

STATE OF MICHIGAN

IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
AND THE WORKERS' COMPENSATION APPELLATE COMMISSION

DENNIS G. SIMPSON,

S.C. NO.: 133274

Plaintiff-Appellee,

C.A. NO.: 264106

v

L.C. NO.: WCAC 04-000017

BORBOLLA CONSTRUCTION & CONCRETE
SUPPLY, INC. and CINCINNATI INSURANCE
COMPANY,

Defendants-Appellants,

and
FLUOR CONSTRUCTORS INTERNATIONAL, INC.
and TRAVELERS CASUALTY & SURETY
COMPANY (RSKCo/CNA),

Defendants-Appellees,

and
SILICOSIS, DUST DISEASE & LOGGING
INDUSTRY COMPENSATION FUND,

Defendant-Appellee.

133274
DEFENDANTS-APPELLEES', FLUOR CONSTRUCTORS INTERNATIONAL, INC.
AND TRAVELERS CASUALTY & SURETY COMPANY (RSKCo/CNA'S), ANSWER TO
DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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ISSUE

DO ALL OF THE DECISIONS BELOW EXONERATE THE INSTANT DEFENDANTS FROM LIABILITY? ARE THOSE RULINGS CORRECT AND NO LONGER IN DISPUTE? BUT, DOES THE COURT OF APPEALS' LIMITATION OF THE APPLICABILITY OF *RAKESTRAW* WARRANT THE COURT'S ATTENTION?

STATEMENT OF FACTS

(Unless otherwise indicated, numbers in parentheses refer to the pages of the November 17, 2003 trial proceedings.)

Plaintiff's workers' compensation claims in this matter were many but the two most seriously pressed were a claim for a work-related wrist disability and a claim for a work-related lung disability (5-6).

Plaintiff had labored as an iron worker (58-72). He had procured work over the years through a union hall and, consequently, worked for many different employers in the course of his career (*Id.*). As an iron worker, plaintiff did heavy work (40-44). He helped build bridges, for example (*Id.*). In so doing, he climbed ladders, re-enforced iron and concrete by inserting iron rods inside the materials, unloaded trucks, welded, and did other related work. (*Id.*)

Chronologically speaking, prior to working for the instant defendants, plaintiff had sustained a wrist injury in 1979 while working for a different employer, an employer plaintiff elected not to sue in this case (46-47).

Plaintiff's claim with respect to the instant defendants appeared to be a claim just related to his lung condition (24). Plaintiff's alleged date of injury with respect to the instant defendants was December 30, 1999 (5). Plaintiff's lung claim was consistently denied below and is no longer in contention. (Court of Appeals' slip op, p 2, n 1; Commission's opinion, p 2, n 1; Magistrate's decision, pp 15-16).

After plaintiff worked for the instant defendants, plaintiff worked for approximately eight different employers (66-73). Plaintiff's work for the subsequent employers was the same type of work plaintiff had performed for the instant defendants, namely: construction work involving iron work. (Commission's opinion, p 2).

Defendant-Appellant was plaintiff's last employer. The Magistrate found that plaintiff suffered an aggravation of his 1979 wrist injury by his one day of work on October 23, 2000 at defendant-appellant. (Magistrate's decision, pp 13-15).

Defendant-Appellant appealed to the Workers' Compensation Appellate Commission. No cross-appeals were filed. Defendant-Appellant did not suggest in briefing the instant defendants are liable instead of them. (Commission's opinion, p 2, n 1). In an opinion and order, mailed June 29, 2005, the Commission unanimously affirmed the Magistrate's decision, including the finding defendant-appellant is liable for aggravation of plaintiff's 1979 wrist injury. (Commission's opinion, pp 9-10).

Defendant-Appellant applied to the Court of Appeals for leave to appeal. The Court in a 2-1 ruling granted the application.

In a published decision released January 25, 2007, the Court unanimously affirmed the decision of the Workers' Compensation Appellate Commission but was "of the opinion that the WCAC erred" in construing this Court's decision in *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003). (Court of Appeals' slip op, p 5 n 4).

