

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

{¶3} Discerning no error on the face of the magistrate's decision, we adopt that decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ.

Writ of mandamus denied.

BROWN and SADLER, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Karen J. Baker,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-373
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Best Cuts, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on October 20, 2009

Schiavoni, Schiavoni, Bush & Muldowney, and Shawn R. Muldowney, for relator.

Richard Cordray, Attorney General, and Allan K. Showalter, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} In this original action, relator, Karen J. Baker, 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 May 12, 1995, relator sustained an industrial injury while employed as the managing cosmetologist at a hair salon located in the Cleveland, Ohio area. The employer, Best Cuts, Inc., was a state-fund employer.

{¶6} 2. The industrial claim (No. 95-397853) is allowed for:

Closed fracture left metatarsal; sprain of left knee; effusion of left knee; aggravation of pre-existing osteoarthritis of the left knee; depressive disorder; anxiety state; dysthymic disorder; generalized anxiety disorder.

{¶7} 3. Following her industrial injury, relator moved from Ohio to Wisconsin.

{¶8} 4. On September 26, 2007, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by psychologist Thomas J. Hayes, Ph.D., who practices in Wisconsin. In his five-page narrative report, Dr. Hayes opines:

DIAGNOSTIC IMPRESSIONS:

AXIS I: Dysthymic Disorder (300.4)
Social Phobia (300.23)
AXIS II: No diagnosis.
AXIS III: Problems with her left leg, foot and knee, hypertension, chronic pain, and obesity.
AXIS IV: Stressors related to dealing with a disability, financial problems, and decreased social function.
AXIS V: Current Global Assessment of Functioning = 65.

With respect to the specific questions asked on the worker's compensation IME request, the answers are as follows:

Question #1: The injured worker has reached a treatment plateau and is stabilized with respect to her psychological functioning. Given the dynamic nature of psychological events, her anxiety can be expected to fluctuate on a day to day basis. She is currently in therapy with a qualified psychiatrist who can continue to monitor her medications,

and help her with exposure therapy and cognitive procedures to help overcome any problems she might have with anxiety in a work setting.

Question #2: With regard to her psychological functioning only, Ms. Baker could return to her former position of employment. She would require assistance from a qualified medical or psychological practitioner to help in her readjustment, but this would be of relatively short duration. The stated problems with her neuropsychological functioning would have to be addressed, but I would anticipate she could quickly return to function when these neuropsychological tasks are done on a consistent basis.

Question #3: The psychological factors involved in Ms. Baker's case were initially adjustment problems. The decrease in mobility and restrictions to her activity exacerbated these adjustment problems and they became chronic. There are significant physical features to this case that are beyond the scope of my abilities, but certainly would play a role in her ability to work. As mentioned in the previous question, it is reasonable to expect that she would need some professional help in readjusting back to the work setting. I would anticipate that this help would not exceed six months duration. This type of psychological readjustment therapy typically cannot be done prior to the person returning to work, and therefore I would state that she has reached her maximum treatment plateau at the present time, with the caveat that she would need additional psychological support to readjust to the work world.

Question #4: As previously stated, she has reached her maximum psychological improvement at this time. I cannot comment on the problems of mobility and the other aspects of her medical condition that could impact her ability to work. I do recommend that she work with a psychiatrist or psychologist to help her readjust to the work setting for a period of several months upon her return. I would anticipate the length of treatment to be approximately three months, but could extend up to six months to affect full recovery.

{¶9} 5. On October 18, 2007, citing Dr. Hayes' report, the bureau moved to terminate temporary total disability ("TTD") compensation.

{¶10} 6. Following a November 16, 2007 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation effective the date of hearing based upon Dr. Hayes' report. Relator administratively appealed the order.

{¶11} 7. Following a January 2, 2008 hearing, a staff hearing officer ("SHO") issued an order terminating TTD compensation effective November 17, 2007, based upon Dr. Hayes' report.

