[Cite as *State ex rel. Cleveland Professional Football, L.L.C. v. Buehrer*, 2012-Ohio-6020.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cleveland Professional Football, LLC,	:	
Relator,	:	No. 11AP-428
v.	:	(REGULAR CALENDAR)
Steve Buehrer, in his capacity as the Administrator of the Ohio Bureau of Workers' Compensation,	:	
Respondent.	:	

D E C I S I O N

Rendered on December 20, 2012

Kelley & Ferraro, LLP, Thomas M. Wilson, Shawn M. Acton, and *Matthew A. McMonagle,* for relator.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, Cleveland Professional Football, LLC ("New Gladiators") commenced this original action in mandamus seeking an order compelling respondent, the Ohio Bureau of Workers' Compensation ("BWC") to vacate its order that transferred the experience, rights and obligations of Cleveland AFL, LLC ("Old Gladiators") to New Gladiators, after finding that New Gladiators is the successor employer of Old Gladiators.

{¶ 2} Pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that the BWC did not abuse its discretion in finding that New Gladiators is a successor employer of Old Gladiators. Based on this finding, the magistrate noted that New Gladiators would be responsible for paying any workers' compensation claims relating to Old Gladiators' employees. However, the magistrate also found that the BWC abused its discretion when it transferred all of Old Gladiators' rate experience to New Gladiators because only a portion of Old Gladiators' business was transferred to New Gladiators. Based upon these findings, the magistrate has recommended that we issue a writ of mandamus ordering the BWC to vacate its order finding that New Gladiators was a successor employer to all of Old Gladiators' experience and/or rights and/or obligations. The magistrate has further recommended that we order the BWC to issue a new order determining the obligations of New Gladiators after determining the following: (1) the amount of premium necessary so New Gladiators can properly assume, as a successor employer, the obligations of Old Gladiators to pay the medical expenses and compensation estimated to be due on Old Gladiators' existing claims; (2) determine if the Professional Employer Organization utilized by Old Gladiators failed to meet its obligations and, if so, New Gladiators should assume that cost; (3) address the argument/evidence that New Gladiators does not have any employees who play football; (4) expressly set forth what portion of Old Gladiators' "experience" is being charged to New Gladiators; and (5) clearly explain its decision concerning New Gladiators' obligations.

{¶ 3} The BWC has filed objections to the magistrate's decision. In its first objection, the BWC challenges a factual finding by the magistrate. The BWC argues that the magistrate erred when "she summarized the bureau['s] conclusion that New Gladiators was a 'successor' to Old Gladiators, when the bureau found New Gladiators 'would be deemed the successor for experience rating purposes.' " (Respondent's objections at 2.) In essence, the BWC contends that there is no evidence in the record to support the magistrate's finding that the BWC transferred anything other than Old Gladiators' experience rating to New Gladiators. We disagree.

{¶ 4} The magistrate's factual finding simply reflects what is expressed in the BWC's notification letter dated May 21, 2010 and its October 15, 2010 adjudication committee order. The May 21, 2010 notification letter from the BWC states "[a]s the successor employer for the entire operation, [of Old Gladiators] you [New Gladiators] are responsible for all existing and future financial rights and obligations of the former employer [Old Gladiators]." Likewise, the October 15, 2010 order of the BWC's adjudication committee states "BWC correctly transferred and/or combined the predecessor's [Old Gladiators] experience and/or rights and/or obligations to the subsequent Employer [New Gladiators] under the Code." The adjudication order also expressly references Ohio Adm.Code 4123-17-02(C), which governs the transfer of rights and obligations. The magistrate did nothing more than restate what is reflected in the BWC's May 21, 2010 notice letter and its October 15, 2010 adjudication committee order. These documents speak for themselves. For this reason, we overrule the BWC's first objection.

{¶ 5} In its second objection, the BWC contends that the magistrate erred by recommending the issuance of a writ to require the BWC to address potential liability issues unrelated to the transfer of Old Gladiators' experience rating to New Gladiators. The BWC further argues that the magistrate misapplied *State ex rel. Crosset v. Conrad*, 87 Ohio St.3d 467 (2000) in concluding that liability issues unrelated to the transfer of Old Gladiators' experience rating should be addressed by the BWC. Lastly, the BWC points out that neither New Gladiators nor the BWC raised any issue regarding the transfer of Old Gladiators' workers' compensation liabilities, if any, to New Gladiators. We agree with the BWC that *Crosset* is inapplicable to this case and there was simply no reason for the magistrate to address an issue not raised by the parties. Therefore, we sustain this aspect of the BWC's second objection.

{¶ 6} We are unable to discern whether the BWC objects to the remaining portion of the magistrate's decision that directs the BWC to expressly address how it will apply Old Gladiators' experience rating to New Gladiators, given that New Gladiators is the transferee of only a portion of Old Gladiators' business. We note that if only a portion of Old Gladiators' business was transferred to New Gladiators, Old Gladiators' experience

rating is transferred in proportion to the business transferred pursuant to Ohio Adm.Code 4123-17-02(B)(3). We see no defect in this part of the magistrate's analysis.

{¶ 7} As noted by the magistrate, New Gladiators does not employ players or coaches. Therefore, it is not the transferee of this portion of Old Gladiators' business. Therefore, we agree with the magistrate that the BWC abused its discretion by transferring all of Old Gladiators' experience rating to New Gladiators. To the extent that the BWC objects to this portion of the magistrate's conclusion of law, we overrule the objection.

{¶ 8} Following an independent review of this matter, we find that the magistrate has properly determined the facts. Therefore, we adopt the magistrate's findings of fact as our own. We also adopt that portion of the magistrate's conclusions of law that address the transfer of Old Gladiators' experience rating to New Gladiators. However, we decline to adopt the portion of the magistrate's conclusions of law that addresses the transfer of Old Gladiators' liabilities to New Gladiators.

{¶ 9} Therefore, we grant relator's request for a writ of mandamus to the extent that we order the BWC to vacate its order finding that New Gladiators was a successor employer to all of Old Gladiators' experience rating. We also agree with the magistrate that the BWC should issue a new order determining New Gladiators' experience rating based only upon the portion of Old Gladiators' business that was transferred to New Gladiators.

