

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel.
Jamey D. Baker

&

Industrial Commission of Ohio, et
al.

Appellants,

v.

Coast to Coast Manpower LLC

Appellee

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

* Supreme Court
* Case No. 2010-0211

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REPLY BRIEF OF APPELLANT, JAMEY D. BAKER

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LAW AND ARGUMENT IN REPLY TO APPELLEE'S BRIEF

In its Merit Brief, Appellee Coast to Coast Manpower, LLC (hereinafter “employer”) contends that Appellants urge the court to adopt a broader rule than R.C. 4123.57(B) allows; that Appellants do not have any support for the argument that the loss of a natural lens results in a total loss of vision in the affected eye; and that the surgical “replacement” of an injured worker’s natural lens does not result in a loss of vision. The following discussion will demonstrate that employer’s contentions are without merit.

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.

A. The loss of an injured worker’s natural lens results in a loss of vision and therefore qualifies for the scheduled loss award for total loss of vision under R.C. 4123.57(B).

Employer contends that Appellants “urge the Court to adopt a ‘broader’ rule regarding ‘total’ loss of sight awards under R.C. 4123.57(B).” (Merit Brief of Appellee, p. 5). In doing so, employer attempts to distinguish the loss of vision from the loss of one’s natural lens by stating that “Appellant Baker lost his natural lens – not the sight – of his eye.” (Id., p. 6). Employer’s argument rests upon the notion that since the statute enumerates scheduled loss awards when limbs or other body parts are lost as a result of an industrial injury and does not enumerate a similar scheduled award for the loss of a natural lens, but only for the loss of vision, the loss of the natural lens *must* not result in the loss of vision. (Id.).

This argument fails to recognize that vision is a bodily function, not a body part.

This court has explicitly stated that “the purpose of an award of compensation pursuant to 4123.57(B) is to compensate for the loss of a body part *or body functioning resulting from the industrial injury.*” *State ex rel. La-Z-Boy Furniture Galleries v. Thomas*, Slip Opinion No. 2010-Ohio-3215, ¶5. (Emphasis added). Multiple body parts must collaborate in order for the body to perform a particular function, and the absence of one body part in the collaboration could result in the partial or complete loss of that function. In the case of sight, the lens is one such essential structure. The lens is an elastic structure that is able to change shape to allow a person to change focus from near to far as needed¹. The absence of the lens, a condition known as aphakia, results in the eye being unable to focus at varying distances². This inability to focus produced by the absence of the natural lens results in a loss of vision.

While this proposition would appear to be obvious, it is significant to note that courts have specifically recognized that the loss of a lens produces a loss of vision within the meaning of R.C. 4123.57(B). In *AutoZone*, the claimant suffered a traumatic eye injury which resulted in the loss of his natural lens and reduced his uncorrected visual acuity to 20/200, the degree of visual impairment at which a person is considered legally blind. *State ex. rel AutoZone, Inc. v. Indus. Comm.*, 2006 Ohio 2959 (10th App. Dist.). Ophthalmologists who examined the claimant four and nine months after his injury found him to be aphakic, and opined that his severely decreased visual acuity was the direct result of the absence of his natural lens. *Id.* at ¶24, ¶26. The court of appeals noted that the issue before it was “whether the loss of a natural lens qualifies as ‘the loss

¹ Joanne Hardy, *Supporting patients undergoing cataract extraction surgery*, NURSING STANDARD, Dec. 9, 2009, at 52.

² American Foundation for the Blind, Glossary of Eye Conditions, <http://www.afb.org/Section.asp?SectionID=42&DocumentID=2139> (last visited July 13, 2010).

of the sight of an eye' for purposes of R.C. 4123.57(B)." *Id.* at ¶14. In adopting the decision of the magistrate, the court of appeals noted that, "it would appear *obvious* that one *cannot see without a lens to focus the light entering an eye*. Therefore...it is reasonable to find that respondent Gaydosh, who suffered aphakia or loss of the use of his lens, suffered a total loss of vision in that eye." *Id.* at ¶15. (Emphasis added). The court of appeals went on to find that "[i]t is undisputed that the loss of the lens was a result of Gaydosh's industrial injury...[and] that the loss of the natural lens due to an industrial injury produces a total loss of *uncorrected* vision of the eye." *Id.* at ¶17. This decision was affirmed by this Court and nothing in that decision repudiates the analysis by the court of appeals. *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St. 3d 186 (2008).

The claimant in *AutoZone* was found to be legally blind without his natural lens. Appellant Baker is in precisely the same situation. He lost his natural lens, and therefore the uncorrected vision, of his right eye as a direct and proximate result of his industrial injury. Such vision as he now enjoys in his right eye is the result of surgical correction. Therefore, he is entitled to the same award to which the claimant in *AutoZone* was entitled.

