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## INTRODUCTION

Following the denial of his workers' compensation claim, appellant, Michael D. Lane ("Lane"), ostensibly appealed into the common pleas court a right to participate issue under R.C. 4123.512. However, Lane asked the trial court to adjudicate an issue it lacked jurisdiction to consider: whether the Industrial Commission of Ohio ("commission") properly exercised continuing jurisdiction over his claim. In an appeal filed under R.C. 4123.512, the common pleas courts do not have inherent jurisdiction over a worker's compensation case. *Jenkins v. Keller*, 6 Ohio St.2d 122 (1966), paragraph 4 of the syllabus. Rather, they have only such jurisdiction as is conferred by statute. *Id.* Originally, Lane's employer, Appellee Newark Group, Inc. ("Newark"), a self-insured employer, had certified his claim for the condition of a "left shoulder strain." However, when Newark showed new and changed circumstances, the commission exercised continuing jurisdiction to vacate the certification and denied Lane's claim in its entirety.

Lane couches his appeal as a right to participate issue, arguing that Newark's original certification of his claim forecloses any revisiting of that issue, even where, as here, the self-insured employer discovers previously unknown facts or new and changed circumstances about the claim. However, to reach the issue of the effect of a certification, Lane has to get past the commission's exercise of continuing jurisdiction, which this Court has clearly held is not a right to participate issue, and cannot be decided in a R.C. 4123.512 proceeding. Plus, the certification issue will be decided in a mandamus petition Lane recently filed in this Court.

Accordingly, the trial court and Second District Court of Appeals reaffirmed well-settled law that the trial court lacked jurisdiction to consider whether the commission properly exercised continuing jurisdiction, and reiterated that Lane failed to prove his claim. Lane's assertion that this case is of great public interest is unpersuasive given, first, that the bounds of a trial court's

jurisdiction under R.C. 4123.512 are well settled, and second, that he failed to meet his burden of proof to establish a work injury.

The Court should deny review.

### **STATEMENT OF THE CASE AND FACTS**

Lane alleged he sustained a shoulder strain in the course of and arising out of his employment the morning of Monday, April 28, 2008. On May 12, 2008, Newark certified the claim, meaning that Lane was allowed to participate in the benefits of the workers' compensation system for that injury without further review. Newark later learned that Lane had driven his car off the road the previous Saturday night while intoxicated, and was arrested by a police officer. He injured his left shoulder while resisting the arrest.

Newark moved the commission to exercise its continuing jurisdiction over the claim under R.C. 4123.52. A staff hearing officer ("SHO") for the commission found the discovery of arrest records detailing a prior injury to Lane's shoulder constituted new and changed circumstances sufficient to invoke the commission's exercise of continuing jurisdiction. After assuming jurisdiction over the claim, the SHO then addressed the claim's merits, and found that Lane had not suffered an injury in the course and scope of his employment.

Lane appealed the denial of his claim to the Montgomery County Court of Common Pleas under R.C. 4123.512. He moved for summary judgment challenging the commission's exercise of continuing jurisdiction, arguing that Newark's certification of his claim was unassailable by the commission. The trial court denied Lane's motion on the basis that it lacked jurisdiction over that issue, and the case proceeded to a bench trial on the claim's merits. At trial, Lane offered no medical testimony and called no witnesses. Instead, he relied solely on documents showing that Newark had initially certified the claim, and he moved for directed verdict asserting that the certification of the claim was conclusive. Newark also moved for directed verdict given that

Lane did not submit the requisite proof to establish a compensable claim. Following post-trial briefing, the trial court granted judgment in Newark's favor, holding that Lane failed to prove that he was injured in the course of his employment. Lane neither submitted evidence of an injury at work, nor did he submit the requisite medical expert testimony to support the claimed injury.

On Lane's appeal to the Second Appellate District, the court affirmed the trial court's judgment. Decision at ¶ 3. The appellate court noted that the commission's exercise of continuing jurisdiction was outside the trial court's purview, and reiterated that the common pleas court had jurisdiction solely over the "right to participate" issue. Decision at ¶ 31. In regard to the claim's merits, the appellate court cited case law requiring medical expert testimony where the claimed injury is outside the common knowledge of the average person. Decision at ¶ 60. Lane did not submit this evidence, or any evidence of an injury at work. Decision at ¶ 43.