Objections sustained in part and overruled in part;
writ of mandamus granted.

SADLER and FRENCH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cleveland Professional Football, LLC,	:	
Relator,	:	No. 11AP-428
v.	:	(REGULAR CALENDAR)
Steve Buehrer, in his capacity as the Administrator of the Ohio Bureau of Workers' Compensation,	:	
Respondent.	:	

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

Rendered on April 25, 2012

Kelley & Ferraro, LLP, Thomas M. Wilson, Shawn M. Acton, and *Matthew A. McMonagle,* for relator.

Michael DeWine, Attorney General, and *John R. Smart,* for respondent.

IN MANDAMUS

{¶ 10} Relator, Cleveland Professional Football, LLC, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, the Ohio Bureau of Workers' Compensation ("BWC") to vacate its order which transferred and/or combined the experience and/or rights and/or obligations of Cleveland AFL, LLC ("Old Gladiators") to Cleveland

Professional Football, LLC ("New Gladiators") after finding that New Gladiators is the successor employer of Old Gladiators.

Findings of Fact:

{¶ 11} 1. In February 2010, New Gladiators applied for Ohio workers' compensation coverage. In the documentation, New Gladiators had indicated that it had purchased Old Gladiators in December 2009. The documentation also indicated that Jim Ferraro owned both Old Gladiators and New Gladiators. The current operations were described as "sales of tickets, sponsorship and merchandise for sports entertainment" and the type of operation was described as "game day operations."

{¶ 12} 2. The BWC processed New Gladiators' application and, in a letter dated May 21, 2010, the BWC notified New Gladiators as follows:

> We received notification of a business acquisition/merger or purchase/sale and have determined you are the successor employer for Ohio workers' compensation purposes.
>
> As the successor employer for the entire operation, you are responsible for all existing and future financial rights and obligations of the former employer. BWC will base your workers' compensation rate(s) on the former employer's experience or the combined experience of all employers involved in the transaction if you had established coverage prior to acquiring the business. As a result, BWC will re-calculate your premium rates, which may result in a rate change.

{¶ 13} 3. Ferraro responded to the BWC's notice in a letter dated June 11, 2010 providing the BWC with documentation from the United States Bankruptcy Court, Northern District of Illinois, Eastern Division, approving the Chapter 7 liquidation of the Arena Football League ("Old League"). The documentation also indicated that Arena Football One, LLC ("New League"), an investment group, had purchased the assets of the Old League from the bankruptcy court and that New Gladiators

purchased the "Cleveland Gladiators" logo from that investment group. Ferraro also explained that the bankruptcy itself involved only the Old League and did not involve any of the teams. Further, Ferraro indicated that "all players in the new Arena League are employed by a single corporation based in Louisiana" and that no players were employed by New Gladiators.

{¶ 14} 4. The BWC responded to Ferraro in a letter dated June 18, 2010, again concluding that New Gladiators was a successor employer to Old Gladiators. Specifically, that letter provides:

> Thank you for your inquiry on June 11, 2010 regarding the Cleveland Gladiators. Attached was information from the United States Bankruptcy Court, Northern District of Illinois Eastern Division. In your inquiry, you asked that we review the documents, in hopes that the information would serve as evidence that Cleveland Professional Football LLC, currently doing business as Cleveland Gladiators, is not a successor to Cleveland AFL, LLC, formerly doing business as Cleveland Gladiators.
>
> A review by our Legal Division Staff Counsel has been completed. Additional documentation reviewed includes the following: Articles of Organization for Cleveland Professional Football LLC & Articles of Amendment; Certificate of Designation of Registered Agent; AFL Asset Sale; AFL Asset Order; and AFL Bill of Sale. The review by Staff Counsel concludes that Cleveland AFL LLC was not a debtor in the bankruptcy case, thus the financial obligations of Cleveland AFL LLC were not discharged. Even if the debts of the former team were discharged, Cleveland Professional Football LLC would be deemed the successor for experience rating purposes for the following reasons: the involvement of a former investor of the old Gladiators; continuity of the league name; continuity of the franchise name; and the continuity of the type of football played.
>
> Therefore, we find that Cleveland Professional Football LLC, doing business as Cleveland Gladiators, is a successor to Cleveland AFL LLC, formerly doing business as Cleveland Gladiators. Should you disagree with the findings, you may file a formal complaint.

{¶ 15} 5. New Gladiators objected to the BWC's determination and requested a hearing. In support of its protest, New Gladiators provided the affidavit of Ferraro wherein he stated:

> [One] My business address is 4000 Ponce de Leon Blvd., Suite 700, Coral Gables, Florida 33146.
>
> [Two] I am the current majority owner and CEO of Cleveland Professional Football, LLC, a Florida Limited Liability Company ("New Cleveland Gladiators").
> [Three] True and accurate copy of the Florida incorporation papers relating to the New Cleveland Gladiators are attached hereto as "Exhibit A."
>
> [Four] Tax identification papers for the New Gladiators are attached hereto as "Exhibit B."
>
> [Five] True and accurate cop[i]es pf documents relating to the New Cleveland Gladiators which were filed with the Ohio Secretary of State are attached hereto as "Exhibit C."
>
> [Six] I was also majority owner and CEO of Cleveland AFL, LLC ("Old Cleveland Gladiators").
>
> [Seven] The Old Cleveland Gladiators was an entity in the now defunct Arena Football League.
>
> [Eight] In approximately late 2009, the Arena Football League indefinitely suspended operations due to financial difficulties.
>
> [Nine] In December of 2009, the Arena Football League filed for bankruptcy. That Bankruptcy was converted from a Chapter 11 reorganization to a Chapter 7 liquidation as evidenced by the Bankruptcy Order which is attached hereto as "Exhibit D."
>
> [Ten] The Trustee for the Bankruptcy Court sold the assets of the now defunct Arena Football League along with the name "Arena Football" and all of the logos of the teams (including the "Cleveland Gladiators") that were owned by the now defunct Arena Football League at the time it went into bankruptcy to an investor group known as "Arena Football One."

