

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel.
Jamey D. Baker

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&

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

Industrial Commission of Ohio, et
al.

Appellants,

* Supreme Court
* Case No. 2010-0211

v.

*

Coast to Coast Manpower LLC

*

Appellee

*

APPELLANT, JAMEY D. BAKER'S
MOTION FOR RECONSIDERATION

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MOTION FOR RECONSIDERATION

Pursuant to Rule XI (2) of the Supreme Court Rules of Practice, Appellant, Jamey D. Baker respectfully moves this Court to reconsider its decision on the merits issued June 9, 2011. Appellant respectfully submits that the majority opinion misperceived his argument, and in so doing reached a result which fails to give effect to the language of the statute and to the mandate of R.C. 4123.95 to liberally construe such language in favor of the injured worker, and which departs from, without overruling, previous holdings of this court. The bases for this motion are more fully developed below.

I. Eligibility for an award for loss of sight under R.C. 4123.57(B) is based on the loss of uncorrected vision resulting from the industrial injury. Because removal of the natural lens in the course of surgery performed to treat an industrial injury results in a total loss of uncorrected vision, proximately caused by such injury, Appellant is entitled to compensation for that loss under R.C. 4123.57(B).

The majority opinion, at ¶ 13, states “Appellants ask us to establish a broad rule that compensation for total loss of vision is warranted any time the natural lens is removed during surgical repair of the eye due to a workplace injury, because the claimant has permanently lost a natural part of the eye that is necessary for sight.” Appellant Baker respectfully submits, however, that this statement appears to misunderstand his fundamental contention. Baker has urged, and continues to urge, this court to hold that compensation for a total loss of uncorrected vision is warranted because surgical removal of the lens, necessary for treatment of a work-related injury to the eye, results in the total loss of uncorrected vision of the injured eye.

It is well-settled that entitlement to an award under R.C. 4123.57(B) for loss of vision is based on loss of *uncorrected* vision. It is significant to point out, moreover, that the legislative adoption of uncorrected vision as the benchmark for such awards represented a deliberate choice by the General Assembly to adopt that standard in place of an earlier standard which measured eligibility on the basis of the claimant's vision after surgery, repair or correction. In *State ex. rel. AutoZone, Inc. v. Industrial Commission*, 2006 Ohio 2959, ¶13 (10th App. Dist.), the employer argued, based on *State ex rel. Nastuik v. Indus. Comm.* (1945), 145 Ohio St. 287, that an injured worker who did not suffer a 100% loss of vision prior to injury-induced surgical intervention, was not entitled to an award for total loss of uncorrected vision under the statute. In rejecting this argument, the Court of Appeals noted that:

Nastuik was based on Section 1465-90 of the Ohio General Code, which required that damages be calculated on the total percentage of vision lost *after* correction, surgery, or repair. That section has since been replaced with R.C. 4123.57(B), which requires that compensation be based upon the party's total loss of *uncorrected* vision. See *State ex rel. Spangler Candy Co. v. Indus. Comm.* (1988), 36 Ohio St. 3d 231, 522 N.E.2d 1078; and *Gen. Elec. Corp.*, *supra*. Accordingly, in light of the legislative change, *Nastuik* is not controlling authority and provides no guidance under the current statute. Instead, the issue in this appeal is whether the loss of a natural lens qualifies as "the loss of the sight of an eye" for purposes of R.C. 4123.57(B).

AutoZone, 2006 Ohio 2959 at ¶14. The court of appeals held, in a decision affirmed by this court, albeit on the basis of somewhat different reasoning, 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.

It is likewise significant that this Court has consistently held, as recently

as last year in *State ex rel. La-Z-Boy Furniture Galleries v. Thomas*, 126 Ohio St. 3d 134 (2010), 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 also *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). Specifically, this Court observed in *La-Z-Boy* that:

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 extra ordinary 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.

La-Z-Boy, 126 Ohio St. 3d at 136. Given these holdings, there can be no dispute that Appellant Baker's visual acuity post-operatively is not a factor in determining his eligibility for compensation for total loss of uncorrected vision.

