

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel.	:	CASE NO. 2010-0211
JAMEY D. BAKER,	:	
	:	
Relator-Appellant,	:	On Appeal from the
	:	Franklin County
vs.	:	Court of Appeals,
	:	Tenth Appellate District
COAST TO COAST MANPOWER LLC,	:	
	:	Court of Appeals
Respondent-Appellee,	:	Case No. 09AP-0287
	:	
and	:	
	:	
INDUSTRIAL COMMISSION OF OHIO,	:	
	:	
Respondent-Appellant.	:	

**MOTION FOR RECONSIDERATION OF APPELLANT,
INDUSTRIAL COMMISSION OF OHIO**

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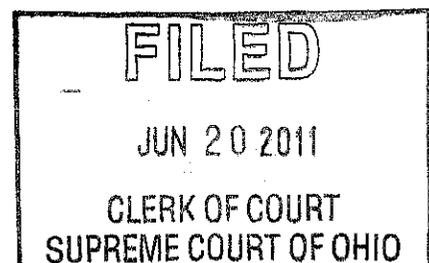


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INTRODUCTION

Appellant, Industrial Commission of Ohio (“commission”) urges the Court to reconsider its decision in this case to provide needed clarity to the state agencies charged with making scheduled loss awards. *State ex rel. Baker v. Coast to Coast Manpower, L.L.C.*, Slip Opinion No. 2011-Ohio-2721.

As the Court’s decision stands now, the commission (and the Bureau of Worker’s Compensation), when considering a loss of use award, must exclude vision loss—no matter how severe—that occurs during or after corrective treatment, if the injured worker’s pre-treatment vision loss did not exceed 25%. But the statute at issue, R.C. 4123.57(B), awards a compensable vision loss as measured by the “percentage of vision *actually lost as a result of the work injury*” and defines loss of uncorrected vision as “the percentage of vision *actually lost as a result of the injury or occupational disease.*” R.C. 4123.57(B) (emphasis added).

The commission therefore asks for guidance in determining future scheduled loss cases where the injured worker’s vision deteriorates post-corrective treatment. The majority determined that an award was not warranted here because Appellant Jamey Baker’s pre-treatment vision loss was less than the 25% threshold in R.C. 4123.57(B), and his vision was corrected by the treatment. But the Court did not indicate how to determine the percentage of vision actually lost when the treatment fails or itself causes vision loss. In Baker’s case, if the surgery had failed and his vision had then deteriorated more than the 25% threshold, the Court’s decision seems to dictate no award at all, even though Baker could have lost all vision in the injured eye.

A standard basing compensation on vision loss pre-corrective treatment—without consideration of possible post-corrective treatment complications and further vision loss—is short-sighted. The Court should reconsider and give the commission guidance in future cases.

STATEMENT OF THE CASE AND FACTS

Baker's right eye was injured on November 3, 2007, while working for Appellee, Coast to Coast Manpower, LLC ("Manpower"). (Industrial Commission Supplement at 1, 30, hereinafter "S. ___"). His workers' compensation claim was allowed for right corneal foreign body, right laceration of eye, and right traumatic cataract. (S. 30). Because of the injury, Baker had to undergo cataract extraction and intraocular lens implant. (S. 19).

Baker moved the bureau to grant a right eye total loss of vision award under R.C. 4123.57(B). At the bureau's request, Baker was examined by Richard Tam, M.D., who opined that Baker's pre-surgery visual impairment was 8%. (S. 21).

The commission ultimately denied Baker's request for a total loss award, despite the loss of his natural lens, because the 8% pre-treatment vision loss fell short of the statutory 25% threshold found in R.C. 4123.57(B). The commissioners found that the determining factor for a loss of vision award was the degree of vision lost pre-surgery, meaning pre-lens implant, and the consequent surgical repair was immaterial to the calculation.

Baker filed suit in mandamus, and the commission's merit brief supported the order denying the award. However, the commission reconsidered and filed objections in Baker's favor after the magistrate recommended that the writ be denied. The Tenth District adopted the magistrate's recommendation, and denied a writ.

A majority of the Court affirmed the Tenth District, holding that pre-surgical visual acuity alone determined whether a vision loss is compensable. 2011-Ohio-2721 at ¶2.

ARGUMENT

Industrial Commission's Proposition of Law:

R.C. 4123.57(B) requires compensable vision loss to be measured as the percentage of vision actually lost due to the work injury, regardless of when the loss occurs.

The commission moves the Court for reconsideration because it needs guidance on how to measure vision loss in cases where injury-related vision loss occurs as a result of or despite corrective treatment. The commission suggests that vision loss may be measured pre- or post-corrective treatment, as long as the vision loss is actually caused by the work injury or the treatment for that injury. Baker may not have had greater than a 25% vision loss pre-corrective surgery, and appears to have had a good outcome from the corrective surgery. However, an artificial deadline that measures the loss only pre-treatment may leave other claimants without recourse when they have suffered actual and severe loss of vision post-treatment. The standard ignores that vision may continue to deteriorate post-surgery, and ignores that complications may arise during or after surgery resulting in further vision loss. In such cases, the bureau and commission should be given flexibility and discretion in measuring vision loss.

Although the majority casts the standard as the “percentage of vision actually lost *prior to any corrective treatment*,” the statute states that vision loss is to be based on “the percentage of vision actually lost *as a result of the injury . . .*” and explains that the “‘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) (emphasis added).

If taken literally, the majority’s standard will force the bureau and commission to measure vision loss immediately post-injury, because any treatment could be considered “corrective.” Under the majority’s decision, any further vision loss occurring after treatment—no matter how severe—must be excluded from the vision loss equation. The Court has found

that lens implant, corneal transplant, glasses and contact lenses are all “corrective” measures. *State ex rel. Kroger v. Stover* (1987), 31 Ohio St.3d 229; *State ex rel. General Electric v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585; *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541; *State ex rel. Parsec v. Agin*, Franklin App. No. 03AP-165, 2003-Ohio-6186.

The commission asks the Court to clarify that vision loss may be measured, not strictly temporally, but causally. In other words, if the commission finds that a vision loss is proximately caused by the work injury, regardless of when the loss occurs, then the commission would be within its discretion to make a scheduled loss award. Such a standard is in accord with the plain language of the statute that the loss be measured by the degree of vision “actually lost as a result of the injury . . .” R.C. 4123.57(B)

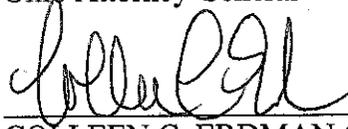
In short, the commission needs guidance as to whether a compensable vision loss occurs when the injured worker’s eye rejects a lens or corneal transplant, complications arise during the course of treatment that cause further vision loss, or vision loss continues despite treatment.

CONCLUSION

The commission respectfully asks the Court to grant reconsideration to provide guidance and clarity for future scheduled loss of vision award cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Reconsideration of Appellant, Industrial Commission of Ohio, was sent to the following by regular U.S. Mail, postage prepaid, this 20th day of June, 2011:

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