

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OHIO

State of Ohio ex rel.  
Jamey D. Baker \*

&

Industrial Commission of  
Ohio, et al. \*

Appellants, \*

v. \*

Coast to Coast Manpower  
LLC \*

Appellee \*

ON APPEAL FROM THE  
FRANKLIN COUNTY  
COURT OF APPEALS,  
TENTH APPELLATE  
DISTRICT

Supreme Court  
Case No. 2010-0211

**MERIT BRIEF OF APPELLANT, JAMEY D. BAKER**  
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## STATEMENT OF FACTS

On or about November 3, 2007, Jamey D. Baker (Appellant) was employed by Coast to Coast Manpower LLC (Employer), as a driver. Appellant was cutting a metal cable that snapped and struck him in the right eye, resulting in a metallic fragment perforating and embedding into his right cornea (Supplement, "Supp.", p.33). Appellant first sought treatment at Physician Plus who transferred him to the care of ophthalmologist Dr. Jack Hendershot. (Supp. p.4). Dr. Hendershot, in turn, transferred Appellant to the Ohio State University Medical Center and Dr. Thomas Mauger, who removed a foreign body and surgically repaired the laceration left by the foreign body the same day, November 3, 2007. (Supp. p.5-10). Subsequent to this first surgery, Appellant was released to Dr. Hendershot's care. Dr. Hendershot diagnosed a traumatic cataract<sup>1</sup> of the right eye on November 4, 2007, and scheduled surgery to perform cataract extraction on February 18, 2008. (Supp. p.20, 33).

Appellant filed a claim application with the Bureau of Worker's Compensation (BWC) and was assigned claim number 07-872217. The BWC allowed Appellant's claim for "corneal foreign body and laceration of the eye" via an Administrative Order dated November 15, 2007. On January 28, 2008, the BWC issued an administrative order additionally allowing Appellant's claim for a traumatic cataract of the right eye.

On February 18, 2008, Dr. Hendershot performed a cataract extraction with implant secondary to diagnoses of traumatic cataract, prior lens perforation and previous uveitis, right eye. (Supp. p.26). This surgery resulted in the removal of the Appellant's

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<sup>1</sup> "Cataract" is defined as "an opacity of the lens of the eye." *Taber's Cyclopedic Medical Dictionary* (19<sup>th</sup> Ed. 2001) 342.

natural lens (capsulotomy) and implantation of an artificial lens. (Supp. p.93).

Prior to Appellant's initial surgery, his visual acuity was rated at 20/50. Prior to the February 28, 2008, surgery, his visual acuity was rated at 20/30. Subsequent to the February 28, 2008, surgery, his visual acuity (corrected) was rated at 20/25. (Supp. p.32).

On or about March 21, 2008, Appellant filed a motion for an award for total loss of vision pursuant to R.C. 4123.57 (B). (Supp. p.30). The Bureau of Worker's Compensation requested an examination by Dr. Richard Tam, who, following an exam on April 22, 2008, opined that Appellant suffered an 8% permanent partial disability. (Supp. p.33). An addendum dated May 18, 2008 from Dr. Tam reiterated his opinion that Appellant had an 8% permanent partial disability. (Supp. p.35).

Appellant's motion went before a District Hearing Officer (DHO) who, on June 19, 2008, awarded an 8% permanent partial. (Supp. p.36-7). An appeal was filed by the injured worker on July 31, 2008. (Supp. p.38). The matter went before a Staff Hearing Officer (SHO) on August 25, 2008. The Staff Hearing Officer vacated the DHO's order and granted an award for 100% vision loss pursuant to R.C. 4123.57(B). (Appendix, p. 25 ). The order reads, in pertinent part,

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 show that the 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, 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.

(Appendix, p. 25-6).

On or about September 17, 2008, Employer appealed the SHO order to the Industrial Commission. (Appendix, p. 22). The Industrial Commission, upon review, granted Employer’s appeal, and, in an order dated January 9, 2009, vacated the SHO order and denied Appellant’s request for award for loss of vision in the right eye. (*Id.*).

The Commission held, in pertinent part,

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 a 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 Manuel 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.

(Appendix, p. 22-3).