In response, Lane filed this appeal. Lane also filed an original action in mandamus on the continuing jurisdiction issue before this Court contemporaneous with the Notice of Appeal filed here. Case No. 2011-1622.

### **THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

The Court should decline jurisdiction first because Lane cannot get past an important threshold jurisdictional issue. Specifically, Lane challenged the commission's exercise of continuing jurisdiction in a R.C. 4123.512 proceeding, even though well-established law holds that the courts have no jurisdiction to decide that question under that statute.

In addition, Lane has correctly filed a case in this Court in mandamus to challenge the commission's exercise of continuing jurisdiction, a course that both the trial court and appellate

court had suggested was the proper avenue for that issue. His first issue is properly decided in that mandamus case, and therefore should not be granted here.

The Court should decline jurisdiction second because what Lane is really challenging will flow from the decision in his separate mandamus case. Lane wholly failed to submit any evidence in the trial court showing he sustained an injury at work, claiming that Newark's certification precludes the need for such proof. But the commission's exercise of continuing jurisdiction voided the certification.

**A. Lane's first proposition of law is not properly raised in a challenge under R.C. 4123.512.**

Lane's first proposition of law should not be granted review because the court cannot reach the issue as it is presented here. Specifically, Lane asserts that a self-insured employer's original certification of a claimant's condition, absent fraud, waives any exercise of continuing jurisdiction by the commission. However, Lane asserted that issue here in a trial under R.C. 4123.512, and the Court has definitively held that continuing jurisdiction is not a "right to participate" issue appropriate for an R.C. 4123.512 case.

An injured worker or employer may seek judicial review of a commission ruling in three ways: (1) by direct appeal to the courts of common pleas under R.C. 4123.512, (2) by filing a mandamus petition, or (3) by a declaratory judgment action. *Felty v. AT&T Technologies, Inc.*, 65 Ohio St.3d 234, 237 (1992). *Felty* further explains if a litigant does not choose the appropriate avenue for review, the reviewing court will not have subject matter jurisdiction. *Id.* "The only decisions reviewable pursuant to 4123.512 are those decisions involving a claimant's right to participate or to continue to participate in the workers' compensation fund." *Afrates v. City of Loraine*, 63 Ohio St.3d 22, 26 (1992). In other words, appeals to a common pleas court are limited to whether an employee's injury, disease, or death occurred in the course of and

arising out of his or her employment. *Benton v. Hamilton County Educ. Serv. Ctr.*, 123 Ohio St.3d 347, 350, 2009-Ohio-4969; *Felty*, 65 Ohio St.3d at 238; *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 279 (2000).

The Court has already decided that whether new and changed circumstances exist sufficient to warrant continuing jurisdiction is a question that does *not* involve a right to participate issue. *Benton*, 123 Ohio St.3d at 351; *Liposchak*, 90 Ohio St.3d at 279-80 (“Thus, under our most recent precedent, any issue other than whether the injury, disease, or death resulted from employment does not constitute a right to participate issue.”). In circumstances similar to Lane’s, the Court held that the common pleas court lacked subject matter jurisdiction to review the commission’s refusal to exercise continuing jurisdiction over a claim. *Benton*, 123 Ohio St.3d at 350. On the flip side, this Court has specifically held that a challenge to the exercise of continuing jurisdiction is reviewable in mandamus:

Appellants also challenge appellee’s resort to mandamus, contending that the commission’s February 2, 1987 order could have been appealed under R.C. 4123.519.<sup>1</sup> Appellants, however, misdefine the issue before us. The relevant question here is not one of appellee’s right to participate in the State Insurance Fund for a “back” injury but is instead whether a mistake sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52 existed. We find this latter question to be the proper subject matter for a writ of mandamus.

*State ex rel. Saunders v. Metal Container Corp.*, 52 Ohio St.3d 85, 86 (1990). Thus, the Court has already established that a question of continuing jurisdiction must be brought in mandamus. The Court cannot reach Lane’s merits issue here. Whether or not the certification of a claim operates as a waiver to continuing jurisdiction cannot be brought as a R.C. 4123.512 challenge, and therefore is inappropriate here.

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<sup>1</sup> Predecessor to R.C. 4123.512.

Lane is not without a remedy. Indeed, Lane has now brought a mandamus action in this Court raising the precise issue in his first proposition of law. Case No. 2011-1622. This Court should decline Lane's invitation to accept discretionary jurisdiction on the certification issue, and decide it in the pending mandamus case.

