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	

APPELLEE COAST TO COAST MANPOWER, LLC'S JOINT MEMORANDUM CONTRA TO APPELLANTS' MOTION FOR RECONSIDERATION

Appellee Coast to Coast Manpower, LLC ("Manpower") hereby opposes Appellants Jamey Baker ("Baker") and the Industrial Commission of Ohio's ("Commission") Motions for Reconsideration. For the reasons stated in the Memorandum below, Appellee Manpower requests that this Court deny Appellants' Motions for Reconsideration.

Respectfully submitted,

Mick L. Proxmire (0074032)
(Counsel of Record)
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.

FILED
JUN 24 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

RESPONSE TO APPELLANT BAKER'S MOTION FOR RECONSIDERATION 2

A. Appellant Baker's Motion For Reconsideration Must Be Denied Because It Is Merely A Reargument Of The Case, Which Is Not Permitted By This Court 2

B. This Court Properly Followed The Plain Language Of R.C. 4123.57(B) And The Applicable Case Law That Confirms That Surgical Removal Of A Natural Lens By Itself Does Not Entitle A Claimant To Total Loss Of Vision Benefits 3

C. This Court's Decision Must Be Upheld Because R.C. 4123.57(B) Requires A Functional Loss, Which Appellant Baker Did Not Suffer Prior To His Surgical Procedure 5

RESPONSE TO APPELLANT COMMISSION'S MOTION FOR RECONSIDERATION 7

A. Appellant Commission's Motion For Reconsideration Must Be Denied Because This Court Does Not Render Advisory Opinions 7

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Page

CASE LAW:

State ex rel. AutoZone v. Indus. Comm. (2008), 117 Ohio St. 3d 186 2
State ex rel. General Electric Corp. v. Indus. Comm. (2004), 103 Ohio St. 3d 420 2,3,5,6
State ex rel. Kroger Co. v. Stover (1987), 31 Ohio St. 3d 229 2,3,4,5,6
State ex rel. La-Z-Boy Furniture Galleries v. Thomas (2010), 126 Ohio St. 3d 134 2,3,4
State ex rel. LetOhioVote.org v. Brunner (2009), 123 Ohio St. 3d 322 7
State ex rel. Shemo v. Mayfield Hts. (2002), 96 Ohio St. 3d 379 2
State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm. (1994), 71 Ohio St. 3d 139 7
Toledo Edison Co. v. City of Bryan (2001), 91 Ohio St. 3d 1233 2

STATUTE/RULES:

Ohio Revised Code Section 4123.57(B) 3,4,5,6,7
Sup. Ct. Prac. R. 11.2 2

MEMORANDUM IN OPPOSITION

INTRODUCTION

Appellants Baker and the Industrial Commission have filed separate Motions for Reconsideration. In the interest of brevity, Appellee responds jointly to the Motions for Reconsideration.

This Court properly held that the Industrial Commission's decision denying Appellant Baker total vision loss compensation was supported by some evidence. Appellant Baker disagrees with this Court's decision and is now seeking to reargue his case with hopes that this Court will reverse itself. This Court, however, read all the briefs and heard oral arguments. All of the arguments contained in Appellant Baker's Motion for Reconsideration were heard and rejected by this Court. Appellant Baker has not presented this Court with any new facts or legal arguments that would justify this Court abandoning a decision it rendered just weeks ago. As such, Appellant Baker's Motion must be denied.

Appellant Commission's Motion for Reconsideration also fails to present any new arguments. Instead, Appellant Commission requests that this Court provide clarification to state agencies charged with making scheduled loss awards. A request for "clarification" is akin to requesting an advisory opinion. It is well-established that this Court does not provide advisory opinions and therefore, Appellant Commission's Motion must also be denied.

LAW AND ARGUMENT

RESPONSE TO APPELLANT BAKER'S MOTION FOR RECONSIDERATION

A. Appellant Baker's Motion For Reconsideration Must Be Denied Because It Is Merely A Reargument Of The Case, Which Is Not Permitted By This Court.

