[Cite as *Cosgrove v. Omni Manor*, 2017-Ohio-646.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ELIZABETH COSGROVE, PLAINTIFF-APPELLEE, VS. OMNI MANOR et al., DEFENDANT-APPELLANT.	)))))))))	CASE NO. 15 MA 0207 OPINION AND JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS: Application for Reconsideration
Motion to Certify a Conflict

JUDGMENT: Denied.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:
Hon. Carol Ann Robb
Hon. Timothy P. Cannon of the Eleventh District Court of Appeals, Sitting by assignment.
Hon. Thomas R. Wright of the Eleventh District Court of Appeals, Sitting by assignment.

Dated: February 16, 2017

[Cite as *Cosgrove v. Omni Manor,* 2017-Ohio-646.]
PER CURIAM.

{¶1} Defendant-Appellant Omni Manor, Inc. ("the employer") has filed a timely application for reconsideration of our December 16, 2016 judgment, wherein we affirmed a jury verdict and judgment rendered in favor of Plaintiff-Appellee Elizabeth Cosgrove ("the worker"). The employer has also filed a timely motion to certify a conflict. For the following reasons, we find no obvious error in our decision, and we deny the application for reconsideration. In addition, the motion to certify a conflict is denied as we do not find the cited cases contain dispositive holdings on the same rule of law set forth in this case and/or they are distinguishable for various reasons.

{¶2} This case originated in the Mahoning County Common Pleas Court upon the worker's appeal of a workers' compensation decision. The case was tried to a jury with a magistrate presiding. The jury was presented with three verdict forms, each describing an injury discussed in the trial testimony and named in the petition filed after the notice of appeal pursuant to R.C. 4123.512(D). The employer did not object to the testimony or the verdict forms. The jury found in favor of the worker for L3-L4 right-sided disc extrusion (herniation) with migrating free fragment (and found against the worker for two levels of stenosis contained in the other two verdict forms).

{¶3} In objecting to the magistrate's memorialization of the jury verdict, the employer claimed the court lacked subject matter jurisdiction because the injury for which the verdict was rendered was not the injury adjudicated (and denied) administratively. This defense was set forth in the employer's answer but was not mentioned again until the employer objected to the magistrate's decision. The trial court overruled the objection and entered judgment for the worker in accordance with the jury verdict.

{¶4} In appealing to this court, the employer argued the injury was a claim which never proceeded through the administrative process, claiming only lumbar strain/sprain was administratively adjudicated. The parties disputed whether the extrusion/herniation injury proceeded through the administrative process and, if not,

whether the Supreme Court's decision in *Ward* prohibited a verdict on the extrusion/herniation injury. *See Ward v. Kroger Co.,* 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155 (concluding the scope of an R.C. 4123.512 appeal is limited to the medical conditions addressed in the order from which the appeal was taken). We opined the employer would have been justified in arguing against submission of a jury verdict form for the extrusion/herniation condition before or during trial. *Cosgrove v. Omni Manor, Inc.*, 7th Dist. No. 15 MA 0207, 2016-Ohio-8481, ¶ 44.

{¶5} However, we concluded the employer waived the issue by allowing the injury to be tried and submitted to the jury without maintaining the defense regarding the scope of the trial. *Id.* at ¶ 45-47. In *Ward*, the issue was raised prior to trial when the employer opposed the plaintiff's motion to amend the complaint to add a different injury. *Ward,* 106 Ohio St.3d 35 at ¶ 2. We pointed out the *Ward* Court noted how some appellate decisions hold a trial court exceeds its "jurisdiction" if it hears a condition which was not administratively adjudicated. *Cosgrove*, 7th Dist. No. 15 MA 0207 at ¶ 49. The Supreme Court said these courts "come closer to the mark, although their reasoning requires some amplification." *Id.*, quoting *Ward,* 106 Ohio St.3d 35 at ¶ 9. Notably, the *Ward* Court did not then refer to subject matter jurisdiction or a void judgment.