B. There is no authority in statutory or case law which precludes an award under R.C. 4123.57(B) for a loss of vision resulting from surgery necessitated by a work-related injury.

In its brief, employer acknowledges that the correct measure for an award for loss of vision is "uncorrected vision." (Merit Brief of Appellant, p. 11-17). On closer reading, however, it becomes clear that the employer's argument departs from precedent by insisting, despite the lack of supporting authority, that the loss of uncorrected vision must be determined on the basis of visual acuity after the injury but before the surgical

removal of the natural lens. (Id.). *Kroger* and numerous cases following and relying upon it have clearly established the proposition that any *improvement* in visual function resulting from transplant or implant surgery represents a correction, rather than a restoration, of vision and is to be disregarded in determining the loss of uncorrected vision. See *State ex rel. Kroger Co. v. Stover*, 31 Ohio St. 3d 229 (1987); *State ex rel. Parsec, Inc. v. Agin, et al.*, 155 Ohio App. 3d 303 (10th App. Dist. 2003); *State ex rel. General Electric v. Indus. Comm.*, 103 Ohio St. 3d 420 (2004); *AutoZone*, 117 Ohio St. 3d 186; and *La-Z-Boy*, Slip Opinion No. 2010-Ohio-3215.

In this case, the employer distorts these holdings, suggesting that the *loss* of natural, uncorrected vision resulting from the surgery necessitated by a work-related injury is likewise to be disregarded. While there is clear authority for the proposition that visual *improvement* resulting from surgery is not to be considered in determining the loss of uncorrected vision, this does not mean that visual *loss* resulting from surgery should be disregarded in making that determination. As discussed above, the court of appeals decision upheld by this court in *AutoZone* squarely frames the issue as whether the loss of a natural lens produces a loss of vision, and answers that question in the affirmative. *AutoZone*, 2006 Ohio 2959 at ¶ 14.

The distortion of precedent which underpins Appellee's position is evident in its inexplicable attempt to equate Appellants' argument in this case with that of the employer in *AutoZone*. (Id., p. 14). In actuality, the arguments on each side of the issue in *AutoZone* are mirrored in the case at bar. In *AutoZone*, the employer argued that because the claimant did not suffer a complete loss of vision prior to his cataract extraction surgery he should not be entitled to a total loss of vision award. *AutoZone*,

117 Ohio St. 3d at 188. This proposition, squarely rejected in *AutoZone*, lies at the very heart of the employer's position in the case at bar. (Merit Brief of Appellee, p. 11-19).

Appellants argue, as the claimant did in *AutoZone*, that because Baker suffered the loss of his natural lens as a result of the industrial accident, he is entitled to an award for total loss of vision. (Merit Brief of Appellant Baker, p. 9, 13-19; Merit Brief of Appellant, Industrial Commission of Ohio, p. 5, 7-13). It is clear beyond any reasonable dispute that it is not Baker, but his employer, who now asks this court to adopt a position which it has previously expressly rejected.

Employer also argues that "at its worst, Baker's visual acuity measured 20/50 – the day of his injury on November 3, 2007. Three months later, before he underwent the surgical lens replacement, Baker's visual acuity measured 20/30. A month and a half after his surgery, Baker's visual acuity measured 20/25. Thus, at no point along this continuum did Appellant Baker demonstrate 'the loss of the sight of an eye.'" (Id., at p. 7). However, this "continuum" neglects any reference to the point at which Appellant Baker's lens was removed – during surgery *which was necessitated by his industrial injury*³.

The argument advanced by the employer in this case is that Baker is not entitled to an award for total loss of vision because that loss was not sustained prior to the surgical removal of his lens. This court has previously considered and, quite rightly, rejected this argument. There is simply nothing in the language of R.C. 4123.57(B) or any judicial interpretation which supports, much less compels, the conclusion that loss of uncorrected vision resulting from injury-related surgery is not compensable as a

³ Surgical removal of the opaque lens is also the *only* means by which a cataract, traumatic or otherwise, can be resolved. Cataract:Eye Disorders: Merck Manual Home Edition. <http://www.merck.com/mmhe/print/sec20/ch231/ch231a.html> (Last visited July 13, 2010).



scheduled loss under the statute. It is clear that Baker suffered a total loss of uncorrected vision when his lens was removed, and would continue to do so to this day absent correction by means of an artificial implant.

C. Surgical correction of vision and post-surgical visual acuity cannot be taken into account when determining a loss of vision award.

