ORIGINAL

In the

Supreme Court of Ohio

STATE OF OHIO, ex rel. JAMEY D. BAKER, Relator-Appellant, vs. COAST TO COAST MANPOWER LLC, Respondent-Appellee, and INDUSTRIAL COMMISSION OF OHIO, Respondent-Appellant.	: : : : : : : : : : : : : : :	CASE NO. 2010-0211 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 09AP-0287

MERIT BRIEF OF APPELLANT, INDUSTRIAL COMMISSION OF OHIO

THEODORE A. BOWMAN (009159)
Gallon, Takacs, Boissoneault &
Schaffer Co., L.P.A.
3516 Granite Circle
Toledo, Ohio 43617
419-843-2001
419-843-6665 fax

Counsel for Appellant,
Jamey D. Baker

AMY S. THOMAS (0074380)
Reminger Co. L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215
614-232-2627
614-232-2410 fax

Counsel for Appellee,
Coast to Coast Manpower LLC

RICHARD CORDRAY
Ohio Attorney General

COLLEEN C. ERDMAN (0080765)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
614-466-6696
614-752-2538 fax
colleen.erdman@ohioattorneygeneral.gov

Counsel for Appellant,
Industrial Commission of Ohio

FILED
MAY 04 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION

This case presents an opportunity for the Court to create a broader and clearer rule involving a loss of vision award than has been established previously. Currently, a claimant who suffers from an immediate loss of his or her natural lens at the time of the injury has sustained a compensable loss of vision. See *State ex rel. Parsec v. Agin*, Franklin App. No. 03AP-165, 2003-Ohio-6186. Additionally, a claimant who is rendered legally blind as a result of the trauma following surgical repair to the eye has sustained a total loss. See *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541. However, it is unclear whether a compensable loss of vision has occurred where a claimant is not rendered legally blind following the initial surgical repair of the eye after a work injury, but a traumatic cataract subsequently develops necessitating the removal of the natural lens. The Appellant, Industrial Commission of Ohio ("commission") urges this Court to hold that a total loss of vision award is warranted where a claimant has lost his or her natural lens due to the trauma and subsequent surgical repair of the eye following a work injury.

A broader rule will provide much needed guidance to the commission and the appellate court. The commission's position provides the needed clarity to counteract the ambiguity with regard to a loss of use award where vision is involved. Moreover, the commission's position is consistent with this Court's previous decision in *State ex rel. Kroger v. Stover* (1987), 31 Ohio St.3d 229, that corrections to vision cannot be considered when making a loss of vision award.

This case is an appeal of right from a workers' compensation mandamus action originating in the Tenth District Court of Appeals. The appellate court found that the commission acted within its discretion when it denied a total loss of use award to Appellant Jamey D. Baker ("Baker"). In upholding the commission's denial of the award, the appellate

court relied on *State ex rel. Dolgencorp, Inc. v. Indus. Comm.*, Franklin App. No. 08AP-1014, 2009-Ohio-6565. *Dolgencorp* is a case with very similar facts, the exception being that the claimant, there, Joanne Simpson, had a cornea transplant rather than an intraocular lens implant, as Baker did. The commission initially granted Simpson's request for a total vision loss award in that matter, and the employer initiated the mandamus action.

During the course of the litigation in both *Dolgencorp* and *Baker*, the commission reconsidered its position and determined that both claimants were entitled to a loss of vision award. Following the appellate court's decisions, Baker, Simpson, and the commission appealed to this Court. The commission asks this Court to reverse the appellate court's decision, here, and to grant the requested writ ordering the commission to grant Baker and Simpson loss of vision awards.

STATEMENT OF THE FACTS AND CASE

Baker sustained an injury to his right eye on November 3, 2007, while working for Appellee, Coast to Coast Manpower, LLC ("Manpower"). (Supplement submitted by Industrial Commission of Ohio at 1, 30, hereinafter "S. ___"). His workers' compensation claim has been allowed for right corneal foreign body, right laceration of eye, and right traumatic cataract. (S. 30).

On the injury date, Baker was seen by ophthalmologist, Jack Hendershot, M.D., following a surgery to remove the foreign body and repair the corneal laceration. (S. 6-10). Baker had been warned that it was possible to develop a traumatic cataract as a result of the corneal laceration repair surgery. (S. 6). Baker, in fact, developed a traumatic cataract for which Dr. Hendershot recommended a cataract extraction. (S. 13-18). Approximately three months after the injury, Baker underwent a cataract extraction with an intraocular lens implant. (S. 19).

Subsequently, Baker moved the Ohio Bureau of Workers' Compensation ("bureau") to grant a right eye total loss of vision award according to R.C. 4123.57(B). At the bureau's request, Baker was examined by Richard Tam, M.D., who opined that Baker's visual impairment amounted to 8%. (S. 22). The bureau asked Dr. Tam to clarify if his initial opinion on Baker's percentage of vision loss was based on post-injury or post-surgical vision (post-surgical meaning post-cataract removal and post-lens implant). Dr. Tam responded that his conclusion of an 8% impairment was based on Baker's post-surgical vision. (S. 24). However, Dr. Tam further concluded that Baker's *post-injury* impairment, based on the available medical records, also demonstrated an 8% impairment. Id. Dr. Tam's amended conclusion was premised on Dr. Hendershot's office note of February 1, 2008, in which he found Baker's right eye visual acuity to be 20/30. (S. 21).

Administratively, a District Hearing Officer ("DHO") granted Baker an 8% permanent partial impairment award on the basis that he suffered an 8% loss of vision, pre-lens implant surgery. (S. 25). The DHO noted that the loss of Baker's lens did not qualify him for a total loss award under *Kroger*. However, a staff hearing officer ("SHO") vacated that order, and granted the loss of vision award, finding that *Parsec* and *AutoZone* applied. (S. 27). On appeal, the full commission heard the matter and vacated the SHO's order. (S. 30). The commission denied Baker's request for a total loss award, despite the loss of his natural lens, because the 8% vision loss fell short of the statutory 25% threshold found in R.C. 4123.57(B). Relying on *Kroger*, the commissioners found that the determining factor for a loss of vision award was the degree of vision lost pre-surgery, meaning pre-lens implant, and the subsequent surgical repair was immaterial to the calculation. Specifically, the commission noted that:

> The pre-cataract surgery demonstrated an uncorrected visual impairment of eight percent (8%), as evidenced in the report from Richard Tam, M.D., dated

> 05/18/2008. Therefore the Commission finds that the pre-surgical threshold of twenty-five (25%) loss of uncorrected vision was not met by the Injured Worker, as required in R.C. 4123.57(B).
>
> The Commission relies on the case of State ex rel. Kroger Company v. Stover (1987), 31 Ohio St.3d 229, Hearing Officer Manual Memo F2, and R.C. 4123.57(B) in support of this decision. In the Kroger case, the Supreme Court determined that a subsequent surgical correction by implantation of artificial lens is not to be considered in determining the percentage of visual loss. The visual loss prior to the surgery is the determining factor for the award.

Id.

Following the full commission's order, Baker filed suit in mandamus, challenging the commission's denial of the loss of vision award. The commission's merit brief supported the order denying the award. However, before the oral argument, the commission further considered the matter and determined that a total loss award was appropriate. As such, it filed objections in Baker's favor after the magistrate recommended that the writ be denied. In overruling those objections, the appellate court adopted the magistrate's recommendation, and relied heavily on another Tenth District decision issued a few days earlier in *Dolgencorp*. In *Dolgencorp*, the court found a loss of use award made under similar circumstances to be an abuse of discretion.

LAW AND ARGUMENT

Standard of review

For the Court to issue of writ of mandamus, Baker must demonstrate that he has a clear legal right to the relief sought and that the commission had a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. To establish a basis for mandamus relief, Baker must show the commission abused its discretion by issuing an order not supported by evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79. Where evidence in the record supports the commission's decision, courts will not disturb the administrative findings in a mandamus action. *State ex rel. Fiber-Lite*

Corp. v. Indus. Comm. (1988), 36 Ohio St.3d 202. Here, a writ of mandamus must issue because the commission's order denying Baker a total loss of use award is not supported by law.

Industrial Commission's Proposition of Law:

> *A total loss of vision award is warranted where a claimant lost his natural lens due to the trauma and subsequent surgical repair of his eye following a work injury.*

1. A review of the case law involving loss of vision awards demonstrates the need for a broader, all-encompassing rule requesting compensation for vision loss due to replacement of the natural lens or cornea.

Kroger and its progeny support an award. In *Kroger*, the claimant was exposed to ammonia and sustained vision loss due to corneal burns and scarring. *State ex rel. Kroger*, 31 Ohio St.3d at 232. The claimant had a right eye corneal transplant which left him with a post-surgical vision loss of 25%, but an uncorrected, pre-surgical vision loss of 80%. Id. at 233. Kroger asked this Court to find that a corneal transplant was not merely corrective, but rather restored vision permanently, thus the claimant's *actual* losses were minimal. Id. at 234. The *Kroger* Court declined to make that finding. Rather, it held that based on current medical practices, a corneal transplant was only corrective, not restorative, and could not be considered in making a loss of use award. Id.

