

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Sunesis Construction,	:	
	:	
Relator,	:	No. 09AP-423
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio	:	
and Timothy Roark, Deceased et al.,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on September 21, 2010

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*Dunlevey, Mahan & Furry, Gary W. Auman, and Douglas S. Jenks*, for relator.

*Richard Cordray*, Attorney General, and *Douglas R. Unver*, for respondent Industrial Commission of Ohio.

*Fox & Fox Co., L.P.A., Bernard C. Fox, Jr., and Karen P. Weisense*, for respondent Timothy Roark, Deceased et al.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Sunesis Construction, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting the application of Timothy Roark ("decedent")

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

{¶2} This case arises out of an incident on July 31, 2005 at a sewer-pipe construction job site in Hamilton County, Ohio. Decedent, who was employed by relator, was working in a trench in an attempt to further advance casing enclosing a sewer pipe. Decedent was killed when the sides of the trench caved in. Decedent's cause of death was officially determined to be traumatic asphyxia resulting from a crush injury.

{¶3} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, the matter was referred to a magistrate of this court. On May 12, 2010, the magistrate rendered a decision, including findings of fact and conclusions of law, which is appended hereto. Therein, the magistrate concluded that the specific safety rules pertaining to trenches and excavations both applied. The magistrate further concluded that the commission's order failed to comply with *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, with respect to five of the six specific safety rules found by the commission to have been violated, and that the commission's order regarding the remaining violation was unsupported by some evidence. Accordingly, the magistrate recommended that this court grant a writ of mandamus ordering the commission to vacate its order granting the VSSR application, and to enter a new order adjudicating the matter in a manner consistent with the magistrate's decision.

{¶4} No party has filed objections to the magistrate's conclusions of law regarding the mutual applicability of the specific safety rules pertaining to trenches and excavations. Similarly, no party has filed objections to the magistrate's findings of fact. However, both decedent's estate and the commission have filed objections to the

magistrate's conclusions of law regarding *Noll* compliance as to five of the violations and the lack of evidentiary support as to the remaining violation.

{¶5} In order to establish a VSSR, a claimant must establish that: (1) an applicable and specific safety requirement existed at the time of the accident; (2) the employer violated the requirement; and (3) the violation proximately caused the injury. *State ex rel. Lange v. Indus. Comm.*, 111 Ohio St.3d 563, 2006-Ohio-6211, ¶14. Because a VSSR penalizes the employer, specific safety requirements "must be strictly construed, and all reasonable doubts concerning the interpretation of the safety standard are to be construed against its applicability to the employer." *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170, 172.

{¶6} "In any order of the Industrial Commission granting or denying benefits to a claimant, the commission must specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision." *Noll* at syllabus. "The purpose for requiring such evidentiary identification and explanation is so that 'meaningful review can be accomplished.'" *State ex rel. Buttolph v. Gen. Motors Corp.*, 79 Ohio St.3d 73, 75, 1997-Ohio-34, quoting *Noll* at 206. A reviewing court will not "search the commission's file for 'some evidence' to support an order of the commission not otherwise specified as a basis for its decision." *Noll* at 204, quoting *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 483. (Emphasis omitted.) *Noll* applies to VSSR review in mandamus. *State ex rel. Donohoe v. Indus. Comm.*, 10th Dist. No. 08AP-201, 2010-Ohio-1317, ¶18.

{¶7} The objections filed by both decedent's estate and the commission contend that the order of the staff hearing officer ("SHO") complies with *Noll* because the SHO

stated the evidence upon which she relied and sufficiently explained her reasoning. We disagree. As is readily apparent from a review of the SHO's order, the SHO's findings pertaining to five of the six alleged violations, Ohio Adm.Code 4123:1-3-13(C)(2), (D)(1) and (2), and (E)(1) and (2), essentially recite the regulation without explaining specifically how relator violated the regulation, how the violation proximately caused decedent's death, and what evidence the SHO relied upon in making such finding. Regarding the remaining violation, Ohio Adm.Code 4123:1-3-13(D)(9), the evidence relied upon by the SHO is insufficient to establish the violation and proximate cause. Thus, we agree with the magistrate's determination that the SHO's order does not comply with the requirements of *NoII* with regard to five of the six violations, and lacks evidentiary support with regard to the remaining violation.

