

ORIGINAL

12-0359

IN THE SUPREME COURT OF OHIO

<b>MICHAEL D. LANE,</b>	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
Appellant,	:	
Vs.	:	Court of Appeals Case No. 24618
<b>THE NEWARK GROUP, INC., et al.</b>	:	
Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT MICHAEL D. LANE

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**FILED**  
 MAR 02 2012  
 CLERK OF COURT  
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EXPLANATION OF WHY THIS CASE IS A MATTER OF  
PUBLIC OR GREAT GENERAL INTEREST

When is a certification of a condition in a workers' compensation claim "conclusive," if the Industrial Commission of Ohio may exercise jurisdiction over its "former orders" and modify the certification over the objection of the claimant? This is the issue presented by this case, and it is one of great public and general interest because a decision will directly impact a significant number of current and future workers' compensation claims with self-insured employers. Until the Second District Court of Appeals' decision, the law had been settled; a modification of an allowance of a condition by the Industrial Commission was not permitted where the claim had been certified by the self-insured employer. The recent decision of the Second District flies in the face of prior precedent from this Court, and opens the door to expanding the scope of R.C. 4123.52's continuing jurisdiction beyond the bounds established by the General Assembly.

This Court has been clear in its previous rulings involving the certainty of certifications of self-insured employers. In *Lewis v. Trimble*, 79 Ohio St.3d 231, 1997-Ohio-393, 680 N.E.2d 1207, this Court referred back to its previous decision in *State ex. Rel. Baker Materials Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202, 206, 631 N.E.2d 138 (1994), and stated:

"In *Baker*, we adopted the following reasoning to the court of appeals in *State ex. Rel. Saunders v. Metal Container Corp.* (Nov. 29, 1988), Franklin App.No. 87AP-509, unreported, 1988 WL 129162:

'When \*\*\* the employer is self-insured, the initial determination of the allowed conditions necessarily is made by the employer in such a situation. The district hearing officer cannot modify the finding over the objection of the claimant, upon the assumption that the self-insured employer erroneously certified the condition. The district hearing officer had no jurisdiction under R.C. 4123.52, or otherwise, to modify the original finding of the employer as to the allowed condition over the objection of the claimant. The employer who made the determination and certified the claim cannot now complain, as it attempted to do before the district hearing officer \*\*\* that it, the employer, had made an erroneous determination and certification as to the allowed condition.'

Thus, the limitations defense is waived at the moment the employer accepts the claimant's residual psychiatric condition as part of the claim." *Id.* at 247. (Emphasis added).

In this case, a self-insured employer voluntarily certified a workers' compensation claim without exercising due diligence. Instead of penalizing the self-insured employer for not exercising due diligence, the Second District found that the Industrial Commission acted appropriately by revoking the certification, notwithstanding the fact that this Court's previous decisions forbid such action.

The effects of this decision could be far-reaching. Self-insured employers are now free to search for ways to establish "new and changed circumstances" that would allow them to revoke certifications and avoid their responsibilities towards injured workers. This cannot be tolerated, particularly where injured workers have been placed at a disadvantage by relying upon the conclusiveness of a self-insured employer's certification. Must an injured worker now insist upon a full hearing at the Industrial Commission in order to obtain favorable evidence on the record, to avoid taking the chance that such evidence will not be available at some later time when his or her self-insured employer may choose to invoke the Industrial Commission's continuing jurisdiction, forcing the injured worker to prove his claim at some future time?

It is clear that, in this Court's previous decisions, this Court intended to maintain the balance between the interests of allowing self-insured employers to enjoy the freedom to initially self-adjudicate workers' compensation claims, while at the same time, provide the claimant with assurance that there was finality to the decision of the self-insured employer. This decision upsets that balance. Left unchecked, a gradual erosion of injured workers' rights will develop, in contravention of R.C. 4123.95, which provides that the Workers' Compensation Act must be liberally construed in favor of the injured worker. This Court's review of this issue is necessary.

#### STATEMENT OF THE CASE AND THE FACTS

This case arose from a Notice of Appeal filed pursuant to R.C. 4123.512, which allows aggrieved parties to request *de novo* review of orders of the Industrial Commission affecting an injured worker's right to participate in the Workers' Compensation Fund.

Appellant Michael Lane was injured on April 28, 2008. He filed a workers' compensation claim which the self-insured employer, Appellee, The Newark Group, Inc. (hereinafter, "Newark"), certified for

the condition of "left shoulder strain," and Appellant obtained the right to participate in the workers' compensation fund for that condition.

Nearly 18 months later, Appellee filed a motion with the Industrial Commission seeking to terminate Plaintiff's right to participate for that condition. After hearings before its District Hearing Officer and Staff Hearing Officer, the Industrial Commission ultimately disallowed Plaintiff's right to participate for the condition of "left shoulder strain", giving rise to the instant appeal. Plaintiff then appealed the decision of the Industrial Commission pursuant to R.C. 4123.512. The Commission purported to exercise its jurisdiction pursuant to "new and changed circumstances" under R.C. 4123.52. The "new and changed circumstances" were that Appellee Newark discovered Appellant Lane had been involved in a motor vehicle accident as a result of drunk driving the Saturday night before the workplace accident.

Appellant filed a Motion for Summary Judgment, on the basis that the certification was "conclusive" under this Court's previous rulings. The Motion for Summary Judgment also was based upon the fact that the intervening Order of the Industrial Commission had no effect, because previous decisions of this Court have held that the Industrial Commission lacks jurisdiction to overturn a certification over the objection of the injured worker. The trial court denied the Motion for Summary Judgment, and the matter proceeded to a bench trial.

At trial, Appellant introduced three exhibits: (1) Requests for Admissions which demonstrated that Newark was a self-insured employer in the State of Ohio for workers' compensation purposes and certified Appellant's workers' compensation claim for the condition of "left shoulder strain" as a result of a workplace injury occurring on April 28, 2008; (2) the document returned to the Bureau of Workers' Compensation on May 12, 2008, signed with the authority of Newark's Operation's Manager, Max Price, which certified Plaintiff's workers' compensation claim; and (3) a second certification document signed on May 20, 2008. The evidence firmly established that Newark, a self-insured employer, certified Appellant's workers' compensation claim. Appellant relied upon the certification to establish his right to participate, and did not present expert medical testimony.

The evidence also firmly established that Appellee Newark certified the workers' compensation claim just six days after it was presented to the self-insured employer – notwithstanding the fact that the self-insured employer had thirty days by law to review it. In fact, the evidence at trial established that Newark exercised no due diligence whatsoever before certifying the claim.

Newark also affirmatively declined to present any claim for fraud at trial, as well.

The Common Pleas Court ruled in favor of Appellee, finding that Appellee was entitled to judgment as a matter of law because Appellant did not present any medical testimony establishing the right to participate. The Common Pleas Court did not consider the effect of the self-insured employer's certification.

On appeal, the Second District Court of Appeals upheld the judgment of the Common Pleas Court, finding that Appellant's argument regarding the lack of jurisdiction was required to be made through mandamus, not in the midst of a right to participate appeal<sup>1</sup>. The Second District Court of Appeals also found the lack of expert medical testimony to be a bar to establishing the right to participate.

#### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: A self-insured employer's certification of a condition in a workers' compensation claim operates as a waiver to re-visit the allowance of the claim, and the Industrial Commission may only exercise jurisdiction in the case of fraud**

Under *Lewis v. Trimble*, 79 Ohio St.3d 231, 1997-Ohio-393, 680 N.E.2d 207, following *Baker and Saunders, infra*, there is no need to engage in any further analysis, once the claimant demonstrates that the self-insured employer certified a workers' compensation claim. *Lewis* was decided by the Supreme Court following litigation premised upon R.C. 4123.512, the right to participate statute. *Lewis* determined that legal defenses, including the statute of limitations affirmative defense, were waivable by a self-insured employer.

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<sup>1</sup> Appellant Lane is also filing a Complaint for a Writ of Mandamus with this Court.

The Second District Court of Appeals erred when it failed to determine that the certification operated as a waiver of the self-insured employer's right to contest the allowance of the claim for left shoulder strain.

Ohio law affords a self-insured employer ample opportunity to dispute the validity of workers' compensation claims and conditions. A self-insured employer is the initial processor of workers' compensation claims and has the ability to take up to 30 days to accept or reject the claim. OAC 4123-19-03(K)(10) ("The employer shall inform a claimant, and the Bureau of Workers' Compensation, in writing, within 30 days from the filing of the claim, as to what conditions it has recognized as related to the injury or occupational disease and what, if any, is has denied.") During this 30 day period, the self-insured employer may investigate the claim before it is set for hearings before the Industrial Commission, and then continue to investigate the claim during the pendency of the claim before the Commission, and ultimately the various common pleas courts, assuming it has initially disputed the allowance of the claim or condition. See R.C. 4123.511 and 4123.522.

