

TABLE OF CONTENTS

	<u>Page</u>
I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1
II. STATEMENT OF THE CASE AND FACTS	3
III. RESPONSES TO LANE’S PROPOSITIONS OF LAW	5
A. <u>Appellant’s Proposition of Law No.1</u> : A self-insured employer’s certification of a condition in a workers’ compensation claim operates as a waiver to re-visit the allowances of the claim, and the Industrial Commission may only exercise jurisdiction in the case of fraud.	5
B. <u>Appellant’s Proposition of Law No. 2</u> : A workers’ compensation claimant need not present any evidence beyond the self-insured employer’s 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.	5
1. The Trial Court Lacked Jurisdiction To Review The Industrial Commission’s Decision To Exercise Its Continuing Jurisdiction.	5
2. Lane Failed To Meet His Burden Of Proof.	9
IV. CONCLUSION.....	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Afrates v. Lorain</u> , 63 Ohio St.3d 22, 584 N.E.2d 1175 (1992).....	6
<u>Flury v. The Central Publishing House of Reformed Church in the United States</u> , 118 Ohio St. 154, N.E. 679 (1928)	3
<u>Gallagher v. Billmaier</u> , 154 N.E.2d 472 (1958).....	5
<u>Gibbs v. General Motors Corp.</u> , 87-LW-1682, 11 th Dist. Court of Appeals.....	10
<u>Gradwell v. A.S. Helbig Constr. Co.</u> , 62 Ohio App.3d 197 (1989).....	5
<u>Green v. B.F. Goodrich Co.</u> , 85 Ohio App.3d 223 (1993).....	6
<u>Hickman v. Ford Motor Company</u> , 52 Ohio App. 2d 327; 370 N.E. 2d 494 (1977).....	10
<u>Lane v. Bur. of Workers' Comp.</u> , 2012-Ohio-209, ¶31	2
<u>Lewis v. Trimble</u> , 79 Ohio St.3d 231, 1997-Ohio-393, 680 N.E.2d 1207.....	1
<u>Marcum v. Barry</u> , 76 Ohio App.3d 536 (1991)	5
<u>Noble v. Colwell</u> , 44 Ohio St. 3d 92, 540 N.E.2d 1381(1989).....	2
<u>State ex rel. Baker Material Handling Corp. v. Indus. Comm. of Ohio</u> , 69 Ohio St.3d 202, 631 N.E.2d 138, 1994-Ohio-437	6, 7
<u>State ex rel. Burnett v. Industrial Commission</u> , 6 Ohio St.3d 266 (1983).....	5
<u>State ex rel. Interstate Brands Corp. v. Conrad, Admin.</u> , 10 th Dist. No. 03AP-1035-2004-Ohio-4645	7
<u>State ex rel. Kokosing Construction Co., Inc. v. Ohio Bureau of Workers' Compensation</u> , 102 Ohio St.3d 429, 2004-Ohio	7
<u>State ex rel. Saunders v. Metal Container Corp.</u> , 52 Ohio St.3d 85, (1990).....	2, 6, 8
<u>State ex. rel. Highway Co. v. Indus. Comm. of Ohio</u> , 70 Ohio App. 2d 41, 434 N.E. 2d 279 (1980)	6
<u>Wallace v. University Hospitals of Cleveland</u> , 171 Ohio St. 487, 172 N.E.2d 459 (1961).....	3
<u>White Motor Corp. v. Moore</u> , 48 Ohio St.2d 156, 2 Ohio App. OP 3d 338, 357 N.E. 2d 1069 (1976).....	9
<u>Williamson v. Rubich</u> (1960), 171 Ohio St. 253	1

Statutes

Ohio Revised Code § 4123.512 1, 2, 3, 4, 5, 6, 9, 11
Ohio Revised Code § 4123.512(D)..... 9
Ohio Revised Code § 4123.52 3, 6, 7, 8

I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This Court will not accept jurisdiction of a discretionary appeal unless “a substantial constitutional question is involved” or the “case is of public or great general interest.” S. Ct. R. III, § 1(B)(2); see also Williamson v. Rubich (1960), 171 Ohio St. 253. The Propositions of Law raised in Plaintiff-Appellant’s Memorandum in Support of Jurisdiction do not satisfy this demanding standard.