State ex rel. Parsec, supra, *State ex rel. General Electric v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585, and *State ex rel. AutoZone, Inc.*, supra, were all decided in light of this Court's holding in *Kroger* that corrections to vision cannot be considered in making a loss of vision award. In *Parsec*, the claimant's left eye was penetrated by a wire and lens opacity resulted. *State ex rel. Parsec*, 2003-Ohio-6168 at ¶2. The same day, the claimant had surgery to remove his natural lens and had an intraocular lens implanted. The commission found that the claimant had sustained a total loss of his natural vision, and Parsec, Inc. filed suit in mandamus. Id. at ¶¶16, 19. The appellate court found no abuse of discretion in making the total loss award.

It noted that, like the *Kroger* claimant, the *Parsec* claimant's lens was rendered useless and had to be removed. Specifically, the court stated that, "[t]he medical evidence in the record clearly establishe[d] that the work-related injury caused a traumatic cataract to occur in claimant's eye and there is no dispute that, in order to treat claimant's work-related injury, the now opaque lens had to be removed and an artificial lens had to be implanted." Id. at ¶2.

In a per curiam decision by this Court following *Parsec*, a claimant sustained an electrical shock that caused cataracts in both eyes, and the commission found him entitled to a loss of vision award. *State ex rel. General Electric*, 103 Ohio St.3d at 420. The claimant's doctor opined that he was legally blind, as his vision was 20/200 post-injury. Id. The injury eventually required bilateral surgery, some four and five years after the injury date, to remove the cataracts, and the claimant received corneal transplants. Id. at 421. Although the subsequent corneal transplant surgery improved his vision, this Court reiterated that "the statute clearly makes uncorrected vision the applicable standard," while again rejecting the employer's argument that procedure was restorative. Id. at 426.

Lastly, in *AutoZone*, the claimant's eye was perforated by a screwdriver, and as a result of the injury and the subsequent repair, he lost his natural lens. *State ex rel. AutoZone*, 117 Ohio St.3d at 186. His doctor opined that he was legally blind, and he moved for a total loss of vision in his left eye. Id. A commission DHO found that because his vision was 20/200, he had some slight vision remaining, and denied the award. Id. at 187. An SHO reversed, relying on *Parsec*, *General Electric*, and *Kroger* to find that the claimant sustained a total loss of vision in his left eye. Id. The commission refused the employer's appeal, and AutoZone filed suit in mandamus.

Citing *Parsec*, the appellate court found that, if an industrial injury "to the claimant's cornea required its surgical removal and an artificial implant to restore his vision," the resulting

"loss of that natural lens was sufficient to qualify as a total loss of loss of vision for the purposes of R.C. 4123.57(B)." *State ex rel. AutoZone v. Indus. Comm.*, Franklin App. No. 05AP-634, 2006-Ohio-2959, ¶16. Then, citing *General Electric* for support, the appellate court explained that the determination that a corneal transplant is corrective rather than restorative recognizes "that some claimants might receive a full loss award for only a partial loss of vision," a result that is supported by the liberal construction required by R.C. 4123.95 and "'the beneficent intent and the social policies underlying the workers' compensation law.'" Id. at ¶19.

Ultimately, on appeal, this Court stated that "pursuant to R.C. 4123.57(B), when a doctor determines that a claimant is rendered 'legally blind' due to the loss of a lens in an industrial accident, that determination constitutes 'some evidence' that the claimant has suffered 'the loss of sight of an eye.'" Id. at 188. This Court declined to make the distinction between the *AutoZone* claimant whose lens was lost due to the trauma and repair of the eye injury, and the *Parsec* claimant who already had a complete loss of vision which necessitated the implantation of a new lens. Id.

2. A broader rule for vision loss should take into consideration the causal, sequential connection between the work injury and a claimant's vision loss, and it would provide an equitable result to injured workers.

Two reasons necessitate the creation of a broader rule allowing a total loss award where the claimant is not legally blind, but has lost his natural lens due to the trauma and subsequent surgical repair of his eye injury. First, a finding that Baker sustained a compensable total vision loss recognizes the causal connection between the work injury and the loss of his natural lens. Additionally, compensating Baker for the loss of his natural lens is an equitable result that treats such a loss similarly to other scheduled losses.

A. A total vision loss is warranted where the loss of the natural lens is causally related to the work injury.

In regard to the first point, the appellate court, in issuing the *Dolgencorp* decision, understood the commission's argument in its objections to be that the surgical procedure to implant a lens or transplant a cornea is truly divisible into two parts: the first part of the surgery, in which the cornea or lens is removed, is differentiated from the second part of the surgery, in which the transplant or implant occurs. The second half of the surgery is considered a correction to vision and cannot be considered in making an award; thus, the exact point in time in which the claimant has lost the natural tissue, a total loss of vision has occurred.

In contrast, the appellate court chose to view the surgery as one singular process. As such, the court refused to separate out the tissue removal from the "corrective" portion of the surgery. However, viewing the surgery as a singular process ignores the sequential, causal connectional between the injury to Baker's eye, the surgical removal of the foreign body which resulted in the cataract, and the eventual removal of the lens in order to remove the cataract. It is unrealistic and impractical to deny the sequential flow between the original work injury and the removal of Baker's lens, and instead require him to wait until lens opacity set-in before he was permitted to have a lens implant.

The timing of when Baker lost his natural lens is not as significant for compensation purposes as the fact that he lost his lens at all. This Court refused to distinguish between the *AutoZone* claimant, whose lens was lost due to the trauma and repair of the eye injury, similar to Baker, and the *Parsec* claimant who had a complete and immediate loss of vision following the injury which necessitated the implantation of a new lens. In both situations, this Court recognized that a total loss of vision occurred. The choice not to distinguish between the two situations is meaningful and appears to signal that the timing of when the lens becomes useless

is not as important as the fact that the useless lens is causally linked back to the work injury. Specifically, there is little discernable difference between *Parsec* and the instant case, other than a temporal difference in the cataract development. However, again, this timing difference is meaningless. In *Parsec*, the appellate court noted that "[t]he medical evidence in the record clearly establishes that the work-related injury caused a traumatic cataract to occur in claimant's eye and there is no dispute that, in order to treat claimant's work-related injury, the now opaque lens had to be removed and an artificial lens had to be implanted." *State ex rel. Parsec*, 2003-Ohio-6168 at ¶2. Given that both claimants suffered from the formation of a cataract, and the removal of the lens to treat the cataract, the germane question is not how soon the cataract developed following the initial injury, but rather its causal connection to the initial injury. Baker has established that causal connection, and under *Parsec*, a total loss of vision award would be appropriate.

Moreover, it is not significant that Baker was not rendered legally blind by the initial surgical repair to his eye before he underwent the lens implant surgery. This Court has not stated that the *only* way to prove a total loss of vision is when a doctor finds a claimant to be legally blind due to a work injury. *State ex rel. AutoZone, Inc.*, 117 Ohio St.3d at 188. Rather, becoming legally blind was "some evidence" of a total vision loss, not the only evidence that can substantiate such a loss.

Lastly, viewing the lens implant surgery as a multiphase process will not result in a slew of requests by claimants to have other "losses" recognized. The appellate court, in the *Dolgencorp* decision, cited to *State ex rel. Qiblawe v. Indus. Comm.*, 96 Ohio St.3d 347, 2002-Ohio-4759, in which a claimant requested a scheduled loss award for the loss of her index finger when the claimant elected to amputate it and reattach the index finger in the middle finger's

position. The middle finger had been previously lost due to a work injury. The claimant was unsuccessful in asserting that she suffered two lost fingers, because this Court refused to view the surgery in two phases, rather it viewed the loss prior to any corrective surgery.

However, the instant case is distinguishable because the claimant in *Qiblawe* lost just one digit—her middle finger—and it was replaced with her original index finger. In contrast, Baker lost his natural lens, and it was replaced with artificial material. Additionally, the appellate court implied that Baker's and the *Qiblawe* claimant's losses are temporary. However, this is patently incorrect with respect to Baker, as he will never have the use of his natural lens again, and under *Kroger*, the implantation of an artificial lens is irrelevant. Also, this argument ignores that Baker's lens was lost on account of the natural, continuous sequence of events following the work injury as opposed to an elective surgery to make the *Qiblawe* claimant's hand more useful.

B. A broader rule will produce equity, certainty in the face of an ambiguous statute, and guidance to the appellate court and commission.

In regard to the second point noted above, compensating Baker for the loss of his natural lens, despite any improvement in vision, is an equitable result that provides guidance to the court and the commission. Generally, permanent partial disability benefits are available for certain "scheduled" losses due to a work injury. These scheduled losses are listed in R.C. 4123.57(B). Loss of sight is equal to one hundred twenty-five weeks. For the permanent partial loss of sight, the statute states that the administrator determines the portion of one hundred twenty-five weeks based on the percentage of vision lost as a result of the injury or occupational disease, "but, in no case shall an award of compensation be made for less than twenty five per cent of uncorrected vision. 'Loss of uncorrected vision' means the percentage of vision actually lost as the result of the injury or occupational disease." R.C. 4123.57(B).

As previously detailed, the case law regarding total vision losses has been limited to the facts of each case. However, a broader rule is now needed, especially in light of an ambiguous statute that does not explain whether "loss of uncorrected vision" is measured post-injury, or post-initial treatment following the injury, or even post-corneal/lens removal, but pre-corneal/lens implant. The appellate court in *Dolgencorp* indicated that the statute required vision loss to be measured pre-surgical correction. However, as noted above, that places far too much emphasis on the temporal aspect of the matter rather than on the causal link between the loss of the natural tissue and the injury.