As set forth in this Court's rules, "A motion for reconsideration...***shall not* constitute a reargument of the case**...." Sup. Ct. Prac. R. XI, Section 2. (emphasis added). When a motion for reconsideration is nothing more than a reargument of the case, it should not be considered by this Court. *State ex rel. Shemo v. Mayfield Hts.* (2002), 96 Ohio St. 3d 379, 2002 Ohio 4905, 775 N.E.2d 493, ¶9. This is true even if this Court is not persuaded that the original decision was correct. *Toledo Edison Co. v. City of Bryan* (2001), 91 Ohio St. 3d 1233, 1234, 2001 Ohio 272, 742 N.E.2d 655 (Pfeifer, J., concurring). Here, Appellant Baker's Motion for Reconsideration is nothing more than a reiteration of the same arguments that were previously considered, and rejected, by this Court. Indeed, Appellant Baker's Motion contains the same cases that were presented to this Court in the briefs and oral arguments.

Appellant Baker does not present anything new but simply disagrees with this Court's analysis. Rather than providing any new cases that contradict this Court's holding, Appellant Baker simply reargues the same cases that are addressed in this Court's decision. *See State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St. 3d 229; *State ex rel. General Electric Corp. v. Indus. Comm.* (2004), 103 Ohio St. 3d 420; *State ex rel. AutoZone v. Indus. Comm.* (2008), 117 Ohio St. 3d 186; *State ex rel. La-Z-Boy Furniture Galleries v. Thomas* (2010), 126 Ohio St. 3d 134. Moreover, Appellant Baker's Motion contains the same arguments that were raised in his merit brief.

In fact, Appellant Baker concedes that his Motion is a continuation of his previously submitted arguments. Appellant Baker expressly acknowledges that he has "*urged,* and

continues to urge, this court to hold that compensation for a total loss of uncorrected vision is warranted" when a natural lens is surgically removed. (Appellant Baker Motion for Reconsideration, pg. 1). Importantly, Appellant Baker never argues that this Court's decision was a result of a failure to consider any arguments or relevant case law. Instead, Appellant Baker contends that this Court misunderstood his arguments.

This Court's decision, however, is well articulated and accurately applies the law to the facts of this case. Although Appellant Baker does not like the conclusion reached by this Court, it does not mean this Court misunderstood his arguments. This Court understood Appellant Baker's arguments but did not find them to be persuasive. Because this Court's rules prohibit the use of a motion for reconsideration as a way to reargue a case, this Court must not consider Appellant Baker's Motion.

B. This Court Properly Followed The Plain Language Of R.C. 4123.57 (B) And The Applicable Case Law That Confirms That Surgical Removal Of A Natural Lens By Itself Does Not Entitle A Claimant To Total Loss Of Vision Benefits.

Even if this Court considers Appellant Baker's Motion for Reconsideration, the Motion must be denied. Appellant Baker's contention that compensation for total loss of uncorrected vision is warranted any time there is a surgical removal of a natural lens ignores the plain language of R.C. 4123.57(B) and the precedent of this Court. *See State ex rel. Kroger Company v. Stover* (1987), 31 Ohio St. 3d 229; *State ex rel. General Elec. Corp. v. Indus. Comm.* (2004), 103 Ohio St. 3d 420, 2004 Ohio 5585); *La-Z-Boy Furniture Galleries v. Thomas* (2010), 126 Ohio St. 3d 134.

In pertinent part, R.C. 4123.57 (B) states that "***in no case* shall an award of compensation be made for *less than twenty-five per cent loss* of uncorrected vision**." *Id.* (emphasis added). It is well-established that the "loss of uncorrected vision," excludes

subsequent improvements to vision. *See Kroger Company*, 31 Ohio St. 3d 229; *General Elec.*, 103 Ohio St. 3d 420; *La-Z-Boy*, 126 Ohio St. 3d 134. Importantly, R.C. 4123.57 (B) bars the Industrial Commission from considering surgical corrections. Thus, the proper standard is to calculate an injured worker's *pre-surgical* visual loss.