Plaintiff-Appellant Michael Lane (“Lane”) is requesting that this Court review the Industrial Commission’s exercise of continuing jurisdiction, but do so in the context of a de novo appeal pursuant to Ohio Revised Code § 4123.512. Specifically, he characterizes the issue presented as: “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?” (Appellant Mem. 1.) In essence, Lane objects to the Industrial Commission’s exercise of continuing jurisdiction; which, as determined by this Court, is a controversy subject to an action in mandamus. Likewise, Lane’s expansive reading of this Court’s decision in Lewis v. Trimble, 79 Ohio St.3d 231, 1997-Ohio-393, 680 N.E.2d 1207, that “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.” (Appellant Mem. 1 and 4), further manifests the propriety of a mandamus action, as opposed to, the instant appeal originating under Ohio Revised Code § 4123.512.

As such, the decision by the Second District Court of Appeals was a routine evidentiary ruling based upon the correct interpretation of matters that are appealable pursuant to R.C. 4123.512 and the evidence necessary to prove entitlement to participate in the Ohio Workers’ Compensation Fund. The appellate court properly determined that only questions involving the

“right to participate” under the Fund may be appealed pursuant to R.C. 4123. Lane v. Bur. of Workers’ Comp., 2012-Ohio-209, ¶31. Put simply, Lane must address the asserted propositions of law by way of a mandamus action.¹ State ex rel. Saunders v. Metal Container Corp., 52 Ohio St.3d 85, 86 (1990). Consequently, because this matter was not properly raised through a mandamus appeal, the propositions of law asserted by Lane may not be addressed by this Court through an appeal pursuant to R.C. 4123.512.

Here, the trial court held a *de novo* trial, weighed the evidence and found that Lane failed to meet his burden of proof. Upon review, the appellate court affirmed the trial court’s decision. Lane’s argument that he was not required to present any evidence beyond the certification of medical condition is wrong and does not warrant review by this court. Likewise, Lane’s challenge as to whether the Commission properly invoked its continuing jurisdiction is a subject for review by an action in mandamus, as opposed to, the instant appeal.

Certainly, there is nothing about the appellate court’s decision in this case that raises a matter of public or great general interest. The framers of the 1912 constitutional amendments explained the heart of the public or great general interest standard as: cases “in which the public is interested—state, county or city, some public body”; cases of “great general interest” are cases “which involve questions affecting a good many people and that have aroused general interest.” Proceedings and Debates of the Constitutional Convention of 1912 , Vol. I, at 1030, (1912). The propositions of law offered in this appeal do not touch upon any public interest, nor affect a great many people or arouse general interest. Rather, this action stems from Lane’s failure to properly address the asserted propositions of law by way of a mandamus action. They certainly do not meet this Court’s past interpretations of the aforementioned phrases. See, e.g., Noble v. Colwell, 44 Ohio St. 3d 92, 94, 540 N.E.2d 1381(1989) (“[n]ovel questions of law or procedure”);

¹ Appellant Lane concurrently filed a Mandamus action with this Court, which has been assigned Case No. 12-0360.

Wallace v. University Hospitals of Cleveland, 171 Ohio St. 487, 172 N.E.2d 459 (1961) (the duty of a private institution that affects most citizens (right to hospital records); Flury v. The Central Publishing House of Reformed Church in the United States, 118 Ohio St. 154, 160 N.E. 679 (1928) (conflict in the courts of appeals even with no certified conflict).

This Court's jurisdiction is invoked sparingly. Adjudication of a matter which affects only the litigants is not a proper use of its time and resources. This case utterly fails to meet the threshold for jurisdiction. Lane presents neither a novel question of law, nor an issue of public or great general interest. Lane's asserted propositions of law must be addressed through a mandamus appeal. For these reasons, as detailed more fully below, this Court should deny further review.

II. STATEMENT OF THE CASE AND FACTS

This is a workers' compensation case appealed to the Montgomery County Court of Common Pleas by Appellant Lane, pursuant to Ohio Revised Code Section 4123.512. Lane appealed an adverse Industrial Commission order denying his claim in its entirety. In so holding, the Industrial Commission exercised its continuing jurisdiction under R.C. Section 4123.52 to vacate Appellee Newark Group, Inc.'s ("Newark Group") certification of Lane's claim application. The Industrial Commission then denied Lane's claim following hearings on the merits.

On appeal, Lane filed a motion for summary judgment. In his Motion, Lane asked the Trial Court to review the propriety of the Industrial Commission's decision to exercise its continuing jurisdiction. In response, Newark Group contended that the Trial Court lacked subject matter jurisdiction to review the Industrial Commission's exercise of its continuing jurisdiction. Rather, the Trial 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.

Upon consideration of Lane's Motion, the Trial Court found that Lane was not entitled to judgment as a matter of law. Specifically, the Trial Court lacked jurisdiction to consider whether the Industrial Commission properly exercised its continuing jurisdiction. Instead, the Trial Court identified a writ of mandamus as the proper vehicle to address Lane's contention.

