

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 (45)

4/24

NOTICE OF HEARING

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

BRIEF AMICI CURIAE

⑧ **MICHIGAN SELF-INSURERS' ASSOCIATION AND**
MICHIGAN MANUFACTURERS ASSOCIATION

PROOF OF SERVICE

FILED

APR 4 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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NOTICE OF HEARING

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


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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Michigan Self-Insurers' Association and the Michigan Manufacturers Association ask the Court for leave to file a brief amici curiae because the Michigan Self-Insurers' Association and Michigan Manufacturers Association are non-profit associations that were organized under the laws of Michigan whose members are employers that collectively have hundreds of cases in which an employee claims compensation for an injury after having an earlier injury because of work.

The brief amici curiae provides a depth of perspective for the Court as it deliberates the *Application for leave to appeal*.

The lawyers for the parties were contacted by telephone on (Friday) March 23, 2007, and none expressed opposition to the participation of the MSIA and MMA as amici curiae.


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BRIEF AMICI CURIAE
MICHIGAN SELF-INSURERS' ASSOCIATION AND
MICHIGAN MANUFACTURERS ASSOCIATION

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT iv

STATEMENT OF QUESTION PRESENTED v

STATEMENT OF FACTS 1

ARGUMENT

I ***RAKESTRAW v GEN DYNAMICS LAND SYS, INC, 469 MICH 220; 666 NW2d 199 (2003) IS NOT LIMITED TO CLAIMS BY AN EMPLOYEE WHOSE SYMPTOMS ARE FROM AN EARLIER NON-OCCUPATIONAL CONDITION*** 1

A. **THE QUESTION IS A QUESTION OF LAW** 3

B. **THERE IS NO QUESTION OF FACT** 4

C. **THE QUESTION IS JURISPRUDENTIALLY SIGNIFICANT IN TWO WAYS** 4

D. **THE COURT OF APPEALS WAS WRONG** 5

RELIEF 9

APPENDIX

A. OPINION OF THE COURT OF APPEALS AA

B. ORDER OF THE COURT OF APPEALS (LV GRT) BB

C. ORDER AND OPINION OF THE WORKERS' COMPENSATION APPELLATE COMMISSION CC

D. ORDER AND OPINION OF THE BOARD OF MAGISTRATES DD

E. TAYLOR, C.W., *PROTESTING PERCEIVED JUDICIAL EXCESS IS HEALTHY FOR SYSTEM OF GOVERNMENT* (DETROIT FREE PRESS, APRIL 16, 2006) EE

F. TRANSCRIPT OF THE ARGUMENT OF *RAKESTRAW v GEN DYNAMICS LAND SYS, INC* FF

INDEX OF AUTHORITIES

COURT RULES

MCR 7.215(C)(2) 4

STATUTES

MCL 418.301(1) 2, 5

MCL 418.861a(14) 3

CASES

Anderson v Chrysler Corp,
189 Mich App 325; 471 NW2d 623 (1991) 2

Bowman v R L Coolsaet Constr Co,
477 Mich 976; - NW2d - (2006) 3

Carter v Gen Motors Corp,
361 Mich 577; 106 NW2d 105 (1960) 2

Farrington v Total Petroleum, Inc,
442 Mich 201; 501 NW2d 76 (1993) 2

James v Auto Lab Diagnostic & Tune-Up Ctrs,
474 Mich 883; 704 NW2d 710 (2005) 3

Johnson v DePree Co,
134 Mich App 709; 352 NW2d 303 (1984) 2

Johnson v Kramer Bros Freight Lines, Inc,
357 Mich 254; 98 NW2d 586 (1959) 8

Kostamo v Marquette Iron Mining Co,
405 Mich 105; 274 NW2d 411 (1979) 2

Laury v Gen Motors Corp (On Remand, On Rehearing),
207 Mich App 249; 523 NW2d 633 (1994) 2

