ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., JAMEY BAKER	
APPELLANT	**CASE NO. 2010-0211**
-vs-	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District – **CASE NO. 09-AP-287**
INDUSTRIAL COMMISSION OF OHIO	
APPELLANT	**(BWC No. 07-872217)**
and	
COAST TO COAST MANPOWER, LLC,	
APPELLEE	

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

Mick L. Proxmire (0074032)
(Counsel of Record)
Melvin Davis (0079224)
REMINGER CO., L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215
614-232-2627 – Telephone
614-232-2410 – Facsimile
athomas@reminger.com
mproxmire@reminger.com
Counsel for Appellee Coast to Coast Manpower LLC.

Theodore A. Bowman (009159)
(Counsel of Record)
GALLON, TAKACS, BOISSONEAULT & SCHAFFER CO. LPA
3516 Granite Circle
Toledo, Ohio 43617-1172
419-843-2001 – Telephone
419-843-6665 – Facsimile
Counsel for Appellant Jamey D. Baker

Colleen Erdman (0080765)
(Counsel of Record)
Assistant Attorney General
OHIO ATTORNEY GENERAL
Workers' Compensation Section
150 E. Gay Street, 22nd Floor
Columbus, OH 43215
614-466-6696 – Telephone
614-728-9535 – Facsimile
colleen.erdman@ohioattorneygeneral.gov
Counsel for Appellant Industrial Commission of Ohio

FILED
OCT 18 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Appellees Coast to Coast Manpower, LLC ("Manpower") and Dolgencorp, Inc ("Dollar General") (collectively "Appellees") hereby respond to Appellant Industrial Commission of Ohio's ("Commission") Motion to Strike Memorandum Contra of Appellees In Response to Appellant's Motion to Consolidate.

For the reasons stated in the memorandum below, Appellees request that this Court deny Appellant's Motion to Strike Response of Appellee to Motion to Consolidate.

Respectfully submitted,

Mick L. Proxmire (0074032)
(Counsel of Record)
Melvin J. Davis (0079224)
REMINGER CO., L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215
614-232-2627 – Telephone
614-232-2410 – Facsimile
athomas@reminger.com
Counsel for Appellee Dolgencorp, Inc.

Mick L. Proxmire (0074032)
(Counsel of Record)
Melvin J. Davis (0079224)
REMINGER CO., L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215
614-232-2627 – Telephone
614-232-2410 – Facsimile
athomas@reminger.com
Counsel for Appellee Coast to Coast Manpower, Inc.

MEMORANDUM IN OPPOSITION

I. PRELIMINARY STATEMENT

From the outset, Appellees apologize to the Court for the need to needlessly paper this file and case. Appellant Commission, however, deemed it necessary to file the instant Motion to Strike Memorandum Contra necessitating the need for this Response by Appellees.

Further, contrary to Appellant Commission's assertion, Appellees' Memorandum Contra is neither factually incorrect, inflammatory nor irrelevant. The underlying issue is the propriety of a Writ of Mandamus and the facts and statements provided are very much relevant to the overall issue raised in the Motion to Consolidate.

II. LAW AND ARGUMENTS

A. There Is No Legal Provision For The Industrial Commission To Internally Reconsider And Take a Position Contrary To It's Own Order.

The Commission's counsel takes issue with Appellees addressing the circumstances that make consolidation of cases inappropriate. The Commission's counsel, however, has not produced any evidence to support the propriety of her actions. In the Commission's Motion to Strike, at page 1 paragraph 2, it states that "the commission internally reconsidered" and that "... counsel in Baker filed an amended brief setting forth that position, *at her client's direction...*". Yet, nothing has been provided legally or by way of documentation to support such a contention or change of position.

"The commission speaks only through its final actions, *i.e.,* its orders." *State ex rel. Yellow Freight System, Inc. v. Industrial Commission of Ohio,* 71 Ohio St.3d 139, 142, citing *Indus. Comm. v. Hogle* (1923), 108 St. 363. The Full Industrial Commission Order from the hearing of 11/25/2008 clearly denies Baker's request for a loss of vision and relies on *State ex rel. Kroger Company v. Stover* in support of its decision. (Stipulated Record, Exhibit X, Pages

107 – 109). The Commission reiterated its position in the Brief of Respondent Industrial Commission of Ohio, before the Tenth District Court of Appeals, where it stated:

> "Moreover, neither the statute nor case law interpreting the statute indicate that merely because Baker received a lens implant necessitates a finding that he has sustained a total loss of vision. Given that the commission has evidence supporting its decision, Baker's request for a writ of mandamus must be denied." (Brief of Industrial Commission Introduction, p1.)

