

IN THE SUPREME COURT OF OHIO

11-0902

Mark A. Bennett	:	On Appeal from the Lucas
	:	County Court of Appeals,
Appellant,	:	Sixth Appellate District
	:	
v.	:	
	:	Court of Appeals
Goodremont's Inc., et al.	:	Case No. L-10-1185
	:	
Appellees.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,
MARK A. BENNETT**

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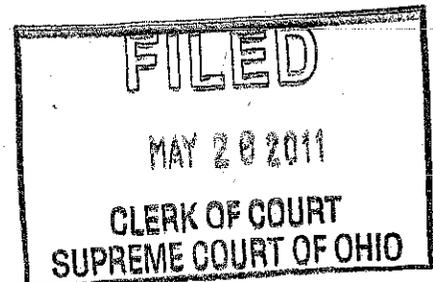


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EXPLANATION OF WHY THIS CASE IS A MATTER OF
PUBLIC OR GREAT GENERAL INTEREST

This case presents a proposition of law that is equally as important and integral to the consideration of the case of *Builders FirstSource Ohio Valley, L.L.C. v. Starkey*, Case Number 2010-0924, (“BFS”) currently before this Court. BFS, like this case, deals with the interpretation and application of *Ward v. Kroger* (2005), 106 Ohio St. 3d 35, 830 N.E. 2d 115, and its syllabus which provides;

The claimant in an R.C. 4123.512 appeal may seek to participate in the Workers’ Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal is taken.

In BFS the focus is on whether the injury found by the BWC in its order was the same as presented in the R.C. 4123.512 hearing, i.e. whether it was directly caused or was an aggravation of a preexisting condition.

However, there is an entire class of workers’ compensation claims that involve an initial order of the Industrial Commission of Ohio (“I.C.”) that simply deny any right of participation on the basis of an affirmative type defense, such as the “coming-and-going” rule, as here. In such claims the Bureau of Workers’ Compensation (“BWC”) does not proceed to make any finding or order as to any specific medical condition. In an R.C. 4123.512 appeal the only issue to be considered should be that specified in the administrative order appealed.

When this Court considers BFS it should also determine the rights of that class of claimants, like Mr. Bennett, who are initially denied. If R.C. 4123.512 is interpreted by this Court to limit the hearing to the issues “...addressed in the administrative order from

which the appeal is taken” that decision should recognize that the same rule applies to initial denials.

The logic of *Ward* is that the I.C. order frames the issue to be judicially reviewed. If an R.C. 4123.512 proceeding goes beyond what is addressed in the I.C.’s order, the court usurps the function of the administrative agency and denies the claimant his administrative hearing rights created by the Workers’ Compensation Act. (*Ward*, at 37, ¶10 and 38, ¶11.)

Further, in the initial denial situation there is no finding or order specifying the medical condition that was either allowed or disallowed. If, as BFC argues, allowing medical conditions not administratively identified in the BWC order to be presented for the first time at the R.C. 4123.512 hearing results in “ambush”, then requiring a claimant to prove his injury(s) for the first time in the R.C. 4123.512 hearing results in even more uncertainty and unnecessary expense.

To require the claimant and state to present expert medical witnesses in the case of an initial denial in the R.C. 4123.512 hearing, where there has been no I.C. ruling in any way as to any medical condition(s), is a waste of money for the claimant and the state. See R.C. 4123.512(D) as to assessment of such costs.

Moreover, it is a waste of judicial time to burden the common pleas court with performing the claim processing functions of the BWC.

This case therefore is one of great public and general interest in its own right as well as being a component of the ultimate decision in *BFS*.

STATEMENT OF THE CASE AND FACTS

The Appellant, Mark A. Bennett ("Bennett"), was employed by the Defendant, Goodremont's Inc., as a "... 'traveling salesperson' to sell photo-copy machines...".¹ "...On February 28, 2006 Mr. Bennett was traveling...to Goodremont's...to give a sales presentation."² "While Mr. Bennett was on an expressway off ramp yielding to traffic, another motorist struck the rear of Mr. Bennett's car...Mr. Bennett receive[d] injuries from that accident."³ Mr. Bennett made a workers' compensation claim as a result of the accident. The Bureau of Workers' Compensation denied the claim on the sole basis that "The employee was going to or coming from work".⁴

Mr. Bennett challenged the decision through the Industrial Commission's ("I.C.") administrative process and then appealed the denial pursuant to R.C. 4123.512 to the Common Pleas Court of Lucas County.

