[Cite as *State ex rel. Retar v. Indus. Comm.*, 2009-Ohio-5669.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kim M. Retar,	:	
Relator,	:	
v.	:	No. 08AP-856
Industrial Commission of Ohio and Lake County,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on October 27, 2009

Heller, Maas, Moro & Magill Co., LPA, and *Robert J. Foley*, for relator.

Richard Cordray, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

Charles E. Coulson, Prosecuting Attorney Lake County, and *Benjamin J. Neylon*, for respondent Lake County.

IN MANDAMUS

CONNOR, J.

{¶1} Relator, Kim M. Retar, commenced this original action requesting a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

{¶2} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate has rendered a decision, including findings of fact and conclusions of law, which is appended to this decision. In the decision, the magistrate recommended that this court deny relator's request for a writ. No objections have been filed to the magistrate's decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, and after an independent review of the evidence, we adopt the decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, the requested writ is denied.

Writ of mandamus denied.

BRYANT and TYACK, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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Relator,	:	
v.	:	No. 08AP-856
Industrial Commission of Ohio and Lake County,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on May 14, 2009

Heller, Maas, Moro & Magill Co., LPA, and *Robert J. Foley*, for relator.

Richard Cordray, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

Charles E. Coulson, Prosecuting Attorney Lake County, and *Benjamin J. Neylon*, for respondent Lake County.

IN MANDAMUS

{¶4} In this original action, relator, Kim M. Retar, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order

denying her permanent total disability ("PTD") compensation and to enter an order granting said compensation.

Findings of Fact:

{¶5} 1. On December 7, 2000, relator sustained an industrial injury while employed as a bus driver for respondent Lake County, Ohio ("employer"), a state-fund employer. On that date, another vehicle collided with the bus relator was driving.

{¶6} 2. The industrial claim (number 00-587555) is allowed for "sprain of neck; sprain of thoracic region; herniated disc at C3-4, C5-6 and C6-7."

{¶7} 3. The record contains a "Vocational Rehabilitation Closure Report" dated November 25, 2002. Written on a form (RH-21) provided by the Ohio Bureau of Workers' Compensation ("bureau"), the report states, in pertinent part:

> She was to learn McKenzie techniques to try to reduce her pain. She began [physical therapy] at Lake Rehabilitation and Wellness Center. She attended [physical therapy] from 11/4/02 through 11/18/02 presenting with numerous pain behaviors throughout. She did not do well with evaluation for McKenzie. * * * [T]he therapist was unsure that Ms. Retar was a good candidate for rehab at this point. In addition, Ms. Retar had a consult on 11/14/02 re: pain management. Dr. Demangone recommended a trial of steroid treatment and prescribed a Medrol dose pack. Given the amount of pain behaviors Ms. Retar demonstrated with even low level therapeutic exercise, her therapist recommended holding [physical therapy] for now. * * * Dr. Demangone suggests in his pain management consult report to Dr. Weinberger that if the steroids prove not to be beneficial, he would consider it appropriate to try a cervical epidural steroid injection. Ms. Retar has the next appointment with her [physician of record] set for 12/3 to discuss Dr. Demangone's findings and recommendations. Also, she plans to follow through with her 12/31 appointment with the specialist re: the syrinx noted by Dr. Hardy on pre and post surgery MRIs. Given the amount of medical activity happening with this case now, a staffing

> was held with the Rehab Consultant and the RN. The decision was to close the case at this time with the hope that Ms. Retar would benefit from these medical avenues. This was discussed with Ms. Retar; she still expresses a goal to pursue vocational rehabilitation and understands that she can call to re-open her file at any time when some of the medical issues are resolved and she is able to be more active in a rehabilitation plan.

{¶8} 4. The record contains a document captioned "Individualized Vocational Rehabilitation Plan" dated February 5, 2003. Written on bureau form RH-2, the document states that relator "has returned to vocational rehabilitation after a previous file was closed on 11/26/02."

{¶9} 5. On January 12, 2004, relator filed an application for PTD compensation.

{¶10} 6. At the employer's request, a report was prepared by vocational rehabilitation specialist Brett Salkin. In his report, Salkin listed so-called "Employment Options" based upon acceptance of various medical reports in the record. With respect to an August 6, 2003 report from Richard F. Weinberger, M.D., Salkin listed "Parking Lot Attendant" and "Scheduler" as among the employment options immediately available. Salkin listed "Customer Service Clerk," "Check Cashier," "Reception Clerk" and "Repair Order Clerk" as among the employment options available upon "appropriate academic remediation and/or skills development."