In *Lewis*, this Court referred back to *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202, 631 N.E.2d 138 (1994), wherein this Court held that: "A self-insured employer who, subsequent to the initial allowance of a workers' compensation claim, certifies a medical condition as allowed on a 'Self Insured Semi-Annual Report of Claim Payments' (form C-174) has conclusively granted that additional condition as part of the claim."<sup>2</sup>

This Court then analyzed why the effect was conclusive, determining that it was because any self-insured employer waives its procedural defenses to the allowance of the claim or condition when it certifies a claim. "[V]alid waiver may also take a procedural form. This occurs when a party fails to raise the defense promptly."<sup>3</sup> The *Lewis* Court went on to cite numerous cases in which it had previously applied the doctrine of procedural waiver: (1) *Miles v. Elec. Auto-Lite Co.*, 133 Ohio St. 613, 617 15 N.E.2d 532, 535 (1938) (waiver of issues of situs of injury, the requisite minimum number of employees,

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<sup>2</sup> *Lewis*, supra pg. 242, citing *Baker*, syllabus para. 1.

<sup>3</sup> *Id.* at 245.

and the status of the employer as self-insuring); (2) *State ex. rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319, 320, 530 N.E.2d 916, 917 (1988) (waiver of due process challenge waived when not previously raised); (3) *State, ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 679 N.E.2d 706 (1997), (waiver of defense of voluntary retirement).<sup>4</sup> The *Lewis* Court then noted that the statute of limitations defense was not unlike any other defense, and that it was capable of being procedurally waived by a self-insured employer, relying upon the fact that there were no explicit provisions in R.C. 4123.84 precluding application of the waiver doctrine.<sup>5</sup>

The case *sub judice* presents a textbook example of the procedural waiver doctrine. Here, the self-insured employer was presented with notice of a claim. Instead of conducting a proper investigation into the validity of the claim, it simply certified the claim just a few days into the thirty day period allowed by law, and without properly denying the claim and seeking a decision of the Industrial Commission after providing notice of the denial to the Bureau of Workers' Compensation and plaintiff. See OAC 4123-19-03(K)(10). Without question, if the doctrine of procedural waiver applies to other issues, including the statute of limitations and voluntary retirement defenses,<sup>6</sup> and more fundamental constitutional issues including due process<sup>7</sup>, it most certainly applies to bar an employer from disputing a workers' compensation claim when it certifies it. See *Miles*, *supra* (finding procedural waiver for issues such as situs of the claim, the minimum number of employees, and the employer's status as a self-insured employer).

The certification of a self-insured employer is not an "order" within the meaning of R.C. 4123.52. It is an act of waiver, precluding the self-insured employer from attempting to re-litigate an issue it chose not to litigate in the first place. Accordingly, under principles of law analogous to the "procedural waiver" doctrine, it is appropriate to determine that where the self-insured employer has chosen to forego its

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<sup>4</sup> *Id.* at 245-246.

<sup>5</sup> *Id.* at 246.

<sup>6</sup> The "voluntary retirement" defense has no applicability to right to participate issues arising under R.C. 4123.513, but nonetheless it is an important doctrine in workers' compensation law, as it bars the payment of disability compensation in some circumstances. See *State ex. rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App. 145, 504 N.E.2d 451.

<sup>7</sup> See *Parker*, *supra*.

opportunity to allow the Industrial Commission of Ohio to impartially decide whether the facts of the workers' compensation claim warrant the allowance of the claim for a condition, it should be barred from attempting to obtain relief from its previous decision, in the absence of fraud.

**Proposition of Law No. 2: A workers' compensation claimant need not present any evidence beyond the self-insured employers' certification of a medical condition in a workers' compensation claim in order to establish the right to participate in the workers' compensation fund in an appeal to the Common Pleas Court pursuant to R.C. 4123.512**

Previous case law from this Court has allowed a claimant to establish their entitlement to participate in the workers' compensation fund for a condition by presenting evidence of the certification without requiring the claimant to present expert medical testimony. Accordingly, the Second District Court of Appeals erred by not giving effect to the certification. A review of this Court's case law, in nearly identical circumstances, is helpful.

In *Lewis*, the claimant suffered an injury that was recognized for the condition of "recurrent right ventral hernia", arising out of employment on May 31, 1987.<sup>8</sup> Nearly five (5) years later, the claimant filed two (2) motions with the Industrial Commission seeking the right to participate in the workers' compensation fund for a psychological condition, "dysthymia", in the first motion and "major depression and panic disorder with agoraphobia" in the second motion.<sup>9</sup> The self-insured employer certified the claim for major depression by filing its own "motion" with the Industrial Commission.<sup>10</sup>

The matter progressed to hearing, and the District Hearing Officer allowed the claim for the additional condition of "major depression" and "panic disorder with agoraphobia".<sup>11</sup> Notwithstanding its certification of the claim for major depression, the self-insured employer filed an appeal, as it discovered after the certification that facts existed which would lead one to believe that the claimant was aware of the condition's existence for more than two (2) years before the filing of the motion, and therefore, the

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<sup>8</sup> *Lewis, supra*, at 231.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

additional allowance was time-barred by the limitations contained within R.C. 4123.84.<sup>12</sup> Ultimately, the Industrial Commission upheld the allowance.<sup>13</sup>

The employer filed an appeal into common pleas court.<sup>14</sup> The employer admitted that it certified the claim, but alleged that the certification had no effect because of the affect of the statute of limitations under R.C. 4123.84, which was raised as an affirmative defense at the trial court level.<sup>15</sup>

Cross motions for summary judgment were filed, and the Greene County Court of Common Pleas granted summary judgment in favor of the self-insured employer.<sup>16</sup> The Second District affirmed, finding that (1) the Industrial Commission lacked jurisdiction to consider a motion for additional conditions beyond the two (2) year limitations found in R.C. 4123.84; and (2) that the claimant "knew or should have known" that he suffered from the condition for more than two (2) years before the filing of the motion for the additional conditions.<sup>17</sup> The Second District upheld the trial court's decision, finding that the certification of the claim did not preclude a self-insured employer from raising defenses at the trial court level on an appeal filed pursuant to R.C. 4123.512.<sup>18</sup>

This Court, however, reversed the Second District's holding, and held that once a self-insured employer certifies the claim for a condition, that certification is conclusive.<sup>19</sup> As is evident from a review of *Lewis*, the discussion surrounding the certification of the condition was central to the outcome of the case, not dicta.<sup>20</sup>

Before discussing the certification issue, this Court determined another important issue under Ohio Workers' Compensation Law: what is the beginning point for the running of the statute of

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<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

limitations period for a residual or flow-through condition?<sup>21</sup> The employer argued that the two year period began when the claimant knew of the symptoms related to the condition; the claimant argued that the two year period began when the claimant possessed the diagnosis that was causally related to the injury and was given notice of that diagnosis and causal relationship.<sup>22</sup> This Court determined that the statute of limitations began when "the claimant knew or should have known of the nature and seriousness of the residual or "flow through" condition and its causal relationship to his or her employment."<sup>23</sup> More important to the case *sub judice* was this Court's application of this standard to the facts of *Lewis*.

After undertaking their analysis of the factual issue surrounding the limitations period, this Court determined that "there remains a genuine issue of fact as to whether claimant knew or should have known of the seriousness of his condition before February 25, 1990."<sup>24</sup> Accordingly, we reverse the judgment of the court of appeals insofar as it bears on this issue [the grant of summary judgment in favor of the employer]."<sup>25</sup>

The initial analysis in *Lewis*, as set forth above, does not consider the certification issue - only the proper legal standard to determine whether claimant has timely filed a motion for a residual or flow through condition.<sup>26</sup> Without having decided the certification issue, this Court would have been obligated to send the case back to the trial court, as a genuine material factual issue existed as to when the claimant knew of the residual condition, and judgment could not have been entered in favor of the claimant by the Supreme Court.<sup>27</sup> But the Supreme Court entered judgment in favor of the claimant, notwithstanding the existence of a genuine issue of material fact as to when the claimant possessed the relevant knowledge<sup>28</sup> because resolution of the certification issue was the significant issue in the case.

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<sup>21</sup> A review of *Lewis* shows that the first issue was decided to dispose of the issue raised by the filing of the employer's motion for summary judgment, while the second issue, and the one germane to this case, was discussed to grant judgment in favor of the plaintiff.

<sup>22</sup> *Id.* at 238.

<sup>23</sup> *Id.* at 241.

<sup>24</sup> February 25, 1990 was two years to the day before the claimant filed his motion.

<sup>25</sup> *Id.* at 242.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> "[A]ccordingly, we reverse the judgment of the court of appeals, and the order of the Commission is reinstated to the extent that it recognizes the residual condition 'major depression and panic disorder.'" *Id.* at 248.

