[Cite as *State ex rel. Dolgencorp, Inc. v. Indus. Comm.*, 2009-Ohio-6565.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dolgencorp, Inc. (aka Dollar General),	:	
Relator,	:	No. 08AP-1014
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Joanne R. Simpson,	:	
Respondents.	:	

D E C I S I O N

Rendered on December 15, 2009

Reminger Co., L.P.A., and *Amy S. Thomas*, for relator.

Richard Cordray, Attorney General, *Charissa D. Payer*, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Philip J. Fulton Law Office, Philip J. Fulton, and *William A. Thorman, III*, for respondent Joanne R. Simpson.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Dolgencorp, Inc. ("relator"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of

Ohio ("commission"), to vacate its order awarding respondent, Joanne R. Simpson ("claimant"), compensation under R.C. 4123.57(B) for total loss of vision of the left eye, and to enter a new order denying that compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that the commission abused its discretion and that we should grant the requested writ. The commission and the claimant filed objections to the magistrate's decision, in which they urged this court not to grant the writ, while relator filed objections urging us to grant the writ for reasons somewhat different than those articulated by the magistrate. This cause is now before the court for a full review.

{¶3} On May 7, 2004, claimant sustained an alkali burn to her left eye in the course and scope of her employment with relator. The claim was allowed for left eye interstitial keratitis, corneal opacity of the left eye, and corneal neovascularization of the left eye. On August 14, 2004, three months after her accident, claimant's treating ophthalmologist, Dr. Erdey, reported that claimant's uncorrected vision in her left eye was 20/30.

{¶4} Three years later, on August 20, 2007, Dr. Erdey submitted to the Bureau of Workers' Compensation a C-9 Request for Medical Service, in which he requested authorization to perform a corneal transplant on claimant's left eye. This request was apparently approved. On August 28, 2007, Dr. Erdey performed the corneal transplant. In a January 11, 2008 letter to claimant's counsel, Dr. Erdey stated that the uncorrected vision in claimant's left eye fluctuated between 20/30 and 20/150 prior to her surgery, and

that after her surgery the uncorrected vision in her left eye was 20/80. He further stated that her left-eye vision loss from the injury is 30 percent.

{¶5} On March 3, 2008, claimant moved for an award for *100 percent loss* of vision in her left eye pursuant to R.C. 4123.57(B). That section of the Ohio Revised Code provides, in pertinent part:

> Partial disability compensation shall be paid as follows.
>
> Except as provided in this section * * * the employee may file an application with the bureau of workers' compensation for the determination of the percentage of the employee's permanent partial disability resulting from an injury or occupational disease.
>
> * * *
>
> (B) In cases included in the following schedule the compensation payable per week to the employee is the statewide average weekly wage * * * per week and shall continue during the periods provided in the following schedule:
>
> * * *
>
> For the loss of the sight of an eye, one hundred twenty-five weeks.
>
> For the permanent *partial* loss of sight of an eye, the portion of one hundred twenty-five weeks as the administrator in each case determines, based upon the percentage of vision actually lost as a result of the injury or occupational disease, but, *in no case shall an award of compensation be made for less than twenty-five per cent loss of uncorrected vision.* "Loss of uncorrected vision" means the percentage of vision actually lost as the result of the injury or occupational disease.

(Emphasis added.)

{¶6} Claimant based her motion for an award for total loss of vision on Dr. Erdey's January 11, 2008 report and his C-9 Request for Medical Service regarding the

corneal transplant surgery. A commission district hearing officer ("DHO") denied the motion, finding that claimant had failed to carry her burden of proof that she had sustained at least a 25 percent loss of uncorrected vision in her left eye as a result of her allowed conditions. This order was based on two medical reports obtained by the Bureau of Workers' Compensation and one report obtained by relator, all of which indicated that claimant had lost five to ten percent of the vision in her left eye as a result of the industrial injury.

{¶7} In a fax dated June 18, 2008, Dr. Erdey told claimant's counsel that claimant had not lost 30 percent of the vision in her left eye, and that his January 11, 2008 letter stating such was incorrect and had been sent in error. He stated that the loss of vision in the left eye was not 30 percent, and directed counsel's attention to a July 27, 2007 report in which Dr. Erdey had noted a 10 percent vision loss in the left eye.

{¶8} After claimant appealed the DHO order, a commission staff hearing officer ("SHO") vacated the DHO order and granted the requested award for total loss of vision in claimant's left eye. The SHO reasoned that because the corneal transplant involved removal of claimant's own cornea before the donor cornea was put in place, "[t]he surgical removal of the lens resulted in a total loss of use of the left eye." (Stip.Rec. 45.) The SHO ended his analysis by stating, "[t]he Staff Hearing Officer notes the doctors concur the injured worker's loss of vision prior to the surgery was less than 25%. However, the injured worker is requesting a total loss of vision, not a partial loss of vision." Id.

{¶9} Following the commission's refusal to consider relator's further appeal, relator instituted this action in mandamus. The magistrate recommended granting of the

writ because "the commission incorrectly held that the loss of the left eye cornea during the August 28, 2007 surgery, by itself, constitutes a total loss of use of the left eye." Ante, ¶49. While accepting as a fact that the industrial injury necessitated claimant's corneal transplant surgery, the magistrate based his ultimate conclusion primarily upon the nature of corneal transplant surgery, which the Supreme Court of Ohio has made clear is *corrective* surgery, not restorative. *State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229, paragraph two of the syllabus.