> [Eleven] Arena Football One purchased the assets of the Arena Football League from the Bankruptcy Court for approximately $6.1 million dollars and formed an entirely new arena football league with an entirely new business model ("New League.")
>
> [Twelve] The New Cleveland Gladiators are affiliated with the New League and are separate and distinct from the Old Cleveland Gladiators and the now defunct Arena Football League.
>
> [Thirteen] Not a single team in the New League, including the New Cleveland Gladiators, exists as a successor or continuation of the now defunct Arena Football League.
>
> [Fourteen] Not a single player on the New Cleveland Gladiators played for the Old Cleveland Gladiators of the now defunct Arena Football League.
>
> [Fifteen] Not a single coach from the Old Cleveland Gladiators is a coach in the New Cleveland Gladiators.
>
> [Sixteen] ALL players in the New League, including those players on the New Cleveland Gladiators' roster, are employed by a single corporation based in Louisiana.
>
> [Seventeen] In other words, the New Cleveland Gladiators does not employ any players as was the case for the Old Cleveland Gladiators of the now defunct Arena Football League.
>
> [Eighteen] Moreover, the composition of the New Cleveland Gladiators front office staff (for example, general manager) is different from the Old Cleveland Gladiators front office staff.
>
> [Nineteen] The New Cleveland Gladiators is not a successor or a mere continuation of the Old Cleveland Gladiators.
>
> [Twenty] The New Cleveland Gladiators hereby objects to the Ohio Bureau of Workers' Compensation's finding dated June 18, 2010 that the New Cleveland Gladiators is a successor to or continuing entity of the Old Cleveland Gladiators for experience rating purposes. (See Exhibit E).

{¶ 16} 6. A hearing was held before the adjudication committee on October 6, 2010.

{¶ 17} 7. Prior to the issuance of an order from the adjudication committee, New Gladiators provided the following additional information:

> The issues to be determined at the aforementioned hearing were whether or not the risk experience and obligations of Cleveland AFL, LLC transfer to Cleveland Professional Football, LLC. At the October 6, 2010 hearing, Cleveland Professional Football, LLC presented legal arguments and facts supporting its position that the risk experience and obligations of Cleveland AFL, LLC do not transfer to Cleveland Professional Football, LLC mainly for the following reasons:
>
> * Cleveland Professional Football, LLC has not expressly or impliedly agreed to assume such obligations,
> * Any transactions made by Cleveland Professional Football, LLC do not amount to a de facto consolidation or merger,
>
> * Cleveland Professional Football, LLC is not a mere continuation of Cleveland AFL, LLC, and
>
> * Any transactions made by Cleveland Professional Football, LLC were not entered into for purposes of escaping obligations under the workers' compensation law.
>
> See OH Admin. Code §4123-17-02(B)(6)(a-d) and OH Admin. Code §4123-17-02(C)(1)(a-d).
>
> Of particular importance, Cleveland Professional Football, LLC, does not employ any people who actually play arena football, a contact sport. (See Affidavit from James Ferraro, previously submitted to the Ohio Bureau of Workers' Compensation). The arena football players on the current Cleveland Gladiators roster are employees of a League corporation. Cleveland Professional Football, LLC is a limited liability company that markets sport entertainment and sells tickets, sponsorships and T-shirts, etc. The make-up of the front office and coaches of Cleveland Professional Football, LLC is very different from Cleveland AFL, LLC. The operations of Cleveland AFL, LLC and Cleveland Professional Football, LLC are very different. The latter does not have any football players as employees. It is patently wrong to transfer/combine the risk experience of Cleveland AFL, LLC and obligations for workers' compensation claims filed by arena football players who were allegedly injured

> while playing for Cleveland AFL, LLC to Cleveland Professional Football, LLC.
>
> During the October 6, 2010 hearing, an attorney for the Ohio Bureau of Workers' Compensation alleged that Cleveland AFL, LLC entered into an agreement with a Professional Employer Organization ("PEO") named Pay Source relating to workers' compensation issues for arena football players who were playing for Cleveland AFL, LLC. The Ohio Bureau of Workers' Compensation did not submit any evidence to support this contention. There is not any evidence that a PEO co-employed arena football players with Cleveland AFL, LLC for workers' compensation purposes.
>
> Enclosed please find several invoices from Pay Source which indicate that Pay Source merely processed payroll for certain non-football playing employees of Cleveland AFL, LLC (Messrs. Adams, Tesar, Tipton, Partlow, and Wilpolt). Enclosed please also find an Ohio BWC U-3 Form and an Application for Ohio Workers' Compensation Coverage which was submitted to the Ohio Bureau of Workers' Compensation by Cleveland Professional Football, LLC. These documents further support the fact that Cleveland Professional Football, LLC is not a successor to Cleveland AFL, LLC for workers' compensation purposes. *Id*.

{¶ 18} 8. In an order mailed October 15, 2010, the adjudication committee denied New Gladiators' protest. In that order, the committee set forth the positions of both New Gladiators and the BWC as follows:

> [New Gladiators' Position:]
>
> The employer's representative stated in 2008, an arena football team was moved to Cleveland. In 2009, the Arena Football League had financial problems. The league dissolved following bankruptcy proceedings. The assets of the arena football league were sold to a new owner. The new owner then contracted with the old owner of the Cleveland team to run the new league team in Cleveland. There was no assumption of liabilities between the old team and the new team. Assets were purchased free and clear from the bankruptcy court. This was not a defacto merger. The old league and new Cleveland Gladiators are different. There is a new coaching staff and there is a different business model. Under the new league the players are not employees of the

> team. The new team is only responsible for sales and marketing of the team.
>
> [BWC's Position:]
>
> The BWC representative stated the Bureau could complete an experience combination despite a bankruptcy because the Cleveland AFL [LLC] was not a party to the Arena Football League's bankruptcy proceeding nor was Cleveland AFL [LLC]'s debts discharged in the bankruptcy. Cleveland AFL [LLC] and Cleveland Professional Football are owned by the same person. The franchise name of The Cleveland Gladiators and the logo were continued as well as the type and method of doing business. Therefore, the experience and liabilities of the old policy were transferred to the new employer's policy.

