

STATE OF MICHIGAN
SUPREME COURT

DENNIS G. SIMPSON
Plaintiff-Appellee,

Supreme Court no. 133274

v

Court of Appeals no. 264106

BORBOLLA CONSTRUCTION & CONCRETE SUPPLY, INC
CINCINNATI INSURANCE COMPANY
Defendants-Appellants,

Lower Court no. 04-000017

and

FLUOR CONSTRUCTORS INTERNATIONAL, INC
TRAVELERS CASUALTY & SURETY COMPANY
Defendants-Appellees,

and

SILICOSIS, DUST DISEASE & LOGGING INDUSTRY
COMPENSATION FUND
Defendant.

_____ /

133274 (42)

NOTICE OF HEARING

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

4/24

BRIEF AMICUS CURIAE

⑦ MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

PROOF OF SERVICE

FILED

APR 3 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

31232

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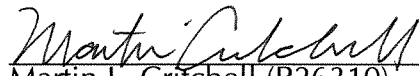
NOTICE OF HEARING

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Please take notice that the *Motion for leave to file brief amicus curiae* shall be heard by the Supreme Court on Tuesday, April 24, 2007.


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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Michigan Health and Hospital Association asks the Court for leave to file a brief amicus curiae because it is interested in the proper understanding and application of the workers' compensation act as its 160 members collectively employ 250,000 people.

The brief amicus curiae of the MHA provides a depth of perspective for the Court.

There is no active opposition to the participation of the MHA as an amicus curiae. The lawyers representing the parties had no opposition when contacted by telephone on (Monday) March 26, 2007.


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BRIEF AMICUS CURIAE
MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

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**STATEMENT OF THE BASIS FOR THE
JURISDICTION OF THE COURT**

The second sentence of MCL 418.861a(14) gives the Court jurisdiction to review *Simpson v Borbolla Constr & Concrete Supply Co*, - Mich App - ; - NW2d - (2007).

The application for leave to appeal was filed and the entry fee paid to the Court on February 23, 2007, which was less than forty-two days after the Court of Appeals decided *Simpson*.

STATEMENT OF QUESTION PRESENTED

I

DOES THE LAST SENTENCE OF MCL 418.301(1) APPLY?

Plaintiff-appellee Simpson answers "Yes."

Defendants-appellants Borbolla - Cincinnati Ins answer "No."

Defendants-appellees Fluor Constr - Travelers answer "No."

Amicus curiae Mich Health and Hospital answers "No."

Court of Appeals answered "Yes."

Workers' Compensation Appellate Comm answered "No."

STATEMENT OF FACTS

The wrist that Dennis G. Simpson fractured at work for Babcock and Wilcox Company proved bothersome when at work for Borbolla Construction & Concrete Supply, Incorporated. *Simpson v Borbolla Constr & Supply, Inc*, - Mich App - ; - NW2d - (2007), p 2.

Simpson then filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation claiming compensation for a personal injury at Borbolla Construction. Borbolla Construction appeared and denied this. And the Bureau remitted the case to the Board of Magistrates for hearing and disposition.

The Board allowed Simpson compensation from Borbolla Construction because "that was the last time he was subjected to the conditions which generated and exacerbated his wrist disease." *Simpson v Borbolla Constr & Concrete Supply*, unpublished order and opinion of the Board of Magistrates, issued on January 7, 2004 (Docket no. 010704046), p 13. Appendix DD.

The Workers' Compensation Appellate Commission affirmed. *Simpson v Borbolla Constr & Concrete Supply, Inc*, 2005 Mich ACO 153. Appendix CC.

The Court of Appeals granted leave to appeal. *Simpson v Borbolla Constr & Concrete Supply, Inc*, unpublished order of the Court of Appeals, issued on December 14, 2005 (Docket no. 264106). Appendix BB. And affirmed. *Simpson v Borbolla Constr & Concrete Supply, Inc*, - Mich App - ; - NW2d - (2007). Appendix AA.

ARGUMENT

I

THE LAST SENTENCE OF MCL 418.301(1) DOES NOT APPLY.

The last sentence of MCL 418.301(1) provides a definition. The last sentence of subsection (1) 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." (emphasis added)

The last sentence of subsection (1) does *not* define *disease* or *personal injury*. The definition of *disease* and *personal injury* are provided by other, distinct authorities. The word *disease* is defined by the first and second sentences of MCL 418.401(2)(b).¹ The term *personal injury* is defined by the ruling of the Court in the case of *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220, 231, 234; 666 NW2d 199 (2003).²

¹ "'Personal injury' shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment. An ordinary disease of life to which the public is generally exposed outside of the employment is not compensable."

