation of Ohio Adm.Code 4123:1-3-13(C)(2); (2) whether the commission abused its discretion in finding that track hoe operator Dino Muntz did not "bench back" the top of the trench in compliance with the alternative shoring provision of Ohio Adm.Code 4123:1-3-13(D)(3); and (3) whether the commission abused its discretion in finding that the trench depth at the point of injury exceeded five feet.

{¶30} The magistrate finds: (1) the commission did not abuse its discretion in finding that the trench was subjected to vibrations from the operation of machinery; (2) the commission did not abuse its discretion in finding that track hoe operator Dino Muntz did not "bench back" the top of the trench; and (3) the commission did not abuse its discretion in finding that the trench depth at the point of injury exceeded five feet.

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

{¶32} Ohio Adm.Code 4123:1-3 sets forth specific safety requirements to protect employees engaged in construction activity.

{¶33} Ohio Adm.Code 4123:1-3-13 is captioned "Trenches and excavations."

{¶34} Ohio Adm.Code 4123:1-3-13(B) provides definitions pertinent here:

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

* * *

(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.

{¶35} Ohio Adm.Code 4123:1-3-13(C) is captioned "General requirements."

Thereunder, the following safety rule is presented:

(2) 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.

{¶36} Ohio Adm.Code 4123:1-3-13(D) is captioned "Trenches." Thereunder, the following safety rules are presented:

(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 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.

* * *

(7) When bracing or shoring of trenches is required, such bracing and shoring shall be carried along with the excavation.

* * *

(9) Portable trench boxes, safety cages or sliding trench shields may be used for the protection of employees in lieu of a shoring system or sloping. Where such trench boxes or shields are used they shall be designed, constructed, and maintained in a manner which will provide protection equal to or greater than the sheeting or shoring required for the trench and shall extend no less than six inches above the vertical part of the trench face.

Some observations regarding the safety rules

{¶37} Some observations regarding the above-quoted safety rules may be helpful. As indicated in the SHO's order of July 15, 2009 at issue here, the commission found a total of six violations of the specific safety rules. The commission found a

violation of Ohio Adm.Code 4123:1-3-13(C)(2). It also found violations of Ohio Adm.Code 4123:1-3-13(D)(1), (2), (3), (7) and (9).

{¶38} Ohio Adm.Code 4123:1-3-13(C)(2) requires shoring and bracing when a trench or excavation is subjected to vibrations from the operation of machinery. Unlike the safety rules applicable only to trenches, the applicability of Ohio Adm.Code 4123:1-3-13(C)(2) is not limited by the trench depth. That is, Ohio Adm.Code 4123:1-3-13(C)(2) can be violated even where the trench depth is less than five feet.

{¶39} Ohio Adm.Code 4123:1-3-13(D)(3) provides for an alternative to shoring where the trench is dug into "hard compact soil." The alternative to shoring is referred to in the record as "benching."

{¶40} In the SHO's order of July 15, 2009, the SHO states that she did not find persuasive the testimony that track hoe operator Dino Muntz "benched back the top of the trench."

{¶41} Benching can occur under Ohio Adm.Code 4123:1-3-13(D)(3) when "the sides of the trench above the five-foot level [are] sloped to preclude collapse, but shall not be steeper than a one-foot rise to each one-half-foot horizontal."

{¶42} Presumably, an employer can avoid a violation of Ohio Adm.Code 4123:1-3-13(C)(2) if it can show that it met the so-called benching alternative set forth at Ohio Adm.Code 4123:1-3-13(D)(3) applicable to "hard compact soil."

Vibrations

{¶43} In finding a violation of Ohio Adm.Code 4123:1-3-13(C)(2), the SHO found that the track hoe bucket created vibrations as the trench was being dug. The SHO also found that the Bobcat caused vibrations when it pulled up along side the trench to

shake stone into the trench. Based upon the activities of the track hoe and the Bobcat, the SHO found that the trench was subjected to vibrations from the operation of machinery.

