STATE OF MICHIGAN

IN THE SUPREME COURT

DENNIS SIMPSON,

Plaintiff-Appellee,

vs

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

Defendants-Appellants,

and

FLUOR CONSTRUCTORS INTERNATIONAL, INCORPORATED and TRAVELERS CASUALTY & SURETY COMPANY (RSKCO/CNA),

Defendants-Appellees,

and

SILICOSIS DUST DISEASE & LOGGING INDUSTRY COMPENSATION FUND,

Defendant-Appellee.

_______________________________________/

Supreme Court: 133274

Court of Appeals: 264106

Lower Court: WCAC Docket No: 040017

133274 Supp

PLAINTIFF'S SUPPLEMENTAL BRIEF

PROOF OF SERVICE

FILED

JUL 13 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

RICHARD L. WARSH (P27813)
Attorney for Plaintiff-Appellee
29566 Northwestern Highway, Suite 120
Southfield, Michigan 48034
(248) 357-7013

DARYL ROYAL (P33161)
Attorney Of Counsel to Richard L. Warsh,
Attorney for Plaintiff-Appellee
22646 Michigan Avenue
Dearborn, Michigan 48124-2116
(313) 730-0055

TABLE OF CONTENTS

INDEX OF AUTHORITIES CITED ii

STATEMENT OF QUESTION PRESENTED iii

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS 1

ARGUMENT:

THE COURT OF APPEALS DID NOT ERR IN FINDING THAT *RAKESTRAW* WAS INAPPLICABLE WHERE THE CLAIMANT'S INITIAL INJURY WAS WORK-RELATED, SINCE THE *RAKESTRAW* INQUIRY APPLIES TO THE "PERSONAL INJURY" ELEMENT OF SECTION 301(1), BUT NOT THE FURTHER ISSUE OF THE CORRECT "DATE OF INJURY," SEPARATELY TREATED BY THAT SECTION. 3 3

Standard of Review 3

RELIEF 8

INDEX OF AUTHORITIES CITED

ITEM: PAGE:

Cases

Baker v General Motors Corp,
409 Mich 639; 297 NW2d 387 (1980) 8

Burnett v City of Adrian,
414 Mich 448; 326 NW2d 810 (1982) 8

Derwinski v Eureka Tire Co,
407 Mich 469; 286 NW2d 672 (1979) 7

DiBenedetto v West Shore Hospital,
641 Mich 394; 605 NW2d 300 (2000) 4

Hudson v Jackson Plating Co,
105 Mich App 572; 307 NW2d 96 (1981) 6

Mudel v Great Atlantic & Pacific Tea Co,
462 Mich 691; 614 NW2d 607 (2000) 4

Oxley v Dep't of Military Affairs,
460 Mich 536; 597 NW2d 89 (1999) 4

Rakestraw v General Dynamics Land Systems, Inc,
469 Mich 220; 666 NW2d 199 (2003) 2-5

Statutes

MCL 418.301(1) 3-8
MCL 418.435 . . . . . 6, 7
MCL 418.861a(14) 4

Other Authorities

1980 PA 357 6
Const 1963, Art VI, §28 4

STATEMENT OF QUESTION PRESENTED

DID THE COURT OF APPEALS CORRECTLY FIND THAT *RAKESTRAW* WAS INAPPLICABLE WHERE THE CLAIMANT'S INITIAL INJURY WAS WORK-RELATED, SINCE THE *RAKESTRAW* INQUIRY APPLIES TO THE "PERSONAL INJURY" ELEMENT OF SECTION 301(1), BUT NOT THE FURTHER ISSUE OF THE CORRECT "DATE OF INJURY," SEPARATELY TREATED BY THAT SECTION?

Plaintiff-Appellee answers "YES."
The WCAC answered "YES."
The Court of Appeals answered "YES."