Thereafter, the committee set forth the following findings of fact and conclusions of law:

> Based on the testimony at the hearing and the materials submitted with the protest, the Adjudication Committee DENIES the Employer's protest to the transfer/combination. The Committee finds that the claims against Cleveland AFL [LLC] were originally allowed against a PEO and would have remained so but for the fact that the PEO went out of business. Under Ohio Administrative Code 4123-17-15 those claims were then transferred to the PEO client-employer, Cleveland AFL [LLC]. The new employer, Cleveland Professional Football League, also uses a PEO to cover its players for purposes of workers compensation. Thus, the business model used by the old and new companies is the same. Both companies share the same franchise name, logo, method of covering players and ownership. BWC correctly transferred and/or combined the predecessor's experience and/or rights and/or obligations to the subsequent Employer under the Code.

{¶ 19} 9. New Gladiators appealed the decision stressing that it does not employ any people who actually play arena football. New Gladiators also attached several documents relating to a workers' compensation claim filed by Lance Witherspoon, a player assigned to New Gladiators during the previous football season. That claim was originally assigned to New Gladiators; however, after further investigation, the BWC

determined that Witherspoon was an employee of the New League and not the New Gladiators. Specifically, the October 18, 2010 letter and attached documentation provides:

> As you are aware, Cleveland Professional Football, LLC has provided you a great amount of evidence to support its contention that Cleveland Professional Football, LLC is not a successor to Cleveland AFL, LLC for workers' compensation purposes. Of particular importance, Cleveland Professional Football, LLC does not employ any people who actually play arena football.
>
> In further support of Cleveland Professional Football, LLC's position, enclosed please find several documents relating to an Ohio workers[']compensation claim filed by Lance Witherspoon, an arena football player assigned to the Cleveland Gladiators during the last arena football season:
>
> * Lance Witherspoon's pay stubs which indicate that he was an employee of Arena Football One, LLC, not Cleveland Professional Football, LLC,
> * The 08/25/10 Note from the OBWC Claims Service Specialist who found that Arena Football One, LLC, not Cleveland Professional Football, LLC, is Mr. Witherspoon's employer, and
>
> * The OBWC's 09/28/10 Order allowing Mr. Witherspoon's claim against Arena Football One, LLC.
>
> A brief summary of the Lance Witherspoon claim is as follows. Mr. Witherspoon alleged that he suffered a knee sprain during last arena football season. Mr. Witherspoon's workers' compensation claim was originally assigned to Cleveland Professional Football, LLC. After further investigation by the Ohio Bureau of Workers' Compensation ("OBWC"), the OBWC correctly found that Mr. Witherspoon was an employee of Arena Football Once, LLC, not Cleveland Professional Football, LLC. The OBWC allowed Mr. Witherspoon's claim against his employer, Arena Football One, LLC.
>
> Cleveland Professional Football, LLC is not a successor to Cleveland AFL, LLC.

{¶ 20} 10. In support of its appeal, New Gladiators included a new affidavit from Ferraro where he made the following relevant additional statements:

> [Four] I am the current majority owner and CEO and Member of Cleveland Professional Football, LLC, a Florida Limited Liability Company ("New Cleveland Gladiators").
>
> * * *
>
> [Seven] True and accurate copies of documents relating to the New Cleveland Gladiators which were filed with the Ohio Secretary of State are attached hereto as "Exhibit C."
>
> [Eight] I am also majority owner and CEO and Member of Cleveland AFL, LLC ("Old Cleveland Gladiators").
>
> [Nine] The Old Cleveland Gladiators was in the now defunct Arena Football League.
>
> [Ten] On or about December 15, 2008, the Arena Football League indefinitely suspended operations due to financial difficulties.
>
> [Eleven] The Arena Football League cancelled the 2009 Season.
>
> [Twelve] The decision to cancel the 2009 Arena Football League Season was a League decision and was unforeseeable by myself and the Old Cleveland Gladiators.
>
> [Thirteen] In 2009, the Arena Football League filed for bankruptcy. That Bankruptcy was converted from a Chapter 11 reorganization to a Chapter 7 liquidation as evidenced by the Bankruptcy Order which is attached hereto as "Exhibit D."
>
> [Fourteen] The Trustee for the Bankruptcy Court sold the assets of the now defunct Arena Football League along with the names "Arena Football" and all of the logos of the teams (including the "Cleveland Gladiators") that were owned by the now defunct Arena Football League at the time it went intro bankruptcy to an investor group knows as "Arena Football One."

> [Fifteen] Arena Football One purchased the assets of the Arena Football League with approval from the Bankruptcy Court for approximately $6.1 million dollars and formed an entirely new arena football league with an entirely new business model ("New League.")
>
> [Sixteen] The New Cleveland Gladiators is affiliated with the New League and is separate and distinct from the Old Cleveland Gladiators and the now defunct Arena Football League.
>
> [Seventeen] Not a single team in the New League, including the New Cleveland Gladiators, exists as a successor or continuation of the now defunct Area Football League.
>
> [Eighteen] Not a single player on the New Cleveland Gladiators roster played for the Old Cleveland Gladiators of the now defunct Arena Football League.
>
> [Nineteen] Not a single coach from the Old Cleveland Gladiators is a coach in the New Cleveland Gladiators.
>
> [Twenty] ALL coaches and players in the New League, including those coaches and players on the New Cleveland Gladiators' roster, are employed by a single corporation based in Louisiana.
> [Twenty-One] In other words, the New Cleveland Gladiators does not employ any coaches or players as was the case for the Old Cleveland Gladiators of the now defunct Arena Football League.
>
> [Twenty-Two] Moreover, the composition of the New Cleveland Gladiators front office staff (for example, general manager) is different from the Old Cleveland Gladiators front office staff.

{¶ 21} 11. In a final order mailed February 23, 2011, the administrator's designee affirmed the adjudicating committee's order with the following minor corrections:

> Based on the testimony and other evidence presented at the hearing, the Administrator's Designee affirms the Adjudicating Committee's findings, decision, and rationale set forth in the order. However, it is noted that, contrary to what is stated in the Adjudicating Committee order, the "players" are not covered by a PEO under contract with the

successor employer. It is only the front office staff that is covered by the PEO agreements.

{¶ 22} 12. Thereafter, New Gladiators filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 23} It is this magistrate's decision that this court should grant a writ of mandamus as will be more fully explained below.