{¶44} According to relator, there is no direct evidence in the record that the above-described activities of the track hoe and the Bobcat subjected the trench walls to vibrations. Relator then asserts that it cannot be inferred from the evidence that the trench was subjected to vibrations. The magistrate disagrees.

{¶45} The commission or its SHO, like any fact finder in any administrative, civil, or criminal proceeding, may draw reasonable inferences and rely on his or her common sense in evaluating the evidence. *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶69.

{¶46} It is true, as relator seems to suggest, that no witness at the July 15, 2009 hearing, including claimant, actually testified that he felt vibrations at the trench when the track hoe or Bobcat were being operated at the trench. Such testimony was not necessary in order for the SHO to infer that the operations of the track hoe and Bobcat caused vibrations at the trench. Relying on her common sense, the SHO could reasonably infer under the circumstances here that the trench was subjected to vibrations by the operation of machinery at or near the trench. *Supreme Bumpers*.

{¶47} Accordingly, the commission did not abuse its discretion in finding that the trench was subjected to vibrations from the operation of machinery—a prerequisite to finding a violation of Ohio Adm.Code 4123:1-3-13(C)(2).

Benching

~~{¶48} As earlier noted, the second issue is whether the commission abused its discretion in finding that track hoe operator Dino Muntz did not "bench back" the top of the trench in compliance with the alternative shoring provision of Ohio Adm.Code 4123:1-3-13(D)(3).~~

~~{¶49} During the July 15, 2009 hearing, track hoe operator Dino Muntz described how he benches a trench using the 36 inch wide track hoe bucket:~~

~~[Relator's counsel]: When you say you take your bucket and you take the edge off, what type of distances are we talking? And I'm specifically talking about the trench you were digging on the date that Mr. Kottenbrock was injured. If you could tell us, you said you have a 36 inch bucket, what type of edge are you taking out?~~

~~Mr. D. Muntz: It's six inches to 12 inches back and like a foot deep. A foot, is that what I want to say, deep? A foot from the top down.~~

~~[Relator's counsel]: Okay. So from the outside of the trench you'd go six to eight inches and then a, and then angle it—~~

~~Mr. D. Muntz: Six to 12 inches.~~

~~[Relator's counsel]: Six to 12. And then angle it a foot down from the top of the trench—~~

~~Mr. D. Muntz: Right.~~

~~[Relator's counsel]: —is that correct? Is that how you dig every trench?~~

~~Mr. D. Muntz: Yes.~~

~~[Relator's counsel]: And why do you do it that way?~~

~~Mr. D. Muntz: To keep anything loose on the top from falling in the trench.~~

~~[Relator's counsel]: What kind of dirt was this under this blacktop, was it, if you know, was it solid, was it stable dirt, was it very unstable?~~

~~Mr. D. Muntz: I wouldn't say it was unstable.~~

~~[Relator's counsel]: Well I saw in the, in the reports that somebody called it clay.~~

~~Mr. D. Muntz: Yes.~~

~~[Relator's counsel]: Is it clay dirt?~~

~~Mr. D. Muntz: Yes.~~

~~[Relator's counsel]: And how would you describe clay dirt compared to other dirt, as far as stability of the dirt?~~

~~Mr. D. Muntz: It's very, it's the most stable dirt that there is.
* * *~~

~~[Relator's counsel]: What's the difference between benching it down and sloping it?~~

~~Mr. D. Muntz: Benching it down you take the bucket, and for every foot you're going down vertical you put the bucket over six inches and just cut it off so that it's got a stair step in it.~~

~~[Relator's counsel]: Okay. And again, that's another way of securing the safety of the trench?~~

~~Mr. D. Muntz: Right.~~

~~(Tr. 79-83.)~~

~~{¶50} During the July 15, 2000 hearing, claimant testified:~~

~~[Claimant's counsel]: Okay. Had you made any preparation to the pavement the day before?~~

~~[Claimant]: We cut the black top to a certain width. Dino had the width, we marked it, and the day before I took a saw and cut the blacktop on each side of the trench and then it was taken out and put in the trucks for disposal.~~

