

[Cite as *State ex rel. Sears Roebuck & Co. v. Davy*, 2010-Ohio-87.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sears Roebuck & Co., :
Relator, :
v. : No. 09AP-272
Cindy L. Davy and Industrial : (REGULAR CALENDAR)
Commission of Ohio, :
Respondents. :
:

D E C I S I O N

Rendered on January 14, 2010

Reminger Co., LPA, Amy S. Thomas and Kevin R. Sanislo,
for relator.

Larrimer and Larrimer, and Thomas L. Reitz, for respondent
Cindy L. Davy.

Richard Cordray, Attorney General, and Sandra E. Pinkerton,
for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶1} Relator, Sears Roebuck & Co. ("relator"), has filed this original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent Cindy L. Davy ("claimant")

permanent total disability ("PTD") compensation, and ordering the commission to find that respondent is not entitled to that compensation.

{¶2} The 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, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion in evaluating claimant's nonmedical disability factors and awarding PTD compensation. Therefore, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator filed objections to the magistrate's decision. Claimant filed a memorandum opposing the objections. This cause is now before the court for a full review.

{¶4} Claimant's workers' compensation claim was allowed for right carpal tunnel syndrome and reflex sympathetic dystrophy, right hand and arm; and depressive disorder with features of anxiety. She filed for PTD compensation on November 21, 2007, at the age of 48. Claimant has a high school education and her previous work experience included experience as a receptionist, a nurse's aide, and a sales associate in relator's automotive department.

{¶5} Claimant's application for PTD compensation was heard before a staff hearing officer ("SHO") on August 11, 2008. Relying upon the reports of Robin G. Stanko, M.D., and Earl F. Greer, Jr., Ed.D., the SHO found claimant could perform at a sedentary level with specific restrictions involving the use of her right arm and hand. In

analyzing the nonmedical disability factors, the SHO found claimant was not able to perform sustained remunerative employment.

{¶6} Relator first states in its objections that it generally accepts the findings of fact as set forth in the magistrate's decision, but requests the addition of one fact, as well as clarification regarding a separate fact.

{¶7} First, relator submits the findings of fact omit pertinent information regarding claimant's condition following corrections to her electrical stimulator in 2006. Relator argues the findings of fact should be modified to include information stating that claimant's physician reimplanted her electrical stimulator in 2006, which resulted in a significant improvement in claimant's pain level, based upon evidence contained in the records of Michael Stanton Hicks, M.D. Second, with respect to paragraph three of the magistrate's decision, relator wishes to clarify that claimant's participation in rehabilitation services refers to physical therapy services, not vocational rehabilitation.

{¶8} Following an independent review of the magistrate's findings of fact, we overrule relator's request to add additional factual information, as we cannot reweigh the evidence. The SHO did not make specific findings on this issue and did not indicate that he relied upon this information. Additionally, this particular information was not contained within the reports the SHO specifically cited as those upon which he was relying. As to relator's request for clarification, we sustain that request and adopt the magistrate's findings of fact as our own, with the following modification: the words "physical therapy-related" shall be inserted into the second sentence of paragraph 3 between the phrases "participated in" and "rehabilitation services," so that the relevant phrase reads:

"participated in physical therapy-related rehabilitation services." Therefore, we adopt the magistrate's findings of fact with this clarification.

{¶9} Next, relator objects to the magistrate's conclusions of law. These objections essentially restate the same arguments that were considered by the magistrate. Although relator does not specifically delineate objections, relator contends the magistrate erred in failing to find an abuse of discretion and generally makes the following arguments: (1) the commission failed to address claimant's nonparticipation in vocational training and the magistrate failed to recognize this as a requirement; (2) the record lacks "some evidence" upon which to conclude that retraining would no longer be feasible anymore; and (3) the commission failed to consider claimant's past employment skills and the transferability of those skills, and the magistrate erred by ignoring this requirement.

{¶10} First, relator contends the magistrate failed to recognize the commission's abuse of discretion in failing to require claimant to participate in vocational training and in failing to acknowledge that the record lacks "some evidence" upon which to conclude that such retraining is no longer feasible or realistic for claimant.