On or about March 23, 2009, Appellant requested that the Tenth District Court of Appeals issue a Writ of Mandamus to the Industrial Commission of Ohio on the basis that the Industrial Commission abused its discretion when it misapplied the loss-of-vision statute, R.C. 4123.57(B), to hold that a claimant who suffers an undisputed industrial injury, which necessitates the complete surgical removal of the natural lens, may not recover for the loss of vision which results from that surgery. (Appendix, p. 7).

Initially, the employer and the commission filed answers denying any abuse of discretion. Significantly, however, in the intervening time between the Appellant's request for a writ and oral argument before Magistrate Brooks on August 18, 2009, the commission changed its position and, conceding that its order denying the award was improper, joined in Appellant's request for a writ of mandamus. (Supp. p. 69).

On or about August 31, 2009, Magistrate Brooks issued a decision denying Appellant's request for a writ of mandamus. (Appendix, p. 21). On or about December 17, 2009, the Tenth District Court of Appeals overruled Appellant's objections to the magistrate's decision and denied the requested writ of mandamus. (Appendix, p. 3). On or about February 2, 2010, Appellant filed a Notice of Appeal of Right of Appellant with this Court. (Appendix, p. 1). On or about February 12, 2010, the case was referred to mediation, though on March 25, 2010, the case was returned to the regular docket.

## ARGUMENT

This Court has recognized that an injured worker who suffers an industrial accident that results in the surgical removal of the natural lens is entitled to a scheduled loss of vision award for total loss of vision in the affected eye. This is true even when the injured worker's lens is replaced by an artificial implant which then allows for increased vision in the eye, as lens implants have been held to be correction, rather than restoration, of vision and therefore not to be considered in determining entitlement to a loss of vision award. *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St. 3d 186, 187 (2008).

However, the court below, in issuing its decision in this case and the factually similar case of *State ex rel. Dolgencorp v. Industrial Commission*, failed to follow its own precedent, as well as this Court's precedent in *AutoZone*, and fashioned its own rule. In the case at bar, the court below referred to its own recent *Dolgencorp* decision for the proposition that surgical implantation of an artificial lens eliminated the loss of vision. The Court of Appeals also held that a claimant would not qualify for a total loss of vision award absent proof that the industrial injury had resulted, prior to surgical removal of the lens, in a total loss of vision. This rule would make loss of vision claimants the only class of scheduled loss claimants denied compensation under R.C. 4123.57(B) because of the use of a prosthetic device. The Court of Appeals' holding disregards settled precedent and is contrary to the purposes and goals of the workers' compensation statutes. Therefore, the judgment of the Court of Appeals must be reversed and the Appellant's request for a writ of mandamus granted.



## Standard of Review

In order for this court to issue a writ of mandamus, the Appellant must show that he has a clear legal right to the relief sought and that the Industrial Commission has the clear legal duty to provide such relief. *AutoZone*, 117 Ohio St. 3d at 187. In order to find such a right to a writ of mandamus, this Court must find that the commission abused its discretion by entering an order not supported by the evidence on record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St. 3d 76 (1986).

- I. PROPOSITION OF LAW #1: Surgical removal of the lens of an eye in the course of treatment for a work-related injury results in a loss of vision in the affected eye. Replacement of the natural lens with a prosthetic implant results in correction, not restoration, of vision. An injured worker who suffers the loss of a natural lens as a result of a work-related injury is entitled to compensation pursuant to R.C. 4123.57(B) for total loss of vision of the affected eye.**

It is undisputed that Appellant suffered a work-place injury that resulted in a traumatic cataract of his right eye. It is also undisputed that the traumatic cataract resulted in the surgical removal of his natural lens and the implantation of an artificial lens. As a result of the loss of his natural lens, Appellant had no remaining natural structure allowing vision in his right eye. He therefore filed a request for a total loss of vision award under R.C. 4123.57(B). The statute states, in pertinent part, that permanent partial disability be paid as follows:

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 a result of the injury or occupational disease*.



R.C. 4123.57(B) (Emphasis added). The statute clearly requires the loss of vision prior to correction to be the standard by which loss of vision awards are measured. It does not permit any improvement as a result of correction to the injured eye to be taken into consideration. As the discussion will show, this Court has consistently held that improvement in vision resulting from a corneal transplant or lens implant surgery is a correction to, not a restoration of, vision. Moreover, this discussion will show that this Court has previously rejected the proposition that an award for total loss of uncorrected vision requires a showing of total loss of vision prior to surgical removal of the natural lens.