{¶6} In the case at bar, we recognized a lack of subject matter jurisdiction can be challenged at any time as it renders a judgment void ab initio. *Id.* at ¶ 49, citing *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 17 and *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11. We then concluded the issue (concerning the scope of the trial in relation to the scope of the administrative proceeding denying the right to participate) was not a question of subject matter jurisdiction. We pointed out the use of the word "jurisdiction" does not necessarily refer to subject matter jurisdiction; besides the matter of personal jurisdiction, the use of the word "jurisdiction" is often used to refer to a third category of jurisdiction: the court's jurisdiction over a particular case. *Cosgrove*, 7th Dist. No. 15 MA 0207 at ¶ 50, citing *Kuchta*, 141 Ohio St.3d 75 at ¶ 18

(noting how unspecified use of the word leads to confusion) and *Pratts*, 102 Ohio St.3d 81 at ¶ 12, 33.

{¶7} This court pointed out how subject matter jurisdiction is to be "determined without regard to the rights of the individual parties involved in a particular case" whereas individual rights are considered when ascertaining the third category of jurisdiction. *Cosgrove*, 7th Dist. No. 15 MA 0207 at ¶ 51, quoting *Kuchta*, 141 Ohio St.3d 75 at ¶ 19. The third category of jurisdiction pertains to "the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction." *Kuchta*, 141 Ohio St.3d 75 at ¶ 19. Where there is subject matter jurisdiction "any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void." *Id.* We concluded the issue in *Ward* dealt with a court's authority to proceed or rule in a particular case within the court's subject matter jurisdiction. *Cosgrove*, 7th Dist. No. 15 MA 0207 at ¶ 52.

{¶8} The employer disagrees with our conclusion and seeks reconsideration under App.R. 26(A)(1). The standard for reviewing an application for reconsideration is whether the application calls to the attention of the court a legally unsupportable holding or an obvious error in its decision, or whether it points to an issue that should have been but was not fully considered. *See, e.g., Niki D'Atri Ents. v. Hines*, 7th Dist. No. 13 MA 0057, 2014-Ohio-803, ¶ 3. An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusion reached and the logic used by an appellate court. *Id.*

{¶9} The employer believes our holding constituted an obvious error. The employer insists the trial court lacked subject matter jurisdiction over the extrusion/herniation condition, claiming the worker failed to comply with the requirements for judicial review set forth in the R.C. 4123.512. The employer relies on four Ohio Supreme Court cases, a case from this court, and cases from various other appellate courts. (As some cases are not recent, we note the requirements for a workers' compensation appeal contained in R.C. 4123.512 were once contained in

R.C. 4123.519.) The worker's response distinguishes this case (where the claim was completely denied administratively) from cases where a condition was allowed below.

{¶10} In one case cited by the employer, the Supreme Court found a lack of subject matter jurisdiction where the notice of appeal was not filed in "the common pleas court 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" as required by R.C. 4123.519. *Jenkins v. Keller*, 6 Ohio St.2d 122, 216 N.E.2d 379 (1966). Since the contract of employment was entered into in Maryland and decedent was killed in that state, the *Jenkins* Court held the Mahoning County Common Pleas Court lacked subject matter jurisdiction. *Id.* at 126 (and the matter could be raised for the first time on appeal). We do not find this holding on point.

{¶11} In another case cited by the employer, the Supreme Court found the trial court did not have subject matter jurisdiction over an executor's appeal because the worker's legal representative had no right to appeal under R.C. 4123.519. *Breidenbach v. Mayfield*, 37 Ohio St.3d 138, 141, 524 N.E.2d 502, 504 (1988). However, this decision was overruled by *State ex rel. Nossal v. Terex Div. of I.B.H.*, 86 Ohio St.3d 175, 712 N.E.2d 747 (1999).

{¶12} The employer relies on the *Cadle* case and states the reference to jurisdiction included subject matter jurisdiction because the Court spoke of conferring jurisdiction on the trial court by strictly complying with the mandatory appeal requirements of the specific statute for appealing workers' compensation cases. *Cadle v. Gen. Motors Corp.*, 45 Ohio St.2d 28, 32-33, 340 N.E.2d 403 (1976), paragraphs one and two of syllabus. Likewise, the employer's certification motion claims the Supreme Court has consistently required strict compliance with the statutory requirements for appealing a workers' compensation case to the common pleas court.