Defendant-Appellant has now applied to this Court for leave to appeal. The instant defendants respond to that application as follows.

ARGUMENT

ALL OF THE DECISIONS BELOW EXONERATE THE INSTANT DEFENDANTS FROM LIABILITY. THOSE RULINGS ARE CORRECT AND NO LONGER IN DISPUTE. HOWEVER, THE COURT OF APPEALS' LIMITATION OF THE APPLICABILITY OF *RAKESTRAW* WARRANTS THE COURT'S ATTENTION.

The instant defendants were joined in the case primarily because plaintiff's case at the outset was more focused on an allegation that he suffered a work-related lung disability allegedly due to exposure to asbestos (23-24).¹ Plaintiff's lung claim was unsuccessful, but plaintiff has prevailed with respect to his left wrist claim. Plaintiff's left wrist problem began with a specific event injury to his left wrist in 1979 when a chain fell on it at work. (Magistrate's decision, p 13). For reasons not entirely clear, plaintiff did not bring the instant action against his 1979 employer, nor join the employer in this case. Instead, plaintiff pursued his lung claim (against the instant defendants) and claimed aggravation of his left wrist problem as a result of his work through his last day at defendant-appellant on October 23, 2000.² Plaintiff has been successful in claiming aggravation on his left wrist problem due to his one day of work at defendant-appellant.

A. The Instant Defendants Cannot Be Held Liable.

The instant defendants have no liability in this matter because plaintiff abandoned his lung claim on appeal. (Commission's opinion, p 2, n 1). And, plaintiff has not argued the instant defendants are liable for his left wrist problem. Defendant-Appellant similarly has not

¹ The asbestos-related claim was also the reason why the defendant Silicosis, Dust Disease & Logging Industry Compensation Fund had been joined to the case (6). Ultimately, the Fund was dismissed from the case by stipulation of the parties (89).

² Plaintiff also claimed a knee injury, but did not prevail with respect to that claim on any level. (Commission's opinion, p 2, n 1; Magistrate's decision, p 16).

claimed the instant defendants are liable for plaintiff's wrist condition in the appellate proceedings including their application for leave to appeal to this Court.

Therefore, the instant defendants cannot be assessed liability in this matter because the decisions below exonerating the instant defendants are final. *Auto-Owners Insurance Co v Amoco Production Co*, 468 Mich 53, 65-66; 658 NW2d 460 (2003); *Calovecchi v State of Michigan, Michigan State Police*, 461 Mich 616, 625-626; 611 NW2d 300 (2000); *Irrizary v Merillat Industries, Inc*, 1993 ACO #147.

That having been said, the instant defendants agree with defendant-appellant that the Court of Appeals' published decision in this case warrants the Court's attention because the Court of Appeals has, in the instant defendants' view, wrongly limited the scope of this Court's decision in *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003).

B. Rakestraw.

Rakestraw presented a question engaging MCL 418.301(1), which says:

An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. 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. MCL 418.301(1).

The facts of *Rakestraw* were that Mr. Rakestraw had suffered from a pre-existing non-work-related problem in his cervical spine, the symptoms of which were aggravated by later work for his employer. *Rakestraw*, 469 Mich at 223. In *Rakestraw*, the Court held:

We hold that a claimant attempting to establish a compensable, work-related¹ injury must prove that the injury is medically distinguishable from a preexisting nonwork-related condition in order to establish the existence of a “personal injury” under § 301(1).

¹ As used in this opinion, a compensable, work-related injury is one that arises “out of and in the course of employment” in accordance with MCL 418.301(1). *Rakestraw*, 469 Mich at 222.

Although the Court in *Rakestraw* refers in the footnote to § 301(1)’s causation element – “arising out of and in the course of employment,” the Court’s focus was squarely on the injury requirement in § 301(1). The Court said:

Thus, several cases from this Court have articulated the principle that, where an employee claims to have suffered an injury whose symptoms are consistent with a preexisting condition, the claimant must establish the existence of a work-related injury that extends “beyond the manifestation of symptoms” of the underlying preexisting condition. [Citation omitted.] *Rakestraw*, 469 Mich at 228.

