

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Franklin County	:	
Board of Commissioners,	:	
	:	
Relator,	:	No. 10AP-1016
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio	:	
and Charlotte Bell,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on January 26, 2012

Ron O'Brien, Prosecuting Attorney, and *Denise L. DePalma*,
for relator.

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

Craig T. Lelli, for respondent Charlotte Bell.

IN MANDAMUS

SADLER, J.

{¶1} Relator, Franklin County Board of Commissioners, commenced this original action requesting this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its award of permanent total disability ("PTD") compensation to respondent Charlotte Bell ("claimant") and to enter an order denying PTD compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate examined and discussed three issues: (1) whether the commission abused its discretion in failing to address whether claimant's refusal to undergo shoulder surgery "broke the causal link" between the alleged disability and the industrial injury (relator's reply brief, at 1); (2) whether the December 2, 2009 report of Dr. Kistler is some evidence upon which the commission can rely; and (3) whether the commission abused its discretion in failing to address whether claimant unjustifiably failed to participate in vocational rehabilitation. (Magistrate's Decision, 11.) The magistrate determined that the commission did not abuse its discretion and that Dr. Kistler's December 2, 2009 report constitutes some evidence upon which the commission can and did rely. Accordingly, the magistrate recommended this court deny the requested writ of mandamus.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} Finding no error of law or other defect in the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law therein. In accordance with the magistrate's decision, the requested writ of mandamus is denied.

Writ of mandamus denied.

BRYANT and CONNOR, JJ., concur.

A P P E N D I X

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	:	
Respondents.	:	

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

Rendered on September 13, 2011

Ron O'Brien, Prosecuting Attorney, and *Denise L. DePalma*,
for relator.

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

Craig T. Lelli, for respondent Charlotte Bell.

I N M A N D A M U S

{¶5} In this original action, relator, Franklin County Board of Commissioners, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD")

compensation to respondent Charlotte Bell ("claimant") and to enter an order denying the compensation.

Findings of Fact:

{¶6} 1. On January 31, 2003, claimant fractured her right fibula when she slipped and fell in a garage at her workplace. Claimant was employed as a bus driver for relator, a state-fund employer. She also injured her right shoulder, right ankle, and lower back. The industrial claim (No. 03-804489) is allowed for:

Closed fracture right fibula shaft; right rotator cuff sprain; aggravation of pre-existing intervertebral disc of the lumbar spine; right rotator cuff syndrome; sprain right ankle; enthesopathy right ankle; localized primary osteoarthritis right shoulder; degenerative joint disease right shoulder.

{¶7} 2. On February 5, 2003, claimant underwent an open reduction and internal fixation of the right ankle.

{¶8} 3. On January 25, 2005, claimant underwent a second surgery for her right ankle.

{¶9} 4. Earlier, on March 16, 2004, claimant was initially examined by Timothy P. Duffey, D.O., for her right shoulder conditions. In a two-page narrative report, Dr. Duffey wrote:

As far as her tendon, it is torn. She provides no other injury, accident or event that tore her tendon. I told her that I believe it requires a repair so I recommended an arthroscopy, right shoulder, subacromial decompression, distal clavicle resection and repair of the rotator cuff. The procedure complications, expectations, risks and benefits were outlined to the patient. * * *

{¶10} 5. On September 26, 2006, claimant was again examined by Dr. Duffey who, in a three-page narrative report, wrote:

Charlotte Bell is seen in recheck examination today on 9/26/06. She was set up for consultation, but I saw her in consultation on 3/16/04, so just over two years ago. At that time, I recommended proceeding with an arthroscopy and repair of her rotator cuff tendon. That has not been performed. She has not had any operative care for this shoulder.

* * *

PLAN:

[One] I have asked her to obtain an MRI of the right shoulder for rotator cuff tendon tear, but basically, I want to know about atrophy and retraction of the tendon. I am concerned that she is going to have a pretty significant amount of atrophy and a retracted tear that is going to be non-reparable.

[Two] I have asked her to get an injection of the subacromial space and get that authorized.

[Three] I do not know if surgery is going to be helpful to her now, but I do believe it was going to be helpful then and this is a natural progression of rotator cuff tendon tears to go on to atrophy and traction and rotator cuff arthropathy.

{¶11} 6. On December 12, 2006, Dr. Duffey wrote:

Her MRI of 1/8/04, which would have been three years ago, showed a rotator cuff tendon tear, but it did not show retraction at that time, and that was one year after her injury.