- a. **This Court and the Court of Appeals have repeatedly held that an award for total loss of vision under R.C. 4123.57(B) is appropriate when surgical treatment of an eye injury results in the loss of the natural lens of the injured eye.**

In *State ex rel. Kroger Co. v. Stover*, this Court held that “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 arts, be taken into consideration in determining the percentage of vision actually lost.” *State ex rel. Kroger Co. v. Stover*, 31 Ohio St. 3d 229, 234 (1987). The claimant in *Kroger* was exposed to ammonia and sustained substantial vision loss resulting from severe burning and scarring of his corneas. *Id.* As a result of his injuries, the claimant underwent corneal transplant surgery to his right eye. *Id.* The claimant sought compensation for loss of uncorrected vision in both eyes under the former R.C. 4123.57(C) (currently R.C. 4123.57(B)). *Id.* The Industrial Commission granted the claimant an 80 percent loss of vision in his right eye and total loss of vision in his left eye. *Id.* The lower courts found the Industrial Commission’s award of loss of

vision to be proper. *Id.* This Court agreed, and held that corneal burns and loss of vision were not separate injuries and that loss of vision was a condition flowing from the initial injury. *Id.* at 234. This Court further held that the employer's request for a writ of mandamus was not warranted because the corneal transplant was a correction to vision, not to be taken into account in determining the percentage of vision actually lost under the former R.C. 4123.57(C). *Id.* at 235. Finally, this Court found that its holding was reinforced by R.C. 4123.95 which requires otherwise ambiguous workers' compensation statutes to be liberally construed in favor of the injured worker and their dependents. *Id.*

Much like the instant case, the claimant in *State ex rel. Parsec, Inc. v. Agin, et al.* was struck in the eye with a wire, resulting in a traumatic cataract of the eye. *State ex rel. Parsec, Inc. v. Agin et al.*, 155 Ohio App. 3d 303 (10<sup>th</sup> App. Dist. 2003). In order to treat the cataract, the opaque lens had to be removed and replaced with an artificial lens. *Id.* at 308. The Court of Appeals adopted the decision of the magistrate, including the finding of facts and conclusions of law. *Id.* at 305. The magistrate stated, in pertinent part,:

“[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....As such, the evidence is clear that, due to the injury, the doctors necessarily had to remove claimant's lens and implant a new one. As such, the evidence does show that claimant sustained a total loss of vision in his left eye.”

*Id.* at 308. The Court of Appeals noted that the claimants' lenses in both *Kroger* and *Parsec* “were rendered completely useless and had to be removed.” *Id.* at 309. Significantly, in this analysis, the Court of Appeals focused on the loss of the lens. *Id.* at 308.



*Kroger* was again revisited in *State ex rel. General Electric v. Industrial Commission* when the claimant's vision decreased to 20/200 after an industrial accident. *State ex rel. General Electric v. Indus. Comm.*, 103 Ohio St. 3d 420 (2004). In that case, the commission granted a scheduled-loss award under R.C. 4123.57(B) for total loss of vision in both eyes. *Id.* Whether the claimant's 20/200 vision was bad enough to constitute loss of vision was not disputed in that case; instead, this Court dealt with whether corrective surgery which improved the claimant's vision foreclosed an award for total loss of vision. *Id.* This Court considered the medical basis for the *Kroger* decision, and stated that despite recent medical advancements, the *Kroger* decision still stands for the proposition that an artificial lens implant is a correction rather than a restoration, thus, any *post-surgical* increase in visual acuity from an artificial lens may not be considered in making an award for loss of vision under R.C. 4123.57(B). *Id.* at 426-7.