{¶10} Because the claimant must prove that she sustained a total loss of *uncorrected* vision as a result of her industrial injury, the magistrate viewed the evidence without regard to the corrective treatment she received (that is, the surgery). The magistrate determined that, in light of the undisputed medical evidence that claimant's left-eye vision loss was less than 25 percent, the commission had abused its discretion in granting an award for total loss of vision by calculating the vision loss at the point in time after the surgeon had removed claimant's natural lens, but before he attached the donor lens.

{¶11} In its objections, citing the *dissent* in *Kroger*, the commission argues that the magistrate should have focused on whether the surgery itself resulted in 100 percent vision loss *before* transplanting the donor lens. In other words, the commission splits the corrective surgery into two phases – removal of the natural lens and attachment of the donor lens – and argues that the former is not corrective, so calculation of loss should occur after that part of the procedure, and that the latter is the only "corrective" aspect of the corneal transplant surgery and should thus not be taken into consideration when calculating vision loss. Based solely on the dissent in *Kroger*, the commission argues that

because corneal transplants are corrective, they should be treated exactly like a surgery in which a limb is surgically amputated and a prosthetic limb is then attached. The commission does not address whether the injured worker in the hypothetical involving a surgically amputated limb had lost the use of that limb prior to amputation.

{¶12} The commission also directs our attention to the cases of *State ex rel. Parsec, Inc. v. Agin*, 155 Ohio App.3d 303, 2003-Ohio-6186, and *State ex rel. Autozone, Inc. v. Indus. Comm.*, 10th Dist. No. 05AP-634, 2006-Ohio-2959, but does not elaborate as to how those two cases apply herein. We note that in *Autozone*, the injured worker was legally blind as a result of his industrial injury *before* any surgical intervention. Claimant, too, relies on *Parsec* to support her argument that because the industrial injury necessitated the corneal surgery, and because the surgery necessarily involved removal of claimant's natural cornea, then, at the point after that removal but before the donor cornea was attached, the injury caused a 100 percent loss of vision in her left eye.

{¶13} In *Parsec*, like in *Autozone*, the injured worker's lenses were rendered completely useless as a result of his industrial injury and, therefore, *prior* to his artificial lens transplant surgery, he had lost 100 percent of his vision in both eyes. Curiously, though, claimant argues that in *Parsec*, we did not require the injured worker to prove that he had sustained a pre-surgery vision loss, as the magistrate here is requiring, and that if we adopt the magistrate's decision, and require all claimants to prove a 100 percent pre-surgery loss of vision, then we will preclude all claims under R.C. 4123.57 for total loss of vision, thereby undermining the goals of the workers' compensation system.

{¶14} We reject both the commission's and claimant's arguments. We adhere, as we must, to the Supreme Court of Ohio's clear pronouncement in *Kroger* that corneal

transplant surgery is corrective; therefore, any calculation of vision loss must be made without regard to any vision improvement achieved as a result of such a surgery.

{¶15} The *Kroger* court did not separate that surgery into two phases, as the commission and claimant urge us to do here, and we refuse to do so. The Supreme Court of Ohio rejected a similar argument in the case of *State ex rel. Qiblawe v. Indus. Comm.*, 96 Ohio St.3d 347, 2002-Ohio-4759. In that case, the claimant suffered the amputation of her right middle finger in an industrial accident. She received a scheduled loss award for the loss of her middle finger, under R.C. 4123.57(B). Later, at the recommendation of her doctor, she underwent a procedure whereby the surgeon amputated her right index finger and then reattached it at the site of the previously amputated middle finger, so that small objects would no longer fall through her hand. In other words, it was preferable, from a practical standpoint, to have a missing index finger instead of a missing middle finger.

{¶16} Then, the claimant moved for an award for the loss of her index finger, reasoning that because, during the surgery, the index finger was amputated, she had "lost" it, even though minutes later it had been reattached to her body. The Supreme Court of Ohio refused to view the surgery in two separate phases, instead adhering to the statutory mandate of viewing loss prior to any corrective surgery. The court noted, "[c]laimant seeks to completely eliminate successful surgical reattachment from the equation. * * * Even if claimant's surgical-amputation rationale is given credence, the successful surgical reattachment at the long finger amputation site eliminates loss there, still leaving claimant entitled to just one award." Id. at ¶5.

{¶17} In *Kroger*, the court emphasized that it was the industrial injury – not any aspect of the surgery – that caused the loss of vision. It stated that "[u]ndeniably [the injured worker] sustained the substantial vision loss found by the commission. His loss resulted from severe burning and scarring of his corneas. The question is whether a transplant eliminates the loss of vision or is a correction of vision." *Kroger* at 234. The court noted that the medical evidence showed that the industrial injury (not the surgery) caused Stover "a percentage loss of eighty percent *uncorrected visual acuity* in the right eye and 96.7 percent in the left eye." (Emphasis sic.) Id. at 233. It was the industrial injury – not any aspect of the corrective surgery – that the court in *Kroger* viewed as the cause of the injured worker's vision loss.