STATE OF MICHIGAN

IN THE SUPREME COURT

DENNIS SIMPSON,

Plaintiff-Appellee,

vs

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

Defendants-Appellants,

and

FLUOR CONSTRUCTORS INTERNATIONAL, INCORPORATED and TRAVELERS CASUALTY & SURETY COMPANY (RSKCO/CNA),

Defendants-Appellees,

and

SILICOSIS DUST DISEASE & LOGGING INDUSTRY COMPENSATION FUND,

Defendant-Appellee.

____/

Supreme Court: 133274

Court of Appeals: 264106

Lower Court: WCAC Docket No: 040017

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

In an opinion dated January 25, 2007, the Court of Appeals affirmed an award of benefits against defendant Borbolla Construction & Concrete Supply, Incorporated and its workers' compensation carrier, Cincinnati Insurance Company. In its opinion, the Court accurately summarized the facts of this matter as follows:

> Plaintiff was an ironworker. During his career, plaintiff worked various jobs for multiple employers, including appellant Borbolla Construction & Concrete Supply, Inc., and defendant Fluor Constructors International, Inc. Plaintiff performed all phases of ironwork, including post tensioning and welding, and he characterized his duties as "hard work."
>
> In 1979, plaintiff was injured when a chain fell several stories onto his left wrist. 2 Plaintiff suffered a nondisplaced

> fracture of the lunate bone. The fracture went untreated and the condition of plaintiff's left wrist progressively worsened. However, despite the worsening condition, plaintiff continued to work.
>
> On October 23, 2000, plaintiff worked for appellant Borbolla Construction & Concrete Supply, Inc. The job involved inserting reinforcing rods into concrete and required plaintiff to, among other things, carry bundles of rods. Plaintiff testified that his wrist bothered him while performing this work, but that he was able to finish the one-day job. Plaintiff has not worked as an ironworker since.
>
> Dr. Howard Sawyer diagnosed plaintiff with a unrepaired, undiagnosed fracture of the lunate bone of the left wrist, which fracture progressed to dissolving necrosis of the bone. In Dr. Sawyer's opinion, plaintiff's continued use of his hands as an ironworker, after suffering the fracture in 1979, increased the rate of bone deterioration to the point that the condition precluded plaintiff from effectively using his wrist and performing most tasks of an ironworker.
>
> Dr. Bala Prasad also diagnosed plaintiff with necrosis of the lunate bone. Dr. Prasad testified that the condition was directly related to the initial fracture suffered by plaintiff and likely developed within two years thereafter. [Opinion below, slip op, at 2]

In briefing before the Court of Appeals (and again before this Court), defendant Borbolla Construction argued that a new date of injury had not been established in its employ, because plaintiff had not proven that its employment caused a "medically distinguishable" condition as required by *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220; 666 NW2d 199 (2003). The Court of Appeals noted that *Rakestraw* involved a situation in which the claimant's initial injury was nonwork-related, and held that "[t]he 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." Opinion below, at 4-5. Where the initial injury was work-related, the Court of Appeals held, *Rakestraw* would not be applicable. *Id.*

In any event, the Court held that *Rakestraw* had been satisfied, in that the medical record supported the WCAC's factual finding that plaintiff's current condition was "medically distinguishable" from the injury he suffered in 1979. Opinion below, at 5, n4.

Additionally, the Court of Appeals held that plaintiff was engaged in the employment that last subjected him to the conditions that resulted in his disability while employed by Borbolla, so as to require the imposition of liability upon that employer by virtue of the following language from MCL 418.301(1): "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."

Defendant Borbolla subsequently sought leave to appeal to this Honorable Court. In an order dated June 1, 2007, the Court directed its Clerk to schedule oral argument on the application, directing that the parties address at that argument "whether the Court of Appeals erred in holding that *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220; 666 NW2d 199 (2003), does not apply where the preexisting condition is work-related." The Court additionally invited the parties to file supplemental briefs, which plaintiff now does.