Her x-ray on 9/26/06 reveals a markedly diminished subacromial space, and that indicates retraction of the tendons and a chronic rotator cuff tendon tear.

It is my belief that based on these results, that the patient has rotator cuff arthropathy, and this is osteoarthritis of the glenohumeral joint as a direct and proximate result of a chronic tear of her rotator cuff.

As you'll note in my correspondence of 9/26/06, I do believe she needs her cervical spine evaluated. I made the

recommendation for a new MRI of her shoulder since it has been three years since her last one because I think now the rotator cuff is retracted, it is chronic, and there will be atrophy associated with the rotator cuff muscles which markedly changes her prognosis. I talked to her about injection, surgery, and I also talked to her about osteoarthritis. Her A/C joint had osteoarthritis on my previous x-rays of 1/8/04, so that was one year after the accident. My professional opinion would be that she had pre-existing osteoarthritis of the A/C joint which was aggravated by her injury of 1/31/03. My professional opinion with medical certainty is that she has osteoarthritis of the glenohumeral joint as a direct and proximate result of her rotator cuff tendon tear, which is more accurately termed rotator cuff arthropathy for the shoulder.

{¶12} 7. On December 7, 2006, claimant moved for the allowance of additional conditions in the claim.

{¶13} 8. By order mailed January 22, 2007, the Ohio Bureau of Workers' Compensation ("bureau") additionally allowed the claim for "localized primary osteoarthritis right shoulder, degenerative joint disease right shoulder." Apparently, the bureau's order was not administratively appealed.

{¶14} 9. On July 6, 2007, claimant was again examined by Dr. Duffey. In a two-page narrative report, Dr. Duffey wrote:

She is here today regarding continuing pain. She had as [sic] recent MRI completed on 6/26/07 and it does reveal a full thickness tear of the supraspinatus tendon. It still has some moderate tendon [sic] retraction measuring about 2 cm. Again, there is moderate acromioclavicular joint osteoarthritis associated with that.

I told her that the only thing that I could really help her with would consist of two things, which include: 1) An arthroscopy with decompression as an attempt to the rotator cuff repair. 2) An arthroscopy with decompression with an attempt at an

open rotator cuff repair with grafting. The procedure, complications, expectations, risks, and benefits were outlined to the patient.

Based on her medical history and her age, she is not interested in proceeding with the surgery. I talked to her specifically about a rotator cuff arthropathy and its issues associated with that. She, again, declined any operative care.

{¶15} 10. On December 7, 2007, Dr. Duffey wrote:

Charlotte was seen today on 12/7/2007 for a follow up visit. She is 73 years of age. As you know, she has rotator cuff arthropathy and glenohumeral joint degenerative disease. These are very significant findings.

I went over her chart with her. I have asked her to perform an x-ray evaluation today.

RADIOGRAPHIC EXAMINATION: X-rays performed today revealed markedly diminished subacromial space with large lateral acromial spur indicating rotator cuff arthropathy.

With her permission under sterile technique I injected her shoulder today. There is very little more I can offer orthopedically. The next step for her is essentially a rotator cuff arthropathy, shoulder arthroplasty.

{¶16} 11. Some 19 months later, on July 7, 2009, Dr. Duffey wrote:

I think a second opinion is indicated. She has a significant permanent problem here in her shoulder. I think she is going to get a suboptimal result based on her chronic pain and her current x-ray findings. I have recommended a subspecialty shoulder surgeon to see if that person agrees with my opinion. Again, my opinion is to proceed with operative care in her case.

{¶17} 12. On July 20, 2009, Robert J. Nowinski, D.O., who specializes in shoulder surgery, wrote:

* * * At the current time I have recommended a repeat MRI to evaluate the current status of her rotator cuff.

Reconstructive options would be attempted rotator cuff repair with augmentation grafting; however, I feel this will most likely be unlikely given her moderate tearing on the previous MRI two years ago. I feel she most likely has progressed and will ultimately require a reverse total shoulder arthroplasty combined with latissimus transfer, rotator cuff repair, biceps tenodesis, and contracture release. We will discuss this based on her MRI findings at her next visit.