{¶18} We must analyze this case in the same manner, inquiring whether the evidence supports the conclusion that, prior to surgery, claimant had suffered a total loss of vision in her left eye as a result of her industrial injury. This brings us to relator's objection. Relator objects to the magistrate's acceptance of the premise that claimant's industrial injury necessitated her corneal transplant surgery. Relator points out that although claimant elected to have the surgery in order to improve her symptoms, there is no evidence that she had lost all of her vision in her left eye and needed surgery to restore it, as the injured worker in *Parsec* did. Indeed, we observe that in *Parsec* the commission found, and we agreed, that the injured worker's injury was so severe that it caused an immediate total loss of vision in his left eye, long before his corneal repair and implantation surgery. Here, claimant did not suffer a total loss of vision as a result of her industrial injury; according to her own treating ophthalmologist she had vision in her left

eye of between 20/80 and 20/150 after her injury, with vision loss in the left eye of ten percent.

{¶19} The plain language of R.C. 4123.57(B) required the commission to decide whether claimant sustained "loss of the sight of an eye" and whether that impairment was "resulting from an injury or occupational disease." Relator argues that when this plain language is applied to the record in this case, it was an abuse of discretion to find that claimant sustained a total loss of vision as a result of her industrial injury. We agree. In keeping with the *Qiblawe* court's rationale, even if the surgical removal of claimant's cornea is given credence, the successful attachment of the donor cornea eliminates the "loss." Prior to her corrective surgery, the point at which R.C. 4123.57(B) and *Kroger* require evaluation of loss, claimant's vision was 20/30 to 20/150 and her treating physician stated that her vision loss in her left eye was 10 percent. Accordingly, the DHO's analysis was correct; review of the SHO's order compels the conclusion that the commission abused its discretion.

{¶20} Thus, we agree with the magistrate's conclusion. However, we do so for slightly different reasons, as discussed herein. We deem unnecessary much of the magistrate's discussion of the differences between corneal transplant surgery and intra-ocular lens implantation surgery. Thus, we decline to adopt that portion of the magistrate's decision.

{¶21} In summary, upon a full review of the record, the applicable law, and the arguments of the parties, we sustain relator's objections and we overrule the commission's objections and claimant's objections. We adopt the magistrate's findings of fact and we adopt, in part, the magistrate's conclusions of law, and supplement the same

with our own conclusions as set forth in this decision. We find that the commission abused its discretion and, accordingly, grant a writ of mandamus ordering the commission to vacate its order awarding claimant compensation under R.C. 4123.57(B) for total loss of vision of the left eye, and to enter a new order denying that compensation.

Relator's objections sustained;
respondents' objections overruled;
writ of mandamus granted.

BROWN and TYACK, JJ., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dolgencorp, Inc. (aka Dollar General),	:	
Relator,	:	
v.	:	No. 08AP-1014
Industrial Commission of Ohio and Joanne R. Simpson,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on July 31, 2009

Reminger Co., L.P.A., and *Amy S. Thomas*, for relator.

Richard Cordray, Attorney General, *Charissa D. Payer* and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Philip J. Fulton Law Office, Philip J. Fulton and *William A. Thorman, III*, for respondent Joanne R. Simpson.

IN MANDAMUS

{¶22} In this original action, relator, Dolgencorp, Inc. (aka Dollar General), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its award of R.C. 4123.57(B) compensation for total loss of

vision of the left eye of respondent Joanne R. Simpson ("claimant"), and to enter an order denying an award of compensation.

Findings of Fact:

{¶23} 1. On May 7, 2004, claimant sustained a severe left eye injury while employed with relator, a self-insured employer under Ohio's workers' compensation laws. The industrial claim (No. 04-850817) is allowed for "left eye; interstitial keratitis; corneal opacity and corneal neovascularization of the left eye."

{¶24} 2. In December 2004, claimant filed an application for the determination of her percentage of permanent partial disability ("PPD").

{¶25} 3. Claimant's application prompted the Ohio Bureau of Workers' Compensation ("bureau") to seek an evaluation from George F. Calloway, Jr., M.D., who examined claimant on May 25, 2005. Dr. Calloway reported:

> History of Present Injury: * * * Ms. Simpson states that while working on May 7, 2004, she spilled bleach in her left eye and as a result of this, sustained an alkali burn to the eye. She was seen at St. Ann's Hospital Emergency Room and treated with copious flushing and then sent to another ophthalmologist who treated her with topical steroids as well as other mediations for inflammation. She is currently taking Pred Forte one drop in the left eye twice a day and Restasis one drop in the left eye twice a day. She continues to notice blurred vision and is having significant problems with photophobia and night driving. She denies any history of problems with her eyes prior to her injury and states that her general health is good.
>
> Physical Examination: Ocular examination revealed an uncorrected visual acuity of 20/50 in the right eye and 20/60 in the left. There was pinhole improvement in the left eye to 20/40. * * * In the left eye, there was no conjunctival injection, however, there was a haze to the temporal peripheral cornea as well as intrastromal vessels (interstitial keratitis). The visual axis data appear to be intact. Dilated

> fundus examination bilaterally showed the disk clear with a cup-disk ratio of 0.3 and sharp margins. The retinal vessels were of normal caliber. The macula, sclera, and the periphery were intact.
>
> Allowed Diagnoses:
>
> 1. Superficial injury, left eye.
> 2. Interstitial keratitis, NOS, left eye[.]
> 3. Corneal opacity, NOS, left eye.
> 4. Corneal neovascularization, NOS, left eye.
>
> Discussion, Recommendation, and Prognosis: Ms. Simpson has sustained an alkali burn to the left eye and as a result, she appears to have a decreased visual acuity as well as significant subjective photophobia. Based on the fifth edition AMA guidelines, I find her to have a 5% impairment of the visual system based on her visual acuity loss with no loss of visual field. However, due to her photophobia, I do consider that to be significant and staying within the fifth edition AMA guidelines, I am finding her to have an additional 10% impairment based on that. This brings her to a total visual system impairment of 15%, which corresponds to a 15% impairment of the whole person. This finding is again based on the medical record and examination of this patient. * * *

{¶26} 4. Based upon Dr. Calloway's report, the bureau issued a tentative order to which relator objected.

