

IN THE SUPREME COURT OF OHIO

**STATE OF OHIO, ex rel.,
JAMEY BAKER**

APPELLANT

-vs-

INDUSTRIAL COMMISSION OF OHIO

APPELLANT

and

COAST TO COAST MANPOWER, LLC,

APPELLEE

CASE NO. 2010-211

On Appeal from the Franklin County Court
of Appeals, Tenth Appellate District –
CASE NO. 09-AP-287

(BWC No. 07-872217)

APPELLEE COAST TO COAST MANPOWER, LLC'S MERIT BRIEF

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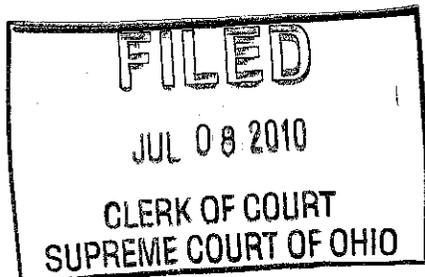


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STATEMENT OF FACTS AND OF THE CASE

Appellee Coast to Coast Manpower LLC (“Coast to Coast”) accepts the factual statements contained within the Merit Briefs of Appellants Industrial Commission of Ohio and Jamey Baker.

STATEMENT OF APPELLANTS’ PROPOSITIONS OF LAW

INDUSTRIAL COMMISSION 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.

JAMEY BAKER PROPOSITION OF LAW:

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.

LAW AND ARGUMENT

- I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE INDUSTRIAL COMMISSION MUST DETERMINE AN AWARD UNDER R.C 4123.57(B) BASED ON THE EMPLOYEE’S LOSS OF VISUAL ACUITY PRIOR TO ANY SURGERY. AS SUCH, SURGICAL LENS REPLACEMENT DOES NOT, BY ITSELF, RESULT IN A TOTAL LOSS OF SIGHT.**

The Court of Appeals, based on the plain language of R.C. 4123.57(B) and this Court’s prior case law, correctly held that surgical replacement of a lens does not, by itself, constitute the loss of the sight of an eye. As such, this Court should affirm the decision of the Court of Appeals. R.C. 4123.57 provides in pertinent part as follows:

- (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. ... 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.

(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 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. ...

R.C. 4123.57 (emphasis added). Both the plain language of this statute as well as this Court’s decisions in *State ex rel. Kroger Company v. Stover* (1987), 31 Ohio St. 3d 229, *State ex rel. General Elec. Corp. v. Indus. Comm.*, 103 Ohio St. 3d 420, 2004-Ohio-5585, and *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St. 3d 186, 2008-Ohio-541, support the Court of Appeals conclusion that surgical lens replacement does not, by itself, result in “the loss of the sight of an eye.”

Appellants urge the Court to adopt a “broader” rule regarding “total” loss of sight awards under R.C. 4123.57(B). However, the plain language of the statute does not support the Propositions of Law advanced by Appellants. In fact, when considering the plain language of R.C. 4123.57(B) in the context of this case, resolution is straightforward. The provision of R.C. 4123.57(B) under which Appellant Baker seeks benefits permits an award only for “the loss of the sight of an eye.” R.C. 4123.57(B). This case, simply, does not involve loss of sight *at all*.

Appellant Baker maintains his entitlement to an award for “the loss of the sight of an eye”—an award of the statewide average weekly wage paid to him for one hundred twenty-five weeks. Yet, Appellant Baker’s visual acuity (loss of vision) both before and after the surgical lens replacement does not even qualify him for an award of benefits under the provision of R.C. 4123.57(B) for “the permanent partial loss of sight of an eye,” which prohibits an award of compensation “for less than twenty-five per cent loss of uncorrected vision.” *Id.* It is undisputed that Appellant Baker’s “loss of uncorrected vision” did not exceed 8 percent. (Baker Supp. 24). Baker’s treating physician measured Baker’s visual acuity pre-surgery at 20/30 and measured his visual acuity post-surgery at 20/25. (Baker Supp. 25).

Indeed, to adopt Appellants’ Propositions of Law, the Court would need to ignore the plain language of R.C. 4123.57(B) and craft a new rule to compensate Appellant Baker for a “scheduled loss” that the statutory schedule simply does not recognize. Specifically, Appellants maintain that Appellant Baker should receive an award under R.C. 4123.57(B) for “the loss of the sight of an eye.” However, Appellant Baker lost his natural lens—not the sight—of his eye.

