

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Charles W. Evert,	:	
dec'd Donna L. Evert, spouse,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-465
	:	
Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Steve Buehrer, Administrator, Ohio	:	
Bureau of Workers' Compensation and	:	
Sypris Technologies Marion LLC,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on May 31, 2012

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*Donaldson Law Offices, L.P.A., Joshua A. Dunkle, and John D. Donaldson; Finnegan Legal, LLC, and Matthew L. Finnegan, for relator.*

*Michael DeWine, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Charles W. Evert's widow, Donna L. Evert, filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to make an award on behalf of her late husband for the functional loss of use of all four of his extremities.

{¶ 2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, attached hereto, which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we issue a writ of mandamus to compel the commission to hold another hearing with all three members of the commission present or at least a hearing at which the evidence is preserved via a transcript or electronic means for review by any member of the commission who is not present.

{¶ 3} Counsel for the commission and the Ohio Bureau of Workers' Compensation ("BWC") has filed objections to the magistrate's decision. Counsel for Donna Evert has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} Counsel for the commission and BWC argues that a presumption of regularity attaches to orders of the commission, even when the proceedings are admittedly irregular. The failure of one of the three fact finders to attend the hearing, coupled with a failure of the absent commissioner to review the actual evidence in the form of a transcript or electronic preservation of the evidence, strips the commission's order of any presumption of regularity. Such a procedure was rejected by a panel of this court in *State ex rel. Sigler v. Lubrizol Corp.*, 10th Dist. No. 10AP-255, 2011-Ohio-4917.

{¶ 5} The situation which counsel seeks to sanction is similar to what could be encountered in a trial court if the judge chose not to attend a hearing and then ruled on the case based upon a summary of the evidence provided by a bailiff or staff attorney.

{¶ 6} Another similar situation would be if an appellate judge did not attend oral argument but decided the case based upon a summary provided by a law clerk or staff attorney.

{¶ 7} The commissioners' responsibility as to fact finding is at the heart of our *Sigler* decision and the opinion of the Supreme Court of Ohio in *State ex rel. Ormet Corp. v. Indus. Comm.*, 54 Ohio St.3d 102 (1990) which *Sigler* followed. Both decisions are founded in the requirement that government entities provide Due Process of Law.

{¶ 8} Counsel for the commission and BWC correctly note that the credibility of the claimant in the *Sigler* case was critical to a determination of whether or not *Sigler*, the

claimant, was entitled to receive permanent total disability compensation. Counsel argues that the issues here are purely legal, not factual. Counsel asserts that the physical presence of the third commissioner is not as necessary where only the merits of legal arguments, such as whether continuing jurisdiction exists, are at issue.

{¶ 9} We cannot know from the record before us what happened at the hearing attended by only two commissioners. Donna Evert and her daughter attended the hearing. We do not know for sure if either one or both testified, since the order issued two weeks later only tells us the matter was taken under advisement and an order would be issued later without a further hearing. That order issued later informs us only that "[t]he Spouse/Dependent has failed to meet her burden of proving that sufficient grounds exist to justify the exercise of continuing jurisdiction." One of the two commissioners who actually attended the hearing found otherwise.

{¶ 10} The non-attending commissioner claimed she reviewed a summary of "the testimony and arguments" presented by the parties. This implies that testimony was taken at the first hearing. The non-attending commissioner found "there is no persuasive evidence to support" invocation of continuing jurisdiction. This again implies that evidence was received but found to be unpersuasive, based on a summary provided by a staff member.

{¶ 11} Contrary to the assertion and arguments of counsel for the commission and the BWC, the record before us does not demonstrate that legal matters only were involved in the hearings before the commission. *Sigler* is not distinguishable based on that assertion.