While not explicitly overruling or repudiating any of the authorities discussed above, the majority opinion reaches a result at variance with the results reached in numerous factually and legally similar cases over the course of more than a quarter century by, for the first time, reading into the statute a requirement that the loss of uncorrected vision must be determined on the basis of pre-surgical visual acuity. This necessarily means that loss of



uncorrected vision must be determined without regard to any loss occasioned in the course of surgical treatment of the injury. The language of R.C. 4123.57(B) contains no such requirement. As the dissent correctly observed, the statute is silent as to when the measurement of loss of uncorrected vision is to be made.

It is axiomatic that in construing statutory language a court must give effect to the plain meaning of the statute, but must not read into it words which are absent from the face of the statute. *Cleveland Elec. Illum. Co. v. Cleveland*, (1988), 37 Ohio St. 3d 50. When construing provisions of the workers' compensation act, moreover, R.C. 4123.95 specifically mandates such provisions "shall be liberally construed in favor of employees and the dependents of deceased employees." Indeed, this court has frequently invoked the legislative mandate of liberal construction of workers' compensation statutes in decisions dealing with scheduled loss awards under R.C. 4123.57(B). *State, ex rel. Walker v. Indus. Comm.*, (1979), 58 Ohio St. 2d 402; *State, ex rel. Kroger Co. v. Stover, supra*; *State ex rel. AutoZone v. Indus. Comm., supra*.

Notwithstanding the absence of any statutory provision compelling such a result, the majority opinion states that Baker is not eligible for an award under R.C. 4123.57(B) because his vision loss did not meet the 25% or greater threshold prior to undergoing cataract surgery. ¶ 14, 22. Implicit in this analysis is the proposition that loss of uncorrected vision resulting from injury-related surgery is not to be taken into account when determining

eligibility for an award under the statute. This proposition, however, is neither compelled by the language of the statute nor consistent with prior appellate decisions, including those of this court.

The majority opinion seeks to distinguish the case at bar from prior decisions upholding awards for total loss of uncorrected vision on the basis that Appellant Baker's immediate post-injury visual deficit was not as great as those involved in other cases. ¶ 19. Many of the cases cited by the majority opinion, however, including *State ex rel. Kroger Co. v. Stover*, 31 Ohio St. 3d 229 (1987); *State ex rel. General Electric Corporation v. Industrial Commission*, 103 Ohio St. 3d 420 (2004); and *State ex rel. AutoZone v. Industrial Commission*, 117 Ohio St. 3d 186 (2008), involved injured workers who suffered less than total loss of uncorrected vision prior to surgical intervention, yet were ultimately compensated for total loss of uncorrected vision under R.C. 4123.57(B).

As previously noted, the court of appeals decision in *AutoZone* expressly held that surgical removal of the lens results in the total loss of uncorrected vision. This court's decision in *AutoZone*, moreover, affirmed the award for total loss of uncorrected vision because the claimant's visual acuity of 20/200, while not representing a complete loss of vision, satisfied a legal definition of "blind" found in an Ohio statute outside of and unrelated to the workers' compensation act. *AutoZone*, ¶ 22. Simply put, under the present majority's construction of R.C. 4123.57(B), awards for total loss of uncorrected vision would not have been appropriate in those previous cases, because the loss, measured prior to surgical intervention, was less than total.

Appellant admittedly did not suffer a complete and total loss of uncorrected vision in his right eye prior to surgery. According to the plain language of the statute, however, "loss of uncorrected vision means the percentage of vision actually lost as a result of the injury or occupational disease." R.C. 4123.57(B). Neither law or logic permits the conclusion that uncorrected vision lost as the result of a surgical procedure made necessary by the work-related injury is not "actually lost" or that such loss is not "a result of the injury." Because Appellant suffered a total loss of *uncorrected* vision as a result of his industrial injury, he is entitled to compensation for that loss pursuant to R.C. 4123.57(B). The present decision to the contrary should be reconsidered.

II. The decision herein treats injured workers who sustain a loss of uncorrected vision due to injury-related surgery differently from those who suffer other losses covered by the scheduled loss provisions of R.C. 4123.57(B) as the result of injury-related surgery.