{¶27} 5. Following a November 14, 2005 hearing, a district hearing officer ("DHO") issued an interlocutory order instructing the bureau to obtain a new examination because the DHO found that Dr. Calloway had considered nonallowed conditions.

{¶28} 6. Pursuant to the DHO's instructions, the bureau sought an evaluation from Jeffrey D. Hutchison, D.O., who examined claimant on February 10, 2006. Dr. Hutchison reported:

> As you know Ms. Simpson was performing her usual duties as an employee of Dolgendorp [sic] Inc., on May 7th 2004 when she was splashed in the face with a bleach or alkali solution. She was immediately treated in the emergency room and subsequently by an ophthalmologist. She has been on several topical medications. At this point she is using Prednisolone acetate drops once a day and Restasis drops twice a day for her left eye. She continues to be bothered by light sensitivity and blurred vision on the left. She is currently otherwise healthy.
>
> On her exam today visual acuity without correction is 20/20-1 on the right and 20/30-2 on the left. Vision does not improve with refractive correction on the left. Extraocular muscle function, pupil exam, muscle balance exam and visual fields by confrontation are normal. The external exam is unremarkable. The slit lamp exam reveals no acute inflammation. The cornea does demonstrate deep neo-vascularization as evidence of interstitial keratitis. There is a central haze, especially in the deep stroma centrally. The anterior chamber is deep and quiet and there is no evidence of intraocular inflammation at this time. Intraocular pressure is in the normal range. Ophthalmoscopy through dilated pupils is unremarkable.
>
> In summary, Ms. Simpson is demonstrating evidence of interstitial keratitis and corneal opacity with neovas-cularization of the cornea in the left secondary to her alkali burn. Visual acuity as a result has been decreased, but her visual fields remain intact.
>
> In order to answer your specific questions: Number one: Has the injured worker sustained a percentage of permanent partial impairment as a result of the allowed injury/ICD codes listed below? Yes. Based on most [sic] the most recent edition of the American Medical Association's Guide to the evaluation of permanent impairment the visual system is impaired and therefore the whole body impairment is estimated at 10%. This includes approximately 5% based strictly on visual acuity impairment and approximately an additional 5% for her subjective symptoms of photophobia.

{¶29} 7. Relator obtained a report dated November 28, 2005, from ophthalmologist James L. Moses, M.D.:

> * * * In response to the question about loss of visual acuity, this patient's loss of visual acuity OS (left eye) at this time is 20/70 without correction. Based upon her vision and AMA guidelines, her permanent loss of vision would be calculated at 5%.
>
> In regard to the second issue of permanent, partial disability, AMA guidelines do not allow for impairments such as constant epiphora (tearing), glare phenomena, loss of depth perception, and involuntary blepharospasm. Therefore, I cannot provide you with a percentage about permanent partial disability despite these symptoms.

{¶30} 8. Apparently, the bureau mailed an order on February 28, 2006 to which relator objected.

{¶31} 9. Following an April 27, 2006 hearing on relator's objection, a DHO issued the following order:

> The District Hearing Officer finds from proof of record that the injured worker has 4% of permanent partial disability, which entitles injured worker to an award of compensation for a period of 8 weeks. * * *
>
> This order is based upon the report(s) of Dr(s). Hutchinson [sic] and Moses.

{¶32} 10. Claimant moved for reconsideration of the DHO's order of April 27, 2006.

{¶33} 11. Following a June 13, 2006 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of April 27, 2006. The SHO's order explains:

> It is the finding of the Staff Hearing Officer that the order of the District Hearing Officer be affirmed for the reason that it is supported by proof of record and is not contrary to law.
>
> This order is based upon the reports of Dr. Hutchison; Moses.

{¶34} 12. Earlier, on August 14, 2004, treating ophthalmologist Richard A. Erdey, M.D., wrote:

> I had the opportunity to evaluate Joann who presents with left eye irritation and photophobia[.] This began after she reported a splash with bleach to her left eye that occurred 6-04 [sic] while she was unloading a truck at work[.] She presented to St[.] Ann's emergency room and had the eye flushed[.] She has had some persistent problems thereafter[.]
>
> Visual acuity OD is 20/20, OS 20/30
>
> Impression
>
> Interstitial keratitis OS as evidenced by deep corneal neovascularization in the temporal aspect of the left eye[.]
>
> There is some diffuse corneal stromal haze and fine keratic precipitates OS[.] This may likely be a result of the alkali burn OS[.] I have recommended vigorous topical steroids and I will follow her periodically in this regard.

(Emphasis sic.)

{¶35} 13. On August 20, 2007, Dr. Erdey wrote:

> We have been following Joanne's eye condition since 8-11-04. She recently became a candidate for a corneal transplant for purposes of vision rehabilitation. We have tentatively scheduled Joanne for 8-28-07 to receive the transplantation.