Barely more than two years ago, this Court again revisited its *Kroger* ruling in *State ex rel. AutoZone v. Industrial Commission* when it expressly rejected the proposition that a claimant whose lens was not determined to be totally opaque prior to removal may not recover for a loss of vision award. *State ex rel. AutoZone v. Indus. Comm.*, 117 Ohio St. 3d 186 (2008). In *AutoZone*, the claimant sustained a scleral and corneal laceration which necessitated surgery involving the removal of the lens of his left eye. *Id.* at 187. A DHO found that the claimant did not demonstrate that the removal of his lens produced a total loss of his uncorrected vision in the affected eye. *Id.* Claimant had suffered 70-80% vision loss pre-surgery. *Id.* at 188. On appeal, an SHO reversed the DHO's determination. *Id.* at 187. The SHO relied, in part, on the Court of Appeals decision in *Parsec*, as well as this Court's decisions in *Kroger* and *General Electric*, and

R.C. 4123.95. *Id.* The employer filed a mandamus action asserting that the commission abused its discretion in allowing the total loss of vision award. *Id.* The Court of Appeals adopted the Commission's reasoning and result and denied the writ, prompting the employer to appeal to this Court. *Id.* In its appeal, the employer sought to distinguish its claimant from the claimant in *Parsec*, claiming the injured worker in *Parsec* had proven a *complete* loss of vision necessitating the removal and replacement of his lens. *Id.* at 188. The employer argued that because the *AutoZone* claimant's lens was not determined to be opaque prior to its removal, claimant should not receive the same award as the claimant in *Parsec*. *Id.* This argument was rejected and the judgment of the Court of Appeals was affirmed. *Id.* at 188-9.

It is significant to note that, in *AutoZone*, this Court expressly rejected both propositions on which the Court of Appeals decision in the case at bar is based. This Court rejected *AutoZone*'s argument that total loss of vision prior to corrective surgery was required and it rejected the contention that implantation of an artificial lens results in restoration, rather than correction, of vision.

- b. **Appellant sustained a traumatic cataract which necessitated surgical treatment consisting of the complete removal of the natural lens and implantation of an artificial device to correct his vision.**

It is not disputed that Appellant suffered an injury to his right eye in the course of and arising out of his employment. It is also not disputed that, as a direct and proximate result of his injury, Appellant suffered a traumatic cataract which necessitated surgical intervention which resulted in the removal of his natural lens and the implantation of an artificial lens. The removal of his natural lens resulted in a total loss of the natural vision

of Appellant's right eye. The only means by which Appellant is able to see in his right eye as a result of the injury, and subsequent surgery, is through the use of the artificial implant. Notwithstanding its own prior holdings and those of this Court, however, the Court of Appeals held that Appellant was not entitled to a scheduled loss award for total loss of vision. In doing so, the court below relied heavily on its own recent decision in *DolgenCorp*.

In *DolgenCorp*, the claimant suffered an industrial injury to her left eye, resulting in a corneal implant, after which the claimant filed for an award for total loss of vision in her affected eye. *State ex rel. DolgenCorp, Inc. v. Indus. Comm.*, 2009 Ohio 6565, ¶15 (10<sup>th</sup> Dist. 2009). A DHO denial of claimant's motion was appealed to an SHO. *Id.* at ¶7-8. The SHO vacated the DHO's order and found that "because the lens transplant involved removal of claimant's own lens before the donor lens was put in place '[t]he surgical removal of the lens resulted in a total loss of use of the left eye.'" *Id.* at ¶8. Appellant-employer filed an action in mandamus challenging the SHO order and subsequent commission refusal to consider its appeal. *Id.* at ¶9. The Court of Appeals granted the writ as it believed the commission incorrectly held that the loss of the claimant's natural lens during the transplant surgery constituted a total loss of vision. *Id.* at ¶14. In granting the writ, the Court of Appeals purported to be following the precedent set forth in *Kroger*. *Id.* at ¶21. Instead, the court deviated from *Kroger*'s holding, as well as the subsequent holdings that have upheld and further explained the court's rationale in *Kroger*. *Id.* at ¶14, 17. The Court of Appeals appeared to fashion a new rule that requires claimants to prove 100% vision loss prior to surgery before being eligible for a total loss of vision award while purporting to follow *Kroger*. *Id.* at ¶14.



vision.

Appellant has, without question, suffered the loss of the natural structure permitting vision in his right eye as a result of a surgical procedure necessitated by his work-related injury. Any vision which exists today in his right eye results not from the restoration of his own tissue or organs, but from the replacement thereof with a prosthetic device. Under the rationale of the Court of Appeals in *Dolgenercorp* and the case at bar, injured workers suffering the loss of natural vision injury would be the only category of workers suffering the loss of a bodily member or function addressed under R.C. 4123.57(B) to be denied compensation for such loss because of the use of a prosthetic device.

