

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.

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DEFENDANTS-APPELLEES', FLUOR CONSTRUCTORS INTERNATIONAL, INC.
AND TRAVELERS CASUALTY & SURETY COMPANY (RSKCo/CNA'S), SUPPLEMENTAL
BRIEF

ORAL ARGUMENT REQUESTED

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ISSUE

**DOES *RAKESTRAW'S* ANALYSIS APPLY
BOTH TO PRE-EXISTING WORK-RELATED
CONDITIONS AND NON-WORK-RELATED
CONDITIONS?**

STATEMENT OF FACTS

Defendants-Appellees incorporate the Statement of Facts contained in their answer filed with the Court, signed March 27, 2007. The only additional fact is that, in response to defendants-appellants' application, the Court issued the following order:

On order of the Court, the motions for leave to file briefs amicus curiae are GRANTED. The application for leave to appeal January 25, 2007 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address 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 preexisting condition is work-related. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. (Supreme Court order, entered June 1, 2007).

What follows is the instant defendants' supplemental argument.

ARGUMENT

RAKESTRAW DESCRIBES HOW TO DETERMINE WHETHER A WORKERS' COMPENSATION CLAIMANT HAS PROVEN A "PERSONAL INJURY" WHERE THE CLAIMANT HAS A PRE-EXISTING CONDITION. THERE IS NO PRINCIPLED REASON WHY RAKESTRAW'S ANALYSIS WOULD NOT APPLY EQUALLY TO PRE-EXISTING WORK-RELATED CONDITIONS AS WELL AS TO PRE-EXISTING NON-WORK-RELATED CONDITIONS.

Nothing within MCL 418.301(1)'s words "personal injury" contemplates inquiry into the work relatedness of the condition. The work relatedness (or causation) inquiry is the province of the phrase that immediately follows the "personal injury" requirement, *i.e.*, the "arising out of and in the course of employment" requirements.¹ The "personal injury" requirement asks whether "damage to the body," a "bodily injury" has occurred. *Weinmann v General Motors Corp*, 152 Mich App 690, 698; 394 NW2d 73 (1986); *Behl v General Motors Corp*, 25 Mich App 490, 498; 181 NW2d 660 (1970), respectively. A person can sustain a "personal injury" at work or away from work. Only after establishing a "personal injury" has indeed occurred does the potential work relatedness of the personal injury become relevant, *i.e.*, is the personal injury one arising out of and in the course of employment or not? *Pearce v Michigan Home & Training School*, 231 Mich 536, 537-538; 204 NW 699 (1925). The Court of Appeals in this case has confused the requirements and erred by mixing the question: "did a 'personal injury' occur?" with the question: "is a 'personal injury' work-related?"

¹ MCL 418.301(1)'s first sentence reads: "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."

Rakestraw's focus was on the "personal injury" requirement not the "arising out of" causation requirements. This focus is evident from the *Rakestraw* opinion, as already described in defendants' answer, and from *Rakestraw*'s heavy reliance on *Miklik v Michigan Special Machine Co*, 415 Mich 364; 329 NW2d 713 (1982). *Miklik* clearly delineates the separate inquiries. *Miklik* holds:

In **all** successful workers' compensation cases, the claimant must establish by a preponderance of the evidence **both** a personal injury and a relationship between the injury and the workplace. In heart cases, the first question is whether there is heart damage. The second is whether the heart damage can be linked by sufficient proof to the employment. Only if the first question is answered affirmatively need the second be asked. *Miklik*, 415 Mich at 367 (emphasis is defendants').^[2]

In contrast to the above, the Court of Appeals has held there is now a class of cases where a claimant can succeed in proving a compensable work-related injury without meeting both requirements. The Court has held that if more than one work injury is alleged and the claimant meets the "personal injury" requirement for the first work injury, he or she need not meet it to prove the second work injury.

The Court of Appeals' holding is wrong because the personal injury requirement must be met to prove a second work injury. If it is not met, then there is no second person injury. And, the question – has a second work injury occurred? – triggers the same inquiry presented in *Rakestraw*. That is, if a claimant has a pre-existing work-related problem, one must ask whether the claimant is experiencing only the manifestation of the symptoms of an earlier work injury or

² *Miklik* later reiterated the necessity of meeting both requirements: "Even if the WCAB had had adequate support for its finding of heart damage in *Miklik*, the board further failed to show a sufficient link between the damage and the workplace." *Miklik*, 415 Mich at 370.

whether something “medically distinguishable” has occurred so as to establish a second personal injury.³

After erroneously saying *Rakestraw* was not focused on the “personal injury” requirement, the Court of Appeals found the only relevant inquiry left the last sentence of § 301(1).