Appellants’ Propositions of Law seek judicial amendment of the plain language of R.C. 4123.57(B). Appellants’ request for a “broader, all-encompassing rule” for vision loss awards would require this Court to add language to the statute. Indeed, for Appellant Baker to recover in this case, the Court would need to add an entirely new type of loss not currently contained in the statutory schedule—namely, an award “for the loss of a natural lens.” However, the statutory schedule currently does not compensate an employee for this type of loss.

Certainly, if the General Assembly wanted to provide a scheduled loss award for an employee’s loss of a natural lens, the General Assembly could easily do so. The General Assembly would only need to amend the statute to do what Appellants essentially ask this

Court to do here—add the words, “for the loss of a natural lens.” However, unless and until the Legislature amends R.C. 4123.57(B) to add “loss of a natural lens” to the list of scheduled injuries, employees can only recover an award related to their eyes by establishing “the loss of the sight of an eye” or “the permanent partial loss of sight of an eye.”

A. THE PLAIN LANGUAGE OF R.C. 4123.57(B) CONFIRMS THAT A SURGICAL LENS REPLACEMENT DOES NOT, BY ITSELF, CONSTITUTE LOSS OF SIGHT OF ANY EYE.

This Court should affirm the Court of Appeals’ decision because the plain language of R.C. 4123.57(B) demonstrates that a surgical lens replacement does not, alone, result in the loss of the sight of an eye. The undisputed facts confirm that Appellant Baker’s loss of vision/loss of visual acuity/loss of uncorrected vision (whatever measure the Court applies) never exceeded 8 percent loss. (Baker Supp. 24-25). In fact, at its worst, Baker’s visual acuity measured 20/50—the day of his injury on November 3, 2007. (Baker Supp. 25). Three months later, before he underwent the surgical lens replacement, Baker’s visual acuity measured 20/30. (*Id.*). A month and a half after his surgery, Baker’s visual acuity measured 20/25. (*Id.*). Thus, at no point along this continuum did Appellant Baker demonstrate “the loss of the sight of an eye”—which the plain language of R.C. 4123.57(B) requires an employee to sustain to recover.

In fact, Appellants’ arguments do not even involve “sight” or the loss of it. This case involves a quintessential “apples versus oranges” comparison. R.C. 4123.57(B) awards compensation for one thing—the loss of the sight of an eye. However, Appellants argue that it should allow compensation for a different thing—the loss of a natural lens. Fundamentally, the plain language of the statute does not allow an award unless the employee demonstrates some functional loss of sight. The Court of Appeals correctly denied Baker’s request for a writ of

mandamus because Appellant Baker, as the facts clearly establish, could not demonstrate the requisite “loss of the sight of an eye.”

It is undisputed under R.C. 4123.57(B) that Baker’s 8 percent visual acuity loss is not “the loss of the sight of an eye.” In fact, an 8 percent visual acuity loss does not even meet the threshold requirement for a “permanent partial loss of sight of an eye,” which requires a minimum “twenty-five per cent loss of uncorrected vision.” R.C. 4123.57(B). R.C. 4123.57(B) (defining “loss of uncorrected vision” as “the percentage of vision actually lost as the result of the injury or occupational disease”).

The facts confirm Appellant Baker’s inability to qualify for a “permanent partial loss of sight of an eye” award. Yet, incredibly, Appellant Baker maintains he is entitled to an award for total “loss of the sight of an eye.” Baker argues that the surgical lens replacement constituted “the loss of the sight of an eye.” However, the simple fact remains that Baker never sustained such a loss—“the loss of the sight of an eye.” Immediately after the accident, before his surgery, and after his surgery, Baker enjoyed sight in the injured eye. (In fact, his pre- and post-surgical visual acuity measurements of 20/30 and 20/25 respectively demonstrate the minimal impact to Baker’s sight). Certainly, Appellant Baker sustained a loss of his natural lens. Despite Appellants’ arguments, however, R.C. 4123.57(B) simply does not provide compensation for this type of loss.

If the Legislature intended to compensate an injured worker for loss of a natural lens and intended to make this factor alone the basis for an award, the Legislature could have easily added this to the list of scheduled losses. However, the Legislature did not do so. Rather than tie an award to the loss of an injured worker’s natural lens, the Legislature tied the award to the function of sight. Baker had sight in his eye both before and after the surgery. Thus, the plain

language of R.C. 4123.57(B) confirms that the Court of Appeals correctly held that Appellant Baker did not sustain “loss of the sight of an eye.”

