[Cite as *State ex rel. Johnson Controls, Inc. v. Montez*, 2009-Ohio-4488.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Johnson Controls, Inc.,	:	
Relator,	:	No. 09AP-98
v.	:	(REGULAR CALENDAR)
Rolando Montez and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on September 1, 2009

Bugbee & Conkle, LLP, and *Mark S. Barnes*, for relator.

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

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

FRENCH, P.J.

{¶1} Relator, Johnson Controls, Inc., filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order, which granted wage-loss

compensation to respondent Rolando Montez ("claimant"), and ordering the commission to deny claimant's application for wage-loss compensation.

{¶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. Relator objects to the magistrate's decision and contends that the magistrate "upheld the Commission's wage loss award in the absence of evidence [claimant] conducted a good faith job search for suitable employment, which is comparably paying work." We disagree.

{¶3} Relator argues that claimant failed to show that he looked for comparably paying work because he testified that he had no idea what the rate of pay would be when he contacted employers, largely because he made those contacts through cold calls without any knowledge of what jobs might be available. We agree with the magistrate, however, that the commission did not abuse its discretion in concluding that claimant met his burden of proof. While claimant searched primarily for custodial work, he did so because that was the type of work he had done previously, and he knew he could perform the work within his restrictions. We note, too, that claimant applied for other types of positions, including forklift operator, driver, and security guard. He conducted what appeared to be a systematic job search. He focused on particular geographic areas and applied for positions at a number of businesses within those areas. This case is distinguishable from *State ex rel. Bowen v. Do It Best Corp.*, 101 Ohio St.3d 392, 2004-Ohio-1670, in which the claimant had failed to identify the

positions sought. Here, claimant's wage-loss statement contains detailed information about each prospective employer contacted and identifies the type of position sought. Claimant also testified that he used the Department of Job and Family Services, an agency that could direct him to any available jobs with comparable pay.

{¶4} We also agree with the magistrate's conclusion and reasoning concerning a misstatement by the staff hearing officer ("SHO"). The SHO stated: "The injured worker is several months outside the initial time period for looking only for comparably paying work. At this stage, the injured worker is required, pursuant to O.A.C. 4125-1-01, to look for any type of work available to him and to mitigate his wage loss." As the magistrate acknowledged, the first sentence is a misstatement because, while claimant was beyond the time period for looking only for suitable employment, a good-faith effort to find suitable employment with comparable pay was still required. See Ohio Adm.Code 4125-1-01(D)(1)(c). We agree with the magistrate that the second sentence is correct and, combined with the SHO's discussion of the relevant factors, indicates the SHO's understanding that claimant was required to look for any, not just "suitable," employment and also to continue his search for work with comparable pay. The SHO expressly found that claimant "was in essence looking for comparable and suitable work." This case is distinguishable, then, from *State ex rel. AFG Industries, Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-383, 2004-Ohio-1732, ¶13, in which the court concluded that the commission had not determined whether the claimant searched for comparably paying work.

{¶5} We also address relator's concern regarding the magistrate's discussion of claimant's acceptance of a job at Ideal Setech,[1] which operates a warehouse and does shipping and receiving for General Motors. Claimant was laid off from Knight's Facilities in January 2008 and did not get the job at Ideal Setech until June 2008. In the meantime, he had begun working at Kellermeyer on February 23, 2008, and worked 35-40 hours per week. When asked at the August 22, 2008 hearing how he got the job at Ideal Setech, claimant said that, about three weeks before his lay-off at Knight's Facilities, he learned through a co-worker that Ideal Setech might be hiring. He and four co-workers put in their resumes. At that time, only a supervisor and another worker worked at the new warehouse. Claimant said that he and his co-workers "kept in touch" with the supervisor, who eventually hired claimant in June 2008. (8/22/08 Tr. 10.)

{¶6} Relator criticizes the following statements by the magistrate: "The evidence indicates that, while he was working for Kellermeyer Business Services, claimant learned that a better paying job would be available at Ideal [Setech]; however, he was not sure when that job would begin. As soon as the opening was available, claimant began his job there making $11.65 per hour." We agree with relator that the magistrate's finding is not entirely accurate, and we delete those two sentences from the magistrate's decision. Instead, we insert the following: "While working for Knight's Facilities in December 2007, claimant learned that Ideal Setech might be hiring. He and several co-workers put in their resumes and kept in touch with a supervisor at the

[1] The record contains numerous spellings of this company's name. Claimant's paycheck stubs confirm that the correct spelling is "Ideal Setech." We will change the magistrate's decision accordingly.

company. Ideal Setech hired claimant on June 23, 2008, for a job making $11.65 per hour." This does not change the outcome of the magistrate's decision, however. Claimant's contact with Ideal Setech over a period of several months was some evidence of his continued efforts to mitigate his wage loss.