Appellant is entitled to a loss of vision award much like the amputee would be entitled to a loss of limb award. For this reason, and those set forth in *General Electric* and *Parsec*, the instant case is distinguishable from *Welker* and *Qiblawe* and, pursuant to R.C. 4123.57(B), Appellant is entitled to a total loss of vision award for the loss of his natural lens.

c. **Appellant is entitled to a scheduled loss award under R.C. 4123.57(B) by reason of the loss of natural vision resulting from his injury and related surgery.**

Similar to the employer in *AutoZone*, and contrary to this Court's holding in that case, the Court of Appeals in the instant case upholds the commission's original determination and seeks to deny Appellant a loss of vision award based upon the fact that he had not yet attained a total loss of vision in his right eye. However, the commission has since conceded error in denying Appellant a total loss of vision award and has joined Appellant in his request for a writ. The Court of Appeals, adopting, in part, the



conclusions of law by the magistrate, conflicts with the on point holding of this Court in *AutoZone*. In *AutoZone*, this Court found a claimant who had a 70 to 80% vision loss at the time of lens implant surgery could recover for a total loss of vision, because the loss of the natural lens was a sequela of the industrial injury. *AutoZone*, 117 Ohio St. 3d at 188. Neither the Court in *AutoZone* nor any other court has held that an injured worker needs to have suffered a total loss of vision prior to surgery before being entitled to a total loss of vision award. It is inconsequential that Appellant's traumatic cataract had not progressed to the point of causing a total loss of vision prior to the lens removal. Appellant suffered a total loss of vision when his natural lens was removed as a consequence of the necessary surgery his compensable injury caused.

The Court of Appeals decision, in effect, punishes Appellant for receiving the surgical correction without waiting for his traumatic cataract to progress to the point of total loss of vision. This punishment undermines the goals of the workers' compensation statutes and goes against the clear, established precedent set forth by this Court in *Kroger*, *General Electric* and *AutoZone*, as well as the Court of Appeals in *Parsec*. Because Appellant, like the claimants in *AutoZone*, *General Electric* and *Kroger*, was not completely blind prior to his surgery, he is entitled to the same award to which this Court found the claimants in those cases entitled.

Finally, R.C. 4123.95 directs courts to liberally construe workers' compensation statutes in favor of injured workers. Appellee may argue that a total loss of vision award to the Appellant constitutes a windfall because he can still see. However, this Court in *General Electric* noted that while it may appear to be a windfall to grant a total loss of vision award to a claimant who has had corrective surgery, it nonetheless cited, with



approval, a Maryland Court of Appeals decision which held;

“Turning to Employer’s argument that the legislature could not have intended such a result, because it might give [the claimant] what Employer views as a windfall, we observe that the beneficial intent and the social policies underlying the workers’ compensation law do not necessarily produce mathematically logical results in every case. We are not dealing with mere mathematics but with the legislative response to problems of an industrial society.”

*General Electric*, 103 Ohio St. 3d at 426. As such, the Appellant is entitled to, and the Industrial Commission committed an abuse of discretion when it denied his request for, an award for total loss of vision in his right eye.

#### CONCLUSION

For the above reasons, Appellant respectfully submits that he has sustained his burden of proof demonstrating an abuse of discretion for which a writ of mandamus will lie. Appellant submits that this Court should issue a writ of mandamus compelling the Commission to vacate the January 9, 2009, order, insofar as it improperly finds that Appellant is not entitled to 100% loss of vision of the right eye for his industrial injury in spite of Appellant’s total loss of his natural lens directly caused by the industrial injury. In the alternative, and at a minimum, this Court should issue a limited writ directing the Commission to vacate the January 9, 2009, order and to conduct further proceedings to determine Appellant’s entitlement to Loss of Vision award pursuant to the applicable legal standards.