This Court, in *Lewis*, granted summary judgment in favor of the injured worker solely upon the evidence of the certification. Had the initial analysis been the only controlling factor, this Court would have remanded the case back to the Court of Common Pleas for further proceedings in order to determine whether there was medical evidence to support the injured worker's contention that he suffered from the additional condition. By granting the injured worker's motion for summary judgment, this Court recognized that judgment was appropriate because of the existence of the certification, alone. The Second District Court of Appeals in this case erred, just as it did originally in *Lewis*, by not giving proper, conclusive weight to the certification and by refusing to enter judgment in Appellant's favor.

Other appellate courts in Ohio have recognized and followed the same reasoning as *Lewis*. The outcome in this case should follow *Klaue v. R.W. Sidley*, Ashtabula App.No. 96-A-0070. In *Klaue*, the plaintiff filed a workers' compensation claim and sought the right to participate for the condition of "725.1 Intervertebrate Disc Syndrome". *Id.* at \*1. The condition was implicitly certified by the self-insured employer through its payment of medical bills. *Id.* at \*4. After several years of denials of medical coverage for plaintiff's back, he filed a motion to obtain clear recognition of that condition. *Id.* at \*3. The condition was denied by the Industrial Commission, the plaintiff filed an appeal pursuant to R.C. 4123.512, and summary judgment was granted by the trial court, finding that plaintiff had the right to participate for that condition. *Id.* at \*2.

The Eleventh District affirmed the trial court's decision, finding that the certification was the only relevant determinative fact, citing *Baker Material Handling Corp.* *Id.* at \*4. "The employer who made the determination and certified the claim cannot now complain\*\*\*that it, the employer, had made an erroneous determination and certification as to the allowed condition." *State ex. rel. Baker Material Handling Corp. v. Indus. Comm.* (1994), 69 Ohio St.3d 202, 206, 631 N.E.2d 138.

The decision of the Second District Court of Appeals gives no effect to the certification of a self-insured employer in an appeal filed pursuant to R.C. 4123.512. This is in direct conflict with this Court's previous decisions in *Lewis*, *Baker Materials Handling*, and *Saunders*, and the Eleventh District's decision in *Klaue*. This Court should review accept this appeal for this Assignment of Error to ensure that

the Industrial Commission, the various Courts of Common Pleas, and the various Appellate District Courts have guidance with regards to the scope of jurisdiction granted to the Industrial Commission by the General Assembly.

#### CONCLUSION

This case is a matter of great public or general interest because it involves the issue of the jurisdiction of the Industrial Commission of Ohio over prior certifications of self-insured employers in workers' compensation funds. The Workers' Compensation Act is designed to be liberally construed in favor of the injured worker, by statute. The Second District failed to recognize the limited scope of jurisdiction granted by the General Assembly to the Industrial Commission.

Prior case law supports Appellant's contention. The Second District's decision opens the doors to confusion for all players in the workers' compensation system, as it removes finality from a process in which this Court has previously stated that finality should be present. This Court's review is necessary to ensure that finality exists within the system.

Respectfully submitted:

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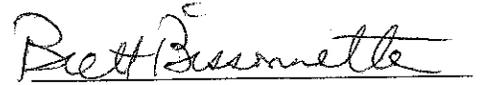
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon Derrick L. Knapp, Assistant Attorney General, 150 E. Gay Street, 22<sup>nd</sup> Floor, Columbus, Ohio 43215; and Corey V. Crognale, Esq., Ice Miller, 250 West Street, Suite 500, Columbus, Ohio 43215-7509, via regular U.S. mail, this 2<sup>nd</sup> day of March, 2012.



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**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

MICHAEL D. LANE	:	
	:	Appellate Case No. 24618
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2010-CV-01678
v.	:	
	:	
BUREAU OF WORKERS'	:	(Civil Appeal from
COMPENSATION, et al.	:	Common Pleas Court)
	:	
Defendants-Appellees	:	

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OPINION

Rendered on the 20<sup>th</sup> day of January, 2012.

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FAIN, J.

{¶ 1} Plaintiff-appellant Michael Lane appeals from a judgment, following a bench

trial, in favor of defendant-appellee The Newark Group, Inc. The trial court also overruled Lane's motion for attorney fees. Lane contends that the trial court erred when it failed to grant summary judgment in his favor. Lane also contends that the trial court erred when it failed to grant a final judgment in his favor.

{¶ 2} We conclude that the trial court did not err in failing to grant summary judgment in favor of Lane, nor did the court err in failing to grant final judgment in Lane's favor. The issue of whether the Industrial Commission had continuing jurisdiction to modify or change prior findings was not properly before the trial court, because Lane did not file a mandamus action, which is the proper vehicle in which to address that issue. The only issue before the trial court was whether Lane is entitled to participate in the workers' compensation system, and Lane failed to present any evidence to support his claim. On appeal to the common pleas court, Lane relied only on Newark Group's prior certification of his claim, and failed to present any medical evidence or other credible evidence to support his contention that he was injured at work and that his soft-tissue strain was caused by the injury. Newark's prior certification as a self-insured employer was no longer in effect after the commission assumed jurisdiction and concluded that Lane's alleged injury was not in the course of, and arising from, his employment. The trial court correctly concluded that Lane failed to meet his burden of proving that his injury was in the course of, and arising from, his employment.

{¶ 3} Accordingly, both assignments of error are overruled, and the judgment of the trial court is Affirmed.

{¶ 4} In January 2008, Michael Lane, employed by The Newark Group, Inc. as a commercial truck driver, was stopped by the police while driving, and refused to take a breathalyzer test. He was cited for OVI, and his commercial driver's license (CDL) was administratively suspended. When Lane informed his supervisor, Max Price, of the suspension, Price assigned Lane temporarily to work on the dock, rather than suspending or firing him.

{¶ 5} In February 2008, Lane's administrative license suspension was terminated, and Lane again began driving a truck for Newark. Lane then incurred another OVI charge on Saturday, April 26, 2008, after having had a few drinks at the Eagles' Lodge in Germantown, Ohio. After Lane left the lodge, his Maroon Suzuki went off the road. Lane again refused to take a breathalyzer test when the police arrived. He was charged once more with OVI, and his license was administratively suspended.

{¶ 6} During the April incident, Lane was handcuffed with his hands behind his back. The arrest report indicates that Lane complained of an injury to his left shoulder, and stated that his shoulder had "popped." Ultimately, Lane's CDL was suspended for two years, but he never disclosed that fact to Newark nor did he disclose the other events that occurred in connection with the Saturday night incident.

{¶ 7} Lane reported to work at Newark on the Monday after being cited for OVI. He did not report the incident to Price. Instead, Lane loaded his truck and went out to do his route. At about 10:30 or 11:00 a.m., Lane reported to Price that he had injured his shoulder while pushing a vegetable bin. Lane requested medical attention, and also stated that no one had seen the injury occur. Lane was instructed to report to the workplace center, Concentra,

in Dayton, Ohio, where he was diagnosed with a shoulder strain.

{¶ 8} Newark is a self-insured employer. Price notified the third-party administrator who handles Newark's workers' compensation claims, and sent the administrator the initial injury report and doctor's report for Lane. Price also discussed the claim with the administrator. Newark certified the claim as Claim No. 825338 for left shoulder strain on May 12, 2008, based on the available information, including the lack of witnesses and lack of knowledge about the incident that had occurred during the prior weekend. After the claim was certified, Lane received medical benefits and compensation under the claim, paid by Newark as a self-insuring employer.

{¶ 9} Price had arranged for Lane to do light-duty work, but there was a period of time when Lane disappeared. Around mid-May 2008, Lane told Price that he had personally injured himself and needed mid-back surgery. Lane was still on the company payroll as an employee.

{¶ 10} Price also indicated that he checks the motor vehicle records for employees annually. When Price performed a routine check, he learned that Lane had received another suspension for Driving Under the Influence. Price checked the dates and discovered that this had occurred the weekend before Lane's work incident. After notifying the third-party administrator and hiring an investigator, Newark became aware that Lane had been arrested for OVI and for resisting arrest the weekend before the alleged workplace injury. The reports for that arrest referred to a left-shoulder injury.

{¶ 11} Upon obtaining official statements from police officers, Newark filed a C-86 motion in October 2009, alleging that the Industrial Commission had jurisdiction under R.C.

4123.52 to “correct a potential fraud and/or mistake of fact” regarding the certification of the claim. Newark referred to the German Township Police records already on file and to addendum reports of Dr. Finneran, dated July 30, 2009, and of Dr. Hoffman, dated August 24, 2009.

{¶ 12} A hearing officer for the Industrial Commission heard Newark’s motion on November 5, 2009. The officer concluded that he had jurisdiction under R.C. 4123.52, and noted that the motion was based on information discovered after the initial certification. The officer further concluded that the employer did not fail to use due diligence in investigating the claim, because a review of arrest records for one or more police departments is not a natural or expected prerequisite for certifying a claim. The officer concluded that discovery of arrest records constitutes “new and changed circumstances” allowing for the exercise of continued jurisdiction.