{¶12} 8. On February 12, 2008, relator filed an application for PTD compensation. In support, relator submitted a letter or report, dated December 5, 2007, from Parnjai Jaiarj, M.D., who practices psychiatry in La Crosse, Wisconsin. The one-paragraph report states:

I am writing this letter to support Ms. Karen Baker's application for workman's compensation. She has been under my care since July 12, 2006 when she presented with severe symptoms of depression. She began to have depression following the incident when she became unemployed due to the accident. Her depression symptoms [include] crying spells, forgetfulness, feelings of worthlessness and [guilt.] [S]he also has some passive suicidal ideation and low self esteem. She had tried multiple medications in the past, yet medication has not been very helpful. I strongly believe that her level of depression has been very severe. Therefore, the patient has become disabled despite active treatment. I strongly believe that since the accident, which was on May 12, 1995, she has become permanently and totally disabled. I do not recommend her for any employment at this time.

{¶13} 9. On May 13, 2008, at the commission's request, relator was examined by Robert J. Braco, M.D., who rendered a four-page narrative report.

{¶14} 10. On July 2, 2008, Dr. Braco completed a physical strength rating form. On the form, Dr. Braco indicated by his checkmark that relator is capable of sedentary work.

{¶15} 11. Earlier, on June 30, 2008, at the commission's request, relator was examined by psychologist Marc J. Ackerman, Ph.D., whose office is located at Glendale, Wisconsin. Thereafter, Dr. Ackerman issued a two-page narrative report, dated July 7, 2008, stating:

Karen Baker was evaluated in this office on 6-30-08. She is morbidly obese and arrived in a wheelchair. The wheelchair was too large to fit through standard doors. As a result, she was required to walk approximately 15 feet to the office. One leg is swollen to approximately 50% larger than the size of the other leg. Her gait is laborious, cumbersome, and demonstrates little ability to stand with sufficient balance. In addition to that, psychological testing shows significant impairment in personality functioning. The MMPI-2 suggests an anxiety disorder with a Dysthymic disorder in a schizoid personality. In addition, she has a low self-esteem, inability to adequately concentrate, and is not insight oriented.

Diagnostic Impression:

Axis I	Dysthymic Disorder 300.4 Generalized Anxiety Disorder 300.20
Axis II	Schizoid Personality Disorder 301.20
Axis III	Physical problems involving hypertension, morbid obesity, intractable chronic pain, physical problems with her left leg, knee, and foot.
Axis IV	Stressors related to finances, social introversion, and dealing with disability[.]
Axis V	Current global assessment of functioning equals 60[.]

With regards to the questions asked, it is this examiners opinion[,] to a reasonable degree of psychological certainty, that Karen Baker has reached the maximum psychological improvement. It is also this examiners opinion, to a reasonable degree of psychological certainty, that Karen Baker is 100% permanent, total disability.

{¶16} 12. Also on July 7, 2008, Dr. Ackerman completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Ackerman indicated by his checkmark, "[t]his injured worker is incapable of work."

{¶17} 13. Apparently, on July 24, 2008, the commission faxed to Dr. Ackerman correspondence requesting an addendum to his July 7, 2008 narrative report by providing answers to two queries. On July 25, 2008, Dr. Ackerman signed and dated his written responses to the queries:

Thank you for your report dated 7/7/08; however I will need an addendum. Please address the following issues:

When responding, consider ONLY these allowed conditions: Depressive Disorder; Anxiety State; Dysthymic Disorder; Generalized Anxiety Disorder.

[One] Your report states in Axis V. "the current global assessment of functioning equals 60"; this should roughly correspond with the percentage of impairment. Please see the attached table from the IC Medical Exam Manual. Based on this information please state the percentage of impairment.

%_____100%_____.

[Two] You also stated that the Injured Worker is incapable of work. Is this opinion based solely on the allowed psychological conditions? You may explain your opinion further on the form being sent.

Yes_____X_____ No_____

(Emphasis sic.)

{¶18} 14. On July 25, 2008, as requested, Dr. Ackerman completed another form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Ackerman again indicated by his checkmark, "[t]his injured worker is incapable of work." In the space provided, Dr. Ackerman also wrote in his own hand: "She would not have a [Global Assessment of Functioning] of 30, but clearly would be 40."

{¶19} 15. Following a December 3, 2008 hearing, an SHO issued an interlocutory order stating:

* * * At hearing, the Staff Hearing Officer raised concern as to the sufficiency of Dr. Ackerman's 7/7/2008 report for the reason that his report is sparse, and contains no specific or in depth discussion of psychiatric findings and/or psychiatric history. Dr. Ackerman's report also failed to provide a discussion concerning this injured worker's activities of daily living; persistence, pace, and concentration; social functioning; and adaptability--and how each of these factors were impacted by the allowed conditions in this claim. More specifically, Dr. Ackerman's report lacked the discussion as to why he held the opinion that the allowed psychiatric conditions in this claim rendered the injured worker to be permanently and totally disabled.