{¶7} Finally, we agree with the commission that relator's objection focuses on only a few of the factors the commission may consider when determining whether a claimant has made a good-faith effort to find suitable employment with comparable pay. As the magistrate detailed, Ohio Adm.Code 4125-1-01(D)(1)(c) requires the commission to consider a host of quantitative and qualitative factors, including a claimant's skills, employment history, and educational background, the number, quality, and consistency of the claimant's contacts with prospective employers, the claimant's use of employment services, labor market conditions, and the claimant's physical capabilities. Having weighed all of these factors, the commission did not abuse its discretion in determining that claimant had made a good-faith effort to search for suitable employment with comparable pay. Therefore, we overrule relator's objection.

{¶8} Having reviewed this matter independently, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it, except as we have expressly stated in this decision. Accordingly, we deny the requested writ.

Objection overruled,
writ of mandamus denied.

BROWN and SADLER, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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Relator,	:	
v.	:	No. 09AP-98
Rolando Montez and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on May 22, 2009

Bugbee & Conkle, LLP, and *Mark S. Barnes*, for relator.

Dorf & Kalniz Ltd., and *Steven M. Kalniz*, for respondent Rolando Montez.

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

IN MANDAMUS

{¶9} Relator, Johnson Controls, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of

Ohio ("commission") to vacate its order which granted wage loss compensation to respondent Rolando Montez ("claimant"), and ordering the commission to deny claimant's application for wage loss compensation.

Findings of Fact:

{¶10} 1. Claimant sustained a work-related injury on October 27, 2003, and his claim has been allowed for "right shoulder strain; right shoulder rotator cuff tear; right shoulder slap tear; right shoulder impingement syndrome; adjustment disorder with depressed mood."

{¶11} 2. Following surgeries, claimant was able to return to light-duty employment with relator until April 10, 2006. At that time, claimant was laid off by relator because relator was no longer able to accommodate claimant's restrictions.

{¶12} 3. Early in August 2006, claimant became employed at Metokote.

{¶13} 4. In September 2006, claimant filed a motion requesting working wage loss compensation from August 1, 2006 forward. In support of his motion, claimant filed the required medical evidence establishing his light-duty restrictions, a copy of the Ohio Department of Job and Family Services ("ODJFS") registration form, Starting Career Opportunities & Training Information ("SCOTI"), as well as pay stubs from August 17, 2006 forward.

{¶14} 5. The commission granted claimant's request for wage loss compensation.

{¶15} 6. Relator filed a mandamus action in this court and ultimately this court granted a writ of mandamus because the commission had failed to address the

adequacy of claimant's job search prior to August 2006 when he obtained the job with Metokote. Instead, the commission had found that a job search, or lack thereof, was irrelevant because claimant had found employment. See *State ex rel. Johnson Controls, Inc. v. Indus. Comm.*, 10th Dist. No. 07AP-510.

{¶16} 7. In March 2008, claimant filed a motion seeking nonworking wage loss compensation from January 7 to February 21, 2008. Claimant attached medical evidence with his restrictions and C-184 job search forms identifying the employer's with whom claimant sought work and the dates he contacted them. Claimant did not include the rate of pay for such employers.

{¶17} 8. With regards to his employment, claimant's evidence indicates the following: on April 10, 2006, claimant was laid off from his light-duty work with relator; on August 8, 2006, claimant secured work with Metokote and worked there until December 2006; in December 2006, claimant began working for Knight's Facility and he worked there until January 4, 2008; claimant began working at Kellermeyer Business Services on February 23, 2008, and worked there until June 22, 2008; and, claimant began working for Ideal [Setech] on June 23, 2008. [While working for Knight's Facilities in December 2007, claimant learned that Ideal Setech might be hiring. He and several co-workers put in their resumes and kept in touch with a supervisor at the company. Ideal Setech hired claimant on June 23, 2008, for a job making $11.65 per hour.]

