IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. John Klein	:	
	:	
Relator-Appellee,	:	
	:	
v.	:	SUPREME COURT NO. 2017-0589
	:	
PRECISION EXCAVATING & GRADING CO.	:	
	:	
and	:	
	:	
INDUSTRIAL COMMISSION OF OHIO	:	
	:	
Respondent-Appellants.	:	

MEMORANDUM OF *AMICI CURIAE*, OHIO ASSOCIATION FOR JUSTICE AND OHIO ASSOCIATION OF CLAIMANTS' COUNSEL, IN SUPPORT OF RELATOR-APPELLEE'S MOTION FOR RECONSIDERATION

Patsy Ann Thomas (0063312)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, OH 43215
(614) 466-6696
patsy.thomas@ohioattorneygeneral.gov
Counsel for Respondent-Appellant,
Industrial Commission of Ohio

Philip J. Fulton (0008722)
Philip J. Fulton Law Office
89 East Nationwide Blvd., Suite 300
Columbus, OH 43215
(614) 224-3838 FAX (614) 224-3933
Phil@fultonlaw.com
Counsel for *Amici Curiae,*
Ohio Association for Justice
Ohio Association of Claimants' Counsel

Dean R. Wagner (0039294)
Vincent J. Delorenzo (0089684)
One Cascade Plaza, Suite 1000
Akron, OH 44308
(330) 535-1555 FAX (330) 535-9113
DRW@deanwagner.com
vdelorenzo@deanwagner.com
Counsel for Relator-Appellee, John Klein

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The National Association of Claimants' Counsel (NACCA), Ohio Chapter, was founded in 1954. It was an organization created with the purpose "to help injured persons, especially in the field of workers' compensation." In 1963, the NACCA was changed to the Ohio Academy of Trial Lawyers. Now known as the Ohio Association for Justice (OAJ), it is an organization with over 1,500 lawyers dedicated to the protection of Ohio's consumers, workers, and families.

In 2008, the Ohio Association of Claimants' Counsel (OACC) was created to advance the founding ideals of the NACCA and to educate the public and legal community on workers' compensation issues. The OACC is a statewide organization of workers' compensation attorneys. OAJ and OACC are filing this Memorandum in Support of Relator-Appellee's Motion for Reconsideration.

LAW AND ARGUMENT

Amici have filed this Memorandum in Support of Relator-Appellee's Motion for Reconsideration because of the concern that a portion of the language in *State ex. rel. Klein v. Precision Excavating & Grading Co.*, Slip Opinion No. 2018-Ohio-3890, specifically ¶ 43, will be misinterpreted and result in outcomes unintended by this Honorable Court. Clearly, had the Industrial Commission found Mr. Klein credible that he was staying in the workforce when he moved to Florida, the Commission would not have terminated his temporary total disability benefits. *State ex rel. Corman v. Allied Holdings, Inc.*, 132 Ohio St.3d 202, 2012-Ohio-2579. For example, when a claimant proves that they have accepted another job, but suffers a disabling industrial injury before leaving the former job and starting the new job, the law is clear that an injured worker remains eligible to receive temporary total disability benefits. *State ex rel. Diversitech General Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381 (1989); *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000) (*Baker II*).

In *Klein*, this Court held that "when a workers' compensation claimant voluntarily removes himself from his former position of employment for reasons unrelated to a workplace injury, he is no longer eligible for temporary total disability compensation, even if the claimant remains disabled at the time of the separation from employment." This holding contravenes the Court's holding in *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376, 732 NE2d 355 (2000) (*Baker* II). In *Baker II*, the Court held that a claimant who leaves their former position of employment to accept another position of employment still remains eligible to receive temporary total disability compensation if the new job exacerbates the allowed conditions in their industrial claim.

Specifically, the Court stated:

> When a claimant who is medically released to return to work following an industrial injury leaves his or her former position of employment to accept another position of employment, the claimant is eligible to receive temporary total disability compensation pursuant to RC 4123.56(A) should the claimant reaggravate the original industrial injury while working at his or her new job.
>
> Today's decision does nothing more than recognize the job mobility of today's labor market. No citation of authority is needed to acknowledge the obvious that any number of people, different from day to day, are moving to other jobs for their same employer, or to different employers. To hold as appellees and their *amici* urge us would be to consign all workers to a particular employment position and employer unless they were willing to abandon some earned benefits. This would be so regardless of promotional opportunities in the same company or other opportunities outside the company. In this case, in the Court of Appeals, Judge Tyack dissented from the majority opinion, stating:
>
> "I see a significant distinction to be made between the situation where an injured worker stops employment entirely and the situation where an injured worker moves from one job within his or her capability to another job within his or her capabilities. The workers' compensation system cannot be used to chain a worker to one specific employer. A worker who has an opportunity to advance his or her lot in life by a career change should not have to face the prospect of losing workers' compensation benefits if any injury sustained on the job with a former employer cause the worker to become unemployed, even at a later date."

Baker II, 89 Ohio st.3d 376, 381. The Court explicitly agreed with Judge Tyack's dissenting opinion in the court below and relied upon it to vacate its initial decision. The timing of an injury, either occurring before or after the injured worker begins a new position of employment, causes no legal distinction in their eligibility to receive temporary total disability benefits because the injured worker has remained in the workforce.