Leskinen v Employment Security Comm,
398 Mich 501; 247 NW2d 808 (1976) 7

Mattison v Pontiac Osteopathic Hosp,
242 Mich App 664; 620 NW2d 313 (2000) 2

<i>Mayor of Lansing v Pub Serv Comm,</i> 470 Mich 154; 680 NW2d 840 (2004)	8
<i>McDonald v Meijer, Inc,</i> 188 Mich App 210; 469 NW2d 27 (1991)	2
<i>Miklik v Michigan Special Machine Co,</i> 415 Mich 364; 329 NW2d 713 (1982)	2
<i>Mudel v Great Atlantic & Pacific Tea Co,</i> 462 Mich 691; 614 NW2d 607 (2000)	4
<i>Price v Westland,</i> 451 Mich 329; 547 NW2d 24 (1996)	3
<i>Rakestraw v Gen Dynamics Land Sys, Inc,</i> 469 Mich 220; 666 NW2d 199 (2003)	2, 3, 4, 5, 6, 8
<i>Siders v Gilco Co,</i> 189 Mich App 670; 473 NW2d 802 (1991)	2
<i>Simpson v Borbolla Constr & Concrete Supply Co,</i> - Mich App - ; - NW2d - (2007)	3, 4, 5
<i>Thomas v Chrysler Corp,</i> 164 Mich App 549; 418 NW2d 96 (1987)	2

**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

IS *RAKESTRAW v GEN DYNAMICS LAND SYS, INC*, 469 MICH 220; 666 NW2d 199 (2003) LIMITED TO CLAIMS BY AN EMPLOYEE WHOSE SYMPTOMS ARE FROM AN EARLIER, NON-OCCUPATIONAL CONDITION?

Plaintiff-appellee Simpson answers "Yes."

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

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

Amici curiae MSIA and MMA answer "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

***RAKESTRAW v GEN DYNAMICS LAND SYS, INC*, 469 MICH 220; 666 NW2d 199 (2003) IS NOT LIMITED TO CLAIMS BY AN EMPLOYEE WHOSE SYMPTOMS ARE FROM AN EARLIER NON-OCCUPATIONAL CONDITION.**

The Court settled the meaning of the term **personal injury** found in the first sentence of MCL 418.301(1)¹ with the ruling in the case of *Rakestraw v Gen Dynamics Land Sys, Inc.*² First, the Court recognized and ended a conflict between earlier decisions. The Court surveyed all of the decisions about what was and what was not a **personal injury** and reaffirmed the pronouncement in the cases of *Kostamo v Marquette Iron Mining Co.*,³ *Miklik v Michigan Special Machine Co.*,⁴ and *Farrington v Total Petroleum, Inc.*;⁵ explained the decision in the case of *Carter v Gen Motors Corp.*;⁶ and overruled *Johnson v DePree Co.*,⁷ *Thomas v Chrysler Corp.*,⁸ *McDonald v Meijer, Inc.*,⁹ *Anderson v Chrysler Corp.*,¹⁰ *Siders v Gilco Co.*,¹¹ *Laury v Gen Motors Corp (On Remand, On Rehearing)*,¹² and *Mattison v Pontiac Osteopathic Hosp.*¹³ *Rakestraw*, p 226-230. Then, the Court described the meaning of the term **personal injury** as "evidence of a symptom is insufficient to establish a personal injury

¹ "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." (emphasis added)

² 469 Mich 220; 666 NW2d 199 (2003).

³ 405 Mich 105; 274 NW2d 411 (1979).

⁴ 415 Mich 364; 329 NW2d 713 (1982).

⁵ 442 Mich 201; 501 NW2d 76 (1993).

⁶ 361 Mich 577; 106 NW2d 105 (1960).

⁷ 134 Mich App 709; 352 NW2d 303 (1984).

⁸ 164 Mich App 549; 418 NW2d 96 (1987).

⁹ 188 Mich App 210; 469 NW2d 27 (1991).

¹⁰ 189 Mich App 325; 471 NW2d 623 (1991).

¹¹ 189 Mich App 670; 473 NW2d 802 (1991).

¹² 207 Mich App 249; 523 NW2d 633 (1994).

¹³ 242 Mich App 664; 620 NW2d 313 (2000).

'arising out of and in the course of employment'" and that, "a claimant must prove that the injury claimed is distinct from the preexisting condition." *Rakestraw*, p 231.

Now, the Court of Appeals declares that this pronouncement by the Court has limited application by distinguishing the facts in the case from the facts in the case of *Rakestraw*. The Court of Appeals said in *Simpson v Borbolla Constr & Concrete Supply Co*, slip op., 4,¹⁴ that, "We hold that *Rakestraw* is factually distinguishable and therefore inapplicable. [I]n *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 employment as an iron worker in 1979 [for Babcock & Wilcox, which is not a party in this lawsuit]." This ruling by the Court of Appeals presents the question about when the ruling by the Court in *Rakestraw* may and may not apply.