{¶18} 9. Claimant's motion was heard before a district hearing officer ("DHO") on April 11, 2008, and was denied on grounds that claimant had failed to file updated

restrictions for the period of time in which he was seeking wage loss compensation. Claimant had submitted the April 14, 2008 report of Teresa Kahler, Ph.D., and the March 20, 2008 report of Jeffrey F. Wirebaugh, M.D. With regard to claimant's job search evidence, the DHO stated:

> The DHO finds that the Injured Worker has met his burden of proof in every other regard. In fact, the Injured Worker found employment through his job search efforts. However, as there are no restrictions for the Injured Worker until 3/14/08, the DHO finds that the application for Non-Working wage loss for the time period of 1/4/08 to 2/23/08 is DENIED.

(Emphasis sic.)

{¶19} 10. Claimant appealed and the matter was heard before a staff hearing officer ("SHO") on June 5, 2008. The SHO also denied claimant's request for wage loss compensation and modified that portion of the DHO's order regarding claimant's medical evidence as follows:

> The Hearing Officer finds Injured Worker has not met the requirements of O.A.C. 4125-1-01(C). The Injured Worker has not provided any updated medical restrictions to the file to support his request for Non-Working Wage Loss benefits. The Injured Worker previously had restrictions in place from 09/09/2006, from Dr. Bialecki-Haase, and from 09/12/2006, from Dr. MacGuffie. He was paid Working Wage Loss previously based upon the restrictions from those doctors. No new restrictions were provided to the file until those of Drs. Wirebaugh, dated 03/20/2008, and Kahler, dated 03/14/2008. As such, the Hearing Officer finds there are not updated restrictions in the file for the period requested and, therefore, the Working Wage Loss request is DENIED.

(Emphasis sic.)

{¶20} 11. Prior to the above hearing before the SHO, claimant filed a second application seeking working wage loss compensation beginning February 23, 2008.

{¶21} 12. Claimant's request for wage loss compensation beginning February 23, 2008 was heard before a DHO on June 2, 2008 and was granted as follows:

> Injured worker has restrictions of no lifting over five pounds, no climbing or reaching, limited crawling, no use of right arm controls and no more than 40 hours per week that prevent him from returning to his former position of employment as an assembly line production worker.
>
> Injured worker's job search prior to 02/23/2008 is found not to be relevant as injured worker is not requesting Non-Working Wage Loss at this time and injured worker has obtained employment.
>
> This order is based upon the reports of Dr. Wirebaugh, 03/20/2008, and Dr. Kahler, 03/14/2008.

{¶22} 13. Relator appealed and continued to assert that claimant's request for wage loss compensation should be denied because claimant did not present sufficient evidence of a good-faith search for employment between January 4 and February 23, 2008.

{¶23} 14. Relator's appeal was heard before an SHO on August 22, 2008. The SHO granted claimant's request for wage loss compensation. With regards to relator's argument that claimant's job search was inadequate, the SHO (1) determined that it was not necessary to review claimant's job search between January 4 and February 22, 2008, because claimant had secured a reasonable position of employment considering his restrictions, and (2) claimant's request for nonworking wage loss from January 17 through February 22, 2008 was denied solely upon claimant's failure to attach updated medical restrictions and not on the basis of a bad-faith job search. Relator had also

asserted that claimant should have sought assistance from private employment agencies. The SHO noted that claimant had registered with the Ohio Department of Jobs and Family Services and the fact that claimant did not seek assistance from private employment agencies was a factor to be considered but not the determinative factor. Specifically, the SHO noted that many private employment agencies charge fees that an unemployed individual may not be able to afford. With regards to claimant's efforts, the SHO stated:

> The injured worker is several months outside the initial time period for looking only for comparably paying work. At this stage, the injured worker is required, pursuant to O.A.C. 4125-1-01, to look for any type of work available to him and to mitigate his wage loss. The Staff Hearing Officer finds that the injured worker did, in fact, register with the Ohio Department of Jobs and Family Services. The injured worker was in essence looking for comparable and suitable work. The injured worker has been working periodically throughout the course of this wage loss time period.
>
> The injured worker was laid off from the Knight's Facility of 1/4/08. At that time, and before the lay-off since the injured worker had knowledge of same, the injured worker had been looking for other work. The injured worker began a position of employer [sic] at Kellermeyer on 2/23/2008. At that job, the injured worker was working a 40-hour work week and being paid $8.75 per hour. While the injured worker was being paid $18.90 at the instant employer, when considering the job market's current condition, and the injured worker's education and skills and restrictions, this Staff Hearing Officer finds the position at Kellermeyer is not an unreasonable place of employment.
>
> However, the injured worker didn't stop at merely at that point. Prior to the lay-off he had applied for a job at Ideal Seatech [sic] to work in their shipping and receiving warehouse department, which ships parts for General Motors. This position would pay $11.65 per hour. The injured worker applied for this position prior to his lay-off from

> Knight's Facilities but was not called for an interview within a few months thereafter. The injured worker did keep in touch with the individual at Seatech [sic] and was, in fact, called in for an interview on 6/23/08. At that time, he was still working for Kellermeyer but switched to the Ideal Seatech [sic] job because of the higher rate of pay.
>
> Therefore, the Staff Hearing [O]fficer finds that the injured worker has continued to do his best to mitigate his wage loss herein. Even while he was working in a 40-hour per week position, he continued to look for better opportunities and took a better opportunity when it came along.

