

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. 2010-0211

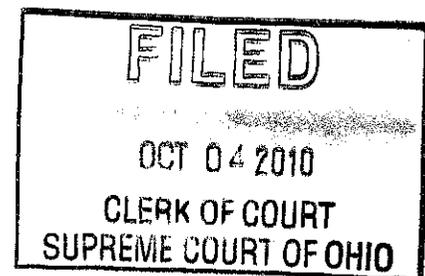
On Appeal from the Franklin County Court
of Appeals, Tenth Appellate District –
CASE NO. 09-AP-287

(BWC No. 07-872217)

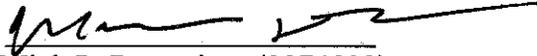
**APPELLEES COAST TO COAST MANPOWER, LLC AND DOLGENCORP, INC'S
MEMORANDUM CONTRA TO APPELLANTS' MOTION TO CONSOLIDATE**

Appellees Coast to Coast Manpower, LLC (“Manpower”) and Dolgencorp, Inc (“Dollar General”), hereby opposes Appellants Jamey Baker (“Baker”) and the Industrial Commission of Ohio’s (“Commission”) Motion to Consolidate *State ex rel. Jamey Baker v. Indus. Comm. and Coast to Coast Manpower, LLC*, Supreme Court Case No. 2010-0211 with *State ex rel. Dolgencorp, Inc. v. Indus. Comm. and Joanne Simpson*, Supreme Court Case No. 2010-0124.

For the reasons stated in the memorandum below, Appellee Manpower requests that this Court deny Appellant’s Motion to Consolidate.



Respectfully submitted,



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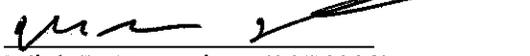
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MEMORANDUM IN OPPOSITION

I. PRELIMINARY STATEMENT

Appellants have misconstrued the facts of *Simpson* and *Baker* in an ill attempt to persuade this Court to consolidate the cases. What is more, Appellants provide no explanation as to why a Motion to Consolidate is being filed this late in the proceedings. Indeed, the Attorney General's Office, who is counsel for the Industrial Commission in both cases, has known of the cases from their inception. In *Simpson*, the Appellee Dollar General appealed the order of the Staff Hearing Officer ("SHO") determining that Simpson sustained a total loss of vision on September 2, 2008. In *Baker*, the Appellant Baker appealed the order of the Full Industrial Commission on March 23, 2009. Both cases were appealed to this Court in close proximity.

At this time, the briefing in *Simpson* and *Baker* is completed. As such, the issues presented in both cases have been briefed separately before this Court. Yet, Appellants have not moved to consolidate *Simpson* and *Baker* until now. As explained below, the only similarities in *Simpson* and *Baker* are that the claimants requested an award of total vision loss. This fact alone cannot serve as the basis for consolidation. Under this theory, every case that involves an award of total vision loss should be consolidated as one regardless of the underlying facts.

There is simply no reason that the cases should be consolidated for purposes of oral arguments as none has been granted by this Court. Instead, the cases should be decided in the same fashion they were briefed—separately. Consolidating these cases would not promote judicial economy but would deny the Appellees' the right to have their cases decided upon their individual merit. Accordingly, this Court must deny Appellants' Motion to Consolidate.

II. STATEMENT OF FACTS AND CASE¹

Simpson

In *State ex rel. Dolgencorp, Inc. v. Indus. Comm. and Joanne Simpson*, Supreme Court Case No. 2010-0124, Appellant Joanne Simpson sustained an injury to her left eye on May 7, 2004. Three months after sustaining her injury, Appellant Simpson began treatment with an ophthalmologist. Subsequently, more than **three years** after Appellant Simpson's workplace injury; her treating ophthalmologist performed a corneal transplant. Following Appellant Simpson's corneal transplant, she sought an award of 100% loss of vision. Significantly, her ophthalmologist noted that Appellant Simpson's vision loss was only 10%.

The District Hearing Officer ("DHO") denied Appellant Simpson's request. On July 2, 2008, Appellant Simpson appealed the DHO's Order and on August 22, 2008, the SHO vacated the DHO Order. The SHO determined that Appellant Simpson sustained a total loss of vision based solely on the surgical removal of the cornea during the corneal transplant.

On September 2, 2008, Appellee Dollar General appealed the SHO Order and requested that the Commission vacate the Order and deny the scheduled loss award. The Commission, however, refused to hear Appellee Dollar General's appeal. Therefore, Appellee Dollar General filed an original action in the Tenth District Court of Appeals seeking a writ of mandamus. The Court of Appeals referred the matter to the Magistrate who concluded that Appellant Simpson did not sustain a total loss of sight of an eye. The Court of Appeals upheld the Magistrate's decision and on February 3, 2010, Appellant Simpson appealed to this Court.

¹ For a comprehensive statement of the facts and procedural history of *State ex rel. Dolgencorp, Inc. v. Indus. Comm. and Joanne Simpson*, Supreme Court Case No. 2010-0124, and *State ex rel. Jamey Baker v. Indus. Comm. and Coast to Coast Manpower, LLC* see the Merit Briefs filed in the respective cases.

Baker:

To be sure, the facts in *Baker* are not similar to those of *Simpson*. In *State ex rel. Jamey Baker v. Indus. Comm. and Coast to Coast Manpower, LLC*, Supreme Court Case No. 2010-0211 Appellant Baker sustained an injury to his right eye on November 3, 2007. On the same day, Baker underwent surgery. The next day Baker was diagnosed with a cataract of the right eye and was scheduled for a surgical cataract extraction. The cataract extraction resulted in a removal of Baker's natural lens and implantation of an artificial lens.