{¶18} 13. Earlier, following an August 15, 2007 hearing, a staff hearing officer ("SHO") issued an order that denies temporary total disability ("TTD") compensation from September 6, 2006 through August 5, 2007. The SHO notes that a previous finding of maximum medical improvement ("MMI") had been entered effective May 24, 2006. Further, the SHO held that the two additional claim allowances are also at MMI. The SHO's order of August 15, 2007 addresses the issue of whether the surgical recommendations should be grounds for further TTD compensation:

* * * Claimant's treating physician referred the claimant to a 07/06/2007 consultation by Dr. Duffey. Dr. Duffey stated that the only way that he could help her would be one of two recommended surgeries. Claimant has explicitly declined surgery. Although the Staff Hearing Officer does not rely upon his report for other reasons, the 04/22/2007 BWC review by Dr. Ahn explains the problem clearly[.] * * * [T]he only treatment which may improve the claimant's condition is a treatment which she declines, [and] she will in fact be unable to return to her former position of employment for the rest of her life. There is no convincing evidence that the claimant's disability was in a status which could be kept properly characterized as temporary at any time from 09/06/2006 forward.

This Staff Hearing Officer has considered, but does not find well taken, counsel for claimant's argument that this analysis effectively forces an injured worker to undergo surgical intervention. The question under consideration is whether the claimant's disability is in a permanent or temporary

status. The medical evidence supports the conclusion that the claimant will not benefit in any permanent way from a less invasive treatment. Consequently, she has reached a status of permanency in the absence of the treatment she may seek of a surgical nature. The alternative is to permit an injured worker who does not wish to pursue a surgical option to obtain disability payment indefinitely simply by declining a surgical option.

{¶19} 14. Earlier, on May 23, 2006, claimant's treating physician Charles J. Kistler, Jr., D.O., wrote:

It is my medical opinion, based on reasonable medical certainty and probability, that Charlotte Bell has not reached maximum medical improvement at the present time. She will need follow up for stabilization of her right shoulder so that we may be able to get her into a vocational rehabilitation plan to structure her for some other type of work or work with restrictions. She cannot return to her former job as a bus driver; however, there is some form of work that she will be able to do with restrictions once they are documented.

{¶20} 15. The record contains a "Physician's Report of Work Ability" ("MEDCO-14") form from Dr. Kistler.

{¶21} The MEDCO-14 requires a physician's signature and the date. Three dates are written. February 25, 2009 appears in the space provided for the date. However, outside the space, but directly underneath, April 16, 2009 is written. Thereunder, August 26, 2009 is written.

{¶22} The MEDCO-14 form also asks for the "[d]ate of this exam." In response, February 16, 2009 is written.

{¶23} On the MEDCO-14 form, placement of a mark in the appropriate box indicates that claimant may return to work with restrictions "from 4-15-09 to 10-15-09."

{¶24} 16. By letter (or report) dated December 2, 2009 to relator's counsel, Dr.

Kistler wrote:

I had the pleasure of examining Charlotte Bell on 10-23-09 for injuries sustained in Claim #03-804489, date of injury 01-31-03, which occurred when she was working as a bus driver for Franklin County. * * *

* * *

It is my medical opinion, taking into account only those conditions allowed in this claim and with reference to the AMA Guidelines to the Evaluation of Permanent Impairment, Sixth Edition, that Charlotte Bell is permanently and totally impaired from sustained remunerative employment solely as a result of the injuries allowed in this claim.

{¶25} 17. On December 9, 2009, claimant filed an application for PTD compensation. In support, claimant submitted the December 2, 2009 report from Dr. Kistler.

{¶26} 18. On March 12, 2010, at the commission's request, claimant was examined by James J. Powers, M.D. Dr. Powers then completed a physical strength rating form on which he indicated by his mark that claimant is capable of "sedentary work."

{¶27} 19. Following a June 2, 2010 hearing, an SHO issued an order awarding PTD compensation beginning October 23, 2009 based upon Dr. Kistler's report dated December 2, 2009. The SHO's order explains:

Permanent and total disability compensation is awarded from 10/23/2009 for the reason that Dr. Kistler examined the Injured Worker on that date and concluded in his report of 12/02/2009 that "...Charlotte Bell is permanently and totally impaired from sustained remunerative employment solely as a result of the injuries allowed in this claim."

Based upon the report of Dr. Kistler and the vocational evaluation performed by Diane Tedeschi, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed condition(s). Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

{¶28} 20. On August 10, 2010, the three-member commission, in a two-to-one vote, mailed an order denying relator's request for reconsideration.

{¶29} 21. On October 27, 2010, relator, Franklin County Board of Commissioners, filed this mandamus action.

Conclusions of Law:

{¶30} Three main issues are presented: (1) whether the commission abused its discretion in failing to address whether claimant's refusal to undergo shoulder surgery "broke the causal link" between the alleged disability and the industrial injury (relator's reply brief, at 1); (2) whether the December 2, 2009 report of Dr. Kistler is some evidence upon which the commission can rely; and (3) whether the commission abused its discretion in failing to address whether claimant unjustifiably failed to participate in vocational rehabilitation.