{¶8} In addition, both decedent's estate and the commission point to additional testimony presented at the hearing and argue that it constitutes "some evidence" to support the SHO's findings. However, as noted above, this court need not search the commission's file for "some evidence" to support its findings that is not otherwise specified as a basis for the commission's decision. While this evidence may well support the SHO's findings, the SHO did not specify this evidence as a basis for those findings.

{¶9} Upon review of the magistrate's decision, an independent review of the record, and due consideration of the objections filed by both decedent's estate and the commission, we find that the magistrate has properly determined the pertinent facts and applied the appropriate law to those facts. However, we observe that the magistrate's conclusion in paragraph 68, *infra*, contains a typographical error, in that it states that the commission abused its discretion in finding a violation of Ohio Adm.Code 4123:1-3-

13(D)(2). The magistrate's decision is clearly meant to state that the commission abused its discretion in finding a violation of Ohio Adm.Code 4123:1-3-13(D)(9). Thus, we modify the magistrate's decision to correct this typographical error and adopt the balance of the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶10} Accordingly, the objections filed by decedent's estate and the commission are overruled, and the requested writ of mandamus is hereby granted. We issue a writ of mandamus ordering the commission to vacate its order granting the VSSR application and to enter an order that adjudicates the matter in a manner in accordance with law and consistent with this decision.

*Objections overruled;  
writ of mandamus granted.*

BRYANT and KLATT, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Sunesis Construction,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-423
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Timothy Roark, Deceased et al.,	:	
	:	
Respondents.	:	

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MAGISTRATE'S DECISION

Rendered on May 12, 2010

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*Dunlevey, Mahan & Furry, Gary W. Auman, and Douglas S. Jenks, for relator.*

*Richard Cordray, Attorney General, and Douglas R. Unver, for respondent Industrial Commission of Ohio.*

*Fox & Fox Co., L.P.A., Bernard C. Fox, Jr., and Karen P. Weisensel, for respondent Timothy Roark, Deceased et al.*

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IN MANDAMUS

{¶11} In this original action, relator, Sunesis Construction, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the application of Timothy Roark ("decedent") for an additional award for

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

Findings of Fact:

{¶12} 1. On July 31, 2005, decedent was killed in a trench while working for relator.

{¶13} 2. In its brief, relator presents what is captioned "Statement of the Case and Facts." See Loc.R. 12(J)(3) pertaining to briefs filed in an original action. Without adopting all of relator's factual assertions as true, the magistrate, nevertheless, finds relator's version of the facts relating to the trench site to be useful to an understanding of this action:

\* \* \* At that time, the Claimant, Timothy Roark worked for Sunesis at a sewer-pipe jobsite on Galbraith Road in Hamilton County, Ohio. \* \* \* During the previous week, Sunesis had dug a trench to lay a four-foot diameter pipe casing through which they would eventually run a sewer line. \* \* \* While attempting to push the casing through the ground from an existing trench, they hit an obstruction requiring Sunesis to excavate the obstruction and clear the path for the casing. \* \* \* While digging, Sunesis discovered a large piece of concrete, approximately fourteen feet long and ten feet deep. \* \* \* Unable to push the casing through, Sunesis dug a path for the casing along side the concrete. \* \* \*

One side of the resulting trench consisted of the concrete obstruction and solid shale rock. \* \* \* The shale rock extended from the trench floor, eight feet up to where it met the concrete obstruction. \* \* \* The other side of the trench, approximately six feet across from the concrete and shale, was soil. \* \* \* The trench was approximately eighteen to twenty feet deep. \* \* \* Sunesis inserted a properly certified ten-foot tall trench box that extended from ground level, down approximately ten feet to where it hit the concrete obstruction. \* \* \* Sunesis could not sink the trench box lower due to the obstruction. \* \* \* Sunesis did not need to shore the concrete side of the trench under the trench box because

it was solid concrete and shale rock. \* \* \* Sunesis shored the other side of the trench by installing steel road plates from the bottom of the trench box to the trench floor. \* \* \*