Respectfully submitted,



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**CERTIFICATION**

This is to certify that the foregoing was served upon Attorney for Appellant, Industrial Commission of Ohio, Colleen C. Erdman, Assistant Attorney General, 150 East Gay Street, 22<sup>nd</sup> Floor, Columbus, Ohio 43215-3130 and upon Attorney for Respondent, Coast to Coast Manpower LLC, Amy S. Thomas and Mick Proxmire, Reminger Co., LPA, 65 East State Street, 4th Floor Columbus OH 43215 by regular U.S. mail this 8<sup>th</sup> day of May, 2010.



Theodore A. Bowman



APPENDIX

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10-0211

State of Ohio ex rel.  
Jamey D. Baker,

Relator,

v.

Coast to Coast Manpower  
LLC

&

Industrial Commission of  
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ON APPEAL FROM THE  
FRANKLIN COUNTY  
COURT OF APPEALS,  
TENTH APPELLATE  
DISTRICT

Court of Appeals  
Case No. 09 APD03 0287

**NOTICE OF APPEAL OF RIGHT OF APPELLANT, JAMEY D. BAKER**

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NOTICE OF APPEAL OF RIGHT OF APPELLANT, JAMEY D. BAKER

Now comes Appellant, Jamey D. Baker, by and through counsel, and, pursuant to Rule II of the Supreme Court Practice Rules, hereby 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 number 09 APD03 0287 on December 22, 2009, in accordance with its Decision filed on December 17, 2009. Copies of both the Judgment Entry and the Decision are attached.

This case originated in the Franklin County Court of Appeals, Tenth Appellate District, thus making this an appeal of right pursuant to Rule II, Section 1(A)(1) of the Supreme Court Practice Rules.

Respectfully submitted



Theodore A. Bowman (009159)  
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CERTIFICATION

This is to certify that the foregoing was served upon Attorney for Appellee, Industrial Commission of Ohio, Colleen C. Erdman, Assistant Attorney General, 150 East Gay Street, 22<sup>nd</sup> Floor, Columbus, Ohio 43215-3130 and upon Attorney for Respondent, Coast to Coast Manpower LLC, Amy S. Thomas, Mick Proxmire, Reminger Co., LPA, 65 East State Street, 4th Floor Columbus OH 43215 by regular U.S. Mail this 1<sup>st</sup> day of February, 2010.



Theodore A. Bowman





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 *Dolgenercorp*, 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.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
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CLERK OF COURTS

State of Ohio ex rel. Jamey D. Baker, :  
Relator, :  
v. :  
Coast to Coast Manpower LLC and :  
Industrial Commission of Ohio, :  
Respondents. :

No. 09AP-287

(REGULAR CALENDAR)

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MAGISTRATE'S DECISION

Rendered on August 31, 2009

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*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.*

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IN MANDAMUS

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:

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.

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.

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.

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

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

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.

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.

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

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

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

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.

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.

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.

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.

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.

16. Thereafter, relator filed the instant mandamus action in this court.

#### Conclusions of Law:

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.

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

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.

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

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. \* \* \*

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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)."

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.

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).

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.

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.

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.

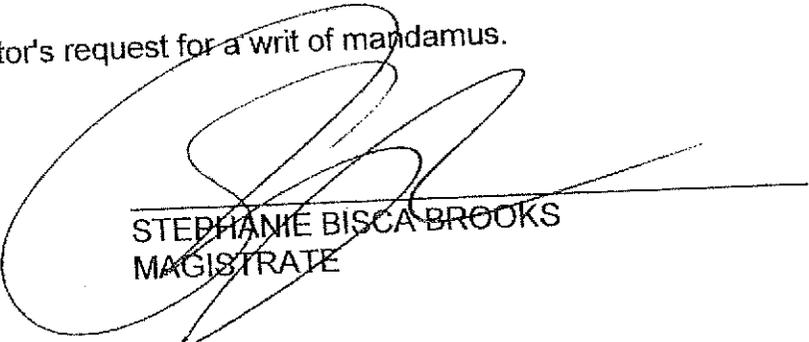
By comparison, in the present case, the immediate damage to relator's eye was to his cornea. Subsequently, relator developed a cataract of his lens. The medical evidence establishes that relator's visual acuity immediately following the injury was 20/50

No. 09AP-287

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.

The present case is not analogous to the facts in *Parsec*.

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.



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).