~~[Claimant's counsel]: Okay. Now this particular area of the blacktop that was cut, do you know about how wide it was?~~

~~[Claimant]: I'm thinking it was 42 inches what we had to cut blacktop out.~~

~~[Claimant's counsel]: Okay. And then it was designed so that the trencher would dig within that 42 inch area?~~

~~[Claimant]: Yes.~~

~~* * *~~

~~[Claimant's counsel]: All right. As you were, as you were in the trench at the time of the accident would you tell us what happened?~~

~~[Claimant]: * * * [S]omebody yelled look out, and I looked over and I could — standing like this, in the trench with the stick, I could see the blacktop about this high.~~

~~[Claimant's counsel]: Up above you?~~

~~[Claimant]: Above me. And this dirt dropped down.~~

~~[Claimant's counsel]: Below the asphalt?~~

~~[Claimant]: Yeah, underneath the blacktop, because I could see that much blacktop, a good foot, the whole length of the trench.~~

~~[Claimant's counsel]: A good foot?~~

~~[Claimant]: Thick.~~

~~[Claimant's counsel]: You're talking about the bottom of the asphalt?~~

~~[Claimant]: The asphalt stayed up there but the dirt underneath it dropped down. And I could see that much blacktop underneath.~~

~~[Claimant's counsel]: Yes.~~

~~[Claimant]: Good eight to 10 inches.~~

~~* * *~~

~~[Claimant's counsel]: Sure. Were there any types of shoring at all—~~

~~[Claimant]: No.~~

~~[Claimant's counsel]: —utilized in that trench?~~

~~[Claimant]: No.~~

~~[Claimant's counsel]: None whatsoever?~~

~~[Claimant]: No.~~

~~[Claimant's counsel]: You had indicated that this was cut through asphalt, this particular trench; is that right?~~

~~[Claimant]: Correct.~~

~~[Claimant's counsel]: Was there any attempt to shore back the sides or slope the sides?~~

~~[Claimant]: No, you couldn't, because from the blacktop and the concrete — or the blacktop being cut, it was a straight shot down both sides.~~

~~[Claimant's counsel]: Okay.~~

~~[Claimant]: Where it's nice and smooth.~~

~~[Claimant's counsel]: Okay. So you're not aware of anything that was done to attempt to keep the sides of the trench from collapsing?~~

~~[Claimant]: No, nothing.~~

~~(Tr. 15-16; 23-24; 26-27.)~~

~~{¶51} Pertinent here, the SHO's order of July 15, 2009 states, in part:~~

~~This Staff Hearing Officer does not find persuasive the testimony of Mr. D. Muntz that he benched back the top of the trench approximately one foot down and six to eight~~

~~inches back to prevent the top from falling in. This is not supported by the fact that the excavation was performed in a blacktop parking lot. The blacktop had been cut the previous day for removal for the trench and was approximately forty-two to forty-eight inches wide. The track hoe bucket was thirty-six inches in length [sic]. In addition, the Injured Worker testified at hearing that the edge of the blacktop came completely to the edge of the trench, and when the wall did cave in, he could look back under the blacktop a foot or so where the wall had caved and see the underside of the asphalt. As a result, the Staff Hearing Officer finds the asphalt was not pooled back approximately six to eight inches from the trench or stopped or benched down one foot to prevent slides or cave-ins on this trench.~~

~~{¶52} In finding unpersuasive the testimony of Dino Muntz as to the benching of the trench, the SHO presents two independent reasons for rejecting his testimony. The first reason is based upon simple arithmetic—subtracting the 36 inch bucket width from the width of the blacktop cut, and dividing the difference by two. Hypothetically, the result of this arithmetic calculation gives the maximum distance on each side of the bucket that could have been used for shoring or benching.~~

~~{¶53} The SHO indicates that the asphalt cut was 42 to 48 inches wide, but the SHO fails to cite to the evidence supporting the stated 42 to 48 inch cut.~~