² The text of the statute does not specifically demand that a claimant prove that his injury is 'medically distinguishable' from a preexisting condition. However, the clear language of the statute *does* require the establishment of 'a personal injury arising out of and in the course of employment.' Where a claimant experiences symptoms that are consistent with the progression of a preexisting condition, the burden rests on the claimant to differentiate between the preexisting condition, which is *not* compensable, and the work-related injury, which *is* compensable. Where evidence of a medically distinguishable injury is offered, the differentiation is easily made and causation is established. However, where the symptoms complained of are *equally* attributable to the progression of a preexisting condition or a work-related injury, a plaintiff will fail to meet his burden of proving by a preponderance of the evidence that the injury arose 'out of and in the course of employment'; stated otherwise, plaintiff will have failed to establish causation. Therefore, as a practical consideration, a claimant must prove that the injury claimed is distinct from the preexisting condition . . .

* * *

. . . we hold that a claimant attempting to establish a compensable work-related injury must adduce evidence of the injury that is medically distinguishable from the preexisting nonwork-related condition in order to establish the existence of a 'personal injury' by a preponderance of the evidence under § 301(1)." (emphasis by the Court)

The Court of Appeals was plainly wrong to supplant the definitions of *disease* and *personal injury* in the first and second sentences of section 401(2)(b) and *Rakestraw* with the definition of the *time of injury* in the last sentence of section 301(1).

The last sentence of subsection (1) also describes two circumstances when it may apply. One is "in the case of a disease." And the other is "in the case of an injury not attributable to a single event."

Neither of these two circumstances actually happened in *this* case. Dennis G. Simpson did not have a "disease" as that word is defined by the first and second sentences of section 401(2)(b). The Commission did not declare that Simpson had some disease such as a Black Lung or silicosis.

And Simpson did not have a "personal injury not attributable to a single event." The injury that Simpson had was attributable to a single event. The Commission reported the fact of a single event as "In 1979 plaintiff suffered an injury when a heavy chain fell several stories landing on his left wrist. The impact caused a nondisplaced fracture of the lunate bone." *Simpson v Borbolla Constr & Concrete, Inc*, 2005 Mich ACO 153, p 1-2. No second event occurred. Certainly, the Commission did not report some second event.

Plainly, the second case described by the last sentence of subsection (1) might have applied if and only if the Commission had determined that Simpson had experienced more than one event — a fall off a ladder or striking the wrist by an errant swing of a hammer — so that there might be some confusion in attribution to the first or the second which the last sentence addresses.

The mistake by the Court of Appeals has the consequence of resurrecting the idea that compensation can be based on connecting work with disability and not work with injury. This is a serious consequence because compensation has never been based on connecting work with disability as the Court said in the case of *Leskinen v Employment Security Comm*, 398 Mich 501, 508-509; 247 NW2d 808 (1976),

"*Eligibility* for benefits under the act is established when an employee proves that he has suffered a personal injury which arose 'out of and in the course of his employment'. MCLA 418.301(1); MSA 17.237(301)(1). *Van Atta v Henry*, 286 Mich 379; 282 NW 185 (1938). It is only after this threshold determination that the *amount* of benefits is then computed. The statutes and the prior decisions of this Court make apparent the fact that 'earning capacity' is a factor in calculating the *amount of benefits*, not whether a claimant has suffered a work-related *personal injury*." (emphasis by the Court)

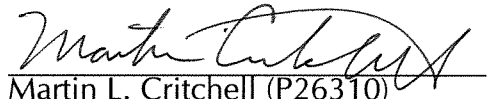
and in *Rakestraw*, p 230,

"Holding that the aggravation of symptoms of a preexisting condition is compensable without finding a work-related injury under § 301(1) is clearly inconsistent with the clear language of the statute as well as case law from this Court."

This mistake by the Court of Appeals is so obvious and is so serious that the Court may peremptorily reverse or grant oral argument of the application.

RELIEF

Amicus curiae Michigan Health and Hospital Association asks the Court to peremptorily reverse the Court of Appeals or grant oral argument of the application for leave to appeal.


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INC. and TRAVELERS CASUALTY & SURETY
COMPANY,

Defendants-Appellees,

and

SILICOSIS DUST DISEASE & LOGGING
INDUSTRY COMPENSATION FUND,

Defendant.

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant Borbolla Construction & Concrete Supply, Inc. and its carrier, Cincinnati Insurance Company, were granted leave to appeal a June 29, 2005, order of the Worker's Compensation Appellate Commission ("WCAC") that affirmed a magistrate's award of benefits

FOR PUBLICATION
January 25, 2007
9:15 a.m.

No. 264106
WCAC
LC No. 04-000017