

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT ARBUCKLE, Personal Representative
of the Estate of CLIFTON M. ARBUCKLE,

Appellee,

Supreme Court No. 151277
Court of Appeals No. 310611

v

MCAC LC #11-000043

GENERAL MOTORS, LLC,
SELF-INSURED,

BWDC Order #031411019

Appellant.

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**APPELLEE'S BRIEF IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL**

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COUNTERSTATEMENT OF ORDER APPEALED FROM

Appellant GM seeks leave to appeal from the Court of Appeals' unpublished per curiam opinion, dated February 10, 2015. The Court of Appeals affirmed the reasoning of the Workers' Compensation Magistrate who held that GM, as Mr. Arbuckle's former employer, failed to meet its burden of proof to demonstrate a right to reduce his previously awarded workers' compensation benefits by the amount of his disability pension benefits. In so holding, the Court of Appeals reversed the Michigan Compensation Appellate Commission because the Commission had not recognized the employer bore the burden of proof and otherwise utilized an improper legal framework.

COUNTERSTATEMENT OF JURISDICTION

This Court has jurisdiction to consider the GM's Application for Leave to Appeal regarding the coordination of workers' compensation benefits pursuant to MCL 418.861a(14) and MCR 7.301(A)(2).

COUNTERSTATEMENT OF QUESTIONS INVOLVED

- I. Did the Appellant General Motors fail to meet its burden of proof as the Employer regarding coordination of benefits where there is no evidence in the record that an authorized representative of the disabled retiree Arbuckle agreed to modify the collective bargaining agreement and pension plan under which he retired so as to permit coordination of disability pension benefits against workers' compensation benefits?

The Director of the WC Agency did not reach the issue.

The Magistrate answered, "Yes."

The MCAC did not directly answer.

The Court of Appeals answered, "Yes."

Appellee Arbuckle answers, "Yes."

Appellant GM answers, "No."

- II. Do Michigan Courts, the Michigan Workers' Compensation Agency, and the Michigan Workers' Compensation Board of Magistrates have jurisdiction to adjudicate Michigan workers' compensation benefits disputes according to Michigan law?

The Director of the WC Agency answered, "Yes."

The Workers' Compensation Magistrate answered, "Yes."

The MCAC did not directly answer, but still asserted jurisdiction.

The Court of Appeals answered, "Yes."

Appellee Arbuckle answers, "Yes."

Appellant GM answers, "Yes" and "No."

COUNTERSTATEMENT OF STANDARD OF REVIEW

Questions of law raised in GM's Application are subject to *de novo* review.

DiBenedetto v West Shore Hosp, 461 Mich 394, 401-402, (2000).

INTRODUCTION

Instead of recognizing that the Michigan Workers' Disability Compensation Act at MCL 418.354(10) places the burden of proof on an employer to establish coordination of benefits, and then pointing to evidence in the record to attempt to meet that burden, GM attempts to recharacterize this workers' compensation case as an action under the Labor Management Relations Act and then asserts that, because of federal pre-emption, the Michigan Workers' Compensation Agency and Michigan Courts do not have subject matter jurisdiction to determine and to review the amount of workers' compensation required to be paid to a disabled Michigan worker under the Workers' Disability Compensation Act. (Application at vii, 11, 12). The argument is novel in the context of this, or any other workers' compensation case, but it has been considered elsewhere and swiftly rejected, as it must be here. The argument-- involving identical facts, involving identically situated GM disability retirees who were awarded Michigan workers' compensation benefits, has already been soundly rejected by U.S. District Judge Corbett O'Meara in *Elizabeth Savage et. al. v General Motors* (Case No:10-12372) (Exhibit 1). There is no good reason or basis for this Court to revisit or disregard the federal judge's ruling on this issue.

COUNTERSTATEMENT OF FACTS

A. GM Was Ordered to Pay Arbuckle Workers' Compensation Benefits Until Further Order of the Agency.

The late Clifton Arbuckle was injured on June 20, 1991 while working for GM.¹ He was found disabled following a trial in 1995 before Workers' Compensation Magistrate Lengauer. GM was ordered to pay Arbuckle ongoing weekly workers' compensation benefits at a fixed rate of benefits of \$362.78/week, 80% of the Plaintiff's after-tax weekly wage at the time of injury, "until further order of the Bureau/[Agency.]" (Mag. Lengauer Op)

B. Arbuckle Retired under a Collective Bargaining Agreement and Pension Plan Barring Coordination of Workers' Compensation Benefits by Disability Pension Benefits.

Section 354(14) of the Workers' Disability Compensation Act provides:

"This section does not apply to any payments received or to be received under a disability pension plan provided by the same employer, which plan is in existence on March 31, 1982. A disability pension plan entered into or renewed after March 31, 1982 may provide that payments under that disability pension plan provided by the employer shall not be coordinated pursuant to this section." MCL 418.354.

Mr. Arbuckle retired on a disability pension in 1993 under the terms of the 1990

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Mr. Arbuckle unfortunately did not live to see his benefits restored by the Court of Appeals. His brother, Robert Arbuckle, was appointed personal representative of the estate and is pursuing past due benefits on behalf of the estate and Clifton's survivors. References to "Arbuckle" in this brief continue to refer to the now deceased Clifton Arbuckle.

collective bargaining agreement. Pursuant to the pension plan and collective bargaining agreement under which he retired, it is undisputed that workers' compensation benefits cannot be reduced by disability pension benefits. (Mag Op, 6; COA at 5) The 1990 Letter Agreement between GM and the UAW, incorporated into the 1990 collective bargaining agreement, established that there would be no such coordination.(Appellant's Exhibit 2)

The Appellant's witness, benefit representative Aaron Dickerson, testified that the 1990 collective bargaining agreement and pension agreement under which Mr. Arbuckle retired, prevented workers compensation benefits from being reduced by pension benefits. (Rule 5 Hearing Transcript, p39-40) Dickerson answered "Correct" when asked "You know that people that retired in 1990 on [a] disability pension didn't see their Workers' Comp benefits get reduced by disability pension amounts if they retired under the 1990 contract, correct?"