~~{¶54} In his affidavit, submitted to the SVIU investigator, claimant avers "[t]he size of the trench was (forty-two to forty-eight (42 to 48)[)] inches wide."~~

~~{¶55} During direct examination, claimant testified that the asphalt cut was 42 inches wide. Later, under cross-examination, claimant testified:~~

~~[Relator's counsel]: Now again, just to clarify the width of the, of the trench, in your Affidavit you said it's between 42 and 48 inches wide?~~

~~[Claimant]: Yes.~~

~~[Relator's counsel]: And you cut the pavement at 42?~~

~~[Claimant]: Yeah.~~

~~[Relator's counsel]: So would, would I be correct in saying that when you take the blacktop off it sort of chunks off and it's actually a wider trench than 42 inches?~~

~~[Claimant]: Not if it's cut nice.~~

~~[Relator's counsel]: Well why then do you say it's between 42 and 48 inches wide?~~

~~[Claimant]: 'Cause I didn't remember what the width of the cut was, it's 42 inches, 42 to 46 inches.~~

~~[Relator's counsel]: Okay. So you didn't remember—~~

~~[Claimant]: No, I don't—~~

~~[Relator's counsel]:— in December?~~

~~[Claimant]: Dino marked it off and I just cut it.~~

~~[Relator's counsel]: So you don't know exactly how wide it was?~~

~~[Claimant]: I'm estimating at 42 inches.~~

~~[Relator's counsel]: Okay. It sounded like you were definite about that. Okay. So you didn't measure that, you really don't know?~~

~~[Claimant]: No, I don't know.~~

~~(Tr. 38-40.)~~

~~{¶56} It can be noted that claimant's estimate of the width of the asphalt cut differs substantially from the SVIU investigator's measurement of the asphalt cut width. As earlier noted, the SVIU investigator found that the trench width was approximately 66 inches, although the width varied. The SVIU investigator calculated, based upon a~~

~~three foot wide bucket, that the asphalt cut allowed for 15 inches on each side of the trench for sloping.~~

~~{¶57} Apparently, the SHO decided to rely upon claimant's estimate of a 42 to 48 inch wide asphalt cut rather than the SVIU investigator's measurements.~~

~~{¶58} Even if it can be argued that claimant's testimony as to the width of the asphalt cut was not successfully impeached on cross-examination, the SHO's own calculation fails to support her finding that there was insufficient distance on each side of the bucket for sloping or benching to meet compliance with Ohio Adm.Code 4123:1-3-13(D)(3).~~

~~{¶59} Using the SHO's own relied upon figures, if the width of the asphalt cut was up to 48 inches, there would be at least six inches on each side of the bucket for sloping or benching ($48" - 36" = 12"$; $12" \div 2 = 6"$).~~

~~{¶60} Clearly, under Ohio Adm.Code 4123:1-3-13(D)(3), if the asphalt cut left six inches on each side of the bucket, there could be sufficient room to meet the rules' requirement that the sloping "not be steeper than a one foot rise to each one half foot horizontal."~~

~~{¶61} In short, the SHO's arithmetic calculation fails to impeach the testimony of Dino Muntz that he benched the trench.~~

~~{¶62} The second reason given by the SHO for discrediting the testimony of Dino Muntz is premised upon claimant's testimony "that the edge of the blacktop came completely to the edge of the trench, and when the wall did cave in, he could look back under the blacktop a foot or so where the wall had caved and see the underside of the~~

asphalt." ~~The SHO's second reason for discrediting the testimony of Dino Muntz is supported by claimant's testimony.~~

~~{¶63} Given that it was within the SHO's fact finding discretion to weigh the testimony of Dino Muntz and claimant, the SHO's second reason does support the finding that relator did not slope or bench the trench and, thus, did not satisfy the alternative sloping provision of Ohio Adm.Code 4123:1-3-13(D)(3).~~

~~Trench Depth~~

~~{¶64} The testimony of claimant and Dino Muntz conflicted as to the depth of the trench at the injury site.~~

~~{¶65} Claimant, who stands five feet, eight inches tall, testified that the trench depth at the location of his injury was about six feet to six feet two inches:~~