The accident occurred at the end of the trench where the casing had been pushed through from the other trench. \* \* \* The four-foot diameter casing extended into the new trench less than approximately five feet. \* \* \* It rested on the trench floor. \* \* \* Anthony Roark, the Claimant's brother \* \* \* had sloped back that end of the trench above the casing to roughly forty-five degrees to prevent a collapse. \* \* \* There was also a steel plate inserted at that end of the trench above the casing. \* \* \*

On July 31, 2005, Roark's job was to clean out the casing which had collected material as it was pushed through the ground. \* \* \* He was told to work from inside the casing and not in the trench itself. \* \* \* He decided on his own, however, to leave the safety of the casing and use a cutting torch to remove a portion of the casing that had bent when it hit the concrete. \* \* \*

Before walking away to get some safety glasses, Roark's co-worker and foreman, Leon Trisdale, ordered him to stay *inside* the casing. \* \* \* When Trisdale returned with the glasses a few moments later, he discovered Roark *outside* the casing nearly covered in debris. \* \* \* Debris \* \* \* pushed Roark into the edge of the casing killing him. \* \* \*

(Emphasis sic.)

{¶14} 3. The Ohio Bureau of Workers' Compensation ("bureau") allowed the death claim (No. 05-849445) and also awarded benefits to decedent's dependent children.

{¶15} 4. On January 29, 2007, a VSSR application was filed on behalf of decedent and his dependents.

{¶16} 5. The VSSR application prompted an investigation by the bureau's Safety Violations Investigation Unit ("SVIU").



{¶17} 6. In the year 2006, Lowell Roark, the administrator of decedent's estate, filed an intentional tort action in the Butler County Court of Common Pleas. That action generated multiple deposition transcripts.

{¶18} 7. The SVIU special investigator obtained copies of the deposition transcripts from the intentional tort action. He also obtained photographs of the accident scene taken by the fire department of the Deer Park Silverton Joint Fire District.

{¶19} 8. On July 11, 2007, the SVIU investigator issued his report of investigation. The deposition transcripts and fire department photographs were made exhibits to the report.

{¶20} 9. Also an exhibit to the SVIU report is the autopsy report of the Hamilton County Coroner's office. The autopsy report determined:

**Diagnoses:**

1. Blunt force trauma to the head and neck with:
  - a) Basilar skull fracture
  - b) bilateral subarachnoid hemorrhage
  - c) cerebral edema
  - d) fracture, mandible, comminuted.
2. Asphxia, traumatic.
3. Pulmonary edema.
4. Abrasions, contusions and lacerations of integument.

**Cause of death:** Traumatic asphyxia due to crush injury.

**Contributory  
cause of death:** Skull fracture

**Manner of death:** Accident.

(Emphasis sic.)

{¶21} 10. Also an exhibit to SVIU report is a toxicology report prepared by the Hamilton County Crime Laboratory. The report indicates that decedent tested positive for "Cocaine/Metabolites."

{¶22} 11. Also an exhibit to the SVIU report is a "Death Report" from the Deer Creek Police Department dated July 31, 2005. The police report states:

\* \* \* At approximately 9:50 AM, the ditch experienced a cave in, trapping Mr. Roark up to the middle of his chest with mud, dirt, clay etc. Attempts to pull Mr. Roark from the ditch before he expired were unsuccessful.

{¶23} 12. On June 10, 2008, the VSSR application was heard by a commission staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record. Three witnesses testified at the hearing. Chuck Renken, relator's "director of field support services" was called to testify as on cross-examination by decedent's counsel. The record before this court contains 78 typewritten pages of Mr. Renken's testimony under examination by counsel for decedent and relator.