{¶13} However, *Cadle* was overruled in its entirety by *Fisher v. Mayfield*, 30 Ohio St.3d 8, 505 N.E.2d 975 (1987). *See also Mullins v. Whiteway Mfg. Co.*, 15 Ohio St.3d 18, 21, 471 N.E.2d 13 (1984) ("the provision in R.C. 4123.519 requiring inclusion of the date of the decision appealed from in a workers' compensation notice

of appeal is non-jurisdictional. R.C. 4123.519 shall be liberally construed, as required by R.C. 4123.95. To this extent, we thus overrule the test set forth in paragraph one of the syllabus in *Cadle*.") *Fisher* held: "The jurisdictional requirements of R.C. 4123.519 are satisfied by the filing of a timely notice of appeal which is in substantial compliance with the dictates of that statute." *Id.* at paragraph one of syllabus. "Substantial compliance for jurisdictional purposes occurs when a timely notice of appeal filed pursuant to R.C. 4123.519 includes sufficient information, in intelligible form, to place on notice all parties to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities." *Id.* at paragraph two of syllabus. Accordingly, strict compliance is not required. Regardless, there is no contention the notice of appeal here did not satisfy these general requirements discussed in these cases.

{¶14} The employer also cited a Supreme Court case involving an original action filed against a trial judge because the judge failed to dismiss a workers' compensation appeal on an issue construed as involving "the extent of disability" (which was not appealable under R.C. 4123.519). The Supreme Court denied the request for a writ, observing: "this court will not assume that the appellee-judge is unaware of the limitations placed upon the *subject-matter jurisdiction* of his court by R.C. 4123.519." (Emphasis added). *State ex rel. McSalters v. Mikus*, 62 Ohio St.2d 162, 163, 403 N.E.2d 1215 (1980). The employer emphasizes the reference to subject matter jurisdiction. Yet, the case at bar was not an attempt to appeal a decision on the extent of disability. The parties agree this case involved only the right to participate.

{¶15} Next, the employer cites this court's holding: "a court of common pleas lacks subject matter jurisdiction over a workers' compensation appeal when a claimant attempts to take the denial of his or her claim directly from the staff hearing officer to the court of common pleas, skipping the third level of administrative review contrary to R.C. § 4123.512 and R.C. § 4123.511." *Dixon v. Conrad*, 7th Dist. No. 04 MA 114, 2005-Ohio-6932, ¶ 11. *See also Bentle v. Worthington Custom Plastics*, 12th Dist. No. CA94-08-069 (Dec. 27, 1994) (trial court properly dismissed workers'

compensation appeal for lack of subject matter jurisdiction where the worker never appealed staff hearing officer's decision to Industrial Commission). The employer equates this concept with the assertion of a particular injury for the first time within the complaint filed at the trial court level even though it may not have been considered during the administrative stages. However, the worker in the case at bar filed a notice of appeal from an Industrial Commission order denying the right to participate and did not skip any stage in filing the appeal.

{¶16} The employer's argument depends upon a supposition that all requirements of the statute deal with jurisdiction (and the same type of jurisdiction). Pursuant to R.C. 4123.512(A), "The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case * * *." Furthermore: "Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal." R.C. 4123.512(A). There is no dispute a notice of appeal was properly filed from an appealable order in this case. The dispute lies in the rendering of a verdict for the worker on a certain injury asserted in the complaint and established in testimony.

{¶17} However, it is the notice of appeal to the trial court that confers jurisdiction, not the complaint thereafter filed. *See* R.C. 4123.512(A) ("The filing of the notice of the appeal with the court is the only act required to perfect the appeal."). *See also* R.C. 4123.512(D) ("The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action."). By way of further example, division (B) of R.C. 4123.512 initially states: "The notice of appeal shall state the names of the administrator of workers' compensation, the claimant, and the employer; the number of the claim; the date of the order appealed from; and the fact that the appellant appeals therefrom." The next

sentence of this same division, contained in a separate paragraph, provides the administrator shall be made a party. R.C. 4123.512(B).