Reference to other portions of R.C. 4123.57 confirms this interpretation. Although the majority of scheduled losses in the statute base on an award on the loss of a particular part of the body, as opposed to a loss of some function (such as sight), at least one other part of R.C. 4123.57 bases an award on functional loss. R.C. 4123.57 also authorizes an award for the following:

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.

R.C. 4123.57(B). A contracture is a tightening of muscle, tendons, ligaments, or skin that prevents normal movement. Thus, this section authorizes a scheduled loss award whenever an injured worker suffers total stiffness or tightening of the muscles, tendons, ligaments, or skin of any part of the fingers or thumbs. Applying Appellants’ logic to this section, an injured worker would be entitled to receive an award under the above section if, during surgery, the injured worker sustained stiffness or contractures that rendered the fingers or thumb useless. However, logic dictates that the Legislature intended this section to compensate an injured worker for the loss of use of the fingers or thumbs only when that loss is permanent—not when the injured worker sustains a transient loss of use—which occurs during every surgery.

In fact, based on the plain language of R.C. 4123.57, Appellants have failed to provide any support for their contention that the surgical replacement of a lens constitutes the loss of the sight of an eye. Baker maintains that he lost sight in his eye when the surgeon replaced his natural lens—i.e., that he could not see. However, this is no different that *any* surgery. From a functional perspective, whenever a person receives general anesthesia, that person cannot see.

Because the Legislature based on award under R.C. 4123.57 on the *function* of sight—and not on the loss of any specific part of the eye—the Court of Appeals correctly concluded that Baker was not entitled to an award under R.C. 4123.57.

In fact, Baker’s argument makes this exact point. Baker argues: “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.” Baker Brief at 17. Indeed, as Baker himself acknowledges, the loss Baker sustained related to the natural structure—the lens. However, he did not lose sight.

Baker further suggests that he “is entitled to a loss of vision award much like an amputee would be entitled to a loss of limb award.” Baker Brief at 17. Baker’s argument, however, is misplaced. First, as emphasized above, the General Assembly has not included in R.C. 4123.57(B) a provision awarding compensation for the loss of the lens of an eye. In contrast, an amputee may recover under R.C. 4123.57(B) because the statute awards benefits for amputations of specific parts of the body. Indeed, R.C. 4123.57(B) sets forth a very specific list regarding amputation and allows a certain award based on the specific body part lost. For example, R.C. 4123.57(B) authorizes an award for the loss of the following body parts (as well as many others) at the following number of weeks:

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 foot, one hundred fifty weeks.

For the loss of a leg, two hundred weeks.

R.C. 4123.57(B). Unlike the express allowance of an award for the loss of a leg, for example, the statute does not authorize an award for the loss of the natural lens of the eye.

Rather, the statutory basis for an award for the loss of a limb fundamentally differs than the basis for the loss of the sight of an eye. The former grants an award for loss of a specific body part, like a leg, and the latter grants an award for a functional loss, like sight in an eye. An injured worker that sustains an amputation as a result of an industrial accident does not need to demonstrate any loss before the amputation because R.C. 4123.57 bases an award on the loss of the specific body part, a leg, hand, etc. However, for sight, the statute requires a functional loss. Again, the Legislature could have very easily awarded damages for loss of a natural lens—in the way that the statute allows an award for loss of other specific body parts. However, until the General Assembly amends R.C. 4123.57 to authorize a specific award for loss of a natural lens, an employee, like Baker, must demonstrate functional loss of sight.

Baker had sight in his eye before the surgery; Baker had sight in his eye after the surgery. Although Baker lost his natural lens, R.C. 4123.57 does not provide for an award simply for this. Accordingly, Appellee Coast to Coast respectfully urges this Court to affirm the Court of Appeals decision.

B. THIS COURT’S PRIOR DECISIONS CONFIRM THAT BAKER DID NOT SUSTAIN THE LOSS OF THE SIGHT OF AN EYE AND CONFIRM THAT THE PRE-SURGICAL VISUAL ACUITY CONTROLS WHETHER THE CLAIMANT SUSTAINED THE LOSS OF THE SIGHT OF AN EYE.

This Court should affirm the Court of Appeals decision because this Court’s prior cases verify that Appellant Jamey Baker did not sustain the loss of the sight of an eye. In *State ex rel. Kroger Company v. Stover* (1987), 31 Ohio St. 3d 229, this Court held that the pre-surgery percentage of visual loss sustained by an injured worker alone determines the award under R.C. 4123.57.