Lane's appeal then came on for a civil bench trial. The triable issue presented was Lane's entitlement to participate in the benefits of the Ohio Workers' Compensation Program for the condition of "left shoulder strain". At trial, Lane offered no medical evidence to support his claim of injury and causal connection to his job. Instead, Lane simply introduced documentation reflecting Newark Group's certification of his claim. Lane then concluded that Newark Group "waived its procedural defenses" upon certification of his claim and, therefore, no further evidence was necessary for Lane to meet his burden of proof.

Upon review of the record evidence, the Trial Court found Lane failed to satisfy his burden of proof, and was not entitled to participate in the Workers' Compensation Program for the condition of left shoulder strain. The Trial Court, thus, properly denied Lane's claim and rendered judgment in Newark Group's favor. From that Judgment, Lane pursued an appeal to the Second Appellate District, Montgomery County. The appellate court upheld the judgment of the Trial Court, finding that Lane's asserted assignments of error did not concern the right to participate in the Fund, and therefore could not be asserted by way of a R.C. Section 4123.512 appeal.

III. RESPONSES TO LANE'S PROPOSITIONS OF LAW

- A. Appellant's Proposition of Law No.1: A self-insured employer's certification of a condition in a workers' compensation claim operates as a waiver to revisit the allowances of the claim, and the Industrial Commission may only exercise jurisdiction in the case of fraud.
- B. Appellant's Proposition of Law No. 2: A workers' compensation claimant need not present any evidence beyond the self-insured employer's 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.
1. The Trial Court Lacked Jurisdiction To Review The Industrial Commission's Decision To Exercise Its Continuing Jurisdiction.

The law is well-established. The jurisdiction of courts of common pleas is conferred by law. Therefore, their jurisdiction is limited in scope to the authority vested in them by statute. Gallagheor v. Billmaier, 154 N.E.2d 472 (1958). Here, the Trial Court's authority is clearly set forth in Revised Code Section 4123.512 which reads, in pertinent part:

The Court, or the jury under the instructions of the Court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the Fund upon the evidence adduced at the hearing of the action. (Emphasis added).

That authority, unlike a trial court's jurisdiction over other administrative appeals, does not prescribe an error proceeding, but requires a de novo proceeding relative to a claimant's right to participate in the workers' compensation program. See, Gradwell v. A.S. Helbig Constr. Co., 62 Ohio App.3d 197 (1989), citing State ex rel. Burnett v. Industrial Commission, 6 Ohio St.3d 266 (1983). Particularly noteworthy is the Franklin County Court of Appeals' construction of Revised Code Section 4123.512 as imposing a mandatory obligation upon the court of common pleas to conduct a de novo proceeding. See, Marcum v. Barry, 76 Ohio App.3d 536 (1991). In so holding, the Court of Appeals noted the use of the word "shall" eliminated any discretion on the part of the trial court to review, affirm, modify, or reverse an order of the Industrial

Commission. Rather the trial courts are limited to determining a claimant's right to participate through a trial de novo. See, also, Green v. B.F. Goodrich Co., 85 Ohio App.3d 223 (1993).

Here, the Trial Court's authority was limited to conducting de novo proceedings to address Lane's right to participate or continue to participate in the Fund. As such, only matters going to Lane's right to participate in the workers' compensation system were appealable under Revised Code Section 4123.512. Afrates v. Lorain, 63 Ohio St.3d 22, 584 N.E.2d 1175 (1992). Lane's right to participate, however, is separate and distinct from the issue of whether the Industrial Commission properly exercised its continuing jurisdiction over his claim. As recognized by both the appellate and trial courts, the latter question, can only properly be raised in mandamus. See, State ex rel. Saunders v. Metal Container Corp., 52 Ohio St.3d 85, 556 N.E. 2d 168 (1990); State ex rel. Morrow v. Indus. Comm., 71 Ohio St. 3d 236, 643 N.E.2d 118 (1994).

This conclusion is further supported upon review of the holdings in State ex rel. Baker Material Handling Corp. v. Indus. Comm. of Ohio, 69 Ohio St.3d 202, 631 N.E.2d 138, 1994-Ohio-437, and Saunders v. Metal Container Corp. In both actions, the propriety of the Industrial Commission's exercise of continuing jurisdiction was a question found to be the proper subject matter for a writ of mandamus. See, also, State ex rel. Highway Co. v. Indus. Comm. of Ohio, 70 Ohio App. 2d 41, 434 N.E. 2d 279 (1980). This principle is not questioned by Lane, and therefore, undercuts his request for appellate relief. Moreover, as briefly explained below, the Industrial Commission properly exercised its continuing jurisdiction.