{¶36} 14. On August 28, 2007, Dr. Erdey performed a penetrating keratoplasty on the left eye. In his operative report, Dr. Erdey wrote: "The patient has severe loss of vision in the operative eye to the 20/70 range due to Corneal Scar in the operative eye. Penetrating keratoplasty of the operative eye is indicated to improve visual function."

{¶37} 15. According to the operative report, Dr. Erdey excised the "corneal button" and then "[t]he donor corneal button was placed endothelial side down into the resulting defect and sutured into place."

{¶38} 16. The record contains an unsigned report, dated January 11, 2008, that was prepared for Dr. Erdey's signature. That report states:

> Joanne had a chemical burn to the left eye on 8-11-04 [sic] while unloading a truck at work[.] Her cornea in the left eye became partially opacified as a result of the chemical burn[.]
>
> Neovascularzation [sic] of the cornea developed which made delaying corneal transplant surgery necessary until vascular-ization regressed[.] In early 2007 the neovascularization [sic] of the left cornea began regressing allowing for the cornea transplant to take place 08-28-07.
>
> The time leading up to the corneal transplant Joanne's vision fluctuated from 20/30 to 20/150[.] Her percentage of vision loss from the injury is 30% based on her presurgical visual acuity of 20/70 in her left eye and 20/20 in her right eye[.] Her peripheral vision in both eyes is full[.] Post operatively her vision in the left eye is 20/80 uncorrected and 20/60 corrected with a clear graft[.]

{¶39} 17. On March 3, 2008, citing Dr. Erdey's unsigned January 11, 2008 report, claimant moved for R.C. 4123.57(B) compensation for "100% loss of vision of the left eye."

{¶40} 18. On April 7, 2008, Dr. Moses wrote to relator's counsel:

> * * * I reviewed your correspondence and the records and notes that have been provided to me[.] Your basic question is what percentage of loss of visual acuity am I able to opine that the client sustained prior to her corrective surgery.
>
> It seems from the notes that the visual acuity prior to penetrating keratoplasty performed by Richard Erdey for the injured left eye was in the 20/70 range[.] This was after a long, arduous course of medical therapy[.] Given the criteria that has been supplied in relation to functional visual acuity,

> the patient's percentage of loss of visual acuity would be calculated at 5%[.] Her vision utilizing both eyes was 20/20[.] Her vision in the right eye was 20/20 and her vision in the left eye was 20/70[.] This would calculate to a functional acuity score of 95% giving an impairment rating of 5% visual impairment[.] Unfortunately, this does not factor in any subjective problems that this patient has had and the loss of time and normal life activities because of sensitivity to light and the need for ongoing medical and surgical therapy[.]

{¶41} 19. A June 18, 2008 facsimile letter, apparently originating from Dr. Erdey's office, indicates that the January 11, 2008 report contains an error in stating that the percentage of vision loss from the injury is 30 percent. The facsimile letter points out that Dr. Erdey did not sign the January 11, 2008 report and that it "should not have been mailed."

{¶42} 20. Following a June 20, 2008 hearing, a DHO issued an order denying claimant's March 3, 2008 motion for R.C. 4123.57(B) compensation. The DHO's order of June 20, 2008 explains:

> It is the finding of the District Hearing Officer that the injured worker has not sustained her burden of proving that she has suffered a loss of sight of her left eye as a direct result of this industrial injury. Specifically, the District Hearing Officer finds that the preponderance of the medical evidence on file fails to document that the injured worker has suffered greater than a twenty-five percent loss of the uncorrected vision in her left eye. Based on this fact, the District Hearing Officer concludes that the injured worker is not eligible to receive a scheduled loss award for total loss of sight in the left eye at this time.
>
> Accordingly, it is the order of the District Hearing Officer that the injured worker's request for a scheduled loss award for the total loss of sight of the left eye is denied. This decision is based upon Dr. Hutchison's 02/10/2006 report, Dr. Calloway's 05/25/2005 report and Dr. Moses' report. The District Hearing Officer further relies upon Section 4123.57 of the Ohio Revised Code.

{¶43} 21. Claimant administratively appealed the DHO's order of June 20, 2008.

{¶44} 22. Following a July 29, 2008 hearing, an SHO issued an order that vacates the DHO's order of June 20, 2008 and grants claimant's motion. The SHO's order explains:

> It is the finding of the Staff Hearing Officer that the injured worker sustained a total loss of vision of the left eye as the result of her industrial injury. Therefore, it is the order of the Staff Hearing Officer that the injured worker is awarded 125 weeks consistent with ORC 4123.57(B). The start date of the award is 08/28/2007.
>
> The Staff Hearing Officer finds the injured worker sustained an injury to her left eye as the result of a chemical splash in her eye. Following treatment, it was determined that the injured worker needed a lens transplant. The lens was surgically removed on 08/28/2007. The surgical removal of the lens resulted in a total loss of use of the left eye. Therefore, a total loss of use is awarded consistent with ORC 4123.57(B).
>
> This decision is based on the records of Dr. Erdey from 08/09/2008 to the present, as well as the surgery of 08/28/2008.
>
> The Staff Hearing officer notes the doctors concur the injured worker's loss of vision prior to the surgery was less than 25%. However, the injured worker is requesting a total loss of vision, not a partial loss of vision.

{¶45} 23. On September 13, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of July 29, 2008.