In *State ex rel. Kroger*, the injured worker, Stover, sought an award for vision loss after he suffered severe corneal burns. Stover underwent corneal transplant surgery to improve his

vision. The corneal transplant surgery succeeded in improving Stover's visual acuity in his left eye; however Stover's body rejected the cornea transplant in the right eye. The employer, Kroger, argued that the Industrial Commission must base its award for Stover's loss of vision on Stover's visual acuity as improved by the corneal transplant. This Court rejected Kroger's attempt to base the final award on the results of the surgical procedure. This Court explained:

Undeniably Stover sustained the substantial vision loss found by the commission. His loss resulted from severe burning and scarring of his corneas. The question is whether a transplant eliminates the loss of vision or is a correction of vision. A corneal transplant does not necessarily result in permanent or trouble-free restoration. This conclusion is substantiated by the medical testimony in this case which shows that Stover has twice suffered a rejection of the grafts in his right eye, and that at the time there was reason to believe that rejection in the left eye was possible.

Id. at 234.

This Court observed that Kroger's argument asked the Court "to find that a corneal transplant is not merely corrective, but restores vision permanently." *Id.* at 234. The Court declined to accept Kroger's argument. *Id.* Rather, the Court concluded that the corneal surgery did not constitute "correction" for purposes of R.C. 4123.57(C) (now R.C. 4123.57(B)). However, the Court acknowledged that medical technology may, one day, require a different conclusion based on advances in medicine. Under the state of medicine then, the Court in *Kroger* could not support the position Kroger advanced:

We acknowledge that advances in medical technology might, at some future time, permit the conclusion that a corneal transplant eliminates the loss (as for example the re-setting of broken bones could). But, at the present and on this record, a corneal transplant is no more than a correction to lost vision.

Accordingly, we hold 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 art, be taken into consideration in determining the percentage of vision actually lost pursuant to R.C. 4123.57(C) [now R.C. 4123.57(B)].

Id. Thus, based on the statutory language, this Court determined that Stover’s pre-surgical visual acuity governed for assessing his entitlement to a loss of vision award.

In *State ex rel. General Elec. Corp. v. Indus. Comm.*, 103 Ohio St. 3d 420, 2004-Ohio-5585, this Court reaffirmed the validity of employing pre-surgical visual acuity for assessing an injured worker’s award for loss of vision under R.C. 4123.57. In *General Electric*, this Court reversed a decision of the Tenth District Court of Appeals concluding that corneal implants had resulted in permanent improvement. The Court of Appeals’ decision stated:

“[B]ased on the evidence in this case, claimant’s eyes were fully repaired surgically in a way similar to the way in which a severed finger can be reattached. There have been significant advances in medical technology with regard to cataract surgery. It is as if the person receives a completely new set of eyes.”

Id. at ¶ 42 (quoting Court of Appeals’ decision). Despite medical advancement in the seventeen years since the Court’s *Kroger* decision, this Court concluded that, contrary to the Court of Appeals’ reasoning, corneal transplant could not support a retreat from the rule requiring assessment of a loss of vision award based on pre-surgery visual acuity. The Court concluded its *General Electric* decision by observing as follows:

In this case, R.C. 4123.57(B) clearly makes uncorrected vision the applicable standard. Case law, in turn, distinguishes between correction and restoration/recovery for purposes of making an award and has presumably left the terms deliberately undefined in order to accommodate advances in medical procedure. The court of appeals in this case felt that the time had arrived to reclassify corneal lens implants as restorative. We do not agree and accordingly reverse its judgment.

Id. at ¶ 52.

In *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St. 3d 186, 2008-Ohio-541, this Court again recognized that pre-surgical visual acuity controls to determine an award under R.C. 4123.57. This Court held that the injured worker had sustained loss of sight of an eye where the loss of visual acuity was 20/200—legally blind. *Id.* at ¶¶ 22-23. This was the injured

worker's loss of visual acuity *before* any surgery. Thus, the injured worker did sustain a functional loss of the sight of an eye—despite any correction that might occur via surgery.

Although this Court's decisions to date have not agreed that medicine has advanced sufficiently such that courts may treat corneal transplant or lens replacement surgeries as restoration instead of correction, the law is clear lens replacement or corneal transplant surgery does not alter the basic statutory requirement that assessment of an award for the loss of the sight of an eye must relate to the pre-surgery visual acuity.