{¶24} 13. Jeffrey S. Darrah, relator's vice president, was called to testify under direct examination by relator's counsel. Mr. Darrah has a bachelor's degree in civil engineering, and he is a registered professional engineer. The record before this court contains 40 typewritten pages of Mr. Darrah's hearing testimony under examination by counsel for relator and decedent.

{¶25} 14. The third witness called to testify at the June 10, 2008 hearing was Wayne Haddix, who is a self-employed expert with a company called "Road to Safety." Mr. Haddix was formerly employed with the Division of Safety and Hygiene of the Industrial Commission of Ohio as an "accident prevention specialist." In that job, he

performed inspections of construction sites, including excavations. The record before this court contains 17 typewritten pages of Mr. Haddix's testimony under examination by counsel for relator and decedent.

{¶26} 15. Following the June 10, 2008 hearing, the SHO issued an order granting the VSSR application. The June 10, 2008 order explains:

It is the finding of the Staff Hearing Officer that on 07/31/2005 the decedent was employed by the employer as a construction laborer. It is further the finding of the Staff Hearing Officer that the decedent sustained a fatal injury in the course of and arising out of his employment when the decedent suffered blunt force trauma to the head and neck resulting in skull fractures and hemorrhage, pulmonary edema and asphyxia as the result of a cave in while he was working in a trench/excavation.

It is further the finding of the Staff Hearing Officer that the decedent's death was the result of the failure of the employer to properly brace, shore or slope the exposed faces of the trench/excavation in such a manner that a cave in could not occur.

The Staff Hearing Officer finds that on 07/31/2005 the decedent was working alone at the bottom of a trench. The cave in which resulted in the decedent's death was not witnessed. The injured worker was found at the bottom of a trench covered in dirt to the approximate height of his shoulders and pressed against a pipe that was being run through the bottom of the trench. The coroner's report indicates that the injured worker died from the sequelae of blunt force trauma to the head and neck and asphyxiation.

Counsel for the decedent has alleged that the employer is in violation of Ohio Administrative Code Sections 4123:1-3-13(C)(1) through (5), 4123:1-3-13(D)(1) through (10) and 4123:1-3-13(E)(1) through (9). The Staff Hearing officer finds that there is no evidence that the employer violated Administrative Code Sections 4123:1-3-13(C)(1)(3)(5). Section (C)(1) concerns contacting utilities companies before excavation. The Staff Hearing Officer finds that no evidence was submitted on this issue and no evidence indicates that

contacting the utilities companies was relevant to the industrial injury. Section (C)(3) relates to undercutting. No evidence or testimony was presented concerning undercutting. Section (C)(5) refers to wells, pits and shafts. No wells, pits or shafts were involved in the incident.

The Staff Hearing Officer further finds subsections (D)(3), (5), (6), (7), (8) and (10) do not apply. Section (D)(3) refers to hard compact soil. The Staff Hearing Officer finds that the incident did not involve hard compact soil. Section (D)(5) refers to wooden trench shoring. The Staff Hearing Officer finds that wooden shoring was not used in the trench in question. Section (D)(6) refers to the means of exit from the trench/excavation. The Staff Hearing Officer finds that there is no evidence that the means of exit from the trench or the absence thereof was relevant in this incident. Section (D)(7) requires that bracing or shoring be carried along with the excavation. The Staff Hearing Officer finds that the bracing/shoring was in the excavation. The problem was that the bracing/shoring was inadequate. Section (D)(8) refers to cross braces and trench jacks. The Staff Hearing Officer finds that no evidence or testimony was presented concerning the use of cross braces or trench jacks. Section (D)(10) refers to the removal of trench supports. The Staff Hearing Officer finds that no trench supports were being removed at the time of the incident. The Staff Hearing Officer therefore finds that this section and all sections listed above are not relevant to this incident.