The Commission then fully lays out law and argument supporting this statement. It is not until the Commission issues its Objections to the Magistrate's Decision From Respondent, Industrial Commission of Ohio, on 9/24/2009, at page 1 and 2 that the Commission says it conceded error. (See generally Objection to Magistrate's Decision From Respondent, Industrial Commission). But, the Commission put forth no case law, statute, administrative provision or code, supporting the ability to concede the position or speak otherwise than to what is in its Order.

Appellees are aware of no case law, statute, administrative provision or code that would allow for a subsequent meeting of the Industrial Commission to change its Order without a hearing. Appellees are also unaware of legal support that would allow counsel of the Commission to merely state there has been a change of position. And finally, Appellees have not been made aware of support that would allow such a change in position to be applied retroactively to an Order of the Full Commission, which was already argued before a Magistrate of the 10th District Court of Appeals. Thus, the Commission still speaks solely from its Order.

B. Subsequent Counsel for the Commission Have Maintained the Prior Decision of the Commission.

The Commission argues that Appellees, to stir up controversy, argues that counsel has taken a position contrary to other attorneys in her office. The controversy was not created by Appellees, it is merely pointed out. Recall, that the alleged change of position does not occur until 9/24/2009 when it comes in the form of Respondent Industrial Commission's Objection to

the Magistrate Decision. However, in the Merit Brief of Appellee Industrial Commission of Ohio, filed 04/02/2010, in *State ex rel. La-Z-Boy Furniture Galleries v. Thomas,* Ohio S. Ct. No. 2009-1706, counsel from the Attorney General's office maintained the argument consistent with the Full Industrial Commission Order issued in Baker. Counsel cited *State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229, and stated that the Commission does not contest this principle. (See Generally Merit Brief of Appellee, Case No. 2009-1706). Thus, despite counsel's contention that the Commission conceded error in the Objection to the Magistrate's Decision in Baker, subsequent counsel for the Commission seemingly maintains otherwise six months later when issuing the Merit Brief in *State ex rel. La-Z-Boy Furniture Galleries v. Thomas.*

III. CONCLUSION

The Motion to Strike Memorandum Contra of Appellees must be denied. The Memorandum Contra to Appellant's Motion to Consolidate is both factually and legally correct and is neither inflammatory nor irrelevant.

Respectfully submitted,

Mick L. Proxmire (0074032)
(Counsel of Record)
Melvin J. Davis (0079224)
REMINGER CO., L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215
614-232-2627 – Telephone
614-232-2410 – Facsimile
athomas@reminger.com
Counsel for Appellee
Dolgencorp, Inc.

Mick L. Proxmire (0074032)
(Counsel of Record)
Melvin J. Davis (0079224)
REMINGER CO., L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215
614-232-2627 – Telephone
614-232-2410 – Facsimile
athomas@reminger.com
Counsel for Appellee
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 **October** 18**, 2010**, upon the following:

Theodore A. Bowman **GALLON, TAKACS, BOISSONEAULT & SCHAFFER CO. LPA** 3516 Granite Circle Toledo, Ohio 43617-1172 419-843-2001 – Telephone 419-843-6665 – Facsimile ***Counsel for Appellant Jamey D. Baker***	Colleen Erdman Assistant Attorney General **OHIO ATTORNEY GENERAL** Workers' Compensation Section 150 E. Gay Street, 22nd Floor Columbus, OH 43215 614-466-6696 – Telephone 614-728-9535 – Facsimile colleen.erdman@ohioattorneygeneral.gov ***Counsel for Appellant Industrial Commission of Ohio in Case No. 10-0211***
Charissa D. Payer **ASSISTANT ATTORNEY GENERAL** Workers' Compensation Section 150 E. Gay Street, 22nd Floor Columbus, OH 43215 ***Counsel for Appellant Industrial Commission of Ohio in Case No. 10-0124***	Ross R. Fulton (Counsel of Record) Phillip J. Fulton **PHILLIP J. FULTON LAW OFFICE** 89 E. Nationwide Blvd., Suite 300 Columbus, OH 43215 ***Counsel for Appellant Joanne Simpson***

Mick L. Proximire (0074032)
Melvin J. Davis (0079224)