Moreover, a broader rule will produce an equitable result because compensation under the circumstances would treat a total vision loss more akin to a limb loss. In either instance, there is a permanent loss of the claimant's natural tissue, regardless of whether a prosthetic device ameliorates the trauma of losing that body part. R.C. 4123.57(B) provides for vision loss awards, in addition to awards for various other losses, including the loss of fingers, toes, hands, feet, arms, and legs. That the statutory scheme includes vision loss awards at all indicates that the General Assembly chose to treat the loss of eyesight more like the loss of an appendage. Treating a vision loss more like a straight-forward loss of a limb would negate the need to distinguish between a total loss of vision before the natural cornea or lens are removed versus the immediate loss of cornea or lens from the work injury.

In short, a corneal transplant was not a restorative procedure in 1987 when this Court decided *Kroger*, nor is it (or a lens implant) a restorative procedure today. In the same way that a claimant fitted with a prosthetic limb will never use, again, the limb he or she was naturally born with, a claimant who receives a corneal transplant or intraocular lens implant is fitted with material that is unnatural to his or her own body. Those devices can never truly replace the

natural tissue with which the claimant was born, even if the cornea transplant or lens implant results in a 100% vision improvement.

CONCLUSION

Accordingly, the commission respectfully requests that the Court reverse the appellate court's decision denying Baker's request for a writ of mandamus. A broader rule is warranted addressing the situation where a claimant has not been rendered legally blind, but has lost his or her natural lens due the trauma and subsequent surgical repair of the eye.

Primarily, a broader rule provides equity and clarity. A clear-cut rule allowing compensation under the circumstances would eliminate the need to interpret what the phrase "loss of uncorrected vision" means when the commission is faced with a claimant who has sustained less than a 25% vision loss, but who has lost his or her natural lens or cornea. Just like the claimant who has permanently lost a hand or foot, Baker has lost the tissue he had at birth.

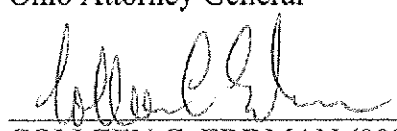
Moreover, Baker is entitled to a loss of vision award because the loss of his lens causally flowed from the original injury. The presence of a metal fragment in Baker's eye required repair; the repair was the catalyst for the development of the traumatic cataract, and the culmination of these events was the loss of Baker's natural lens to remove the cataract. The implantation of the artificial lens device meant to correct Baker's vision is irrelevant to that loss.

Lastly, with a broader rule, the proper focus would then be on causation rather than timing distinctions. Again, in *AutoZone*, this Court refused to find material temporal differences when the claimant's lens became useless as compared to the *Parsec* claimant. Thus, it would not be unreasonable to extend the *AutoZone* decision to Baker's case to find that up to the removal of the injured tissue, but before the artificial lens was implanted, Baker was merely experiencing the causally-related effects of the original eye injury. Arguably, there are temporal

considerations that could warrant a distinction between an immediate loss and an eventual loss of vision, however those temporal considerations are outweighed by the need to justly compensate Ohio workers. If the focus were solely on causation, it would be correct to view the surgery correcting Baker's vision in two separate phases, with the removal phase resulting in a total loss because he would not have had the lens removed but for the work injury.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General



COLLEEN C. ERDMAN (0080765)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
614-466-6696
614-752-2538 fax
colleen.erdman@ohioattorneygeneral.gov

Counsel for Appellant,
Industrial Commission of Ohio

CERTIFICATE OF SERVICE

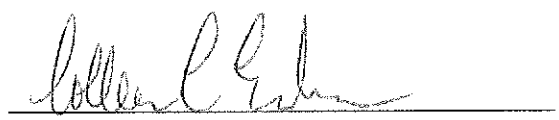
This is to certify that a copy of the foregoing *Merit Brief of Appellant, Industrial Commission of Ohio*, was sent to the following by regular U.S. Mail, postage prepaid, this 4th day of May, 2010:

Theodore A. Bowman
GALLON, TAKACS, BOISSONEAULT & SCHAFFER CO., L.P.A.
3516 Granite Circle
Toledo, Ohio 43617

Counsel for Relator-Appellant,
Jamey D. Baker

Amy S. Thomas
REMINGER CO. L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215

Counsel for Respondent-Appellee,
Coast to Coast Manpower LLC



COLLEEN C. ERDMAN
Assistant Attorney General

APPENDIX

Second Notice of Appeal 1

Judgment Entry, Court of Appeals, Tenth District 4

Decision, Court of Appeals, Tenth District 5

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Supreme Court of Ohio

STATE OF OHIO, ex rel. JAMEY D. BAKER,	:	CASE NO. 2010-0211
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District. Case No. 09AP-0287
vs.	:	
COAST TO COAST MANPOWER LLC, et al.,	:	09-287
Appellee.	:	

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2010 FEB -9 PM 1:25
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SECOND NOTICE OF APPEAL

THEODORE A. BOWMAN (009159)
Gallon, Takacs, Boissoneault &
Schaffer Co., L.P.A.
3516 Granite Circle
Toledo, Ohio 43617
419-843-2001
419-843-6665 fax
tbowman@gallonlaw.com

Counsel for Appellant,
Jamey D. Baker

RICHARD CORDRAY
Ohio Attorney General

COLLEEN C. ERDMAN (0080765)
Counsel of Record
Assistant Attorney General
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
614-466-6696
614-752-2538 fax
colleen.erdman@ohioattorneygeneral.gov

Counsel for Appellant,
Industrial Commission of Ohio

AMY S. THOMAS (0074380)
Reminger Co. L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215
614-232-2627
614-232-2410 fax
athomas@reminger.com

Counsel for Appellee,
Coast to Coast Manpower LLC

FILED
FEB 03 2010
CLERK OF COURT
SUPREME COURT OF OHIO

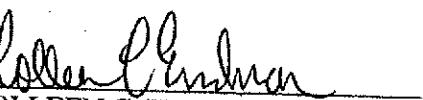
NOTICE OF APPEAL OF APPELLANT
INDUSTRIAL COMMISSION OF OHIO

Appellant, Industrial Commission of Ohio, gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 09AP-0287 on December 17, 2009. A copy of the judgment entry is attached.

This case originated in the Franklin County Court of Appeals. Therefore, this is an appeal as of right.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General

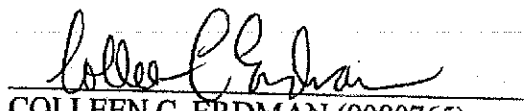


COLLEEN C. ERDMAN (0080765)
Counsel of Record
Assistant Attorney General
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
614-466-6696
614-752-2538 fax
colleen.erdman@ohioattorneygeneral.gov

Counsel for Appellant,
Industrial Commission of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the Notice of Appeal was sent to Amy Thomas, counsel for Appellee, Coast to Coast Manpower, LLC, Reminger Co., LPA, 65 East State Street, 4th Floor, Columbus, Ohio 43215, and Theodore Bowman, counsel for Appellant, Jamey Baker, 3516 Granite Circle, Toledo, Ohio 43617, and, by regular U.S. Mail, postage pre-paid, this 3rd day of February, 2010.



COLLEEN C. ERDMAN (0080765)
Assistant Attorney General

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jamey D. Baker,	:	
Relator,	:	
v.	:	No. 09AP-287
Coast to Coast Manpower LLC and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 17, 2009, the objections to the decision of the magistrate are overruled. As discussed in our decision, we adopt, in part, the decision of the magistrate with regard to the findings of fact and conclusions of law, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs shall be assessed against relator.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

Judge Susan Brown

Judge Judith L. French, P.J.

Judge John A. Connor

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jamey D. Baker,	:	
Relator,	:	
v.	:	No. 09AP-287
Coast to Coast Manpower LLC and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on December 17, 2009

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman*, for relator.

Reminger Co., L.P.A., *Amy S. Thomas*, and *Mick Proxmire*, for respondent Coast to Coast Manpower LLC.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Jamey D. Baker, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator's loss of vision award for an injury

he sustained to his right eye, and ordering the commission to grant him a 100 percent loss of vision award pursuant to R.C. 4123.57(B).

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision, and recommended that this court deny relator's request for a writ of mandamus. Relator and the commission have filed objections to the magistrate's decision.

{¶3} Relator asserts the following two objections:

> 1. The Magistrate committed a mistake of law when she determined that Relator is not entitled to 100% loss of vision award despite the fact Relator[ ] lost the natural vision of his right eye.
>
> 2. The Magistrate committed a mistake of law when she distinguished this matter from [*State ex rel. Parsec, Inc. v. Agin*, 155 Ohio App.3d 303, 2003-Ohio-6186].

{¶4} The commission asserts the following two objections:

> 1. The magistrate erred in finding that the commission had some evidence that Baker did not sustain greater than 25% loss of vision.
>
> 2. The magistrate erred in not applying case law which supports Baker's contention that the loss of his natural lens due to the trauma of repair to his eye following a work injury constitutes a total loss.

{¶5} We recently issued a decision that determined the issues under consideration herein in *State ex rel. Dolgencorp, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-1014, 2009-Ohio-6565. In *Dolgencorp*, a case dealing with a corneal transplant surgery, which is considered a "corrective" surgery like the artificial lens implantation in the present case, we concluded that R.C. 4123.57(B) and *State ex rel. Kroger Co. v.*

Stover (1987), 31 Ohio St.3d 229, require any calculation of vision loss be made prior to corrective surgery, without regard to any vision improvement achieved as a result of such surgery. Thus, applying this principle to the present case, as did the magistrate, because relator's vision following the injury, but before surgery was 20/30, resulting in an eight-percent impairment, relator was not entitled to a loss of vision award because relator did not establish a minimum of 25 percent loss of vision, as required by R.C. 4123.57(B).