The Staff Hearing Officer finds that the employer has violated the remainder of the cited specific safety requirements. The Staff Hearing Officer finds pursuant to Section (C)(2) employers are required to take precautions by way of shoring and bracing to prevent slides or cave ins where trenches or excavation are made in locations adjacent to back filled 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 of vibration. The Staff Hearing Officer finds that the trench in which the decedent was working was close to another trench and was close to street traffic. The Staff Hearing Officer further finds that machinery was operated by the employer close to the excavation. The Staff Hearing Officer further finds that Section (D)(1) requires that where employees are working in unstable ground more than five

feet deep the exposed faces of the trenches must be laid back to a stable slope or some equivalent means of protection shall be provided where employees may be exposed to moving ground or cave ins.

(D)(2) provides that the 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 in them. Section (D)(9) provides that portable trench boxes, safety cages or sliding trench shields may be used for the protection of employees in lieu of shoring system or sloping. This section further provides that 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. Based upon the testimony of Mr. Renken, the Staff Hearing Officer finds that the trench box did not extend at least six inches above the vertical part of the trench face.

Section (E) refers to excavations. Section (E)(1) provides that 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 ground or some other equivalent means. The Staff Hearing Officer further finds that Section (E)(2) requires that the supporting systems for excavations shall be designed by a qualified person and shall meet accepted engineering requirements. Based upon the testimony of Mr. Renken and Mr. Derrah [sic] the Staff Hearing Officer finds that no engineer or qualified person designed the trench box that was in place at the time of Mr. Roark's death. The Staff Hearing Officer therefore finds that the supporting system in use on 07/31/2005 did not meet accepted engineering requirements.

The Staff Hearing Officer further finds that there is insufficient evidence to demonstrate if Section (E)(5), (6), (7) and (8) apply.

The Staff Hearing Officer finds that it is the failure of the employer to properly support the trench in which Mr. Roark was working by constructing a shoring system designed by an engineer or a qualified person, sufficient to guard against the dangers of unstable soil which resulted in the death of

Mr. Roark. It is therefore ordered that an additional award of compensation be granted to the dependents of the decedent in the amount of 40% of the maximum weekly rate under Rule of "STATE EX REL ENGLE V. INDUSTRIAL COMMISSION", 142 OHIO ST. 425.

{¶27} 16. Relator moved for rehearing pursuant to Ohio Adm.Code 4123-3-20(E).

{¶28} 17. On November 21, 2008, another SHO mailed an order denying relator's

motion for rehearing:

It is hereby ordered that the motion for rehearing filed 10/16/2008 be denied. The Employer has not submitted any new and relevant evidence nor shown that the order of 06/10/2008 was based on an obvious mistake of fact or on a clear mistake of law.

The order from the 06/10/2008 hearing, mailed 09/17/2008, found violations of both Section OAC 4121:1-3-13(D) dealing with trenches, and Section (E) dealing with excavations. These terms "trench" and "excavation" are defined in OAC 4121:1-3-13(B)(4) and (11). This rehearing request order is not stating that the terms are totally exclusive of each other. Even if they are viewed as totally exclusive of each other, considering the violations found in the order from the 06/10/2008 hearing, liability would still be found. Some of the evidence may be in dispute, but there are no obvious mistakes of fact shown.

{¶29} 18. On December 5, 2008, relator moved for so-called reconsideration. On January 8, 2009, the three-member commission mailed an order denying reconsideration.

{¶30} 19. On April 29, 2009, relator, Sunesis Construction, filed this mandamus action.

#### Conclusions of Law:

{¶31} Two main issues are presented: (1) whether the specific safety rules set forth at Ohio Adm.Code 4123:1-3-13(D) pertaining to trenches and the rules set forth at Ohio Adm.Code 4123:1-3-13(E) pertaining to excavations are mutually exclusive with

regards to their applicability, and (2) whether the commission's determinations comply with *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, as to each of the six specific safety rules that the commission found were violated.

{¶32} The magistrate finds: (1) the specific safety rules pertaining to trenches and excavations are not mutually exclusive, and (2) the commission's order is not *Noll* compliant with respect to all of the six specific safety rules found to have been violated.

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

{¶34} Ohio Adm.Code 4123:1-3 is captioned "Construction Safety."

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

{¶36} Thereunder, Ohio Adm.Code 4123:1-3-13(B) provides definitions:

(1) "Accepted engineering requirements (or practices)" means those requirements or practices which are compatible with standards required by a registered architect, a registered professional engineer, or other duly licensed or recognized authority.