Appellant's witness, Elizabeth LaMarra, GM's Manager of Life Insurance and Disability Plans, answered "True" when asked whether employees "that retire under different contracts have different entitlements based upon when they retired, correct?" She further testified that "you retire under a pension plan contract based on your retirement date." (Cited by COA at 5) "Q: Is that the letter of understanding in place in 1990 that was in place when Mr. Arbuckle retired in 1993. A. Yeah..." "Q. That document said that disability pensions don't coordinate against Workers' Comp, correct? A. Yes." (Lamarra Dep, 18, Plaintiff's Exhibit 2, LaMarra Dep)

C. GM attempted to unilaterally and retroactively amend the terms of the contract and pension plan without Arbuckle's consent.

GM and the UAW however engaged in negotiations in 2007 regarding its active members and *future* disability retirees, and pursuant to those negotiations, persons retiring after the effective date of that 2007 contract, GM began applying a formula that considers the amount of Social Security Disability benefits that workers receive in order to determine whether the disability retiree's workers' compensation benefits should be reduced. After 2010, GM however attempted to make that formula retroactive to persons *already retired* on disability pensions, including Mr. Arbuckle, by attempting to amend prior collective bargaining agreements and pension plan language. The new formula GM has sought to impose retroactively on Mr. Arbuckle and other injured disability retirees states:

"Workers' compensation payments for such employees shall be reduced by disability retirement benefits payable under the Hourly-Rate Employees Pension Plan to the extent that the combined workers' compensation payments, initial Social Security Disability Insurance Amount, and the initial disability retirement benefits (per week) exceed the employee's average weekly wage at the time of injury....."

GM has maintained that it has been entitled to unilaterally reduce Arbuckle's workers' compensation benefits down to \$262.55/week through its attempt to retroactively modify his collective bargaining agreement and pension plan (and because of Mr. Arbuckle's receipt of Social Security Disability benefits) to permit greater coordination of benefits --an attempt made after Mr. Arbuckle retired and was no longer a represented

member of the bargaining unit. Mr. Arbuckle testified that he did not have any opportunity to participate in voting on the attempt to amend the contract as he was “not a member of the bargaining unit as a retiree and allowed to vote.” (Arbuckle, Rule 5 Hearing Transcript, 44-45)

GM reported that it began reducing the workers’ compensation benefits of many GM disability retirees including Mr. Arbuckle through this formula in January 2010, when it attempted to make this formula retroactive to persons already retired. Even though Magistrate Lengauer ordered that GM continue to pay benefits to Mr. Arbuckle at a specific rate “until further order,” GM never sought such a further order and began to unilaterally reduce his workers’ compensation benefits.

D. The U.S. District Court ruled against GM and held these workers’ compensation cases are not pre-empted by federal labor law.

GM initially attempted to remove a group of these workers’ compensation cases involving this issue to federal court. GM unsuccessfully argued that Plaintiffs’ challenge to the reductions were pre-empted under federal labor law. *Elizabeth Savage et. al. v General Motors* (Case No:10-12372) (Exhibit 1). U.S. District Judge Corbett O’Meara held that GM had improperly removed the cases to federal court, that GM in these cases had the burden of proof to establish that the reduction of benefits was proper, and that the disabled workers’s arguments were not pre-empted under federal labor law. GM filed a Motion for Reconsideration with Judge O’Meara but then withdrew its Motion and those cases were

remanded back to the Agency.²

E. The Director of the Workers' Compensation Agency Ordered GM to Cease Improper Coordination of Arbuckle's Workers' Compensation Benefits.

Meanwhile, Arbuckle filed a request for an Agency Rule 5 hearing (R 408.35) before the Director of the Workers' Compensation Agency asking the Director to enforce the previous order to pay unreduced benefits. Following a Rule 5 hearing on the matter, the Director of the Workers' Compensation Agency ruled in his decision of November 3, 2010 that GM was found to be in non-compliance with Magistrate Lengauer's order to pay benefits and the Director ordered GM to cease improper coordination. The Director recognized that GM was improperly considering Arbuckle's Social Security Disability Benefits in its coordination of benefits in violation of MCL 418.354(11).³ The Director did

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While Arbuckle, Savage, and others, have been consistently asserting their rights under state workers' compensation law, two disabled workers later filed a complaint instead in federal court, affirmatively pleading violations of the LMRA, and sought class certification. *Garbinski v General Motors*, (2:11-cv-11503-GER-MKM, ED Mich). GM opposed class certification and it was not granted. These plaintiffs, for whatever reason, chose to stipulate in their LMRA claims, to what GM will never be able to prove, i.e. that GM and the union, acting as representative of the retirees, amended the contract and pension plan. (Exhibit 2)As a result, U.S. District Judge Rosen in an unpublished decision granted General Motors' motion for summary judgment against Ms. Garbinski and Ms. Rynicki; the Court of Appeals affirmed.

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Social Security Disability benefits are not allowed to be considered in the coordination or reduction of Michigan workers' compensation benefits. MCL 418.354(11) provides:

MCL 418.354 Coordination of Benefits

MCL 418. 354(11) Disability insurance benefit payments under the social security act shall be considered to be payments from funds provided by the employer and to be primary payments on the employer's obligation under Section 35, 361 or 835 as old age benefit payments are considered pursuant to this section. The coordination of social security disability benefits shall commence on the date of the award certificate of the social security disability benefits. Any accrued social security disability benefits shall not be coordinated. **However, social security disability insurance benefits shall only be so considered if section 224 of the Social Security Act, 42 USC 424a is revised so that a reduction of social security disability benefits is not made because of the receipt of workers' compensation benefits by the employee.**

This coordination provision added to the Act in 1981 permitting coordination of fifty percent of a claimant's Social Security disability benefits never became effective because according to its terms, Social Security disability benefits could be used to reduce workers' compensation only if Social Security eliminated its rule that workers' comp benefits can reduce Social Security Disability at 42 USC 424a. 42 USC has not been changed.