{¶11} 7. Following a July 16, 2004 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application.

{¶12} In the order, the SHO relied upon a report from John L. Dunne, D.O., who examined relator on April 20, 2004. Based on that report, the SHO found that relator has the "residual functional capacity to perform sustained remunerative employment of at least a sedentary nature."

{¶13} The SHO also relied upon the Salkin report in analyzing the nonmedical factors.

{¶14} 8. On July 13, 2007, at relator's request, Hyo Kim, M.D., issued a three-page narrative report in which he concludes:

> * * * Mrs. Retar sustained a neck injury from work and suffered multiple cervical herniated discs causing radicular pain down to her left arm mostly. She underwent cervical fusion and corpectomy, and received multiple physical therapy treatments, cervical epidural steroid injections, and medical treatment. However, she continues to have electrodiagnostic evidence of radicular compression in her neck causing pain, tingling sensation, and numbness in her left arm. She can not function without taking pain pills because the pain continues to get worse unless she takes the pain medications on a regular basis. She has been on narcotic pain medications and Neurontin for the control of pain and the medications affect her cognitive abilities. She can not sit, stand, or drive for any length of time due to the neck pain with limited range of motion. She can not lift or carry anything heavier than 5 pound maximum. She can not reach over shoulder level. She can not push or pull with either hand due to arm pain.
>
> Therefore, it is my medical opinion that Mrs. Retar is permanently and totally disabled from all sustained renumerative [sic] employment due to the allowed conditions in this claim since February 1, 2005. Please refer to the attached physical capacity evaluation form with regard to her physical limitations.

{¶15} 9. The record contains a two-page report dated September 19, 2007 from Micha Daoud, CRC, CLCP, RN. Daoud was asked to "[r]eview file and give opinion regarding file closure." Daoud's report was submitted to "University Comp Care." The report states:

> According to available file documentation, the injured worker (IW) was deemed not feasible for vocational rehabilitation services, due to information from the physician of record (POR) indicating that the IW is not able to work. This is

supported by file documentation, and as a result, the rehab file should remain closed.

Upon review of the file, it is noted that the POR indicates that the IW is totally disabled from work, as per file documentation from the POR dated 7-30-07 [sic][1]. The POR indicates that the IW has no abilities for work, and the POR indicates that this is permanent.

Based on the information provided by the POR, the IW is unable to work. This poses as a barrier to employment, and therefore, the IW has no possible work goals. Without the goal of work, the IW is not feasible for services, as per BWC Guidelines.

According to BWC Guidelines, Chapter 4, Section F; Item # 2, concerning feasibility:

"Feasibility for vocational services means that there is a reasonable probability that the injured worker will benefit from services at this time and return to work as a result of the services."

In this case, there is no indication that the IW will benefit from services and return to work. In fact, there is indication that the IW will not return to work. Since the POR indicates that the IW is not able to work, it is expected that the IW will not benefit from rehabilitation services and will not return to work. As a result, the IW is not feasible for services, and the rehab file should remain closed.

It is noted that the IW has had two prior attempts to benefit from vocational rehabilitation services. The IW was referred for rehab services on 10-07-02, but the file was closed on 11-25-02, due to pain and need for epidurals. This rehab referral was unsuccessful. A second rehab referral was made on 2-5-03. The IW then received services of vocational evaluation, work conditioning, career counseling, clerical work adjustment (IW chose to discontinue this service after 1 day due to pain), job seeking skills training, job search, and job placement services. The IW did not find employment after 12 weeks of job search, and at that time, she did not want an extension of job search services; the rehab file was closed on 12-1-03, unsuccessfully.

[1] Presumably, "POR dated 7-30-07" is a reference to Dr. Kim's July 13, 2007 report.

> Currently, the IW's physical status is not improved since the prior referral in 2003. She was not successful in finding work in 2003, when she had abilities for physical demands of sedentary and light-medium jobs. She now has lesser physical abilities and cannot meet demands of sedentary work, so she is not a suitable candidate for work or for rehab services. The file documentation is clear; the IW is not feasible for vocational rehabilitation services and the rehab file should remain closed.