As noted, Ohio Revised Code Section 4123.52 conveys to the Industrial Commission a broad grant of authority to exercise continuing jurisdiction over claims and to modify or change former findings or orders as "in its opinion is justified." See, Ohio Revised Code Section

4123.52. Consequently, Lane can cite no authority to support his position that the Industrial Commission cannot invoke its continuing jurisdiction involving claim allowances previously certified by a self-insured employer. To the contrary, such actions were recently approved in State ex rel. Kokosing Construction Co., Inc. v. Ohio Bureau of Workers' Compensation, 102 Ohio St.3d 429, 2004-Ohio-3664, and State ex rel. Interstate Brands Corp. v. Conrad, Admin., 10th Dist. No. 03AP-1035-2004-Ohio-4645, where courts held that the employers, who initially certified claims but later, via the Industrial Commission's exercise of continuing jurisdiction, obtained disallowance of the claims on grounds that they were fraudulent, were entitled to surplus fund reimbursement for medical and compensation benefits paid.

Equally telling, the Supreme Court's holding in Baker Materials v. Industrial Commission, reaffirms the propriety of Newark Group's action before the Commission. In Baker, the self-insured employer, subsequent to the initial allowance of a claim, certified a medical condition on a semi-annual report of claim payment. Subsequently, the self-insured employer sought to retract its certification contending that it committed a clerical error. In turn, Baker filed a request for reconsideration with the Industrial Commission on the basis that it erroneously certified the claim for the additional condition of a herniated disk. The Industrial Commission denied Baker's request, which prompted Baker to file a complaint for a writ of mandamus. Rejecting Baker's contention that its certification was a clerical error and that it had the authority to correct clerical errors, the Supreme Court stated that the self-insurer's jurisdiction is limited to determining the first level of a claim and, in order for the self-insured employer to secure modification of its prior certification, it must invoke the continuing jurisdiction of the Industrial Commission upon a showing of new and changed conditions subsequent to the initial order, fraud, or clerical error. Here, Newark Group complied by

requesting the Industrial Commission exercise continuing jurisdiction in response to newly discovered evidence of Lane's shoulder injury just two days prior to his alleged date of injury at work.

Likewise, this Court's holding in Saunders does not bar the Industrial Commission's exercise of continuing jurisdiction in this matter. Lane's references to Saunders were taken out of context. In that case, the Court explained that R.C. 4123.52 grants the Commission continuing jurisdiction to modify or change former orders in certain cases of mistake. 52 Ohio St.3d at 86. The "mistake" in Saunders involved a claim that was initially certified by the employer for "back spr. back." However, for an unknown reason, subsequent Commission orders merely listed the allowed condition as "back." The employer then moved the Commission to clarify the allowed conditions in the claim. Thereafter, the Commission altered the claim allowance to reflect only an injury to the "lumbar" area. The injured worker appealed the order, contesting removal of the "back" from her claim allowance.

On appeal, this Court explained that there was a statutorily defective allowance in the Commission's initial orders that reflected only "back." It explained that the listing of the accepted condition as "back" constituted a mistake over which the Commission could properly exercise continuing jurisdiction in order to correct the defective allowance. However, the Court determined that the Commission went too far when it narrowed the allowance from "back" to "lumbosacral" and "lumbar spine" despite any allegation that the designation of "back" was inaccurate. The Court explained that the Commission's continuing jurisdiction did not allow the extent of the correction it attempted to make. Certainly this Court's analysis and determination in Saunders undercuts and/or disproves Lane's argument that the Commission may not exercise continuing jurisdiction over claim allowances that were certified by a self-insured employer, as it

expressly states that the Commission could properly exercise continuing jurisdiction, albeit not to the extent it attempted to do so. It is against this background, that Newark Group submits that Lane's appeal is without foundation.

2. Lane Failed To Meet His Burden Of Proof.

Lane's appeal was filed pursuant to Ohio Revised Code Section 4123.512, which contemplates a full *de novo* trial. As such, the trial court had to adjudicate Lane's right to participate or to continue to participate in the workers' compensation fund upon the evidence adduced at the trial of this action. See, Revised Code Section 4123.512(D). Thus, Lane was required to establish not only that his injury arose out of and in the course of his employment, but also that a direct and proximate causal relationship existed between his injury and employment. See, White Motor Corp. v. Moore, 48 Ohio St.2d 156, 2 Ohio App. OP 3d 338, 357 N.E. 2d 1069 (1976).