{¶46} 24. On November 18, 2008, relator, Dolgencorp, Inc. (aka Dollar General), filed this mandamus action.

Conclusions of Law:

{¶47} It is undisputed that the industrial injury necessitated the surgical removal of the left eye cornea so that a donor cornea could be transplanted into the surgical site.

The commission, through its SHO, determined that the surgical removal of the left eye cornea constitutes a total loss of use of the left eye, even though a donor cornea was successfully transplanted.

{¶48} The issue is whether the commission correctly held that the loss of claimant's own left eye cornea during the August 28, 2007 penetrating keratoplasty constitutes a total loss of use of her left eye within the meaning of R.C. 4123.57(B).

{¶49} The magistrate finds that the commission incorrectly held that the loss of the left eye cornea during the August 28, 2007 surgery, by itself, constitutes a total loss of use of the left eye. Accordingly, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶50} R.C. 4123.57(B) provides a schedule for compensation for enumerated losses. The statute states:

> For the loss of the sight of an eye, one hundred twenty-five weeks.
>
> For the permanent partial loss of sight of an eye, the portion of one hundred twenty-five weeks as the administrator in each case determines, based upon the percentage of vision actually lost as a result of the injury or occupational disease, but, in no case shall an award of compensation be made for less than twenty-five per cent loss of uncorrected vision. "Loss of uncorrected vision" means the percentage of vision actually lost as the result of the injury or occupational disease.

{¶51} Analysis begins with the observation that a corneal transplant is a very different surgical procedure than an intraocular lens implant. Moreover, the surgical procedures operate on different components of the human eye. The corneal transplant which occurred in the instant case involves excision of the "corneal button" and

replacement with a "donor corneal button." This procedure is described as "penetrating keratoplasty" in the operative report of Dr. Erdey.

{¶52} In *State ex rel. Parsec, Inc. v. Agin*, 155 Ohio App.3d 303, 2003-Ohio-6186, the industrial injury resulted in a "total traumatic cataract" of the left eye. The claimant in *Parsec* underwent removal of the intraocular lens and the insertion of a "three-piece silicone intraocular lens." Id. at ¶9. Some of the language in *Parsec* suggests, however, that the claimant underwent a corneal transplant.

{¶53} In reviewing the case law pertinent here, it is important to keep in mind the distinction between corneal transplant surgery and intraocular lens implant surgery.

{¶54} Review begins with *State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229, wherein paragraph two of the syllabus states:

> The improvement of vision resulting from a corneal transplant is a correction to vision and thus, shall not, on the current state of the medical art, be taken into consideration in determining the percentage of vision actually lost pursuant to R.C. 4123.57(C) [now R.C. 4123.57(B)].

{¶55} In *State ex rel. Gen. Elec. Corp. v. Indus. Comm.*, 10th Dist. No. 02AP-1291, 2004-Ohio-105 ("*General Electric I*"), the commission awarded Randall Ross R.C. 4123.57(B) compensation for the total loss of use of both eyes. Ross had experienced an electrical shock at work which caused cataracts to develop in both eyes. Treating physician Ramesh M. Kode, M.D., recommended cataract surgery. In December 2000, the cataract was removed from the right eye. In February 2001, the cataract was removed from the left eye. The DHO noted in his order that Ross underwent "bilateral lens transplants." The SHO noted in his order that Ross "had cataract surgery and

intraocular lens implants." Id. at ¶23, 30. Thus, the cataract surgeries involved placement of an artificial intraocular lens into each eye.

{¶56} In *General Electric I*, this court held that Ross's surgeries "eliminated any actual permanent loss suffered as a result of the accident" and thus the surgeries were not viewed as a correction to vision under R.C. 4123.57(B). Id. at ¶6. This court, in *General Electric I*, attempted to distinguish *Kroger* which, as previously noted, involved corneal transplant surgeries.

{¶57} This court's judgment and decision in *General Electric I* was appealed as of right to the Supreme Court of Ohio. On appeal, this court's judgment was reversed. *State ex rel. Gen. Elec. Corp. v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585 ("*General Electric II*").

{¶58} The *General Electric II* court reaffirmed the continued viability of its decision in *Kroger*. It also noted that in *Kalhorn v. Bellevue* (1988), 227 Neb. 880, 420 N.W.2d 713, the Supreme Court of Nebraska reached the same conclusion regarding a synthetic-lens implant. Id. at ¶28.

{¶59} In its final paragraph, the *General Electric* II court states:

> * * * The court of appeals in this case felt that the time had arrived to reclassify corneal lens implants as restorative. We do not agree and accordingly reverse its judgment.

Id. at ¶51.

{¶60} Because this court, in *General Electric I*, had actually endeavored to reclassify intraocular lens implants necessitated by industrially-induced cataracts, presumably the language of the final paragraph of the court's decision in *General Electric II* should be read in that light.

{¶61} In *State ex rel. Autozone, Inc. v. Indus. Comm.*, 10th Dist. No. 05AP-634, 2006-Ohio-2959 ("*Autozone I*"), this court upheld the commission's decision to award to Stephen Gaydosh R.C. 4123.57(B) compensation for total loss of vision of his left eye.

{¶62} On January 16, 2004, Gaydosh injured his left eye in an industrial accident. The claim was allowed for "perforated globe left eye." Id. at ¶2.

