

ORIGINAL

In the
Supreme Court of Ohio

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

Relator-Appellant,

vs.

COAST TO COAST MANPOWER LLC,

Respondent-Appellee,

and

INDUSTRIAL COMMISSION OF OHIO,

Respondent-Appellant.

CASE NO. 2010-0211

On Appeal from the
Franklin County
Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 09AP-0287

AMENDED REPLY BRIEF OF APPELLANT, INDUSTRIAL COMMISSION OF OHIO

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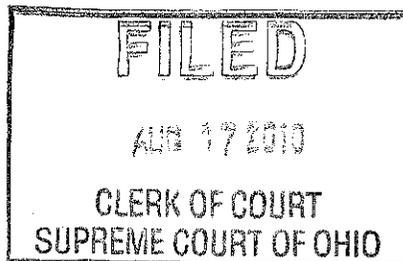


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INTRODUCTION

An injured worker who loses his natural lens due to the trauma and subsequent surgical repair to the eye necessitated by a work injury is entitled to a total loss of vision award. This is so even if the loss of visual acuity, measured before surgical correction, would not otherwise qualify the claimant for a scheduled loss award under R.C. 4123.57(B). Appellant, Industrial Commission of Ohio (“commission”) advocates this broad rule for three reasons. First, the rule is consistent with this Court’s holding in *State ex rel. Kroger v. Stover* (1987), 31 Ohio St.3d 229, that a correction to (as opposed to a restoration of) vision cannot be considered when making a loss of vision award. Secondly, this position provides the appellate court, the commission, and the Bureau of Workers’ Compensation guidance and clarity when interpreting the statutory requirements for a loss of vision award. Lastly, it creates an equitable result for the claimant whose natural lens or cornea is forever removed, even though the claimant did not lose all, or even most of his or her visual acuity before the surgical removal of his or her natural tissue.

Here, the commission denied Appellant, Jamey D. Baker’s (“Baker”) request for a total loss of use award after his natural lens had to be surgically removed and an artificial, intraocular lens implanted. While this litigation was pending, the commission reexamined the issue and determined that Baker suffered a total loss of vision in his right eye. During the time between the surgical removal of Baker’s own lens, but before the implant was put in place, Baker suffered a total vision loss. *Kroger* and its progeny support a scheduled loss award despite arguments to the contrary by Appellee, Coast to Coast Manpower, LLC (“Manpower”). For the reasons stated below, the commission asks this Court to grant Baker’s request for a writ of mandamus.

LAW AND ARGUMENT

Reply to Appellee's Argument:

- A. *Measuring visual acuity prior to the surgical removal of a claimant's natural lens ignores the causal relationship between the removal of the lens and the work injury.*

The plain language of R.C. 4123.57(B) mandates an award for the loss of eyesight, and by virtue of the loss of Baker's natural lens, he has suffered a total, functional loss of his sight. Contrary to Manpower's argument, the statute does not bar the award contemplated by the commission and Baker. Manpower suggests that the surgical replacement of the lens, alone, does not result in the loss of eyesight. However, this position is flawed for two reasons.

Flexibility in *when* to measure visual acuity is key to fairly compensating Baker for his loss. Manpower insists that visual acuity must be measured at a single point in time, and that point must be before the intraocular lens implant surgery. Not only does this rigid position ignore that the true extent of damage to Baker's eye may not yet be immediately known, but, more importantly, it distorts Baker's current position. No one disputes that Baker did not suffer more than an 8% vision loss pre-surgery. However, the inquiry is incomplete if the commission is forced to measure visual acuity solely at that point. In reality, Baker totally lost his right eye vision during the course of the surgery when his natural lens was removed, *pre-intraocular lens implant*. Because *Kroger* does not permit the commission to consider corrections to vision when making a scheduled loss award, the commission is entitled to measure vision loss *post-natural tissue removal*, but pre-vision correction. In short, the commission should have the discretion to measure pre-surgical visual acuity the moment before the corrective procedure occurs, that is, the cornea transplant or intraocular lens implant. To decide otherwise dictates that Baker wait until his natural lens became opaque before he was permitted to undergo a cataract extraction.

In Manpower's Supplemental Citation filed July 21, 2010, it erroneously asserts that the commission, here, is taking a position contrary to the position it took in *State ex rel. La-Z-Boy Furniture Galleries v. Thomas*, Slip Opinion No. 2010-Ohio-3215. Not only are *La-Z-Boy's* facts vastly different, as that case involved a pre-employment corneal injury and transplant and a post-employment corneal injury and transplant, but the issue there was when to measure the injured worker's baseline visual acuity. *Id.* at ¶2. That is, should Thomas's baseline have been measured after his non-work related corneal transplant, when his vision measured 20/50, or before his non-work related corneal transplant, when his vision was 20/200? *Id.* This Court held that the injured worker's pre-injury, post-corneal transplant vision of 20/50 was his baseline, rather than 20/200. *Id.* at ¶25. This Court affirmed that Thomas suffered a total loss of vision after the work injury caused Thomas to lose the transplanted cornea. *Id.* at ¶¶2, 9, 25.