{¶ 13} The officer additionally held that there was insufficient evidence to vacate the entire allowance. Relying on medical records of Doctors Hoffman and Finneran, who discussed only a pre-existing degenerative condition, the officer concluded that while the arrest records clearly demonstrated a prior shoulder injury, there was no medical evidence that Lane did not sustain a new and distinct injury at work.

{¶ 14} Newark appealed from the decision. Subsequently, in December 2009, a staff hearing officer issued a decision agreeing that discovery of the arrest records constituted new and changed circumstances for jurisdictional purposes. The staff hearing officer held, however, that Lane did not have an injury in the course of, and arising out of, his employment. The staff hearing officer relied on the arrest records and affidavit of Gregory Bosley, which

clearly demonstrated that Lane injured his left shoulder prior to the date of the alleged work injury. The staff hearing officer also relied on further review of medical records by Doctors Hoffman and Finneran, who concluded that Lane did not have an injury in the course of and arising out of his employment.

{¶ 15} Lane appealed from the decision of the staff hearing officer, but the Industrial Commission refused his appeal. Lane then filed a notice of appeal and complaint with the Montgomery County Common Pleas Court. In the complaint, Lane described the issue as whether he “is entitled to participate \* \* \* for an injury, which injury was on a direct basis, a cumulative trauma basis, an accelerated basis, a flow-through basis, or an aggravation of a pre-existing condition basis, in the course of his employment with defendant.” Complaint, ¶11. Along with the complaint, Lane filed a partial list of six medical experts upon whom he intended to rely.

{¶ 16} In October 2010, Lane filed a motion for summary judgment, contending that the legal issue before the court was whether the Commission had jurisdiction to vacate the allowance of a claim where the claim had been conclusively certified by a self-insured employer. In January 2011, the trial court overruled the motion for summary judgment, concluding that it lacked jurisdiction to consider whether the Commission had continuing jurisdiction, and noting that mandamus would have been the appropriate remedy if the Commission had, indeed, lacked continuing jurisdiction to vacate the claim.

{¶ 17} In February 2011, the trial court held a hearing on the case. A transcript of the hearing has not been provided, but a CD-ROM audiovisual recording of the hearing has been included and has been reviewed. At the hearing, the parties waived a jury trial and made

opening statements. Lane declined to make an opening statement and did not call witnesses. Lane introduced some exhibits, including answers to a request for admissions, in which Newark admitted that Lane was an employee, that Newark was a self-insuring employer, and that Newark had certified the claim for a left-shoulder strain. Lane also introduced various documents pertaining to the certification of the claim with the Industrial Commission.

{¶ 18} The defense objected to admission of these items, contending that the certification had been vacated, and that the trial court was required to decide the appeal de novo and could not consider jurisdictional matters absent a mandamus petition. The court admitted the evidence for purposes of Lane's offer of proof. After the evidence was admitted, Lane moved for a "directed verdict," again contending that Newark's certification of the claim was conclusive. Newark moved for judgment as well, arguing that Lane failed to offer proof, and the court took both motions under consideration.

{¶ 19} Newark then presented testimony from Lane and Price, as related above. After the parties filed post-hearing memoranda, the trial court issued a decision rendering judgment in Newark's favor. The court concluded that Newark did not waive procedural defects by certifying the claim. In addition, the court held that Lane failed to meet his burden of proving that he was injured in the course of employment, because his injury was not one within the common knowledge of the average layman, nor did Lane present any evidence of injury. The court noted that Lane failed to present any credible evidence that his injury was in the course of, and arising from, his employment.

{¶ 20} Lane appeals from the judgment of the trial court.

II

{¶ 21} Lane presents two assignments of error and has combined his discussion of the assignments of error. Accordingly, we will consider the assignments of error together. Lane's First Assignment of Error is as follows:

{¶ 22} "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FAILED TO GRANT SUMMARY JUDGMENT AS A MATTER OF LAW IN FAVOR OF APPELLANT-PLAINTIFF, MICHAEL D. LANE."

{¶ 23} Lane's Second Assignment of Error is that:

{¶ 24} "THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT JUDGMENT AS A MATTER OF LAW IN FAVOR OF APPELLANT-PLAINTIFF-MICHAEL D. LANE."

{¶ 25} Under these assignments of error, Lane contends that a self-insured employer's certification of the right to participate in the workers' compensation fund is conclusive evidence of the right to participate. According to Lane, once Newark certified his claim, it waived its right to raise defenses against the claim and the Industrial Commission lacked jurisdiction to modify the certified claim. In response, Newark argues that a writ of mandamus is the proper vehicle for deciding the Industrial Commission's jurisdiction, and that the trial court was limited to a de novo review of Lane's eligibility to participate in the system.

{¶ 26} In *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202, 1994-Ohio-437, the Supreme Court of Ohio considered whether self-employed insurers have the ability to correct clerical errors that are made in certifying claims or in the additional

allowance of claims. The court noted that qualifying employers are permitted to pay claims directly to injured employees and, thus, become self-insurers who pay no premiums to the State Insurance Fund. *Id.* at 205. Accordingly, self-insurers “ ‘are the initial processing agents of claims brought by their employees. The commission or bureau becomes involved only if the self-insurer denies a claim and the employee appeals.’ ” *Id.* (Citation omitted.)

{¶ 27} In *Baker*, the Supreme Court of Ohio noted that once an employer certifies a claim or an additional allowance on the claim, the finding is conclusive and cannot be modified “ ‘over the objection of the claimant, upon the assumption that the self-insured employer erroneously certified the condition.’ ” *Id.* at 206. (Citation omitted.) Subsequently, in *Lewis v. Trimble*, 79 Ohio St.3d 231, 1997-Ohio-393, the Supreme Court of Ohio stressed that this concept applies equally “whether the condition certified is characterized as an initial injury or as an additional or residual condition.” *Id.* at 242.

{¶ 28} The Supreme Court observed in *Baker*, however, that under R.C. 4123.52, the Industrial Commission has the power to modify or change prior findings “upon a showing of (1) new and changed conditions subsequent to the initial order, (2) fraud, or (3) clerical error.” 69 Ohio St.3d at 207. (Citation omitted.) The court further concluded that while R.C. 4123.52 refers only to the Commission and not to self-employed insurers, the latter group would also be able to secure modification or changes of prior awards upon a showing of new and changed conditions, fraud, or clerical error. *Id.*

{¶ 29} In later cases, the Supreme Court of Ohio added that “[t]he commission may exercise its continuing jurisdiction in cases of “(1) new and changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, or (5) error by an inferior tribunal.” *Benton*

*v. Hamilton Cty. Educational Serv. Ctr.*, 123 Ohio St.3d 347, 2009-Ohio-4969, ¶6, citing *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 1998-Ohio-616.

{¶ 30} Lane contends that under *Lewis*, Newark’s certification is conclusive and the Commission lacked jurisdiction to modify or change the award. The trial court disagreed, holding that it could not consider the jurisdictional issue because Lane failed to file a mandamus action.

{¶ 31} We agree with the trial court. The Supreme Court of Ohio has indicated that the only issue that can be appealed in workers’ compensation cases is the right to participate in the fund. In order to litigate whether fraud or mistakes have occurred in a manner sufficient to invoke the Commission’s continuing jurisdiction, litigants must file mandamus actions. See, e.g., *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86. In such situations, the trial court does not review the evidence *de novo*, but reviews the evidentiary record to see if “the commission’s decision is legally sound.” *State ex rel. Quest Diagnostics, Inc. v. Indus. Comm.*, Franklin App. No. 10AP-153, 2011-Ohio-78, ¶10.

{¶ 32} Accordingly, because Lane failed to file a mandamus action, the issue of whether the Commission properly assumed jurisdiction was not before the trial court.

{¶ 33} In the case before us, the Commission assumed jurisdiction on the basis of “new and changed circumstances,” which is one of the permitted reasons for modifying or changing prior findings.<sup>1</sup> In this regard, R.C. 4123.52(A) states that:

{¶ 34} “The jurisdiction of the industrial commission and the authority of the

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<sup>1</sup>We make no observation on whether that ground is correct, because the issue of the Commission’s continuing jurisdiction to modify or vacate was not within the jurisdiction of the trial court.

administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified.” Again, the commission’s decision, in a properly brought mandamus action, is reviewed to see if it is legally sound.

{¶ 35} An example of how the process generally works can be found in *State ex rel. Sherry v. Indus. Comm.*, 108 Ohio St.3d 122, 2006-Ohio-249. In that case, the claimant, Sherry, was awarded total temporary disability in March 2001. *Id.* at ¶3. Although the employer was not self-insured, the disability determination would have been as “conclusive” as Newark’s certification of Lane’s claim, since both actions allowed the award. Although the awards arrive through different procedural routes, there is no material difference once the award or certification has been made.