An examination of Appellant Baker's vision revealed that he suffered only an 8% permanent partial disability. The SHO, however, awarded Baker an award for 100% vision loss pursuant to R.C. 4123.57(B). On September 17, 2008, Appellee Manpower appealed the SHO Order to the Industrial Commission. The Full Industrial Commission vacated the SHO Order and denied the request for 100% vision loss. On March 3, 2009, Appellant Baker requested that the Tenth District issue a writ of mandamus. No reconsideration ever took place by the Full Industrial Commission as counsel stated in Appellants Motion to Consolidate.

On August 31, 2009, the Magistrate issued a decision denying Appellant Baker's request for a writ of mandamus. On December 17, 2009, the Tenth District upheld the Magistrate's decision. Thereafter, on February 2, 2010, Appellant Baker filed a Notice of Appeal with this Court.

III. LAW & ARGUMENT

A. The Assistant Attorney General In *Baker* Has Argued Contrary To the Conclusions Of The Industrial Commission.

From the outset, it must be noted that the argument set forth in Appellants' Motion to Consolidate that the Industrial Commission changed its positions while Appellant Baker's writ of mandamus was pending is simply not true. The Commission reviewed Appellant Baker's

request for an award for “the loss of sight of an eye” and determined that Appellant Baker was not entitled to an award for “the loss of sight of an eye.” The *Commission* has never changed its position.

In reality, the Assistant Attorney General as *counsel* for the Commission has changed her position and has taken a position contrary to her client and the attorneys in her own office. As noted in Appellant Baker’s supplemental authority filed with this Court, in *State ex rel. La-Z-Boy Furniture Galleries v. Thomas*, Ohio S. Ct. No. 2009-1706, the Commission, represented by the Attorney General’s Office, submitted a brief arguing that the Commission “should not consider the outcome of eye surgery performed to correct a work injury when considering the percentage of vision loss before and after a work injury. *Sate ex. rel. Gen. Elec. Corp. v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585; *State ex. rel. Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229.” In *Thomas*, the Attorney General’s Office represented that the Commission did not contest the established principles as set forth by this Court.

Significantly, the brief filed in *Thomas* was filed on April 2, 2010, which is *after* Appellant Baker requested a writ of mandamus from the Court of Appeals. Moreover, the brief filed in *Thomas* was filed after the Commission in this case filed its objections to the Magistrate’s decision denying Appellant Baker’s request for mandamus. The Assistant Attorney General by arguing that Appellant Baker is entitled to a total loss award has argued contrary to the legal conclusions the Commission reached in denying Appellant’ Baker’s award.

For Appellants to argue that the Commission reversed its position is a gross misrepresentation of the facts and procedural history of *Baker*. It is the Assistant Attorney General that has changed her position and this should not be considered as a basis for consolidation.

B. *Simpson* and *Baker* Are Not Factually Similar And Should Be Decided On Their Own Merits.

For the sake of brevity, Appellees will not recite the legal arguments set forth in *Simpson* and *Baker*. Rather it is sufficient that the cases involve different fact patterns. Although the cases involve common issues they are not identical. Although *Simpson* and *Baker* involve R.C. 412.57, the facts of each case are dissimilar. In *Simpson* the Appellant's surgery did not occur until three years after her workplace injury. In *Baker* the Appellant underwent surgery the next day. Thus, in *Simpson* there is an evaluation of the Appellant's visual acuity prior to surgery and visual acuity after surgery. In *Baker*, however, it is undisputed that even after surgery, Appellant's "loss of uncorrected vision" did not exceed 8%. Thus, *Baker* does not involve the loss of sight at all.

Further, Appellants incorrectly assert that there is commonality of parties in *Simpson* and *Baker*. Indeed, the employers are different and the underlying claimants are different. The only party that is similar is the Industrial Commission. This is true with all mandamus actions seeking the vacation of an order issued by the Industrial Commission. The fact the undersigned counsel represents the employers in *Simpson* and *Baker* is not a justifiable reason to consolidate the cases.

The Appellees in *Simpson* and *Baker* deserve to have their case individually decided based upon the facts specific to their case. Further, consolidating the cases would not be in the interest of judicial economy. As stated above, the parties have already submitted their merit briefs in *Simpson* and *Baker*. Moreover, they were not consolidated when heard before the Commission and were not consolidated when briefed to the Court of Appeals. Thus, every aspect of the cases have been analyzed and considered separately. There is no reason to change this now.

In short, Appellants have not provided any legitimate basis for consolidating these cases. There is no analysis or explanation as to why consolidation is necessary this late in the proceedings. Appellants' contention that there is commonality of parties and issues is simply incorrect and must be rejected by this Court.

IV. CONCLUSION

For the reasons set forth above, this Court should deny Appellants' Motion to Consolidate. The facts in *Simpson* and *Baker* are not identical and should be analyzed separately by this Court.

Respectfully submitted,



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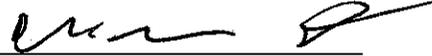
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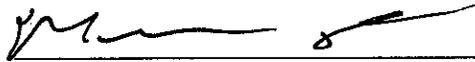
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of this document was served via regular US mail, postage pre-paid, on **October 4, 2010**, upon the following:

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