In this case, Appellant Baker's loss of uncorrected vision prior to the surgical lens replacement did not exceed eight (8) per cent. Therefore, Appellant Baker's pre-surgical vision did not meet the minimum twenty-five (25) per cent threshold for the permanent partial loss of sight of an eye, let alone a total loss of vision. Moreover, Appellant Baker's vision actually improved after the corrective surgery. Consequently, even after the surgery, Appellant Baker's "loss of uncorrected vision" did not meet the twenty-five (25) per cent threshold required by R.C. 4123.57(B).

It is clear that Appellant Baker is seeking compensation for the loss of a natural lens—not the "loss of uncorrected vision." Appellant Baker's argument that the loss of a natural lens automatically results in a total loss of uncorrected vision of the eye disregards the fact that he ***never suffered a loss of vision***. It is undisputed that before and after surgery, Appellant Baker retained vision in his injured eye. Appellant Baker was unconscious during the surgical procedure and therefore, never experienced any loss of vision. This is a critical distinction because this is not a case where a claimant suffered the requisite loss of vision and then had his vision surgically restored. If that were the case, Appellant Baker would be entitled compensation. But it's not the case and he is not entitled to compensation. The statute provides that compensation must be awarded for a "loss of uncorrected vision"—not a "loss of a natural lens."

The cases cited by Appellant Baker actually support this Court's decision. For instance, this Court held in *State ex rel. Kroger Company v. Stover* (1987), 31 Ohio St. 2d 229, that the pre-surgery percentage of visual loss sustained by an injured worker is what determines whether an award under R.C. 4123.57 is warranted. Likewise this Court in *State ex rel. General Elec. Corp. v. Indus. Comm.* (2004), 103 Ohio St. 3d 420, 2004 Ohio 5585, held that when assessing whether an injured worker is entitled to an award for loss of vision, it is the pre-surgical visual acuity that is pertinent. This Court's decisions in *Kroger* and *General Electric* establish that an award of compensation for loss of sight is not appropriate unless the injured worker suffers the requisite loss of uncorrected vision ***pre-surgery***.

In the matter sub judice, as stated above, the amount of vision lost by Appellant Baker was less than the twenty-five (25) per cent required by R.C. 4123.57 (B). Prior to his surgery, Appellant Baker's loss of vision was only eight (8) per cent. To use Appellant Baker's logic would allow every injured worker who undergoes a surgical lens removal to receive total loss compensation even if the injured worker never experienced a loss of vision. This Court properly held that Appellant Baker was not entitled to total loss compensation because his actual vision loss never exceeded eight (8) per cent.

This Court should not overturn its decision. Accordingly, this Court must deny Appellant Baker's Motion for Reconsideration.

C. This Court's Decision Must Be Upheld Because R.C. 4123.57 (B) Requires A Functional Loss, Which Appellant Baker Did Not Suffer Prior To His Surgical Procedure.

Appellant Baker's anecdotal argument that this Court's decision treats injured workers who sustain a loss of uncorrected vision differently from those who suffer other losses covered by R.C. 4123.57 (B) must fail. While Appellant Baker points to examples in which an injured

worker may receive compensation under R.C. 4123.57(B) for the loss of bodily functions following a surgical procedure, he ignores scenarios in which compensation is denied even when function is restored through surgery. For example, an injured worker that has a total knee replacement due to a work-related injury is not entitled to a total loss award for the leg despite his use of an artificial joint.