Thereafter, the Appellees, Goodremont's Inc. and the Bureau of Workers Compensation both filed for summary judgment on the sole issue addressed by the I.C. order and the only issue of the R.C. 4123.512 appeal, being the application of the "coming and going" exclusion. The trial court granted Appellees' summary judgment motions holding that Mr. Bennett was denied participation on the basis of the "coming and going rule".

¹ Findings of Fact, Conclusions of Law, and Judgment Entry, Lucas County Common Pleas Court, June 4, 2010, ¶1.

² Findings of Fact, Conclusions of Law, and Judgment Entry, Lucas County Common Pleas Court, June 4, 2010, ¶2.

³ Findings of Fact, Conclusions of Law, and Judgment Entry, Lucas County Common Pleas Court, June 4, 2010, ¶3.

⁴ Findings of Fact, Conclusions of Law, and Judgment Entry, Lucas County Common Pleas Court, June 4, 2010, ¶4.

That judgment was appealed to the Court of Appeals and by its decision at 2009-Ohio-2920 reversed the awards of summary judgment and remanded the case to the trial court on the question of the coming-and-going rule.

Upon remand the case was tried to the Court which found that the "...coming-and-going rule would not apply to preclude workers' compensation benefits for Mr. Bennett."⁵ The Court however granted a directed verdict for the Appellee, BWC, on the basis that Mr. Bennett did not prove a specific injury he sustained in the motor vehicle accident.⁶

That decision was appealed to the Court of Appeals. That Court, relying on *Ward v. Kroger*, 106 Ohio St. 3d 35, 2005-Ohio-3560, held the claimant must prove a "specific medical condition"⁷ although the I.C. had not made any determination in its order concerning the injury and had only denied the claim in its order on the basis of the coming-and-going rule. (Appendix 1)

A timely motion for reconsideration was filed by Mr. Bennett with the Court of Appeals which was denied on April 12, 2011. (Appendix 2)

⁵ Findings of Fact, Conclusions of Law, and Judgment Entry, Lucas County Common Pleas Court, June 4, 2010, ¶4.

⁶ Findings of Fact, Conclusions of Law, and Judgment Entry, Lucas County Common Pleas Court, June 4, 2010, ¶7.

⁷ Appendix 1, Decision and Judgment, Court of Appeals, March 18, 2011.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: THE ONLY ISSUE(S) TO BE CONSIDERED IN AN
R.C. 4123.512 APPEAL ARE THOSE WHICH WERE DETERMINED IN THE
ADMINISTRATIVE ORDER APPEALED.

At the administrative level a workers' compensation claim has two stages. The first is for the claimant to qualify. There are numerous bases, such as the coming-and-going rule, upon which a claimant can be denied participation. In that situation the administrative review process stops. An order is made by BWC specifying the denial of the claim. There is no determination of what injury or medical condition is involved in the claim.

If the case proceeds to the second stage then there is an administrative evaluation of the medical condition(s). This process is informal and designed to be economical as provided by 4123.511(A);

The bureau shall investigate the facts concerning an injury or occupational disease and ascertain such facts in whatever manner is most appropriate and may obtain statements of the employee, employer, attending physician, and witnesses in whatever manner is most appropriate.

Ward v. Kroger (2005) 106 Ohio St. 3d 35, 2005-Ohio-3560, 830 N.E.2d 1155 and *Builders FirstSource Ohio Valley, LLC v. Starkey*, Case No. 2010-0924, before this Court, deal with the second stage of a claim; but the same basic principals of the Proposition of Law No. 1, here, and the Proposition of Law No. 2 of *BFS* apply to both. In particular, it is necessary that the administrative orders at either stage be specific and frame the issue.

