

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Industrial Energy Systems, Inc.,	:	
Relator,	:	
v.	:	No. 10AP-876
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Richard Forgues,	:	
Respondents.	:	

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DECISION

Rendered on May 3, 2012

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*Ross, Brittain & Schonberg Co., L.P.A., Brian K. Brittain, Michael J. Reidy, Scott W. Gedeon and Meredith L. Ullman, for relator.*

*Michael DeWine, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Industrial Energy Systems, Inc. ("relator"), has filed this original action requesting a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission") to vacate its order awarding a 50 percent handicap reimbursement to respondent Richard Forgues ("claimant") and to enter an order awarding 75 percent or 100 percent handicap reimbursement.

{¶ 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, which is appended to this decision.

{¶ 3} Therein, the magistrate denied the request for a writ of mandamus, based upon the following findings: (1) the burden of proof is on the employer to establish entitlement to relief under the statute governing handicap reimbursement (R.C. 4123.343), and relator failed to meet its burden; (2) the staff hearing officer ("SHO") was not required to accept both opinions of Dean W. Erickson, M.D., particularly where the opinions are severable; therefore, the SHO could properly accept Dr. Erickson's opinion as to the right shoulder arthritis contributing 50 percent to the cost of the claim, while still rejecting the opinion that the right hip arthritis contributed 25 percent to the cost of the claim; (3) the commission is not limited to only consideration of medical evidence under Ohio Adm.Code 4123-3-35(D)(2)(a); rather, the administrator is to determine the relief to be granted based on "[t]he degree to which medical evidence *or other evidence* indicates the pre-existing handicap has affected the cost of the claim." (Emphasis added); (4) the commission is not required to accept the medical evidence presented, even if there is no direct medical evidence which opposes that evidence; therefore, despite the lack of a medical opinion demonstrating the right hip arthritis has not contributed to the cost of the claim, the commission was within its discretion to reject Dr. Erickson's opinion; and (5) if the right hip arthritis contributed only 3 percent of the total medical costs in the claim, Dr. Erickson's opinion as to a 25 percent contribution to all costs of the claim is questionable.

{¶ 4} Relator filed objections to the magistrate's decision. The commission filed a memorandum opposing the objections. This cause is now before the court for a full review regarding the following two objections to the magistrate's decision:

1. The Magistrate's decision denying Relator's request for a Writ of Mandamus fails to even address the Industrial Commission's contravention of OAC 4123-3-35(D)(2)(c) when it decided the handicap percentage.
2. The Magistrate's decision denying Relator's request for a Writ of Mandamus wrongfully equates an unsupported statement made during argument by counsel for the Ohio Bureau of Workers' Compensation as "an analysis of the

historical claim cost" of the claim, and then rejects the medical evidence based upon this statement.

{¶ 5} In its first objection, relator contends the magistrate erred by failing to address the SHO's failure to comply with Ohio Adm.Code 4123-3-35(D)(2)(c) and to consider the effect of the handicap condition on the future costs of the claim. However, we note, as did the magistrate, that the burden of proof is on relator as the employer to establish that it is entitled to the relief by producing appropriate medical evidence or other evidence as indicated, pursuant to Ohio Adm.Code 4123-3-35(D). Here, relator failed to meet its burden of proof.

{¶ 6} The medical records and Dr. Erickson's report did not contain medical evidence to support the conclusion that the pre-existing hip arthritis impacted the workers' compensation claim. Dr. Erickson's reports were dedicated almost exclusively to the right shoulder. Dr. Erickson's conclusion that the pre-existing hip arthritis prolonged and delayed the claimant's recovery is not supported by any objective evidence and, consequently, the hearing officer was not persuaded. As the magistrate determined, it was within the discretion of the SHO to reject Dr. Erickson's opinion on this issue, even while accepting his opinion as to the contribution of the pre-existing right shoulder arthritis to the cost of the claim, and even despite the lack of any evidence opposing Dr. Erickson's conclusion regarding the right hip arthritis. Furthermore, relator did not provide any evidence of future costs of the claim, despite the fact it was its burden to do so. Thus, there was nothing to be considered on this issue.

{¶ 7} Accordingly, we overrule relator's first objection.

{¶ 8} In its second objection, relator submits the hearing officer improperly considered an unsupported statement made by the representative for the Bureau of Workers' Compensation ("BWC") during argument, and used that statement to reject medical evidence provided by relator through Dr. Erickson. The statement at issue referenced medical costs for the right hip, which purportedly constituted only 3 percent of the total medical cost in the claim.<sup>1</sup> Relator argues the statement was made without any

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<sup>1</sup> We note that this objection challenges a statement that was referenced in the SHO order, but relator did not raise this argument in its appeal of the SHO order to the commission.

documentary evidence, and did not constitute "testimony," and therefore, it cannot be the basis for a decision which "trumps" the medical evidence in the claim.