Baker's baseline vision has never been at issue. Imagining that there is a temporal continuum of visual acuity, the issue here is not when to measure Baker's baseline, but rather when to measure the *second* point on the continuum that will be compared to the baseline. Manpower incorrectly asserts that the second point is immediately post-injury. Again, that distorts the extent of Baker's eye damage. Rather, the full extent of Baker's vision loss could not be measured until the moment his natural lens was removed during the course of the corrective surgery.

Secondly, Manpower's position denies the causal connection and sequential flow between the original work injury and the removal of Baker's lens. On the same date the injury occurred, Baker underwent the surgical removal of the foreign body that was caught in his eye as a result of the injury. As Baker's doctor had warned him could happen, within days after the initial surgery he developed a traumatic cataract. The doctor recommended the removal of

Baker's natural lens in order to treat the cataract, and he was fitted with an intraocular lens implant. Again, given that the loss of Baker's lens was causally related to the work injury, the commission has the discretion to measure loss of visual acuity the moment the lens is removed.

The question of when a total loss of vision occurs for purposes of a scheduled loss award under R.C. 4123.57(B) has been debated for years, but courts have consistently held that a corneal or lens transplant surgery is corrective and not restorative, and that, therefore, an injured worker undergoing such surgery has a total loss of use of the affected eye. The appellate court below decided that the commission cannot divide the corrective surgery into two phases. However, preventing the bifurcation of the surgery arbitrarily emphasizes the timing aspect of *when* the loss of vision occurred. Again, the determining factor is whether the loss of the lens is causally related to the work injury. As such, the corrective surgery must be separated into two parts: the surgical removal of the lens is distinct from the corrective intraocular lens implant.

Additionally, arbitrarily requiring the commission to measure Baker's vision loss before the extent of damage stemming from the initial injury is known violates R.C. 4123.95, and its directive to liberally construe the code in favor of the injured worker. The appellate court's position also runs contrary to this Court's decisions. This Court refused to distinguish between the claimant in *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541, whose lens was lost due to the trauma and repair of the eye injury, similar to Baker, and the claimant in *State ex rel. Parsec v. Agin*, Franklin App. No. 03AP-165, 2003-Ohio-6186, who had a complete and immediate loss of vision following the injury, which required a lens implant. In both situations, this Court recognized that a total loss of vision occurred. When the lens becomes useless is not as important as the fact that the useless lens is causally linked back to the work injury.

B. *Loss of use of an eye is a functional loss similar to a loss of use by paralysis and, therefore, the claimant is entitled to an award under R.C. 4123.57(B).*

The loss of Baker's lens constitutes a loss of vision even though R.C. 4123.57(B) does not specify an award for the loss of the lens. Manpower's argument is flawed because this Court has affirmed scheduled loss awards in other cases where the claimants' lenses were injured, and held irrelevant that the statute did not specifically address the loss of a lens. *State ex rel. AutoZone*, supra, and *State ex rel. Parsec*, supra. As this Court's decisions have shown, the eye does not function properly without a lens. The statute cannot be read to exclude scheduled loss awards for injuries to the eye that affect eyesight, even if those injuries, themselves, are not explicitly delineated in the statutory language.

The commission recognizes that the mere fact that a surgery took place is not the dispositive factor. Rather, the removal of Baker's lens during surgery, *to treat a complication of the initial surgical repair to the eye*, is the operative fact. Moreover, under *Kroger*, the replacement, itself, is immaterial to a scheduled loss determination. This Court has repeatedly held that an intraocular lens implant is a corrective procedure, just as is a corneal transplant. Necessarily, the removal of the natural lens following the development of a traumatic cataract is evidence of a total vision loss.

The commission is not suggesting that the surgery, itself, resulted in Baker's vision loss, because the mere fact that he was under anesthesia, and unable to use eyes to see, is irrelevant to the present inquiry. The same applies to the claimant who, under anesthesia, is unable to move his arms, legs, or use any other body part addressed in R.C. 4123.57(B). Rather, the loss resulted solely from the removal of the lens as part of the course of treatment to extract the traumatic cataract. In other words, the claimant who awakes from anesthesia regains his or her ability to use his limbs, whereas Baker remains lens-less forever.

