[Cite as *State ex rel. Maxim Healthcare Servs., Inc. v. Indus. Comm.*, 2012-Ohio-1012.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Maxim Healthcare Services, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-122
Industrial Commission of Ohio and Jennifer Fisk,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 13, 2012

Christine Faranda Law, LLC, and *Christine M. Faranda*, for relator.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman*, for respondent Jennifer Fisk.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶ 1} Relator, Maxim Healthcare Services, Inc., commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order determining the surgery and treatment respondent Jennifer Fisk requested is reasonable and necessary for the treatment of her allowed conditions and to

find instead that claimant did not meet her burden of proof under *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229 (1994).

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. The magistrate noted relator's argument that the commission abused its discretion when (1) it authorized treatment in the face of no evidence to support the order, and (2) it ordered relator to pay for treatment without determining whether the cost of treatment was medically reasonable.

{¶ 3} In response to relator's contentions, the magistrate determined (1) the record contained some evidence, Dr. Logan's March 2, 2010 report, on which the commission could rely to conclude the injured worker's requested surgery was "reasonably related to the allowed conditions and reasonably necessary to treat the allowed condition," and (2) even though the staff hearing officer did not determine whether the cost of the services was medically reasonable, the record contains no indication that relator raised the issue before the commission. Accordingly, the magistrate determined the requested writ of mandamus should be denied.

II. Objections

{¶ 4} Relator filed objections to the magistrate's conclusions of law:

> **OBJECTION #1 – The Magistrate improperly concluded that Dr. Logan's two reports dated December 16, 2009 and March 2, 2010 are not equivocal.**
>
> **OBJECTION #2 – The Magistrate improperly concluded that the medical reasonableness of the procedures was not raised or presented.**

A. *First Objection—Dr. Logan's Two Reports*

{¶ 5} Relator's first objection contends that because Dr. Logan's two reports are equivocal and therefore cannot support the commission's order, the magistrate improperly determined the doctor's March 2, 2010 report is some evidence on which the commission could rely.

{¶ 6} The magistrate appropriately summarized why relator's objection is not persuasive. The magistrate concluded the two reports are neither contradictory nor equivocal because (1) the reports were written six months apart, (2) the 2010 report followed failed conservative treatment, (3) the 2010 report considered evidence not reviewed in the 2009 report, and (4) the results of the cervical MRI provided the doctor with a basis to recommend surgery.

{¶ 7} For the reasons set forth in the magistrate's decision, the first objection is overruled.

B. *Second Objection—State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229 (1994).

{¶ 8} Relator's second objection challenges the magistrate's disposition of relator's contentions under *Miller*.

{¶ 9} As relator properly points out, *Miller* set forth a three-part test to determine whether medical services should be authorized. The first step asks whether the medical services are reasonably related to the allowed conditions of the industrial injury, the second examines whether the services are reasonably necessary to treat the industrial injury, and the third is directed to whether the cost of the requested service is medically reasonable. In applying *Miller*, the staff hearing officer found "the weight of the evidence supports the requested treatment is reasonable and necessary for treatment of the allowed conditions in the claim and is found to be authorized and payable." (Magistrate's Decision, ¶25.) Noting the staff hearing officer's conclusion addresses only two of the three prongs of *Miller*, relator contends the record lacks some evidence to support the third prong.

{¶ 10} None of the parties dispute that claimant bears the burden of proving all three prongs of *Miller* in order to secure authorization for the requested procedure. Relator, however, as the party seeking a writ of mandamus bears the burden of proving the commission, through its staff hearing officer, failed to comply with the *Miller* test. Relator hinges its argument on the staff hearing officer's failure to address the third prong of the test.

{¶ 11} Relator's argument falls short of supporting a writ of mandamus. Initially, relator states "there was no transcript of the hearings at the [staff hearing officer]."

(Objections, 3.) The statement, however, does not address whether relator could have obtained a transcript of the hearing, as mandamus actions before this court frequently contain such transcripts. Moreover, the staff hearing officer's failure to note evidence regarding the third prong may as easily indicate, contrary to relator's argument, that the record revealed no dispute between the parties on the third prong, leaving the staff hearing officer to resolve only those issues on which the parties presented disputed evidence.

{¶ 12} Relator thus failed to carry its burden of proving the record lacks evidence to support the third prong of *Miller*. Accordingly, relator's second objection is overruled.