~~[Claimant's counsel]: Okay. Now as you were in the trench looking up at Billy, can you tell us where the asphalt was in relation to your top of your head?~~

~~[Claimant]: It was, it was probably about that much higher than your head.~~

~~[Claimant's counsel]: Okay. You're indicating about five or six inches taller—~~

~~[Claimant]: About six—~~

~~[Claimant's counsel]:—than you?~~

~~[Claimant]: Yes, about six feet to six feet two inches.~~

~~[Claimant's counsel]: Okay. And that would have been the area initially by the, by the catch basin where you had the first—~~

~~[Claimant]: No.~~

~~[Claimant's counsel]:—stone poured in?~~

~~[Claimant]: No, that, that would be to where I got hurt.~~

~~(Tr. 20-21.)~~

~~{¶66} The testimony of Dino Muntz indicated a lesser trench depth:~~

~~[Relator's counsel]: * * * [T]o the best of your recollection, how high did the edge of that trench come onto Mr. Kottenbrock?~~

~~Mr. D. Muntz: I would say that it was here to here.~~

~~[Relator's counsel]: Okay, shoulder height?~~

~~Mr. D. Muntz: Yeah.~~

~~[Hearing Officer]: Shoulders to your armpit?~~

~~Mr. D. Muntz: Yeah.~~

~~[Relator's counsel]: Shoulder—~~

~~Mr. D. Muntz: Under the armpit.~~

~~[Hearing Officer]: And that's the top of the trench?~~

~~Mr. D. Muntz: Yes.~~

~~(Tr. 77-78.)~~

~~{¶67} While the SHO could have rendered a determination of the trench depth at the injury point based upon a weighing of the testimonies of claimant and Dino Muntz, the SHO chose not to do so. Instead, the SHO endeavored to determined trench depth at the injury point by starting with the measurement of the SVIU investigator who determined that the "height" of the storm drain as measured from its bottom to the top of the drain cap was five feet. Because the injury point did not occur at the location of the storm drain, it was necessary for the SHO to consider other factors in determining~~

~~whether the trench depth at the injury point was less than or greater than the five foot height of the storm drain.~~

~~{¶68} Claimant testified that the trench was dug well below the depth of the bottom of the catch basin:~~

~~[Claimant's counsel]: Okay. And the trench that you were digging, would it be at the same depth initially, when you would dig out the dirt, as the bottom of the catch basin?~~

~~[Claimant]: No, it, it's almost about eight, probably 10 inches deeper.~~

~~[Claimant's counsel]: And why is it deeper?~~

~~[Claimant]: So you can put four to six inches of stone.~~

~~[Claimant's counsel]: And why do you put the stone in the bottom of the trench?~~

~~[Claimant]: Walk on and also it gives support to the pipe.~~

~~[Claimant's counsel]: Okay. And is that your standard procedure?~~

~~[Claimant]: Yes.~~

~~[Claimant's counsel]: Okay. So you're digging, they're digging this area out, you say it's eight to 10 inches, perhaps, below the bottom of the catch basin—~~

~~[Claimant]: Yes.~~

~~[Claimant's counsel]:— is that right?~~

~~[Claimant]: Yes.~~

~~(Tr. 17-18.)~~

~~{¶69} Also, claimant testified that he was not injured at the catch basin, but at some distance from it:~~

~~[Claimant's counsel]: Okay. And do you know approximately how far you were from the catch basin at the time of the accident?~~

~~[Claimant]: Probably 15 to 20 foot, maybe 25 foot away from the catch basin.~~

~~(Tr. 22.)~~

~~{¶70} Dino Muntz, however, estimated a lesser distance from the catch basin to the injury point:~~

~~[Claimant's counsel]: Now this particular accident, though, happened fairly close to the catch basins you had just installed?~~

