[Cite as *State ex rel. Leftwich v. Indus. Comm.*, 2012-Ohio-823.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Theodore Leftwich,	:	
Relator,	:	
v.	:	No. 11AP-40
Industrial Commission of Ohio and DKS Group, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 1, 2012

Philip J. Fulton Law Office, Ross R. Fulton and *Chelsea J. Fulton,* for relator.

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

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶ 1} Relator, Theodore Leftwich, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its October 6, 2010 staff hearing officer's order and to enter an order awarding permanent total disability compensation.

I. Facts and Procedural History

{¶ 2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. As the magistrate's decision explains, this court, in a prior mandamus action, issued a writ of mandamus that ordered the commission (1) to vacate its staff hearing officer's September 3, 2008 order denying relator permanent total disability compensation, (2) to reconsider the matter in a manner consistent with this court's memorandum decision adopting the magistrate's decision, and (3) after reconsidering, to enter a new order that adjudicates the application. Following a hearing, another staff hearing officer issued a new order of October 6, 2010 that once again denies relator permanent total disability compensation.

{¶ 3} In the current action, the magistrate's decision sets out in the findings of fact the essence of the prior action as well as the staff hearing officer's October 6, 2010 order, determined the staff hearing officer complied with this court's direction arising out of the first mandamus action, and decided relator is not entitled to a writ of mandamus.

II. Objections

{¶ 4} Relator filed two objections to the magistrate's decision:

> A. The Magistrate Erred As a Matter of Law by Not Issuing a Writ of Mandamus When the Commission Failed to Abide By This Court's First Mandamus Order.
>
> B. The Magistrate Erred As a Matter of Law When It Did Not Find the PTD Order of October 6, 2010 in Violation of *Noll* and *Stephenson*.

Relator's objections largely reargue those matters adequately addressed in the magistrate's decision. For the reasons set forth in the decision, the objections are unpersuasive.

{¶ 5} Consistent with this court's direction in the first mandamus action, the commission vacated the September 3, 2008 order denying relator's permanent total disability compensation and adjudicated the application anew. Relying on some, but not all, of the same reports as the September 2008 order, the commission's staff hearing officer concluded relator reached maximum medical improvement and has the capacity to

perform sedentary work. Unlike the September 3, 2008 order, the October 6, 2010 order does not identify any conditions as temporary. Moreover, nothing in our prior mandamus order directed the commission to explain the inconsistency in its 2008 order.

{¶ 6} Consistent with *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), the staff hearing officer then considered relator's nonmedical disability factors, addressed each, and concluded permanent total disability compensation is not warranted. Because the October 6, 2010 order does not repeat the same circumstances that led to the first writ and explains both the medical and nonmedical aspects of relator's application, it complies with our instructions from the prior action. Accordingly, for the reasons set forth in the magistrate's decision, the objections are overruled.

III. Disposition

{¶ 7} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled; writ denied.

BROWN, P.J., and CONNOR, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Theodore Leftwich,	:	
Relator,	:	
v.	:	No. 11AP-40
Industrial Commission of Ohio and DKS Group, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on October 19, 2011

Philip J. Fulton Law Office, Ross R. Fulton and *Chelsea J. Fulton*, for relator.

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

IN MANDAMUS

{¶ 8} In a prior mandamus action, this court issued a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate an order of its staff hearing officer ("SHO") denying permanent total disability ("PTD") compensation to relator, Theodore Leftwich, and, in a manner consistent with this court's memorandum decision that adopted the magistrate's decision, enter a new order that adjudicates the

PTD application. Following an October 6, 2010 hearing, another SHO issued a new order that again denies the PTD application.

{¶ 9} In this original action, relator requests a writ of mandamus ordering the commission to vacate the October 6, 2010 SHO's order and to enter an order awarding PTD compensation.

Findings of Fact:

{¶ 10} 1. On April 28, 2000, relator sustained an industrial injury while employed as a laborer for respondent DKS Group, Inc., a state-fund employer. On that date, relator was involved in a motor vehicle accident. The industrial claim (No. 00-433818) is allowed for "contusion of right hip; lumbosacral sprain; aggravation of osteoarthritis of the right hip; pain disorder with psychological factors."

{¶ 11} 2. On June 14, 2007, relator filed an application for PTD compensation.

{¶ 12} 3. On October 23, 2007, at the commission's request, relator was examined by Andrew Freeman, M.D., who issued a seven-page narrative report. In his report, Dr. Freeman estimates whole person impairment to be at 16 percent based only on the allowed physical conditions of the claim. He also opined that the allowed physical conditions have reached maximum medical improvement. The report further states:

> The amount of pain was not disproportionate for what is expected with the allowed conditions in the claim and their associated impairment as calculated above, so no additional impairment % for pain was combined into the impairment rating.