{¶ 24} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 25} R.C. 4123.32, formerly R.C. 4123.32(D), states in part:

> The administrator of workers' compensation, with the advice and consent of the bureau of workers' compensation board of directors, shall adopt rules with respect to the collection, maintenance, and disbursements of the state insurance fund including all of the following:
>
> * * *
>
> (C) Such special rules as the administrator considers necessary to safeguard the fund and that are just in the circumstances, covering the rates to be applied where one employer takes over the occupation or industry of another or where an employer first makes application for state insurance, and the administrator may require that if any employer transfers a business in whole or in part or otherwise reorganizes the business, the successor in interest shall assume, in proportion to the extent of the transfer, as determined by the administrator, the employer's account and shall continue the payment of all contributions due under this chapter[.]

{¶ 26} Ohio Adm.Code 4123-17-02(B) is captioned "Succeeding employers-experience" and states in part:

> (1) Where one legal entity, not having coverage in the most recent experience period, wholly succeeds another legal entity in the operation of a business, his or its rate shall be based on the predecessor's experience within the most recent experience period.
>
> (2) Where a legal entity having an established coverage or having had experience in the most recent experience period wholly succeeds one or more legal entities having established coverage or having had experience in the most recent experience period and at least one of the entities involved has a merit rating experience, the experience of all the involved entities shall be combined to establish the rate of the successor.
>
> (3) Where a legal entity succeeds in the operation of a portion of a business of one or more legal entities having an established coverage or having had experience in the most recent experience period, the successor's rate shall be based on the predecessor's experience within the most recent experience period, pertaining to the portion of the business acquired by the successor.

{¶ 27} Several cases are pertinent to the issue presented here. The first is *State ex rel. Lake Erie Constr. Co. v. Indus. Comm.*, 62 Ohio St.3d 81 (1991). In that case, the Paul E. Bleile Company ("Bleile") incorporated in 1957, constructed highway guardrails, installed signs and landscaped roadways. Lake Erie Construction ("Lake Erie") performed similar work.

{¶ 28} In April 1983, Bleile's Board of Directors decided to cease competitive biding on government contracts as of June 1, 1983. The board's minutes indicated they were negotiating to sell Bleile's tools and equipment to Lake Erie and that Lake Erie had already agreed to continue the employment of all Bleile employees, to assume Bleile's leases, and to purchase its inventory and equipment. The minutes also indicated there were plans for Lake Erie to continue the Bleile profit-sharing plan.

{¶ 29} Bleile stopped competing for new projects as planned. Approximately three weeks into Bleile's final construction project, five Bleile employees died in a plane crash en route to the construction site. Ohio workers' compensation death claims were allowed on behalf of the deceased. Bleile's workers' compensation premium rates increased substantially as a result. Bleile formerly dissolved in 1986.

{¶ 30} In May 1987, after completion of an audit, the BWC recommended that Bleile's experience rating be combined with Lake Erie's. The BWC adjudicating committee adopted the recommendation and Lake Erie unsuccessfully appealed to the commission. Lake Erie filed a complaint in mandamus in this court. This court denied the writ and Lake Erie appealed as of right to the Supreme Court of Ohio.

{¶ 31} The *Lake Erie* court stated:

> Appellant [Lake Erie] proposes that (1) it is not Bleile's successor in interest, and (2) it does not meet the common-law criteria for successor liability assumption and, therefore, cannot assume Bleile's rate experience. We disagree.
>
> The current controversy centers on the definition of "successor in interest." Appellees define the term by the statutory language that precedes it—successor in interest being the transferee of a "business in whole or in part." Appellant responds that R.C. 4123.32 does not define the term and, therefore, under R.C. 1.49, the court must adopt a common-law definition. This argument fails.
>
> We find no evidence in either R.C. 4123.32(D) or Ohio Adm.Code 4121-7-02(B) that "successor in interest" is intended to be the term of art that appellant claims. Both sections imply that a successor in interest, for workers' compensation purposes, is simply a transferee of a business in whole or in part. Presumably, the General Assembly would have expressly set forth a more specialized meaning if that was its intent. Contrary to appellant's representation, there is no need to look beyond these provisions.

Id. at 83-84.

{¶ 32} Years later, a similar case came through this court and then was appealed to the Supreme Court of Ohio. *State ex rel. Crosset Co., Inc. v. Conrad,* 10th Dist. No. 95APD10-1300 (Nov. 7, 1996); *State ex rel. Crosset Co., Inc. v. Conrad*, 87 Ohio St.3d 467 (2000). In the *Crosset* case, Old Crosset was a member of the state insurance fund and obtained workers' compensation coverage for its employees. In 1990, Old Crosset submitted an application to the BWC to participate in a retrospective-rating plan. The BWC approved the application.

{¶ 33} In 1993, Old Crosset was forced to cease operations of its business when the banks foreclosed on the company's assets. On June 12, 1993, an asset sale agreement was executed between the banks and New Crosset. Old Crosset was not a party to this agreement and New Crosset continued in the same business and continued to use Old Crosset's name for its business.

{¶ 34} In July 1993, New Crosset filed an application with the BWC for workers' compensation coverage. The BWC conducted an audit and found that Old Crosset ceased operating on June 12, 1993 when they were foreclosed by their banks. The auditor concluded that all of Old Crosset's assets and operations were sold to New Crosset and transferred Old Crosset's claims experience to New Crosset. The BWC also determined that New Crosset was responsible for Old Crosset's retrospective-rating plan obligations.

{¶ 35} New Crosset filed a mandamus action in this court seeking a writ of mandamus ordering the BWC to find that New Crosset was not responsible for any costs incurred under the retrospective-rating plan. New Crosset did not challenge the

BWC's determination that Old Crosset's claims experience properly transferred to New Crosset.[1]

{¶ 36} In considering the matter, this court considered R.C. 4123.32 as well as Ohio Adm.Code 4123-17-51(F) which still provides as follows:

> (F) Successor: entity not having coverage Predecessor: retrospective-rated
>
> When an entity not having coverage wholly succeeds a retrospective-rated entity, the experience of the predecessor shall be transferred to the successor-employer effective as of the actual date of succession. The successor remains liable for any and all open retrospective-rated premium or other charges associated with the predecessor. The successor entity will become retrospective-rated as of the date of succession until the end of the policy year, with the same plan parameters chosen by the predecessor risk. The adjustment for combinations in the experience rating system will follow the same rules that are in effect as of the date of succession.