{¶6} Furthermore, here, as in *Dolgencorp*, the magistrate discussed the differences between corneal transplant surgery and intraocular lens implantation surgery. Under our analysis, this discussion becomes unnecessary, and we decline to adopt that portion of the magistrate's decision.

{¶7} Accordingly, after an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of relator's and the commission's objections, we overrule the objections. Accordingly, we adopt, in part, the magistrate's decision with regard to the findings of fact and conclusions of law, and we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

FRENCH, P.J., and CONNOR, J., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jamey D. Baker,	:	
Relator,	:	
v.	:	No. 09AP-287
Coast to Coast Manpower LLC and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on August 31, 2009

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman*, for relator.

Reminger Co., L.P.A., Amy S. Thomas and *Mick Proxmire*, for respondent Manpower Coast to Coast LLC.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶8} Relator, Jamey D. Baker, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its order which denied him a loss of vision award for an injury he sustained to his right eye and ordering the commission to grant him a 100 percent loss of vision award pursuant to R.C. 4123.57(B).

Findings of Fact:

{¶9} 1. Relator sustained a work-related injury on November 3, 2007 when a metal cable he was cutting snapped and struck him in the right eye.

{¶10} 2. Relator was examined by ophthalmologist Jack Hendershot, M.D. on the date of his injury. Upon examination, Dr. Hendershot found that relator's visual acuity in his right eye was 20/50.

{¶11} 3. On that same day, November 3, 2007, Thomas F. Mauger, M.D., performed surgery to remove the foreign body from relator's cornea and to repair a corneal laceration. According to the operative report, once the metallic foreign body was removed, a single suture was placed through relator's cornea to repair the laceration left by the foreign body.

{¶12} 4. Relator's workers' compensation claim was originally allowed for "right corneal foreign body, right laceration of eye."

{¶13} 5. Following surgery, relator developed a traumatic cataract in his right eye. Thereafter, his claim was allowed for "right traumatic cataract."

{¶14} 6. Relator saw Dr. Hendershot again on February 1, 2008. At that time, Dr. Hendershot measured relator's visual acuity in his right eye at 20/30. Dr. Hendershot recommended that relator undergo surgery to remove the damaged lens and replace it with an intraocular lens.

{¶15} 7. On February 18, 2008, Dr. Hendershot performed surgery to remove the lens of relator's right eye which had sustained a traumatic cataract. As part of the procedure, Dr. Hendershot replaced that lens with an intraocular lens, serial number 107662670.065. It was relator's lens which was replaced and not his cornea.

{¶16} 8. On March 14, 2008, following surgery, Dr. Hendershot measured the visual acuity of relator's right eye at 20/25.

{¶17} 9. In March 2008, relator filed a request for total loss of vision of his right eye pursuant to R.C. 4123.57(B).

{¶18} 10. The Ohio Bureau of Workers' Compensation ("BWC") requested an examination by Richard Tam, M.D.

{¶19} 11. Following his examination, Dr. Tam authored a report dated April 22, 2008. After noting the history of relator's injury and taking visual measurements, Dr. Tam opined that relator's vision loss was a direct and proximate result of his injury and concluded that relator's acuity impairment, accounting for both distance and near acuity, was three percent, and his visual field impairment was six percent. Because the loss of visual acuity and visual field were independent, Dr. Tam opined that relator's visual system impairment was eight percent.

{¶20} 12. Dr. Tam offered a second report dated May 18, 2008. In that report, Dr. Tam explained why he was asked to author a second report:

> I have been asked to clarify if my evaluation was based on post-injury or post-surgical vision, according to the policy that "The loss of vision for traumatic cataract is based on the injured worker's post injury vision prior to correction by glasses, contact, or surgical intervention." I accept the allowed conditions in this claim.

> This policy is in contrast to the original request for me to determine percentage of loss of vision per the AMA guidelines, which states that "The individual should be tested with the best available refractive correction." The AMA guidelines are consistent with basic ophthalmologic principles of testing vision. Current BWC policy for traumatic cataract is not consistent with AMA guidelines.

Thereafter, Dr. Tam opined as follows:

> Regardless of this conflict, my original conclusion above was based on my evaluation of the claimant, which occurred after his cataract removal. Therefore, to address his vision after the injury, after the surgery for foreign body removal, and before cataract removal, I can only refer to his medical record, which indicates visual acuity of 20/30 OD at distance and near on 2/1/08. Visual field was not tested, so I must assume that my visual field evaluation is similar to his visual field prior to cataract surgery. Pre-injury information is not available and therefore is assumed to be normal. The visual impairment prior to cataract surgery then is 2% for visual acuity and 6% for visual field, which still results in 8% impairment.

{¶21} 13. Relator's motion was heard before a district hearing officer ("DHO") on June 19, 2008. The DHO found that the medical evidence supported a finding of an eight percent impairment as follows:

> The District Hearing Officer finds that the injured worker's request for lost [sic] of vision right eye is determined in accordance with State of Ohio, Industrial Commission Policy Statement and Guidelines, Memo F1 and the case of Spangler Candy Company v. Industrial Commission (1988), 36 Ohio State 3d 231.
>
> Memo F1 states "the computation of a permanent partial loss of sight of an eye shall be made on the basis of vision actually lost by the particular individual and not based on a percentage computed on a hypothetical scale of normalcy." The District Hearing Officer also relies on the case of Kroger Company v. Stover (1987), 31 Ohio St. 3d 229.
>
> Based on the reports of Richard Tam, dated 04/22/2008 and 05/18/2008, the District Hearing Officer finds that the injured

> worker has suffered an 8% Permanent Partial Impairment due to the allowed physical conditions in this claim.

Relator had argued that the removal of the lens, in and of itself, automatically justified a finding of total loss of vision; however, the DHO concluded that relator's rationale constituted a misreading of *State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229.

{¶22} 14. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on August 25, 2008. The SHO vacated the prior DHO's order and granted relator's request for a total loss of vision of the right eye. The SHO applied this court's decision in *State ex rel. Parsec, Inc. v. Agin*, 155 Ohio App.3d 303, 2003-Ohio-6186, to support the award. The SHO stated:

> The Staff Hearing Officer finds the facts here, mirror those of Parsec v. Industrial Commission of Ohio, 155 Ohio App. 3d 303. In this case, as in Parsec: "the medical evidence in the record clearly establishes that the work-related injury caused a traumatic cataract to occur in claimant's eye and there is no dispute that, in order to treat claimant's work's [sic] related injury, the now opaque lens had to be removed and an artificial lens had to be implanted... As such, the evidence is clear, due to the injury, the doctors necessarily had to remove the injured worker's cornea and implant a new one. As such, the evidence docs [sic] show that injured worker sustained a total loss of vision in his left eye." (Parsec at 308).
>
> The Staff Hearing Officer also finds the case State ex rel. Auto Zone, Inc. v. Industrial Commission, [10th Dist. No. 05AP-634,] 2006-Ohio-2959, supports the contention that "the Commission can conclude that the loss of the natural lens due to an industrial injury produces a total loss of uncorrected vision of the eye".
>
> The Staff Hearing Officer finds that the loss of vision award is granted based upon injured worker's uncorrected vision post-injury and not simply because his lens was removed from his eye during the surgical procedure. The Staff Hearing Officer does not find any case law that supports an award of loss of use due to the removal of a lens during surgery.

> This finding of total loss of vision is supported by the medical evidence in file that indicates that injured worker's allowed condition of traumatic cataract necessitated a cataract extraction with an implant. Therefore, the Staff Hearing Officer concludes that the injured worker suffered a loss of vision of 100% which required that his lens be replaced with an artificial lens.

{¶23} 15. Manpower Coast to Coast LLC ("employer") appealed and the matter was heard before the commission on November 25, 2008. The commission vacated the prior SHO's order and denied relator's request for a total loss of vision award after finding that relator had not met his burden of proving that he sustained at least a 25 percent loss of vision when his pre-injury vision was compared to his post-injury vision. Specifically, the commission stated:

> It is the finding of the Commission that the C-86 motion filed by the Injured Worker on 03/24/2008, is denied. The Injured Worker has failed to file medical evidence to substantiate a minimum of twenty-five percent (25%) loss of uncorrected vision that would be necessary to qualify for a loss of vision award under R.C. 4123.57(B).
>
> Historically, the Injured Worker sustained severe right eye trauma which required surgical removal of an embedded metal fragment. The right eye subsequently developed a traumatically induced cataract that was progressive in nature. The pre-cataract surgery demonstrated an uncorrected visual impairment of eight percent (8%), as evidenced in the report from Richard Tam, M.D., dated 05/18/2008. Therefore the Commission finds that the pre-surgical threshold of twenty-five percent (25%) loss of uncorrected vision was not met by the Injured Worker, as required in R.C. 4123.57(B).
>
> The Commission relies on the case of State ex rel. Kroger Company v. Stover (1987), 31 Ohio St.3d 229, Hearing Officer Manual Memo F2, and R.C. 4123.57(B) in support of this decision. In the Kroger case, the Supreme Court determined that a subsequent surgical correction by implantation of artificial lens is not to be considered in

> determining the percentage of visual loss. The visual loss prior to the surgery is the determining factor for the award.