{¶18} Although the first paragraph was considered jurisdictional, the Supreme Court found the mandatory requirement in the separate paragraph was non-jurisdictional. "Because the statute's jurisdictional requirements are explicitly limited to filing a notice of appeal, the additional requirements in the second paragraph of subsection (B) are not jurisdictional." *Spencer v. Freight Handlers, Inc.*, 131 Ohio St.3d 316, 2012-Ohio-880, 964 N.E.2d 1030, ¶ 17, 21, 23 ("the administrator need not be included in the notice of appeal to invoke the subject-matter jurisdiction of the court"). In accordance, not every requirement in R.C. 4123.512 is jurisdictional; even the same division of the statute can contain both jurisdictional and non-jurisdictional items. Notably, the *Spencer* Court added:

> The inclusion of the administrator as a party is one of many nonjurisdictional requirements for a workers' compensation appeal to proceed. For example, a claimant is also required to file a petition describing the underlying facts and demonstrating a cause of action within 30 days of filing the notice of appeal. R.C. 4123.512(D). Although an appellant's failure to comply with R.C. 4123.512(D) could lead to dismissal of the appeal, that does not make the requirement jurisdictional.

Id. at ¶ 22, citing *Singer Sewing Mach. Co. v. Puckett*, 176 Ohio St. 32, 36-37, 197 N.E.2d 353 (1964) (holding the requirement to file the petition within thirty days of the notice of appeal was not jurisdictional; "the purpose of requiring a petition by the claimant is to give orderliness to the appellate proceeding. The court already has full jurisdiction over the action by virtue of the timely filed notice of appeal").

{¶19} As the petition filed under R.C. 4123.512(D) is non-jurisdictional, the injuries asserted in said petition cannot deprive the court of subject matter jurisdiction it already acquired via the notice of appeal from the administrative denial of the right to participate. We do not believe our decision refusing to find a lack of subject matter jurisdiction was an obvious error. The employer is merely disagreeing with our

resolution of its appellate argument. The notice of appeal from an appealable order of the Industrial Commission conferred jurisdiction on the common pleas court. Whether the worker's petition and/or the jury verdict broadened the permissible scope of the trial (which remained a trial on the right to participate) is a different issue that did not implicate subject matter jurisdiction. Any *Ward* violations in the assertion of injuries in the petition which vary from those addressed administratively involve the trial court's authority to proceed or rule on a particular case (the third category of jurisdiction).

{¶20} This leads to the employer's motion to certify a conflict. Pursuant to rule, a motion to certify a conflict "shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed." App.R. 25(A). Pursuant to the Ohio Constitution: "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." Article IV, Section 3(B)(4) of the Ohio Constitution.

{¶21} Initially, we note the employer's motion to certify claims our decision conflicts with the Supreme Court cases discussed in the application for reconsideration as to whether various aspects of R.C. 4123.512 (or former R.C. 4123.519) are jurisdictional. Yet, a motion to certify a conflict must show conflicts between appellate districts; a case cannot be certified to the Ohio Supreme Court based on an alleged failure to apply Supreme Court law. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 598-599, 613 N.E.2d 1032 (1993). The employer also suggests our decision conflicts with appellate cases which cite the relied-upon Supreme Court cases. This would still be the assertion of a conflict with a Supreme Court case. See *Whitelock*, 66 Ohio St.3d at 598-599.

{¶22} The employer asks this court to certify a conflict between our decision and other appellate decisions "on the issue of whether compliance with the requirements set forth in R.C. 4123.512 is necessary for subject matter jurisdiction,

which is not waivable and can be asserted for the first time on appeal, or whether these requirements merely confer the court of common pleas with 'jurisdiction over a particular case,' which is waivable." The employer's framing of the issue is overly broad. R.C. 4123.512 contains various requirements, not all of which are jurisdictional.

{¶23} In order to certify a conflict, the asserted conflict on "a rule of law" set forth in the case of another appellate district *must* be upon "the same question" ruled upon by this court in the current appeal. *Id.* at 596. The employer lists cases which are not on point. For instance, our decision does not conflict with a decision finding a lack of subject matter jurisdiction where the worker filed a notice of appeal in the common pleas court of the wrong county. *McKown v. Mayfield*, 11th Dist. No. 1829 (June 30, 1988) (finding the issue was one of subject matter jurisdiction, not venue). We also note the *McKown* decision has little value since R.C. 4123.512 now provides: "If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction."