{¶ 37} As above indicated, Ohio Adm.Code 4123-17-51(F) specifically provided that the successor employer remained liable for any and all open retrospective-rated premium or other charges associated with the predecessor. Upon review of the facts, this court concluded that the issue was whether New Crosset had "wholly succeeded" Old Crosset. If so, then New Crosset would be liable under Ohio Adm.Code 4123-17-51(F). Because this determination had not been made by the BWC, this court granted a limited writ vacating the BWC's order and directing the BWC to reevaluate New Crosset's liability in accordance with R.C. 4123.32 and, if applicable, Ohio Adm.Code 4123-17-51.

{¶ 38} Both New Crosset and the BWC appealed this court's decision. The Supreme Court of Ohio capsulized this court's decision as follows:

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[1] The fact that New Crosset did not challenge the BWC's transfer of Old Crosset's claims experience is an important fact to keep in mind.

> On October 10, 1995, New Crosset filed a complaint in the Franklin County Court of Appeals requesting that a writ of mandamus issue vacating the order of the Bureau and compelling the Bureau to find that New Crosset is not responsible for the retrospective-rating claims costs incurred by Old Crosset. The court of appeals concluded that the Bureau had abused its discretion when it declared that New Crosset was liable for the *entire* amount of Old Crosset's outstanding retrospective-rating claims costs. The court of appeals instead found that New Crosset had only partially succeeded Old Crosset, and thus granted a limited writ of mandamus vacating the order of the Bureau and ordering the Bureau to reassess New Crosset's liability based on a partial succession.

Id. at 470. (Emphasis sic.)

{¶ 39} The Supreme Court of Ohio framed the issue before it as follows:

> The issue presented for our review is whether a corporation that purchases the foreclosed assets of another corporation through an intermediary bank may be held liable for the outstanding workers' compensation claims costs incurred during the predecessor's participation in a retrospective-rating plan.

Id. at 471.

{¶ 40} The parties made the following arguments:

> New Crosset urges that *Lake Erie* is inapplicable to the instant matter, since the issue under consideration therein involved risk *experience* ratings and not a retrospective-rating premium plan, two concepts that New Crosset contends are irreconcilable. In contrast, the Bureau argues that the court's decision in *Lake Erie* did not hinge on the type of rating involved and urges that we apply the definition of "successor in interest" set forth therein. The Bureau contends that New Crosset fits the definition of "successor in interest" espoused in *Lake Erie* because New Crosset is merely a transferee of Old Crosset's business.

(Emphasis sic.) *Id*. at 473.

{¶ 41} The court concluded that there was "a distinct and fundamental difference between the transfer of ratings

based upon a predecessor's claims experience and holding a successor company liable for claims due that the predecessor itself promised to pay under a retrospective-rating plan." *Id*. at 474.

{¶ 42} Thereafter, the court noted that R.C. 4123.32(D), now R.C. 4123.32(C), conferred two distinct types of role making power on the BWC. First, the BWC is to adopt rules establishing which workers' compensation premium *rates* apply when one employer takes over the industry of another. Second, the BWC is to adopt rules establishing who should assume *payments* due on an employer's account after he transfers the business, in whole or in part, or otherwise reorganizes the business. The court went on to hold that the law espoused in *Lake Erie* continued to be properly applied for purposes of transferring or combining the experience ratings of employers. However, the court found that this rationale was irrelevant in a retrospective-rating plan. Further, the court went on to note that there was no transfer between Old Crosset and New Crosset, no agreement or negotiations between the two, and no opportunity for New Crosset, through the intermediary bank, to determine the claims obligations of Old Crosset. Id. As such, the court found that New Crosset could not be labeled a "successor in interest" as contemplated by *Lake Erie* and R.C. 4123.32.

{¶ 43} Following the Supreme Court of Ohio's decision in *Crosset*, emphasis was placed on the court's distinction between a transfer of Company A directly to Company B and a transfer of Company A to a bank and then from a bank to Company B. Thereafter, when challenging the BWC's transfer of Company A's claims experience to Company B, parties before this court have argued that the determination hinges exclusively on whether the transfer is direct from A to B or indirect from A to the bank and then to B.

{¶ 44} For example, in *State ex rel. Valley Roofing, LLC v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 07AP-181, 2007-Ohio-6277, the parties exclusively argued that the case turned exclusively upon the applicability of *Crosset* to the facts presented. In that case, Valley Roofing, LLC ("Valley Roofing") sought a writ of mandamus ordering the BWC to vacate its decision finding that Valley Roofing was a "successor in interest" to Tech Valley Contracting, Inc. ("Tech Valley"), pursuant to R.C. 4123.32 and the *Lake Erie* case, and ordering the BWC to find that Valley Roofing was not a "successor in interest" to Tech Valley for workers' compensation purposes. Tech Valley defaulted on obligations to its financial lender, PNC Bank. On April 24, 2003, Valley Roofing was formed as a limited liability company. On April 29, 2003, PNC Bank sent a letter to Tech Valley confirming that PNC Bank had taken possession of the equipment, accounts, work-in-progress and general intangibles such as contract rights in accordance with the terms of a security agreement executed by Tech Valley due to its default. The same day, PNC Bank entered into an asset purchase agreement with Valley Roofing providing that Valley Roofing would purchase, acquire, and assume from PNC Bank free and clear of any liabilities, all rights, title and interest to the enumerated assets of Tech Valley.

{¶ 45} In June 2004, Valley Roofing was notified by the BWC that the claims experience rating of Tech Valley was being transferred to Valley Roofing based on the following: Valley Roofing was operating out of the same facility from which Tech Valley operated; the existing contracts were transferred to Valley Roofing by the bank and were serviced by Valley Roofing, and several of the same employees who were employees with Tech Valley were now employed by Valley Roofing.