{¶24} 16. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶25} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶26} For the reasons that follow, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

{¶27} As a preliminary matter, there are two different surgical procedures which have been discussed in the various cases involving loss of vision awards. Some of the cases have involved the removal of the cornea and a corneal transplant. The other cases involve the removal of the lens and its replacement. "Cornea" is defined in Taber's Cyclopedic Medical Dictionary (20th ed. 2005):

> The transparent anterior portion of the sclera (the fibrous outer layer of the eyeball), about one sixth of its surface. * * * [T]he cornea is the first part of the eye that refracts light. It is composed of five layers[.] * * *

Corneal transplants involve "the most common organ transplantation procedure in the U.S." When it is necessary to remove the cornea, the patient's cornea is replaced with a cornea from a healthy human donor eye.

{¶28} The other procedure involves the replacement of the lens. "Lens" is defined in Taber's as follow: "The crystalline lens of the eye."

{¶29} When doctors discuss the formation of cataracts, they are referring to damage to the lens and not the cornea. "Cataract" is defined in Taber's as follows:

> An opacity of the lens of the eye, usually occurring as a result of aging, trauma, endocrine or metabolic disease, intraocular disease, or as a side effect of the use of tobacco or certain medications[.] * * * Cataracts are the most common cause of blindness in adults. * * *

{¶30} When a patient has developed a cataract, "[s]urgical removal of the lens is the only effective treatment." Further, "[i]n the U.S. about a million cataract surgeries are performed annually." When the lens of the eye is replaced, it is replaced with an "intraocular lens" ("IOL"). An IOL is "[a]n artificial lens usually placed inside the capsule of the lens to replace the one that has been removed. A lens is removed because of abnormalities such as cataracts." As above indicated, an IOL is made of an artificial substance and is not living tissue.

{¶31} The magistrate felt it necessary to identify both procedures here in large part because many of the cases discussing loss of vision awards have used the terms interchangeably. Because corneal transplants involve living donor tissue while IOLs

involve artificial lens, it is conceivable that the Supreme Court of Ohio may ultimately determine that the two procedures should be treated differently.

{¶32} The present case involves the removal of the lens of relator's right eye and the insertion of an IOL.

{¶33} R.C. 4123.57(B) provides, in pertinent part:

> Partial disability compensation shall be paid as follows.
>
> * * *
>
> For the loss of the sight of an eye, one hundred twenty-five weeks.
>
> For the permanent partial loss of sight of an eye, the portion of one hundred twenty-five weeks as the administrator in each case determines, based upon the percentage of vision actually lost as a result of the injury or occupational disease, but, in no case shall an award of compensation be made for less than twenty-five per cent loss of uncorrected vision. "Loss of uncorrected vision" means the percentage of vision actually lost as the result of the injury or occupational disease.

{¶34} In *Kroger Co.*, the claimant had sustained severe corneal burns to both eyes and ultimately required a corneal transplant to his right eye. The claimant filed an application for additional compensation for the loss of uncorrected vision in both eyes pursuant to R.C. 4123.57(C), now 4123.57(B). The employer had argued that the claimant's loss of vision had been surgically repaired and, as such, did not represent an actual loss. The court disagreed and ultimately held as follows:

> The improvement of vision resulting from a corneal transplant is a correction to vision and thus, shall not, on the current state of the medical art, be taken into consideration in determining the percentage of vision actually lost pursuant to R.C. 4123.57(C).

Id. at ¶2 of the syllabus.

{¶35} Although the *Kroger Co.* case involved a corneal transplant, the court has applied this same standard whether the claimant has undergone a corneal transplant or the implantation of an IOL. Both are considered corrections to vision. Further, regardless of the procedure involved, the court has continually required claimants to meet the same burden of proof: the percentage of uncorrected vision actually lost as a result of the injury.

{¶36} In the present case, relator contends that this court's decision in *Parsec* should be applied and warrants a finding of total loss of vision. This magistrate disagrees.

{¶37} In *Parsec*, the claimant sustained a very serious injury to his eye which penetrated and caused immediate and severe damage to the lens of his eye. Claimant underwent surgery and an IOL was implanted.

{¶38} The commission granted the claimant a total loss of vision award. The employer argued that the claimant had failed to meet his burden of proof because he did not present evidence of his visual acuity prior to the injury. However, this court noted that the claimant was 28 years of age at the time of the injury and that, according to the medical evidence, the claimant had no eye problems prior to the injury. Further, the evidence indicated that the claimant's vision in his uninjured eye was 20/20. Essentially, the assumption was made that the claimant's injured left eye was also 20/20 prior to the date of injury and, because it was established that the injury caused significant damage to his lens necessitating the removal of the lens and the insertion of an IOL, this court upheld the total loss of vision award.

{¶39} That same year, this court considered the case of *State ex rel. Pethe v. Indus. Comm.*, 10th Dist. No. 02AP-1202, 2003-Ohio-6832. In that case, the claimant

sustained an injury to his cornea and later developed a cataract of the lens. Ultimately, the claimant had the lens removed and an IOL implanted. The commission denied the claimant's request for total loss of vision after finding that the claimant did not meet his burden of proof.

{¶40} In the *Pethe* case, the claimant had long-standing glaucoma which had already significantly impacted his vision. In fact, Dr. Smith had stated in his report that the claimant's permanent loss of corrected vision was due both to the injury and glaucoma. Because the claimant was unable to establish the percentage of vision lost as a result of the injury, the commission denied his request for total loss of vision.

{¶41} The claimant filed a mandamus action in this court. One of the arguments the claimant made was that the removal of his lens, in and of itself, yielded a total loss of vision before his lens was replaced with an IOL. This court disagreed and reiterated that the claimant is required to demonstrate the amount of pre-injury vision that was lost due to the injury. In the claimant's situation, it was clear from the medical evidence that he had lost some vision in his right eye as a result of the injury; however, the commission found that there was insufficient evidence to establish what percentage of vision was lost, either 100 percent or otherwise, post-injury. Because in *Kroger Co.,* the court stated that a lens implant is corrective (similar to glasses and contact lenses), it is the loss of uncorrected vision which the claimant must demonstrate.

{¶42} Approximately one year after this court's decision in *Pethe*, the Supreme Court of Ohio issued its decision in *State ex rel. Gen. Elec. Corp. v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585. That case also involved the removal of the claimant's lens and the implantation of an IOL because the claimant developed a cataract. In

General Electric, the claimant presented medical evidence that his vision had decreased to 20/200 following the injury and before surgery. Although the claimant did not have evidence of his actual visual acuity prior to the injury, the commission considered that it had been essentially normal. The commission granted the claimant a total loss of vision award for both eyes.

{¶43} The employer filed a mandamus action in this court. This court concluded that medical technology had advanced to such an extent that the removal of a lens and the implantation of an IOL was no longer merely corrective but that it, in fact, was restorative. This court noted that, post-surgery the claimant's vision was restored to 20/20.

{¶44} On appeal, the Supreme Court of Ohio reiterated that R.C. 4123.57(B) clearly makes uncorrected vision the applicable standard. Further, the court refused to come to the conclusion that the implantation of an IOL restored a claimant's sight. Instead, the court continued to hold that the implantation of an artificial lens was corrective and not restorative. As such, the court upheld the total loss of vision award.

{¶45} Two years later, this court again addressed loss of vision issues in *State ex rel. Autozone, Inc. v. Indus. Comm.*, 10th Dist. No. 05AP-634, 2006-Ohio-2959. In *Autozone*, the claimant sustained a severe injury to his left eye that required the removal of his lens and the implantation of an IOL. There was medical evidence in the record indicating that the claimant's visual acuity before the injury was 20/20 and that following the injury, and prior to surgery, his vision was 20/200. Dr. Mah explained that, at 20/200 the claimant was legally blind. This court framed the issue as follows: "[T]he issue in this

appeal is whether the loss of a natural lens qualifies as 'the loss of the sight of an eye' for purposes of R.C. 4123.57(B)."

{¶46} This court held that the loss of the natural lens was sufficient to qualify as a total loss of vision pursuant to R.C. 4123.57(B). This court applied *Parsec* and upheld the award because, as a result of the injury, the claimant no longer had a functioning lens.

{¶47} The employer appealed the matter to the Supreme Court of Ohio. In *State ex rel. Autozone, Inc. v. Indus. Comm.*, 117 Oho St.3d 186, 2008-Ohio-541, ¶18, the court affirmed the judgment of this court, but on different grounds. The court set forth the question before it and its holding as follows:

> The question under R.C. 4123.57(B) is whether a claimant has suffered loss of sight or partial loss of sight. The answer to that question determines whether the claimant receives 125 weeks of compensation or some percentage thereof. Today, we make the unremarkable holding that pursuant to R.C. 4123.57(B), when a doctor determines that a claimant is rendered "legally blind" due to the loss of a lens in an industrial accident, that determination constitutes "some evidence" that the claimant has suffered "the loss of the sight of an eye" pursuant to R.C. 4123.57(B).

(Emphasis added.) The court also went on to note that the measurement 20/200 is a significant standard in the definition of blindness and concluded that the opinions of two doctors that the claimant was rendered legally blind in his left eye due to the workplace injury constitutes "some evidence" to support the commission's decision that the claimant had suffered the loss of sight of the eye under R.C. 4123.57(B).

{¶48} The foregoing analysis of case law involving loss of vision results in the following principles: (1) R.C. 4123.57(B) clearly makes uncorrected vision the applicable standard; (2) claimants have the burden of presenting evidence so that the commission

can determine the amount of a claimant's pre-injury vision that was lost due to the injury; (3) the improvement of vision resulting from either a corneal transplant or the implantation of an IOL is a correction to vision and is not taken into consideration in determining the percentage of vision actually lost; and (4) when a doctor determines that a claimant is rendered "legally blind" (visual acuity 20/200) due to the injury to the eye in an industrial accident, that determination constitutes "some evidence" that the claimant has suffered the loss of sight of an eye.