{¶ 9} There is nothing to indicate that the magistrate relied upon the SHO's reference to the above statement as "testimony." However, as the magistrate pointed out, the commission is not limited to consideration of just medical evidence. It may also consider "other evidence," such as historical claim costs, as argued by the representative for the BWC. The magistrate determined that, if such a historical claim cost of 3 percent were accepted, it would certainly call into question Dr. Erickson's opinion that the right hip arthritis contributed 25 percent to the cost of the claim. Given that there was no evidence to support Dr. Erickson's opinion, other than simply his unsupported conclusion, and given that the burden of proof rests with the employer, the magistrate did not err in endorsing the hearing officer's rejection of Dr. Erickson's 25 percent opinion.

{¶ 10} Accordingly, we overrule relator's second objection.

{¶ 11} Following an independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;  
writ of mandamus denied.*

SADLER and DORRIAN, JJ., concur.

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**A P P E N D I X**

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	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Richard Forgues,	:	
	:	
Respondents.	:	

## MAGISTRATE'S DECISION

Rendered on October 13, 2011

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*Ross, Brittain & Schonberg Co., L.P.A., Brian K. Brittain, Michael J. Reidy, Scott W. Gedeon and Meredith L. Ullman, for relator.*

*Michael DeWine, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.*

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## IN MANDAMUS

{¶ 12} In this original action, relator, Industrial Energy Systems, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding 50 percent handicap reimbursement in the industrial claim of respondent Richard Forgues ("claimant") and to enter an order awarding handicap reimbursement in the amount of 75 percent or 100 percent based upon consideration of the reports of Drs. Erickson and Clark.

**Findings of Fact:**

{¶ 13} 1. On May 24, 2007, claimant sustained an industrial injury while employed as a laborer with relator, a state-fund employer. On the "First Report of an Injury, Occupational Disease or Death" (FROI-1) form, the industrial accident is described: "Was working outside at work and became hot, nauseated and lightheaded, passed out and fell."

{¶ 14} 2. On the date of injury, claimant was treated at the EMH Regional Medical Center where he underwent imaging of his right hip and right shoulder. The radiology report of May 24, 2007 concludes:

Frontal and lateral views of the right hip demonstrate mild osteoarthritis bilaterally. Overall head and neck morphology are preserved[.] No focal osseous abnormalities are seen.

\* \* \*

Three views of the right shoulder show degenerative changes at the acromioclavicular joint and greater tuberosity[.] A small cystic fragment projects at the supraspinatus tendon. No focal or acute abnormality is seen.

{¶ 15} 3. The industrial claim (No. 07-831488) is allowed for "sprain right hip [and] thigh; sprain right rotator cuff; tear right rotator cuff."

{¶ 16} 4. On August 3, 2007, claimant underwent right shoulder surgery performed by Robert Zanotti, M.D. In his operative report, Dr. Zanotti describes the surgical procedure: "Arthroscopic debridement of slap and labral base, arthroscopic rotator cuff repair and arthroscopic subacromial decompression."

{¶ 17} 5. On October 28, 2009, relator filed an application for handicap reimbursement on a form provided by the Ohio Bureau of Workers' Compensation. On the form (CHP-4A), relator claimed that "arthritis" was the pre-existing condition upon which relator claims a right to R.C. 4123.343 handicap reimbursement.

{¶ 18} 6. Following a February 3, 2010 informal conference with the administrator's representative, an order was mailed February 12, 2010 ordering that 40 percent of the claim be charged to the statutory surplus fund.

{¶ 19} 7. Earlier, relator requested that Dean W. Erickson, M.D., review the medical records in the industrial claim. In his report dated February 1, 2010, Dr. Erickson opines:

Based upon a review of the facts set forth in the medical records as well as the current history and physical examination, and accepting the examination findings in the medical record, I would offer the following opinions to a reasonable degree of medical certainty[.]

[One] Does the claimant suffer from the condition of arthritis in the right hip and right shoulder? Yes[.] The x-rays and shoulder MRI at the time of the injury or shortly thereafter fairly document arthritis in the right shoulder at the AC joint and right hip arthritis[.]

[Two] If so, do the claimant's arthritic conditions preexist the injury of May 24, 2007? Yes[.] The arthritic changes noted on the x-rays and the MRI scan take years to develop, therefore the arthritic condition in both the shoulders [sic] and the hip would have clearly predated the injury of May 24, 2007[.]