{¶ 36} In 2002, the Bureau of Workers’ Compensation (BWC) conducted an investigation after receiving information that Sherry was operating a home-repair business. Based on the results of the investigation, the BWC asked the commission to make a declaration of fraud, terminate Sherry’s temporary total disability compensation, and declare an overpayment of all compensation paid after late June 2001. *Id.* The commission ultimately ordered repayment to June 2001, after finding that Sherry had improperly received compensation. *Id.* at ¶7. While not relevant for purposes of the appeal before us, the Supreme Court of Ohio concluded that the Commission had continuing jurisdiction, and upheld the denial of Sherry’s application for a writ of mandamus. *Id.* at ¶8-11.

{¶ 37} In the case before us, the Commission’s staff hearing officer similarly held, after assuming jurisdiction, that Lane did not have an injury in the course of and arising out of

his employment. The hearing officer relied on the arrest records, which demonstrated a prior injury to Lane's left shoulder, and on further review by doctors, who concluded that Lane did not have an injury in the course of and arising out of his employment. When Lane appealed that decision to the trial court, the only issue before the court was whether Lane was entitled to participate in the workers' compensation system.

{¶ 38} As the Supreme Court of Ohio has noted:

{¶ 39} "A 'claim' in a workers' compensation case is the basic or underlying request by an employee to participate in the compensation system because of a specific work-related injury or disease. A decision by the commission determines the employee's right to participate if it finalizes the allowance or disallowance of an employee's 'claim.' The only action by the commission that is appealable under R.C. 4123.519 is this essential decision to grant, to deny, or to terminate the employee's participation or continued participation in the system." *Felty v. AT & T Technologies, Inc.*, 65 Ohio St.3d 234, 239, 1992-Ohio-60.<sup>2</sup>

{¶ 40} In Lane's case, the Industrial Commission could have decided that no grounds for modification or change existed. Under that scenario, Newark could have filed a mandamus action, contending that new and changed circumstances existed. *Benton*, 2009-Ohio-4969, at ¶9 and 11 (holding that the Commission's refusal to discontinue a claim does not involve the claimant's right to participate and the common pleas court lacks subject-matter jurisdiction over the matter. In such cases, the proper remedy is for the employer to file a mandamus action.)

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<sup>2</sup>Former 4123.519 was amended and recodified as 4123.512 by 1993 H 107, effective October 20, 1993.

{¶ 41} Alternatively, once the Commission decided it had jurisdiction to modify or change the prior findings, it could have terminated Lane's right to participate (as it did) – in which case Lane would have had the right to appeal the question of participation. Or, the Commission could have allowed Lane to continue to participate – in which event Newark would have had the right to appeal. Id. at ¶16 (noting that “when a claimant's right to participate is granted, the claimant's employer has the right to appeal; and when the right to participate is terminated, the claimant has the right to appeal. ‘Because both the employer and the employee have the right to appeal when they are negatively affected by the commission's ruling, both are equally situated.’ ”)

{¶ 42} The Supreme Court of Ohio has repeatedly stressed that “[s]uch appeals are limited to ‘whether an employee is or is not entitled to be compensated for a particular claim.’ ” *Thomas v. Conrad*, 81 Ohio St.3d 475, 478, 1998-Ohio-330, quoting from *Felty*, 65 Ohio St.3d 234, 239. The appeal is heard de novo, and the claimant has the burden of proof, as well as the burden of going forward. *Youghiogheny & Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St.3d 70, 71.

{¶ 43} Despite having this burden, Lane chose not to present any evidence in the trial court pertaining to his injury. Instead, he contended at trial that the conclusive nature of Newark's certification relieved him from having to present any proof. In this regard, Lane relied heavily on *Lewis*, supra, 79 Ohio St.3d 231, 1997-Ohio-393. According to Lane, the Supreme Court of Ohio held in *Lewis* that a self-insured employer waives its defenses to a claim once it certifies a workers' compensation claim.

{¶ 44} In *Lewis*, the claimant, Carles Lewis, was granted a workers' compensation

award for a recurrent hernia that arose in May 1987. Lewis filed an additional claim in February 1992 for psychological conditions related to his inability to work, relying on a 1990 report of a Dr. Arnold. The employer then had Lewis examined by Dr. Clary, who noted in his report that Lewis had seen Dr. Arnold in 1988 for Social Security disability (which he had applied for in October 1987), and had been anxious and depressed since he had been unable to work in 1987. In November 1992, the employer accepted the condition of permanent depression that was discussed in Dr. Clary's report. *Id.* at 231-32.

{¶ 45} The employer later contended that it had discovered Dr. Arnold's 1988 report after accepting the additional claim for depression. The employer, therefore, raised a defense in the administrative proceedings that Lewis's additional claim was barred by the statute of limitations. *Id.* After the depression condition was administratively allowed, the employer appealed to the common pleas court, which concluded that Lewis's claim for depression was barred by the statute of limitations in R.C. 4123.84. *Id.* at 232. The court of appeals affirmed, holding that the employer was not estopped from asserting the limitations defense even though it had acquiesced in the claim after expiration of the limitations period, because the limitations period invoked the Commission's subject-matter jurisdiction. *Id.*

{¶ 46} On further appeal, the Supreme Court of Ohio observed that: (1) the initial filing period in R.C. 4123.84 is intended as a notice requirement to enable employers to protect themselves; (2) R.C. 4123.84 has exceptions in the nature of waiver, which look to the employer's actions; and (3) the limitations period should begin within two years after the claimant knew or should have known of the seriousness of the residual or flow-through condition and its connection to his employment. *Id.* at 238-41. Because there were issues of

fact on the latter point, the court reversed the judgment of the court of appeals insofar as it bore on this issue. *Id.* at 242,

{¶ 47} The Supreme Court of Ohio next considered whether summary judgment should have been granted in Lewis's favor. Citing *Baker*, 69 Ohio St.3d 202, 1994- Ohio-437, the court first noted that a self-insurer's allowance of a condition, whether initial, residual, or additional, and whether by certification or indirectly, indicates that the claim has been conclusively granted. 79 Ohio St.3d at 242. The employer, however, relied on the argument that the limitations period in R.C. 4123.84 is jurisdictional, and contended that *Baker* should not apply where a self-insurer accepts a claim after it has become time-barred. In contrast, Lewis argued that the limitations bar is not jurisdictional and can be waived. *Id.*

{¶ 48} After discussing various interpretations and applications of the term "jurisdictional," the Supreme Court of Ohio concluded that waiver can apply to the defense of untimely notice or lateness in filing claims under R.C. 4123.84. *Id.* at 246. The court then concluded that because the Commission lacks jurisdiction to modify a self-insurer's certification over the objection of the claimant, the employer had waived the limitations defense when it accepted Lewis's residual psychiatric condition as part of the claim. *Id.* at 247. Accordingly, the court reversed the judgment of the court of appeals and reinstated the order of the Commission to the extent that it reflected what the employer had accepted when it certified Lewis's claim.

{¶ 49} Lane relies on the result in *Lewis*, as well as language about the conclusive nature of the certification, to argue that Newark waived any defenses when it certified the claim. We disagree with Lane, and conclude that *Lewis* does not apply.

{¶ 50} Modification of a prior certification finding was not at issue in *Lewis*. The court decided, instead, whether an employer could waive the limitations bar in R.C. 4123.84 by choosing to accept a claim after the limitations period has expired. Furthermore, Lane fails to consider the following comments in *Lewis*, where the court stated that:

{¶ 51} “The fact that the employer expresses surprise at having discovered Dr. Arnold's report subsequent to accepting the claim is irrelevant. There is no evidence in the record, and, indeed, no allegation made, that Dr. Arnold's report was fraudulently withheld. In fact, the employer chose to accept the residual condition based on Dr. Clary's September 25, 1992 report, which specifically stated that claimant ‘saw a psychologist, Dr. Arnold in 1988 for Social Security disability’ and that since 1987, when he became unable to work, ‘he has felt anxious and depressed.’ ” Id. at 248.

{¶ 52} Fraud, along with changed circumstances, clerical error, and so on, are grounds that permit the Commission to assume jurisdiction under R.C. 4123.52 to modify a previously allowed finding. Had fraud been present in *Lewis*, the decision would have been different. The Supreme Court's comments, as well as the evidence, indicate that the employer was inattentive or disregarded known facts – and its conduct thus would not have satisfied any possible ground of modification or change. Accordingly, *Lewis* does not support Lane's position. If an employer's certification could never be set aside, there would be no need to specify grounds that could allow the Commission to modify a claim under R.C. 4123.52.