Despite the fact that Michigan law does not permit Social Security Disability to be "considered" in reducing workers' compensation benefits, GM inserted a Social Security Disability offset into its latest collective bargaining agreements. **Anticipating the illegality of this formula, GM and the UAW actually entered into a written agreement in 2007 that GM would pay full coordination to injured workers when the Michigan Supreme Court or Court of Appeals found this coordination formula in violation of Michigan law. (Exhibit 3, LaMarra Dep 27-32) GM and the UAW originally agreed in 2007 that "with respect to the "Workers' Compensation" letter contained in the Hourly Rate Employee Pension Plan, GM agrees that if the Michigan Supreme Court or the Michigan Court of Appeals, whichever court issues the final order, rules that the reduction described in such letter is in violation of Section 354(14) of the Michigan Workers Compensation Act, as amended, GM agrees to stop such reductions. "** The Director held the formula wrongfully considered Social Security Disability benefits; the Court of Appeals did not reach the issue, finding instead that the attempt to retroactively amend the contract and pension failed. Arbuckle preserves this issue and continues to maintain this is an additional legal basis by which full benefits are rightfully restored.

not reach the issue of whether GM had met its burden of establishing a right to coordinate disability pension benefits through its attempt to retroactively amend the contract and pension plan governing those injured workers who were already retired.

F. The Workers' Compensation Magistrate found that GM failed to meet its burden of proof to establish a right to coordinate disability pension benefits against workers' compensation benefits.

GM then appealed the Director's opinion to a Magistrate. In his Opinion and Order of March 10, 2011, Magistrate Birch affirmed the Director's order to reinstate full benefits for different reasons. Magistrate Birch, citing *Brown v Beckwith Evans Co*, 192 Mich App 158 (1991), recognized that GM, as the Employer, has the burden of proof to establish coordination of benefits. Magistrate Birch found that GM had failed to meet its burden of proof that an authorized representative of Mr. Arbuckle--no longer a member of the union bargaining unit after he retired-- had agreed to modify his collective bargaining agreement and pension plan retroactively so as to permit greater coordination of workers' compensation benefits. The Magistrate ruled there was insufficient evidence that the union had authority to bargain for Arbuckle and bind him to an attempted 2009 amendment to the contract to justify coordination of his disability pension benefits.

G. The MCAC Opinion.

The Michigan Compensation Appellate Commission then reversed the reinstatement

of benefits ordered by Director Nolish and Magistrate Birch. Without discussing GM's burden of proof, the MCAC panel instead quoted five paragraphs from the case of *Murphy v City of Pontiac*, 221 Mich App 639 (1997)⁴ suggesting that the case, in itself, directed a decision in favor of GM in this matter. (MCAC at 4-5)

H. The Michigan Court of Appeals, agreeing with the Magistrate, held that GM failed to meet its burden of proof to establish a right to coordination where there was no evidence a representative of Arbuckle agreed to changes in the terms of his contract and pension under which he retired.

The Court of Appeals reversed the MCAC panel and remanded for further proceedings consistent with its opinion. The Court held:

“Under the specific circumstances of this case, we find that the MCAC erred in concluding that Defendant had authority to coordinate Plaintiff's benefits. We agree with the reasoning of Magistrate Birch.

It is not undisputed that under the 1990 CBA, coordination of workers' compensation benefits with disability retirement benefits was not allowed. Dickerson answered, 'Correct' when asked 'Okay, and you know that people that retired in 1990 on disability pension didn't see their Workers' Compensation benefits get reduced by disability pension amounts if they retired under the 1990 contract?' LaMarra answered 'True' when asked, 'employers [sic] that retire under different contracts have different

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The Court in *Murphy* stated: “We hold that changes in a pension plan as a result of a collective bargaining agreement constitute renewal of the plan within the meaning of Section 354(14). We presume that the intent underlying this section is to prevent retroactive application of the act's coordination provisions and thus protect retirees who may have retired on the assumption that their workers' compensation and disability pension benefits would not be coordinated. However, the second sentence of subsection 14 implies that the Legislature also intended to allow employees and representatives of employees to bargain with employers regarding coordination after March 31, 1982.”

entitlements based on when they retired, correct?' She further stated that 'you retire under a pension plan contract based on your retirement date.'

When the Appellant attempted to amend the terms of Plaintiff's benefit structure, plaintiff as a retiree, had no representation. Indeed, the record contains no evidence that plaintiff authorized the UAW to act as his representative to modify the 1990 agreement under which he retired. In *Murphy*, 221 Mich App at 643-644, the Court discussed whether an amendment of a CBA allowing previously disallowed coordination of benefits constituted a 'renewal' of a pension plan such that coordination was lawful. The Court upheld coordination and held that 'the pension plan at issue here was changed as a result of collective bargaining...' Id at 644. However, the crucial distinction between *Murphy* and the present case is that in *Murphy*, id. at 642, the parties had stipulated that the 'pension plan may be changed by collective bargaining agreement or by ordinance amendment.' There was no such stipulation in the present case. It is simply not tenable that a contract could be amended with respect a particular party when that party had no representation during the amendment process."

SUMMARY OF ARGUMENT

The Michigan Workers' Disability Compensation Act, for injuries occurring after March 31, 1982, sets forth specific circumstances when an employer can, and cannot, reduce workers' compensation benefits because a disabled employee is in receipt of certain other types of benefits. MCL 418.354. Although GM never mentions it in its Application for Leave to Appeal, Michigan law places the burden of proof on an Employer to establish a right to coordinate workers' compensation benefits because of the receipt of certain other benefits.

See MCL 418.354(10)⁵ and *Brown v Beckwith Evans Co*, 192 Mich App 158 (1991). MCL 418.354(11) and (14) set forth specific circumstances when an employer can, and cannot, reduce workers' compensation benefits by other benefits including Social Security Disability benefits and disability pension benefits.