[Three] If the claimant did suffer from a preexisting arthritic condition, did the claimant's arthritis problem prolong or delay recovery? Yes[.] Mr[.] Forgues' preexisting arthritic condition of the right shoulder and hip significantly prolonged and delayed his recovery[.] The arthritis in the AC joint and shoulder contributed to a weakened rotator cuff which ultimately contributed to the rotator cuff tear[.] Due to ongoing arthritis which eventually required subacromial decompression, Mr[.] Forgues had a re-tear of the rotator cuff requiring a second surgery[.]

Mr[.] Forgues' ongoing hip complaint would not be related to the soft tissue injury of the right hip sprain which is the allowed condition, but due to the preexisting and ongoing osteoarthritis of the right hip[.]

It is estimated that Mr[.] Forgues' right shoulder arthritis contributed 50% to prolonging and delaying his recovery and his right hip arthritis contributed 25% to a prolongation and delaying the recovery[.]

(Emphasis omitted.)

{¶ 20} 8. At relator's request, Dr. Erickson conducted an additional review of medical records and then issued another report dated March 16, 2010:

I have had the opportunity to review additional medical records with respect to Richard Forgues' claim number 07-831488 allowed for sprain of right hip, strain of right rotator cuff, and tear of right rotator cuff sustained in the employ of Industrial Energy Systems on May 24, 2007. \* \* \*

\* \* \*

Since I completed my independent medical file review, additional medical records have now become available. Consistent with the history previously noted, Mr. Forgues indeed had had a prior history of bilateral shoulder pain. On March 22, 2005, he underwent an MRI of both shoulders. The right shoulder showed a small partial thickness tear of the supraspinatus tendon with acromioclavicular arthritis. A left shoulder MRI showed superior labral tear with acromioclavicular arthritis, but no rotator cuff tear. Mr. Forgues presented to Dr. Robert Zanotti on September 28, 2006, one day after he had presented to EMH Regional Medical Center/Avon Lake Emergency Department complaining of right shoulder pain after changing a tire. Dr. Zanotti recommended a cortisone injection, which was completed on that date. Mr. Forgues was then referred for an MRI scan of the right shoulder on October 3, 2006, which showed tendinopathy with a full-thickness tear at the distal infraspinatus. Consistent with the previous MRI in 2005, the October 3, 2006, MRI again showed degenerative arthritis at the acromioclavicular joint with direct mass effect on the supraspinatus musculotendinous junction. Mr. Forgues followed up with Dr. Zanotti on October 9, 2006, noting that he received temporary relief from the cortisone injection. Dr. Zanotti recommended surgery, which was completed at EMH Regional Medical Center on October 24, 2006, consisting of arthroscopic rotator cuff repair, arthroscopic decompression, and limited debridement of the labral tear. At that time of the surgery, Mr. Forgues was noted to have rotator cuff tear with impingement. Dr. Zanotti also noted a large anterior osteophyte, which required deburring, removing roughly 5 to 8 millimeters. Mr. Forgues returned to see Dr. Zanotti two days later on October 26, 2006, at which time therapy was initiated through Kaiser.

Based upon a review of the facts set forth in the medical records and accepting the examination findings in the



medical record, I would offer the following opinions to a reasonable degree of medical certainty.

[One] Based on this additional documentation concerning the treatment predating the injury in this claim are you still of the opinion that the claimant suffers from the condition of pre-existing arthritis of the right shoulder (pre-existing the injury date of May 24, 2007)? The additional medical records further support the fact that Mr. Forgues had significant pre-existing arthritis of the right shoulder. The basis for this opinion is as follows:

- Mr. Forgues' MRI of the right shoulder in 2005 definitely showed arthritic changes of the acromioclavicular joint that were significant enough to produce a mass effect on the rotator cuff.
- The followup MRI scan on October 3, 2006, following the tire changing injury showed what appears to be progressive arthritis at the acromioclavicular joint, now producing definitive mass effect on the rotator cuff. The surgical report by Dr. Zanotti of October 24, 2006, indicated that Mr. Forgues required deburring of large anterior osteophytes, which are arthritic growths in the joint.

[Two] Has your opinion changed as to whether or not the claimant's right shoulder arthritic problem prolonged or delayed his recovery? My previously stated opinion that Mr. Forgues' pre-existing right shoulder arthritis prolonged and delayed his recovery is unchanged.