Employer, throughout its merit brief, painstakingly reminds the Court that Appellant Baker currently enjoys vision out of his right eye, and, therefore, argues he has not suffered a loss of vision. (Merit Brief of Appellee, p. 6-8, 11, 17-19). The employer contends that “Baker argues that that surgical lens replacement ‘constituted the loss of the sight of an eye’” and that “Baker maintains that he lost sight in his eye when the surgeon replaced his natural lens – i.e., that he could not see.” (Id. at p.8-9). These statements make clear that Appellee has misunderstood Baker’s contention.

Appellant does not contend that he suffered a loss of vision when his lens was replaced. He suffered a total loss of uncorrected vision when his lens was *removed* as a direct result of his industrial injury. Baker would continue to suffer a total loss of vision today if his vision had been left *uncorrected*.

The employer’s repeated emphasis on Baker’s post-surgical visual acuity is misplaced. This Court has repeatedly recognized that replacement of a natural lens either by an implant or transplant is a correction to, not a restoration of, vision and is therefore not to be taken into account when determining loss of vision awards. This proposition was reiterated by this Court as recently as July 13, 2010, in *State ex rel. La-Z-Boy Furniture Galleries v. Thomas*, Slip Opinion No. 2010-Ohio-3215.

In *La-Z-Boy*, the claimant, Thomas, suffered a non-industrial corneal disease that resulted in transplant surgery that improved his visual acuity from 20/200 to 20/50. *Id.*

at ¶1-2. Approximately one year after surgery, Thomas was involved in an industrial accident that resulted in the loss of his corneal transplant and returned his visual acuity to 20/200. *Id.* Another corneal transplant was performed, correcting his vision once again to 20/50. *Id.* Thomas then filed an application with the Industrial Commission for a total loss of vision award under R.C. 4123.57(B). *Id.* at ¶3. A DHO granted Thomas' application, awarding him the total loss of vision award. *Id.* at ¶5. La-Z-Boy appealed the DHO order at which time a SHO reduced the amount of the award from 100% to 75% without explanation. *Id.* at ¶6. Claimant and employer both petitioned the Tenth District Court of Appeals for mandamus relief. *Id.* at ¶7. The employer contended that Thomas was not entitled to any scheduled loss award, while Thomas argued that the commission abused its discretion by allowing him an award for partial, rather than total, loss of vision in the affected eye. *Id.* at ¶7, 9. The court of appeals denied the employer's petition for a writ of mandamus and granted the claimant's, ordering the commission to issue an award for total loss of vision. *Id.* at ¶9.

On appeal from that decision, this Court noted that

“Consistent with the statute, we have declared uncorrected vision to be the standard by which postinjury vision must be measured. *** Implants and transplants, while much more sophisticated [than glasses and contact lenses], also do not replicate the extraordinary capabilities of one's own lens or cornea. *** In discussing lens implants, we observed that unlike the eye's natural lens, an implant cannot focus or filter light. Accordingly, as recently as 2008, we continued to characterize these procedures as mere corrections to vision that could not be used to determine postinjury visual acuity.”

Id. at ¶16. (Internal citations omitted).

CONCLUSION

It is undisputed that Appellant, Jamey D. Baker, suffered an injury in the course

of his employment which proximately caused a traumatic cataract in his right eye. As a direct result of that injury, he underwent surgery which required the removal of his traumatized lens and replacement of the natural lens with an artificial device.

As the foregoing discussion of *AutoZone* has revealed, it has been expressly recognized that the loss of a lens results in a total loss of uncorrected vision of the affected eye. It is, moreover, well-settled law, reiterated by this Court as recently as last month, that lens implants do not replicate the capabilities of the natural lens and must be regarded as correction, rather than restoration, of vision.

Appellant contends, and the Industrial Commission admits, that the order denying his application for a total loss of vision of his right eye was an abuse of discretion. Appellee's argument against such an award boils down to two propositions, neither of which is supported by the language of the statute or the decisions of this Court.

The first is that the loss of vision must exist prior to surgical removal of the lens in order to be compensable. Neither law nor logic supports the proposition that a loss of natural visual function which results from surgery necessitated by an industrial injury should be excluded from compensability under R.C. 4123.57(B). This proposition was quite rightly rejected in *AutoZone* and should be, once again, rejected in the present case.

The second proposition is that Appellant, following his implant surgery, has vision in his right eye. It is well-settled that implant surgery is a correction, not a restoration, of vision. Appellant's post-surgery visual acuity is, quite simply, irrelevant.

Appellant Baker respectfully submits that the provisions of R.C. 4123.57(B) and

the prior holdings of this Court establish that he is entitled to a scheduled loss of vision award for the total loss of uncorrected vision of his right eye. This Court should reverse the judgment of the Tenth District Court of Appeals and issue a writ of mandamus compelling the Industrial Commission to enter an order granting the award to which Appellant is plainly entitled.

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, 22nd 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 9th day of August, 2010.



Theodore A. Bowman