{¶49} Turning back to the facts of this case, the medical evidence establishes that, immediately following the injury, relator's vision had decreased to 20/50. Before relator underwent surgery to remove his lens and implant an IOL, his visual acuity had improved. Specifically, on February 1, 2008, his visual acuity was 20/30. In his report, Dr. Tam was asked to assume that relator's vision was 100 percent prior to the injury. Dr. Tam opined that the decrease in relator's visual acuity from 20/20 to 20/30 represented an eight percent impairment. The commission relied on the report of Dr. Tam and concluded that relator was not entitled to a loss of vision award because relator did not establish a minimum of 25 percent loss of vision.

{¶50} With regard to relator's specific argument that his case is analogous to *Parsec*, this magistrate disagrees. Again, in *Parsec*, the injury the claimant sustained caused immediate and severe damage to the lens of his eye and resulted in a **total** traumatic cataract. The claimant's lens was opaque and useless. The claimant was only 28 years old and his vision in his uninjured eye was 20/20. This court agreed with the commission's determination that the claimant had presented some evidence of a total loss of vision.

{¶51} By comparison, in the present case, the immediate damage to relator's eye was to his cornea. Subsequently, relator developed a cataract of his lens. The medical evidence establishes that relator's visual acuity immediately following the injury was 20/50 but that one month later, prior to surgery, his vision had improved and his visual acuity was 20/30. Relator's lens was still functional. Dr. Tam opined that this constituted an eight percent impairment.

{¶52} The present case is not analogous to the facts in *Parsec*.

{¶53} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion by finding that he was not entitled to any loss of vision award under R.C. 4123.57(B) because he failed to present medical evidence to substantiate a minimum of 25 percent loss of uncorrected vision. As such, this court should deny relator's request for a writ of mandamus.

s/s Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

Denial of wage loss compensation was unlawful where there was no evidence that claimant was working less than the maximum medically permitted hours at his former full-time job and lost a part-time job as a result of an allowed accident: State ex rel. DiRosa v. Industrial Comm'n, 84 Ohio St. 3d 56, 701 N.E.2d 991, 1998 Ohio 685, (1998).

An adequate job search is a prerequisite to eligibility for wage loss compensation: State ex rel. Harsch v. Industrial Comm'n, 83 Ohio St. 3d 280, 699 N.E.2d 503, 1998 Ohio 113, (1998).

Wage loss benefits are not barred simply because a claimant is no longer employed at the company where the injury occurred, even if the separation is employee-induced. A finding of lack of a good faith job search must be explained: State ex rel. Stafford v. Industrial Comm'n, 84 Ohio St. 3d 225, 702 N.E.2d 1205, 1998 Ohio 322, (1998).

A limited writ of mandamus would issue compelling the commission to vacate its orders denying RC § 4123.56(B) wage loss compensation to claimant and to reconsider her entitlement where her employer had terminated her by letter while she was under treatment for both physical and mental health problems: State ex rel. Banks v. Industrial Comm'n, 1998 Ohio App. LEXIS 628 (1998).

Voluntary acceptance of part-time work for reasons unrelated to an injury bars wage loss compensation: State ex rel. Reamer v. Industrial Comm'n, 77 Ohio St. 3d 450, 674 N.E.2d 1384, 1997 Ohio 42, (1997).

Wage loss compensation requires a search for jobs within the claimant's capabilities: State ex rel. Vanover v. Emery Worldwide, 80 Ohio St. 3d 367, 686 N.E.2d 518, 1997 Ohio 109, (1997).

The meaning of "direct result" as contemplated by RC § 4123.56(B) and OAC 4121-3-32 does not extend to any result that may eventually occur down the line: State ex rel. Tullis v. City Asphalt & Paving Co., 80 Ohio St. 3d 364, 686 N.E.2d 516, 1997 Ohio 110, (1997).

Subsequent employee conduct is not a preeminent factor in determining wage-loss eligibility: State ex rel. Sanese Servs. v. Industrial Comm'n, 79 Ohio St. 3d 213, 680 N.E.2d 991, 1997 Ohio 397, (1997).

Wage loss compensation for a claimant who becomes self-employed after an injury must be based on the claimant's net income after business expenses, not on gross income: State ex rel. Richards v. Industrial Comm'n, 110 Ohio App. 3d 109, 673 N.E.2d 667 (1996).

The fact that a claimant has been fired for a reason unrelated to an allowed condition has no bearing on a claimant's eligibility for wage loss compensation, where the medical evidence reveals that the claimant could not have returned to his or her employment position regardless of the firing: State ex rel. McGonegle v. Industrial Comm'n, 76 Ohio St. 3d 272, 667 N.E.2d 392, 1996 Ohio 162, (1996).

A wage loss motion premised on inability to find other suitable work requires that the claimant actually sought work within his capacities: State ex rel. Consolidated Freightways v. Engerer, 74 Ohio St. 3d 241, 658 N.E.2d 278, 1996 Ohio 136, (1996).

Ohio Administrative Code 4121-3-32(D)(2) permits wage-loss compensation, under certain circumstances, to claimants who have resumed their former employment. What is, however, a prerequisite to wage-loss payment is a medical inability to secure comparably paying work. A full release to return negates any assertion that claimant's inability to earn at his preinjury rate is medically precipitated: State ex rel. Chora v. Industrial Comm'n, 74 Ohio St. 3d 238, 658 N.E.2d 276, 1996 Ohio 318, (1996).

Voluntary acts that limit earnings may bar wage-loss compensation. OAC 4121-3-32(D) does not specify how an application for wage-loss compensation must be made: State ex rel. Pepsi-Cola Bottling Co. v. Morse, 72 Ohio St. 3d 210, 648 N.E.2d 827, 1995 Ohio 82, (1995).

Firing may, but does not automatically, bar wage loss compensation under RC § 4123.56(B): State ex rel. Watts v. Schottenstein Stores Corp., 68 Ohio St. 3d 118, 623 N.E.2d 1202, 1993 Ohio 133, (1993).

A claimant's layoff does not necessarily bar wage loss compensation under RC § 4123.56(B): State ex rel. Andersons v. Industrial Com. of Ohio, 64 Ohio St. 3d 539, 597 N.E.2d 143, 1992 Ohio 90, (1992).

—Bonuses

Prior to OAC 4125-1-01(A)(16), there was no approved method of allocating bonuses for purposes of computing wage loss compensation. The method chosen by the commission was reasonable: State ex rel. City of Middleburg Heights v. Indus. Comm'n, 92 Ohio St. 3d 476, 751 N.E.2d 986, 2001 Ohio 1267, (2001).

—Week by week analysis

Under RC § 4123.56, a week-by-week analysis of wage loss is mandated: State ex rel. Haddox v. Industrial Comm'n, 88 Ohio St. 3d 279, 725 N.E.2d 635, 2000 Ohio 326, (2000).

The basic wage loss compensation formula mandates a week-by-week analysis to determine a claimant's actual wage loss: State ex rel. Bos v. Navistar Int'l Transp. Corp., 90 Ohio St. 3d 314, 738 N.E.2d 791, 2000 Ohio 88, (2000).

Wage replacement insurance program

Where an employer made payments through its wage replacement insurance program and withheld taxes from the payments, mandamus was the employer's proper remedy from the commission's denial of an offset for taxes withheld: State ex rel. GMC v. Indus. Comm'n, 117 Ohio St. 3d 480, 884 N.E.2d 1075, 2008 Ohio 1593, (2008).

Weight loss program

Approval of a weight-loss program does not preclude a finding of maximum medical improvement: State ex rel. Williams v. Cincinnati Country Club, 83 Ohio St. 3d 284, 699 N.E.2d 505, 1998 Ohio 112, (1998).

Additional allowance of obesity is not a prerequisite to consideration of payment for a weight-reduction program. To be compensable, weight loss must improve allowed conditions, not merely alleviate pain: State ex rel. Miller v. Industrial Comm'n, 71 Ohio St. 3d 229, 643 N.E.2d 113, 1994 Ohio 204, (1994).

§ 4123.57 Partial disability compensation.

Partial disability compensation shall be paid as follows.

Except as provided in this section, not earlier than twenty-six weeks after the date of termination of the latest period of payments under section 4123.56 of the Revised Code, or not earlier than twenty-six weeks after the date of the injury or contraction of an occupational disease in the absence of payments under section 4123.56 of the Revised Code, the employee may file an application with the bureau of workers' compensation for the determination of the percentage of the employee's permanent partial disability resulting from an injury or occupational disease.

Whenever the application is filed, the bureau shall send a copy of the application to the employee's employer or the employer's representative and shall schedule the employee for a medical examination

the bureau medical section. The bureau shall send a copy of the report of the medical examination to the employee, the employer, and their representatives. Thereafter, the administrator of workers' compensation shall review the employee's claim file and make a tentative order as the evidence before the administrator at the time of the making of the order warrants. If the administrator determines that there is a conflict of evidence, the administrator shall send the application, along with the claimant's file, to the district hearing officer who shall set the application for a hearing.

