

IN THE SUPREME COURT OF OHIO

ORIGINAL

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

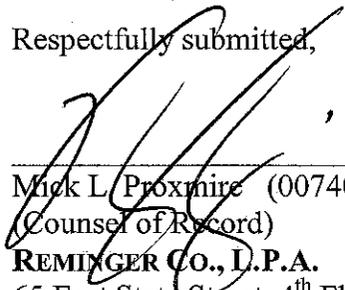
On Appeal from the Franklin County Court
of Appeals, Tenth Appellate District –
CASE NO. 09-AP-287

(BWC No. 07-872217)

**APPELLEE COAST TO COAST MANPOWER, LLC'S MEMORANDUM CONTRA TO
AMICUS CURIAE OHIO ASSOCIATION OF CLAIMANTS' COUNSEL'S MOTION IN
SUPPORT OF APPELLANT JAMEY BAKER'S MOTION FOR RECONSIDERATION**

Appellee Coast to Coast Manpower, LLC ("Manpower") hereby opposes Amicus Curiae Ohio Association of Claimants' Counsel's ("Ohio Association") Motion in Support of Appellant Jamey Baker's ("Baker") Motion for Reconsideration. For the reasons stated in the Memorandum below, Appellee Manpower requests that this Court deny Amicus Curiae Ohio Association's Motion 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

mproxmire@reminger.com

Counsel for Appellee

Coast to Coast Manpower, Inc.

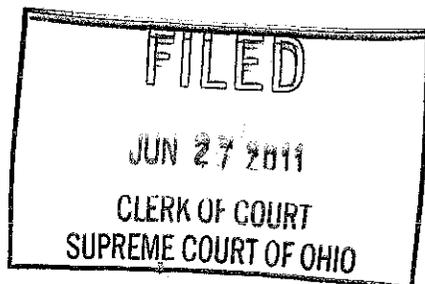


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
LAW AND ARGUMENT	1
A. Amicus Curiae Ohio Association’s Motion Must Be Rejected Because This Court’s Rules Expressly State That Amicus Curiae May Not File Motions For Reconsideration.	1
B. This Court Properly Gave Deference To The Industrial Commission’s Order Denying Appellant Baker’s Request For Total Vision Loss Compensation	2
C. This Court’s Decision Does Not Create Any New Standard But Instead Properly Followed The Precedent Set By This Court.....	4
CONCLUSION.....	6
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Page

CASE LAW:

State ex rel. AutoZone v. Indus. Comm. (2008), 117 Ohio St. 3d 186.....4
State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St. 3d 7283
State ex rel. General Electric Corp. v. Indus. Comm. (2004), 103 Ohio St. 3d 4204
State ex rel. Kroger Co. v. Stover (1987), 31 Ohio St. 3d 2293
State ex rel. La-Z-Boy Furniture Galleries v. Thomas (2010), 126 Ohio St. 3d 1344
State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm. (1994), 71 Ohio St. 3d 1393

STATUTE/RULES:

Ohio Revised Code Section 4123.57(B).....5,6
Sup. Ct. Prac. R. 11.2.....1

MEMORANDUM IN OPPOSITION

I. INTRODUCTION

Amicus Curiae Ohio Association has filed a motion that is supposedly in support of Appellant Jamey Baker's Motion for Reconsideration. Amicus Curiae Ohio Association's motion, however, does not *support* any of the arguments raised in Appellant Baker's Motion for Reconsideration. Instead, Amicus Curiae raises wholly different arguments that are not mentioned by Appellant Baker. In reality, Amicus Curiae Ohio Association's motion is an independent motion for reconsideration. Since this Court's rules expressly prohibit amicus curiae from filing motions for reconsideration, this Court must reject Amicus Curiae Ohio Association's Motion.

Further, Amicus Curiae's motion must fail on the merits. Amicus Curiae Ohio Association's motion does not present any arguments or cases that contradict this Court's decision. In fact, Amicus Curiae Ohio Association argues that this Court should have given deference to the Industrial Commission. This position actually supports this Court's decision because the Industrial Commission determined that Appellant Baker was not entitled to compensation. Amicus Curiae Ohio Association's motion is based on a misunderstanding of the law and the facts of this case and must be denied.

II. LAW AND ARGUMENT

A. Amicus Curiae Ohio Association's Motion Must Be Rejected Because This Court's Rules Expressly State That Amicus Curiae May Not File Motions For Reconsideration.

Pursuant to S. Ct. Prac. R. 11.2 (C), "[a]n amicus curiae may not file a motion for reconsideration. An amicus curiae may file a memorandum in *support* of a motion for reconsideration...." *Id.* (emphasis added). Upon review of Amicus Curiae Ohio Association's

motion, it is clear that the motion does not *support* any of the arguments raised in Appellant Baker's Motion for Reconsideration. Instead, Amicus Curiae Ohio Association's motion is based on arguments that are not even referenced in Appellant Baker's Motion for Reconsideration.