Under the majority's analysis, a claimant who sustains a total loss of uncorrected vision as the immediate consequence of a work related injury is clearly entitled to compensation for such loss, while one whose loss occurs at a later date, during and as the result of surgery undertaken to treat the injury, is not. It is obvious from an examination of the scheduled loss provisions of R.C. 4123.57(B) that such a result could not obtain in the case of any other situation in which a scheduled bodily member or function is lost as a consequence of injury-related surgery.

It cannot be disputed, for example, that a claimant who sustains a crushing injury and serious lacerations to his or her arm as a result of a

press accident, but does not suffer immediate traumatic amputation of the arm, would nonetheless be entitled to a scheduled loss award if, several weeks post-injury, a life-threatening infection of the wounds necessitated amputation of the injured limb. Similarly, a claimant who suffers a lumbar disc herniation which results in radicular pain affecting both legs has not lost his legs, or the use of them, for purposes of R.C. 4123.57(B) immediately after the industrial injury. If, however, he or she undergoes surgery in an attempt to alleviate the pain caused by the disc herniation, and a surgical complication results in paralysis of the legs, no one would seriously suggest that scheduled loss payments for loss of use of the legs should be denied because claimant retained the use of the lower extremities prior to surgery.

In these situations, and in Appellant's situation, a loss covered by the statute has taken place as a proximate result of a work-related injury. Under the terms of R.C. 4123.57(B), Appellant submits, it is immaterial whether that loss took place contemporaneously with the traumatic event, or weeks, months or years later, as a consequence of surgical treatment necessitated by the workplace injury. One who suffers the loss of a bodily member or function for which compensation is provided by R.C. 4123.57(B) is entitled to the compensation specified in the statute, regardless of whether the loss resulted immediately from the trauma or remotely, as the result of medical procedures necessitated by the initial injury. The majority opinion, however, provides that in the case of loss of uncorrected vision -- and so far as Appellant can discern, only in such case -- the loss must occur prior to

surgical intervention to be compensable. This construction of the statute subjects claimants seeking compensation for a loss of uncorrected vision to a temporal test not based on any explicit statutory requirement and not applicable to claimants seeking scheduled loss compensation for any other loss addressed by R.C. 4123.57(B).

Finally, the immediately preceding point leads directly to consideration of the dissenting opinion's observation that the present decision creates an incentive for injured workers to delay treatment (§ 36) because it would permit payment of scheduled loss compensation to one who postpones surgery until his traumatic cataract has progressed to the stage that it renders the natural lens totally opaque. (§ 35). Viewing the present decision in this light, it becomes all the more apparent that the underlying premise -- that the loss of uncorrected vision must occur prior to surgery to be compensable -- is flawed in that it makes eligibility for the scheduled loss award dependent upon when the loss occurred, rather than whether it was a result of the industrial injury.

CONCLUSION

Appellant suffered a total loss of uncorrected vision in his right eye as a direct and proximate result of a surgical procedure undertaken for treatment of a traumatic injury to the eye sustained in the course of and arising out of his employment. Neither the language of the statute, which must be liberally construed in favor of the injured worker, or the prior decisions of this court support the proposition that loss of uncorrected vision

resulting from injury-related surgery is not compensable under R.C. 4123.57(B).

In addition, the construction of the statute adopted by the majority imposes a temporal eligibility requirement on claimants seeking compensation for the loss of uncorrected vision which does not apply to those seeking compensation for any other loss falling within the scope of the statute's protection. In so doing, finally, it has the unfortunate effect of creating an incentive for claimants with similar injuries to delay treatment until their visual deficits become great enough to trigger the payment of compensation. This unintended but predictable consequence of the present decision is fundamentally at odds with an overarching goal of any sound workers' compensation system – that of facilitating prompt medical care and the early return of injured workers to their jobs.

For these reasons, Appellant Jamey D. Baker respectfully urges this court to reconsider its decision issued herein on June 9, 2011, and to reverse the judgment of the Tenth District Court of Appeals.

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 Appellee, Coast to Coast Manpower LLC, Mick Proxmire, Reminger Co., LPA, 65 East State Street, 4th Floor Columbus OH 43215 by regular U.S. mail this 16th day of June, 2011.



Theodore A. Bowman