III. Disposition

{¶ 13} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law, as modified here. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusion of law, as modified in this decision. For the reasons set forth in the magistrate's decision and in this decision, we deny the requested writ of mandamus.

Objections overruled; writ denied.

CONNOR and DORRIAN, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Maxim Healthcare Services, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-122
Industrial Commission of Ohio and Jennifer Fisk,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on November 29, 2011

Christine Faranda Law, LLC, and *Christine M. Faranda*, for relator.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and *Theodore A. Bowman*, for respondent Jennifer Fisk.

IN MANDAMUS

{¶ 14} Relator, Maxim Healthcare Services, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order finding that the surgery and treatment requested by respondent Jennifer Fisk ("claimant") was reasonable and

necessary for the treatment of her allowed conditions and ordering the commission to find that claimant did not meet her burden of proof under *State ex rel. Miller v. Indus. Comm.* (1994), 71 Ohio St.3d 229.

Findings of Fact:

{¶ 15} 1. Claimant sustained a work-related injury on April 27, 2009, and her workers' compensation claim has been allowed for the following conditions: "cervical strain; thoracic strain; lumbar strain; cervical disc protrusions at C5-6 and C6-7; disc herniation at the L1-L2 level."

{¶ 16} 2. An MRI of claimant's cervical spine was performed on June 8, 2009.[1] The following findings and impression were revealed:

> FINDINGS: There is straightening of the cervical lordosis. There is no fracture or spondylolisthesis. There is mild disc height loss at the C6-C7 level with mild disc desiccation within the cervical spine most pronounced at C3-C4, C4-C5 and C5-C6. The cervical vertebral body heights are maintained.
>
> * * *
>
> IMPRESSION:
>
> [One] There is mild to moderate left foraminal narrowing at the C6-C7 level related to a 3 mm left uncovertebral-/foraminal disc osteophyte complex. There is no central stenosis at C6-C7.
>
> [Two] Otherwise very mild discogenic change and facet arthropathy as described above with no central or foraminal stenosis at the remaining levels.
>
> [Three] Straightening of the cervical lordosis is nonspecific, but likely relates to positioning or muscular spasm. There is no fracture or spondylolisthesis.

{¶ 17} 3. An MRI of claimant's lumbar spine was performed on June 18, 2009. That MRI revealed the following findings and impression:

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[1] This document was attached to relator's brief and was not made part of the stipulation of evidence; however, inasmuch as it is time-stamped February 1, 2010 preceding the commission hearing, no objection has been made to its inclusion, the MRI is discussed in the various briefs, it will be considered.

> FINDINGS: The axial T2-weighted images are slightly degraded by motion artifact. Incidental note is made of prominent venous plexuses within the posterocentral aspects of the T12 and L2 vertebral bodies. Bone marrow signal intensity is age appropriate. The vertebral bodies appear of normal height. There is mild degenerative disc disease at the L1-L2 level where there is mild disc desiccation, mild disc space narrowing and osteophyte formation. The conus is not studied in detail, but it appears grossly unremarkable lying at approximately the L1-L2 level.
>
> * * *
>
> IMPRESSION:
>
> [One] Mild degenerative disc disease at the L1-L2 level with a moderate-sized broad-based central disc protrusion causing mild spinal canal stenosis.
>
> [Two] T12-L1 level: There is a central/left paracentral disc extrusion dissecting caudally which causes mild effacement of the thecal sac anterior to the spinal cord but does not appear to deform the spinal cord. This causes mild spinal canal stenosis.
>
> [Three] No significant foraminal narrowing of the lumbar spine is seen.

{¶ 18} 4. An independent medical examination was performed by S. S. Purewal, M.D. In his July 6, 2009 report, after reviewing claimant's history and reviewing the MRIs, Dr. Purewal opined that claimant's cervical disc protrusions with referred symptoms to the left upper extremity and the central disc herniation at L1-2 and the pain and referred symptoms to her left hip and thigh region were due to the allowed conditions in claimant's claim and were not due to her pre-existing mild degenerative changes. Dr. Purewal opined further that claimant had reached maximum medical improvement for the cervical, thoracic, and lumbar sprain/strains, but not for the herniated disc conditions. Ultimately, Dr. Purewal concluded:

> Ms. Fisk is not capable of returning to her work duties at this time pending further evaluation and treatment by a neurosurgeon. The treatment at this point would not be considered excessive.