~~Mr. D. Muntz: Right.~~

~~[Claimant's counsel]: Do you know how close?~~

~~Mr. D. Muntz: I would say within 10 foot or so.~~

~~(Tr. 100.)~~

~~{¶71} Besides the distance of the injury point to the catch basin, as a factor to consider, there was a "flow grade" from the catch basin to the other end of the trench. Dino Muntz testified that this flow grade was probably set at two and one half inches per one hundred foot:~~

~~[Claimant's counsel]: And you also have to be sure you have a slope?~~

~~Mr. D. Muntz: Right.~~

~~[Claimant's counsel]: So that the water will drain from that catch basin?~~

~~Mr. D. Muntz: Yes.~~

~~[Claimant's counsel]: And drain away from it. And you've indicated it's running to another catch basin; is that right?~~

~~Mr. D. Muntz: Yes.~~

~~[Claimant's counsel]: So that particular catch basin has to be, I believe you've indicated you had a, you thought, two and a half inch drop every hundred feet; is that right?~~

~~Mr. D. Muntz: I think that's what it was set on.~~

~~[Claimant's counsel]: Okay.~~

~~Mr. D. Muntz: I'm not certain, but.~~

~~[Claimant's counsel]: So it would have to be at least two and a half inches deeper?~~

~~Mr. D. Muntz: If it's set on 20 it's two and a half inches of fall in.~~

~~[Claimant's counsel]: A hundred foot.~~

~~Mr. D. Muntz: Hundred foot.~~

~~[Claimant's counsel]: Yes, sir.~~

~~(Tr. 98-99.)~~

~~{¶72} Also to be factored into the SHO's determination was the slope of the parking lot surface between the south catch basin that had already been set by the date of injury and the north catch basin that had not been set at the time of injury. The slope of the parking lot surface was approximately one foot in a little over a hundred feet:~~

~~[Relator's counsel]: — was there a slope on that parking lot?~~

~~Mr. D. Muntz: Yes.~~

~~[Relator's counsel]: Was the slope on that parking lot more than two and a half inches per hundred feet?~~

~~Mr. D. Muntz: Yes.~~

~~[Relator's counsel]: Do you know what the slope of the parking lot was?~~

~~Mr. D. Muntz: No.~~

~~[Relator's counsel]: How do you know it was more than two and a half per hundred feet?~~

~~Mr. D. Muntz: Because the depth in the, this catch basin here and the depth in the next catch basin was over a foot of difference.~~

~~[Relator's counsel]: Okay. And how far were the two catch basins apart, if you know?~~

~~Mr. D. Muntz: I don't know now.~~

~~[Relator's counsel]: More than a hundred feet?~~

~~Mr. D. Muntz: Yes.~~

~~[Relator's counsel]: More than 200 feet?~~

~~Mr. D. Muntz: No.~~

~~[Relator's counsel]: Okay.~~

~~Mr. D. Muntz: Maybe just a little more than a hundred feet.~~

~~[Relator's counsel]: Okay. And there was a difference in a foot for that hundred feet.~~

~~Mr. D. Muntz: Yes.~~

~~(Tr. 86-87.)~~

~~{¶73} Obviously, the "flow grade" of the pipe connecting the two basins would tend to enhance somewhat the estimate of trench depth while the slope of the parking lot surface would lessen the estimate of trench depth.~~

~~{¶74} In light of the above testimonial evidence, the pertinent part of the SHO's order bears rereading:~~

~~The Staff Hearing Officer finds the Injured Worker was working in a trench both grading soil and stone at the time of the injury herein. The Staff Hearing Officer finds the dispute herein rests on the depth of the trench in which the Injured Worker was working. The Staff Hearing Officer finds the most empirical evidence on file are the measurements taken by the Special Investigator for the Industrial Commission which indicate that the height of the catch basin or storm drain, which was installed the day before the Injured Worker's injury, was five feet in depth. However, pursuant to all the testimony on file, beneath that five feet of depth, there is at least four to six or more inches of stone used to level the bottom of the trench and used as a base to set the concrete catch basin on. Therefore, the Staff Hearing Officer finds that the level of the trench, even at the site of the catch basin, was over five feet in depth.~~