Finally, there was concern as to whether or not Dr. Ackerman addressed all of the allowed psychiatric conditions in this claim when rendering his opinion. This claim is allowed for "depressive disorder; anxiety state; dysthymia; and generalized anxiety disorder." Dr. Ackerman's 7/7/2008 written report appears to only address the conditions of "dysthymic disorder" and "generalized anxiety disorder" in his report. Dr. Ackerman further referenced a non-allowed condition of schizoid personality disorder in rendering his opinion.

Given the above difficulties with Dr. Ackerman's report, and the ambiguity inherent in his medical opinion on this extent of disability issue, the Staff Hearing Officer directs that this matter be referred back to the Industrial Commission

Medical Section with instructions to secure a written addendum report from Dr. Ackerman addressing each of the above perceived deficiencies. * * *

{¶20} 16. On December 10, 2008, Dr. Ackerman completed another form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Ackerman indicated by his checkmark: [t]his injured worker is incapable of work." In the space provided, Dr. Ackerman wrote in his own hand:

Any score above 65 on the MMPI-2 represents psychopathology. Karen Baker's depression score was 90; anxiety 90; confusion 87; social interaction 80; low self esteem 81. Therefore, she has incapacitating depression and anxiety with poor social interaction and poor self esteem.

{¶21} 17. Following a January 12, 2009 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 02/12/2008. After full consideration of the issue of permanent total disability, it is the order of the Staff Hearing Officer that Injured Worker's application be denied. The Staff Hearing Officer finds that there is insufficient evidence to establish, by a preponderance of the evidence, that Injured Worker's allowed disorders in the above claim, independently prevent her from engaging in sustained remunerative employment.

In issuing this order, the Staff Hearing Officer relies upon the 05/13/2008 report of Dr. Robert B[r]aco, M.D.; the 09/26/2007 report of Dr. Thomas Hayes, Ph.D.; and the Injured Worker'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 Injured Worker has failed to satisfy her requisite burden of proof in showing that she is unable to engage in sustained remunerative employment as a result of the allowed conditions in her above claim.

Dr. Thomas Hayes, Ph.D., evaluated the Injured Worker with regard to her allowed psychiatric conditions. In his 09/26/2007 report, Dr. Hayes opines that the Injured Worker has reached a treatment plateau, and maximum medical improvement for her allowed psychiatric conditions. In particular, Dr. Hayes recites that there "were no problems with thought content or process endorsed." He adds that the Injured Worker's affect was only "mildly depressed." He notes findings consistent with only a "mild social anxiety," and states that the Injured Worker was oriented in three spheres. Dr. Hayes notes that the Injured Worker reported that her normal daily activities involve cleaning the house; doing dishes; doing laundry; and cooking a meal. The Injured Worker also reported to Dr. Hayes that she does crocheting, and reads books. Dr. Hayes further notes normo-productive [sic] speech, and finds that the Injured Worker retains the ability to engage in a logical and goal directed conversation. Most significantly, Dr. Hayes opines that this Injured Worker retains the residual functional capacity to return to her former position of employment as a manager of a beauty salon. The report of Dr. Hayes was previously relied upon by the Industrial Commission in the prior Staff Hearing Officer order of 01/02/2008, which order terminated temporary total disability compensation on the basis that the allowed psychiatric conditions had reached maximum medical improvement.

The findings and conclusions of Dr. Hayes are relied upon by this Staff Hearing Officer in the issuance of this order.

Dr. Robert Braco evaluated the Injured Worker with respect to her allowed physical conditions. Dr. Braco concludes from his evaluation that this Injured Worker suffers an impairment rating of 24%, with respect to the whole person impairment. Dr. Braco's conclusion is rendered in the context of the allowed physical conditions alone. More significantly, Dr. Braco concludes that this Injured Worker retains the residual functional capacity to engage in sedentary work. "Sedentary Work" is defined 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, pull, 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 findings and conclusions of Dr. Braco, with respect to the Injured Worker's residual physical functional capacity, are relied upon by this Staff Hearing Officer. No other evidence was submitted by the Injured Worker with respect to this residual functional physical capacity issue. In fact, only the medical report of Dr. Parnjai Jaiarj, M.D., was submitted by the Injured Worker with the IC-2 Application. Therein, Dr. Jaiarj speaks only to impairment flowing from the allowed psychiatric conditions. Accordingly, the Staff Hearing Officer finds the conclusions reached by Dr. Braco to be uncontroverted and persuasive.