{¶63} On May 6, 2004, Gaydosh was examined by ophthalmologist Francis S. Mah, M.D., who reported:

> * * * The injury was significant and Mr. Gaydosh is fortunate to still have his eye. He has a corneal and scleral laceration, which extends from the 9 o'clock area to the central visual axis up to the 12 o'clock area and beyond the 12 o'clock area. He is aphakic due to the loss of the lens during the trauma and repair. In terms of vision loss today, he is legally blind, 20/200 although he does have better potential for vision. Most likely his vision will never be as good as it had been prior to the injury, which it is assumed his vision is [sic] 20/20 in the left eye. At this stage, I would say that he has lost at least 75 to 80% of his vision and this does not include obviously the surgery and hardship that he has had to entail [sic] from the rehabilitation of his eye.

Id. at ¶24.

{¶64} Apparently, while Gaydosh had lost the natural lens of his left eye due to the industrial injury, and was said to be "aphakic," his left eye had not received a lens implant at the time he applied for R.C. 4123.57(B) compensation for total loss of use of the eye. That is, on October 5, 2004, Autozone's doctor, Dr. Magness, opined: "A penetrating Keratoplasty, vitrectomy, and lens implant would be necessary to provide visual rehabilitation." Id. at ¶26.

{¶65} In *Autozone I*, this court states that the "issue * * * 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)." Id. at ¶14.

{¶66} In upholding the commission's award of compensation for total loss of vision of the left eye, this court, in *Autozone I,* explained:

> * * * [I]t would appear obvious that one cannot see without a lens to focus the light entering the eye. Therefore, based upon the evidence presented, it is reasonable to find that respondent Gaydosh, who suffered aphakia or loss of the use of his lens, suffered a total loss of vision in that eye.
>
> The magistrate relied upon *Parsec*, in which the injured party suffered from a cataract as a result of an industrial injury that required his original lens to be removed and replaced with an artificial lens. In *Parsec*, it was undisputed that the injury to the claimant's cornea [sic] required its surgical removal and an artificial implant to restore his vision. As a result, we held that the loss of that natural lens was sufficient to qualify as a total loss of vision for purposes of R.C. 4123.57(B).
>
> This case is factually very similar to *Parsec*. Two separate examinations of Gaydosh's injuries revealed that he was aphakic, meaning he no longer had the natural lens of his eye. It is undisputed that the loss of the lens was the result of Gaydosh's industrial injury. Therefore, we agree with the magistrate that, under *Parsec*, "the commission can conclude that the loss of the natural lens due to an industrial injury produces a total loss of *uncorrected* vision of the eye." (Magistrate's decision, at 8.) (Emphasis added.)
>
> Relator asserts that, although *Parsec* granted an award for 100 percent vision loss, the claimant in *Parsec* still had the burden of showing that he suffered a 100 percent loss of vision prior to the removal of his natural lens. Therefore, even though *Parsec* applies insofar as the claimants in each case lost the lenses of their eyes, relator suggests that Gaydosh is not entitled to recovery because there is no evidence that he suffered a complete loss of vision.
>
> We believe that relator's argument fails in light of *Gen. Elec. Corp.* In *Gen. Elec. Corp.*, the Ohio Supreme Court found

> that claimant's corneal transplant [sic] was not restorative and thus awarded claimant a scheduled-loss award. In doing so, the court recognized that some claimants might receive a full loss award for only a partial loss of vision. However, the court observed that R.C. 4123.95 is to be liberally interpreted and "the beneficent intent and the social policies underlying the worker compensation law do not necessarily produce mathematically logical results in every case." *Gen. Elec. Corp.*, at 426, quoting *Dawson's Charter Serv. v. Chin* (1986), 68 Md.App. 433, 444, 511 A.2d 1138.
>
> In *Parsec*, the claimant's lens had been rendered useless and required removal. Gaydosh also lost his lens. In both cases, the claimants did not have functioning lenses. One cannot see without a functioning lens. Based upon the facts and circumstances of this case and the holdings in *Parsec* and *Gen. Elec. Corp.*, relator's objections are overruled.

Id. at ¶15-20.

{¶67} Autozone appealed as of right the judgment of this court to the Supreme Court of Ohio. On appeal, this court's judgment was affirmed, *State ex rel. Autozone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541 ("*Autozone II*"), but on different grounds than this court offered in *Autozone I*.

{¶68} In *Autozone II*, the court holds:

> * * * Today, we make the unremarkable holding that pursuant to R.C. 4123.57(B), when a doctor determines that a claimant is rendered "legally blind" due to the loss of a lens in an industrial accident, that determination constitutes "some evidence" that the claimant has suffered "the loss of the sight of an eye" pursuant to R.C. 4123.57(B).

Id. at ¶18.

{¶69} The *Autozone II* court explains:

> * * * Dr. Magness found that the claimant's *corrected* vision in his injured eye was 20/200.
>
> That 20/200 measurement is a significant standard in the definition of blindness. R.C. 3304.28(B)(1) defines "blind" as

"[v]ision twenty/two hundred or less in the better eye with proper correction." In *State ex rel. Nastuik v. Indus. Comm.* (1945), 145 Ohio St. 287, 292, 30 O.O. 503, 61 N.E.2d 610, this court wrote that " '[t]he reduction in visual acuity to 20/200 * * * or a reduction in visual efficiency to 20 per cent or less, is the accepted standard of industrial blindness.' " Id., quoting a report of the Committee on Visual Economics of the American Medical Association, reprinted in May, Diseases of the Eyes (18th Ed.1943) 221. In *Nastuik*, this court denied a claimant's writ of mandamus, holding that since the claimant had 20/200 corrected vision before his industrial injury, he was already blind before his injury and thus was not entitled to compensation for loss of sight.