{¶ 12} As a result, we overrule the objections to the magistrate's decision. We modify the magistrate's decision at paragraph 17 to reflect that Commissioner DiCeglio voted to grant the motion for continuing jurisdiction and Commissioner Abrams voted to deny the motion. Otherwise, we adopt the findings of fact in the magistrate's decision as amplified herein. We adopt the conclusions of law in the magistrate's decision.

{¶ 13} We therefore grant a limited writ of mandamus compelling a vacating of the commission's order refusing to exercise continuing jurisdiction. The writ further compels the commission to conduct a new hearing before all their members of the commission or a

hearing at which a record is kept such that any non-attending member of the commission can fully and impartially review the evidence and arguments presented.

*Objections overruled;  
limited writ of mandamus granted.*

**BRYANT and KLATT, JJ., concur.**

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**APPENDIX**

**IN THE COURT OF APPEALS OF OHIO**

**TENTH APPELLATE DISTRICT**

State of Ohio ex rel. Charles W. Evert,	:	
dec'd Donna L. Evert, spouse,	:	
	:	
Relator,	:	
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Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Steve Buehrer, Administrator, Ohio	:	
Bureau of Workers' Compensation and	:	
Sypris Technologies Marion LLC,	:	
	:	
Respondents.	:	

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**MAGISTRATE'S DECISION**

**Rendered on February 28, 2012**

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*Donaldson Law Offices, L.P.A., Joshua A. Dunkle, and John D. Donaldson; Finnegan Legal, LLC, and Matthew L. Finnegan, for relator.*

*Michael DeWine, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.*

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**IN MANDAMUS**

{¶ 14} Relator, Donna L. Evert, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to make an award on behalf of relator's deceased husband, Charles W. Evert ("Evert"), for the functional loss of use of all four of Evert's extremities.

**Findings of Fact:**

{¶ 15} 1. Decedent sustained a work-related injury on May 2, 2004 and his workers' compensation claim was allowed for the following conditions:

SPRAIN OF RIGHT KNEE & LEG; TEAR MEDIAL  
MENISCUS RIGHT KNEE; RIGHT SYNOVITIS NOS.

{¶ 16} 2. Evert underwent total right knee replacement surgery on May 24, 2006.

{¶ 17} 3. The surgery went well and Evert was discharged to the rehabilitation center for further services. Thereafter, Evert began having problems breathing, suffered a heart attack, and died May 28, 2006. The cause of death was anoxic brain injury as a consequence of cardiopulmonary arrest.

{¶ 18} 4. Relator filed an application for death benefits and her application was granted and the claim was allowed as a death claim in an order from the Bureau of Workers' Compensation ("BWC") mailed May 1, 2007.

{¶ 19} 5. The employer appealed and the matter was heard before a district hearing officer ("DHO") on July 3, 2007. The DHO determined that decedent's death was causally related to the work-related injury and found that relator was wholly dependant upon decedent as she was his spouse. As such, the DHO determined that death benefits were payable to relator as the surviving spouse from the date of death until her death or remarriage as provided in R.C. 4123.59.

{¶ 20} 6. On July 19, 2007, relator filed a C-86 motion requesting that Evert be granted a scheduled loss of use of his arms and legs pursuant to R.C. 4123.57.

{¶ 21} 7. Relator's motion was denied in an order mailed September 14, 2007. The BWC indicated that the application had not been timely filed and referred the matter to the commission for a hearing. Specifically, that order states:

IW representative request scheduled loss of use of all limbs pursuant to ORC 4123.57. Claimant was brain dead and in a coma for approx. 48 hours before being declared formally dead. BWC requests that this motion be denied as this request was made after 1 year of death and in accordance with the statue, the request must be made within 1 year after death. The IW has been deceased since 5-28-06 and the request was filed 7-19-07. BWC also notes that Dr. Barton's

review of 8-26-07 does not support the request as he opined "the injured worker did not suffer from loss of use of any or all four extremities as a result of the injury of 5-2-04 and the allowed conditions of the claim."

BWC notes that the statute of limitations expired for applying for loss of use award.