Given the above findings and conclusions of Drs. Hayes and Braco, the Staff Hearing Officer determines that this Injured Worker is not precluded from returning to the work-force by medical factors alone. Therefore, the Injured Worker's Stephenson factors must be addressed before this extent of disability issue can be settled.

The Staff Hearing Officer finds that this Injured Worker is 53 years of age. Such age is found to be a positive factor for this individual because it permits her time to undergo educational remediation and/or further vocational training to increase her employment skills.

The degree of such educational/vocational training necessary to promote a return to work would be limited in the context of the facts of this case as the Injured Worker has an extensive history of working as a beautician--a job title for which she has already been trained. In fact, in the last years of her employment, this Injured Worker was a "Managing Cosmetologist" with this Employer of Record. Although the Dictionary of Occupational Job Titles describes work as a beautician to be in the light category of work, many of the Injured Worker's duties with respect to this position were compatible with sedentary work. On her IC-2 application, this Injured Worker describes her duties as: managing supplies coming into the shop; ordering supplies as needed; scheduling all the girls working at the shop;

cutting and styling hair; sales and inventory of beauty products; knowledge of deposits on a daily basis; compliance with State licensing requirements for the beauty shop; and supervision of the other employees, including dispute resolution and compliance with dress code. These findings, coupled with her age of 53, persuade this Staff Hearing Officer that this Injured Worker requires only limited educational/vocational training to heighten her already well-defined employment skills. Transferable skills to sedentary work include: sales; supervision of other workers; clerical work; book-keeping; and management of a small business concern.

With respect to education, the Staff Hearing Officer finds that this Injured Worker has an eleventh-twelfth grade education, but has not received her High School Diploma. This finding is based upon the information provided by the Injured Worker on her IC-2 application. The Injured Worker further indicates on her IC-2 application that she can read, write, and perform basic math functions. The Injured Worker also supplemented her twelve years of formal education with vocational training at the Boardman Beauty Academy, where she received training as a cosmetologist--a job title which the Injured Worker performed for a fourteen year period of time. The Injured Worker's formal education, when coupled with her on the job work experience, is found to be a positive factor for this Injured Worker.

With respect to work history, this Injured Worker performed in the position of home health care provider/baby-sitter in the period from 1997 to December 2005. In this position, the Injured Worker was responsible for feeding, supervising, administering medicine, and assisting the elderly father of Dayle Doyle. Skills learned in this position include: using judgment; working with others to accomplish a goal; meeting responsibilities for another's care and health needs; and working on a schedule. Also, the Injured Worker performed as a baby-sitter for the four grandchildren of Dayle Doyle from 2001 to 2005. These findings are based upon the 02/23/2007 Memorandum of Interview of Dayle Doyle in file. The Injured Worker received compensation for her labor in this position at the rate of two-hundred dollars per week.

These findings support the conclusion that this Injured Worker's education and work experiences are of sufficient

quality to allow her return to work in entry level positions in the sedentary classifications of work. Sedentary jobs within the residual functional capacity retained by this Injured Worker would include: 1.) telemarketer; 2.) appointment clerk; 3.) check cashier; 4.) alarm-system monitor; 5.) customer service clerk; and 6.) order clerk. These findings are based upon the description of jobs set forth in the Dictionary of Occupational Titles. These employment options are found to be viable options for this Injured Worker.

Given the totality of the above evidence, the Staff Hearing Officer finds that this Injured Worker's disability is not total and that Injured Worker is capable of performing and/or being retrained to engage in sustained remunerative employment. Therefore, the Injured Worker's request for permanent total disability compensation is denied.