{¶ 13} 4. Also on October 23, 2007, Dr. Freeman completed a physical strength rating form. On the form, Dr. Freeman indicated by his mark that relator is capable of sedentary work. However, he indicated the following limitations: "He must be able to stand up to 5 minutes per hour, as needed. He should be able to ambulate with a cane."

{¶ 14} 5. Also on October 23, 2007, at the commission's request, relator was examined by psychologist Lee Howard, Ph.D., who issued an eleven-page narrative report. In his report, Dr. Howard opined:

> The claimant can perform at the simple, moderate, and complex task range. He can perform at the low to moderate stress range but not at the high stress range. This does not

> take into account the physical allowances in this claim, motivational/attitudinal factors, and/or subjective factors.

{¶ 15} 6. On April 9, 2008, Dr. Season authored the following office note:

> Theodore returned for re-evaluation of his continuing lower back and right hip pain.
>
> He had a number of questions today regarding his continuing right hip symptoms and his consideration for right total hip replacement. I discussed with him the clinical factors that would need to be considered to make him a candidate for right total hip replacement. I also gave him the names of various respected total hip orthopedic surgeons in Columbus for consideration.
>
> He continues to get his pain managed by a pain management [specialist].

{¶ 16} 7. Following a September 3, 2008 hearing, an SHO issued an order denying the PTD application. In determining residual functional capacity, the SHO relied upon the reports of Drs. Freeman and Howard. Following a lengthy discussion of the non-medical factors, the SHO's order of September 3, 2008 concludes:

> One of the primary factors preventing the [I]njured [W]orker from returning to the work force [sic] is his chronic pain and need to alleviate that pain with medication that makes him unable to focus on the tasks before him and even affects his speech, concentration, and ability [to] find words to express his thoughts. He stated that when he takes his pain medication he is unable to drive safely. He testified at hearing that when he took tests to assess his reading and writing abilities during rehabilitation assessments, he had been taking his medication. Therefore, it is found that the test results that placed the [I]njured [W]orker at the third grade reading level and sixth grade math level, were not indicative of his actual abilities or potential. Furthermore, it is found that the [I]njured [W]orker's prior work history is inconsistent with such a low assessment of his educational abilities.
>
> Edwin H. Season, M.D., the [I]njured [W]orker's orthopedic surgeon, stated on 04/09/2008 that the extent of the [I]njured [W]orker's chronic pain may improve significantly if he should

> undergo hip replacement surgery. Understandably, Dr. Season is reluctant to perform the surgery on a patient as young as the [I]njured [W]orker, considering that such procedures are only effective for ten years or so. The fact remains, however, that the [I]njured [W]orker has great potential to return to the work force [sic] after his pain is reduced as a result of surgery and/or finding a medication that relieves his pain with fewer side effect[s].
>
> * * *
>
> Considering the foregoing medical evaluations and his age, education, work history and other disability factors, it is found that the injured worker retains the ability to return to some form of sustained remunerative employment.

{¶ 17} 8. On May 21, 2009, relator filed in this court a mandamus action, State ex rel. Leftwich v. Indus. Comm. (Mar. 18, 2010), 10th Dist. No. 09AP-507 (memorandum decision), which was assigned to a magistrate.

{¶ 18} 9. On November 25, 2009, this court's magistrate issued a decision. In his conclusions of law, the magistrate states:

> Based upon the reports of Drs. Freeman and Howard and its analysis of the nonmedical factors, the commission, through its SHO, determined that relator is able to return to some form of sustained remunerative employment. Having made that determination, the commission then states: "One of the primary factors preventing the injured worker from returning to the work force [sic] is his chronic pain and need to alleviate that pain with medication." In the paragraph of the order addressing Dr. Season's April 9, 2008 report, the commission finds that relator "has great potential to return to the work force [sic] after his pain is reduced as a result of surgery and/or finding a medication that relieves his pain with fewer side effect[s]."
>
> In the magistrate's view, the commission's statements or findings, above quoted, undermine its reliance upon the report of Dr. Freeman who opined that the allowed physical conditions are at MMI and that relator is medically able to perform sedentary employment. The SHO's statements or findings, above quoted, strongly suggest that the SHO was unsure that the allowed physical conditions of the claim are at MMI or that relator can perform sedentary work as Dr.