\* \* \*

(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.

\* \* \*

(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.

(12) "Trench boxes (safety cages, trench shields)" means a shoring system composed of steel plates and bracing welded or bolted together, which support the walls of a trench from the ground level to the trench bottom and which can be moved along as work progresses.

{¶37} 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.

{¶38} 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. \* \* \*

(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. \* \* \*

\* \* \*

(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.

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

Two 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. \* \* \*

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

{¶40} It is well-settled that a VSSR award is deemed a penalty to the employer subject to the rule of strict construction with all reasonable doubts concerning the interpretation of the safety standard to be construed against the applicability of the standard to the employer. *State ex rel. Watson v. Indus. Comm.* (1986), 29 Ohio App.3d 354; *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170.

{¶41} It is also firmly established that the determination of disputed factual situations as well as the interpretation of a specific safety requirement is within the final jurisdiction of the commission, and subject to correction in mandamus only upon a showing of an abuse of discretion. *State ex rel. Roberts v. Indus. Comm.* (1984), 10 Ohio St.3d 1; *State ex rel. Allied Wheel Products, Inc. v. Indus. Comm.* (1956), 166 Ohio St. 47; *State ex rel. Volker v. Indus. Comm.* (1996), 75 Ohio St.3d 466.

{¶42} Of course, the commission's authority to interpret its own safety rules is not unlimited. Strict construction does require that the commission's interpretation be reasonable. *State ex rel. Martin Painting & Coating Co. v. Indus. Comm.* (1997), 78 Ohio St.3d 333, 342. The commission may not effectively rewrite its own safety rules when it interprets them. *State ex rel. Lamp v. J.A. Croson Co.* (1996), 75 Ohio St.3d 77, 81.

{¶43} Analysis begins with the observation that there is no language in Ohio Adm.Code 4123:1-3-13 indicating that the rules for trenches and the rules for excavations are mutually exclusive. In fact, the definitions indicate quite the opposite—that a trench is an excavation, but an excavation need not be a trench. Ohio Adm.Code 4123:1-3-13(B)(4) states "an excavation may become a trench." Ohio Adm.Code 4123:1-3-13(B)(11) states that a trench means a narrow excavation.

{¶44} Under the above analysis, the trench at issue is also an excavation and thus, the rules for trenches and the rules for excavations can be mutually applicable.

{¶45} Here, deference must be accorded the commission in its interpretation of its rules for trenches and excavations. Moreover, the rule of strict construction does not favor relator's restricted interpretation of the rules. The commission's interpretation of its rules is not unreasonable and does not lead to a patently illogical result. *Lamp*.

{¶46} As earlier noted, the second issue is whether the commission's determinations comply with *Noll* as to each of the six specific safety rules that the commission found were violated.

{¶47} The syllabus of *Noll* states:

In any order of the Industrial Commission granting or denying benefits to a claimant, the commission must

specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision.

{¶48} It is well-settled that *Noll* applies to VSSR review in mandamus. *State ex rel. Donohoe v. Indus. Comm.*, 10th Dist. No. 08AP-201, 2010-Ohio-1317, ¶18.

{¶49} To successfully assert a VSSR, a claimant must establish that the employer's violation of a specific safety requirement proximately caused his or her injury. *State ex rel. Bayless v. Indus. Comm.* (1990), 50 Ohio St.3d 148, 149.

{¶50} The commission, through its SHO, found six violations of specific safety rules applicable to trenches and excavations. Those six rules are as follows:

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

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

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

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

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

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

{¶51} The magistrate shall address each of the six rules in light of what the SHO's order of June 10, 2008 states regarding the violations and proximate cause.