It says:

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) [last sentence] (emphasis is defendants’).

This last sentence means where there is more than one work injury (or continuous deleterious exposure to a deleterious environment in an occupational disease case) the factfinder is to choose the last day at such work as the operative date of injury for payment of benefits. In non-occupational disease cases such as here, the factfinder must determine *first* whether there has been more than one compensable event so as to select the last day of work. Section 301(1)’s last sentence is simply not relevant in cases like this until *after* it is already been determined that two or more work-related personal injuries have occurred.

Finally, this Court’s references to *Rakestraw* since its release are telling. In *Fahr v General Motors Corp*, ____ Mich ____; ____ NW2d ____ (2007) (SC Docket No. 133500, entered

³ It is commonplace for employees to allege injuries at different employers or multiple dates of injury while working for the same employer, particularly when one employer has different insurance companies on different dates. *E.g.*, *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). Determining whether and when a personal injury has occurred is important for a number of reasons, not the least of which is that it determines the governing average weekly wage and weekly rate of compensation payable. See, MCL 418.371 and MCL 418.355. Generally speaking, the more recent the year of a personal injury the more lucrative is the claimant’s weekly rate of compensation. This reality no doubt explains plaintiff’s desire to assess liability on the last employer in this case rather than on the earlier 1979 employer. Plaintiff’s weekly rate of compensation for the alleged last day of work injury is \$186.58, whereas for the 1979 date of injury it would be \$156.00.

June 22, 2007) this Court described *Rakestraw*'s operation without suggesting *Rakestraw* was limited to pre-existing work-related conditions as opposed to "a pre-existing condition," or "an underlying condition." (Emphasis is defendants').⁴ Also, Justice Markman's concurring opinion in *Rowland v Washtenaw County Road Commission*, 477 Mich 197; ___ NW2d ___ (2007) summarized *Rakestraw* with no suggestion it is limited to pre-existing work-related conditions as opposed to cases where there is "a preexisting condition." *Rowland*, 477 Mich at 236-237, chart entry #18 (emphasis is defendants').

In sum, the Court of Appeals' insistence in this case that "[t]he significance of the preexisting condition in *Rakestraw* was not so much it was preexisting, but rather that it was not work-related," (Court of Appeals slip at p 4), does not square with *Rakestraw*, with logic, nor

⁴ This order provides:

On order of the Court, the application for leave to appeal the February 22, 2007 order of the Court of Appeals is considered. We note that the Workers' Compensation Appellate Commission majority misinterpreted this Court's decision in *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003), when it asserted that *Rakestraw* does not require a "pathological change in a pre-existing condition" in order for a plaintiff to establish that a work-related personal injury has occurred. *Rakestraw* clearly requires a plaintiff who is suffering from a pre-existing condition to show that his work has caused an injury that is medically distinguishable from the progression of an underlying pre-existing condition. This cannot be done merely by showing a worsening of symptoms. Rather, to demonstrate a medically distinguishable change in an underlying condition, a claimant must show that the pathology of that condition has changed. Although a medical expert need not use the phrase "change in pathology," there must be record evidence from which a legitimate inference may be drawn that the plaintiff's underlying condition has pathologically changed as a result of a work event or work activity in order to meet the legal test for a personal injury under MCL 418.301(1) and *Rakestraw*. In this case, the record contains evidence that the plaintiff's preexisting medical condition was pathologically aggravated by his working conditions. Accordingly, the leave to appeal is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The motion to consolidate is DENIED.

KELLY, J., concurs in the result only.

CAVANAGH, J., would deny leave to appeal without the further statements found the majority's order. *Fahr, supra* (SC Docket No. 133500, entered June 22, 2007).

with this Court's post-*Rakestraw* observations. Simply put, the facts of *Rakestraw* presented a pre-existing condition that was not work-related, but the Court's rule was not and should be limited to that any more than it should be limited to cases presenting cervical problems such as Mr. Rakestraw had.

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 reverse 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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BY: _____

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