In this case, the Court of Appeals recognized that "it is not disputed that under the 1990 GM-UAW collective bargaining agreement, coordination of workers' compensation benefits with disability retirement was not allowed" and that the disabled Mr. Arbuckle retired on a disability pension under the terms of the 1990 agreement. (COA at 5) In recognizing that GM failed to meet its burden of proof, the Court of Appeals, agreeing with the Magistrate, recognized that the evidentiary record "contains no evidence that [Arbuckle, as a disabled retiree] authorized the UAW to act as his representative to modify the 1990 agreement under which he retired." According to blackletter labor law, retirees are not, and cannot be, represented by the union as members of the bargaining unit. *Allied Chem. & Alkali Workers v Pittsburgh Plate Glass Co*, 404 U.S. 157 (1971). The Court of Appeals also recognized that "a contract cannot be amended with respect to a particular party when that party had no representation during the amendment process." GM failed in its efforts

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MCL 418.354(10) states: "The employer or carrier taking a credit or making a reduction as provided in this section shall immediately report to the Bureau the amount of any credit or reduction, and as requested by the bureau, furnish to the bureau satisfactory proof of the basis for a credit or reduction."

to rewrite its contractual agreement retroactively so as to reduce the disabled retiree's workers' compensation benefits by negotiating with a union that no longer, as a matter of law, represented the retiree. The Court of Appeals recognized that "there is no indication that Defendant entered into any new agreement *with plaintiff*." There were instead "attempted amendments." (COA at 6)

GM asserts that the workers' compensation benefits which the Michigan Workers' Compensation Magistrate ordered due and payable were just "extra payments" which "exceed statutory requirements," which GM at its whimsy or "discretion" can choose to pay or not pay its disability retirees (Application at vii, 11). While GM at one time had some discretion regarding the coordination of disability benefits against workers' compensation benefits, it exercised that discretion by 'opting into' an agreement that prevented disability pension benefits from reducing workers' compensation benefits. GM offers a distorted and tendentious history of the coordination provisions of the Workers' Disability Compensation Act claiming that by default, coordinating other benefits is mandatory. (Application at ii, 16) In fact, the statutory language and the legislative history show that the compromise struck by the Legislature in 1980 and 1981 regarding when and how certain specific types of benefits can be coordinated against workers' compensation benefits was in fact quite nuanced, and that full coordination of all types of benefits was *not* enacted in part to help workers cope with the effects of inflation following an injury.

GM argues that this 'cap' formula is "fair" as it caps the amount of total benefits a person receives at their average weekly wage at the time of injury. (Lamarra Dep, at 34) It fails to mention that given the effects of inflation, Mr. Arbuckle's average weekly wage in 1990 of \$655.69 no longer has the same purchasing power it did 25 years ago. GM also seeks to ignore the fact that if a disabled worker like Mr. Arbuckle had attempted to take on a part-time job to make up for the loss of workers' compensation benefits, his workers' compensation benefits would have been further reduced under MCL 418. 301(5)(b) *and* the disabled retiree would forfeit his entire disability pension. (Mr. Arbuckle's disability pension "prohibits finding new employment." (Mag Op at 9).

GM furthermore attempts to re-argue that Mr. Arbuckle "disguised his contract claim as a workers' compensation claim" (Application at 11) and argues at great length that this Court should instead decide this Michigan workers' compensation case according to its partisan selection of cases interpreting the federal Labor Management Relations Act-- instead of according to the terms of the Michigan Workers' Disability Compensation Act. Instead of advancing arguments under the Michigan Workers' Disability Compensation Act in what GM concedes is a "routine worker's compensation claim," (Application at 1) GM attempts to twist and transform this disputed award of workers' compensation benefits into an action Mr. Arbuckle did not file under the Labor Management Relations Act.

GM attempts to scare the Court into believing that this admittedly "routine workers'

compensation case” will somehow have vague “far reaching unintended consequences not only for GM but for employers and employees across this state.” (Application at 1, *Ibid*) While simultaneously seeking to slash the workers’ compensation benefits of its disability retirees, GM has the chutzpah to claim that it is only trying to protect the rights and benefits of retirees and organized labor. GM vaguely claims that this decision will “irrevocably hinder the ability of unions to bargain collectively with issues that affect their retirees.” (Application at 2) To the contrary, the relationship between unions and retirees was delineated by the U.S. Supreme Court forty-five years ago in *Allied Chem. & Alkali Workers v Pittsburgh Plate Glass Co*, 404 U.S. 157 (1971). Mr. Arbuckle’s unpublished Court of Appeals’ decision simply echoes a long line of cases following *Pittsburgh Plate* that recognizes that retirees are not members of the bargaining unit and that unions are not as a matter of law the authorized representatives of retirees. The Supreme Court recognized in that case that retirement rights and benefits can be a permissive subject of bargaining between employers and unions, but once a worker retires he or she is no longer represented by the bargaining unit. These have been blackletter principles in labor-management relations for forty-five years, and this unpublished Michigan Court of Appeals’ decision changes nothing. Employers and unions remain free to negotiate the rights and benefits which retirees will possess upon retirement; what employers cannot do under the law is unilaterally and retroactively strip a disabled worker of previously ordered

workers' compensation benefits through a deal with a union who no longer, as a matter of blackletter law, represents that disabled worker.

Notwithstanding its vague hyperbole, the Appellant GM fails to demonstrate pursuant to MCR 7.302(B)(3) and (5) in its Application for Leave that this case "involve legal principles of major significance to the state's jurisprudence" and that the decision of the Court of Appeals is "clearly erroneous and will cause material injustice."