**B. The lower courts correctly found that Lane failed to meet his burden of proof to establish a compensable claim.**

The Court should decline to accept jurisdiction over Lane's second proposition of law because it directly contradicts nearly a century of well-established Ohio workers' compensation law. A trial under R.C. 4123.512 is a trial *de novo*. *Youghioghney & Ohio Coal Co. v. Mayfield*, 11 Ohio St.3d 70 (1984). The claimant bears the burden of proof and the burden to go forward with the case, even if the employer appealed the claim's allowance into court. *Klamfoth v. Advanced Founds. Solutions*, 10th District No. 08AP-934, 2009-Ohio-4547, ¶ 14. The claimant must prove his whole case, including both proof that he was injured in the course and scope of his employment, *and* medical proof that he sustained compensable injuries.

Here, Lane wrongly contends that Newark's original certification of his claim precludes the necessity to present medical evidence in an appeal under R.C. 4123.512. In that regard, the court of appeals correctly framed the issue, and held that the claim certification did not excuse Lane from presenting medical evidence:

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.

Decision at ¶ 56. In other words, the exercise of continuing jurisdiction nullified the certification, and Lane was therefore required, as are all claimants, to present medical evidence at the R.C. 4123.512 trial, proving his injuries.

The Court should decline review of both propositions of law.

## LAW AND ARGUMENT

### **Industrial Commission's Response to Appellant Lane's Proposition of Law No. 1:**

*A self-insured employer's certification of a condition in a workers' compensation claim does not preclude the Industrial Commission's exercise of continuing jurisdiction upon the identification of new and changed circumstances.*

Lane's arguments are without merit and should be rejected here. First, the Court cannot reach his first proposition in the context of this case, as a question of continuing jurisdiction is inappropriate for a R.C. 4123.512 proceeding. *Liposchak*, 90 Ohio St.3d at 279; *Benton*, 123 Ohio St.3d at 350. The decision below should be upheld on these grounds alone.

Second, his first proposition of law, even if the Court could reach it, is unsupported by law or reasonable argument. Lane argues that a self-insured employer's certification of a condition operates as a permanent waiver to an exercise of continuing jurisdiction. This proposition is supported nowhere in the statutes or case law and should be rejected as an unwarranted contraction of the commission's power of continuing jurisdiction over each case.

Lane relies exclusively on *Lewis v. Trimble*, 79 Ohio St.3d 231, 247 (1997) to argue that the commission may exercise continuing jurisdiction over a self-insured employer's certification only in "the case of fraud." In *Lewis*, the Supreme Court found that the self-insured employer had procedurally waived its statute of limitations defense when it moved the commission to accept a condition after the two-year deadline in R.C. 4123.84. The modification of a prior certification finding was not at issue in *Lewis*, and Lane's argument ignores the commission's ability to exercise jurisdiction over claims in a variety of situations, not just when fraud exists. Most importantly, nowhere in any statute or case has the General Assembly or this Court distinguished a self-insured's certification from any other circumstance with respect to continuing jurisdiction.

In *Lewis*, the injured worker moved to amend his claim to include two additional psychological conditions. *Id.* at 231. The employer sent the injured worker to an independent medical exam, and the doctor opined that one of the conditions was related to his work injury. *Id.* As a result of the doctor's exam, the employer filed an administrative motion accepting an amendment of the claim to include the additional condition diagnosed by the doctor. After the employer filed the motion, it alleged that it discovered medical documents showing that the injured worker had been diagnosed with a similar condition years before. *Id.* At the commission hearings, the employer argued that the two-year statute of limitations in R.C. 4123.84 barred the injured worker's request to add the condition to his claim. *Id.* The commission rejected this argument and amended the injured worker's claim. The employer then appealed the matter into common pleas court under R.C. 4123.512.

The Supreme Court rejected the employer's statute of limitations defense, finding that the employer waived the defense the moment it filed the administrative motion accepting the additional psychological condition. *Id.* at 247. The Court held that the employer made a conclusive determination as to the condition when it moved to accept the condition despite that it occurred after the two-year statute of limitations. *Id.* at 248.