At trial, Lane sought to meet his burden of proof upon the introduction of documents reflecting Defendant Newark Group's certification of his claim. Lane, however, offered no further evidence establishing any injury sustained in the course of and arising out of his employment or any causal relationship between that injury and his employment. The absence of such evidence is fatal to Lane's claim.

Specifically, in Moore, the Supreme Court stated that:

in order to establish a right to workers' 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.

Where the issue of causal connection between an injury and the specific subsequent physical disability involves questions which are matters of common knowledge, medical testimony is not necessary in order to submit the case to a jury.

Paragraphs 1 and 2 of the syllabus.

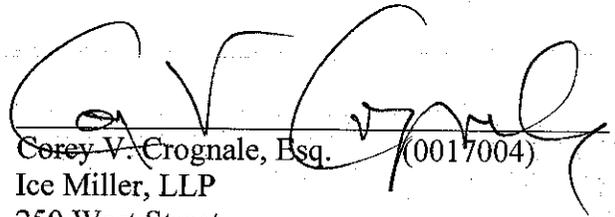
In White, the injury involved was a readily observable bruised knee. Accordingly, it was deemed unnecessary for White to introduce medical evidence to establish the existence of his readily observable contusion and its causal connection to his incident at work. Conversely, an injury sustained by a claimant that is internal and unaccompanied by any observable external evidence requires the introduction of expert medical testimony. It is when the internal complexities of the body are at issue, that initiates the need for medical evidence to move from common knowledge matters within a layman's competency to those areas in which medical expert testimony is appropriate and indeed most necessary for the trier of fact to understand the nature of the case and the cause of the injuries alleged. See, Gibbs v. General Motors Corp., 87-LW-1682, 11th Dist. Court of Appeals. Accordingly, it has been held that "lumbosacral sprains are such matters to be beyond the realm of common or lay knowledge and requires medical expert testimony." See, Hickman v. Ford Motor Company, 52 Ohio App. 2d 327; 370 N.E. 2d 494 (1977) (sprains held to be a matter beyond realm of common or lay knowledge).

Here, Lane sought to participate in the workers' compensation claim for various right shoulder conditions. Similar to the Court's holdings in Hickman, Gibbs and White, it was necessary for Lane to show by a preponderance of the evidence through medical expert testimony that his shoulder condition exists and that it is causally related to his employment. Lane failed to submit any such evidence. Accordingly, Lane failed to meet his burden of proof and the Trial Court properly granted judgment in Newark Group's favor.

IV. CONCLUSION

In his Memorandum in Support of Jurisdiction, Lane urges this Court to ignore existing statutory and case law and address his asserted propositions of law regarding the Commission's exercise of continuing jurisdiction, which were improperly raised by way of his R.C. 4123.512 appeal. Lane's arguments do not call into question the parameters of R.C. 4123.512 appeals nor does he assert that the issues raised are the proper subjects of such an appeal. Moreover, the substance of Lane's argument finds no support in any controlling authorities, raises no concern that this is an unsettled area of law within Ohio, and invites countless appeals to the trial courts regarding the Commission's routine exercise of continuing jurisdiction. Given these circumstances, Lane has not presented an issue of public or great general interest. Therefore, this Court should refuse jurisdiction over this case.

Respectfully submitted,



Corey V. Crognale, Esq. (0017004)
Ice Miller, LLP
250 West Street
Columbus, Ohio 43215
Phone: (614) 462-2281
Fax: (614) 224-3284
Email: corey.crognale@icemiller.com

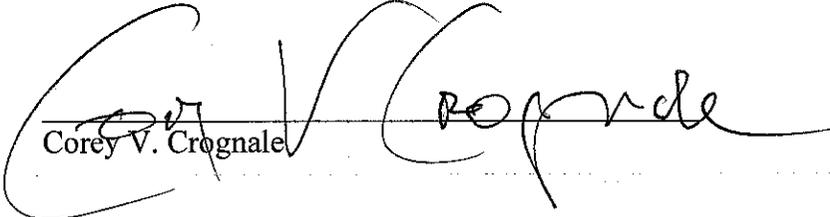
*Attorney for Appellee,
The Newark Group, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. mail, postage prepaid, on this 29 day of March, 2012, to the following:

Gary D. Plunkett
Brett R. Bissonette
Hochman & Plunkett Co., L.P.A.
3077 Kettering Boulevard
Point West, Suite 210
Dayton, Ohio 45439

Colleen C. Erdman
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130


Corey V. Crognale