ARGUMENT

I. **The Appellant GM failed to meet its burden of proof as the Employer regarding coordination of benefits, where there is no evidence in the record that an authorized representative of Arbuckle agreed to modify the collective bargaining agreement and pension plan under which he retired so as to permit coordination of disability pension benefits against his workers' compensation benefits.**

A. **Workers' compensation is a legislatively crafted system of benefits, not, as GM alleges, a discretionary employee benefit program.**

GM argues both that it is free at its unfettered "discretion" to pay or not pay Mr. Arbuckle the uncoordinated workers' compensation benefits he was promised when he retired, and also that it doesn't have to follow Michigan law because the Michigan Workers' Disability Compensation Act is pre-empted by the federal Labor Management Relations Act. To stake out its position that payment of workers' compensation benefits that it is, in this case, paying pursuant to Order, is only discretionary, GM describes workers' compensation as a mere "program" as if the Act and the Order were merely some sort of

charitable handout or a discretionary employee benefit “program.” Workers’ compensation is instead a legislatively crafted system of benefits, created by the Legislature in a constitutional grand bargain, designed to deliver prompt, certain and “sustaining benefits” for disabled workers in exchange for the loss of workers’ rights to sue employers in tort. *McAvoy v HB Sherman Co*, 401 Mich 419 (1977); *New York Central Railroad v White*, 243 U.S.188, 37 S Ct. 247, 61 L.Ed 667 (1917).

GM claims that “any payment of non-coordinated overlapping benefits is solely a creature of private contract.” (Application at 5) To the contrary, the benefits that must be paid to an injured worker are mandated by statute and, in this case, by the 1995 Order of the Magistrate which GM did not appeal. Moreover, the circumstances where benefits can be coordinated is spelled out by statute: MCL 418.354.” As this Court stated in *Harrington v Department of Labor and Industry*, 252 Mich 87, 89 (1930):

“Compensation is not a private matter between employer and employee. The public is interested. The act declares a state policy that the burden of industrial accidental personal injuries shall be borne by the industries, not by the general public. To effectuate this policy, the act provides for frequent regular payments, weekly not monthly, or quarterly, or annually. It opposes payments in gross or in lump sum, except in certain 'special circumstances.' Subject to its limitations, it contemplates weekly payments of compensation during disability, no more, no less.”

GM argues that the Michigan courts are powerless to interpret and apply the Michigan Workers’ Compensation Act and that it, at its discretion, is free to ignore it. When GM has failed to pay workers’ compensation and wrongfully coordinated benefits in the

past, this Court has recognized that such wrongfully coordinated benefits “are deemed by statute to have been ‘underpayments’ of workers’ compensation benefits” and must be paid “within sixty days with interest.” *Romein v. General Motors Corp.*, 436 Mich 515, 523 (1990)

B. Coordination of benefits is not always “mandatory” as GM alleges. Instead, as the Employer, GM must meet its burden to establish a right to coordinate specific benefits pursuant to MCL 418.354.

To stake out its untenable position, GM manufactures a legislative history to advance its cause. Many states did in fact introduce coordination provisions into their workers’ compensation statutes in recent decades, but despite what GM implies in its Application (at vii), there are a vast range of differences amongst the fifty states with respect to coordination and when and how particular other benefits, including disability pension benefits, can be coordinated against workers’ compensation. (See e.g. “As to private pensions...whether provided by the employer, union, or the individual’s own purchase, there is ordinarily no occasion for reduction of [workers’] compensation benefits.”¹⁴⁻¹⁵⁷ Larson's Workers' Compensation Law § 157.05. (Underline added)

Coordination of all other benefits is not automatic or mandatory as GM suggests. Specific attention instead needs to be focused on MCL 418.354 and the legislative history underpinning its adoption. While it is true that when the Legislature passed the coordination amendments to the Act in December 1980 and December 1981, it, overall, lightened the burden of employers to pay worker’s compensation benefits. The Legislature

however drafted and passed specific compromises regarding how workers' compensation liability could sometimes be offset because of the receipt of particular benefits.⁶ While GM wants to find a legislative intent to coordinate all possible benefits against workers' compensation benefits by quoting at length from *Franks v White Pine* 422 Mich 636 (1985), (Application at 3)--a case overturned by the Legislature⁷--the Legislature instead struck compromises when specific benefits could be coordinated in part to address the effects of inflation on the purchasing power of workers' compensation benefits. As Justice Brickley later recognized in *Drouillard v Stroh Brewery Company*, 449 Mich 223 (1995) one of the "twin purposes" of the coordination amendments was "to maintain suitable wage loss benefits;"

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The Legislature specifically decided that unemployment benefits and regular pension benefits can reduce workers' compensation on a dollar for dollar basis. MCL 418.358; MCL 418.354(1)(d.) Half of social security retirement benefits can be used to offset against workers' compensation. MCL 418.354(1)(a). Social Security Disability Benefits are **not** to be considered in calculating workers' compensation benefits unless federal law is changed. MCL 418.354(11). Benefits, for example, provided by the Pension Benefit Guaranty Corporation are not coordinated against workers' compensation. *Corbett v Plymouth Twp*, 453 Mich 522 (1996).

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The Michigan Legislature amended MCL 418.354 with the addition of MCL 418.354(17) that provides "The decision of the Michigan Supreme Court in *Franks v White Pine Copper Division*, 422 Mich 636 (1985) is declared to be erroneously rendered insofar as it interprets this section....This remedial and curative amendment shall be liberally construed to effectuate this purpose." This Court later recognized in *Romein* that it was perfectly valid for the Legislature to overturn and reject the Court's *Franks* opinion regarding the intent of the Legislature regarding the coordination amendments. Discussing these cases, and following this logic, see also *Kouri v Equitable Assurance*, 716 F Supp 1018 (ED Mich, 1989)

the amendments were not passed solely with the goal of stopping so-called duplicative payments.