{¶ 53} Furthermore, if the Commission decides that modification or change in a finding is not warranted, and continues the employee's participation, the employer can appeal this decision to the common pleas court. When the employer appeals from a Commission

decision not to modify or vacate a finding of participation, even though the claimant typically has the burden of proving eligibility at the trial court level, the original certification would have been left intact by the Commission's decision to continue paying benefits. Thus, the employee suffers no prejudice, nor has the employer been permitted to make an "end run" around the conclusive effect of the proceedings before the Commission.

{¶ 54} Conversely, if the Commission concludes that the injury was not in the course of, and arising, from employment, and terminates benefits, there is no reason why the initial finding should retain conclusive effect. In that situation, as here, the employee would have the burden in the trial court of proving that he or she was injured in the course and scope of employment.

{¶ 55} Lane also argues that Newark "affirmatively withdrew and disclaimed any claim for fraud." Brief of Plaintiff-Appellant Michael D. Lane, p. 8. Again, we disagree. As a preliminary point, the issue of fraud is not pertinent, because Lane failed to file a mandamus action, which would have been the appropriate remedy for contesting the Commission's assumption of jurisdiction.

{¶ 56} We note that the trial court mentioned its reluctance to countenance Lane's deceit in failing to advise his employer of his prior injury. In concluding that Lane failed to present any credible evidence that he was injured as a result of his employment, the trial court indicated that it did not believe Lane. This was within the trial court's power. Lane had the burden of proving entitlement to participate in the fund, and this could not have been accomplished by relying on a certification finding that was no longer in effect. Instead of attempting to prove that he was entitled to participate, by presenting medical evidence and

personal testimony about the injury, Lane submitted no proof other than the employer's certification, which had no further force, due to the rulings of the Industrial Commission.

{¶ 57} It is true that Newark certified the claim, based on information from Lane, who was the sole witness to the alleged work-related injury. Until Newark's motion was filed with the Commission, the certification was conclusive. However, once the Commission found evidence justifying modification or change of the former findings, the Commission could consider other evidence bearing on the issue of whether Lane had sustained an injury in the course of, and arising out of, his employment. Based on the arrest evidence and the evidence of medical doctors, who found that the injury was not in the course of, and arising out of, employment, the Commission concluded that Lane was not entitled to participate in the workers' compensation system.

{¶ 58} The trial court rejected Lewis's appeal because he failed to meet the appropriate burden of proof. In particular, the court stressed that Lewis's injury, a back strain, is not one within the common knowledge of the average person. The court also stressed that Lewis did not present either any evidence of injury or any credible evidence that he was injured as a result of his employment.

{¶ 59} "In order to establish a right to workmen's compensation for harm or disability claimed to have resulted from an accidental injury, it is necessary for the claimant to show by a preponderance of the evidence, medical or otherwise, not only that his injury arose out of and in the course of his 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. (Citation omitted.)

{¶ 60} Furthermore, “ [e]xcept as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion.” *Wright v. City of Columbus*, Franklin App. No. 05AP-432, 2006-Ohio-759, ¶6, quoting from *Darnell v. Eastman* (1970), 23 Ohio St.2d 13, syllabus. Soft-tissue injuries like neck and back strains and sprains require expert testimony to establish a causal connection, because they are injuries that are “internal and elusive, and are not sufficiently observable, understandable, and comprehensible by the trier of fact.” 2006-Ohio-759 at ¶19. Accord *Krull v. Ryan*, Hamilton App. No. C-100019, 2010-Ohio-4422, ¶11-12. Consequently, the trial court did not err in concluding that Lane failed to meet his burden of proof.

{¶ 61} Accordingly, the trial court did not err in failing to grant summary judgment in Lane’s favor, nor did it err when it failed to grant final judgment as a matter of law in favor of Lane.

{¶ 62} Both of Lane’s assignments of error are overruled.

### III

{¶ 63} Both of Lane’s assignments of error having been overruled, the judgment of the trial court is Affirmed.

.....

GRADY, P.J., and HALL, J., concur.

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GREGORY J. CRUSH  
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IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

MICHAEL D. LANE  
Plaintiff-Appellant

v.

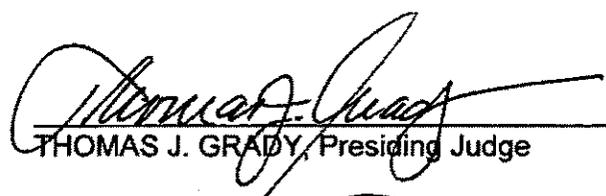
BUREAU OF WORKERS'  
COMPENSATION, et al.  
Defendant-Appellees

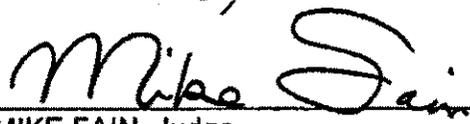
: Appellate Case No. 24618  
: Trial Court Case No. 2010-CV-01678  
: (Civil Appeal from  
: Common Pleas Court)  
: **FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 20th day  
of January, 2012, the judgment of the trial court is **Affirmed**.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App. R. 30(A), it is hereby ordered that the Clerk of the Montgomery  
County Court of Appeals shall immediately serve notice of this judgment upon all parties and  
make a note in the docket of the mailing.

  
THOMAS J. GRADY, Presiding Judge

  
MIKE FAIN, Judge

*Michael T. Hall*  
MICHAEL T. HALL, Judge

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Thursday, January 13, 2011 10:55:39 AM  
CASE NUMBER: 2010 CV 01678 Docket ID: 15781530  
GREGORY A BRUSH  
CLERK OF COURTS MONTGOMERY COUNTY OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

MICHAEL D. LANE,

Plaintiff,

-vs-

BUREAU OF WORKERS'  
COMPENSATION, et. al,

Defendants.

CASE NO. 2010 CV 01678

JUDGE MARY KATHERINE HUFFMAN

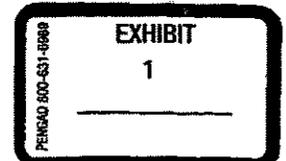
DECISION, ORDER AND ENTRY  
OVERRULING MOTION FOR  
SUMMARY JUDGMENT

This matter is before the court on Plaintiff's Motion for Summary Judgment filed herein on November 23, 2010. Defendant, Newark Group, Inc. filed its Memorandum Contra on December 15, 2010. Plaintiff filed his Reply Memorandum on December 20, 2010. This matter is now ripe for decision.

I. FACTS

The facts herein are not in dispute. Instead, the parties agree that the issues before the court are matters of law.

Plaintiff, Michael Lane, was an employee of The Newark Group, Inc. (hereinafter "Newark") on April 28, 2008. Newark is a self-insured employer for purposes of workers' compensation claims. Lane filed a claim with the Ohio Bureau of Workers' Compensation (hereinafter "BWC") alleging a work-related accident occurred on April 28, 2008 in the course of



and arising out of his employment with Newark. As a self-insured employer, Newark was notified by BWC in a letter dated May 6, 2008 that it could either certify or reject Lane's workers' compensation claim. Newark subsequently certified the claim for the condition of "left shoulder strain" on May 12, 2008. Lane subsequently received medical benefits and compensation, which included a permanent partial disability award.

Subsequently, on October 1, 2009, Newark filed a Motion with the BWC seeking to terminate Lane's right to participate in the workers' compensation fund for the condition of left shoulder strain. At a subsequent hearing, a Staff Hearing Officer terminated Plaintiff's right to participate. While the parties may disagree on the matter, allegedly the decision of the Staff Hearing Officer was based upon newly discovered evidence of the source of Plaintiff's shoulder injury, a confrontation with the police two days prior to his work-related injury. Lane then filed an appeal to the Industrial Commission, which subsequently refused that appeal. This appeal then ensued.

## II. LAW AND ANALYSIS

Summary judgment is appropriate pursuant to Rule 56(c) of the Ohio Rules of Civil Procedure when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, that being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64, 66 (1978). The burden of showing that no genuine issue exists as to any material fact falls upon the moving party. *Mitseff v. Wheeler*, 38 Ohio St. 3d 112, 115, 526 N.E.2d 798 (1988). Additionally, a motion for summary judgment forces the nonmoving party to produce evidence on any issue (1) for which that party bears the burden of production at trial, and (2) for which the moving party has met its initial burden.

*See Dresher v. Burt*, 75 Ohio St. 3d 280 (1996). A non-moving party may not rest upon the mere allegations or denial of his pleadings, but must set forth specific facts showing there is a genuine issue for trial. *Chaney v. Clark Cty. Agricultural Soc.*, 90 Ohio App. 3d 421, 424 (1993).

The key to summary judgment is that there must be no genuine issue as to any material fact. Whether a fact is material depends on the substantive law of the claim being litigated. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Turner v. Turner*, 67 Ohio St. 3d 337 (1993). An issue of fact exists when the relevant factual allegations in the pleadings, affidavits, depositions or interrogatories are in conflict. *Link v. Leadworks Corp.*, 79 Ohio App. 3d 735, 741 (1992).