In *Ward v. Kroger*, 106 Ohio St 3d.35, 2005-Ohio-3560, this Court declared:

The claimant in an R.C. 4123.512 appeal may seek to participate in the Workers' Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal is taken.

This proposition of law is as applicable to the appeal of initial denials as it is to second stage appeals of the medical conditions to be allowed or denied.

As *Ward* and *BFS* emphasize, the Ohio Workers' Compensation system is predominately administrative in nature with the Bureau and the Commission acting as the primary decision makers. The courts become involved under R.C. 4123.512 only to the extent of what is addressed in the administrative order.

In an initial denial as to qualifying for participation, the medical condition is irrelevant. In fact, the medical condition has not been administratively considered nor is it a part of the order.

In this type situation the process to be applied is set forth in R.C. 4123.512(G):

If the finding of the court...is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission...

Thus, as here, where the order disqualifying Mr. Bennett on the sole basis of the coming-and-going rule is reversed the claim is returned to the administrative process at that stage for the BWC to proceed with its claim processing function.

Simply put, R.C. 4123.512 proceedings, in the context of this type of case, do not contemplate the Court to proceed beyond the stage of the Bureau's order, nor for it to complete the functions of the administrative agency to a determination of what medical condition will be allowed.

As stated in *Ward* at Ohio St. 3d 37, N.E. 2d 1158:

The requirement that workers' compensation claims be presented in the first instance for administrative determination is a necessary and inherent part of the overall adjudicative framework of the Workers' Compensation Act.

Further, it is apparent that when the administrative order does not address or specify the medical condition(s) that litigating this questions in the R.C. 4123.512 hearing is a waste of money for the State and the claimant and usurps the statutory duty of the BWC and I.C. to make such determinations within the framework of the Workers' Compensation Act.

Given the statutory requirement that the Workers' Compensation Act be liberally construed in favor of the employee (R.C. 4123.95) the appellate decision, herein, runs contra to that mandate and the anticipated decision in *BFS*.

CONCLUSION

For the foregoing reasons, the Appellant, Mark A. Bennett, requests that the Court accept jurisdiction of this discretionary appeal and reverse the decision of the court of Appeals for the Sixth Appellate District of Ohio, or in the alternative stay its determination pending this Court's decision in *Builders FirstSource Ohio Valley, L.L.C. v. Starkey*, Case Number 2010-0924, which may decide the issues of this appeal.

Respectfully submitted,

By:

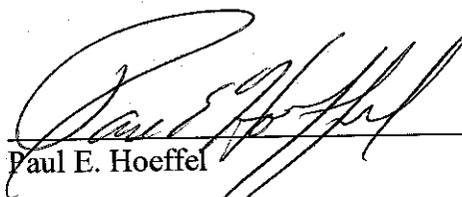


Paul E. Hoeffel, Counsel of Record

COUNSEL FOR APPELLANT,
MARK A. BENNETT

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellees, Joshua W. Lanzinger, Ohio Attorney General's Office, One Government Center, Suite 1340, Toledo, Ohio 43604-2261 and Roman Arce, Marshall & Melhorn, LLC, Four SeaGate, Eighth Floor, Toledo, Ohio 43604, on this 26th day of MAY, 2011.



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COUNSEL FOR APPELLANT,
MARK A. BENNETT

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mark A. Bennett

Court of Appeals No. L-10-1185

Appellant

Trial Court No. CI0200605864

v.

Goodremont's, Inc., et al.

DECISION AND JUDGMENT

Appellee

Decided:

MAR 18 2011

* * * * *

Paul E. Hoeffel, for appellant.

Mike DeWine, Attorney General of Ohio, and Joshua W.
Lanzinger, Assistant Attorney General, for appellee Administrator,
Bureau of Workers' Compensation.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which granted the Administrator of the Bureau of Workers' Compensation's ("BWC") motion for a directed verdict on appellant's civil action to participate in the

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Ohio workers' compensation fund for alleged injuries incurred during an automobile accident on February 28, 2006. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Mark A. Bennett, sets forth the following two assignments of error:

{¶ 3} "ASSIGNMENT OF ERROR NO. 1: The Court erred in directing a verdict for Appellees on the issue of "injury" which was not a finding made in the decision of the Industrial Commission that was appealed.