{¶ 22} 8. A hearing was held before a DHO on November 6, 2007. The DHO denied relator's motion finding that it was not filed within the statute of limitations. Specifically, the DHO stated:

R.C. 4123.60 provides that a dependant of the decedent-injured worker is entitled to a permanent partial disability award "(i)f the decedent would have been lawfully entitled to have applied for an award at the time of his death." However, R.C. 4123.60 also provides that "such payments may be made only in cases in which the application for compensation was made in the manner required by this chapter, during the lifetime of such injured or disabled person, or within one year after the death of such injured or disabled person." In the case before this District Hearing Officer, the decedent-injured worker expired on 05/28/2006, and the "application for compensation" - - the surviving spouse's motion - - was not filed until 07/19/2007. Therefore, the application for the scheduled loss award was not filed within the one-year limitation required by R.C. 4123.60. Accordingly, the surviving spouse's motion, filed 07/19/2007, is denied.

Counsel for the surviving spouse argued that the 01/16/2007 report of Dr. Steiman, filed 02/08/2007, should be considered an "application" for the purpose of satisfying the one-year limitation set forth in R.C. 4123.60. The District Hearing Officer finds that counsel's argument is not found persuasive for the reason that the 01/16/2007 report of Dr. Steiman is a medical report, and thus is not a request for a specific act placed upon BWC or the Industrial Commission. Therefore, the 01/16/2007 report of Dr. Steiman is not an application for the purpose of satisfying the one-year limitation specified in R.C. 4123.60. Accordingly, counsel's argument is not found persuasive.

(Emphasis sic.)

{¶ 23} 9. Relator filed an appeal and the matter was set for hearing before a staff hearing officer ("SHO") on January 4, 2008. The SHO affirmed the prior DHO's order and denied relator's motion for the loss of use of all four limbs of Evert prior to his death on May 28, 2006. The SHO found that the motion was not filed within one year of Evert's death (date of death May 28, 2006; date of application July 19, 2007). Specifically, the SHO's order states:

The injured worker's C-86 motion is denied as the Staff Hearing Officer finds that the request was not timely filed. The widow-claimant's request is a request for accrued compensation under ORC 4123.60. ORC 4123.60 provides as follows:

"If the decedent would have been lawfully entitled to have applied for an award at the time of his death the Administrator may, after satisfactory proof to warrant an award and payment, award and pay an amount, not exceeding the compensation which the decedent might have received, but for his death, for the period prior to the date of his death, to such of the dependants of the decedent, or for such services rendered on account of the last illness or death of such decedent, as the Administrator determines in accordance with the circumstances in each such case, but such payments may be made only in cases in which application for compensation was made in the manner required by this chapter, during the lifetime of such injured or disabled person, or within one year after the death of such injured or disabled person." Emphasis added)

The Staff Hearing officer finds that the application for the scheduled loss award was not filed until 7/19/2007. The decedent expired on 5/28/2006. Therefore, the application was not filed within one year after the date of death of the injured worker/decedent. Therefore, the Staff Hearing Officer finds that the C-86 motion is denied for the reason it is untimely filed.

The Staff Hearing Officer rejects the argument of the widow-claimant's representative that the 1/16/2007 report of Dr. Steiman, filed 2/08/2007, is an "application" for the purpose of satisfying the one-year filing limitation in ORC 4123.60. The Staff Hearing Officer finds that the report of Dr. Steiman is merely a medical report, and is not an application for a specific form of compensation.

Further, the BWC claims management guidelines on death claims, as submitted to the claim file on 11/06/2007, indicate that an application for accrued compensation is not required in instances where the injured worker was already receiving a specific benefit or had applied for a specific benefit, prior to his death. In the instant claim, the injured worker/decedent was already receiving the payment of temporary total disability compensation, and therefore the BWC paid the widow-claimant that accrued compensation absent an application. However, those guidelines specifically indicate that if the injured worker was not receiving the benefit or had not applied for the benefit prior to his death, then applicants have only one year from the date of death to make application for that type of accrued compensation. The same was not timely applied for in the instant claim.