Freeman has opined. In the magistrate's view, the inconsistency of the determinations rendered in the SHO's order indicates an abuse of discretion for which a writ of mandamus must issue.

Ohio Adm.Code 4121-3-34 sets forth the commission's rules for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. The first paragraph under Ohio Adm.Code 4121-3-34(D) states:
The following guidelines shall be followed by the adjudicator in the sequential evaluation of applications for permanent total disability compensation[.]

Ohio Adm.Code 4121-3-34(D)(1)(f) provides:

If, after hearing, the adjudicator finds that the injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the injured worker shall be found not to be permanently and totally disabled because the condition remains temporary. In claims involving state fund employers, the claim shall be referred to the administrator to consider the issuance of an order on the question of entitlement to temporary total disability compensation. * * *

Ohio Adm.Code 4121-3-34(D)(2) provides:

(b) If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.

The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. * * *

(c) If, after hearing and review of relevant vocational evidence and non-medical disability factors, as described in

paragraph (D)(2)(b) of this rule the adjudicator finds that the injured worker can return to sustained remunerative employment by using past employment skills or those skills which may be reasonably developed through retraining or through rehabilitation, the injured worker shall be found not to be permanently and totally disabled.

* * *

Here, the commission rendered a determination under Ohio Adm.Code 4121-3-34(D)(2)(b) and (c) when it relied upon the reports of Drs. Freeman and Howard, and upon analysis of the nonmedical factors, concluded that relator retains the ability to return to some form of sustained remunerative employment.

The commission's order perhaps suggests that it may have intended to render an alternative determination under Ohio Adm.Code 4121-3-34(D)(1)(f) when it found that relator "has great potential to return to the work force [sic] after his pain is reduced as a result of surgery and/or finding a medication that relieves his pain with fewer side effect[s]."

It has been held that a claimant's need for surgery can constitute a new and changed circumstance justifying the exercise of the commission's R.C. 4123.52 continuing jurisdiction to revisit a prior finding that the industrial injury has reached permanency or MMI. State ex rel. Chrysler v. Indus. Comm. (1998), 81 Ohio St.3d 158, 167-168. See, also, State ex rel. Navistar Internatl. Trans. Corp. v. Indus. Comm. (1993), 66 Ohio St.3d 267, 270. However, a claimant cannot avoid a finding of MMI by refusing to elect surgery. State ex rel. Gregg v. Indus. Comm. (2000), 88 Ohio St.3d 405.

While relator does not cite to Chrysler, Navistar or Gregg, those cases provide a helpful backdrop to an understanding of the issue here.

The SHO's possible alternative determination is fatally flawed. There is no medical evidence in the record to support the finding that relator's chronic pain may improve significantly if he should undergo hip replacement surgery or, for that matter, that relator even intends to have the surgery. While Dr. Season's April 9, 2008 office note indicates that

> right hip replacement was being considered, it simply fails to address what impact the surgery might have on chronic pain or relator's future ability to work. Apparently, the SHO simply inferred from Dr. Season's April 9, 2008 office note that surgery was being considered to reduce relator's chronic pain. Because the SHO does not have medical expertise, the SHO cannot draw that inference from Dr. Season's April 9, 2008 office note. State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm. (1998), 81 Ohio St.3d 56.
>
> Moreover, contrary to what the SHO's order states, Dr. Season never stated that relator was too young for the surgery or that the procedure is only effective for ten years or so.
>
> In sum, the commission's possible alternative determination is not only itself fatally flawed, it undermines the determination that relator is able to return to sustained remunerative employment based upon the reports of Drs. Freeman and Howard and its analysis of the nonmedical factors.
>
> Given the above analysis, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of September 3, 2008 and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates relator's PTD application.

Id. at ¶ 21-34.

{¶ 19} 10. On May 18, 2010, this court issued its memorandum decision stating:

> * * * [T]his matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this memorandum decision. In his decision, the magistrate determined "the commission's possible alternative determination is not only itself fatally flawed, it undermines the determination that relator is able to return to sustained remunerative employment based upon the reports of Drs. Freeman and Howard and its analysis of the nonmedical factors." (Magistrate's Decision, ¶33.) As a result, the magistrate determined this court should issue a writ of mandamus ordering the commission to vacate its staff hearing officer's order of September 3, 2008 and, in a manner consistent with the magistrate's decision, to enter a

> new order that adjudicates relator's permanent total disability application.
>
> No objections were filed to the magistrate's decision.
>
> Finding no error of law or other defect on the face of the magistrate's decision, we adopt it as our own including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we issue a writ of mandamus that orders the commission to vacate its staff hearing officer's September 3, 2008 order and, in a manner consistent with this memorandum decision that adopts the magistrate's decision, to enter a new order that adjudicates relator's permanent total disability application.