ARGUMENT

THE COURT OF APPEALS DID NOT ERR IN FINDING THAT *RAKESTRAW* WAS INAPPLICABLE WHERE THE CLAIMANT'S INITIAL INJURY WAS WORK-RELATED, SINCE THE *RAKESTRAW* INQUIRY APPLIES TO THE "PERSONAL INJURY" ELEMENT OF SECTION 301(1), BUT NOT THE FURTHER ISSUE OF THE CORRECT "DATE OF INJURY," SEPARATELY TREATED BY THAT SECTION.

Standard of Review. This Court reviews findings of fact rendered by the WCAC to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal

framework. Const 1963, Art VI, §28; MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000); *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000); *Oxley v Dep't of Military Affairs*, 460 Mich 536; 597 NW2d 89 (1999).

In its opinion, the Court of Appeals distinguished between claims that involved a prior work-related injury and those in which the previous injury was not work-related. However, it is important to look to the reasoning for this distinction, because it properly recognizes a distinction between two issues – causation and date of injury – separately dealt with in MCL 418.301(1).

In that statute, the legislature defined "personal injury," and made a showing of same a prerequisite to an award of benefits, but later went on to indicate how the appropriate date of injury was to be determined once a personal injury had been established:

> 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) (emphasis supplied)]

As the highlighted language makes clear, "personal injury" and "date of injury" are treated as two separate concepts, to be decided independently pursuant to different standards.

Pursuant to this Court's decision in *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220; 666 NW2d 199 (2003), a claimant satisfies the "personal injury" requirement by demonstrating a "medically distinguishable" injury:

> In this case, 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). [*Rakestraw, supra*, at 234]

At that point, the claimant has proven the requisite "personal injury." Once that personal injury is established, a claimant need not repeatedly demonstrate a new personal injury to establish a new date of injury.[1]

Instead, §301(1) includes a separate test for "date of injury," involving a determination as to "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). There is no causation element to this test at all. If the claimant performed the same type of work after the earlier injury, the appropriate "date of injury" is the last day of employment in that work, as a matter of law. It is irrelevant that there was no proof of a distinct contribution to plaintiff's disability from his single day of work for defendant. Section 301(1) does not require such a contribution, just a showing of work of the same nature as that which caused the disability.

This was precisely the analysis utilized by the Court of Appeals below. It wrote:

> In *Rakestraw*, the plaintiff's preexisting 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 ironworker in 1979. Therefore, the instant case is not like *Rakestraw*, where an employee attempted to establish a compensable injury by relying on symptoms that could be attributed to the progression of a preexisting condition unrelated to work. This distinction is of great import as the focus of *Rakestraw* was clearly on causation, i.e., whether the plaintiff's injury arose out of and in the course of employment. *Id*. at 225, 230-231. The significance of the preexisting condition in *Rakestraw* was not so much that it was preexisting, 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 preexisting 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

---

[1]Of course, if the claimed injury is a new one, the "personal injury" requirement would still have to be met, in accordance with *Rakestraw.*

distinctions between *Rakestraw* and the case at bar are significant such that *Rakestraw* is simply inapplicable.

This analysis correctly notes that a new date of injury may be found without a corresponding showing of a new personal injury, as the two are separate and distinct as defined by §301(1).

The idea that an employer may be found liable for workers' compensation benefits, despite a lack of actual contribution to its employee's disability, is not a new one. Essentially the same language regarding date of injury that appears in §301(1) also appears in §435, applicable to occupational diseases: "The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted." MCL 418.435. This language was considered by the Court of Appeals in *Hudson v Jackson Plating Co*, 105 Mich App 572; 307 NW2d 96 (1981), in which it affirmed a decision of the Workers' Compensation Appellate Commission ["WCAC"] which assessed full liability against the last employer, without the need for a finding of actual aggravation or contribution.[2]

In fact, §435 was once the "apportionment" provision of the Act, providing for the spreading of liability between all employers who had employed the claimant in employment of the same nature as that in which the occupational disease was due and originally contracted over his or her last 10 years of work.[3] Liability was apportioned not based upon

---

[2]See the Workers' Compensation Appellate Commission's opinion, at 2-8, for a more in-depth discussion of the development of this rule of law.