With respect to disability pension benefits, a particular compromise was struck. The Appellant in its Briefs ignores the specific compromise found at MCL 418.354(14), the real legislative history leading to its creation⁸, and instead cites general

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What the actual legislative history regarding the possible coordination of workers' compensation benefits by disability pension benefits shows that the Governor sought to reform worker's compensation in 1981 so as to permit the coordination of worker's compensation by other benefits. An impetus for the 1980 and 1981 reform is recognized to be *A Report to the People of Michigan: Worker's Compensation in Michigan, the report of The House Republican Task Force on Worker's Compensation*. (Exhibit Four) That report however also recognized that "benefits should be periodically adjusted for inflation...[U]nless the law is changed, [an injured worker] will be destined to live out the rest of his life on [the original compensate rate] "regardless of the rapidly shrinking purchase power of his dollars...." Report at 7. The Governor's original proposal for coordination of benefits met with significant resistance in the Democratic controlled House and Senate. *Legislators Rip Milliken Delay*, Detroit News, November 18, 1981. (Exhibit 4) The Speaker of the House spoke out against the Governor's proposal, including how the Governor's proposal failed to factor in how inflation "erodes compensation". *Workers' Comp Reform: Rhetoric vs. Realities*. The Flint Journal, December 1981. (Exhibit 4)

The Senate ultimately rejected the Governor's proposal and put forward a plan it considered more "just and humane." *Democrats Offer a 'Just Plan' for Workers' Comp*, December 2, 1981. Detroit Free Press. (Ibid) The Democratic package of bills included SB 595 offered by Democrat James DeSana that would become, as amended, the coordination provisions of PA 203 of 1981. (Exhibit Four) "In the House Labor Committee as well, "the principal Democratic amendment to the Governor's bill allowed for "the sum of total benefits "to increase annually along with inflation." *Ibid*. The Substitute bill for Senate Bill No. 595 adopted on December 4, 1981 provided that the coordination provisions of Section 354 "does not apply to any payments received or to be received under a disability pension plan provided by the same employer in a collective bargaining agreement which plan is in existence on the effective date of this section. Any disability pension plan entered into or

language from the Governor's political campaign to enact broad coordination of benefits.

Instead of total coordination of all benefits, a political compromise was reached in the text of MCL 418.354(14):

"This [coordination] section does not apply to any payments received or to be received under a disability pension plan provided by the same employer which plan is in existence on March 31, 1982. Any disability pension plan entered into or renewed after March 31, 1982 may provide that the payments under that disability pension plan provided by the employer shall not be coordinated pursuant to this section."

- C. **Where Arbuckle retired under a collective bargaining agreement and pension plan that prohibited coordination of workers' compensation benefits by disability pension benefits, the Court of Appeals correctly agreed with the Magistrate that GM failed to meet its burden of proof regarding coordination where there was no evidence in the record that any representative of Arbuckle consented to the attempted amendment of the contract and pension plan under which Plaintiff retired.**

Justice Taylor in *Tyler v Livonia Pub. Schs*, 459 Mich 382, 390 (1999) recognized that the disability pension coordination provisions in MCL 418.354(14) "are essentially 'opt out' clauses. By their terms, they apply only to disability pension plans that are entered into or

renewed after the effective date of this section may provide that the payments under that disability pension plan provided shall not be coordinated...." The language was then finalized in conference committee.

While the Governor in 1981 may have wanted broad coordination of benefits, the Governor's bill did not pass and a compromise was negotiated in the Legislature that enabled disability retirees to continue to receive both workers' compensation benefits and disability pension benefits in a manner that helped them avoid the effects of inflation and the reduced purchasing power of their worker's compensation benefits.

renewed after March 31, 1982. These provisions permit plans that are entered into or renewed after March 31, 1982, to be exempted from the general coordination requirement. Said another way, these clauses, if utilized, allow parties to a disability pension plan entered into or renewed after March 31, 1982, to except such plan from the general regime of coordination by specifically so providing in the plan.” It is undisputed that GM’s pension plan under which Mr. Arbuckle retired “opted out” of coordination of disability pension benefits.⁹ GM however failed to offer any evidence that GM later entered into a valid amended agreement with an authorized representative of Mr. Arbuckle “opting back in” to coordination-- **and GM failed to offer such evidence because no such evidence exists.**

Instead the evidentiary record reviewed and described by Magistrate Birch and the Court of Appeals shows that pursuant to the pension plan and collective bargaining agreement under which Mr. Arbuckle retired, it is undisputed that workers’ compensation benefits can not be reduced by disability pension benefits. (Mag Op, 6; COA at 5) The 1990 Letter Agreement between GM and the UAW, incorporated into the 1990 collective bargaining agreement, established that there would be no such coordination.(Appellant’s Exhibit 2) The Appellant’s own witness, benefit representative Aaron Dickerson, testified

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As the Court of Appeals noted, this promise of non-coordination in Mr. Arbuckle’s pension plan did not ‘expire.’ There is, as Defendant’s own witness Elizabeth LaMarra testified, “only one pension plan.” The plan did not expire or terminate. GM’s failed attempt to amend the plan leaves the original language intact. (COA at 6)

that the 1990 collective bargaining agreement and pension plan under which Mr. Arbuckle retired, prevented workers compensation benefits from being reduced by pension benefits. (Rule 5 Hearing Transcript, p39-40) Dickerson answered "Correct" when asked "You know that people that retired in 1990 on [a] disability pension didn't see their Workers' Comp benefits get reduced by disability pension amounts if they retired under the 1990 contract, correct?" Appellant's own witness, Elizabeth LaMarra, GM's Manager of Life Insurance and Disability Plans, answered "True" when asked whether employees "that retire under different contracts have different entitlements based upon when they retired, correct?" She further testified that "**you retire under a pension plan contract based on your retirement date.**" (Cited by COA at 5) The evidentiary record is undisputed, confirmed by testimony from GM's own witnesses, that persons retiring on disability pensions pursuant to the 1990 collective bargaining agreement and pension plan would not have their workers' compensation benefits reduced by disability pension benefits.

As Magistrate Birch and the Court of Appeals recognized, GM did not bargain with the Plaintiff to modify the terms of his contract and pension; there were only attempted amendments by negotiating with a union who no longer as a matter of law could represent him.