{¶31} The magistrate finds: (1) the commission did not abuse its discretion in failing to address claimant's refusal to undergo shoulder surgery; (2) Dr. Kistler's December 2, 2009 report is some evidence upon which the commission can and did rely; and (3) the commission did not abuse its discretion in failing to address the failure to undergo vocational rehabilitation.

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

{¶33} Turning to the first issue, Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to adjudication of PTD applications.

{¶34} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines to be followed by the adjudicator in the sequential evaluation of PTD applications.

{¶35} It can be observed that a refusal to undergo surgery does not appear as a ground for denial of a PTD application under the guidelines set forth at Ohio Adm.Code 4121-3-34(D).

{¶36} The Supreme Court of Ohio has repeatedly addressed the obligation of a PTD claimant to undergo opportunities for rehabilitation. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525; *State ex rel. Bowling v. Natl. Can Corp.* (1996), 77 Ohio St.3d 148; *State ex rel. Wood v. Indus. Comm.* (1997), 78 Ohio St.3d 414; *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250; *State ex rel. Cunningham v. Indus. Comm.* (2001), 91 Ohio St.3d 261.

{¶37} In *B.F. Goodrich*, the court states:

The commission does not, nor should it, have the authority to force a claimant to participate in rehabilitation services. However, we are disturbed by the prospect that claimant may have simply decided to forgo retraining opportunities that could enhance re-employment opportunities. An award of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment.

Id. at 529.

{¶38} In *Wilson*, the court states:

We view permanent total disability compensation as compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. Thus, it is not unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse a claimant's nonparticipation in reeducation or retraining efforts, claimants should no longer assume that a participatory role, or lack thereof, will go unscrutinized.

Id. at 253-254.

{¶39} The *Wilson* court thus recognized that extenuating circumstances can excuse a claimant's nonparticipation in rehabilitation or retraining.

{¶40} Citing *Wilson*, which states that it is not unreasonable to expect a claimant to participate in return-to-work efforts, relator concludes that "the same concept applies to a claimant who fails to take advantage of all reasonable avenues of medical recovery." (Relator's brief, at 4.) Pointing out that two physicians have opined that claimant would benefit from shoulder surgery, and yet claimant has refused the recommended surgery, relator claims that the refusal to undergo the shoulder surgery presents a ground for denial of the PTD application that the commission failed to consider.

{¶41} Significantly, neither Dr. Duffey nor Dr. Nowinski opined that shoulder surgery would render claimant medically able to work. However, both doctors obviously believe that shoulder surgery will benefit claimant.

{¶42} Interestingly, in his July 6, 2007 report, Dr. Duffey states: "The procedure, complications, expectations, risks, and benefits were outlined to the patient." Dr. Duffey

then explains that, "[b]ased on her medical history and her age, she is not interested in proceeding with the surgery."

{¶43} Thus, Dr. Duffey's report supports claimant's counterargument here, that "as with all the surgeries recommended none of the doctors could guarantee that her impairment would have been [improved]." (Claimant's brief, at 8.)

{¶44} While the *Wilson* court states that a claimant's nonparticipation in reeducation or retraining efforts will no longer go unscrutinized, this rationale has never been applied to a claimant's refusal to undergo a surgery recommended by a physician of record.

{¶45} The decision to undergo surgery is uniquely personal where the claimant must carefully weigh the risks against the anticipated benefits. Ordinarily, this type of decision should not be second-guessed by the commission or the courts. Clearly, under the circumstances here, claimant's decision to refuse the surgical option should not be second-guessed.

{¶46} Based upon the above analysis, it is clear that the commission did not abuse its discretion in failing to address in its order claimant's refusal to undergo shoulder surgery.

{¶47} As earlier noted, the second issue is whether the December 2, 2009 report of Dr. Kistler is some evidence upon which the commission can rely.

{¶48} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to

clarify an ambiguous statement. Ambiguous statements, however, are considered equivocal only while they are unclarified. *Id.*

{¶49} Relator contends that the two reports from Dr. Kistler that pre-date his December 2, 2009 report render that report equivocal and thus the December 2, 2009 report must be removed from evidentiary consideration. The magistrate disagrees.

{¶50} In his May 23, 2006 report, Dr. Kistler opined that, although claimant cannot return to her former job as a bus driver, "there is some form of work that she will be able to do with restrictions once they are documented."