{¶ 4} "ASSIGNMENT OF ERROR NO. 2: The Court erred in directing a verdict where there was sufficient evidence that reasonable minds could well differ as to Appellant sustaining an injury, if such proof was necessary."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. In January 2006, appellant was hired by defendant, Goodremont's, as a territory manager. In this position, appellant spent approximately 80 percent of his work time contacting current and prospective clients at their places of business to demonstrate and sell photocopiers.

{¶ 6} On February 28, 2006, appellant was en route to Goodremont's central office for a presentation to a prospective client. While waiting at a yield on an exit ramp for the expressway, appellant's automobile was struck in the rear by another motorist.

{¶ 7} On March 29, 2006, appellant filed a claim with the BWC for alleged injuries to his back and neck sustained in the above accident. The BWC denied the claim

based on its determination that appellant was coming or going to work. As such, it did not arise out of appellant's employment. Appellant appealed this decision to a district hearing officer, and later to a staff hearing officer of the Industrial Commission. Both officers sustained the decision of the BWC. After the Industrial Commission denied appellant's further appeal, appellant began an action in the Lucas County Court of Common Pleas to "determine the claimant's right to participate in the fund upon the evidence adduced at the hearing."

{¶ 8} In May 2008, the trial court granted summary judgment to the BWC and Goodremont's, Inc., finding that appellant was barred from participation in the workers' compensation fund by the coming and going rule. On appeal of that decision, this court determined that the trial court's analysis of appellant's status as a semi-fixed situs employee was in error and remanded for further proceedings.

{¶ 9} On remand, a bench trial was conducted on April 16, 2010. At the close of appellant's case, appellee moved for a directed verdict based on appellant's failure to provide evidence of a compensable injury. The trial court heard arguments and considered post-trial briefs on the matter. The court then determined that appellant's alleged injuries were not of the sort that were common knowledge and required medical testimony to establish proximate cause.

{¶ 10} On June 24, 2010, based on this determination, and appellant's failure to offer any medical testimony establishing the proximate cause of appellant's injuries, the trial court granted appellee's motion for directed verdict. This appeal ensued.

{¶ 11} We begin our review by noting the well-established rule that, when an appeal is made to a trial court from a denial of claim of the Industrial Commission under R.C. 4123.512, the court has a mandatory duty to determine a claimant's right to participate in the workers' compensation fund. *Wagner v. Fulton Indus.* (1997) 116 Ohio App.3d 51, 54. See, also, *Marcum v. Barry* (1991), 76 Ohio App.3d 536, 539-40. It is not within the court's discretion to remand the case back to the Industrial Commission. *Wagner* at 54.

{¶ 12} A trial court conducting a hearing pursuant to R.C. 4123.512 does so de novo, regarding the specific medical condition that was presented to the Industrial Commission. *Ward v. Kroger*, 106 Ohio St.3d 35, 2005-Ohio-3560, ¶ 8-9. The decision is based upon the evidence before it, not the evidence that was before the Industrial Commission. *Marcum* at 539-40; R.C. 4123.512(D). A claimant's right to participate in the fund will be predicated on his showing to the court by a preponderance of evidence, not only that his "injury rose out of and in the course of employment, but also that a direct or proximate causal relationship existed between his injury and his harm or disability." *White Motor Corp. v. Moore* (1976), 48 Ohio St.2d 156, paragraph one of the syllabus.

{¶ 13} In his first assignment of error, appellant claims that, where the Industrial Commission did not make a finding on the issue of injury, the trial court could not base its decision on this. However, once the decision of the Industrial Commission was appealed to the court, the issue to be determined was whether appellant had a right to

participate in the fund. To decide this issue, the court, in its de novo review, had to make a determination, based on the evidence before it, of whether the accident was a proximate cause of the alleged injuries.