The administrator shall notify the employee, the employer, and their representatives, in writing, of the tentative order and of the parties' right to request a hearing. Unless the employee, the employer, or their representative notifies the administrator, in writing, of an objection to the tentative order within twenty days after receipt of the notice thereof, the tentative order shall go into effect and the employee shall receive the compensation provided in the order. In no event shall there be a reconsideration of a tentative order issued under this division.

If the employee, the employer, or their representatives timely notify the administrator of an objection to the tentative order, the matter shall be referred to a district hearing officer who shall set the application for hearing with written notices to all interested persons. Upon referral to a district hearing officer, the employer may obtain a medical examination of the employee, pursuant to rules of the industrial commission.

(A) The district hearing officer, upon the application, shall determine the percentage of the employee's permanent disability, except as is subject to division (B) of this section, based upon that condition of the employee resulting from the injury or occupational disease and causing permanent impairment evidenced by medical or clinical findings reasonably demonstrable. The employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage, but not more than a maximum of thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, per week regardless of the average weekly wage, for the number of weeks which equals the percentage of two hundred weeks. Except on application for reconsideration, review, or modification, which is filed within ten days after the date of receipt of the decision of the district hearing officer, in no instance shall the former award be modified unless it is found from medical or clinical findings that the condition of the claimant resulting from the injury has so progressed as to have increased the percentage of permanent partial disability. A staff hearing officer shall hear an application for reconsideration filed and the staff hearing officer's decision is final. An employee may file an application for a subsequent determination of the percentage of the employee's permanent disability. If such an application is filed, the bureau shall send a copy of the application to the employer or the employer's representative. No sooner than sixty days from the date of the mailing of the application to the employer or the employer's representative, the administrator shall review the application. The administrator may require a medical examination or medical review of the employee. The administrator shall issue a tentative order based upon the evidence before the administrator, provided that if the administrator requires a medical examination or medical review, the administrator shall not issue the tentative order until the completion of the examination or review.

The employer may obtain a medical examination of the employee and may submit medical evidence at any stage of the process up to a hearing before the district hearing officer, pursuant to rules of the commission. The administrator shall notify the employee, the employer, and their representatives, in writing, of the nature and amount of any tentative order issued on an application requesting a subsequent determination of the percentage of an employee's permanent disability. An employee, employer, or their representatives may object to the tentative order within twenty days after the receipt of the notice thereof. If no timely objection is made, the tentative order shall go into effect. In no event shall there be a reconsideration of a tentative order issued under this division. If an objection is timely made, the application for a subsequent determination shall be referred to a district hearing officer who shall set the application for a hearing with written notice to all interested persons. No application for subsequent percentage determinations on the same claim for injury or occupational disease shall be accepted for review by the district hearing officer unless supported by substantial evidence of new and changed circumstances developing since the time of the hearing on the original or last determination.

No award shall be made under this division based upon a percentage of disability which, when taken with all other percentages of permanent disability, exceeds one hundred per cent. If the percentage of the permanent disability of the employee equals or exceeds ninety per cent, compensation for permanent partial disability shall be paid for two hundred weeks.

Compensation payable under this division accrues and is payable to the employee from the date of last payment of compensation, or, in cases where no previous compensation has been paid, from the date of the injury or the date of the diagnosis of the occupational disease.

When an award under this division has been made prior to the death of an employee, all unpaid installments accrued or to accrue under the provisions of the award are payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee, and if there are no children surviving, then to other dependents as the administrator determines.

(B) In cases included in the following schedule the compensation payable per week to the employee is the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code per week and shall continue during the periods provided in the following schedule:

For the loss of a first finger, commonly known as a thumb, sixty weeks.

For the loss of a second finger, commonly called index finger, thirty-five weeks.

For the loss of a third finger, thirty weeks.

For the loss of a fourth finger, twenty weeks.

For the loss of a fifth finger, commonly known as the little finger, fifteen weeks.

The loss of a second, or distal, phalange of the thumb is considered equal to the loss of one half of such thumb; the loss of more than one half of such thumb is considered equal to the loss of the whole thumb.

The loss of the third, or distal, phalange of any finger is considered equal to the loss of one-third of the finger.

The loss of the middle, or second, phalange of any finger is considered equal to the loss of two-thirds of the finger.

The loss of more than the middle and distal phalanges of any finger is considered equal to the loss of the whole finger. In no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

For the loss of the metacarpal bone (bones of the palm) for the corresponding thumb, or fingers, add ten weeks to the number of weeks under this division.

For ankylosis (total stiffness of) or contractures (due to scars or injuries) which makes any of the fingers, thumbs, or parts of either useless, the same number of weeks apply to the members or parts thereof as given for the loss thereof.

If the claimant has suffered the loss of two or more fingers by amputation or ankylosis and the nature of the claimant's employment in the course of which the claimant was working at the time of the injury or occupational disease is such that the handicap or disability resulting from the loss of fingers, or loss of use of fingers, exceeds the normal handicap or disability resulting from the loss of fingers, or loss of use of fingers, the administrator may take that fact into consideration and increase the award of compensation accordingly, but the award made shall not exceed the amount of compensation for loss of a hand.

For the loss of a hand, one hundred seventy-five weeks.

For the loss of an arm, two hundred twenty-five weeks.

For the loss of a great toe, thirty weeks.

For the loss of one of the toes other than the great toe, ten weeks.

The loss of more than two-thirds of any toe is considered equal to the loss of the whole toe.

The loss of less than two-thirds of any toe is considered no loss, except as to the great toe; the loss of the great toe up to the interphalangeal joint is co-equal to the loss of one-half of the great toe; the loss of the great toe beyond the interphalangeal joint is considered equal to the loss of the whole great toe.

For the loss of a foot, one hundred fifty weeks.

For the loss of a leg, two hundred weeks.

For the loss of the sight of an eye, one hundred twenty-five weeks.

For the permanent partial loss of sight of an eye, the portion of one hundred twenty-five weeks as the administrator in each case determines, based upon the percentage of vision actually lost as a result of the injury or occupational disease, but, in no case shall an award of compensation be made for less than twenty-five per cent loss of uncorrected vision. "Loss of uncorrected vision" means the percentage of vision actually lost as the result of the injury or occupational disease.

For the permanent and total loss of hearing of one ear, twenty-five weeks; but in no case shall an award of compensation be made for less than permanent and total loss of hearing of one ear.

For the permanent and total loss of hearing, one hundred twenty-five weeks; but, except pursuant to the next preceding paragraph, in no case shall an award of compensation be made for less than permanent and total loss of hearing.

In case an injury or occupational disease results in serious facial or head disfigurement which either impairs or may in the future impair the opportunities to secure or retain employment, the administrator shall make an award of compensation as it deems proper and equitable, in view of the nature of the disfigurement, and not to exceed the sum of ten thousand dollars. For the purpose of making the award, it is not material whether the employee is gainfully employed in any occupation or trade at the time of the administrator's determination.

When an award under this division has been made prior to the death of an employee all unpaid installments accrued or to accrue under the provisions of the award shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

When an employee has sustained the loss of a member by severance, but no award has been made on account thereof prior to the employee's death, the administrator shall make an award in accordance with this division for the loss which shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

(C) Compensation for partial impairment under divisions (A) and (B) of this section is in addition to the compensation paid the employee pursuant to section 4123.56 of the Revised Code. A claimant may receive compensation under divisions (A) and (B) of this section.

In all cases arising under division (B) of this section, if it is determined by any one of the following: (1) the amputee clinic at University hospital, Ohio state university; (2) the rehabilitation services commission; (3) an amputee clinic or prescribing physician approved by the administrator or the administrator's designee, that an injured or disabled employee is in need of an artificial appliance, or in need of a repair thereof, regardless of whether the appliance or its repair will be serviceable in the vocational rehabilitation of the injured employee, and regardless of whether the employee has returned to or can ever again return to any

ainful employment, the bureau shall pay the cost of the artificial appliance or its repair out of the surplus created by division (B) of section 4123.34 of the Revised Code.

In those cases where a rehabilitation services commission recommendation that an injured or disabled employee is in need of an artificial appliance would conflict with their state plan, adopted pursuant to the "Rehabilitation Act of 1973," 87 Stat. 355, 29 U.S.C.A. 701, the administrator or the administrator's designee or the bureau may obtain a recommendation from an amputee clinic or prescribing physician that they determine appropriate.

(D) If an employee of a state fund employer makes application for a finding and the administrator finds that the employee has contracted silicosis as defined in division (X), or coal miners' pneumoconiosis as defined in division (Y), or asbestosis as defined in division (AA) of section 4123.68 of the Revised Code, and that a change of such employee's occupation is medically advisable in order to decrease substantially further exposure to silica dust, asbestos, or coal dust and if the employee, after the finding, has changed or shall change the employee's occupation to an occupation in which the exposure to silica dust, asbestos, or coal dust is substantially decreased, the administrator shall allow to the employee an amount equal to fifty per cent of the statewide average weekly wage per week for a period of thirty weeks, commencing as of the date of the discontinuance or change, and for a period of one hundred weeks immediately following the expiration of the period of thirty weeks, the employee shall receive sixty-six and two-thirds per cent of the loss of wages resulting directly and solely from the change of occupation but not to exceed a maximum of an amount equal to fifty per cent of the statewide average weekly wage per week. No such employee is entitled to receive more than one allowance on account of discontinuance of employment or change of occupation and benefits shall cease for any period during which the employee is employed in an occupation in which the exposure to silica dust, asbestos, or coal dust is not substantially less than the exposure in the occupation in which the employee was formerly employed or for any period during which the employee may be entitled to receive compensation or benefits under section 4123.68 of the Revised Code on account of disability from silicosis, asbestosis, or coal miners' pneumoconiosis. An award for change of occupation for a coal miner who has contracted coal miners' pneumoconiosis may be granted under this division even though the coal miner continues employment with the same employer, so long as the coal miner's employment subsequent to the change is such that the coal miner's exposure to coal dust is substantially decreased and a change of occupation is certified by the claimant as permanent. The administrator may accord to the employee medical and other benefits in accordance with section 4123.66 of the Revised Code.