~~In addition, the Staff Hearing Officer finds that there was a flow grade from that catch basin down to the other end of the trench. The measurements on this vary in the factual evidence on file. The Employer alleges it was two to two and one-half inches per one hundred feet was the decline grade. However, the Employer also acknowledges that the other catch basin in the parking lot was at least a foot lower than the first as a result of a slope in the lot itself. Therefore, the Staff Hearing Officer finds since the Injured Worker was not at the catch basin site at the time of the injury, but was at least a few feet away from that area following the decline grade of the trench, the Injured Worker was in a trench well over five feet in height.~~

~~{¶75} Given a one foot drop in grade between the south catch basin and the north catch basin within a little over 100 feet, based upon claimant's estimate that his injury could have occurred 25 feet away from the south catch basin, the grade of the parking lot surface would drop approximately three inches (one fourth of a foot) from the south catch basin to the injury point.~~

~~{¶76} Based upon Dino Muntz's estimate that the injury occurred within ten feet or so of the south catch basin, the grade of the parking lot surface would drop only approximately one-tenth of a foot or approximately 1.2 inches.~~

~~{¶77} Clearly, whether the slope of the parking lot surface dropped approximately three inches or approximately 1.2 inches from the south catch basin to the injury point does not offset the added trench depth of five to six inches needed for the stone to be placed at the bottom of the trench.~~

~~{¶78} Therefore, based upon the above analysis, the SHO's determination that claimant "was in a trench well over five feet in height" is supported by the evidence relied upon by the SHO and does not constitute an abuse of discretion.~~

~~{¶79} However, relator adds another factor that it would like this court to consider in reviewing the SHO's determination of trench depth. This factor was not argued by relator to the hearing officer, but was argued in its motion for rehearing. Relator argues that the SHO abused her discretion by failing to consider that the asphalt layer allegedly cannot be viewed as "earth" as that term is used in the definition of "excavation" at Ohio Adm.Code 4123:1-3-13(B)(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.~~

~~{¶80} Also, relator points to Ohio Adm.Code 4123:1-3-13(B)(9) which again provides:~~

~~"Sides," "walls," or "faces" means the vertical or inclined earth surfaces formed as a result of trenching or excavation work.~~

~~{¶81} During the hearing, claimant testified that the asphalt layer was a "[g]ood eight to 10 inches." He also testified that the asphalt layer was "a good foot."~~

~~{¶82} According to relator, the SHO abused her discretion by failing to reduce her determination of trench depth by the thickness of the asphalt layer. Conceivably, by doing so, the trench depth could be less than five feet.~~

~~{¶83} The commission "has the discretion to interpret its own rules; however, where the application of those rules to a unique factual situation gives rise to a patently illogical result, common sense should prevail." *State ex rel. Maghie & Savage, Inc. v. Nobel* (1998), 81 Ohio St.3d 328, 331, quoting *State ex rel. Harris v. Indus. Comm.* (1984), 12 Ohio St.3d 152, 153.~~

~~{¶84} The word "earth" is not directly defined at Ohio Adm.Code 4123:1-3-13. However, its definition as applicable to trenches can be gleaned from some of the other definitions under Ohio Adm.Code 4123:1-3-13(B). For example, Ohio Adm.Code 4123:1-3-13(B)(5) and (14) state:~~

~~(5) "Hard compact soil" means all earth materials not classified as unstable.~~

~~* * *~~

~~(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.~~

~~{¶85} It can be noted that the term "earth material" is used in both of the above definitions.~~

~~{¶86} Perhaps helpful is Webster's Third New International Dictionary, unabridged 1966 (G. & C. Merriam Company 1966), which defines "earth" as "the fragmental material composing part of the surface of the globe."~~

~~{¶87} In any event, in the magistrate's view, in the context of trench digging, the commission's inclusion of the asphalt layer in the measurement of trench depth was not unreasonable nor clearly contrary to any definition or rule found at Ohio Adm.Code 4123:1-3-13. Accordingly, the commission did not abuse its discretion on this matter.~~