{¶51} On the triple-dated MEDCO-14 form, Dr. Kistler opines, based upon a February 16, 2009 examination, that claimant may return to work with restrictions beginning April 15 to October 15, 2009.

{¶52} Obviously, Dr. Kistler's PTD opinion in his December 2, 2009 report (based on an October 23, 2009 examination), was rendered over eight months after the February 16, 2009 examination that is the basis for his MEDCO-14 opinion. Moreover, Dr. Kistler's PTD opinion in his December 2, 2009 report is rendered almost three and one-half years after the May 23, 2006 report.

{¶53} Because Dr. Kistler's PTD opinion in his December 2, 2009 report is not based upon the same examinations that premised the prior reports, the magistrate must conclude that the December 2, 2009 report is not equivocal, and thus constitutes some evidence upon which the commission can and did rely. See [*State ex rel.*] *Baja Marine Corp. v. Indus. Comm.*, 114 Ohio St.3d 70, 2007-Ohio-2881, ¶16, 22 (Dr. Viau's single examination generated contrary conclusions); *State ex rel. M. Weingold & Co. v. Indus. Comm.*, 97 Ohio St.3d 44, 2002-Ohio-5353 (substantial inconsistencies between two C-

84s generated by the same examination compel the conclusion that the reports are internally inconsistent).

{¶54} Logically, a doctor who re-examines his patient must be allowed to report and opine on his actual clinical findings even when those findings are significantly different than the findings previously obtained. That is, the rule regarding equivocal medical opinions cannot be used to prohibit a doctor from reporting a change in the claimant's medical condition.

{¶55} In short, Dr. Kistler's December 2, 2009 report is indeed some evidence upon which the commission can and did rely.

{¶56} As earlier noted, the third issue is whether the commission abused its discretion in failing to address whether claimant unjustifiably failed to participate in vocational rehabilitation.

{¶57} The record contains a report, dated October 27, 2009, from Disability Case Manager Diane Tedeschi, M.Ed. In her report, Ms. Tedeschi states:

Ms. Bell's most recent referral to vocational rehabilitation services was made on August 28, 2009. At this time BWC determined that Ms. Bell was not eligible for vocational rehabilitation services. This decision was appealed by the [Attorney of Record] on September 8, 2009 at which time Ms. Bell's file was referred to BWC's ADR Unit. After reviewing the file BWC determined that Ms. Bell was eligible for vocational rehabilitation services. A BWC Order was sent to the injured worker on September 10, 2009 informing her of this decision.

Upon notice of Ms. Bell's eligibility for vocational rehabilitation services, the [Managed Care Organization] determined that the injured worker was not feasible for vocational services. This decision was conveyed to Ms. Bell

in a letter dated September 15, 2009. On September 18, 2009, the [Attorney of Record] submitted an appeal regarding this decision.

Recommendations

This Reviewer concurs with the decision that Ms. Bell is not feasible for participation in vocational rehabilitation services. It is commendable that Ms. Bell wishes to return to work however it does not appear from a physical standpoint that she could tolerate a vocational rehabilitation program. Specifically, BWC HPP Vocational Rehabilitation Guidelines, Chapter 4, Section 1 states in part..... "Vocational rehabilitation plans must reflect that the injured worker will approximate a 40 hours work week, or, at a minimum, that the injured worker participates at least 3 days per week in plan activities."

From medical records included in Ms. Bell's file it appears that the injured worker's pain in her right shoulder is becoming more intense. In fact, Dr. Nowinski documented in an office note dated July 20, 2009 (previously referenced) that Ms. Bell "describes her pain as severe, 8/10, constant and getting worse." Dr. Nowinski continued to recommend an MRI to evaluate Ms. Bell's right shoulder and opined that she may need extensive surgery such as a total reverse shoulder arthroplasty, etc.

Considering the aforementioned, Ms. Bell could not physically tolerate a vocational rehabilitation program due to her level of pain and therefore is not feasible for vocational rehabilitation services. * * *

(Emphasis sic.)

{¶58} Seemingly referring to the October 27, 2009 Tedeschi report, relator, in effect, contends that the commission should have determined that claimant's refusal to undergo shoulder surgery results in her not being feasible for participation in vocational rehabilitation services and, on that basis, is grounds for denial of the PTD application.

{¶59} Relator's argument lacks merit. The argument is premised upon the same proposition that this magistrate has previously rejected. That is, claimant's refusal to undergo shoulder surgery cannot be used by the commission as a basis for the denial of the PTD application.

{¶60} 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).