

STATE OF MICHIGAN
SUPREME COURT

DENNIS SIMPSON

SSN. 382-64-0216

SUPREME COURT DOCKET NO: 133274

Plaintiff/Appellee,

-v-

COA DOCKET NO: 264106

BORBOLLA CONSTRUCTION AND CONCRETE SUPPLY

Cincinnati Casualty Company

Defendant/Appellant.

and

FLUOR CONSTRUCTORS INTERNATIONAL, INC.

Travelers Casualty & Surety Company (RSKCO/CNA)

Defendant/Appellee.

and

SILICOSIS, DUST DISEASE & LOGGING

INDUSTRY COMPENSATION FUND,

Defendant/Appellee.

STATE OF MICHIGAN)

) ss

COUNTY OF WAYNE)

NICHOLAS P. MOORE, being duly sworn, deposes and says that on the 5th day of July, 2007, he served a copy of the annexed:

DEFENDANT/APPELLANT'S, BORBOLLA CONSTRUCTION
AND CINCINNATI CASUALTY COMPANY, SUPPLEMENTAL BRIEF

on the individual(s) named below:

Mr. Richard L. Warsh, Attorney for Plaintiff
29566 Northwestern Hwy., Ste. 120, Southfield, MI 48034

Mr. Gerald M. Marcinkoski, Attorney for Fluor Constructors
600 South Adams Rd., Ste. 300, Birmingham, MI 48009

Ms. Jessica E. LePine, Attorney for Silicosis, Dust Disease Fund
3030 West Grand Blvd., Ste. 10-161, Detroit, MI 48226

FILED

JUL 9 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

133274
Supp

g

Mr. Martin L. Critchell, Attorney for *amicus curiae* Michigan Health and Hospital Association, 30700 Telegraph Rd., Ste. 2580, Bingham Farms, MI 48025

by enclosing in a sealed envelope plainly addressed to said individual(s) at the above address and depositing same with lawful postage affixed thereto in the United States Mail.

PARSONS, BOUWKAMP & BUIE, P.C.



BY; NICHOLAS P. MOORE (P62745)

Subscribed and sworn to before me this
5th day of July, 2007.



PATRICIA A. KOWALSKI

Notary Public, Wayne County, Michigan

My Commission expires: September 7, 2011

STATE OF MICHIGAN
SUPREME COURT

DENNIS SIMPSON

SSN. 382-64-0216

Plaintiff/Appellee,

-vs-

BORBOLLA CONSTRUCTION AND CONCRETE SUPPLY

Cincinnati Casualty Company

Defendant/Appellant.

and

FLUOR CONSTRUCTORS INTERNATIONAL, INC.

RSKCO/CNA

Defendant/Appellee.

SUPREME COURT NO: 133274

COA DOCKET NO: 264106

DEFENDANT/APPELLANT, BORBOLLA CONSTRUCTION AND CONCRETE
SUPPLY AND CINCINNATI CASUALTY COMPANY

SUPPLEMENTAL BRIEF

NICHOLAS P. MOORE (P62745)
Attorney for Defendant/Appellant,
Borbolla Construction and Concrete Supply
and Cincinnati Casualty Company
20523 Merriman Road
Livonia, Michigan 48152-1623
(248) 478-8100

LAW OFFICES
PARSONS, BOUWKAMP & BUJE, P.C.
20523 MERRIMAN ROAD
LIVONIA, MICHIGAN 48152-1623

(248) 478-8100

TABLE OF CONTENTS

STATEMENT OF THE ISSUES 1

STATEMENT OF THE FACTS 2

ARGUMENT 3-5

RELIEF REQUESTED 6

EXHIBITS

Index No

Supreme Court Order
(dated June 1, 2007) 1

INDEX OF AUTHORITIES

Fahr v General Motors Corporation,
-Mich-; -NW2d- (2007) 3, 4

Leskinen v Employment Security Comm,
398 Mich 501; 247 NW2d 808 (1976) 4

Rakestraw v General Dynamics Land Systems, Inc.,
469 Mich 220, 666 NW2d 199 (2003) 1, 2, 3, 4

STATUTES

MCL 418.301(1) 4, 5

STATEMENT OF THE ISSUES

DOES RAKESTRAW V GENERAL DYNAMICS LAND SYSTEMS, INC. APPLY WHERE THE PRE-EXISTING CONDITION IS WORK-RELATED?