Again, a loss of vision award under R.C. 4123.57(B) is dependent upon the injured worker's loss of uncorrected vision prior to a surgical procedure. *See Kroger*, supra; *see also General Elec. Corp.*, supra. Here, Appellant Baker did not suffer an "uncorrected loss" until he underwent surgery. Without the surgery, Appellant Baker retained his uncorrected sight. The surgical procedure brought the "corrected" aspect into play. The plain language of R.C. 4123.57(B) does not provide compensation to injured workers for a "scheduled loss" of vision. In this case, unlike the hypothetical situations Appellant Baker presents in his Motion, Appellant Baker never suffered a functional loss. Both before and after his surgery, Appellant Baker maintained his vision.

This Court's decision was based on the plain language of the statute that requires the loss of sight of an eye. If Appellant Baker feels that the statute is inequitable, he must address it with the General Assembly, not this Court. Because Appellant Baker did not suffer a loss of vision, the Commission properly denied total loss of vision compensation. This Court appropriately held that the Commission's decision was supported by some evidence. As such, Appellant Baker's Motion for Reconsideration must be denied.

RESPONSE TO APPELLANT INDUSTRIAL COMMISION'S MOTION FOR RECONSIDERATION

A. Appellant Commission's Motion For Reconsideration Must Be Denied Because This Court Does Not Render Advisory Opinions.

Before discussing the merits of Appellant Commission's Motion for Reconsideration, it is pertinent that Appellee address the factual inaccuracies presented to this Court. Appellant Commission continues to assert that the Industrial Commission reconsidered its order denying total vision loss compensations. The Industrial Commission, however, speaks exclusively through its orders. *State ex. rel. Yellow Freight Sys., Inc. v. Indus. Comm.* (1994), 71 Ohio St. 3d 139, 142, 1994 Ohio 173, 642 N.E. 2d 378. In this case, the Industrial Commission has never issued an order reversing its decision to deny Appellant Baker's request for total vision loss compensation. It was Appellant Commission's counsel that had a change of course—not the Industrial Commission.

With regards to the merits of Appellant Commission's Motion, this Court must deny the Motion because it seeks an advisory opinion. Specifically, Appellant Commission has moved this Court for reconsideration because it needs *guidance* and *clarification* on how to measure vision loss in cases involving corrective treatment. (Appellant Commission Motion pg. 3). This Court, however, has consistently held that it does not issue advisory opinions. *State ex rel. LetOhio Vote.org v. Brunner* (2009), 123 Ohio St. 3d 322, 2009 Ohio 4900, 916 N.E. 2d 462, ¶ 51. Appellant Commission's Motion does not offer any arguments or suggestions that this Court should reconsider and reverse its decision. Instead, Appellant Commission wants this Court to advise on how the Industrial Commission should proceed in future cases.

This Court's decision does not need clarification. As stated above, the plain language of R.C. 4123.57(B) and this Court's prior decisions in *Kroger* and *General Electric* are clear that an

injured worker must sustain at least a twenty-five (25) per cent loss of vision prior to corrective surgery. Like Appellant Baker, Appellant Commission' discontent with the statute should be addressed by the General Assembly and not this Court. Because Appellant Commission does not present any arguments or even request that this Court abandon its decision, this Court must deny Appellant Commission's Motion for Reconsideration.

CONCLUSION

Appellants Baker and Commission's Motions for Reconsideration fail to present any arguments that were not previously considered and rejected by this Court. A motion for reconsideration is not an opportunity for a disgruntled party to reargue their case like Appellant Baker has done here. Nor is a motion for reconsideration an opportunity to requests an advisory opinion as Appellant commission has done. This Court adequately applied the law and determined that Appellant Baker was not entitled to total loss of vision compensation. There is nothing presented by Appellant Baker or Appellant Commission that warrants this Court reversing its own decision. Therefore, this Court must deny Appellant Baker and Appellant Commission's Motions for Reconsideration.

Respectfully submitted,

Mick L. Proxmire (0074032)
(Counsel of Record)
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 **June** 24, **2011** 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***

Mick L. Proxmire (0074032)