{¶ 14} Appellant suggests that the trial court should have only ruled on whether the injury happened in the course of employment, and left the Industrial Commission to determine whether or not there was proximate cause. But, as stated above, once a court takes jurisdiction of an appeal from the Industrial Commission the court cannot remand it back to the commission. The court must make the determination of whether or not the claimant can participate in the fund. In doing so, both the issue of whether the injury occurred during the course of employment and whether there is a causal relationship between the accident and the injury being claimed must be addressed. Where the claimant fails to show a causal relationship, as occurred here, there is no error in directing a verdict adverse to the claimant. Accordingly, we find appellant's first assignment of error not well-taken.

{¶ 15} In appellant's second assignment of error, he claims that sufficient evidence and inferences were adduced at trial to support his claim of injury resulting from the automobile accident. In this assignment, appellant reiterates the argument made from his first assignment of error that the issue of injury was not before the court. Given that we have already determined this argument to be without merit, no further discussion of it is warranted. Rather, our inquiry in appellant's second assignment of error will focus on

whether appellant entered sufficient evidence or inferences to the court showing a causal relationship between his accident and his alleged injuries to avoid a directed verdict.

{¶ 16} When a claimant attempts to prove proximate cause of his injury, two general types of cases arise. *White Motor Corp.* at 159. In the first type, where the injury and the subsequent disability are matters of common knowledge, no medical testimony is required to carry the claimant's burden. Courts have interpreted these types of injuries to include such things as a visible bruise, *id.* at 160, or a fractured ankle, *Canterbury v. Skulina*, 11th Dist. No. 2000-0-0060, 2001-Ohio-8768.

{¶ 17} However, where the injury is "internal and elusive in nature, unaccompanied by any observable evidence," *Gibbs v. General Motors Corp.* (Mar. 27, 1987), 11th Dist. No. 3625, then the injury moves outside the realm of common knowledge and requires medical testimony to establish a causal link. *Id.* This standard has been applied in cases involving neck and back injuries caused by lifting heavy weights, *Howard v. Seaway Food Town, Inc.* (Aug. 14, 1998), 6th Dist. No. L-97-1322, neck and back injuries caused by being pushed, *Wright v. City of Columbus*, 10th Dist. No. 05AP-432, 2006-Ohio-759, ¶ 19, and neck and back injuries caused in automobile accidents. *Rogers v. Armstrong*, 1st Dist. No. C-010287, 2002-Ohio-1131. See, also, *Krull v. Ryan*, 1st Dist. No. C-100019, 2010-Ohio-4422, ¶ 13 (discussing the applicability of *Rogers* to workers' compensation cases).

{¶ 18} In the present case, appellant's claimed injury is generic. The testimony by both appellant and his wife vaguely alleges only that appellant was injured without any

specific substance or detail. This by itself puts appellant's claim at odds with *Ward*, which requires a claimant to state a specific injury or medical condition upon which he seeks to participate in the fund. *Ward* at ¶ 10. Nonetheless, even were we to accept appellant's statements made in discovery that he injured his neck and back, his claim would still fail.

{¶ 19} As previously determined by this court, back and neck injuries require medical testimony to show a causal relationship. *Howard*, supra. These injuries are not normally visible, like a bruise or a break. A common person cannot ordinarily verify the cause or existence of such injuries in another person. Instead, they fit very neatly into the category of "internal or elusive injuries." Given the nature of such injuries, it is logical that a court must require expert medical testimony to prove causation for such injuries. See *Chilson v. Conrad*, 11th Dist. No. 2005-P-0044, 2006-Ohio-3423, ¶ 25.

{¶ 20} Appellant's argument that injury can be inferred by the fact that he was in an automobile accident is also unconvincing. There is no special category for automobile accidents that waives the need to provide expert medical testimony to show causation of injuries. Neck and back injuries suffered in automobile accidents cannot be determined by using the common knowledge standard. Expert medical testimony to show proximate cause is required. See *Rogers v. Armstrong*, 1st Dist. No. C-010287, 2002-Ohio-1131; *Mahaffey v. Stenzel* (Jan. 25, 1999), 4th Dist. No. 97CA2391, *Langford v. Dean* (Sept. 30, 1999), 8th Dist. No. 74854.