In *Harless*, the Court also noted that Rule 56 (E) of the Ohio Rules of Civil procedure requires a party opposing a summary judgment motion to show specific facts demonstrating that there is a genuine issue of material fact. *Id.* at 65-66. In demonstrating that there is a genuine issue for trial, only disputes over facts that might affect the outcome of the suit (i.e., material facts) may preclude summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). All doubts or conflicts in the evidence must be construed most strongly in favor of the party against whom judgment is sought. *Morris v. Ohio Casualty Insurance Co.*, 35 Ohio St. 3d 45, 47 (1988). A trial court must examine all appropriate materials filed before ruling on a motion for summary judgment. *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 358 (1992). Summary judgment is to be granted only on the basis of the pleadings, depositions, answers to interrogatories, admissions, affidavits, transcripts of evidence, and written stipulations. Civ. R. 56(c) permits the court to review the pleadings and any attachments to the pleadings. *Prendergast v. Snoeberger*, 154 Ohio App. 3d 162, 167 (2003). In this case, the court has examined all evidentiary materials, including, but not

limited to the affidavits and depositions submitted herein. It is with this standard of review in mind that a motion for summary judgment must be considered.

The parties both raise jurisdictional issues, albeit decidedly different ones, for the court's consideration. Plaintiff alleges that the BWC lacked jurisdiction to vacate the certification made by Newark; Defendant claims that the court lacks subject matter jurisdiction to consider the actions of the BWC, but only to conduct a de novo trial on the matter of Plaintiff's claimed injury. Since the court's jurisdiction to consider the merits of Plaintiff's motion must be resolved prior to any substantive decision on the motion, the court will consider whether it has jurisdiction to consider the actions of the BWC in exercising authority over a claim certified by a self-insured employer.

To be specific, Newark claims in its Memorandum filed December 15, 2010 that "this Court lacks subject matter jurisdiction to review and vacate the order of the Industrial Commission. Put simply this Court's jurisdiction is limited to a de novo review under Revised Code section 4123.512 to determine Lane's eligibility to participate in the workers' compensation program." Instead, Newark argues that an application for a writ of mandamus is the only appropriate vehicle for Plaintiff to challenge the actions of the Industrial Commission in exercising jurisdiction over a claim certified by a self-insured employer.

The jurisdiction of the courts of common pleas in Ohio are determined by statute, and, thus, the jurisdiction of this court is limited to that conferred by law. *Section 4(B), Article IV, Ohio Constitution. Mattone v. Argentina*, 123 Ohio St. 393 (1931).

O.R.C. §4123.512 provides, in pertinent part:

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 [4123.51.1] of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has

jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 [4123.51.1] of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 [4123.51.1] of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

O.R.C. §4123.511(E), referred to above, provides:

(E) Upon the filing of a timely appeal of the order of the staff hearing officer issued under division (D) of this section, the commission or a designated staff hearing officer, on behalf of the commission, shall determine whether the commission will hear the appeal. If the commission or the designated staff hearing officer decides to hear the appeal, the commission or the designated staff hearing officer shall notify the parties and their respective representatives in writing of the time and place of the hearing. The commission shall hold the hearing within forty-five days after the filing of the notice of appeal and, within seven days after the conclusion of the hearing, the commission shall issue its order affirming, modifying, or reversing the order issued under division (D) of this section. The commission shall notify the parties and their respective representatives in writing of the order. If the commission or the designated staff hearing officer determines not to hear the appeal, within fourteen days after the expiration of the period in which an appeal of the order of the staff hearing officer may be filed as provided in division (D) of this section, the commission or the designated staff hearing officer shall issue an order to that effect and notify the parties and their respective representatives in writing of that order.

Except as otherwise provided in this chapter and Chapters 4121., 4127., and 4131. of the Revised Code, any party may appeal an order issued under this division to the court pursuant to section 4123.512 [4123.51.2] of the Revised Code within sixty days after receipt of the order, subject to the limitations contained in that section.

“(T)he common pleas court has a mandatory duty to determine a claimant’s right to participate in the workers’ compensation fund once a party appeals” the decision of the Industrial Commission to the common pleas court.” *Williams v. Truck & Bus Div. of General Motors Corp.*,

Montgomery App. No. 18455 (Nov. 9, 2000), citing *McCoy v. Adm., Bureau of Workers' Comp.*, Greene App. No. 96-CA-143 (June 27, 1997). O.R.C. §4123.519 contemplates not only a full and complete de novo determination of both facts and law but also contemplates that such determination shall be predicated not upon the evidence adduced before the Industrial Commission but, instead, upon evidence adduced before the common pleas court as in any civil action, which may involve a jury trial if demanded. The proceedings are de novo both in the sense of receipt of evidence and determination. The common pleas court, or the jury if it be the factual determiner, makes the determination de novo without consideration of, and without deference to, the decision of the Industrial Commission. *Marcum v. Barry, Adm.*, 76 Ohio App. 3d 536 (1991). As contrasted with other statutes dealing with appeals from administrative agencies, O.R.C. §4123.519 does not contain the words "review, affirm, modify, or reverse," but instead only contemplates a de novo determination of the claimant's right to participate in the workers' compensation fund *following hearing of the action. Id.* (Emphasis added).

The decision in *State, ex rel Saunders v. Metal Container Corp.*, is particularly instructive. In *Saunders*, a mandamus action was brought challenging the jurisdiction of the Industrial Commission relating to a self-insured employer's original certification of an injury by modifying the certification. The court determined that a mandamus was the proper vehicle through which to challenge the action of the Industrial Commission, as the relevant question was not one of the employee's right to participate in the workers' compensation fund, but instead whether a mistake sufficient to invoke the continuing jurisdiction of the Industrial Commission existed. *See also State, ex rel. Highway Co. v. Indus. Comm.*, 70 Ohio App. 2d 41 (1980); *State ex. rel. Morrow v. Industrial Comm.*, 71 Ohio St. 3d 236 (1994). The court will not decide the question of whether the Industrial Commission had continuing jurisdiction to disallow Plaintiff's claim, as this court lacks jurisdiction to consider that matter.

The court finds, when construing the evidence in a light most favorable to the non-moving party, that Plaintiff has failed to establish that he is entitled to judgment as a matter of law, as this court finds that it lacks jurisdiction to consider whether the Industrial Commission had jurisdiction to modify the decision of the self-insured employer certifying the claim for the condition of left shoulder strain. Instead, that determination is one to be brought by a Writ of Mandamus. As such, Plaintiff's Motion for Summary Judgment must be **OVERRULED**.

SO ORDERED:

JUDGE MARY KATHERINE HUFFMAN

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General Division  
Montgomery County Common Pleas Court  
41 N. Perry Street, Dayton, Ohio 45422

**Case Title:** MICHAEL D. LANE vs BUREAU OF WORKERS  
COMPENSATION  
**Case Number:** 2010 CV 01678  
**Type:** Decision

So Ordered

A handwritten signature in cursive script that reads "Mary K. Huffman".

Mary K. Huffman

Electronically signed by mhuffman on 2/11/10 1:55:21 PM page 8 of 8

Montgomery County Common Pleas Court  
General Division

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

MICHAEL D. LANE,

CASE NO. 2010 CV 01678

Plaintiff,

JUDGE MARY KATHERINE HUFFMAN

-vs-

BUREAU OF WORKERS'  
COMPENSATION, et. al,

Defendants.

DECISION, ORDER, AND ENTRY  
GRANTING JUDGMENT IN FAVOR  
OF DEFENDANT AND AGAINST  
PLAINTIFF AND OVERRULING  
PLAINTIFF'S MOTION FOR  
ATTORNEY FEES

This matter represents a de novo proceeding resulting from certain findings of the Industrial Commission relating to an alleged workplace injury. On February 25, 2010, Plaintiff, Michael D. Lane, filed his Notice of Appeal of the Decision of the Industrial Commission denying him the right to participate in the Workers' Compensation fund for the condition of "left shoulder strain." The matter proceeded to a bench trial on February 22, 2010. Also before the court is Plaintiff's Application for Award of Attorney's Fees and Expenses filed herein on March 18, 2011. These matters are now ripe for decision.

The court has considered the evidence adduced at the time of the bench trial, the written closing arguments and memoranda of counsel, all pending motions and memoranda, and the oral arguments made during the trial.

EXHIBIT  
2

### I. FINDINGS OF FACT

The relevant facts herein are generally not in dispute. Instead, it is the interpretation of the law that is at issue.