> In my opinion, this patient does need a neurosurgical evaluation for the disc problems described above, and she will probably need additional treatment in the form of epidural steroid injections and physical therapy. The current ongoing treatment with Medrol Dosepak, pain medications, and anti-inflammatory medications is also appropriate to treat her current condition.

{¶ 19} 5. Claimant had a follow-up visit with Sean R. Logan, M.D. In his September 16, 2009 report,[2] Dr. Logan commented on the cervical electrodiagnostic study performed by Dr. Osborne:

> * * * This study shows some muscular irritability in the mid cervical paraspinal muscles. There is no evidence of left upper extremity radiculopathy. In addition, the lumbar sampling looking for a lumbar radiculopathy, did not produce any abnormal results either.

Dr. Logan noted further that claimant had undergone one lumbar injection and was scheduled to receive another one in the upcoming week. Following his physical examination, Dr. Logan stated:

> * * * Ms. Fisk is not a candidate for surgical intervention of the cervical or lumbar spine at this time. I have recommended that she continue to work with the pain management specialist. I would be happy to re-evaluate her in the future should she develop new findings on either the cervical or lumbar MRI scans that would suggest that she be considered a candidate for surgery.

{¶ 20} 6. The record contains the February 18, 2010 letter from Panagiotis Bakos, a physician with Midwest Pain Treatment Center. With regard to claimant's condition and her need for medication, Dr. Bakos opined:

> Ms. Fisk at this point has reached maximum medical improvement status from our perspective, but she has been referred back to Dr. Logan for further evaluation as she did not respond well to interventional pain management modalities for her cervical/lumbar pain complaints which are described by the allowed conditions of neck sprain,

[2] This document was attached to relator's brief and was not made part of the stipulation of evidence; however, inasmuch as it is time-stamped February 1, 2010 preceding the commission hearing, no objection has been made to its inclusion, it will be considered.

> thoracic and lumbar sprain as well as disk herniation L1-2 and protruding disk at C5-6 and C6-7. The patient's above conditions would be reasonably related to the patient's pain complaints, and therefore the above medication which had a beneficial effect. It is therefore our concerted medical opinion, with a reasonable degree of medical probability, that Celebrex or perhaps a related medication of the nonsteroidal anti-inflammatory category would be of benefit for her conditions.

{¶ 21} 7. Claimant was again evaluated by Dr. Logan and, in his March 2, 2010 report, he noted that claimant complained of intermittent left arm pain in the left forearm and associated numbness of her left arm and hand. Claimant indicated that her left hand is weak and she drops objects. She also complained of rather constant left parascapular pain as well as pain across the area of her lumbar back. Following his physical examination and reconsidering the prior cervical MRI, Dr. Logan stated:

> Cervical MRI scanning was reviewed. This study was from June 2009 and demonstrates straightening of the normal cervical lordosis. A combination osteophyte with disc protrusion is noted at the C6-7 levels. This is to the left of the midline and causes mild compromise of the neural foramen.
>
> Ms. Fisk has persistent neck pain with left upper extremity pain which appears to be consistent with a C7 radiculopathy. Electrodiagnostic studies were non confirmatory for an acute cervical radiculopathy but did note paravertebral muscle irritability.

Thereafter, Dr. Logan noted that claimant had undergone extensive medical management as well as physical, chiropractic, and massage therapies; however, claimant continued to have persistent pain. Ultimately, Dr. Logan recommended the following:

> I discussed with Ms. Fisk anterior discectomy with fusion at the C6-7 level. I reviewed the technical aspects of the procedure with her as well as expected convalescence. The potential risks and complications of the surgery to include but not exclusive for infection, hemorrhage, the use of blood products, the risks of nerve root injury with permanent weakness or numbness, the risks of recurrent laryngeal nerve

> injury with change in voice, the risks of spinal cord injury with paraplegia or quadriplegia, the risks of inadvertent durotomy, the risks of stroke, and the risks of death were discussed. This includes the risks of death due to anesthetic complications as well as [illegible] cardiac or pulmonary events. Ms. Fisk voiced an understanding of these issues and would like to think about surgery. She has requested that I go ahead and apply to the Bureau of Worker's [sic] Compensation for the procedure. Her nurse case manager, Nancy Banks, was present with her today.