{¶ 46} Valley Roofing filed a protest; however, the adjudicating committee denied the protest finding that the sale from PNC Bank to Valley Roofing was more than a mere sale of assets and that it constituted a transfer of a business under the *Lake Erie* decision.

{¶ 47} Valley Roofing filed a mandamus action in this court asserting that the BWC had failed to consider the implications of the *Crosset* case. The BWC argued that the *Crosset* case should not be applied. This court determined that the case turned upon the applicability of *Crosset* to the facts presented by Valley Roofing's situation. Specifically, this court stated:

> The Supreme Court of Ohio decided the Crosset case based upon the failure of a direct transfer of the assets between the companies involved and construed R.C. 4123.32 to require a direct transfer for a successor in interest relationship to exist.
>
> * * *
>
> Tech Valley did not transfer a business. Tech Valley lost a business to a bank as the result of a security agreement. Valley Roofing bought the assets from the bank.

Id. at ¶ 5-6.

{¶ 48} More recently, in *State ex rel. The K & D Group, Inc. v. Ryan*, 10th Dist. No. 10AP-608, 2011-Ohio-5051, this court again addressed the successor-in-interest issue from a completely different angle. Mid-America formerly managed an apartment complex now known as Parkside Garden Apartments. An entity affiliated with K&D Group purchased Parkside Garden Apartments and then entered into a contract with K&D Group by which K&D Group acquired the right to manage the apartments. K&D Group retained approximately half of Mid-America's former employees, assumed the prior leases, operated under the same manual numbers, and the day-to-day operations remained the

same. The BWC found a partial transfer of experience from Mid-America to K&D Group pursuant to Ohio Adm.Code 4123-17-02(B)(3) finding K&D Group was a successor employer.

{¶ 49} K&D Group argued that the BWC's finding was improper because K&D Group did not acquire anything. This court upheld the BWC's determination stating:

> In the case at bar, neither party has argued, nor does the record reflect, that this matter involved a involuntary transfer. The property at issue was not purchased following a bankruptcy or foreclosure. Nor was the property purchased from an intermediary bank. There is nothing in the record to suggest that the purchase of the property was anything other than arm's-length commercial transaction between a willing seller and a willing buyer. Therefore, this case is distinguishable from *Valley Roofing* and [*State ex rel. Bodine, Carr, Perry, L.L.C. v. Ohio Bur. of Workers' Comp.*, 10th Dist No. 08AP-294, 2009-Ohio-3234].
>
> Nor does *Valley Roofing* stand for the proposition that a subsequent employer can only be a successor-in-interest if there is a direct transfer of the business. The absence of a direct transfer between the predecessor-employer and the subsequent employer was not the basis of the *Valley Roofing* decision. Rather, as noted above, the decision turned on the first step of the analysis—the involuntary nature of the transfer of assets between the predecessor-employer and the bank.
>
> Nothing in R.C. 4123.32(C) and Ohio Adm.Code 4123-17-02(B) require that the transfer be direct. As the magistrate correctly notes, "a successor in interest * * * is simply a transferee of a business in whole or in part" for workers' compensation purposes. *State ex rel. Lake Erie Constr. Co. v. Indus. Comm.* (1991), 62 Ohio St.3d 81, 83-84, 578 N.E.2d 458.

Id. at ¶ 12-14.

{¶ 50} In the present case, Old Gladiators did not file for bankruptcy. Here, it was Old League that filed for bankruptcy and Old Gladiators was a team that played in the Old League. Following the declaration of bankruptcy, New League was

formed. Certain assets of Old League were purchased by an investor group. It was from this investor group that New Gladiators purchased certain assets, specifically Old Gladiators' logo. There was no transfer, either direct or indirect. However, these facts are not dispositive.

{¶ 51} Here it is undisputed that Ferraro was the majority owner of Old Gladiators and is the majority owner of New Gladiators. There was no sale—there was no bankruptcy. Old Gladiators ceased doing business when the Old League filed for bankruptcy. When the New League was formed, New Gladiators took up business where Old Gladiators had stopped—with one major exception: Old Gladiators employed football players and New Gladiators does not. New Gladiators is a successor employer; however, the transfer here is only partial and not total.

{¶ 52} There is evidence in the record which New Gladiators brought to the attention of the BWC that does not appear to have been considered at all. According to the affidavit of Ferraro, New Gladiators does not employ any football players or coaches. Instead, New Gladiators' business operations involve solely the sale of tickets, sponsorship, and merchandise for sports entertainment. There can be no argument that the risk involved when a company's employees actually play football is significantly greater than if the company's employees are performing primarily clerical duties.

{¶ 53} New Gladiators' argument that none of its employees are football players is bolstered by the documentation in the stipulation of evidence concerning a claim filed by Witherspoon, a football player who played for New Gladiators. Witherspoon sustained an injury and New Gladiators was originally determined to be Witherspoon's employer for workers' compensation purposes. However, after investigating the

matter, the BWC determined that New Gladiators was not Witherspoon's employer; instead, New League was Witherspoon's employer and Witherspoon's claim was processed under New League's policy.

{¶ 54} Nowhere in the orders from the BWC is this issue addressed. The only reference to this issue is noted under New Gladiators' arguments. This issue is not addressed in the findings of fact and conclusions of law portion of the BWC's orders.

{¶ 55} After reviewing the BWC's letters and orders, the magistrate finds no evidence that the BWC considered and/or correctly addressed this issue. The May 21, 2010 letter informing New Gladiators that it was found to be the successor employer of Old Gladiators, indicates that New Gladiators is the "successor employer for the entire operation," is "responsible for all existing and future financial rights and obligations" of Old Gladiators, and New Gladiators workers' compensation rate will be based on Old Gladiators "experience."

{¶ 56} Thereafter, in response to a letter and documents submitted by Ferraro explaining, among other things, that Old Gladiators had employees who were football players while New Gladiators did not, the BWC responded in a letter dated June 18, 2010. The BWC explained its decision that New Gladiators "would be deemed the successor for experience rating purposes": for several reasons, including the "continuity of the type of football played."