A. THE QUESTION IS A QUESTION OF LAW.

The question about when the ruling by the Court in the case of *Rakestraw* may and may not apply is a question of law that the Court may consider by the authority of the second sentence of MCL 418.861a(14), which states that, "the supreme court shall have the power to review questions of law involved with any final order of the commission, if application is made by the aggrieved party within 30 days after the order by any method permissible under the Michigan court rules." Certainly, a question about the law that applies is a question of law whether the source of the law is a statute or is a ruling about the meaning of a statute as the Court said in the case of *Price v Westland* that, "'error may be committed . . . by failing to correctly apply the law to the finding of fact.' [citations omitted]."¹⁵ And the question is a question of law because it concerns the scope of a ruling by the Court. See, *James v Auto Lab Diagnostic & Tune-Up Ctrs*¹⁶ and *Bowman*

¹⁴ - Mich App - ; - NW2d - (2007).

¹⁵ 451 Mich 329, 336-337; 547 NW2d 24 (1996).

¹⁶ 474 Mich 883; 704 NW2d 710 (2005).

*v R L Coolsaet Constr Co*¹⁷ in which the Court considered — and reversed — decisions by the Court of Appeals about the scope of a ruling by the Court.

The Court may consider the question for itself and with no assumption that the Court of Appeals was actually right because review of a question of law is *de novo*. *Mudel v Great Atlantic & Pacific Tea Co.*¹⁸

B. THERE IS NO QUESTION OF FACT.

Underscoring that the question is a question of law is the absence of any question of fact. Dennis G. Simpson came to work for Borbolla Construction with a progressive condition from a personal injury that had occurred while at work for another employer, Babcock & Wilcox. And this condition proved painful at Borbolla. *Simpson*, slip op., 2.

C. THE QUESTION IS JURISPRUDENTIALLY SIGNIFICANT IN TWO WAYS.

The question is significant because this is the first and the last time that the Court will have an opportunity to provide an answer. This is the first time that the question has arisen. The question was not propounded and reserved for later decision when the Court decided *Rakestraw*. The question was not propounded or so much as implied in either of the dissenting opinions in the case of *Rakestraw*. And no panel of the Court of Appeals has ever said that the case of *Rakestraw* was to be applied only to the particular facts of the case.

And this will be the last time that the Court will have an opportunity to provide an answer. *Simpson* is a published opinion that must be applied by the Board, the Commission, and all of the panels of the Court of Appeals by the terms of the rule of *stare decisis* as the first sentence of MCR 7.215(C)(2) states that, "A published opinion of the Court

¹⁷ 477 Mich 976; - NW2d - (2006).

¹⁸ 462 Mich 691, 732; 614 NW2d 607 (2000), "The judiciary continues to review questions of law involved in any final order of the WCAC under a *de novo* standard of review."

of Appeals has precedential effect under the rule of stare decisis." The Court cannot be confident that an employer will pay the costs to litigate another case to the Court with the certainty of losing before the Board, the Commission, and the Court of Appeals because of *Simpson* and with no certainty that the Court might grant leave to consider the question. Indeed, a party might be more than pessimistic about this should the Court deny leave in this case.

The other reason that the question is jurisprudentially significant is the absence of a rule to apply when *Rakestraw* does not apply. While the Court of Appeals said that this kind of case was exempt from the rule of law expressed by the Court in the case of *Rakestraw*, there was no statement about what rule of law did apply. Certainly, the rule about aggravation of symptoms could not apply in the absence of *Rakestraw* for the Court had flatly overruled all of the decisions allowing that. *Rakestraw*, p 230.

The closest to a rule to apply in the absence of *Rakestraw* was "on October 23, 2000, plaintiff was last subjected to the conditions that resulted in his disability. As a result, October 23, 2000 is the proper date of injury under MCL 418.301(1)." *Simpson*, slip op., 5. The problem with this reference to subsection 301(1) is that subsection 301(1) was the very statute that the Court explicated in the case of *Rakestraw*. The decision by the Court of Appeals that *Rakestraw* does not apply implies that the statute in that case — subsection 301(1) — does not apply making the reference to subsection 301(1) most problematic.

D. THE COURT OF APPEALS WAS WRONG.

The Court of Appeals was wrong in several ways. First, the ruling by the Court in the case of *Rakestraw* was an omnibus ruling about what was and what was not a **personal injury**. The Court said of subsection 301(1) that, "the statute *clearly* requires the establishment of a work-related *injury*, not a symptom that simply occurs in the workplace.

MCL 418.301(1)." *Rakestraw*, p 233. There was no exclusion or caveat for how the existing condition brought to work had come about.