{¶ 21} Appellant failed to claim a specific injury for which he was seeking a right to participate in the fund, or provide any expert medical testimony showing a proximate causal relationship between any alleged injuries and his automobile accident. For the reasons stated herein, we find appellant's second assignment of error not well-taken.

{¶ 22} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

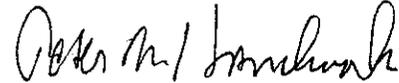
JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

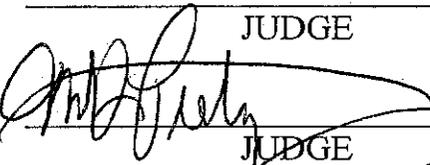
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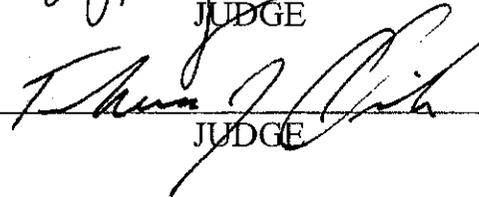
Thomas J. Osowik, P.J.
CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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COMMON PLEAS COURT
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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mark A. Bennett

Court of Appeals No. L-10-1185

Appellant

Trial Court No. CI0200605864

v.

Goodremont's, Inc., et al.

DECISION AND JUDGMENT

Appellees

Decided: **APR 12 2011**

This matter is pending before the court on appellant's application for reconsideration filed on March 30, 2011. Although not expressly captioned or stated by appellant, the motion is deemed to be made pursuant to App.R. 26(A)(1). On March 18, 2011, this court affirmed the trial court judgment of a directed verdict in favor of appellee, concluding that appellant had failed to assert a specific medical injury or establish a causal relationship between his generic injury claims in the underlying motor vehicle accident. As such, the judgment of the trial court was affirmed.

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As stated in *Matthew v. Matthews* (1981), 5 Ohio App.3d 140, paragraph two of the syllabus:

"The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been."

In support of the application, appellant first reiterates the assertion that the trial court somehow erred or breached the parameters of its authority in its proximate cause consideration. This issue has been thoroughly contested and considered during the course of this case. The procedural history of this case precluded the remand of the matter to the Industrial Commission for proximate cause purposes. We remain unconvinced that *Ward v. Kroger*, 106 Ohio St.3d 35, 2005-Ohio-3560, establishes the propriety of appellant's contention. *Ward* pertained to alleging new medical conditions. Such was not the scenario involved in the instant case. In addition, *Ward* reflects that a claimant must state a specific medical injury or condition as the basis of seeking compensation from the fund. The record clearly reflects that appellant failed to do so. Appellant made wholly generic claims necessitating medical testimony in support of causation.

Appellant also contends in support of his motion that it was somehow improper or irrelevant for this court to consider caselaw outside of that which was directly cited by the parties. Appellant summarily concludes that such independent analysis by the court

constitutes nothing more than "semantics" and thus does not constitute a "substantive issue." We respectfully disagree with both the characterization and the unilateral conclusion accompanying same.

Lastly, appellant unpersuasively suggests that his own testimony alleging generic injury and the equally generic testimony of a lay witness should suffice for medical proximate cause purposes. Suffice it to say, we are not persuaded of the merits of any such contention.

We have reviewed and considered appellant's application for reconsideration and memorandum in support. We find that there was not an incomplete or incorrect review as summarily suggested by appellants. We find that appellant has set forth no substantive grounds for relief. On consideration whereof, we find appellant's application to be without merit. It is denied.

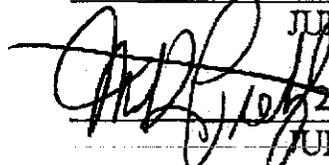
Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, P.J.
CONCUR.



JUDGE



JUDGE



JUDGE