The evidence at trial revealed that Plaintiff, Michael Lane, began his employment with Defendant, Newmark Group, Inc. (hereinafter "Newmark"), in January, 2007. During the period of his employment Lane was charged with OVI on January 19, 2008. Lane, who worked as a truck driver for Newmark, was subject to a CDL license suspension and, thus, could no longer perform his job duties. Lane was candid with his employer about his license suspension and arrest and his employer placed him in a position working on its dock during the period of his license suspension.

On February 28, 2008 Lane's driver's license suspension was lifted and his driving privileges, including his CLD license, were reinstated. Lane then returned to driving a truck for Newmark.

On April 26, 2008 Lane was again charged with OVI. During the course of arrest Lane was involved in an altercation with police while being handcuffed and complained of an injury to his shoulder. Lane's driver's license, and CDL license, were immediately suspended as a result of the arrest. When questioned on cross-examination, Lane admitted that he stated in his deposition that his hands were handcuffed behind his back and he told officers that his left shoulder hurt.

The following Monday when he returned to work, April 28, 2008, Lane did not mention the OVI arrest, nor the license suspension to his supervisor. Instead, he proceeded with his normal workday, including driving a truck, despite his license suspension. During the course of his workday, at approximately 10:30-11:00AM, Lane advised his supervisor, Max Price, that he had hurt his shoulder while lifting product on his route. Lane requested medical attention, and Price sent him to the workplace health center. Lane returned with paperwork indicating that he had suffered a strained shoulder. Price then contacted the company's third party administrator. Since

there were no witnesses to the alleged incident and no evidence to refute Lane's claims at that point, the claim was allowed and certified on May 12, 2008.

Lane had been given light duty by his physician. Price testified that Lane "disappeared" for a time, and Price did not know where he was. He learned at some point that Lane had had back surgery.

During a routine review of the driver's license status of employees, Lane's second OVI arrest of April 26, 2008 was discovered. Price obtained the police report of the incident and learned of Lane's claim of a shoulder injury. It was then that Newmark contested the allowance of the claim for "left shoulder strain." Price testified that the claim would not have been certified if Lane had been truthful and forthcoming about his arrest and potential injury on April 26, 2008.

Newmark is a self-insured employer for workers' compensation claims. Following discovery of Lane's arrest and apparent injury on April 26, 2008, Newmark moved the Industrial Commission to exercise continuing jurisdiction over the matter to review the claim, particularly based upon its claim that Lane had fraudulently made the claim. The Industrial Commission determined that it had continuing jurisdiction over the matter, pursuant to the language of O.R.C. §4123.52, and determined that Lane did not have an injury in the course of and arising out of his employment at Newmark on April 28, 2008. Thereafter, this appeal ensued.

## II. LAW AND ANALYSIS

The jurisdiction of the courts of common pleas in Ohio are determined by statute, and, thus, the jurisdiction of this court is limited to that conferred by law. *Section 4(B), Article IV, Ohio Constitution. Mattone v. Argentina*, 123 Ohio St. 393 (1931).

O.R.C. §4123.512 provides, in pertinent part:

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 [4123.51.1] of the

Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 [4123.51.1] of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 [4123.51.1] of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

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“(T)he common pleas court has a mandatory duty to determine a claimant’s right to participate in the workers’ compensation fund once a party appeals” the decision of the Industrial Commission to the common pleas court.” *Williams v. Truck & Bus Div. of General Motors Corp.*, Montgomery App. No. 18455 (Nov. 9, 2000), citing *McCoy v. Adm., Bureau of Workers’ Comp.*, Greene App. No. 96-CA-143 (June 27, 1997). O.R.C. §4123.519 contemplates not only a full and complete de novo determination of both facts and law but also contemplates that such determination shall be predicated not upon the evidence adduced before the Industrial Commission but, instead, upon evidence adduced before the common pleas court as in any civil action, which may involve a jury trial if demanded. The proceedings are de novo both in the sense of receipt of evidence and determination. The common pleas court, or the jury if it be the factual determiner, makes the determination de novo without consideration of, and without deference to, the decision of the Industrial Commission. *Marcum v. Barry, Adm.*, 76 Ohio App. 3d 536 (1991). See also *Benton v. Hamilton County Educ. Serv. Ctr.*, 123 Ohio St. 3d 347 (2009). As contrasted with other statutes dealing with appeals from administrative agencies, O.R.C. §4123.519 does not contain the words “review, affirm, modify, or reverse,” but instead only contemplates a de novo determination of the claimant’s right to participate in the workers’ compensation fund *following hearing of the action*. *Id.* (Emphasis added).

Plaintiff argues that the Industrial Commission was without jurisdiction to deny the claim after the self-insured employer, Newmark, certified the claim for left shoulder strain.

“In an appeal, pursuant to R.C. 4123.512, the issues to be addressed by the [court of common pleas] would be those relating to the presence of a medical condition and whether or not it was a work-related injury, and the [court of common pleas] would not and could not correct an improper exercise of jurisdiction by the commission granting reconsideration pursuant to R.C. 4123.52...” *State ex. rel. Wells v. Industrial Comm. of Ohio*, 2006-Ohio-2738, quoting *State ex. re.*

*Forrest v. Anchor Hocking Consumer Glass*, 2003-Ohio-6077. Still further, “(b)ecause the issue of exercising continuing jurisdiction is separate and distinct form a right-to-participate action, the issue of continuing jurisdiction could not be challenged” in an action in the court of common pleas. *State ex. re. Wells, supra*.

While this court is not in a position to determine the authority of the Industrial Commission, the court notes that, for purposes different than pending before this court, the Tenth District Court of Appeals previously determined that when a self-insured employer, which initially certified a workers’ compensation claim, when it is discovered that the allowance of the claim was fraudulently obtained, the Industrial Commission has the authority to exercise continuing jurisdiction to disallow the claim. *See State ex. re. Interstate Brands Corp. v. C. James Conrad, Administrator*, 2004-Ohio-4645.

This court has previously determined that it is without jurisdiction to determine if the Industrial Commission had the authority or jurisdiction to deny Lane’s claim after it had been certified by the self-insured employer. Instead, this court is limited in its authority to that which is prescribed by O.R.C. §4123.512.

Plaintiff and Defendant both moved for a directed verdict following the close of Plaintiff’s evidence. Plaintiff argued that he had a right to participate in the workers’ compensation fund as a matter of law as a result of the self-insured employer’s initial certification of the claim. Defendant argued that Plaintiff had failed to meet his burden as established by O.R.C. §4123.512(D).

In order to prevail in this right-to-participate claim, Plaintiff must prove by a preponderance of the evidence that he was injured in the course of and arising out of his employment. O.R.C. §4123.512(D).

Plaintiff argues that Defendant has waived any procedural defects when it originally certified the claim. The court is of a differing opinion and concludes that any proceedings before

the Industrial Commission or actions by the self-insured employer in certifying the claim are irrelevant to a fact-finder's determination in a right-to-participate appeal. O.R.C. §4123.512 specifically requires the trier of fact to determine whether the employee was injured in the course of and arising out of his employment; the statute does not suggest, or grant the court the authority to consider that which is suggested by Plaintiff. Furthermore, to accept Plaintiff's argument that this court cannot consider the merits of the case, but instead must stand on some procedural defect not within the court's purview, is to suggest that the court must countenance Mr. Lane's deceit in failing to advise his employer of his injury in the altercation with the police two days prior to his claimed work-related injury. Furthermore, Lane engaged in what could, at the very least, be deemed a subterfuge when he denied to Concentra, his employer's third-party administrator, that he had a prior injury to his shoulder.

Plaintiff argues that the decision of the Ohio Supreme Court in *Lewis v. Trimble*, 79 Ohio St. 3d 231 (1997) is dispositive. The court disagrees in that the proceeding before this court is a de novo one, irrespective of the decisions reached at the administrative level.

Where the question of injury involves a matter of common knowledge to the average layman, it is not necessary to submit medical testimony in order to prevail in a right-to-participate case. *White Motor Corp. v. Moore*, 48 Ohio St. 2d 156 (1976).

The court finds that Plaintiff has failed to meet his burden of establishing that he prove by a preponderance of the evidence that he was injured in the course of and arising out of his employment. The claimed injury is not one within the common knowledge to the average layman, nor did Plaintiff present evidence as to any injury. Furthermore, Plaintiff failed to present any credible evidence that he was injured as a result of his employment. As such, the court hereby **OVERRULES** Plaintiff's Motion for Directed Verdict and grants **JUDGMENT** in favor of

Defendant. The court finds, based upon Plaintiff's failure to meet his burden of proof, that he is not entitled to participate in the workers' compensation fund for the condition of left shoulder strain.

Inasmuch as the court is permitted to award attorney fees only if Plaintiff were to prevail in this action, Plaintiff's Motion for Award of Attorney's Fees and Expenses is **OVERRULED**.

SO ORDERED:

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JUDGE MARY KATHERINE HUFFMAN

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A handwritten signature in cursive script that reads "Mary K. Huffman".

Mary K. Huffman