{¶24} 15. Relator filed an appeal from the SHO's order and this appeal was refused by order of the commission mailed September 30, 2008.

{¶25} 16. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶26} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶27} In order to receive workers' compensation, a claimant must show not only that a work-related injury arose out of and in the course of employment, but, also, that a direct and proximate causal relationship exists between the injury and the harm or disability. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. This principle is equally applicable to claims for wage loss compensation. *State ex rel. The Andersons v. Indus. Comm.* (1992), 64 Ohio St.3d 539. As noted by the court in *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, a wage loss claim has two components: a reduction in wages and a causal relationship between the allowed condition and the wage loss.

{¶28} In considering a claimant's eligibility for wage loss compensation, the commission is required to give consideration to, and base the determination on, evidence relating to certain factors including claimant's search for suitable employment. The Supreme Court of Ohio has held that a claimant is required to demonstrate a good-faith effort to search for suitable employment which is comparably paying work before a claimant is entitled to both nonworking and working wage loss compensation. *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210; *State ex rel. Reamer v. Indus. Comm.* (1997), 77 Ohio St.3d 450; and *State ex rel. Rizer v. Indus. Comm.* (2000), 88 Ohio St.3d 1. A good-faith effort necessitates a claimant's consistent, sincere, and best attempt to obtain suitable employment that will eliminate the wage loss.

{¶29} Ohio Adm.Code 4125-1-01(C) identifies for claimants the relevant information which must be contained with an application for wage loss compensation. Specifically, Ohio Adm.Code 4125-1-01(C)(5) provides:

> All claimants seeking or receiving working or non-working wage loss payments shall supplement their wage loss application with wage loss statements, describing the search for suitable employment, as provided herein. The claimant's failure to submit wage loss statements in accordance with this rule shall not result in the dismissal of the wage loss application, but shall result in the suspension of wage loss payments until the wage loss statements are submitted in accordance with this rule.
>
> (a) A claimant seeking or receiving wage loss compensation shall complete a wage loss statement(s) for every week during which wage loss compensation is sought.
>
> (b) A claimant seeking wage loss compensation shall submit the completed wage loss statements with the wage loss application and/or any subsequent request for wage loss compensation in the same claim.
>
> (c) A claimant who receives wage loss compensation for periods after the filing of the wage loss application and/or any subsequent request for wage loss compensation in the same claim shall submit the wage loss statements completed pursuant to paragraphs (C)(5)(a), (C)(5)(d) and (C)(5)(e) of this rule every four weeks to the bureau of worker's [*sic*] compensation or the self-insured employer during the period when wage loss compensation is received.
>
> (d) Wage loss statements shall include the address of each employer contacted, the employer's telephone number, the position sought, a reasonable identification by name or position of the person contacted, the method of contact, and the result of the contact.
>
> (e) Wage loss statements shall be submitted on forms provided by the bureau of workers' compensation.

{¶30} Ohio Adm.Code 4125-1-01(D)(1)(c) provides certain relevant factors to be considered by the commission in evaluating whether a claimant has made a good-faith effort. Those factors including: the claimant's skills, prior employment history, and educational background; the number, quality, and regularity of contacts made with prospective employers; for a claimant seeking any amount of working wage loss compensation, the amount of time devoted to making prospective employer contacts during the period for which working wage loss is sought, as well as the number of hours spent working, any refusal by the claimant to accept assistance from the Ohio Bureau of Workers' Compensation in finding employment; any refusal by the claimant to accept the assistance of any public or private employment agency; labor market conditions; the claimant's physical capabilities; any recent activity on the part of the claimant to change their place of residence and the impact such change would have on the reasonable probability of success and the search for employment; the claimant's economic status; the claimant's documentation of efforts to produce self-employment income; any part-time employment engaged in by the claimant and whether that employment constitutes a voluntary limitation on the claimant's present earnings; whether the claimant restricts a search of employment that would require the claimant to work fewer hours per week than worked in the former position of employment; and whether, as a result of physical restrictions, the claimant is enrolled in a rehabilitation program.