The magistrate did not answer.

The Workers' Compensation Appellate Commission answered "yes".

The Court of Appeals answered "no".

Defendant/Appellant, Borbolla Construction and Cincinnati Casualty Company answers, "yes".

Defendant/Appellee Flour Constructors-Travelers Casualty & Surety Company answers, "yes".

Amici curiae MSIA and MMA answer "yes".

STATEMENT OF THE FACTS

Borbolla hereby incorporates by reference the Statement of the Facts contained in its Application for Leave to Appeal filed on February 21, 2007.

The Court ordered argument of the application for leave to appeal to address the question of whether "the Court of Appeals erred in holding that Rakestraw v General Dynamics Land Systems, Inc, 469 Mich 220 (2003) does not apply where the pre-existing condition is work related."

ARGUMENT

Rakestraw provides the definition of personal injury:

...the statute clearly requires the establishment of a work-related injury, not a symptom that simply occurs in the workplace.

Rakestraw v General Dynamic Land Systems, Inc., 469 Mich 220, 233, 666 NW2d 199 (2003). This Honorable Court had the opportunity to revisit Rakestraw recently in Fahr v General Motors Corporation, -Mich-; -NW2d- (2007) and reiterated that a medically distinguishable change in an underlying condition requires proof that the pathology of that condition has changed.

Rakestraw and Fahr concerned factual circumstances where the claimant alleged an aggravation of a pre-existing non-work related condition. However, the focus is not the origin of the pre-existing condition; it is whether "work has caused an injury that is medically distinguishable from the progression of a pre-existing condition". The effect the claimant's subsequent work had on the pre-existing condition is the determining factor. If the claimant does not prove that his subsequent work activity "caused a medically distinguishable injury", whether the pre-existing condition was personal or occupational is irrelevant.

In the instant matter, the Court of Appeals has restricted the application of Rakestraw and its progeny by focusing on the origin of the pre-existing condition. This Honorable Court did not address that issue in Rakestraw or Fahr, realizing the relative unimportance of that issue as it pertains to the definition of disability.

There is an important distinction to be made between personal injury and disability, which the Court of Appeals seems to confuse. Eligibility for benefits is secondary to the establishment of a personal injury which arose out of and in the course of employment. MCL 418.301(1); Leskinen v Employment Security Comm, 398 Mich 501; 247 NW2d 808 (1976). In the case at bar, personal injury occurred at plaintiff's previous employer, Babcock & Wilcox, 20 years earlier. If that personal injury lead to disability, as plaintiff argues, then Babcock & Wilcox is the responsible employer, unless further personal injury is proven. Plaintiff did not establish an additional injury, and liability falls on Babcock & Wilcox.

The Court of Appeal's reliance on the last sentence of MCL 418.301(1) in placing liability on Borbolla is also misplaced. The last sentence of MCL 418.301(1) does not define disease or personal injury; it defines the term *time of injury* by stating that:

Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

In the instant matter, plaintiff did not suffer from a disease but he did have an injury attributable to a single event, making the last sentence of MCL 418.301(1) inapplicable. Even if MCL 418.301(1) applied, the plaintiff still failed to prove that his work activity for Borbolla subjected him to conditions that resulted in his disability.

RELIEF REQUESTED

WHEREFORE, Defendant Borbolla Construction & Concrete Supply, Inc./Cincinnati Insurance Company respectfully requests that this Honorable Court reverse the decision of the Court of Appeals.

Respectfully submitted,



BY: NICHOLAS P. MOORE (P62745)
Attorney for Defendant/Appellant,
Borbolla Construction and
Cincinnati Casualty Company

DATED: July 5, 2007

LAW OFFICES
PARSONS, BOUWKAMP & BUJE, P.C.
20523 MERRIMAN ROAD
LIVONIA, MICHIGAN 48152-1623

(248) 478-8100