In issuing this order, the Staff Hearing Officer finds that the Injured Worker has not availed herself of the services provided by Vocational Rehabilitation. A 1/10/2003 letter from Janice Gruhn, Ohio District Manager, found that the Injured Worker's rehabilitation file was closed because the Injured Worker declined to participate in vocational rehabilitation. Similarly, a 04/07/2004 letter in file--from Avatar Comp--stated again that the Injured Worker declined to participate in vocational rehabilitation. 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 retraining efforts, "Claimants' should no longer assume that a participator 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 the Injured Worker's failure to engage in Vocational Rehabilitation in an effort to improve her re-employment potential. This finding is amplified given that Claimant is only fifty-three years of age presently, was only approximately 39 years of age at the time of injury, 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 has failed." The Staff Hearing Officer finds, based upon the above evidence that this Injured Worker did not exhaust all reasonable avenues for accomplishing a return to sustained remunerative employment given her failure to participate in vocational rehabilitation and/or re-education programs.

(Emphases sic.)

{¶22} 18. On February 13, 2009, the three-member commission mailed an order denying relator's request for reconsideration.

{¶23} 19. On April 10, 2009, relator, Karen J. Baker, filed this mandamus action.

Conclusions of Law:

{¶24} Two issues are presented: (1) whether Dr. Hayes' report constitutes some evidence upon which the commission can rely in its determination of the PTD application when the report was earlier requested for the determination of whether TTD compensation should be continued or terminated, and (2) whether the commission abused its discretion in rejecting the reports of Dr. Ackerman when it was the commission that requested the reports.

{¶25} The magistrate finds: (1) Dr. Hayes' report does constitute some evidence upon which the commission can and did rely in its adjudication of the PTD application, and (2) the commission did not abuse its discretion in rejecting the reports of Dr. Ackerman.

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

{¶27} Turning to the first issue, a similar, if not identical, issue was presented to this court in *State ex rel. Bray v. Hamilton Fixture Co.*, 10th Dist. No. 05AP-821, 2006-Ohio-4459.

{¶28} In *Bray*, the claimant, Sharon S. Bray, had an industrial claim allowed for physical and psychological conditions. Following an award of TTD compensation, the bureau requested that Bray be examined by psychologist Chris H. Modrall, Ph.D.

{¶29} Following his examination, Dr. Modrall opined that the psychological condition had reached maximum medical improvement ("MMI"). He further noted that he believed that Bray could return to work from a psychological standpoint. He advised that the return to work occur on a "staggered basis" where Bray might work a few hours the first week, "one-half a day the next week" and then return to full-time duty. *Bray*, at ¶24.

{¶30} Based on Dr. Modrall's report, the bureau moved for termination of TTD compensation on MMI grounds. Following an October 15, 2001 hearing, a DHO terminated TTD compensation based upon Dr. Modrall's report.

{¶31} Thereafter, Bray filed an application for PTD compensation. In support of her application, Bray submitted a report from her treating psychiatrist, Thor Tangvald, M.D., who opined that Bray was permanently and totally disabled.

{¶32} In denying Bray's PTD application, the SHO relied in part on Dr. Modrall's report. Bray then filed a mandamus action in this court to challenge the commission's denial of her application.

{¶33} Holding that Dr. Modrall's report could be relied upon to support the PTD determination even though it had been submitted for the TTD request, this court, in *Bray*, denied the request for a writ of mandamus.

{¶34} *Bray* answers the issue relator puts forth here. Based on *Bray*, this magistrate concludes that Dr. Hayes' report constitutes some evidence upon which the commission can and did rely in determining the PTD application.

{¶35} Turning to the second issue, the commission has exclusive authority to evaluate evidentiary weight and credibility. *State ex rel. Bell v. Indus. Comm.* (1995), 72 Ohio St.3d 575, 577, citing *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18. It follows from that premise that the commission is free to reject reports from its own physicians. *Id.* The commission need not give heightened deference to a report from its own physician. *Id.* See *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139 (requiring the commission to accept the conclusions in a report from its own rehabilitation center would improperly make the rehabilitation division, not the commission, the ultimate evaluator of disability).

{¶36} Given the above authorities, the second issue is easily answered. Clearly, it was within the commission's discretion to reject Dr. Ackerman's reports as evidence upon which it would rely.

{¶37} Relator accuses the commission of "doctor shopping" because it refused to rely upon the reports of Dr. Ackerman. (Relator's brief, at 5, 7.) This accusation lacks merit.

{¶38} Relator does not define what she means by the term "doctor shopping." Presumably, "doctor shopping" implies that the commission improperly endeavored to

find a doctor who would support an alleged preconceived notion of the merits of the PTD application. There is no evidence in the record that this occurred.

{¶39} 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).