(Emphasis sic.)

{¶ 24} 10. Relator's appeal was refused by order of the commission mailed January 29, 2008 and relator's request for reconsideration was denied by order of the commission mailed March 12, 2008.

{¶ 25} 11. On April 21, 2009, relator filed a C-86 motion requesting that the commission exercise its continuing jurisdiction regarding the denial of the scheduled loss of use of all four extremities. Because the BWC did not have jurisdiction to address the issue, the matter was referred to the commission in an order mailed September 30, 2009.

{¶ 26} 12. Relator's motion was heard before a DHO on December 11, 2009. At the hearing, relator's counsel argued that this court's decision in *State ex rel. Leto v. Indus. Comm.*, 180 Ohio App.3d 17, 2008-Ohio-7056 (10th Dist.) applied and, pursuant to *Leto*, her motion had been timely filed. The DHO disagreed, distinguished *Leto*, and determined that relator's application was outside the statute of limitations and untimely.

{¶ 27} 13. Relator appealed and the matter was heard before an SHO on March 9, 2010. Although the SHO vacated the prior DHO order, the SHO denied the motion finding that relator had neither demonstrated new and changed circumstances warranting the commission's exercise of continuing jurisdiction, and, even if relator had presented sufficient evidence to support the commission's exercise of its continuing jurisdiction, the SHO determined that Evert's facts differed from *Leto's* facts and that the holding in *Leto* did not apply.

{¶ 28} 14. Specifically, the SHO stated:

Initially, the Injured Worker's representative indicated that the mistake of law was made in the Staff Hearing Officer order issued 01/09/2008. The Staff Hearing Officer rejects the argument that a mistake of law was made. The Injured Worker's representative relies on the LETO case which was decided after the date of the Staff Hearing Officer hearing on 01/04/2008. Therefore, the mistake of law argument fails as the LETO case was not even in existence at the time of the 01/04/2008 decision.

The Widow-Claimant's representative also alleges that continuing jurisdiction should be exercised based on new and changed circumstances. The Staff Hearing Officer also rejects that argument. The Injured Worker relies on two bases for the alleged new and changed circumstances. One basis is the LETO case and the other is the answers to interrogatories of Kathy Lamb date 04/13/2009. Ms. Lamb was a Claim Service Specialist at the time of the original adjudication of the loss of use issue on 01/04/2008.

The Staff Hearing Officer does not find the answers to interrogatories by Ms. Lamb dated 04/13/2009 to constitute "new and changed circumstances on which to exercise continuing jurisdiction." While the Staff Hearing Officer finds that the answers to interrogatories are new evidence that was not on file at the time of the 01/04/2008 Staff Hearing Officer hearing, the Staff Hearing Officer further finds that the new or changed circumstances must arise subsequent to the initial order. The Staff Hearing Officer finds that the interrogatories at issue could have been posed to claim's representative Lamb prior to the time of the 01/04/2008 order. The memorandum from the Bureau of Workers' Compensation as contained in the claim file with document date 12/07/2009 indicates that the Bureau of Workers' Compensation's counsel was first contacted by the Injured Worker's representative on 01/23/2008 regarding an interview with Claim Service Specialist Kathy Lamb. The Injured Worker's representative did not pursue an interview with Ms. Lamb until after the Staff Hearing Officer order was issued on 01/04/2008 denying the requested benefits. The Staff Hearing Officer finds that the requested interview with Ms. Lamb could have been requested prior to the 01/04/2008 order and therefore does not constitute a circumstance or evidence that would not have been readily available prior to the initial series of orders on the loss of use

issue. As such, the Staff Hearing Officer does not find this evidence to constitute new and changed circumstances that was not readily discernible at the time of the initial hearings on the loss of use issue.