{¶52} With respect to Ohio Adm.Code 4123:1-3-13(C)(2), the SHO's order offers the following explanation:

\* \* \* The Staff Hearing Officer finds pursuant to Section (C)(2) employers are required to take precautions by way of shoring and bracing to prevent slides or cave ins where trenches or excavation are made in locations adjacent to back filled 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 of vibration. The Staff Hearing Officer finds that the

trench in which the decedent was working was close to another trench and was close to street traffic. The Staff Hearing Officer further finds that machinery was operated by the employer close to the excavation. \* \* \*

{¶53} Clearly, that the trench at issue was close to another trench and was close to street traffic and that machinery was operated by the employer close to the excavation cannot, by itself, be held to be a violation. A violation of the rule can occur only if it is found that the employer failed to take "additional precautions by way of shoring and bracing." The SHO fails to state specifically what type of shoring and bracing relator failed to do with respect to Ohio Adm.Code 4123:1-3-13(C)(2).

{¶54} It should be noted that, in the paragraph of the SHO's order immediately above the one that addresses Ohio Adm.Code 4123:1-3-13(C)(2), the order simply states "the problem was that the bracing/shoring was inadequate." But the finding of inadequate bracing/shoring is unsupported by citation to evidence relied upon and an explanation of the reasoning behind the findings in violation of *Noll*.

{¶55} While no one disputes the commission's finding that the trench at issue was close to another trench and to street traffic and that machinery was operated close to the excavation, the commission failed to render appropriate findings regarding the key issues in violation of *Noll*. That is, the commission failed to explain the violation and proximate cause.

{¶56} Clearly, the commission abused its discretion in finding a violation of Ohio Adm.Code 4123:1-3-13(C)(2) and, at best, inferring proximate cause.

{¶57} With respect to Ohio Adm.Code 4123:1-3-13(D)(1), the SHO's order offers the following explanation:

\* \* \* The Staff Hearing Officer further finds that Section (D)(1) requires that where employees are working in unstable ground more than five feet deep the exposed faces of the trenches must be laid back to a stable slope or some equivalent means of protection shall be provided where employees may be exposed to moving ground or cave ins.  
\* \* \*

{¶58} The above passage from the SHO's order merely explains what the safety rule requires. There is no explanation as to how relator violated the rule supported by relied-upon evidence and reasoning. Moreover, proximate cause is not addressed.

{¶59} Clearly, the commission abused its discretion in finding a violation of Ohio Adm.Code 4123:1-3-13(D)(1) and, at best, inferring proximate cause.

{¶60} With respect to Ohio Adm.Code 4123:1-3-13(D)(2), the SHO's order offers the following explanation:

(D)(2) provides that the 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 in them. \* \* \*

{¶61} The above passage of the SHO's order merely explains what the safety rule requires. Clearly, as with the previous rule, the commission abused its discretion in finding a violation of Ohio Adm.Code 4123:1-3-13(D)(2) and, at best, inferring proximate cause.

{¶62} With respect to Ohio Adm.Code 4123:1-3-13(D)(9), the SHO's order offers the following explanation:

\* \* \* Section (D)(9) provides that portable trench boxes, safety cages or sliding trench shields may be used for the protection of employees in lieu of shoring system or sloping. This section further provides that 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. Based upon the testimony of Mr. Renken, the Staff Hearing Officer finds that the trench box did not extend at least six inches above the vertical part of the trench face.

{¶63} During cross-examination by claimant's counsel, Mr. Renken testified:

Q. Okay. Did the trench box, the portable trench box, extend at least twelve inches above the lip of the vertical face of the trench?

A. I don't honestly know that. I – based on the pictures I've seen, I believe it was above it – the – the ground level, yes.

Q. Okay.

A. I don't know if it was twelve inches or not.

(Tr. 24.)

{¶64} Mr. Renken did not testify that the trench box failed to extend no less than six inches above the vertical part of the trench face. Mr. Renken did testify that he believed the trench box extended above the vertical part of the trench face, but he did not know whether it extended 12 inches above.

{¶65} Ohio Adm.Code 4123:1-3-13(D)(9) requires that the trench box extend no less than six inches above the vertical part of the trench face. Counsel's question was obviously not designed to elicit relevant information from the witness. Clearly, Mr. Renken's testimony does not support the SHO's finding that the trench box did not extend at least six inches above the vertical part of the trench face. Accordingly, the SHO's finding is unsupported by some evidence upon which the SHO relied.