Appellants argue that these cases support their Propositions of Law. However, in so doing, they ignore the aspect of this Court's holdings addressing the level of vision loss prior to surgery. For example, Appellant Baker urges that the Court of Appeals decision below conflicts with this Court's holding in *AutoZone* because the *AutoZone* case allowed the claimant to recover an award "for the loss of the sight of an eye" even though claimant had a 70 to 80 percent vision loss at the time he underwent lens replacement surgery. Baker Brief at 18. However, in *AutoZone*, this Court rejected the very same argument Appellant Baker attempts to make to support his position. Thus, contrary to Baker's argument, this Court's *AutoZone* decision reinforces this Court's prior loss of vision decisions and reaffirms the analytical approach a court or the Industrial Commission must use to determine entitlement to an award under R.C. 4123.57(B)—namely, that the injured worker must demonstrate a functional loss of sight based on the injured worker's visual acuity prior to any surgical intervention:

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).

State ex rel. AutoZone, 2008-Ohio-541 at ¶ 18. Moreover, this Court emphasized that AutoZone based its argument that claimant had not sustained “the loss of the sight of an eye,” and had only sustained a partial loss of sight, on its erroneous interpretation of one doctor’s report. *Id.* at ¶ 20. AutoZone seized upon a single comment in one doctor’s report to maintain that the claimant could only recover an award for the partial loss of sight because, AutoZone argued, claimant “only” lost 75 to 80 percent vision. *Id.* However, this Court rejected AutoZone’s contention. Importantly, this Court recognized that the doctor’s report upon which AutoZone relied actually concluded that the percentage of vision the claimant lost “was ‘at least’ 75 to 80 percent, intimating that the loss could be greater.” *Id.* Moreover, this Court observed that the doctor’s report failed to identify whether the “percentage reflected the claimant’s corrected or uncorrected vision in that eye.” *Id.* Of course, most importantly, this Court recognized that claimant’s doctor opined “that the injury had left [claimant] ‘legally blind.’” *Id.*

As well, the doctor AutoZone requested examine the claimant did not even attempt to assign a percentage of vision loss—opting instead to conclude, simply, that the claimant “‘sustained loss of vision in the left eye directly and solely due to the industrial injury.’” *Id.* at ¶ 21 (quoting Dr. Magness report). Moreover, this doctor confirmed that the claimant’s *corrected* vision in his injured eye measured 20/200, which this Court emphasized constituted “legal blindness.” *Id.* at ¶ 21-22.

Thus, examination of *AutoZone* confirms that Appellant Baker makes the identical, erroneous argument AutoZone attempted before this Court. Baker, just like AutoZone, relies on the incorrect assumption that the *AutoZone* claimant had a specific percentage of vision loss below 100 percent. *See Baker Brief* at 18 (arguing that in *AutoZone*, “this Court found a

claimant who had 70 to 80% vision loss ... could recover for a total loss of vision”). However, as this Court observed about its conclusion, the case involved “the unremarkable holding that pursuant to R.C. 4123.57(B), when a doctor determines that a claimant is rendered ‘legally blind’ ... the claimant has suffered ‘the loss of the sight of an eye’ pursuant to R.C. 4123.57(B).” *Id.* at ¶ 18.

C. THE LAW AND LOGIC REQUIRE USE OF A CLAIMANT’S PRE-SURGICAL VISUAL ACUITY TO DETERMINE ENTITLEMENT TO AN AWARD UNDER R.C. 4123.57(B).

Logic also confirms that the law requires continued use of pre-surgical visual acuity loss to determine an award under R.C. 4123.57. Otherwise, injured workers who are surgical candidates would automatically obtain a greater damages award (the maximum award, in fact)—regardless of the amount of their visual acuity loss—as opposed to injured workers whose injuries do not qualify them for surgery.

Baker argues the Court should allow him to recover an award for total loss of sight—compensation of the statewide average weekly wage for 125 weeks. It is undisputed, however, that Baker’s vision lost, at worst, equaled 8 percent. However, Baker maintains that the loss of his natural lens entitles him to a full award. In contrast, a claimant for whom surgery was not a viable option may suffer significantly more vision loss yet recover only a fraction of what Baker seeks. For example, a claimant who sustained 50 percent vision loss would only recover one-half the award Baker seeks even though the claimant in this example sustained vision loss more than six times greater than Baker’s vision loss. *See* R.C. 4123.57(B) (providing that for permanent partial loss of sight of an eye, injured worker entitled to receive portion of 125 weeks as administrator determines, “based upon the percentage of vision actually lost as a result of the injury or occupational disease”).