Amicus Curiae Ohio Association contends that this Court failed to give deference to the Industrial Commission. Amicus Curiae Ohio Association further claims that this Court's decision creates a new standard that treatment cannot be considered in determining workers' compensation benefits. However, neither of these arguments is asserted in Appellant Baker's Motion for Reconsideration. Appellant Baker's Motion for Reconsideration asserts, albeit incorrectly, that the removal of a natural lens by itself entitles a claimant to total vision loss compensation. (*See* Appellant Baker Motion for Reconsideration). Appellant Baker also asserts an anecdotal argument that this Court's decision treats workers who sustained a loss of vision differently from other who suffer a functional loss. (*Id.*).

The arguments raised in Amicus Curiae Ohio Association's motion are wholly different from the arguments raised in Appellant Baker's Motion for Reconsideration. Amicus Curiae cannot covert its motion for reconsideration into a motion in *support* of reconsideration by merely inserting the word "support" in its title page. Amicus Curiae Ohio Association's motion is by all accounts a separation motion for reconsideration. Therefore, pursuant to S. Ct. Prac. R. 11.2(C), this Court must reject Amicus Curiae Ohio Association's motion.

B. This Court Properly Gave Deference To The Industrial Commission's Order Denying Appellant Baker's Request For Total Vision Loss Compensation.

Amicus Curiae Ohio Association's argument that this Court should give deference to the judgment of the Industrial Commission actually supports rather than undermine this Court's decision. Amicus Curiae Ohio Association seemingly ignores that this Court upheld the order of

the Industrial Commission, which denied Appellant Baker's request for total vision loss compensation. Specifically, this Court held that the Industrial Commission's decision to deny loss-of-vision benefits was supported by some evidence. (*See* June 9, 2011 Decision).

Where Amicus Curiae Ohio Association goes awry is in the belief that Appellant Commission's counsel is the voice of the Industrial Commission. It is well-established, however, that the Industrial Commission speaks *exclusively* through its orders—not its counsel. *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, Appellant Commission's counsel took a position that was contrary to the Industrial Commission. The position of Appellant Commission's counsel does not replace the decision that was reached by the Industrial Commission, which denied Appellant Baker's request for benefits.

Further, Amicus Curiae Ohio Association's reliance on the "Medical Examination Manual" attached to its motion is misplaced. First, the "Medical Examination Manual" was never submitted by any party as part of the record before this Court. In Ohio, an appellate court cannot consider matters outside of the record. *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St. 3d 728, 730, 654 N.E. 2d 1254. Therefore, this Court, as a matter of law, cannot consider the "Medical Examination Manual." Moreover, the "Medical Examination Manual" is inapplicable because it was issued in 1982, five years before this Court rendered its opinion in *State ex rel. Kroger Company v. Stover* (1987), 31 Ohio St. 2d 229. In *Kroger*, this Court held that the standard in determining whether an injured worker is entitled to loss of vision compensation is the injured worker's pre-surgical visual acuity. *Id.* Thus, this Court's decision with regards to Appellant Baker was consistent with *Kroger*.

Amicus Curiae Ohio Association also mistakenly relies upon orders issued by the Industrial Commission after the *Baker* decision was rendered. Amicus Curiae Ohio Association, however, does not attach any of the medical records that were submitted to the Industrial Commission. Without the medical records it is impossible to determine whether the Industrial Commission's order granting loss of vision benefits was based on the claimant's pre-surgical visual acuity. Ultimately, none of the subsequent orders referenced by Amicus Curiae Ohio Association replace the Industrial Commission's order with regards to Appellant Baker.

To be sure, the Industrial Commission's decision to award or deny benefits must be made on a case-by-case basis depending on the facts of each case. Here, the Industrial Commission reviewed Appellant Baker's medical records and the full Commission determined that Appellant Baker was not entitled to loss of vision compensation. Appellee Manpower agrees that this Court should give deference to the Industrial Commission's order, which denied Appellant Baker's request for total loss of vision compensation.

C. This Court's Decision Does Not Create Any New Standard But Instead Properly Followed The Precedent Set By This Court.

Amicus Curiae Ohio Association argues that this Court's decision creates a new standard that surgery cannot be considered when determining whether loss of vision compensation is appropriate. Apparently, Amicus Curiae Ohio Association did not read this Court's decisions in *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; and *La-Z-Boy Furniture Galleries v. Thomas* (2010), 126 Ohio St. 3d 134. The aforementioned cases confirm that the standard in Ohio, at least dating back to 1987, has been to measure an injured worker's visual acuity prior to any corrective surgery.