If so, has your opinion changed as to what percentage of the claimant's current medical problems is a result of his pre-existing right shoulder arthritis? My previous opinion that Mr. Forgues' pre-existing right shoulder arthritis has contributed 50% to prolongation and delay in his recovery is unchanged. The basis for this opinion is [as] follows:

- The extent of Mr. Forgues' pre-existing arthritis based on the review of the now available medical records is even more significant.
- Mr. Forgues' pre-existing arthritis was of such a degree that he required subacromial decompression with osteophyte removal in 2006, approximately 8 months prior to the injury of record in May 2007.

- What happens in situations such as this is that an individual's pre-existing arthritis predisposes him to a further rotator cuff injury. In this case although Mr. Forgues did have surgical attention to his previous arthritic condition, it still was significant enough to cause a recurrent right rotator cuff tear; thus contributing significantly to delay and prolongation of his recovery from the May 2007 injury.

{¶ 21} 9. On April 14, 2010, treating chiropractor Mark W. Clark, D.C., wrote:

Per my letter dated May 11, 2009, concerning the above patient, I have reviewed it again and I am of the opinion that if Mr. Forgues had not had any of the pre-existing arthritic conditions as noted in my letter, he may not have had to undergo the repeated surgeries for his shoulder. It is more than likely that he would have sustained a much less serious injury to his right rotator cuff. That being the case, I can therefore state based upon reasonable medical/chiropractic certainty, that 100% of the compensation and medical treatment incurred in this claim were increased due to the pre-existing arthritis.

{¶ 22} 10. Following an April 15, 2010 hearing, a district hearing officer ("DHO") issued an order stating:

The request for handicap reimbursement \* \* \* is granted to the extent of this order.

The District Hearing Officer approves the handicap reimbursement of 75% relying on the reports of Dr. Dean Erickson dated 02/01/2010 and 03/16/2010 and a review of the documentation on file. The Injured Worker had surgery shortly before the injury to the shoulder and degenerative arthritis is noted by all of the examining and reviewing physicians in the claim.

{¶ 23} 11. Relator administratively appealed the DHO's order of April 15, 2010.

{¶ 24} 12. Following a May 17, 2010 hearing, a staff hearing officer ("SHO") issued an order stating that the DHO's order is "modified." The SHO's order explains:

It is the finding of the Staff Hearing Officer that the CHP-4A filed 10/28/2009 is granted. The Injured Worker is found to have had the pre-existing condition of arthritis. This finding is based on the 05/24/2007 x-ray report as well as the 08/30/2007 [sic] operative notes and the 02/01/2010 report

of Dean Erickson, M.D. The Staff Hearing Officer also finds that 50% of the cost of the claim is to be charged to the statutory surplus fund. This is because pre-existing arthritis of the right shoulder contributed to the cost of the claim by delaying the Injured Worker's recovery. This finding is based on the report from Dr. Erickson. Although the evidence shows that the Injured Worker had pre-existing arthritis of the right hip the Staff Hearing Officer finds that this condition did not contribute to the costs of the claim. The representative for the Administrator indicated that medical costs for the hip constitute only 3% of the total medical costs in the claim. \* \* \*

{¶ 25} 13. Relator administratively appealed the SHO's order of May 17, 2010.

{¶ 26} 14. On June 10, 2010, another SHO mailed an order refusing relator's administrative appeal.

{¶ 27} 15. On July 30, 2010, the three-member commission mailed an order denying relator's request for reconsideration.

{¶ 28} 16. On September 15, 2010, relator, Industrial Energy Systems, Inc., filed this mandamus action.

#### Conclusions of Law:

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

{¶ 30} R.C. 4123.343 was enacted in 1955 to encourage employers to employ and retain handicapped employees. *State ex rel. Am. Seaway Foods, Inc. v. Indus. Comm.* (1991), 62 Ohio St.3d 50. Under the statute, the commission reimburses or credits an employer, totally or partially, for compensation and benefits paid to a handicapped employee who is later industrially injured and whose handicap contributed to either the injury itself or a resulting disability. *Id.*; R.C. 4123.343(D).

{¶ 31} R.C. 4123.343(D)(2) provides:

The circumstances under and the manner in which an apportionment under this section shall be made are:

\* \* \*

Whenever a handicapped employee is injured or disabled or dies as a result of an injury or occupational disease and the administrator finds that the injury or occupational disease

would have been sustained or suffered without regard to the employee's pre-existing impairment but that the resulting disability or death was caused at least in part through aggravation of the employee's pre-existing disability, the administrator shall determine in a manner that is equitable and reasonable and based upon medical evidence the amount of disability or proportion of the cost of the death award that is attributable to the employee's pre-existing disability and the amount found shall be charged to the statutory surplus fund.