{¶24} Likewise, our decision has no relation to a case where a worker amended his complaint filed in a worker's compensation appeal to add an intentional tort claim against the Industrial Commission and the Bureau of Workers' Compensation. In addressing the worker's assignment of error on subject matter jurisdiction, the Tenth District found the common pleas court lacked subject matter jurisdiction because the court of claims has exclusive original jurisdiction over claims against the state for monetary damages. *Canady v. Industrial Comm.*, 10th Dist. No. 99AP-930 (May 23, 2000) (and the analysis under the first assignment of error contested the trial court's grant of the employer's motion to dismiss *for failure to state a claim* against the employer for intentional tort; it did not relate to subject matter jurisdiction).

{¶25} The employer also cites *Helton* where: the Industrial Commission refused to hear the worker's appeal of the staff hearing officer's decision; the worker

then filed only a "complaint" in the common pleas court; and the appellate court held the trial court properly dismissed the case for lack of subject matter jurisdiction because the worker never invoked the jurisdiction of the common pleas court by filing a notice of appeal as required by R.C. 4123.512. *Helton v. Administrator, Bur. of Workers' Comp.*, 10th Dist. No. 14AP-935, 2015-Ohio-3570, ¶ 3, 13. This case is not in conflict with our ruling. In fact, *Helton* explained: "Pursuant to R.C. 4123.512, the only act required to perfect an appeal is the timely filing of the notice of appeal. * * * Thus, while a complaint typically is the document that initiates an action in a court, under R.C. 4123.512, the notice of appeal is the document that confers jurisdiction upon the trial court." *Id.* at ¶ 8.

{¶26} Nor is the Third District's *McBride* case on point. In that case, a worker received benefits for a crushed and fractured leg, and the Indiana employer did not appeal. When an additional condition was allowed later, the employer appealed to the trial court, claiming it was not amenable to Ohio's workers' compensation law. The employer also alleged the worker's participation in Indiana's insurance fund precluded benefits under Ohio's fund so that the common pleas court lacked jurisdiction over the subject matter of the case. The Third District framed the issue as one of personal jurisdiction and found the employer already submitted to personal jurisdiction in Ohio. *McBride v. Coble Express, Inc.*, 92 Ohio App.3d 505, 509-511, 636 N.E.2d 356, 359 (3d Dist.1993). The appellate court recited how subject matter jurisdiction is conferred on the common pleas court on matters concerning the right to participate or to continue to participate. *Id.* at 511. The court noted "the additional award of benefits * * * is a 'new' determination of McBride's right to continuing participation in the fund, and not a decision as to his extent of disability. The common pleas court thus has subject matter jurisdiction to hear an appeal on that part of the decision, pursuant to R.C. 4123.519 * * *." *Id.* at 511-512. This does not portray a conflict on a rule of law expressed by this court in the current case.

{¶27} In another case cited in the employer's certification motion, a court found a lack of subject matter jurisdiction after concluding the administrative decision being appealed did not involve a worker's right to participate in the workers'

compensation fund. *Gilbraith v. Autozone, Inc.*, 4th Dist. No. 13CA1, 2014-Ohio-2347, ¶ 21, 27 (where the parties agreed a denial of the right to participate must foreclose future compensation to be appealable). Here, it was not disputed the right to participate was denied and the order was appealable. *Gilbraith* did not concern an appealable order followed by a petition listing an additional injury (which was raised but allegedly not considered administratively).

{¶28} As aforementioned, the employer also equates the situation at hand with cases where a worker filed a notice of appeal from an order which was not fully appealed through the administrative stages. *See Bentle*, 12th Dist. No. CA94-08-069 (trial court properly dismissed workers' compensation appeal for lack of subject matter jurisdiction where the worker never appealed staff hearing officer's decision to the Industrial Commission). However, we explained the situation is distinguishable here as the worker appealed a staff hearing officer decision to the Industrial Commission and subsequently filed a notice of appeal to the common pleas court from an appealable order.