Id. at ¶ 2-4.

{¶ 20} 11. On March 23, 2010, this court filed its judgment entry:

> For the reasons stated in the memorandum decision of this court rendered herein on March 18, 2010, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that a writ of mandamus issue that orders the commission to vacate its staff hearing officer's September 3, 2008 order and, in a manner consistent with this memorandum decision that adopts the magistrate's decision, to enter a new order that adjudicates relator's permanent total disability application.
> * * *

{¶ 21} 12. Following an October 6, 2010 hearing, another SHO issued an order that again denies the PTD application. The SHO's order of October 6, 2010 explains:

> The Injured Worker is a 51 year old male with a high school education and two and [one] half years of community college, and a work history including experience as a Monitor Supervisor, Scanner/Editor, Crew Trainer, Patient Transporter/Mail Clerk, Clerk, and Assistant Chef. In claim number 00-433818 the Injured Worker was injured on 04/28/2000 when he was involved in a motor vehicle accident. In claim number 04-300959 the Injured Worker was injured on 01/07/2004 when he was cutting up fruit with a knife and cut his right fifth finger. The Staff Hearing Officer notes that the Injured Worker has not undergone any surgical procedures with regard to the allowed conditions in either claim. Presently, the Injured Worker's treatment is

conservative. The Injured Worker sees his physician for pain medication. In addition, it is noted that the Injured Worker does not see a psychologist or psychiatrist or take medication for the allowed psychological condition recognized in claim number 00-433818. According to the Injured Worker's IC-2 Application, the Injured Worker last worked in July, 2004.

The Injured Worker was examined on 10/23/2007 by Industrial Commission Specialist Andrew Freeman, M.D., with regard to the allowed physical conditions recognized in both claims. Dr. Freeman opined that the allowed physical conditions in both claims have reached maximum medical improvement. Dr. Freeman opined that the Injured Worker has a 16% whole person impairment due to the allowed physical conditions in both claims. Finally, Dr. Freeman opined that the Injured Worker was capable of performing sedentary work activity with some restrictions. The Injured Worker must be able to stand up for five minutes per hour and should be able to ambulate with a cane.

The Injured Worker was examined on 10/23/2007 by Industrial Specialist Lee Howard, Ph.D., with regard to the allowed psychological condition recognized in claim number 00-433818. Dr. Howard opined that the allowed psychological condition in Claim number 00-433818 has reached maximum medical improvement and that the Injured Worker has a 10% whole person impairment due to the condition "Pain Disorder with Psychological Factors." In addition, Dr. Howard opined that the Injured Worker is capable of work with the following limitations/restrictions: "The Claimant can perform at the simple, moderate, and complex task range. He can perform at the low to moderate stress range but not at the hight [sic] stress range."

The Staff Hearing Officer relies upon the medical opinions of Dr. Freeman and Dr. Howard to find that when only the impairment arising from the allowed conditions of the claims are considered, the Injured Worker has the residual functional capacity to perform sedentary work activity. Furthermore, when his degree of medical impairment is considered in conjunction with his non-medical disability factors, the Staff Hearing Officer finds that the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled.

The Staff Hearing Officer considers the Injured Worker's age to be a vocational asset with regard to his potential for returning to the workforce. The Staff Hearing Officer finds the Injured Worker's age in and of itself would not prevent the Injured Worker from obtaining and performing work and that individuals of the Injured Worker's age can work for many years prior to receiving Social Security Retirement Benefits. In addition, individuals of the Injured Worker's age have more than sufficient time to acquire new jobs [sic] skills, at least through informal means such as sho[r]t-term or on-the-job training, that could enhance their potential for re-employment.

The Staff Hearing Officer views the Injured Worker's high school education and two and [one] half years of community college as a strong vocational asset regarding his potential for re-employment. The evidence presented at hearing and contained in the claim file indicates that the * * * Injured Worker complete[d] high school with a "B" average. After graduating[,] the Injured Worker moved to Colorado where he attended Aurora Community College for two and a half years majoring in accounting and architecture. The Injured Worker indicated on his IC-2 Application that he can read, write, and do basic math, as would be expected of an individual with his level of formal education. In addition, the Injured Worker testified that he has access to a computer in his home and has basic computer skills. Based upon these facts, the Staff Hearing Officer finds that the Injured Worker has more than sufficient education, intellect, and literacy abilities to obtain and perform work activity at the level described by Dr. Freeman and Dr. Howard in their reports.