{¶11} Under *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 173, the commission must consider the nonmedical factors of age, education, and work history, in addition to other factors, such as physical, psychological, and sociological factors, in its PTD analysis. Thorough consideration of the *Stephenson* factors is essential to the determination of PTD, where a claimant's medical capacity to do work is not dispositive and the nonmedical factors indicate that the claimant cannot realistically return to the job market. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 1994-Ohio-296.

Furthermore, pursuant to *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, the commission must also state what evidence it relied upon and provide a brief explanation for its decision.

{¶12} R.C. 4123.58(D)(4) precludes PTD compensation where the employee's inability to work is the result of the employee's failure to engage "in educational or rehabilitative efforts to enhance the employee's employability, *unless such efforts are determined to be in vain.*" (Emphasis added.)

{¶13} Contrary to relator's assertion, this statute (and current case law) does not mandate that the commission shall not award PTD compensation if the injured worker does not engage in efforts to retrain. Instead, the statute states that PTD compensation can still be awarded where there is no participation in vocational rehabilitation *if* such participation would be in vain. Although the commission did not specifically use the phrase "in vain," the SHO essentially made that finding using similar language.

{¶14} It is well-settled law that the commission is the expert on nonmedical factors, including vocational evidence. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 1997-Ohio-152. Here, the claimant admitted that she never applied for vocational rehabilitation. As noted by the magistrate, the SHO determined that, given the finding that claimant would be capable of less than a full range of sedentary work, and given the severe restrictions imposed involving her dominant right arm and hand, coupled with her lack of a college education and negative prior work history, successful participation in a vocational retraining program would be unrealistic. As the magistrate found, such an explanation is sufficient to meet the requirements of *Noll*, and a more detailed explanation is not required.

{¶15} The magistrate further cited the SHO's finding that claimant had received a total loss of use award for her right hand, thereby rendering it useless. As noted, claimant's current residual functional capacity is extremely limited. She cannot grip or pick up small items with her right hand, or perform repetitive power grip or power pinch activities. Additionally, she is unable to type, write, use a computer, or perform various other tasks she had previously performed. Relator, however, argues that claimant could possibly learn to perform these and other tasks, possibly with her left hand, if she participated in vocational rehabilitation. Yet, as the magistrate pointed out, the commission is the expert on vocational rehabilitation issues, and it determined that, under these circumstances, vocational retraining would not be feasible, due to the severe restrictions imposed by claimant's particular disability, and due to the other relevant factors. There is some evidence supporting the commission's findings and this court cannot "reweigh" the evidence. Therefore, we agree with the magistrate's conclusion that the commission did not abuse its discretion in determining it was unrealistic to require claimant to engage in vocational rehabilitation, based upon its determination that efforts to rehabilitate her would not be feasible.

{¶16} Furthermore, like the magistrate, we reject relator's argument that, pursuant to *State ex rel. Arthur v. Indus. Comm.*, 10th Dist. No. 05AP-1018, 2006-Ohio-6776, the commission is not permitted to make a determination as to whether or not vocational rehabilitation is feasible. Relator has submitted that, because it is the injured worker's burden to prove vocational rehabilitation efforts would have been in vain, and because the claimant presented no evidence on this issue, the commission cannot make a determination here.

{¶17} Under *Arthur*, this court found it was improper to shift the burden onto the commission to require it to consider how rehabilitation and retraining would be affected by the claimant's multiple surgeries, when the claimant did not meet her burden of showing why she did not participate in retraining or why such efforts would be in vain. However, here, unlike in *Arthur*, the burden has not been shifted to the commission to make these considerations via a writ of mandamus. As the magistrate noted, *Arthur* does not prevent the commission from making this determination by its own choice, based upon all of the evidence before it, as is the situation here.

{¶18} Finally, relator argues the commission failed to properly consider claimant's past employment skills and the transferability of those skills and, in turn, the magistrate failed to acknowledge this abuse of discretion. We disagree. Although the magistrate found the SHO did not specifically state that claimant lacked transferable skills, the magistrate determined the commission did not fail to consider respondent's past employment skills and the transferability of those skills.