~~**Ohio Adm.Code 4123:1-3-13(D)(2) and (3)**~~

~~{¶88} The two safety rules presented at Ohio Adm.Code 4123:1-3-13(D)(2) and (3) state:~~

~~(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 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.~~

~~{¶89} As relator points out, the SHO determined:~~

~~* * * [T]he type of soil being trenched herein was clay but it had not been tested for stability, moisture content, or any other stability factor. * * *~~

~~(Relator's brief, at 14.)~~

~~{¶90} According to relator, the commission cannot enter a finding of a violation of Ohio Adm.Code 4123:1-3-13(D)(2) or (3) in the absence of finding that the side of the trench is either "in unstable or soft material" or is "in hard compact soil." The magistrate agrees.~~

~~{¶91} In the absence of a specific finding as to the type of soil, the commission cannot enter a finding of a violation of Ohio Adm.Code 4123:1-3-13(D)(2) or (D)(3).~~

~~**Ohio Adm.Code 4123:1-3-13(D)(9)**~~

~~{¶92} Ohio Adm.Code 4123:1-3-13(D)(9) provides:~~

~~(9) Portable trench boxes, safety cages or sliding trench shields may be used for the protection of employees in lieu of a shoring system or sloping. Where such trench boxes or shields are used they shall be designed, constructed, and maintained in a manner which will provide protection equal to or greater than the sheeting or shoring required for the trench and shall extend no less than six inches above the vertical part of the trench face.~~

~~{¶93} As relator correctly points out, Ohio Adm.Code 4123:1-3-13(D)(9) provides an "alternative method of protecting against cave ins." (Relator's brief, at 13.) It can be observed that the safety rule states that "[p]ortable trench boxes, safety cages or sliding trench shields may be used for the protection of employees in lieu of a shoring system or sloping." (Emphasis added.)~~

~~{¶94} Here, relator did not elect to use a portable trench box, safety cage or sliding trench shield. Rather, relator took the position at hearing that it used sloping or "benching" as provided by Ohio Adm.Code 4123:1-3-13(D)(3). Consequently, there was no violation of Ohio Adm.Code 4123:1-3-13(D)(9).~~

~~**Ohio Adm.Code 4123:1-3-13(D)(7)**~~

~~{¶95} Ohio Adm.Code 4123:1-3-13(D)(7) provides:~~

~~(7) When bracing or shoring of trenches is required, such bracing and shoring shall be carried along with the excavation.~~

~~{¶96} The SHO's order erroneously suggests that the employer somehow conceded a violation of Ohio Adm.Code 4123:1-3-13(D)(7) as well as other safety rules. This was based on the testimony of Dino Muntz who indicated that relator does not use trench boxes unless the trench depth is six feet or more.~~

~~{¶97} In actuality, there is no real explanation in the order as to how relator violated Ohio Adm.Code 4123:1-3-13(D)(7). Accordingly, the finding of a violation of Ohio Adm.Code 4123:1-3-13(D)(7) is an abuse of discretion.~~

~~**Ohio Adm.Code 4123:1-3-13(C)(2)
and 4123:1-3-13(D)(1)**~~

~~{¶98} Ohio Adm.Code 4123:1-3-13(C)(2) provides:~~

~~(2) 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.~~

~~{¶99} Ohio Adm.Code 4123:1-3-13(D)(1) provides:~~

~~(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").~~

~~{¶100} Based upon the analysis heretofore provided, the commission did not abuse its discretion in finding violations of these two safety rules. The question here is whether this court must issue a writ of mandamus ordering the commission to vacate its findings of violations of the other safety rules that have been determined here to constitute abuses of discretion. The magistrate finds that a writ of mandamus should~~

~~not issue under these circumstances to vacate safety rule violations while allowing two violations to stand.~~

{¶101} Significantly, the commission, through its SHO, assessed the minimum penalty of 15 percent. Thus, reconsideration of the VSSR penalty based upon fewer violations will not reduce the 15 percent penalty.

{¶102} Accordingly, based upon the above analysis, 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).