In *State ex rel. Gen. Elec. Corp. v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585, 816 N.E.2d 588, the claimant's vision decreased to 20/200 after an industrial accident, and the commission granted a scheduled loss award under R.C. 4123.57(B) for total loss of vision in both eyes. The fact that the claimant's 20/200 vision was bad enough to constitute "the loss of the sight of an eye" was not disputed in that case. Instead, this court dealt with whether corrective surgery that resolved the claimant's vision loss foreclosed an award for total loss of vision. We held that the surgery constituted a correction, not a restoration, of the claimant's sight, and that the court of appeals had erred in disallowing the commission's award based upon the claimant's surgical correction.

Gaydosh here suffered essentially the same injury as the claimant in *Parsec*, and at least the same extent of vision loss as the claimant in *Gen. Elec.* Both doctors found Gaydosh's vision in his injured eye to be 20/200. That level of vision is consistent with legal blindness under Ohio statutory and case law.

R.C. 4123.95 directs liberal construction of workers' compensation statutes in favor of injured workers. A liberal construction is not necessary in this case. It is self-evident that blindness fulfills the requirement of "the loss of the sight of an eye." Therefore, the opinions of two doctors that Gaydosh was rendered legally blind in his left eye due to a workplace injury constituted "some evidence" in the record to support the commission's decision that Gaydosh had

> suffered "the loss of the sight of an eye" under R.C. 4123.57(B).

Id. at ¶21-25. (Emphasis sic.)

{¶70} At best, under the case law analyzed above, only this court's decisions in *Autozone I* and *Parsec* can be seriously argued to support the commission's award of R.C. 4123.57(B) compensation for the surgical loss of claimant's own cornea during the corneal transplant surgery. However, reliance upon this court's decisions in *Autozone I* and *Parsec* is problematical because those cases involved intraocular lens implants, not a corneal transplant which is at issue here. There exists no Ohio case holding that corneal transplant surgery itself presents a total loss of vision of the left eye.

{¶71} Further undermining any supposed commission reliance upon *Autozone I* and *Parsec* is the court's four-to-three decision in *Autozone II*. To begin, the *Autozone II* majority did not adopt this court's rationale in *Autozone I* that Gaydosh's loss of his natural lens automatically entitled him to an award of total loss of vision. Rather, the majority relied upon the doctors' opinions that Gaydosh's injury produced 20/200 visual acuity which meets the definition of legal blindness.

{¶72} Moreover, the three justice *Autozone II* minority specifically rejected this court's *Autozone I* rationale. The dissenting justices in *Autozone II* wrote:

> * * * [I]n the instant case, Dr. Mah, Gaydosh's treating physician, specified that the percentage of vision actually lost in the left eye was 75 to 80 percent. The commission relied upon Dr. Mah's medical report in granting Gaydosh's motion, but made an award for a 100 percent loss of vision. The commission concedes that *none* of the medical evidence of record supports a finding of 100 percent loss of vision in the left eye. Accordingly, in line with our precedent in [*State ex rel. ABF Freight Sys., Inc. v. Indus. Comm.*, 96 Ohio St.3d 80, 2002-Ohio-3612, *State ex rel. Moorehead v.*

> *Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364], and [*State ex rel. Spangler Candy Co. v. Indus. Comm.* (1988), 36 Ohio St.3d 231], I would assert that the determination of a 100 percent loss of vision is not supported by evidence of a total vision loss contained in the record.
>
> The majority relies heavily on *State ex rel. Parsec, Inc. v. Indus. Comm.*, 155 Ohio App.3d 303, 2003-Ohio-6186, 800 N.E.2d 1180, in reaching its decision. In that case, an industrially induced cataract blocked all light, necessitating surgical replacement of the eye's natural lens with an artificial one. The commission awarded total loss of vision in that eye, and the employer filed a mandamus in the Tenth District Court of Appeals.
>
> The appellate court considered the question whether the artificial-lens implant was a "correction" of vision, something not taken into account when calculating the percentage of vision actually lost according to R.C. 4123.57(C). The appellate court concluded that it was a correction of vision and therefore upheld the commission's award.
>
> *Parsec*, however, is distinguishable from the facts in this case because, there, the record contained evidence that the claimant had suffered a 100 percent loss. Accordingly, *Parsec* should not be read as compelling a 100 percent award for the loss of a natural lens when the medical evidence indicates that the resulting loss of vision is 75 to 80 percent.

Id. at ¶32-35. (Emphasis sic.)

{¶73} To summarize, while this court's judgment in *Autozone I* was affirmed by the four-justice *Autozone II* majority, the basis or grounds for this court's decision in *Autozone I* appears undermind by the *Autozone II* court.

{¶74} Given the above analysis of the case law, this magistrate must conclude that the commission's award of compensation for total loss of vision based solely upon the penetrating keratoplasty performed by Dr. Erdey on August 28, 2007 cannot stand.

{¶75} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the July 29, 2008 order of its SHO awarding R.C. 4123.57(B) compensation for total loss of use of the left eye, and to enter an order denying the compensation.

/S/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).