{¶16} 10. On February 5, 2008, relator filed her second PTD application which is at issue in this action. In support, relator submitted the July 13, 2007 report from Dr. Kim.

{¶17} 11. On May 5, 2008, at the commission's request, relator was examined by Kirby J. Flanagan, M.D., who is board certified in occupational medicine. In his three-page narrative report, Dr. Flanagan opined that the industrial injury produces a "32% whole person impairment." (Emphasis omitted.)

{¶18} 12. On May 5, 2008, Dr. Flanagan completed a physical strength rating form on which he indicated that relator is capable of "sedentary work."

{¶19} 13. Following a July 16, 2008 hearing, an SHO issued an order denying relator's PTD application. The SHO's order explains:

> This matter is before this Staff Hearing Officer on the injured worker's Application for Permanent Total Disability Compensation filed 2/5/2008. After full consideration of the issue of permanent total disability, it is the order of the Staff Hearing Officer that injured worker's application is denied. The Staff Hearing Officer finds that there is insufficient evidence to establish that injured worker's allowed disorders in the above claim independently prevent her from engaging in sustained remunerative employment. (It is noted that the injured worker's IC-2 application of 2/5/2008 only references claim number 00-587555 for consideration with respect to this Permanent Total Disability issue.)
>
> In issuing this order, the Staff Hearing Officer relies upon the 5/5/2008 report of Industrial Commission Specialist, Dr.

> Kirby Flanagan, M.D.; and an analysis of claimant's [*State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167] factors. The totality of this evidence persuades the Staff Hearing Officer that claimant has failed to satisfy her requisite burden of proof in demonstrating her entitlement to permanent total disability compensation.
>
> Dr. Flanagan examined the injured worker with regard to all of her allowed physical conditions. In his 5/5/2008 report, Dr. Flanagan opines that injured worker has reached maximum medical improvement. He further opines that she retains the physical functional capacity to engage in sustained remunerative employment. Specifically, Dr. Flanagan states that the injured worker can perform work within the sedentary classification.
>
> "Sedentary Work" is defined in OAC Section 4121-3-34(B)(2)(a) as follows:
>
> Sedentary work means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.
>
> The Staff Hearing Officer accepts the findings and conclusions of Dr. Flanagan, and relies upon these findings and conclusions in issuing this order. Accordingly, the Staff Hearing Officer finds that injured worker is not precluded from returning to sustained remunerative employment solely on a medical basis. Thus, while the Staff Hearing Officer accepts and adopts the physical findings and conclusions of Dr. Flanagan, an analysis of injured worker's Stephenson factors is warranted before a final determination of this extent of disability issue can be settled.
>
> The Staff Hearing Officer finds that injured worker is forty-eight (48) years of age. The Staff Hearing Officer further finds that this age is a positive factor for this injured worker. Such age permits this injured worker time to secure additional training to heighten her employability in the job

market through educational/vocational remediation and/or training. The Staff Hearing Officer is unable to ascertain any factors which would somehow diminish the conclusion that her age is a positive factor.

The Staff Hearing Officer additionally finds that the injured worker graduated from high school is 1978. O.A.C. Section 4121-3-34(B)(3)(iv) defines "high school education" as twelfth grade level or above. Notably, this section further sets forth that a high school education means ability in reasoning, arithmetic, and language skills acquired through formal education at twelfth grade education or above. Continuing, it is stated that "Generally an individual with these educational abilities can perform semi-skilled through skilled work." There is no evidence in file to contradict the conclusion that this injured worker's educational abilities are appropriately defined by her high school education. The injured worker's education is found to be a positive factor for this claimant. It establishes an ability to learn. This education also provides a firm foundation from which injured worker could enhance her employment skills through additional education and training. No vocational support was submitted by injured worker to refute these findings.

In regard to work history, the Staff Hearing Officer finds that the injured worker was employed for Dirt Devil from February 1996 through May 1996. There she was involved in the assembly of vacuum cleaners. From May 1996 through September 1996, the injured worker worked in the Deli Department at Rini Rego Grocery. Her work involved slicing meat and cheese for customers, and providing other deli services for customers. From September 1996 until December 7, 2000, injured worker was employed by Lake County as a busing aide, and then as a bus driver. Prior to 1996, injured worker was a stay at home mother caring for her family. The injured worker's limited employment history is found to be a negative factor for this injured worker for that work history has not provided her with skills (perhaps other than working with the public) that are transferable to sedentary work.