[3]Prior to 1980 PA 357, MCL 418.435 included the following language: "If the employee was employed by prior employers in an employment to the nature of which the disease was due and in which it was contracted, the hearing referee to whom the case is assigned or the director on motion made in writing by the last employer shall join any or all prior employers, mentioned in the motion, as parties-defendant. A 'prior employer', for purposes of this section, means an employer who has employed the employee for 6 months or longer during the 10 years preceding the date upon which the employee was last subjected to the conditions resulting in disability. * * * The hearing referee shall apportion liability for compensation among the several employers in proportion to the time that the employee was employed in the service of each employer in the employment to the nature of which the disease was due and in which it was contracted..."

relative contributions to the ultimate disability, but instead *solely* upon the time spent with each respective employer. In other words, it did not matter whether there was any contribution or not, as long as the employments were of the same nature and type. See, *e.g.*, *Derwinski v Eureka Tire Co*, 407 Mich 469; 286 NW2d 672 (1979).

Clearly, then, there is precedent for the imposition of liability without a showing of actual contribution or aggravation. These statutes obviously reflect the legislature's determination that it is pointless to undertake extensive and recurrent litigation to answer the often-impossible question of which of several similar or identical jobs actually contributed to the claimant's disability, and which did not. If such language requires liability under Chapter 4 of the Worker's Disability Compensation Act, via MCL 418.435, the same approach should be taken with the essentially identical language used in Chapter 3, more specifically in MCL 418.301(1).

This is not to say, of course, that a claimant could not also claim a new injury as the result of continued employment after an earlier injury, as from a further aggravation of the prior condition in a different type of employment or the cause of a new condition altogether. In that instance, the employee would presumably have to prove the occurrence of a new "personal injury," which likely would require a finding of a medically distinguishable condition pursuant to *Rakestraw*.

In the instant case, the Court of Appeals found that plaintiff had established a new injury date, whichever analysis was used. The Court affirmed the WCAC's finding that, during his brief employment with Borbolla Construction, plaintiff was engaged in the same type of work that caused his disability. Opinion below, at 4-5. It further found that said employment caused a medically distinguishable condition, thereby satisfying *Rakestraw*'s requirement for establishing a new personal injury. Opinion below, at 5, n4. That being so, plaintiff is entitled to an award whichever analysis applies to him.

However, plaintiff submits that the Court of Appeals properly noted the distinction between the "personal injury" and "time of injury or date of injury" analyses set forth in §301(1). If these tests were one and the same, there would have been no need for both clauses. "Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Baker v General Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980). Nor, presumably, would the legislature have used the separate and distinct terms noted ("personal injury" as opposed to "date of injury") to refer to the same thing. As the Court noted in *Burnett v City of Adrian*, 414 Mich 448, 477; 326 NW2d 810 (1982), "this Court should not presume that the Legislature meant to say the same thing twice using different words."

The approach suggested in this brief is the only way to reconcile both the first and third sentences of §301(1), giving effect to each. This Court should therefore deny leave to appeal in this case, or enter an order consistent with plaintiff's argument above.

RELIEF

WHEREFORE Plaintiff-Appellee DENNIS SIMPSON respectfully requests that this Honorable Supreme Court deny Defendants-Appellants' Application for Leave to Appeal, and further grant him any other relief to which he may be entitled.

Respectfully submitted,

DARYL ROYAL (P33161)
Attorney Of Counsel to Richard L. Warsh,
Attorney for Plaintiff-Appellee
22646 Michigan Avenue
Dearborn, Michigan 48124-2116
(313) 730-0055

RICHARD L. WARSH (P27813)
Attorney for Plaintiff-Appellee
29566 Northwestern Highway, Suite 120
Southfield, Michigan 48034
(248) 357-7013

Dated: July 12, 2007