{¶ 22} 8. Dr. Logan completed a C-9 form that same day requesting the treatment noted in his March 2, 2010 report.

{¶ 23} 9. Heather Huntington, D.C., submitted a report dated May 5, 2010 opining that further chiropractic treatment was necessary while claimant awaited surgery. Dr. Huntington agreed that surgery was the proper course of treatment for claimant at this time.

{¶ 24} 10. Claimant's request for the authorization of treatment and medication was heard before a district hearing officer ("DHO") on June 28, 2010. Apparently, the DHO granted claimant's request and relator filed an appeal.

{¶ 25} 11. Relator's appeal was heard before a staff hearing officer ("SHO") on August 30, 2010. The SHO affirmed the prior DHO's order stating as follows:

> The request for an interior discectomy and arthrodesis with anterior plating at C6-7 with anterior plating, physical therapy, post-operative and cervical x-rays pre-operative as requested by Dr. Logan is granted. The requested treatment is found to be reasonable and necessary for treatment of the allowed conditions of disc protrusion at C5-6 and C6-7.
>
> The Hearing Officer relies upon the report of Dr. Purewal dated 07/06/2009, Dr. Logan dated 03/02/2010, the C-9 dated 03/02/2010, the MRI dated 06/08/2009, and the report of Dr. Huntington dated 05/05/2010. In his report dated 07/06/2009 Dr. Purewal felt that a neurosurgical evaluation for the disc problems was indicated. Following an initial evaluation by Dr. Logan wherein Injured Worker was found to not be a candidate for surgical treatment she was again evaluated after Dr. Bakos. He saw her 02/17/2010 and felt that she needed to be re-referred back to Dr. Logan as she did not respond well to interventional pain management

> modalities. Dr. Logan saw Injured Worker again on 03/02/2010 and felt that an anterior discectomy or fusion of the C6-7 level was appropriate. Injured Worker's treating chiropractor Dr. Huntington also agrees with the need for surgery for the allowed conditions as stated in her report of 05/05/2010.
>
> Therefore the Hearing Officer finds the weight of the evidence supports the requested treatment is reasonable and necessary for treatment of the allowed conditions in the claim and is found to be authorized and payable.
>
> The Self-Insuring Employer is hereby ordered to comply with the above findings.

{¶ 26} 12. The commission denied relator's appeal.

{¶ 27} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 28} Relator argues that the commission abused its discretion by authorizing treatment when there was no evidence to support that determination and by ordering relator to pay for that treatment without determining whether or not the cost of that treatment was medically necessary.

{¶ 29} The magistrate makes the following findings: (1) there is some evidence in the record upon which the commission relied to find that the requested surgery was reasonably related to the allowed conditions and reasonably necessary to treat the allowed conditions, and (2) although relator is correct that the SHO made no finding as to whether or not the costs of those services was medically reasonable, there is no evidence in the record that relator raised this issue before the commission. As such, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 30} 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* (1983), 6 Ohio St.3d 28.

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

{¶ 32} In arguing that there was no evidence in the record to support the SHO's order, relator argues that the reports of Dr. Logan are equivocal and therefore cannot constitute some evidence upon which the SHO could rely and the remaining reports do not constitute some evidence upon which the commission could rely.

{¶ 33} It is undisputed that equivocal medical opinions have no probative value and cannot constitute some evidence upon which the commission can rely. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 655. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. Id.

{¶ 34} Relator contends that Dr. Logan's September 16, 2009 and March 2, 2010 reports are equivocal. Dr. Logan noted in his September 16, 2009 report that the cervical electrodiagnostic study showed some muscular irritability in the mid cervical paraspinal muscles, but that there was no evidence of left upper extremity radiculopathy. Further, Dr. Logan noted that there was no evidence of lumbar radiculopathy. Thereafter, Dr. Logan noted that claimant had received one lumbar injection from Dr. Bakos and that she was scheduled to have another injection in the upcoming week. With regard to further treatment at that time, Dr. Logan opined that claimant was not a candidate for surgical intervention; instead, he recommended that she continue to work with the pain management specialist. Dr. Logan further indicated that if claimant developed new

findings on either the cervical or lumbar MRI scans, he would re-evaluate her to determine whether or not she had become a candidate for surgery.