Second, the facts that the Court had thought were important were that E. Wayne Rakestraw brought a condition to work for General Dynamics Land System that then proved painful at work there. The Court said in *Rakestraw*, p 222, that, "At the time plaintiff began working for defendant in 1996, he had a preexisting neck condition that was asymptomatic. According to plaintiff, his work for defendant caused his neck pain to return and increase." The Court did not mention that this "preexisting neck condition" was itself from a non-occupational or occupational injury. And the reason that the Court — and the two dissents — did not mention this was that this was not important. There was not to be one rule when the preexisting condition was non-occupational — say an injury playing football in college — and a different rule when the preexisting condition was occupational — say when an injury occurred while working for General Motors. And for good reason. The origins of the preexisting condition as personal or occupational does not affect whether that condition is painful during later work or is pathologically changed during later work to allow compensation from the current employer.

Indeed, the subject was actually discussed in the case of *Rakestraw*. The second question during the argument was about this problem,

"JUSTICE TAYLOR: If a person has an injury on Job 1 and is out for comp for 1 and goes to Job 2, proceeds along fairly well and then just has symptoms at Job 2 and can't continue at Job 2. Is that person out of luck in terms of comp.

MR. CRITCHELL: No. In that situation you've described you have a person who is an employee. Have they had a personal injury in your example. Yes. You would go to the next level of inquiry—arising out of and in the course of employment and in your example there has been. They returned to work and have more pain, the pain is disabling that might allow them weekly benefits but personal injury is this amiable stick. But the pain will be disabling but the personal injury will signal who pays. And you would go down and see 'by an employer subject to this act at the time of the personal injury'.

JUSTICE TAYLOR: So in our hypothetical the claimant would make claim against the first employer.

MR. CRITCHELL: Exactly correct.

JUSTICE MARKMAN: What if he could go back to the first employer, however, and do the job and it's only because of the circumstances of the second employment that the pain has manifested itself. Can he still recover from the first employer?

MR. CRITCHELL: I'm sorry, I didn't grasp the question.

JUSTICE MARKMAN: Let's say you can go back to Employer 1 and perform the job that he was originally doing, but he can't perform Job #2 because of the pain arising out of the particular circumstances of Job 2.

MR. CRITCHELL: That question really, and that's been a problem in workers comp and in some lower courts. That question conflates two different concepts. In workers comp there are indeed two different concepts. One is personal injury. The other one, which your question addresses is disability from the personal injury. In that hypothetical I believe that employee would not be disabled but he would have a personal injury.

JUSTICE TAYLOR: So that person would not get comp.

MR. CRITCHELL: He might not necessarily receive weekly workers comp for a disability from a personal injury. He would be entitled to medical care for a personal injury. The Workers Compensation Act does allow—" Transcript of the oral argument of *Rakestraw*, p 3. Appendix FF.

And the answer then is the answer now. The employee with the preexisting condition from an occupational injury should receive compensation from that employer — here, Babcock & Wilcox — not from the subsequent employer whose work provoked some symptom such as pain with no change in that condition — here, Borbolla Construction.

Finally, it appears that the Court of Appeals conflated **personal injury** and **disability** which are two quite different subjects as the Court observed in the case of *Leskinen v Employment Security Comm*¹⁹ when stating,

¹⁹ 398 Mich 501; 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*." *Leskinen*, p 508-509. (emphasis by the Court)

These mistakes warrant some action by the Court. Indeed, the independence of the Court to announce what the law is²⁰ is risked by tolerating anything other than frank recognition and faithful application of the law announced by the Court as Chief Justice TAYLOR said,

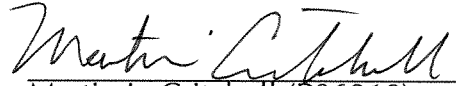
"There are, it seems, three basic components of judicial independence. Obviously, judges should be motivated by a sincere desire to follow the law, and not by fear or favoritism. Similarly, the parties should comply with the court's ruling, and not attempt to evade the ruling or dictate the outcome by threats or coercion. Finally, other branches of government should not encroach on the judiciary's role." Taylor, C.W., *Protesting perceived judicial excess*, Detroit Free Press, April 16, 2006.

Indeed, the mistakes by the Court of Appeals are so clear and *Rakestraw* so definitive that peremptory disposition or simple oral argument of the application for leave is most effective.

²⁰ The Court said in the case of *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959) that, "the primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto" and in the more recent case of *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004) that, "our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law."

RELIEF

Amici curiae Michigan Self-Insurers' Association and Michigan Manufacturers Association ask the Court to grant oral argument of the application for leave to appeal or to peremptorily reverse *Simpson v Borbolla Constr & Concrete Supply, Inc.* - Mich App - ; - NW2d - (2007).



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