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 07-872217  
LT-ACC-OSIF-COV  
PCN: 2081491 Jamey D. Baker

Claims Heard: 07-872217

JAMEY D. BAKER  
248 N WASHINGTON ST  
TIFFIN OH 44883-1529

FINDINGS MAILED  
JAN 15 2009  
INDUSTRIAL COMMISSION  
OF OHIO

Date of Injury: 11/03/2007

Risk Number: 1420392-0

This claim has been previously allowed for: RIGHT CORNEAL FOREIGN BODY,  
RIGHT LACERATION OF EYE, RIGHT TRAUMATIC CATARACT.

This matter was heard on 11/25/2008, before the Industrial Commission pursuant to the provisions of R.C. 4121.03, 4123.511 and 4123.52 on the following:

IC-12 Notice Of Appeal filed by Employer on 09/17/2008.

Issue: Scheduled Loss/Loss Of Use - LOSS OF VISION RIGHT EYE

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present at the hearing:

APPEARANCE FOR THE INJURED WORKER: Ms. Painter  
APPEARANCE FOR THE EMPLOYER: Mr. Proxmire  
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

HEARD BY: Mr. DiCeglio, Mr. Thompson, Mr. Abrams

11/25/2008 - It is the decision of the Industrial Commission that the Employer's appeal, filed 09/17/2008, is taken under advisement for further review and discussion and that an order be issued without further hearing.

11/25/2008 - After further review and discussion, it is the finding of the Industrial Commission that the Employer's appeal, filed 09/17/2008, is granted and the Staff Hearing Officer order, issued 09/04/2008, is vacated.

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

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 07-872217

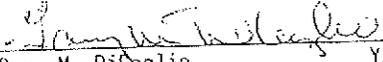
visual loss. The visual loss prior to the surgery is the determining factor for the award.

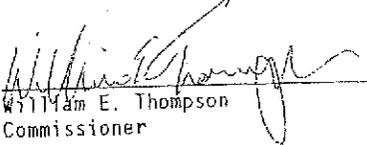
Therefore, the request for loss of vision in the right eye is denied.

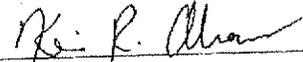
ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN 60 DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN R.C. 4123.512.

Typed By: PD/rh  
Date Typed: 01/09/2009

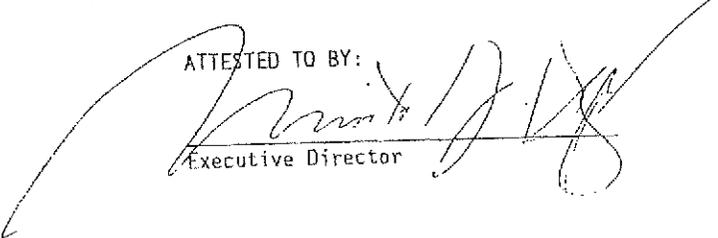
The action is based upon the motion made by Mr. Thompson, seconded by Mr. Abrams, and voted on as follows:

  
\_\_\_\_\_  
Gary M. DiCeglie YES  
Chairperson

  
\_\_\_\_\_  
William E. Thompson YES  
Commissioner

  
\_\_\_\_\_  
Kevin R. Abrams YES  
Commissioner

ATTESTED TO BY:

  
\_\_\_\_\_  
Executive Director

Findings Mailed:

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

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07-872217  
Jamey D. Baker  
248 N Washington St  
Tiffin OH 44883-1529

Risk No: 1420392-0  
Coast To Coast Manpower LLC  
2820 16th St  
North Bergen NJ 07047-1541

ID No: 20511-91  
Gallon Takacs Boissoneault & Schaff  
3516 Granite Cir  
Toledo OH 43617-1172

ID No: 150-80  
\*\*\*Compensation Consultants\*\*\*  
5500 Glendon Ct Ste 300  
Dublin OH 43016-3290

ID No: 21353-91  
\*\*\*Reminger Co, LPA\*\*\*  
65 E State St Ste 400  
Columbus OH 43215-4227

ID No: 9994-05  
\*\*\*BWC, Law - Columbus\*\*\*  
Attn: Director Of Legal Operations  
30 W Spring St # L-26  
Columbus OH 43215-2216

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 07-872217

BWC, LAW DIRECTOR

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NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT [www.ohioic.com](http://www.ohioic.com). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

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The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 07-872217  
LT-ACC-OSIF-COV  
PCN: 2081491 Jamey D. Baker

Claims Heard: 07-872217

JAMEY D. BAKER  
248 N WASHINGTON ST  
TIFFIN OH 44883-1529

Date of Injury: 11/03/2007

Risk Number: 1420392-0

This claim has been previously allowed for: RIGHT CORNEAL FOREIGN BODY,  
RIGHT LACERATION OF EYE, RIGHT TRAUMATIC CATARACT.