{¶31} In this mandamus action, relator contends that the commission abused its discretion when it determined that claimant had produced sufficient evidence of a good-faith job search for suitable employment which is comparably paying work between

January 7 and February 22, 2008, when he accepted his job with Kellermeyer. Relator argues that claimant did not gather enough information about those prospective jobs, sought only janitorial/custodial work even though his doctor had not restricted him to this type of work, and failed to search for comparably paying work as evidenced by the fact that he did not know the rate of pay for any of those jobs.

{¶32} As indicated in the findings of fact, claimant's current job with Ideal [Setech] is the fourth job he has secured since relator laid him off in April 2006 because relator could no longer provide claimant with light-duty work. Claimant was out of work for four months and registered with ODJFS. He secured employment with Metokote in August 2006, and worked there until December 2006 when he took a job at Knight's Facility. Claimant's job at Knight's Facility ended January 4, 2008. At that time, he registered with ODJFS, utilized on-line and newspaper job listings, and actively sought employment as a custodian. On February 23, 2008, claimant began working at Kellermeyer. Claimant continued looking for other employment and learned that positions would become available at Ideal [Setech]. Claimant took the steps necessary and secured a job paying $3 more per hour with Ideal [Setech] on June 23, 2008.

{¶33} Claimant's request for wage loss compensation for the period January 7 to February 21, 2008 was denied solely because he did not file appropriate contemporaneous medical evidence of continuing restrictions. His job search for this period was not an issue and was found to be sufficient.

{¶34} While relator is correct to assert that claimant was required to make a good-faith search for suitable employment which was comparably paying work and that

his actions during the relevant time period were relevant, the magistrate finds that relator has not demonstrated that the commission abused its discretion in finding that claimant's job search was sufficient.

{¶35} Credibility and the weight to be given evidence are for the commission to determine. *Teece*. In the present case, claimant testified that he knew he could perform custodial work and that he felt comfortable doing that type of work. Further, claimant did conduct a job search; it is just that relator believes his job search was inadequate. Part of relator's argument is that, because claimant did not know the hourly rate of prospective jobs, he could not possibly have been searching for comparably paying work. While this could be a factor, the commission did not find that it defeated claimant's search. The magistrate cannot say that the commission abused its discretion in this regard.

{¶36} The SHO did mistakenly say that claimant was outside the initial time period for looking only for "comparably paying work." The SHO should have said he was outside the initial time period for looking only for "suitable employment." However, the magistrate finds that this misstatement is not critical given the remainder of the SHO's order. The SHO went on to say that claimant was required to look for any type of work available to him to mitigate his wage loss. This is correct. Ohio Adm.Code 4125-1-01(D)(1)(b) states that a claimant may first search for **suitable** employment within his skills, prior employment history, and educational background. After 60 days, if the claimant is unable to find such employment, the claimant is required to expand his job search to include entry level and/or unskilled employment opportunities. It appears that

the SHO inadvertently used the word "comparable" instead of "suitable." The magistrate does not find this to be a reason to find that the commission abused its discretion in granting claimant wage loss compensation.

{¶37} As the commission stated, claimant continued to actively seek employment even while he was working. When he knew that he would be laid off at Kellermeyer, he began looking for other employment and learned that positions would become available at Ideal [Setech]. That job which he ultimately secured at Ideal [Setech], paid him $3 more per hour than he was making while at Kellermeyer. That, in and of itself, is some evidence that he was seeking to mitigate his wage loss as it is undisputed that claimant had been earning $18.90 when he was injured. At oral argument, counsel argued that claimant "lucked into" this job at Ideal [Setech] and did not secure it by way of a proper job search. However, claimants should not be discouraged from using all sources of information when looking for comparably paying work. Claimant had a good lead from a co-worker on an upcoming opening at Ideal [Setech]. Relator had the opportunity to present this argument to the commission and this magistrate cannot say that the commission abused its discretion by rejecting it.

{¶38} After reviewing the record, the magistrate concludes that, although the commission did make a misstatement in saying that claimant's job search was immaterial, the commission had (1) already found that claimant's job search was sufficient, and (2) made the determination again that his job search was sufficient. Relator's arguments go to credibility and the weight of the evidence and relator has not demonstrated that the commission abused its discretion.

{¶39} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in awarding claimant wage loss compensation and relator's request for a writ of mandamus should be denied.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).