{¶ 57} Following the New Gladiators protest, the adjudicating committee cited Ohio Adm.Code 4123-17-02(B) and (C), which deal with situations where "one legal entity * * * wholly succeeds another legal entity in the operation of a business, [the] rate shall be based on the predecessor's experience within the

most recent experience period." Thereafter, the adjudicating committee denied New Gladiators protest stating, in part: New Gladiators "also uses a PEO to cover its players for purposes of workers' compensation [and] the business model used by the old and new companies is the same. Both companies share the same * * * method of covering players and ownership."

{¶ 58} New Gladiators' appeal was denied in its entirety. The administrator's designee adopted the adjudicating committee's "findings, decision, and rationale" with one exception. The administrator's designee noted that the "players [were] not covered by a PEO under contract" with New Gladiators.

{¶ 59} Nothing in any of the above documents indicates the New Gladiators' rate will not involve coverage for football players no longer employed by New Gladiators. At oral argument, counsel for the BWC indicated that, despite the poor wording, the BWC order really means the following: The BWC will look back at the last several years for which Old Gladiators had coverage. Depending on the number and type of injuries and existing claims involving Old Gladiators' football players, New Gladiators would temporarily be assessed enough of a premium in order to pay the future medical bills and compensation only for these players and that New Gladiators' rate is not being based on the premise that New Gladiators continues to employ football players.

{¶ 60} Unfortunately, based on the evidence and orders before this court, there is nothing to substantiate counsel's assertions. The question that arises now is, as a successor employer in part of Old Gladiators, for what obligations is New Gladiators responsible?

{¶ 61} The magistrate finds that New Gladiators is responsible for paying any claims which occurred to Old

Gladiators' employees. Old Gladiators never went bankrupt—there were no financial problems—Old Gladiators ceased operations because the Old League went bankrupt and there were no more games that would be played. When the New League formed, arena football games resumed. Ferraro, who had been the majority owner of Old Gladiators, became the majority owner of New Gladiators. As such, there is evidence that New Gladiators should contribute sufficient premiums to pay the estimated costs of Old Gladiators' claims.

{¶ 62} The magistrate further notes that there is mention in the order of the adjudicating committee and the final order referencing the use of a professional employer organization ("PEO") by both Old Gladiators and New Gladiators. Ohio Adm.Code 4123-17-15 pertains to PEO agreements and provides in pertinent part as follows:

> (A)(1) "Professional employer organization" or "PEO" means a sole proprietor, partnership, association, limited liability company, or corporation that enters into an agreement with one or more client employers for the purpose of coemploying all or part of the client employer's workforce at the client employer's work site. "Professional employer organization" or "PEO" does not include a temporary service agency.
>
> (2) "Client employer" means a sole proprietor, partnership, association, limited liability company, or corporation that enters into a PEO agreement and is assigned shared employees by the PEO. "Client employer" does not mean an employer who is a noncomplying employer as defined in rule 4123-14-01 of the Administrative Code.
>
> (3) "Coemploy" means the sharing of the responsibilities and liabilities of being an employer.
>
> (4) "Shared employee" means an individual intended to be assigned to a client employer on a permanent basis, not as a temporary supplement to the client employer's workforce, who is coemployed by a professional employer organization and a client employer pursuant to a professional employer organization agreement.

> * * *
>
> (C) Where a client employer enters into a PEO agreement:
> (1) Each client employer must establish and maintain an individual account with the bureau.
>
> (2) The PEO shall be considered the succeeding employer, solely for purpose of workers' compensation experience, and shall be subject to rule 4123-17-02 of the Administrative Code, basic or manual rate, whereby all or part of the experience of the client employer is transferred to the PEO policy for rate making purposes.
>
> * * *
>
> (E) A PEO which enters into a PEO agreement with a noncomplying employer or a PEO which fails to comply with this rule shall not be considered the employer for workers' compensation purposes. In these instances the payroll of the shared employees shall be reported by the client employer under its workers' compensation risk numbers for workers' compensation premium and claims purposes, unless prohibited by federal law. Claims that are filed by the client employer's shared employees shall be charged to the experience of the client employer.

{¶ 63} '[In the present case, the record indicates that Old Gladiators entered into a PEO agreement. Old Gladiators would have been the client-employer in that agreement. Further, the evidence indicates that the PEO with which Old Gladiators entered into an agreement is no longer in business. As such, it is conceivable that the PEO with whom Old Gladiators had an agreement failed to meet its obligations under the law. If the obligations which the PEO did not meet would have been charged to the client-employer, Old Gladiators, then, to the extent that any unpaid obligations exist, New Gladiators is likewise responsible for these.

{¶ 64} To the extent that Old Gladiators and New Gladiators are owned by the same individual, New Gladiators

is a successor employer of Old Gladiators but, because of the facts in this case, New Gladiators' obligations would be significantly different from Old Gladiators' obligations and it was an abuse of discretion for the BWC to transfer and/or combine Old Gladiators' experience and/or rights and/or obligations to New Gladiators with the exception of that portion of Old Gladiators' policy covering its clerical staff. In other words, to the extent that a portion of New Gladiators performs the same tasks as a portion of Old Gladiators performed, it would be proper for the BWC to transfer that part of Old Gladiators' experience to New Gladiators. Further, New Gladiators should contribute sufficient premiums to cover the cost of Old Gladiators existing claims. However, since the record demonstrates that none of New Gladiators' employees are football players, this significant distinction makes it an abuse of discretion for the BWC to have transferred all of Old Gladiators' experience and/or rights and/or obligations to New Gladiators.

{¶ 65} Based on the foregoing, it is this magistrate's decision that this court should issue a writ of mandamus ordering the BWC to vacate its order finding that New Gladiators was a successor employer to all of Old Gladiators' experience and/or rights and/or obligations. The BWC should issue a new order determining the obligations of New Gladiators after determining the following: (1) the amount of premium necessary so New Gladiators can properly assume, as a successor employer, the obligations of Old Gladiators to pay the medical expenses and compensation estimated to be due on Old Gladiators' existing claims, (2) determine if the PEO utilized by Old Gladiators failed to meet its obligations and, if so, New Gladiators should assume that cost, (3) address the argument/evidence that New Gladiators does not have any employees who play football, (4) expressly set forth what portion of Old Gladiators' "experience" is

being charged to New Gladiators, and (5) clearly explain its decision concerning New Gladiators' obligations.

/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).