In responding to the dissent, the *Rakestraw* majority bifurcated the distinction between the injury requirement and the causation requirement in § 301(1), saying:

The clear language of the statute requires that a claimant prove the existence of an injury “arising out of and in the course of employment.” Simply put, a claimant must prove the *presence* of an injury as well as its *cause* to establish a compensable claim. *Rakestraw*, 469 Mich at 232-233 n 11.

Consequently, the following rule was understood to have emerged from *Rakestraw*:

Therefore, as a practical consideration, a claimant must prove that the injury claimed is distinct from the preexisting condition in order establish “a personal injury arising out of and in the course of employment” under § 301(1). *Rakestraw*, 469 Mich at 231-232.

C. Rakestraw's Factual Difference From This Case Is Immaterial To The Necessary Legal Analysis.

It should make no difference for analytical purposes whether the pre-existing problem is a pre-existing work-related or non-work-related problem. While the facts of the *Rakestraw* case presented a situation where the pre-existing problem was non-work-related, *Rakestraw's* decision did not turn on that fact. Instead, *Rakestraw* focused on whether Mr. Rakestraw sufficiently differentiated his alleged "personal injury" at work from his pre-existing problem. *Rakestraw* focused on "personal injury" rather than on the causation element of § 301(1).

D. Workers' Compensation Appellate Commission's Decisions Post-Rakestraw.

Some of the Workers' Compensation Appellate Commission's cases subsequent to *Rakestraw* are worth reviewing to appreciate the need for this Court to settle the law on this point.

Initially, the Commission questioned whether *Rakestraw* intended its rule to apply to pre-existing work-related conditions in addition to pre-existing non-work-related conditions such as presented by *Rakestraw's* facts. Compare and contrast, *Burnaska v Ford Motor Co*, 2004 ACO #110 [*Rakestraw's* rule is confined to prior non-work-related problems] with *Zanskas v National Staff Management, Inc*, 2003 ACO #224 [*Rakestraw* applies to all claims of work-related aggravation of pre-existing work-related conditions regardless of whether the pre-existing condition was work-related or not]. The controversy seemed to have been resolved with the release of *Lapham v Engineered Plastic Components, Inc*, 2004 ACO #394. There, the Commission acknowledged *Rakestraw* "has been the subject of disagreement at the Commission level." *Lapham*, slip op at p 3. After reviewing differing opinions on the subject, the Commission concluded that "any discord among [the cases] is more perceived than real." *Lapham*, slip op at p 8. *Lapham* says *Rakestraw* "stand[s] for the proposition that an employee sustains a new date of injury when it is shown the employee has sustained a permanent worsening in the disability due to

subsequent injury or work activity.” *Lapham*, slip op at p 8. Applying this rule, *Lapham* affirmed the trial Magistrate’s finding of a new and later date of injury based on an aggravation of a prior work-related problem.

The issue has remained controversial, however. In *Beattie v Wells Aluminum Corp*, 2005 ACO #157, the Commission split again on the question. The Commission majority reiterated *Rakestraw* applies to pre-existing work-related injuries, saying this is “the better view.” *Beattie*, slip op at p 6. But, a concurring Commissioner in *Beattie* resurrected the “split opinion in the Commission as to whether *Rakestraw*” applied and would limit *Rakestraw* to pre-existing non-work-related conditions. *Beattie*, slip op at p 14.

E. The Court Of Appeals Opts For The Limited View.

The Court of Appeals in the instant case opted for the narrow view of *Rakestraw*. The Court did so by reading *Rakestraw* as concerning itself exclusively (or at least primarily) with the causation element in § 301(1) [“arising out of and in the course of employment”], rather than the “personal injury” requirement in § 301(1). The Court of Appeals says “the focus of *Rakestraw* was clearly on causation, i.e., whether the plaintiff’s injury arose out of and in the course of employment. [*Rakestraw*, 469 Mich] at 225, 230-231.” (Court of Appeals’ slip op, p 5). In the Court of Appeals’ view, since plaintiff’s pre-existing problem was work-related, the arising out of and in the course of employment requirement had been previously satisfied (albeit by liability with another employer not a party to the case) thus doing away with the need to refer to *Rakestraw*. The Court explained:

The significance of the pre-existing condition in *Rakestraw* was not so much that it was pre-existing, but rather that it was not work-related. The purpose of requiring a “medically distinguishable,” work-related, injury in *Rakestraw* was to establish causation, not to simply distinguish the pre-existing

condition from a “new” injury. Because of *Rakestraw*’s focus on establishing a causal connection to the workplace, which is not an issue in the instant case, the factual distinctions between *Rakestraw* and the case at bar are significant such that *Rakestraw* is simply inapplicable. (Court of Appeals’ slip op, p 5; footnote omitted but discussed below).

The Court of Appeals then held *Rakestraw* “inapplicable” because:

In *Rakestraw*, the plaintiff’s pre-existing condition was not work-related; whereas, in the instant case, plaintiff’s initial left wrist injury occurred during the course of his employment as an iron worker in 1979. Therefore, the instant case is not one, as in *Rakestraw*, where an employee is attempting to establish a compensable injury by relying upon symptoms which could be attributed to the progression of a pre-existing, nonwork-related, condition. (Court of Appeals’ slip op, p 4).

The instant defendants believe there is no principled reason for the Court of Appeals to draw the distinction it has. The question of whether a personal injury occurred on plaintiff’s last day of work engages the *Rakestraw* analysis in either case because the following question must be asked and answered: Was plaintiff on his last day of work merely experiencing an aggravation of the symptoms of his prior problem or did something medically distinguishable occur so as to establish a *new* date of injury?

Remarkably, the Court of Appeals’ limitation of *Rakestraw* was unnecessary. The Workers’ Compensation Appellate Commission had applied *Rakestraw* in this matter and found plaintiff satisfied it. The Court of Appeals acknowledged this reality in a footnote saying that, while the Court agreed with the Commission’s result in finding the last employer liable, the Court would limit *Rakestraw* anyway because “we are of the opinion that the WCAC erred” in finding *Rakestraw* applicable. (Court of Appeals’ slip op, p 5, n 4).

F. Many Workers' Compensation Cases Present This Question.

This controversy warrants the Court's attention because many workers' compensation cases present the question of whether an employee's disability is attributable to one employer's date of injury or to another's. It is a question that arises in everyday workers' compensation practice. Some examples through the years include: *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243; 262 NW2d 629 (1978); *Gilbert v Reynolds Metals Co*, 59 Mich App 62; 228 NW2d 542 (1975); *Gibbs v Keebler Co*, 56 Mich App 690; 224 NW2d 698 (1974); *Mullins v Dura Corp*, 46 Mich App 52; 207 NW2d 404 (1973).

Therefore, although the instant defendants have no liability in this matter, the primary issue presented³ warrants the Court's attention because it significantly restricts the breadth of the Court's *Rakestraw* decision and, in the instant defendants' view, erroneously so.

³ Defendant-Appellant offers an argument on a second issue in their application alleging the work plaintiff performed defendant-appellant was not sufficiently similar to plaintiff's prior iron work. (Defendant-Appellant's Argument II). This is a question of fact. *Dressler*, 402 Mich at 256. As the Court of Appeals said, there is more than ample support in the record for the conclusion that plaintiff's work for the defendant-appellant subjected plaintiff to sufficiently similar type of conditions which produced his disability as his prior iron work. (Court of Appeals' slip op, p 5). The work need not be identical. *E.g.*, *Hughes v Lakey Foundry*, 91 Mich App 170, 176; 284 NW2d 135 (1979); *Mundy v Detroit Grey Foundry*, 57 Mich App 331, 335-336; 225 NW2d 754 (1975). The instant defendants submit that this issue does not merit the Court's attention.

RELIEF

WHEREFORE, defendants-appellees, Fluor Constructors International, Inc. and Travelers Casualty & Surety Company (RSKCo/CNA), respectfully request that the Supreme Court recognize the instant defendants have no liability in this matter but address the Court of Appeals' limitation on the applicability of *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003).

Respectfully submitted,

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