{¶19} The magistrate found the SHO's recitation of many of the tasks or jobs which claimant had previously been able to perform, such as serving as a receptionist, were actually demonstrative of the types of skills which would ordinarily be transferable to other sedentary work. Yet, these jobs require skills like typing or operating a computer or cash register, and claimant's particular allowed injury prevents her from performing the types of activities she previously performed and from using the types of skills she previously acquired. As noted by the magistrate, the SHO further explained how claimant would no longer be able to perform those jobs and tasks or utilize the skills associated with those jobs, due to the severe restrictions involving her dominant right hand. The

magistrate concluded the SHO did not abuse its discretion by identifying certain potentially transferable skills claimant had developed using certain types of employment examples, and explaining why the skills required for those jobs would not be transferable to less than sedentary work that she could only perform with her nondominant hand. We agree.

{¶20} Following an independent review of this matter, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We adopt the magistrate's findings of fact, with the modification as indicated herein. We also adopt the magistrate's conclusions of law. Accordingly, relator's objections to the magistrate's decision, with the exception of the request for clarification regarding the findings of fact, are overruled. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled; writ denied.

BROWN and FRENCH, 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. Sears Roebuck & Co., :

Relator, :

v. : No. 09AP-272

Cindy L. Davy and Industrial : (REGULAR CALENDAR)

Commission of Ohio, :

Respondents. :

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

Rendered on August 17, 2009

Reminger Co., LPA, Amy S. Thomas and Kevin R. Sanislo,
for relator.

Larrimer and Larrimer, and Thomas L. Reitz, for respondent
Cindy L. Davy.

Richard Cordray, Attorney General, and Sandra E. Pinkerton,
for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶21} Relator, Sears Roebuck & Co., 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 which awarded permanent total disability ("PTD")

compensation to respondent Cindy L. Davy ("claimant"), and ordering the commission to find that claimant is not entitled to that compensation.

Findings of Fact:

{¶22} 1. Claimant sustained a work-related injury on June 2, 2001 and her workers' compensation claim has been allowed for "right carpal tunnel syndrome and reflex sympathetic dystrophy, right hand and arm; depressive disorder with features of anxiety."

{¶23} 2. Claimant returned to work for a brief period of time following her injury; however, she has not worked since her right carpal tunnel release surgery in March 2002. Following this surgery, the commission granted claimant a scheduled-loss award for the total loss of use of her right hand in 2005.

{¶24} 3. In November 2007, claimant filed an application for PTD compensation. According to her application, claimant was 48 years old, had last worked in March 2002, was receiving social security disability benefits, graduated high school in 1978, attended cosmetology school for a period of time, could read, write, and perform basic math, utilized a TENS unit, and participated in rehabilitation services until her arm became frozen due to the allowed conditions of reflex sympathetic dystrophy. Claimant has work experience as a receptionist, nurse's aide, and a sales associate in the automotive department with relator. As a receptionist, claimant answered phones and did some filing. As a nurse's aide, claimant assisted patients with daily needs such as feeding, dressing, and bathing. While employed in the automotive department, claimant assisted customers, measured tires, drove cars into the service bay, ordered parts if necessary, entered data into a computer, and operated the cash register.

{¶25} 4. Claimant's application was supported by medical reports from Donald J. Tosi, Ph.D., and Richard M. Ward, M.D. Dr. Tosi opined that claimant's allowed psychological condition prevented her from returning to gainful employment. Dr. Ward opined that claimant's allowed physical conditions prevented her from performing sustained remunerative employment.

{¶26} 5. Claimant was examined by Robin G. Stanko, M.D., on April 10, 2008. After providing physical findings upon examination and describing claimant's decreased range of motion of her digits, wrist, elbow, and shoulder, Dr. Stanko opined that claimant's allowed physical conditions had reached maximum medical improvement ("MMI"), assessed a 33 percent whole person impairment, and opined that claimant could perform work as follows:

* * * I feel the claimant could perform activity at sedentary work levels, that is, lifting up to 10 lbs. overall, but with right arm lifting limited to 5 lbs. and no overhead lifting with the right arm and no repetitive power grip and power pinch activities with the right hand. * * *

{¶27} 6. Claimant was also examined by Earl F. Greer, Jr., Ed.D., for her allowed psychological condition. In his April 10, 2008 report, Dr. Greer concluded that claimant's allowed psychological condition had reached MMI, assessed a 15 percent whole person impairment, and opined that her allowed psychological condition would not prevent her from returning to work.