{¶ 35} Because further conservative care did not alleviate claimant's symptoms, Dr. Bakos referred claimant back to Dr. Logan for further evaluation. In his March 2, 2010 report, Dr. Logan noted that claimant had sharp intermittent pain in her left forearm with numbness of her left arm and hand. Claimant also complained of left parascapular pain. Dr. Logan's physical examination revealed that claimant had limited flexion and hyperextension of her neck, 40 degrees of rotation to either side. Dr. Logan noted left triceps and digital extensor weakness at 4/5 without atrophy, diminished pinprick sensation in the distal left C6-C7 dermatomal distribution, reflexes were 1+ and symmetric except at the triceps.

{¶ 36} Dr. Logan re-reviewed the 2009 cervical MRI and noted that claimant did have a combination osteophyte with disc protrusion at C6-7. He noted that the electrodiagnostic study did not confirm acute cervical radiculopathy; however, he determined that her persistent neck pain with left upper extremity pain was consistent with C7 radiculopathy. Because conservative therapy had failed, Dr. Logan determined that claimant was a candidate for surgical intervention at this time.

{¶ 37} Dr. Logan's reports are approximately six months apart. Between the two reports, claimant continued with extensive medical management including physical, chiropractic, and massage therapies. Dr. Logan's March 2, 2010 report took into account the fact that conservative therapy had failed. Further, Dr. Logan did not mention the cervical MRI in his September 16, 2009 report. He only referenced the cervical electrodiagnostic study performed by Dr. Osborne. When he re-evaluated her six months later, Dr. Logan reviewed the cervical MRI and noted straightening of the normal cervical lordosis as well as a combination of osteophyte with disc protrusion at C6-7 levels causing mild comprise of the neural foramen. Dr. Logan concluded that claimant's left upper extremity pain as well as her radiculopathy could be explained by these findings.

{¶ 38} The magistrate finds that these medical reports are neither contradictory nor equivocal for the following reasons: (1) the reports were written six months apart; (2) the 2010 report was written after claimant failed further conservative treatment; (3) the 2010 report considered a piece of evidence which was not reviewed for the 2009

report; and (4) the results of the cervical MRI provided Dr. Logan with a reason to recommend surgery at that time. Finding that these reports are not contradictory, the magistrate finds that relator's argument that Dr. Logan's report cannot constitute some evidence upon which the commission could properly rely should be rejected. Further, relator's challenge to the remaining evidence relied on by the commission is misplaced. Each additional piece of evidence relied on supports Dr. Logan's conclusion that surgery is now appropriate. As such, these documents were properly relied upon.

{¶ 39} Relator's second argument is that the commission abused its discretion by authorizing the treatment without first considering whether or not the costs of those medical services were reasonable. In *Miller*, supra, the Supreme Court of Ohio set forth a three-prong test which must be met by claimants seeking authorization for medical services. That three-prong test asks the following questions: (1) are the medical services sought reasonably related to the industrial injury, that is, the allowed condition; (2) are the services reasonably necessary for the treatment of the industrial injury; and (3) is the cost of those services medically reasonable.

{¶ 40} In the present case, the SHO specifically found that "the weight of the evidence supports the requested treatment is reasonable and necessary for treatment of the allowed conditions in the claim and is found to be authorized and payable."

{¶ 41} Relator is correct to argue that the SHO did not address the medical reasonableness of the cost for the procedure. However, relator has not presented any evidence establishing that it raised this issue at the commission level. As noted in the findings of fact, relator did not include a copy of the June 28, 2010 DHO order. Further, relator did not include a copy of its appeal from that order. As such, this court cannot determine that relator raised this issue and no mention of such an argument was made by the SHO. Relator has failed to meet its burden of proof on this issue.

{¶ 42} Ordinarily, reviewing courts do not consider errors which the complaining party could have called, but did not call, to the lower court's attention at a time when it could have been avoided or corrected. See *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78. In *State ex rel. Gibson v. Indus. Comm.* (1988), 39 Ohio St.3d 319, the Supreme Court of Ohio specifically held that the standard from *Quarto Mining*

was equally applicable in a mandamus action where the issue is not raised previously, the issue has been waived.

{¶ 43} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion when it granted claimant's request and authorizing the surgery as requested and this court should deny relator's request for a writ of mandamus.

/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).