This matter was heard on 08/25/2008 before Staff Hearing Officer Mara  
Lanzinger Spidel pursuant to the provisions of Ohio Revised Code Section  
4121.35(B) and 4123.511(D) on the following:

APPEAL of DHO order from the hearing dated 06/19/2008, filed by Injured  
Worker on 07/31/2008.  
Issue: 1) Scheduled Loss/Loss Of Use - LOSS OF VISION RIGHT EYE

APPEAL of DHO order from the hearing dated 06/19/2008, filed by BWC on  
08/04/2008.  
Issue: 1) Scheduled Loss/Loss Of Use - LOSS OF VISION RIGHT EYE

Notices were mailed to the injured worker, the employer, their respective  
representatives and the Administrator of the Bureau of Workers'  
Compensation not less than 14 days prior to this date, and the following  
were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Schaffer; Injured Worker;  
Mrs. Baker  
APPEARANCE FOR THE EMPLOYER: Mr. Russo  
APPEARANCE FOR THE ADMINISTRATOR: Mr. Heyman

The order of the District Hearing Officer, from the hearing dated  
06/19/2008, is VACATED. Therefore, the injured worker's C-86 Motion, filed  
03/24/2008, is GRANTED.

The Staff Hearing Officer GRANTS 100% loss of vision of the right eye,  
pursuant to 4123.57(B). The Statute provides that "loss of uncorrected  
vision" means the percentage of vision actually lost as a result of the  
injury or occupational disease.

Injured worker's Motion is supported by the operative report of Dr.  
Hendershot, dated 02/18/2008.

Injured worker sustained a severe injury to his right eye on  
November 3, 2008, when a metallic fragment perforated and embedded into his  
right cornea. He was evaluated by Dr. Vance in an Urgent Care Center and  
sent immediately to an ophthalmologist, Dr. Hendershot. He was then  
transferred to Ohio State University where he underwent operation by Dr.  
Mauger later that evening to remove the foreign body, seal the rupture and  
injection antibiotics. Traumatic cataract was noted the next day, which  
progressed. Other complication included irritis noted on 01/15/2008.  
Cataract removal was performed by Dr. Hendershot on 02/18/2008. On  
02/18/2008, the Staff Hearing Officer finds that injured worker's lens was  
removed and an implant was placed in injured worker's eye.

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 07-872217

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 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 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, 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.

Therefore, 125 weeks are awarded.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at [www.ohioic.com](http://www.ohioic.com) or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Toledo District Office, One Government Center, Suite 1500, Toledo OH 43604.

Typed By: mlg  
Date Typed: 08/29/2008

Findings Mailed: 09/04/2008

Mara Lanzinger Spidel  
Staff Hearing Officer

Electronically signed by  
Mara Lanzinger Spidel

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

07-872217  
Jamey D. Baker  
248 N Washington St  
Tiffin OH 44883-1529

ID No: 20511-91  
Gallon Takacs Boissoneault & Schaff  
3516 Granite Cir  
Toledo OH 43617-1172

The Industrial Commission of Ohio

## RECORD OF PROCEEDINGS

Claim Number: 07-872217

Risk No: 1420392-0  
Coast To Coast Manpower LLC  
2820 16th St  
North Bergen NJ 07047-1541

ID No: 150-80  
\*\*\*Compensation Consultants\*\*\*  
5500 Glendon Ct Ste 300  
Dublin OH 43016-3290

ID No: 9997-05  
\*\*\*BWC, Law - Toledo\*\*\*  
Attn: David Szuch  
1 Government Ctr Ste 1136  
Toledo OH 43604-2209

BWC, LAW DIRECTOR

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## ORC Ann. 4123.57 (2010)

## § 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 by 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 gainful 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.

ORC Ann. 4123.95 (2010)

§ 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.