{¶28} 7. Claimant's application for PTD compensation was heard before a staff hearing officer ("SHO") on August 11, 2008. The SHO relied on the medical reports of Drs. Stanko and Greer and found that claimant could perform at a sedentary level with the specific restrictions involving the use of her right arm and hand. Thereafter, the SHO

analyzed the nonmedical disability factors and found that claimant was not able to perform sustained remunerative employment:

The injured worker is 49 years old, has a high school education plus training as a cosmetologist, and a work history as a sales clerk, nurse's aide, and receptionist in a tire store. She has not performed any work since 03/05/2002. She is right hand dominant. Her claim is allowed for reflex sympathetic dystrophy of the right arm and hand, and she has received a scheduled loss award for a total loss of use of the right hand.

* * *

The injured worker's age of 49 is a positive vocational factor. Her high school education is also considered to be a positive vocational factor. Her work history is not considered to be a positive vocational factor, as none of her prior jobs would be within her current residual functional capacity. This capacity is extremely limited, given the fact that it directly affects her dominant right upper extremity. The employer at hearing argued that she would be capable of working again as a receptionist in a tire store or other similar facility, or as a hostess in a restaurant, for example. The Staff Hearing Officer, however, is not persuaded that that would be the case. She would not be able to type, and would have to write left handed, which would be very difficult, and consequently this would effectively preclude her from working as a receptionist. She also would need the ability to use both hands to hold, pass out, and retrieve menus as a restaurant waitress, and most likely have to be able to do some light table cleaning and cashier/computer work, which she would not be capable of given the severe restriction involving her right arm and hand. The Staff Hearing Officer finds that she would be capable of less than a full range of sedentary work, with severe restrictions involving her dominant right upper extremity, and that without a college education or the equivalent she would effectively not be able to find suitable employment within those restrictions. Furthermore, given the severe restrictions affecting her right upper extremity, a successful participation in a significant vocational retraining program would not be feasible or realistic anymore.

{¶29} 8. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶30} 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.

{¶31} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments but also the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶32} In this mandamus action, relator asserts that the commission abused its discretion in its evaluation of the nonmedical disability factors. Specifically, relator contends that the commission failed to explain how the positive vocational factors of age and education are outweighed by what the commission determined were the negative vocational factors of claimant's work history, failed to explain how it concluded that claimant lacked transferable skills, failed to address what skills claimant could reasonably develop, and failed to consider claimant's failure to participate in vocational rehabilitation.

{¶33} In analyzing the nonmedical disability factors, the commission concluded that relator's age of 49 years and her high school education were both positive factors in terms of her ability to become reemployed. With regards to claimant's prior work history, the commission found it was a negative factor and concluded that claimant was no longer able to perform the majority of tasks which she had performed in her prior jobs. Specifically, the SHO noted that claimant was right hand dominant and had already received a scheduled-loss award for the total loss of use of her right hand. The SHO noted that claimant would be unable to type, write with her dominant hand, or perform cashier/computer work. As such, the SHO concluded that claimant could not return to work as a receptionist. The SHO concluded that claimant would need to be able to use both hands, or at least her dominant hand, in order to compete and find a job in today's workforce. The SHO also concluded that claimant's severe restrictions and limitations to her right upper extremity would render her participation in significant vocational retraining unrealistic.

{¶34} Part of relator's argument is that the commission improperly intertwined claimant's physical limitations due to the allowed conditions with the nonmedical disability factors. This magistrate disagrees.

{¶35} A review of the transcript from the hearing before the SHO reveals that relator had argued that claimant could perform sedentary work in an office setting as a receptionist. In its order, the SHO specifically addressed this argument and explained why it was being rejected. It is not improper for the commission to look at a claimant's physical limitations to determine whether or not a claimant can return to work which was performed in the past. Further, although the SHO did not specifically state that claimant lacked transferable skills, the magistrate finds that the commission's explanation of many of the tasks which claimant performed in her prior jobs represents skills which would ordinarily be transferable to other sedentary work. However, the commission considered these skills and concluded that claimant would no longer be able to utilize those skills given her severe physical limitations. In identifying specific jobs claimant could no longer perform, the SHO was responding to specific arguments raised by relator at the commission hearing. This is not an improper intertwining of claimant's medical and nonmedical disability factors. Instead, it represents a careful response to relator's arguments which identified certain potentially transferable skills which claimant had developed and explained why those skills would not transfer to less than sedentary work which claimant can only perform with her left, nondominant hand. This was not an abuse of discretion.