Further, the Staff Hearing Officer does not find that the LETO case represents new and changed circumstances on which to exercise continuing jurisdiction. It is true that the LETO case was decided after the 01/04/2008 Staff Hearing Officer hearing which denied the scheduled loss of limbs as being untimely filed. However, the Staff Hearing Officer agrees with the Bureau of Workers' Compensation's position that the LETO case is totally distinguishable on its facts and is not applicable to the facts in the instant claim. In the LETO case, Mr. Leto was injured in a motor vehicle accident on 06/28/2005 and he died on 07/19/2005. A death claim was filed by the Widow-Claimant and this claim for death benefits was combined with the injury claim that the Employer in LETO had neither certified nor rejected. The Bureau of Workers' Compensation subsequently disallowed all claims based on the going and coming rule. Subsequently in an order mailed 07/07/2006, the Industrial Commission vacated the Staff Hearing Officer order and allowed the claim. On 05/09/2007, a scheduled loss award motion for loss of use of all four of Leto's extremities was filed. That motion was subsequently denied for the reason it was not filed within one year from the date of Leto's death as indicated in 4123.60. The Court of Appeals indicated that the decedent's surviving spouse in Leto was not "lawfully entitled" under 4123.60 to have applied for an award for the decedent's total loss of use of his extremities until the Commission mailed its order granting the decedent the right to participate in the Workers' Compensation system on 07/07/2006. Therefore, the court indicated that the one year statute of limitations in 4123.60 did not bar the relator's functional loss of use of award in that case.

However, the facts in the instant claim are totally different. The Injured Worker in the instant claim, Mr. Everet [sic], had a date of injury on 05/02/2004 and the claim was allowed by the Bureau of Workers' Compensation on 06/02/2004 as an allowed claim. Therefore, in the instant claim, there was no right to participate issue in the Workers' Compensation's system involving Mr. Everet [sic], as Mr. Everet's [sic] initial claim giving him the right to participate in the Workers' Compensation system was allowed in June of

2004, shortly after the date of his injury in this claim. Therefore, the decedent's surviving spouse, Ms. Everet [sic], was lawfully entitled to have applied for the award for decedent's alleged total loss of use of his extremities as the decedent had an allowed Workers' Compensation claim at the time of his death, unlike the Injured Worker/Decedent in the LETO case. As the facts in the LETO case are distinguishable from the facts in the instant claim, the Staff Hearing Officer does not find that the LETO case represents any new and changed circumstance on which the Staff Hearing Officer can exercise continuing jurisdiction.

(Emphasis sic.)

{¶ 29} 15. Relator's appeal was refused by order of the commission mailed April 7, 2010.

{¶ 30} 16. Thereafter, relator sought reconsideration of the SHO's refusal order and the underlying SHO order of March 9, 2010, which denied the request for continuing jurisdiction.

{¶ 31} 17. Following a hearing on July 29, 2010, the commission entered an interlocutory order finding that the matter should proceed to a hearing. A hearing was held before two of the commissioners on October 5, 2010. The commissioners determined that relator had not met the burden of proving that sufficient grounds existed to justify the exercise of continuing jurisdiction and indicated that the SHO order following the March 9, 2010 hearing remained in effect. Commissioner DiCeglio voted to deny relator's motion while Commissioner Abrams voted to grant the motion. Commissioner Taylor was not present at the hearing but, after discussing the matter with SHO Alan Miller, who had attended the hearing, Commissioner Taylor voted to deny relator's request for reconsideration.

{¶ 32} 18. Thereafter, relator filed the instant mandamus action in this court.

**Conclusions of Law:**

{¶ 33} Relator raises three issues here. First, relator contends that this court's decision in *Leto* warrants a granting of an award for scheduled loss of use of all four of Evert's extremities. Second, relator argues that even if *Leto* is distinguishable, then R.C. 4123.60 is ambiguous and that liberally construing that statute, this court should determine that the report of Dr. Steiman satisfied the one year filing requirement of R.C. 4123.60. Third, relator argues that she was denied due process of law when Commissioner Taylor voted in spite of the fact that she did not attend the hearing.