*Lewis* did not involve the commission's exercise of continuing jurisdiction. Rather, the matter was adjudicated administratively following the employer's motion to accept an additional condition in the claim, and then appealed into court as a right to participate issue. Lane blurs this procedural history and ignores its significance. The *Lewis* Court never adjudicated whether the commission could assume jurisdiction following an allegation of new and changed circumstances because it never had to—simply, the issue was never before the Court. Thus, the Court's discussion related to the waiver of defenses or the conclusiveness of an employer's

allowance of a condition is inapplicable here. Unlike *Lewis*, once the commission assumed jurisdiction over Lane's claim, it nullified the employer's certification. This is wholly unlike *Lewis* where the employer's acceptance of the condition remained intact throughout the administrative proceedings.

Generally, the commission is authorized to exercise continuing jurisdiction, and to make such modification or change with respect to former findings or orders as is justified. R.C. 4123.52. This Court has recognized that the commission is vested with broad, although not unlimited, authority to exercise this continuing jurisdiction. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990. The *Gobich* Court noted that "[c]ontinuing jurisdiction can be invoked only where one of these preconditions exists: (1) new and changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, or (5) error by an inferior tribunal." *Id.* at ¶ 14. Given this explicit statutory authority to modify former findings, an employer's certification of the claim does not bar the commission from exercising continuing jurisdiction over it.

In fact, "[c]ertification by the employer in state fund cases shall not be determinative of compensability. Every such claim is subject to administrative review as to compensability." Ohio Adm. Code 4123-3-08(B)(3). Similarly, continuing jurisdiction applies even where the employer is self-insured, otherwise the employees of self-insured employers would be treated differently from those of state fund employers. *State ex rel. Saunders*, 52 Ohio St.3d at 86. As the appellate court aptly noted, "[i]f 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." Decision at ¶ 52.

In short, Lane can no longer rely on a certification that has been set aside by the commission's proper exercise of continuing jurisdiction. The Court should affirm.

**Industrial Commission's Response to Appellant Lane's Proposition of Law No. 2:**

*A self-insured employer's certification of a condition in a workers' compensation claim does not waive the claimant's duty to present medical evidence in a R.C. 4123.512 appeal, where the employer's certification has been superseded by the Industrial Commission's exercise of continuing jurisdiction under R.C. 4123.52.*

Again, even if the Court could reach Lane's second proposition, it should affirm. Lane's second proposition of law, that a self-insured employer's certification of a medical condition precludes the necessity that the claimant present medical evidence in a R.C.4123.512 case, also flies in the face of the statutes and case law. Once the commission has found sufficient reason to exercise continuing jurisdiction, and overturns the employer's previous certification, that certification can no longer be used for anything, much less to allow the claimant to forego presenting medical evidence in a R.C. 4123.512 case.

Here, once the commission hearing officers found new and changed circumstances sufficient to invoke the commission's continuing jurisdiction, the commission re-examined the merits of Lane's claim. Based on the arrest records from the weekend previous to the alleged work injury, and medical evidence Newark submitted in the administrative hearing, the SHO found that Lane did not suffer an injury at work. Thus, once the commission had exercised continuing jurisdiction, by definition, the certification was no longer in force. The R.C. 4123.512 appeal therefore was correctly treated as any other: Lane had to prove all aspects of his claim, including medical proof of compensable injuries. Had the commission declined to exercise continuing jurisdiction, and Newark's certification remained valid, Lane would have had no basis to appeal under R.C. 4123.512. Thus, Lane is really challenging the validity of the commission's exercise of continuing jurisdiction.

Rather than submit evidence to support his claimed right to participate in the workers' compensation system, Lane relied solely on Newark's original certification of his claim. He

argued that the commission erred in vacating the certification and assuming jurisdiction over the claim, an issue the trial court lacked subject matter jurisdiction to hear.

Lane cites several cases, including *Lewis v. Trimble*, 79 Ohio St.3d 231, for the proposition that certification by a self-insured employer is definitive, and precludes the need for the claimant to present evidence at trial. However, neither *Lewis* nor any of the other cases cited by Lane excuse the claimant from his burden of proof. Moreover, none of the cited cases prohibit the commission from assuming jurisdiction over claims that were previously certified by a self-insured employer.

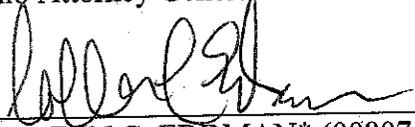
Lane cannot rely on a certification nullified by a proper exercise of continuing jurisdiction. The Court should affirm.

**CONCLUSION**

For the above reasons, this Court should decline jurisdiction.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of Appellee, Administrator, Bureau of Workers' Compensation was served by U.S. mail this 2nd day of April, 2012, upon the following counsel:

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