{¶36} Relator also contends the commission abused its discretion by failing to consider the skills that claimant could develop and failed to consider her lack of

participation in vocational rehabilitation. With regards to skills which she could reasonably develop, the commission specifically stated that, because of the severe restrictions claimant had involving her dominant right upper extremity and her lack of a college degree, participation in significant vocational retraining was unrealistic. In making this argument, relator cites this court's decision in *State ex rel. Arthur v. Indus. Comm.*, 10th Dist. No. 05AP-1018, 2006-Ohio-6776. Relator argues that the injured worker is required, in every case, to explain why he/she did not participate in vocational rehabilitation and, further, how any attempt would have been futile. The magistrate finds that relator is arguing *Arthur* out of context.

{¶37} In *Arthur*, the SHO considered the injured worker's failure to engage in vocational rehabilitation and stated:

The Staff Hearing Officer finds from a review of the file that the Injured Worker has not engaged in any type of retraining even though she has been out of the work force for approximately 4 years since her most recent injury in 2001.

A review of the file indicates that the Injured Worker did attempt to engage in a rehabilitation program in 1981 but her rehabilitation plan was closed as she missed several days without calling either the team or the doctor and it was determined that the Injured Worker did not want to participate in rehabilitation at that time.

The Hearing Officer finds that the Injured Worker's lack of engaging in rehabilitation reflects negatively on the [I]njured Worker's application for permanent and total disability compensation. The Hearing Officer finds that 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. *State ex rel. B.F. Goodrich Co. v. Industrial Comm.* (1995) 73 Ohio St.3d 525. The Hearing Officer finds that such a conclusion can not be drawn based on the Injured Worker's forgoing retraining opportunities that could enhance re-employment opportunities.

Id. at ¶32.

{¶38} In *Arthur*, the injured worker argued that the SHO failed to consider that she had three surgeries (2002, 2003, and 2004) when determining that she had failed to participate in vocational rehabilitation following her last day of work (March 2002) and the date she filed her application for PTD compensation (September 2005). The magistrate agreed that the SHO's analysis was deficient because this issue was not addressed.

{¶39} In sustaining the commission's objection, this court found that the magistrate had erroneously placed the burden on the commission to consider how rehabilitation and retraining would be affected by the injured worker's multiple surgeries. This court reiterated that the burden of proof remains on the claimant to show why she did not participate in vocational rehabilitation.

{¶40} In the present case, the commission, which is the exclusive evaluator of disability and the ultimate expert on vocational and nonmedical evidence, concluded that claimant's inability to use her dominant right hand rendered her unemployable and that vocational rehabilitation was neither feasible nor realistic. Contrary to relator's argument, the commission **can** make this decision. In *Arthur*, this court never said the commission could not have considered and discussed the impact of the injured worker's surgeries on her vocational rehabilitation. Instead, this court said it was improper to shift this burden to the commission by way of a writ of mandamus.

{¶41} Further, relator contends that the commission's explanation on this issue was insufficient. The commission provided a brief, simple explanation of why retraining was not feasible and the magistrate rejects relator's arguments asserting that the commission was required to provide some type of more detailed explanation in this

regard. The commission is required to provide a brief explanation and analysis. In the present case, the commission did and this magistrate cannot say that the commission abused its discretion.

{¶42} Although relator argues that, in relying on the report of Dr. Stanko, the commission found that claimant could perform sedentary work, relator ignores the severe restrictions imposed by Dr. Stanko. At oral argument, counsel for relator acknowledged that, in granting her a total loss of use award, the commission determined that her dominant right hand was useless. As such, she cannot type, write, use a computer, or perform other tasks in the same manner she had performed previously.

{¶43} Relator's counsel argued that claimant could learn to perform these tasks or other tasks with her left hand if she had participated in rehabilitation. In determining that vocational rehabilitation would not be feasible or realistic, the SHO obviously disagreed. As the expert in these matters, the magistrate finds that relator has not shown that the commission abused its discretion in this regard.

{¶44} Relator strongly disagrees with the outcome reached by the commission. However, because the commission's order is supported by some evidence and because the commission did provide an analysis of the nonmedical disability factors, the magistrate finds that relator has not demonstrated that the commission abused its discretion in granting claimant an award of PTD compensation. It matters not that a different evaluator may have reached a different result and this court will not reweigh the evidence.

{¶45} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in awarding claimant PTD compensation 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).