To get around this problem, GM misleadingly suggests in its Application that the U.S. Supreme Court in *Pittsburgh Plate & Glass*, 404 US 157 (1971) held that unions can bind

retirees during collective bargaining agreements when it wrote: "It is well-settled, as a matter of law, that unions have the power to bind their retirees during collective bargaining negotiation with respect to non-vested retiree benefits....*Pittsburgh Plate*." (Application at 17) The U.S. Supreme Court instead held that retirees could **not** be members of the bargaining unit represented by the union:

"Nowhere in the history of the National Labor Relations Act is there evidence that retired workers are to be considered as within the ambit of the collective bargaining obligations of the statute....Section 9(a) of the Labor Relations Act accords representative status only to the labor organization selected or designated by the majority of employees in a 'unit appropriate' for the purposes of collective bargaining agreement."....In addition to holding that pensioners are not 'employees' within the meaning of the Act, we hold that they were not and could not be 'employees' included in the bargaining unit....Even if industry commonly regards retirees benefits as a statutory subject of bargaining...it would not be determinative. Common practice cannot change the law and make into bargaining unit employees those who are not."¹⁰

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In footnote 20 to *Pittsburgh Plate*, the U.S. Supreme Court noted, that despite not being represented by the union in retirement, retirees were "not without protection" and cited-- *as an example*-- that retirees have a right to bring a claim under the LMRA with respect to vested benefits promised under a collective bargaining agreement. The U.S. Supreme Court however did not rule, as GM suggests, that unions have the power to bind retirees with respect to non-vested benefits.

Moreover, Mr. Arbuckle's workers' compensation benefits are not "non-vested retiree benefits" as GM argues. They are not, among other reasons, "non-vested" because they are to be paid pursuant to an order of the magistrate. They are also not paid to 'retirees;' they are paid to 'disabled workers', retired or not. To evade compliance with the Magistrate's order to pay benefits, GM goes to great lengths to rewrite the Workers' Disability Compensation Act with incompatible terms and concepts that make little sense in the workers' compensation context.

As Magistrate Birch held, and the Court of Appeals affirmed, GM did not bargain with the Plaintiff Arbuckle to modify the terms of his contract and pension; there were only attempted amendments conducted by negotiating with a union who no longer as a matter of law could represent him and could provide him no consideration for any attempted modification.

II. Michigan Courts, the Michigan Workers' Compensation Agency and the Michigan Workers' Compensation Board of Magistrates have jurisdiction to adjudicate Michigan Workers' Compensation benefit disputes according to Michigan law.

A. The U.S. District Court has already rejected GM's federal pre-emption arguments in identical GM workers' compensation cases; this Court has no reason to reject the federal court's ruling regarding federal pre-emption.

GM continues to maintain that Michigan Courts, the Michigan Workers' Compensation Agency and Michigan Workers' Compensation Board of Magistrates do not have subject matter jurisdiction to determine the amount of workers' compensation benefits disabled workers in Michigan can receive. (Application at ii, vii, viii, 11, 12, 13, 14, 15, 24.) GM again claims that the Labor Relations Management Act deprives Michigan of subject matter to interpret and apply its own workers' compensation act.¹¹ We have been down this

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The Appellant rehashes its argument that the Taft-Hartley Act, or Labor Relations Management Act, passed by Congress in 1947 sought to federalize the law of workers' compensation and to preempt injured workers from pursuing their right to benefits in state workers' compensation proceedings. This argument completely contradicts the legislative history behind 28 USC 1445(c) which expressly bars removal of workers' compensation

road before. When GM attempted to unilaterally modify the terms of the contract and pension under which Mr. Arbuckle and similarly situated individuals retired so as to attempt to coordinate workers' compensation benefits by disability pension benefits, General Motors initially tried to remove the first group of disputed cases away from the

cases to federal court.

In determining whether state actions are pre-empted, the courts' "sole task is to ascertain the intent of Congress." *California Fed Savings & Loan Assn v Guerra*, 479 US 272 (1978). The search for congressional intent about preemption has long been said to begin with "the basic assumption that Congress did not intend to displace state law." *Maryland v Louisiana*, 451 US 746 (1981).

The presumption against preemption is stronger in matters "traditionally regarded as properly within a "matter of public health or safety." *Automated Medical Labs v Hillsborough County*, 471 U.S. 707 (1985). Advocates for preemption must show more than an "obscure grant of authority to regulate areas traditionally supervised by the state's police power." *Merrill Lynch Pierce Fenner & Smith Inc v Dabit*, 547 US 71 (2006). Federal preemption is not likely to be implied if there exists a 'historically entrenched state-law remedy' and the federal statute has not expressly preempted it." *Ibid*. "The nature of the state activity matters where implied preemption is argued. A field that is 'intrinsically local' with a long history of local controls 'posts a strong caution against the possibility that Congress would lightly preempt local regulation in this field.'" *Ibid* at 1515.

Federal labor law does not, and never has, preempted state workers' compensation laws providing for workers' compensation benefits. OSHA does not preempt workers' compensation claims. *Fuller v Skornicka* 79 F3d 685(7th Cir. 1996); *People v Pymm* 563 NE2d 1 (New York, 1990) cert den 498 US 1085 (1990); *People v Hegedus* 432 Mich 598 (1989). ERISA does not preempt workers' compensation claims for workers' compensation benefits, and specifically does not pre-empt MCL 418.354. *Scheuneman v GMC*, 243 Mich App 210 (2000); *Employer's Resource Management Co. Inc, v James*, 62 F3d 627, 634 (4th Cir. 1995)

Workers' Compensation Agency and into federal court. On identical facts, involving similarly situated injured GM disability retirees receiving workers' comp who had their benefits reduced like Arbuckle, U.S. District Judge Corbett O'Meara in *Savage et al. v General Motors*, (No. 10-12372, Ex 2, Appellant's Brief) rejected GM's arguments for federal removal and for federal pre-emption under the LMRA. Judge O'Meara, quoting the U.S. Supreme Court in *Caterpillar Inc., v Williams*, 482 U.S. 386, 398-399 (1987), held: "[T]he presence of a federal question, even a §301 question [under the LMRA], in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court."; see also *Alongi v Ford Motor Co*, 386 F 3d 716 (6th Cir. 2004); *Paluda v ThyssenKrupp Budd Co.*, 303 Fed Appx 305 (6th Cir. 2008). While GM is defending its reduction of workers' compensation benefits by arguing about the terms of a purported amendment to a collective bargaining agreement, that did not give GM the right to remove these cases to federal court, nor are such arguments by GM a basis for federal pre-emption. Arbuckle has not filed suit under the LMRA.