How Amicus Curiae Ohio Association comes to the conclusion that this Court's decision creates a new standard is unknown; especially considering that attachment B to its motion states that "the loss of vision...is based on the injured work's post injury vision *prior to*...surgical intervention." (See Amicus Motion for Reconsideration attachment B). Seemingly, Amicus Curiae Ohio Association should know that this Court's decision that Appellant Baker's pre-surgical acuity was determinative is not a new standard by any means. Yet, Amicus Curiae Ohio Association ignores this Court's prior decisions and the language of R.C. 4123.57(B).

Amicus Curiae Ohio Association further argues that this Court's decision is at odds with every other jurisdiction in the country but does not cite to any cases from outside jurisdictions. And even if Amicus Curiae Ohio Association cited to cases in outside jurisdictions it would be irrelevant to the application of R.C. 4123.57 (B), because it is an Ohio statute that this Court has already interpreted. Likewise, any citation to lower appellate courts is misplaced because this Court has already spoken on the parameters of R.C. 4123.57 (B).

Amicus Curiae Ohio Association also mistakenly argues that this Court's decision leaves claimants that undergo an unsuccessful surgery with no recourse. To the contrary, the failure of a surgical procedure would be a separate case for the Industrial Commission to consider and depending on the circumstances the claimant may recover compensation for such failure. Therefore, the failure of a surgical procedure does not bar a claimant from compensation as Amicus Curiae Ohio Associations incorrectly states.

Amicus Curiae Ohio Association's attempt to draw a comparison between loss of vision and a loss of a limb is also misplaced. Eye surgery is not the same as a limb under R.C. 4123.57. With regard to loss of vision, the statute expressly refers to "uncorrected vision." Thus, this section of R.C. 4123.57 applies to vision and nothing else. This Court's decision in this case

does not affect a claimant's ability to recover compensation for a loss of limb. Instead, this case is limited to requests for loss of vision compensation.

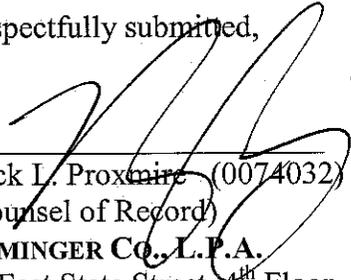
In short, this Court has not set any new standard or limited the ability of claimant's to recover compensation for work-related injuries. This Court followed the plain language of R.C. 4123.57(B) and prior precedent. Nothing in this Court's decision is new or out of the ordinary. As such, even if this Court considers Amicus Curiae Ohio Association's motion for reconsideration, it must fail on the merits.

III. CONCLUSION

Amicus Curiae Ohio Association's motion does not support Appellant Baker's Motion for Reconsideration but is a separate motion to reconsider. Because this Court's rules expressly prohibit amicus curiae from submitting motions to reconsider, Amicus Curiae Ohio Association's motion must be denied.

Further, Amicus Curiae Ohio Association's motion must be denied because there are no arguments that contradict this Court's decision. This Court properly held that the Commission's order denying Appellant Baker's request for total vision loss compensation was supported by some evidence. This determination was made after reviewing the evidence, the language of R.C. 4123.57(B) and this Court's prior decisions. Amicus Curiae Ohio Association does not present this Court with anything new that warrants a reversal of this Court's decision. Accordingly, Amicus Curiae Ohio Association's motion must be denied.

Respectfully submitted,



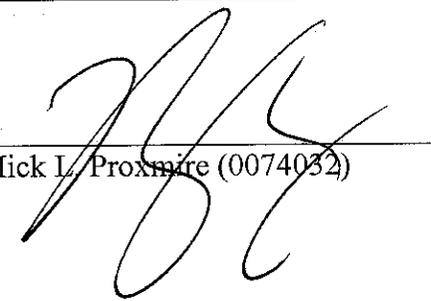
Mick I. Proxmire (0074032)
(Counsel of Record)

REMINER CO., L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215
614-232-2627 – Telephone
614-232-2410 – Facsimile
athomas@reminer.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 27, 2011 upon the following:

<p>Theodore A. Bowman GALLON, TAKACS, BOISSONEAULT & SCHAFFER CO. LPA 3516 Granite Circle Toledo, Ohio 43617-1172 419-843-2001 – Telephone 419-843-6665 – Facsimile <i>Counsel for Appellant Jamey D. Baker</i></p>	<p>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 <i>Counsel for Appellant Industrial Commission of Ohio</i></p>
<p>Ross R. Fulton Phillip J. Fulton PHILIP J. FULTON LAW OFFICE 89 E. Nationwide Blvd., Ste. 300 Columbus, OH 43215 614-224-2828 – Telephone 614-224-3933 – Facsimile <i>Counsel for Amicus Curiae Ohio Association of Claimants' Council Ohio Association for Justice</i></p>	


Mick L. Proxmire (0074032)