(E) If a firefighter or police officer makes application for a finding and the administrator finds that the firefighter or police officer has contracted a cardiovascular and pulmonary disease as defined in division (W) of section 4123.68 of the Revised Code, and that a change of the firefighter's or police officer's occupation is medically advisable in order to decrease substantially further exposure to smoke, toxic gases, chemical fumes, and other toxic vapors, and if the firefighter, or police officer, after the finding, has changed or changes occupation to an occupation in which the exposure to smoke, toxic gases, chemical fumes, and other toxic vapors is substantially decreased, the administrator shall allow to the firefighter or police officer an amount equal to fifty per cent of the statewide average weekly wage per week for a period of thirty weeks, commencing as of the date of the discontinuance or change, and for a period of seventy-five weeks immediately following the expiration of the period of thirty weeks the administrator shall allow the firefighter or police officer sixty-six and two-thirds per cent of the loss of wages resulting directly and solely from the change of occupation but not to exceed a maximum of an amount equal to fifty per cent of the statewide average weekly wage per week. No such firefighter or police officer is entitled to receive more than one allowance on account of discontinuance of employment or change of occupation and benefits shall cease for any period during which the firefighter or police officer is employed in an occupation in which the exposure to smoke, toxic gases, chemical fumes, and other toxic vapors is not substantially less than the exposure in the occupation in which the firefighter or police officer was formerly employed or for any period during which the firefighter or police officer may be entitled to receive compensation or benefits under section 4123.68 of the Revised Code on account of disability from a cardiovascular and pulmonary disease. The administrator may accord to the firefighter or police officer medical and other benefits in accordance with section 4123.66 of the Revised Code.

(F) An order issued under this section is appealable pursuant to section 4123.511 [4123.51.1] of the Revised Code but is not appealable to court under section 4123.512 [4123.51.2] of the Revised Code.

HISTORY: GC § 1465-80; 103 v 72(85), § 33; 107 v 161; 108 v Pt1, 313; 114 v 26; 117 v 113; 119 v 565(576); 120 v 449; 121 v 660; 122 v 268(720); 123 v 250; 124 v 806; Bureau of Code Revision, 10-1-53; 126 v 1015(1028) (Eff 10-5-55); 128 v 743(757) (Eff 11-2-59); 130 v 932 (Eff 1-23-63); 130 v 926 (Eff 10-1-63); 132 v H 331 (Eff 10-31-67); 132 v H 268 (Eff 12-11-67); 133 v H 680 (Eff 11-25-69); 134 v H 280 (Eff 9-20-71); 135 v H 417 (Eff 11-16-73); 136 v H 662 (Eff 10-31-75); 136 v H 714 (Eff 1-1-76); 136 v S 545 (Eff 1-17-77); 137 v H 1282 (Eff 1-1-79); 138 v H 138 (Eff 7-27-79); 141 v S 307 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); 144 v H 297 (Eff 7-26-91); 145 v H 107 (Eff 10-20-93); 147 v H 363 (Eff 6-30-97); 147 v S 45; 148 v H 180. Eff 8-6-99; 151 v S 7, § 1, eff. 6-30-06.

See provisions of § 3 of 151 v S 7 following RC § 4121.10.

Effect of amendments

151 v S 7, effective June 30, 2006, in the second paragraph, substituted "twenty-six" for "forty" twice; and, in (B), inserted "first finger, commonly known as a" in the second paragraph, substituted "second" for "first" in the third paragraph, substituted "third" for "second" in the fourth paragraph, substituted "fourth" for "third" in the fifth

their judgment or settlement were barred by the affirmative defense of accord and satisfaction from seeking the equitable relief of payment of sums given to the Bureau pursuant to RC §§ 4123.93 and 4123.931. Upon repayment of the sums to the Bureau, the employees each had signed a settlement agreement that contained accord and satisfaction language as to any purported claims arising therefrom. Dambolena v. Ohio Bureau of Workers' Comp., — Ohio App. 3d —, — N.E. 2d —, 2007 Ohio App. LEXIS 4004, 2007 Ohio 4435, (Aug. 30, 2007), affirmed by 117 Ohio St. 3d 541, 2008 Ohio 1735, 885 N.E.2d 244, 2008 Ohio LEXIS 999 (2008).

Retroactivity

Pursuant to RC § 1.48, the amendment to RC § 4123.93 cannot be applied retroactively: (decided under former analogous section) Bates v. Sherwin-Williams Co., 105 Ohio App. 3d 529, 664 N.E.2d 612 (1995).

Revised Code § 4123.93, granting automatic subrogation rights to self-insuring employers, cannot be applied retroactively: (decided under former analogous section) Williams v. Winston, 65 Ohio Misc. 2d 44, 640 N.E.2d 923 (CP 1994).

§ 4123.94 Preference of judgments.

All judgments obtained in any action prosecuted by the administrator of workers' compensation or by the state under the authority of this chapter shall have the same preference against the assets of the employer as is allowed by law on judgments rendered for claims for taxes.

HISTORY: GC § 1465-77; 103 v 72(85), § 30; Bureau of Code Revision, 10-1-53; 143 v H 222. Eff 11-3-89.

§ 4123.95 Liberal construction.

Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees.

HISTORY: 128 v 743(771). Eff 11-2-59.

CASE NOTES AND OAG

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Generally

Workers' compensation statutes shall be liberally construed in favor of employees and the dependents of deceased employees; in a workers' compensation action, the industrial commission erred in denying an injured worker's application for TTD because the commission should have focused its inquiry upon what the employee reasonably understood his medical restrictions. State ex rel. Mackenzie v. Ford Motor Co., 2003 Ohio App. LEXIS 2980, 2003 Ohio 3339, (2003), appeal dismissed by 100 Ohio St. 3d 1440, 2003 Ohio 5691, 797 N.E.2d 1288, 2003 Ohio LEXIS 2782 (2003).

A bill for x-rays which contains no suggestion of injuries is not proper notice under RC § 4123.84: Woodruff v. Springfield United Roofing, Inc., 1993 Ohio App. LEXIS 2575 (2nd Dist. 1993).

Holding that the commission had no duty to pay RC § 4123.57(B) and RC § 4123.57(C) benefits without an offset, the court observed that under RC § 4123.95 the courts and the commission must not construe RC Chapter 4123 in favor of whichever claimant happens to appear before them at any given time, but in favor of all employees and their dependents equally: State ex rel. Maurer v. Indus. Comm., 47 Ohio St. 3d 62, 547 N.E.2d 979 (1989).

Revised Code § 4123.95 does not override the commission's authority to formulate policies and standards for administering the workers' compensation laws: Swallow v. Indus. Comm., 36 Ohio St. 3d 55, 521 N.E.2d 778 (1988).

The mandate of RC § 4123.95 cannot overcome the clear language of RC § 4123.02.1 excluding workers' compensation benefits respecting National Guard members for whom benefits are otherwise provided by the federal government: Furrier v. Connor, 12 Ohio St. 3d 219, 12 Ohio B. 303, 466 N.E.2d 557 (1984).

Construed in accordance with RC § 4123.95, RC § 4123.57(B) does not preclude an award for a percentage of permanent partial disability after a claimant has already been determined to be permanently and totally disabled: State ex rel. Consolidated Coal Co. v. Indus. Comm., 62 Ohio St. 2d 147, 16 Ohio Op. 3d 166, 404 N.E.2d 141 (1980).

Applying RC § 4123.95, the court concluded that the RC § 4123.57(B) requirement of "substantial evidence of new and changed circumstances," being absent from RC § 4123.58, was intended to apply only to partial disability claims under the former section: State ex rel. General Motors Corp. v. Industrial Comm., 42 Ohio St. 2d 278, 71 Ohio Op. 2d 255, 328 N.E.2d 387 (1975).

The enactment of RC § 4123.95 most probably resulted, in part, from the prior judicial use of procedural niceties to cause unjust results in certain cases: Wires v. NL Industries, Inc., 46 Ohio App. 2d 40, 75 Ohio Op. 2d 35, 345 N.E.2d 629 (1974).

Citing RC § 4123.95, the court held that RC § 4123.01 extended the scope of compensable injuries to include unusual and unexpected accidents resulting from employment without regard to the presence of an "external accidental means": Moody v. Keller, 33 Ohio App. 2d 300, 62 Ohio Op. 2d 446, 295 N.E.2d 216 (1973).

Applying RC § 4123.95, the court held that an injured employee who filed an application for modification of an award more than two years after the original injury to secure compensation for a subsequent resultant disability not described in the original application was not barred by virtue of RC § 4123.84: Kittle v. Keller, 9 Ohio St. 2d 177, 38 Ohio Op. 2d 414, 224 N.E.2d 751 (1967).

Amount of vision lost

The commission is vested with the authority to interpret and implement legislation passed by the General Assembly. Revised Code § 4123.95 dictates that workers' compensation legislation shall be liberally construed in favor of employees. Therefore, the commission did not abuse its discretion in determining that, for purposes of RC § 4123.57(C), the