Surgery did not materially change Baker's visual acuity. Before surgery, Baker's visual acuity measured 20/30. (Baker Supp. at 25). A month and a half later, after surgery, Baker's visual acuity measured 20/25. (*Id.*). Because Baker underwent a surgical procedure, Baker contends he should recover more than an injured worker that may have a far greater visual acuity loss but for whom surgery is not an option. Surgery is not determinative for a full "loss of sight award." Surgery has never been, and this Court should not accept it now, as the benchmark or determinative factor for an award. Instead, as the plain language of the statute mandates, a claimant must establish a functional loss of sight. And, the level of the claimant's recovery must depend on the percentage of visual acuity loss determined prior to any surgery.

D. SURGERY DOES NOT CONSTITUTE THE LOSS OF THE SIGHT OF AN EYE.

Appellants cannot demonstrate that the surgical replacement of a lens resulted in the loss of the sight of an eye. Appellants' argument rests upon the surgical removal of the natural lens. But, Appellants have provided nothing to link the surgery to loss of the *sight* of an eye. It is undisputed that claimant enjoyed sight (20/25, in fact) following the surgery. (Baker Supp. at 25). Indeed, everything in the record confirms claimant Baker's *sight* and nothing in the record establishes that Baker sustained the loss of the sight of an eye. Baker supplied no medical evidence to demonstrate that he experienced a total loss of sight of an eye at any point during this claim. Rather, the record confirms that, at its worst, Baker's vision lost equaled 8 percent. (Baker Supp. 24).

This Court has consistently reaffirmed that R.C. 4123.57(B) makes uncorrected, pre-surgical visual acuity the applicable standard for determining loss of sight. *See, e.g., State ex rel. General Elec. Corp. v. Indus. Comm.*, 103 Ohio St. 3d 420, 2004-Ohio-5585 at ¶ 52. The basis for this decision is that medical technology has not yet advanced to the point that the

Court deems surgical lens replacement restorative rather than corrective. Thus, the Court adopted this rule so that claimants would not be denied compensation where surgical intervention improved vision but perhaps not permanently. Thus, the Court determined that claimants should recover based on the status of vision pre-surgery so that claimants would not receive a reduced award because surgery decreased the percentage of vision lost.

Appellants' argument conflicts not only with the plain language of the statute but also with this Court's reasoning in its prior decisions. Appellants' argument seeks to make the surgical procedure the threshold for an award. As their argument confirms, Baker does not seek an award because he sustained loss of the sight of an eye but because he lost his natural lens. Until the General Assembly amends R.C. 4123.57(B) to create a category of compensation for the loss of a lens, the plain language of the statute continues to require a claimant to demonstrate a functional loss of sight.

Moreover, adopting Appellants' reasoning would result in inequitable application of R.C. 4123.57(B). An injured worker who would not benefit from surgery but who has a greater percentage of vision loss than Baker would recover less (perhaps substantially) than an injured worker like Baker, whose percentage of loss of visual acuity was no more than 8 percent both pre- and post-surgery.

CONCLUSION

Coast to Coast respectfully urges this Court to affirm the decision of the Court of Appeals. The Court of Appeals correctly interpreted and applied R.C. 4123.57(B) and this Court's prior decisions. Both the plain language of R.C. 4123.57 and this Court's prior decisions interpreting it demonstrate that the Court of Appeals correctly determined that Baker is not entitled to a writ of mandamus. Baker cannot recover for the loss of the sight of an eye

simply because he underwent a surgical procedure. Baker has not, and cannot, show that he sustained any loss of sight. The evidence shows otherwise. Baker had a visual acuity of 20/30 before the surgical procedure and a visual acuity of 20/25 after the surgery. Thus, as this Court has always required, a claimant must demonstrate the loss of the sight of an eye based on functional loss of vision—as measured prior to any surgery.

Respectfully submitted,



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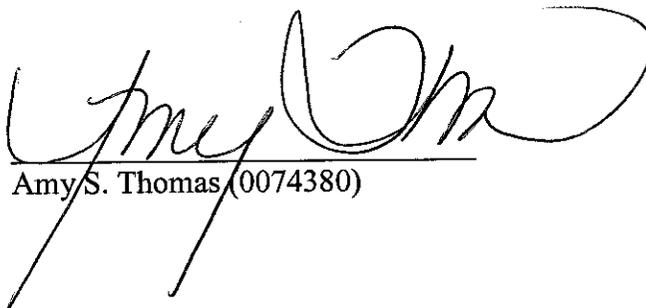
Coast to Coast Manpower, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of this document was served via regular US Mail, postage pre-paid, on **JULY 8, 2010** upon the following:

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