However, while no vocational evidence was submitted in this present permanent total disability process, vocational evidence is in file from a prior IC-2 application. This report is that of Brett Salkin, CRC, CDMS, of 6/9/2004. Therein, Mr. Salkin stated that although there are few skills from injured

worker's past work history which would be transferable to sedentary work, there is no evidence to suggest that this injured worker would not be able to develop academic or other skills required for entry level jobs. Referencing injured worker's high school education, Mr. Salkin specifically identified jobs within injured worker's retained functional capacity. Such jobs included, "Customer Service Clerk; Check Cashier; Reception Clerk; Repair Order Clerk; Scheduler; and Parking Lot Attendant". The Staff Hearing Officer finds that these job titles are viable employment options for this injured worker.

Finally, the Staff Hearing Officer notes that injured worker was found ineligible for permanent total disability benefits by prior Staff Hearing Officer decision of 7/16/2004. In that decision, the Staff Hearing Officer found that injured worker medically retained the physical capacity to perform work of a sedentary nature. Despite such findings, and despite her still relatively young age of 44 years at that time, this injured worker has not participated in any type of educational/vocational training for the purpose of enhancing her employability. Nor has she sought work of a sedentary nature since the issuance of the prior Staff Hearing Officer PTD denial order of 7/16/2004.

Given the above findings, this present Staff Hearing Officer finds that the injured worker has not exhausted all avenues for returning to the work force. In this regard, the Staff Hearing Officer finds the decision in State ex rel. Cunningham v. Indus. Comm. (2001), 91 Ohio State 3d 261, to be instructive. Therein, it was stated that it is not "unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve rehabilitation potential". (Id. at p. 262). Continuing, the Ohio Supreme Court stated that while extenuating circumstances can excuse a claimant's nonparticipation in re-education or retaining [sic] efforts, "claimant's should no longer assume that a participatory role, or lack thereof, will go un-scrutinized". (Id. at p. 262).

In the present matter, the Staff Hearing Officer is not persuaded that there are extenuating circumstances that would excuse injured worker's failure to engage in Vocational Rehabilitation in an effort to improve her re-employment potential. This finding is amplified given that injured worker is now only forty-eight years of age, and has

> been medically found to possess the capacity to perform sedentary work. As set forth in State ex rel. Wilson v. Indus. Comm. (1977), 80 Ohio State 3d 250, permanent total disability is a compensation of "last resort, to be awarded only when all reasonable avenues for accomplishing a return to sustained remunerative employment have failed." The Staff Hearing Officer finds, based upon the above evidence, that injured worker has not exhausted all reasonable avenues for accomplishing a return to sustained remunerative employment given her failure to participate in vocational rehabilitation and/or re-education programs.
>
> Based upon all of the foregoing evidence, the Staff Hearing Officer concludes that this injured worker retains the functional capacity to be trained to perform work within the sedentary classification. Accordingly, the Staff Hearing Officer concludes that this injured worker is not permanently and totally disabled.

{¶20} 14. On September 29, 2008, relator, Kim M. Retar, filed this mandamus action.

Conclusions of Law:

{¶21} The main issue is whether the commission abused its discretion in its analysis of the nonmedical factors, and particularly with respect to its finding of an absence of extenuating circumstances that would excuse relator's alleged failure to engage in vocational rehabilitation.

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

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

414; *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250; *State ex rel. Cunningham v. Indus. Comm.* (2001), 91 Ohio St.3d 261.

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

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

Id. at 529.

{¶25} In *Wilson*, the court states:

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

Id. at 253-254.

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

{¶27} In *State ex rel. Slater v. Indus. Comm.*, 10th Dist. No. 06AP-1137, 2007-Ohio-4413, this court determined that the commission abused its discretion in its denial of PTD compensation by holding the claimant, Glenn O. Slater, accountable for his failure to explore vocational rehabilitation and training when medical evidence indicated that Slater had undergone chemotherapy and a tracheostomy for treatment of his nonindustrial

carcinoma. Specifically, in violation of *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, the commission held Slater accountable for his failure to pursue vocational rehabilitation absent any reasoning supported by some evidence.

{¶28} In *Slater*, this court issued a writ of mandamus ordering the commission to issue a new order that adjudicates the PTD application.