With respect to the identically situated GM disability retirees seeking to have their workers' compensation benefits restored, Judge O' Meara held that plaintiffs' workers' compensation case were **not** "breach of contract claim[s] in disguise. Plaintiffs are seeking

to enforce a right to receive worker's compensation benefits, which is created by state statute, not the CBA. Although GM attempts to characterize Plaintiffs' claim as a 'right to non-coordination' under the CBA, Plaintiffs' claim is for benefits under the statute. Plaintiffs are not asserting a right to non-coordination'; rather GM is seeking to justify its right to coordinate benefits under the CBA. Accordingly, the court finds that Plaintiffs' state law claims are not pre-empted by Section 301 [of the LMRA]"¹²

GM has already had an opportunity to exhaustively argue its theory of federal pre-emption of these workers' compensation cases in federal court and chose to abandon its motion for reconsideration. While collateral estoppel may not strictly apply, this Court should not grant Appellant's Application to rehash what U.S. District Judge O'Meara found unconvincing and untenable.

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GM again cites the unpublished decision of Judge Rosen in *Garbinski v General Motors* in support of its theory, yet the posture of the *Garbinski* case is limited to its facts as the Plaintiff there affirmatively asserted in its Complaint violations of the Labor Management Relations Act in pleadings Garbinski filed in federal court, whereas Arbuckle here filed for a Rule 5 hearing before the Director of the Workers' Compensation Agency demanding that a prior order of a magistrate to pay benefits be enforced. In the case here, the interpretation of a collective bargaining agreement only arises in GM's defensive argument for coordination as Judge O'Meara recognized in *Savage*. (This Court should also take note that the 6th Circuit in its unpublished *Garbinski* decision made no such findings of federal pre-emption as GM has at times suggested.)

B. GM disingenuously attempts to recharacterize this Michigan workers' compensation case as an action filed under the federal Labor Management Relations Act in order to evade application of Michigan law.

GM also argues that the amount of workers' compensation benefits Arbuckle was entitled to receive should be determined by applying a partisan selection of cases interpreting the Labor Management Relations Act. Eligibility for Michigan Workers' Compensation benefits should instead be determined by applying and interpreting Michigan statutes and Michigan case law. Much of GM's Application consists of a partisan selection of cases interpreting the Labor Management Relations Act, which utilize a distinction between "vested" and "non-vested" benefits. GM for example disingenuously asserts that it is "well-settled as a matter of law, that unions have the power to bind retirees, during collective bargaining agreement with respect to non-vested retiree benefits." (Application at 17) To the contrary, see e.g. the opinion of the 7th Circuit Court of Appeals, written by U.S. Court of Appeals Judge J. William Bauer, joined by Judge Frank Easterbrook:

In Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., the Supreme Court held that retirees are not "employees" within the meaning of the collective bargaining obligations of the NLRA and cannot be "employees" included in a bargaining unit. 404 U.S. 157, 172, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971). This is so even in a case where an employer modifies benefits that were originally established through collective bargaining. 404 U.S. at 183-88. Because [the union] is not the exclusive bargaining representative of the forty-one retirees that make up the class, any claims for benefits here belong to the retirees individually, and the retirees may deal directly with [the Employer] in pursuing such claims. See *Meza v. General*

Battery Corp., 908 F2d 1262, 1270 (5th Cir. 1990) ("An ex-employee/ex-union member is free to pursue his own claims and make his own settlements with the former employers.")....Although the employees could individually agree to arbitrate their statutory claims, the union could not agree on the employees' behalf."

Rossetto v. Pabst Brewing Co., 128 F3d 538, 541 (1997)

GM's claim that, as matter of "well-settled law," the union had the power to amend the contract and pension plan to bind Mr. Arbuckle as a retiree is simply untrue. GM attempts to import distinctions sometimes found in cases interpreting the LMRA like "nonvested" benefits– but not found anywhere in the Michigan Workers' Disability Compensation Act--as a method to deprive Mr. Arbuckle of workers' compensation benefits he was assured of when he retired. Workers' compensation benefits are not "non-vested retiree benefits." Workers' compensation benefits are not "non-vested" benefits and this is particularly true when they are paid pursuant to an order of the magistrate. They are not paid to retirees; they are paid to disabled workers, retired or not. The Court of Appeals was correct not to engage in judicial activism by rewriting the Workers' Disability Compensation Act by importing such distinctions or by recasting this workers' compensation case as an action under the LMRA.

CONCLUSION

The Appellant GM introduced no evidence that an authorized representative of the Plaintiff agreed to modify his pension and contract under which he retired so as to allow his workers' compensation benefits to be reduced by disability pension benefits. The Court of Appeals was, accordingly, correct to conclude that the Appellant failed to meet its burden of proof and to reinstate the Order of the Magistrate. In briefing to this Court, Appellant does not recognize that it had the burden of proof to establish that the rate of benefits being paid to plaintiff by order could be reduced. It also does not recognize what must be presented to establish that burden of proof. Its Application, accordingly, lacks merit and does not meet the requirements of MCR 7.302 and, accordingly, should be denied.

RELIEF

WHEREFORE, for the reasons stated herein, the Application for Leave to Appeal should be denied.

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April 27, 2015
Date

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