{¶29} In another case, a worker (whose initial claim was allowed) sought to add eight additional conditions: two conditions were allowed, and six were not allowed. The worker appealed; the employer did not appeal. The Eleventh District noted, "Beaumont's appeal encompassed only that part of the SHO's order that was adverse to him, i.e., the denial of his request for recognition of six of his eight additional medical conditions." *Beaumont v. Kvaerner N. Am. Constr.*, 11th Dist. No. 2013-T-0047, 2013-Ohio-5847, ¶ 14. However, the context of the statement is important; the court then stated, "The only way the question of participation regarding the two additional conditions that the SHO had allowed could be adjudicated in the common pleas court would be for [the employer] to take an appeal from the SHO's order." *Id.* The Eleventh District then concluded the worker's notice of appeal did not vest the trial court with jurisdiction to address *the employer's attempt to appeal* the allowance of the two conditions. *Id.* at ¶ 15. This is not the same rule of law we made pronouncements on in the current case.

{¶30} The employer also mentions the Sixth District's recent decision in *Young v. Craig Transp. Co.*, 6th Dist. Nos. WD-14-068, WD-14-073, WD-14-077, 2016-Ohio-1401, 62 N.E.3d 855. In *Young*: a district hearing officer allowed the worker to participate for concussion with brief coma, cervical sprain/strain, and open head wound; the district hearing officer also found the Ohio action was not barred by R.C. 4123.542 due to the worker's receipt of Indiana benefits; a staff hearing officer found the action was barred by R.C. 4123.542; the Industrial Commission refused to hear the case; and the worker appealed to the common pleas court. The trial court granted summary judgment in favor of the worker, finding her claim was not barred and she was entitled to participate for concussion, cervical sprain/strain, and open head wound. (The trial court eliminated "with brief coma" from the concussion injury upon finding no evidence on a loss of consciousness.)

{¶31} The BWC and the employer appealed, arguing the trial court erred in granting summary judgment for the worker and failing to grant summary judgment in their favor as the worker's action was barred by R.C. 4123.542. The Sixth District sustained the assignment of error for a reason different than was raised and concluded the trial court lacked subject matter jurisdiction to hear the worker's appeal because the administrative decision (using R.C. 4123.512 to bar the action) did not involve the right to participate and was therefore not appealable. *Young*, 6th Dist. Nos. WD-14-068, WD-14-073, WD-14-077 at ¶ 22, 25-26, 36, 39. This was the dispositive holding in *Young*.

{¶32} The BWC alternatively argued the trial court lacked subject matter jurisdiction to find the worker was entitled to participate for concussion. *See id.* at ¶ 16, 27. The BWC noted the condition initially allowed was "concussion with brief coma," which is not the same medical condition as "concussion." *Id.* at ¶ 27. Although the Sixth District already ruled the trial court lacked jurisdiction over the entire appeal, the court proceeded to address this issue.

{¶33} The Sixth District quoted from *Ward*: "R.C. 4123.512 provides a mechanism for judicial review, not for amendment of administrative claims at the judicial level"; and a "claimant in an R.C. 4123.512 appeal may seek to participate in

the Workers' Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal was taken." *Id.* at ¶ 28, quoting *Ward*, 106 Ohio St.3d 35 at ¶ 11, syllabus. The *Young* court found the trial court's deletion of the diagnosis "brief coma" to be "a medical decision as to the extent of Young's claim, which exceeds the scope of its permissible review * * *." *Young*, 6th Dist. Nos. WD-14-068, WD-14-073, WD-14-077 at ¶ 29. "Accordingly, we find that the trial court did not have jurisdiction to decide that Young suffered from a 'concussion' as a result of her work-related injury." *Id.* We note the court did not specifically use "subject matter jurisdiction" here. We also note the matter was not tried with consent and submitted to a jury, i.e., there were no waiver concerns (if the issue is not subject matter jurisdiction). Still, the court characterized the assignment of error as well-taken, and the assignment of error raised subject matter jurisdiction. *See id.* at ¶ 16, 27, 29. (In addition, the court equated the issue with "extent of disability" and previously explained such issue is not in the common pleas court's jurisdiction by way of appeal.) The *Young* court's ruling on this matter could be considered in conflict with our holding.