Manpower's attempt to relate loss of sight due to the removal of Baker's lens to receiving general anesthesia prior to surgery is not a well-reasoned theory. When a patient's anesthesia wears off, the patient returns to their pre-surgery normal state of consciousness. However, when a patient's lens is removed during surgery, the patient never returns to the pre-surgery status with his or her natural tissue. Contrary to Manpower's argument, a functional loss is equivalent to an actual loss, which entitles Baker to a loss of use award.

In *Kroger*, this Court held that a claimant's corneal transplant "was only corrective, not restorative, and could not be considered in making an award." *Kroger*, paragraph two of the syllabus. Thus, under *Kroger*, a total loss of use award is appropriate when an individual's own lens or cornea is removed and replaced with a transplant lens or cornea. Ohio appellate courts, and this Court, have consistently followed the principle set forth in *Kroger*. See *Parsec*, supra (a lens implant surgery required a total loss award); *State ex rel. General Electric v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585 (commission did not abuse its discretion when it granted the total loss of use award to claimant who had no visual impairment prior to the injury and 20/200 vision after the injury); *AutoZone*, supra (there is some evidence supporting loss of use where a doctor determines claimant is rendered "legally blind" due to the loss of a lens in an industrial accident).

In short, this Court has not stated that the *only* way to prove a total loss of vision is when a doctor finds a claimant to be legally blind due to a work injury. *AutoZone*, supra at 188. Rather, becoming legally blind was "some evidence" of a total vision loss, not the only evidence that can substantiate such a loss. Because, as in *Kroger* and its progeny, part of Baker's own natural eye was removed and replaced with an implant, he is entitled to a total vision loss award under R.C. 4123.57(B). Finding that Baker sustained a compensable total vision loss recognizes

the causal connection between the work injury and the loss of his natural lens. Additionally, compensating him for the loss of his natural lens is an equitable result that treats such a loss similar to other scheduled losses.

This Court has held that injured workers are entitled to a total loss of use award when they suffer a less-than-amputation loss, but are unable to use the injured limb(s). See *State ex rel. Gassmann v. Indus. Comm.* (1975), 41 Ohio St.2d 64; and *State ex rel. Walker v. Indus. Comm.* (1979), 58 Ohio St.2d 402. The cases of *Gassmann* and *Walker* involved claimants who were rendered paraplegics after suffering industrial injuries. In both cases, the Court found that the claimants had lost their legs to the same extent as if they had been amputated or otherwise physically removed. *State ex rel. Alcoa Bldg. Products v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166. In *Alcoa*, the claimant urged the Court for a literal interpretation of R.C. 4123.57. However, as the Court held in *Alcoa*, this type of interpretation is unworkable and negates the holdings in *Gassmann* and *Walker*. *Alcoa* at 343. Further, in *Alcoa*, the Court held:

As the court of appeals observed, the ability to use lifeless legs as a lap upon which to rest a book is a function unavailable to one who has had both legs removed, and under an absolute equivalency standard would preclude an award. And this will always be the case in a nonseverance situation. If nothing else, the presence of an otherwise useless limb still acts as a counterweight--and hence an aid to balance--that an amputee lacks. *Alcoa's* interpretation would foreclose benefits to the claimant who can raise a mangled arm sufficiently to gesture or point. It would preclude an award to someone with the hand strength to hold a pack of cards or a can of soda, and it would bar--as here--scheduled loss compensation to one with a limb segment of sufficient length to push a car door or tuck a newspaper. Surely, this could not have been the intent of the General Assembly in promulgating R.C. 4123.57(B) or of *Gassmann* and *Walker*.

Id.

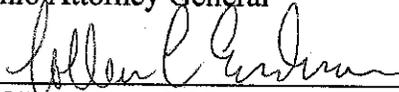
Despite Manpower's argument to the contrary, Baker did suffer a functional loss when he underwent intraocular lens implant surgery. His loss is an actual loss of functioning caused by the industrial injury, thus, he is entitled to a loss of use award.

CONCLUSION

The commission respectfully requests that this Court reverse the decision of the court of appeals, and issue the writ sought by Baker. Both R.C. 4123.57(B) and case law interpreting the statute permit a scheduled loss award where the claimant loses his natural lens as a result of the work injury, even if the loss of visual acuity *before* corrective surgery takes place is less than total. Compensating Baker recognizes the loss that he actually suffered because his natural lens would not have been removed had he not developed the traumatic cataract, which in turn would not have developed without the industrial injury and earlier surgical repair to his eye.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *Amended Reply Brief of Appellant, Industrial Commission of Ohio*, was sent to the following by regular U.S. Mail, postage prepaid,

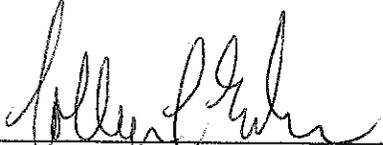
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