Supplementing the statute, Ohio Adm.Code 4123-3-35(D) provides:

The burden of proof is upon the employer to establish entitlement to the relief under section 4123.343 of the Revised Code by appropriate medical evidence or other evidence as may be indicated.

\* \* \*

(2) With respect to any credit under division (D)(2) of section 4123.343 of the Revised Code, the administrator shall determine the degree of relief to be granted based upon the following:

(a) The degree to which medical evidence or other evidence indicates the pre-existing handicap has affected the cost of the claim.

(b) The employer shall establish the relationship between the pre-existing condition and subsequent injury by way of aggravation or delayed recovery by proof on file but the condition need not be recognized by an order of allowance for such condition or aggravation of the condition.

(c) In determining the appropriate per cent of relief in the claim, the administrator shall consider the effect of the handicap condition on the past claims costs and shall also account for the effect of the handicap condition on the anticipated future costs of the claim.

{¶ 32} Relying exclusively on Dr. Erickson's reports, the DHO awarded a 75 percent handicap reimbursement. Apparently, the DHO awarded 50 percent for the right shoulder arthritis and 25 percent for the right hip arthritis as indicated in the conclusion of Dr. Erickson's February 1, 2010 report.

{¶ 33} On administrative appeal, while citing to Dr. Erickson's February 1, 2010 report, the SHO reduced the award to 50 percent, explaining that the pre-existing right hip arthritis "did not contribute to the costs of the claim." According to the SHO's order, "[t]he representative for the Administrator indicated that medical costs for the hip constitute only 3% of the total *medical* costs in the claim." (Emphasis added.)

{¶ 34} Apparently, the SHO accepted Dr. Erickson's opinion that "right shoulder arthritis contributed 50% to prolonging and delaying his recovery," but rejected Dr. Erickson's opinion that "his right hip arthritis contributed 25% to a prolongation and delaying the recovery."

{¶ 35} In rejecting Dr. Erickson's opinion that the right hip arthritis contributed 25 percent to the cost of the claim, the SHO relied upon an apparent oral statement made at the hearing by the administrator's representative that "medical costs for the hip constitute only 3% of the total *medical* costs in the claim." (Emphasis added.)

{¶ 36} The SHO was not required to accept both of Dr. Erickson's opinions as to the right shoulder arthritis and right hip arthritis, particularly where the opinions seem to be severable without an improper insertion of medical expertise that hearing officers do not have. Thus, the SHO could properly accept Dr. Erickson's opinion that the right shoulder arthritis contributed 50 percent to the cost of the claim, but reject the opinion that the right hip arthritis contributes 25 percent to the cost of the claim.

{¶ 37} Ohio Adm.Code 4123-3-35(D)(2)(a) provides that the administrator shall determine the degree of relief to be granted based upon "[t]he degree to which medical evidence *or other evidence* indicates the pre-existing handicap has affected the cost of the claim." (Emphasis added.) Relator seems to ignore this provision of the Ohio Administrative Code when it argues that the commission's determination of handicap reimbursement is restricted solely to the medical evidence of record. Clearly, Ohio Adm.Code 4123-3-35(D) permits the commission to accept an analysis of the historical claim costs in determining handicap reimbursement. The commission is not simply limited to consideration of medical evidence, as relator argues.

{¶ 38} As Ohio Adm.Code 4123-3-35(D) makes clear, the burden of proof is upon the employer to establish entitlement to relief under the handicap reimbursement statute. Furthermore, the commission is not required to accept medical evidence even where there

is no direct medical evidence in opposition. That is, it was well within the commission's fact-finding discretion to reject that part of Dr. Erickson's report in which he opined that the right hip arthritis has contributed 25 percent to the cost of the claim even though there is no other medical opinion that the right hip arthritis has not contributed to the cost of the claim.

{¶ 39} Here, the commission has articulated a reason for rejecting that part of Dr. Erickson's report that opines that the right hip arthritis contributed 25 percent to the cost of the claim. Obviously, if the right hip arthritis contributed only 3 percent of the total *medical* costs in the claim, Dr. Erickson's opinion as to a 25 percent contribution to all costs of the claim is suspect.

{¶ 40} Given relator's burden of proof, the commission can properly reject Dr. Erickson's 25 percent opinion based upon acceptance that the right hip arthritis contributed only 3 percent of the total medical costs in the claim.

{¶ 41} It is important to note that the administrator's representative did not state that the right hip arthritis contributed three percent to the total claim costs. Thus, relator cannot argue that the administrator's representative supports entitlement to at least a three percent handicap reimbursement for the right hip arthritis.

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

/s/ Kenneth W. Macke

KENNETH W. MACKE  
MAGISTRATE

### **NOTICE TO THE PARTIES**

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