Yet, in the instant decision's headnote and in ¶ 43 of the decision, the Court discussed Klein's intent to leave his position of employment permanently, and concluded that Klein's own actions prevented him from returning to his former position of employment. The Court erroneously focused on Klein's abandonment of his former position of employment rather than

on whether he had abandoned the workforce or employment generally. *Baker* II clearly established that the test in a voluntary resignation case is whether a claimant has opted to leave the workforce, not merely their former position of employment. Without further clarification from the Court, the *Klein* decision creates confusion regarding this previously settled issue.

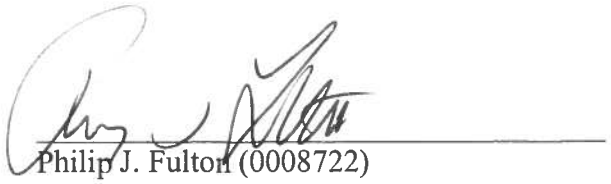
Additionally, the Court's holding may violate the Doctrine of Unconstitutional Conditions. This doctrine states that the government cannot condition a person's receipt of a governmental benefit on the waiver of a constitutionally protected right. This decision limits claimants' constitutional rights to freedom of movement, their rights to move and travel to leave the state, or to seek new or improved employment.

A constitutional right of intrastate travel exists. *State v. Burnett*, 93 Ohio St.3d 419 (2001). This includes a constitutional right to travel and to move from one state to another. *Jones v. Evans,* 932 F. Supp. 204 (N.D. Ohio 1996); Ohio Const. Article I, Section 1. The United States Supreme Court has repeatedly recognized the right to interstate travel as a fundamental right which can be impinged upon only if the state has a compelling interest and the statute is narrowly tailored to that interest. *Attorney General of New York v. Soto-Lopez,* 476 US 898, 901-902, 106 S. Ct. 2317, 90 L.Ed.2d 899 (1986); *Memorial Hosp. v. Maricopa Cty.,* 415 US 250, 254, 94 S. Ct. 1076, 39 L.Ed.2d 306 (1974). "Freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing, and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person." *Aptheker v. Secretary of State*, 378 US 500, 520, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (Douglas, J., concurring).

Based on the foregoing, *Amici* respectfully request that this Honorable Court clarify its decision by reaffirming its holding in *Baker II* to ensure that claimants have the ability to take advantage of job opportunities, and that their constitutional rights are not conditioned upon the forfeiture of their workers' compensation benefits. In reaffirming *Baker II*, *Amici* recommend that both ¶ 43 and the headnote be modified to the following:

> Workers' Compensation—When a claimant permanently removes himself from the workforce for reasons unrelated to a workplace injury, the claimant is no longer eligible for temporary total disability compensation, even if the claimant remains disabled at the time of his separation from employment—*State ex rel. Reitter Stucco, Inc. v. Indus. Comm.* and *State ex rel. OmniSource Corp v. Indus. Comm.* overruled.
>
> {¶43} The Industrial Commission found that Klein's move to Florida, combined with all of the relevant circumstances and evidence demonstrating his intention to permanently leave the workforce, constitutes a voluntary abandonment of his employment related to his industrial injury. *State ex rel. Corman v. Allied Holdings, Inc.*, 132 Ohio St.3d 202, 2012-Ohio-2579. Our decision here does not stand for the proposition, as the concerning opinion suggests, that a relocation automatically constitutes a voluntary abandonment. *State ex rel. Baker v. Indus. Comm.*, (2000), 89 Ohio St.3d 376 (*Baker II*). A determination of voluntary abandonment requires consideration of all relevant circumstances existing at the time of the alleged abandonment. *Diversitch,* 45 Ohio St.3d at 383, 544 ZN.E.2d 677. And the totality of Klein's statements and actions here demonstrate that even before his injury, Klein intended to permanently leave the workforce. We find that there was some evidence to support the Commission's order.

Respectfully submitted,



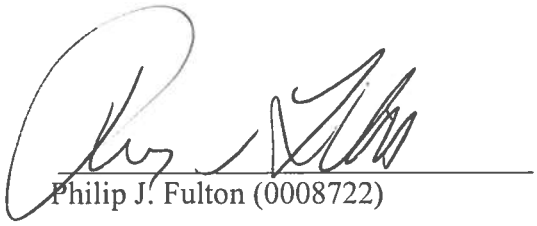
Philip J. Fulton (0008722)
PHILIP J. FULTON LAW OFFICE
89 East Nationwide Blvd., Suite 300
Columbus, OH 43215
Phil@fultonlaw.com
(614)224-3838 FAX (614)224-3933
Counsel for *Amici Curiae*,
Ohio Association for Justice
Ohio Association of Claimants' Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by regular U.S. mail on this 9th day of October, upon:

Patsy Ann Thomas
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, OH 43215

Dean R. Wagner (0039294)
Vincent J. Delorenzo (0089684)
One Cascade Plaza, Suite 1000
Akron, OH 44308



Philip J. Fulton (0008722)