{¶ 34} Finding relator's third argument has merit and warrants the granting of a writ of mandamus compelling the commission to rehear this case, any discussion of the first two arguments would be inappropriate.

{¶ 35} 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).

{¶ 36} Relator's third argument is that she was denied due process of law when only two commissioners were actually present at the hearing and a third commissioner voted without having viewed a transcript or listening to an audio replay of the hearing.

{¶ 37} Commissioner DiCeglio voted to deny relator's motion while Commissioner Abrams voted to grant the motion. Commissioner Taylor, the deciding vote, was not present at the hearing. After discussing the matter with an SHO in attendance and hearing his summary of the testimony, Commissioner Taylor voted to deny relator's motion.

{¶ 38} In support of her argument, relator cites this court's decision in *State ex rel. Sigler v. Lubrizol Corp.*, 10th Dist. No. 10AP-255, 2011-Ohio-4917. In that case, Terry W. Sigler had filed an application for permanent total disability ("PTD") compensation which was granted by an SHO and the commission did not grant reconsideration.

{¶ 39} The employer filed a mandamus action in this court which resulted in a writ of mandamus vacating the award of PTD compensation and returning the case to the commission for further review.

{¶ 40} Thereafter, an SHO again granted Sigler PTD compensation and the employer sought reconsideration from the full commission. Two of the three members of the commission conducted an evidentiary hearing which was not recorded. The third commissioner was not present and was not able to view a transcript of the testimony or hear arguments presented at the hearing. Instead, the third commissioner relied on someone else's notes and voted to overturn the SHO's award of PTD compensation.

{¶ 41} At the hearing, Sigler had testified about his physical conditions, his attempts at vocational rehabilitation, and the future medical procedures being contemplated, including a second surgery.

{¶ 42} One commissioner was in favor of granting PTD compensation while the other commissioner had been opposed. This court noted, "Evaluating Sigler's past efforts at rehabilitation and his ability to benefit from future rehabilitation efforts seems to be key to the finding that Sigler is or is not entitled to PTD compensation." *Sigler* at ¶ 8 This court determined that the third commissioner should have been in a position to evaluate Sigler's credibility on these issues and not simply rely on the impressions, notes, and summaries of what occurred. This court stated further:

We are bound by the rulings of the Supreme Court of Ohio in *State ex rel. Ormet Corp. v. Indus. Comm.* (1990), 54 Ohio St.3d 102. In the Ormet case, the Supreme Court of Ohio found, in a per curiam opinion, that Due Process of Law was violated when a nonattending member of the commission voted on an application for PTD without reviewing a transcript of the proceedings. In Ormet, the employer was claiming a violation of Due Process.

In a subsequent case, *State ex rel. Ohio Bell Tel. Co. v. Indus. Comm.*, 68 Ohio St.3d 329, 1994–Ohio–533, the Supreme Court of Ohio found no violation of Due Process. However, in the Ohio Bell case, the nonattending commissioner had access to an audiotape of the hearing before the commission.

*Id.* at ¶ 9.

{¶ 43} As stated previously, only two commissioners heard relator's request for reconsideration and each voted for a different outcome. After the third commissioner reviewed notes and discussed the case, the commission denied the request for reconsideration. Because the commission's order does not explain why Commissioner Abrams wanted to grant the motion, this court cannot know and cannot determine whether or not Commissioner Taylor's vote might have been different if she had been in attendance. Applying *Sigler*, this court should grant relator the same relief here.

{¶ 44} Based on the foregoing, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to hold another hearing with all commissioners present or to see to it that the testimony given is either transcribed or an audio recording is made in the event one of the commissioners is absent.

/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).