{¶29} In *Slater*, this court, through its magistrate, distinguished this court's decision in *State ex rel. Searles v. Indus. Comm.*, 10th Dist. No. 01AP-970, 2002-Ohio-3097, affirmed 98 Ohio St.3d 390, 2003-Ohio-1493.

{¶30} In *Searles*, this court states:

> The commission may state separate, alternative grounds for denial of PTD. *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757, 598 N.E.2d 192. If the commission does choose to use alternative grounds, "those grounds should not be merged together and should be explained separately so that a reviewing court can understand what has been done." *Id*. at 761, 598 N.E.2d 192. The commission's decision, in separate paragraphs, details the grounds utilized to deny relator's PTD application. One basis for the denial of PTD was relator's failure to participate in rehabilitation. But the commission also focused on factors that would be assets for relator in obtaining employment. Although the commission did not expressly state that these were all separate reasons for denial, the decision did explain the grounds separately, thereby allowing this court to properly review that decision.
>
> Even if the commission improperly weighed relator's failure to participate in rehabilitation, we find that there was other evidence in the record to support the commission's decision to deny relator's PTD application. * * *

Id. at ¶5-6.

{¶31} In *Slater*, this court, through its magistrate, distinguished *Searles*:

> Unlike the situation in *Searles*, the SHO's order here does not address the failure to pursue vocational rehabilitation in a

> separate paragraph. Actually, the SHO points to the failure to pursue vocational rehabilitation in the two key paragraphs in which the other nonmedical factors such as age, education and work history are addressed. That is, the SHO's finding of a failure to pursue vocational rehabilitation is intertwined with the analysis of the other nonmedical factors.

Id. at ¶44.

{¶32} In this action, there is evidence in the record showing that relator participated, albeit briefly, in a bureau-sponsored rehabilitation program during November 2002, but participation was closed later that month so that she could pursue further medical treatment.

{¶33} The evidence of record further shows that relator reentered the bureau-sponsored rehabilitation program in February 2003, and that she received many services such as "job seeking skills training." After a 12-week job search, the rehabilitation file was closed in early December 2003.

{¶34} There is also evidence in the record that relator was again considered for participation in vocational rehabilitation services in September 2007 but services were denied because relator's physician of record opined that relator was permanently and totally disabled.

{¶35} Notwithstanding the evidence in the record, in his order of July 16, 2008, the SHO finds a "failure to participate in vocational rehabilitation and/or re-education programs," but cites to no evidence in the record to support such finding. In fact, the SHO's order strongly suggests that the SHO was simply unaware of the evidence before him regarding relator's long history of failed endeavors at vocational rehabilitation.

{¶36} In short, there is no evidence in the record and none cited by the commission to support its determination that relator failed to participate in vocational rehabilitation and/or reeducation programs.

{¶37} The more problematic issue under the *Searles* case is whether the commission's flawed determination regarding vocational rehabilitation participation can be separated from the remainder of the nonmedical analysis. The magistrate finds that it can.

{¶38} The last paragraph of the SHO's order is key to determining that the commission's flawed determination is severable from the nonmedical analysis:

> Based upon all of the foregoing evidence, the Staff Hearing Officer concludes that this injured worker retains the functional capacity to be trained to perform work within the sedentary classification. Accordingly, the Staff Hearing Officer concludes that this injured worker is not permanently and totally disabled.

{¶39} Relator's alleged failure to participate in vocational rehabilitation is largely irrelevant to the commission's finding that relator "retains the functional capacity to be trained to perform work within the sedentary classification."

{¶40} Relator's age of 48 years and her high school education were determined to be positive vocational factors.

{¶41} Clearly, it can be said that relator's age and education can enable her to train for sedentary work. *State ex rel. Murray v. Mosler Safe Co.* (1993), 67 Ohio St.3d 330 (claimant's age of 49 years and his high school education support the commission's determination that he is capable of performing sedentary employment); *State ex rel. Ellis v. McGraw Edison Co.* (1993), 66 Ohio St.3d 92 (claimant's age of 51 years and his high

school education support the commission's conclusion that claimant can be retrained for an occupation consistent with his physical abilities).

{¶42} Accordingly, because the commission's flawed analysis of relator's vocational rehabilitation history can be separated from the remainder of the nonmedical analysis, the commission's denial of the PTD application should not be overturned.

{¶43} It is therefore 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).