{¶66} But even if, for the sake of argument, we accept the SHO's finding that the trench box did not extend at least six inches above the vertical part of the trench face, and thus the safety rule was violated, the SHO's order fails to address proximate cause.

{¶67} Decedent did not die inside the trench box. Thus, there is no evidence in the record upon which the commission could determine that violation of the six-inch requirement was the proximate cause of death.

{¶68} Clearly, the commission abused its discretion in finding a violation of Ohio Adm.Code 4123:1-3-13(D)(2) because the finding is not supported by some evidence. Moreover, even if the rule was violated, the violation cannot be the proximate cause of death.

{¶69} With respect to Ohio Adm.Code 4123:1-3-13(E)(1), the SHO's order offers the following explanation:

Section (E) refers to excavations. Section (E)(1) provides that 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 ground or some other equivalent means. \* \* \*

{¶70} The above passage from the SHO's order merely explains what the safety rule requires. There is no explanation as to how relator violated the rule supported by relied upon evidence and reasoning. Moreover, proximate cause is not addressed.

{¶71} Clearly, the commission abused its discretion in finding a violation of Ohio Adm.Code 4123:1-3-13(E)(1) and, at best, inferring proximate cause.

{¶72} The sixth and last specific safety rule relator was found to have violated is Ohio Adm.Code 4123:1-3-13(E)(2). The SHO's order offers the following explanation:

\* \* \* The Staff Hearing Officer further finds that Section (E)(2) requires that the supporting systems for excavations shall be designed by a qualified person and shall meet accepted engineering requirements. Based upon the testimony of Mr. Renken and Mr. Derrah [sic] the Staff Hearing Officer finds that no engineer or qualified person designed the trench box that was in place at the time of Mr. Roark's death. The Staff Hearing Officer therefore finds that the supporting system in use on 07/31/2005 did not meet accepted engineering requirements.

\* \* \*

The Staff Hearing Officer finds that it is the failure of the employer to properly support the trench in which Mr. Roark was working by constructing a shoring system designed by an engineer or a qualified person, sufficient to guard against the dangers of unstable soil which resulted in the death of Mr. Roark. \* \* \*

{¶73} Whether or not a "qualified person" designed the trench box is irrelevant. Decedent was not killed in the trench box. Although Mr. Renken testified that the trench box was certified by its manufacturer to be used to a certain depth, there is no evidence in the record showing that the trench box proximately caused decedent's death.

{¶74} The SHO's order suggests that Ohio Adm.Code 4123:1-3-13(E)(2) was violated because the bracing/shoring system was designed by foreman Anthony Roark who is neither an engineer nor allegedly a "qualified person" within the meaning of the rule.

{¶75} Ohio Adm.Code 4123:1-3-13(B) does not offer a definition of "qualified person." Presumably, a "qualified person" need not actually be a registered architect or registered professional engineer, as long as the person is properly trained to apply accepted engineering requirements applicable to trenches and excavations.



{¶76} Presumably, the SHO determined that foreman Anthony Roark was not a qualified person based upon the testimony of Mr. Renken and Mr. Darrah. However, it is not the duty of this court to search the lengthy hearing transcripts and provide reasoning based upon those transcripts to support the SHO's position that Anthony Roark was not a "qualified person" under the rule. That duty remains with the commission.

{¶77} Moreover, even if the commission were to appropriately determine that Anthony Roark was not a "qualified person," the commission must also address proximate cause.

{¶78} In order to enter a VSSR award, the commission must explain how the lack of a qualified person to design the shoring, etc. became the proximate cause of decedent's death.

{¶79} Clearly, the commission abused its discretion in finding that relator violated Ohio Adm.Code 4123:1-3-13(E)(2) and, by, at best, inferring proximate cause.

{¶80} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order granting the VSSR award, and, in a manner consistent with this magistrate's decision, enter a new order either granting or denying a VSSR award.

*/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).