{¶34} Yet, the *Young* court had already ruled the trial court lacked jurisdiction over the entire appeal for a different reason (unrelated to this case). Therefore, the second holding was not dispositive or necessary and was dicta. A case cannot be certified unless it sets forth a conflicting "rule of law" on the same question. *Whitelock*, 66 Ohio St.3d at 596. This test is not satisfied if the statement relied upon was dicta. *See, e.g., Olynyk v. Scoles,* 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254, ¶ 19-20; *State v. Burke*, 10th Dist. No. 04AP-1234, 2006-Ohio-1026, ¶ 18-20; *Berdyck v. Shinde*, 128 Ohio App.3d 68, 89, 713 N.E.2d 1098 (6th Dist.1998).

{¶35} Finally, the employer quotes the following from a Ninth District case: "Under Ohio law, in an appeal from an Industrial Commission's ruling, the subject matter jurisdiction of the court of common pleas is limited only to those matters heard and decided by the commission." *March v. Associated Materials, Inc.*, 9th Dist. No.

19413 (Nov. 3, 1999).[1] However, the issue before the *March* court was not whether the court lacked subject matter jurisdiction to allow participation for an injury which was not the one denied administratively. Rather, the jury rendered a verdict finding March entitled to participate *on the two conditions which were previously disallowed administratively*. The issue before the *March* court was whether the jury was prejudicially misled when a doctor mentioned a condition which was not being tried. The court found the jury already heard similar testimony without objection and concluded there was no plain error or prejudice. The court pointed out the jury rendered verdict only on the two conditions previously disallowed and concluded: "If the result of the trial would have been different, perhaps the Defendant could have claimed prejudice and plain error." We emphasize the use of "perhaps" and the reference to prejudice, i.e., the court did not conclude the defendant could have raised subject matter jurisdiction if the trial resulted in a jury verdict for an additional condition.

{¶36} Any conflict concerning the issue raised by the application for reconsideration cannot be certified if it was not dispositive to the case alleged to be in conflict. *See State ex rel. Davet v. Sutula*, 131 Ohio St.3d 220, 2012-Ohio-759, 963 N.E.2d 811, ¶ 2. We do not find the statement from the March case was utilized by that court to reach the decision in the case. We also note the worker's contention that the cited cases are not factually on point and do not involve a workers' compensation appeal where no claim was allowed administratively.

{¶37} Although we believe this appeal involves an important issue and a definitive decision by the Ohio Supreme Court would be desirable, the cases cited by

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[1] The Ninth District cited *Hausch* and *Mims* for this holding; however, neither case mentioned subject matter jurisdiction. In fact, the Ninth District's *Hausch* case framed the issue as discretionary. *Hausch v. Alsides, Inc.*, 9th Dist. No. 2730-M (Aug. 12, 1998) ("Because Hausch's amended complaint sought to introduce issues that were not before the Industrial Commission when it heard Hausch's claim, the trial court did not abuse its discretion by denying her leave to amend her complaint."). The *Mims* case merely held the worker's appeal does not permit review of a condition for which he received a favorable ruling below, meaning the employer was required to appeal in order to contest that condition. *Mims v. Lennox-Haldeman Co.*, 8 Ohio App.2d 226, 228-29, 199 N.E.2d 20 (8th Dist.1964) (and noting the petition is not jurisdictional)

the employer are not sufficiently on point to allow this court to certify a conflict. The Supreme Court has respectfully admonished the appellate courts to refrain from certifying conflict unless there is "a true and actual conflict on a rule of law" *Whitelock*, 66 Ohio St.3d at 599. In accordance, the motion to certify a conflict is denied.

{¶38} For the foregoing reasons, the employer's application for reconsideration and motion for certification of a conflict are denied.

Robb, P.J., concurs.

Cannon, J., concurs.
Eleventh District Court of Appeals, sitting by assignment.

Wright. J., concurs.
Eleventh District Court of Appeals, sitting by assignment.