The Staff Hearing Officer views the Injured Worker's work history as a vocational asset with regard to his potential for returning to the workforce. As noted above the Injured Worker has a work history including experience as a Monitor Supervisor, Scanner/Editor, Crew Trainer, Patient Transporter/Mail Clerk, Clerk, and Assistant Chef. The Staff Hearing Officer notes that the Injured Worker has a long and varied work history commencing in 1980 and ending in 2007. While working as a Monitor Supervisor and Crew [T]rainer the Injured Worker was responsible for supervising other employees. While working as a Patient Transporter the Injured Worker assisted patient care support services and

> lab in-patient care. While working as a clerk in several jobs the Injured Worker assisted managers in filling out paper work, made telephone calls to patients, and assisted patients who needed help obtaining employment. While working as an assistant Chef the Injured Worker assisted the Chef in preparing for events, assembling menus, monitoring food preparation, and supervising extra employees. As a result of the Injured Worker's work experience he has developed a wide variety of job skills and training that would assist him in obtaining and performing work activity a[t] the level described by Dr. Freeman and Dr. Howard in their reports.
>
> Therefore, because the Injured Worker has the residual functional capacity to perform sedentary work when only the impairment arising from the allowed conditions of the claims are considered, because he is qualified by age, education, and work history to obtain and perform work at that level, and because he has the capacity to acquire new job skills, at least through informal means, that could enhance his potential for re-employment, the Staff Hearing Officer finds that the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled. Accordingly, the IC-2 Application filed 06/14/2007 is denied.

{¶ 22} 13. On January 12, 2011, relator, Theodore Leftwich, filed this mandamus action.

Conclusions of Law:

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

{¶ 24} Analysis begins with the observation that the SHO's order of October 6, 2010, like the order of September 3, 2008, relies upon the reports of Drs. Freeman and Howard for the determination of residual functional capacity. Based upon the reports of those two doctors, the SHO's order of October 6, 2010 determines that relator is able to perform "sedentary work activity." Thereafter, the SHO discusses the non-medical factors such as age, education and work history. The SHO concludes that relator is capable of sustained remunerative employment and is thus not permanently and totally disabled.

{¶ 25} Unlike the SHO's order of September 3, 2008, the SHO's order of October 6, 2010 does not suggest "that it may have intended to render an alternative

determination under Ohio Adm.Code 4121-3-34(D)(1)(f)," as stated in the magistrate's decision of November 25, 2009.

{¶ 26} Unlike the SHO's order of September 3, 2008, the SHO's order of October 6, 2010 does not mention Dr. Season's April 9, 2008 report that discusses chronic pain and the potential need for hip replacement surgery.

{¶ 27} Unlike the SHO's order of September 3, 2008, the SHO's order of October 6, 2010 does not state that relator has great potential to return to the workforce after his pain is reduced as a result of surgery and/or finding a medication that relieves pain with fewer side effects. The SHO's order of October 6, 2010 simply does not address, nor repeat, those concerns or flaws that the magistrate addressed in recommending a writ of mandamus in the prior action.

{¶ 28} Rather, the SHO's order of October 6, 2010 states reliance upon the medical reports of Drs. Freeman and Howard for the determination of residual functional capacity and then addresses the non-medical factors. The SHO's order of October 6, 2010 does not refer to the prior magistrate's decision that was adopted by this court. In fact, the SHO's order of October 6, 2010 does not even indicate that a writ of mandamus had been issued.

{¶ 29} In the magistrate's view, none of the above observations flaws the SHO's order of October 6, 2010 or renders it non-compliant with this court's writ of mandamus.

{¶ 30} According to relator:

> * * * To address Mr. Leftwich's PTD application in a manner that is consistent with the magistrate's decision, then, the Commission had to at least consider whether the noted chronic pain and medication that prevented Mr. Leftwich from returning to work undermined the physician findings that Mr. Leftwich was capable of sustained remunerative employment.

(Relator's brief, at 13.)

{¶ 31} The magistrate disagrees with relator's assertion as quoted above. This court's writ of mandamus did not order the commission to further explain in a new order its reliance upon the reports of Drs. Freeman and Howard in light of any other evidence in the record regarding chronic pain or the need for a total hip replacement.

{¶ 32} It is well-settled that the commission need not explain its reliance upon the medical reports it has chosen to support its determination of residual functional capacity. State ex rel. Bell v. Indus. Comm., 72 Ohio St.3d 575, 577-78, 1995-Ohio-121. This court's writ of mandamus did not change this well-settled legal principle.

{¶ 33} 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).