THE STATE OF SOUTH CAROLINA
In The Court of Appeals

L9847

APPEAL FROM
THE WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2012-206507
Op. No. 5171, Filed September 4, 2013

Carolyn M. Nicholson, Claimant, ... Respondent,

vs.

S.C. Dep't of Social Services, Employer, and
State Accident Fund, Carrier, Defendants, ... Appellants.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Respondent Carolyn Nicholson respectfully petitions the Court for a rehearing *en banc* pursuant to Rule 221, SCACR and a suggestion for rehearing *en banc* pursuant to Rule 219(b), SCACR. This case involves a question of exceptional importance because the Court's current decision introduces fault into the no-fault system fundamental to workers' compensation. It is further respectfully submitted the Court overlooked or misapprehended South Carolina law that an accident "arises out of" the employment under S.C. Code Ann. § 42-9-160 when there is apparent to

a rational mind, considering all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. The language on which the Court based its decision – "a claimant's injury is only compensable if the source of the injury was a risk 'peculiar to the work and not common to the neighborhood'" – has been disfavored and modified by our Supreme Court in favor of the requirement that to "arise out of" the employment under § 42-9-160, there need only be apparent to a rational mind, considering all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury.

Arising out of the Employment.

The term "peculiar to the work" used by the Court in its decision appeared in South Carolina case law in 1944 when the Supreme Court quoted at length from a 1913 decision by the Supreme Judicial Court of Massachusetts when defining the Workers' Compensation Act's "arising out of" requirement. See Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944), quoting In Re Employers' Liability Assurance Corp., 102 N.E. 697 (Mass. 1913)(also known as McNicol's Case).

> It (the injury) arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the

> event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Eargle, 32 S.E.2d at 242-43. While the Eargle decision did not turn on this language from the Massachusetts court, it introduced this language into South Carolina's jurisprudence.

However, some years after the In Re Employers' Liability Assurance Corp. decision, the Massachusetts court itself abandoned this language. In Caswell's Case, the court held that "[a]n injury arises out of the employment if it arises out of the nature, conditions, obligation or incidents of the employment; in other words, out of the employment looked at in any of its aspects." Caswell's Case, 26 N.E.2d 328, 330 (Mass. 1940):

> Unquestionably, the injury was received in the course of his employment. The only other requirement is that the injury be one "arising out of" his employment. **It need not arise out of the nature of the employment. An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects**. Thom or Simpson v. Sinclair, [1907] A.C. 127, 142, 143. An employee who, in the course of his employment, is hurt by contact with something directly connected with his employment, receives a personal injury arising out of his employment, even though the force that caused the contact was not related to his employment. Thom or Simpson v. Sinclair, [1917] A.C. 127, 134-136. Lord Atkin, in Brooker v. Thomas Borthwick & Sons (Australasia), Ltd. [1933] A.C. 669, 677, stated the principle thus: "If a workman is injured by some natural force such as lightning, the heat of the sun, or extreme cold, which in itself has no kind of connection with employment, he cannot recover unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to suffering such an injury. **But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered. So that if the roof or walls fall upon**

> **him, or he slips upon the premises, there is no need to make further inquiry as to why the accident happened.**"

Id. (emphasis added) Based on this broader language, the Massachusetts court has on at least two occasions considered whether a fall at work arose out of employment. In Bator's Case, the court held that an injury that occurred when the worker fell while attempting to climb onto a box to sit was within the scope of employment and arose out of the nature, conditions, obligations or incidents of the employment looked at in any of its respects. The court noted that "[a]ll that is required is that his activity be incidental to and not inconsistent with his employment." Bator's Case, 153 N.E.2d 765, 767 (Mass. 1958). Also, in Ware's Case, the court held that a fall from a sidewalk where the employee had walked several stores away from the employer's premises during lunch did not arise from "any aspect of the job—'the nature, conditions, obligations or incidents of the employment.'" Ware's Case, 282 N.E.2d 673, 674 (Mass. 1972)(quoting Caswell's Case, 26 N.E.2d 328, 330 (Mass. 1940)). The court noted that "[t]he question is whether the claimant's employment brought her in contact with the risk which actually caused her injuries." Id.

The South Carolina Supreme Court embraced this change in the definition of "arising out of" by quoting approvingly from Caswell's Case in its decision in Jordan v. Dixie Chevrolet, 218 S.C. 73, 61 S.E.2d 654 (1950). The Court noted that this was "the more modern" view and that Caswell's Case

> is a landmark in Massachusetts law as it avoided the paralyzing effect of the earlier decision in McNicol's Case requiring 'peculiar' exposure, and 'denial of compensation for common risks.' . . . 'Under such a broad definition, as well as under narrower rules, it is not necessary that the injury be one which ought to have been foreseen or expected. Even unusual or extraordinary consequences of the employment may well be compensable. The risk insured is not

> only the foreseeable one, but the risk which, after the event, can be seen to have its origin the nature, conditions, obligations, or incidents of the employment.'

Jordan, 61 S.E.2d at 657. And it is apparent from Jordan that the purpose in moving away from the more restrictive definition of "arising out of" was that workers' compensation laws were intended to be free of the fault-based determinations of tort law and that the "peculiarity" requirement of In Re Employers' Liability Assurance Corp. improperly required this search for fault. See Jordan, 61 S.E.2d 657-660.

While the case on which the Court of Appeals relies in its underlying decision, Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965), refers to In Re Employers' Liability Assurance Corp. and does not mention the change in the law found in Caswell's Case or Jordan, neither the language quoted in Jordan nor the broadening of the "arising out of" requirement found therein has been reversed or expressly disfavored by any subsequent decision of our Supreme Court. And, as noted in Jordan, it is this broader definition that fits within the stated purposes of the Workers' Compensation Act.

Under this broader language of Caswell's Case and Jordan, the injury in the present case is compensable, as the fall occurred well within the conditions, obligations or incidents of the employment. Walking across the carpet and scuffing her shoe on the carpet were natural incidents of the work and not inconsistent with the employment but a result of the exposure occasioned by the employment. As in Jordan, it is not necessary that the more remote cause of the injury, the carpet, be peculiar to the work under South Carolina law following Jordan. The risk here clearly had its origin the nature, conditions, obligations, or incidents of the employment. The employment brought her in contact with the risk. The Commission's determination that the injury here was compensable should

have been affirmed.

The Introduction of Fault into Workers' Compensation.

The Court's decision in this case introduces fault and premises liability concepts into the no-fault workers' compensation system, where the express purpose of workers' compensation is the absence of such fault-based determinations. It is vitally important to distinguish a "causal connection" to employment from the concept of causation as developed and applied in tort law.

Professor Larson in his treatise, Workers' Compensation Law, § 3.06 (2005), discusses this important distinction at length. Larson reminds us that, "[i]t is instantly apparent that 'arising out of the employment' does not mean exactly the same thing as 'legally caused by the employment." Id. He distinguishes the phrases by noting, "proximate cause or legal cause is out of place in compensation law, because, as developed in tort law, it is a concept that is itself thoroughly suffused with the idea of fault; that is, it is a theory of causation designed to bring about a just result when starting from an act containing some element of fault." Id.

Fault has no place in workers' compensation. "One of the purposes of the Workmen's Compensation Act is to protect and partially compensate employees who are injured while engaged in the regular course of their employment irrespective of mishap, independent of the injury itself, and/or negligence on the part of either the employee or employer." Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492, 496 (1939). "The American concept of workmen's compensation is founded upon recognition of the advisability, from the standpoint of society as well as of employer and employee, of discarding the common law idea of tort liability in the employer-employee relationship and of substituting therefor the principle of liability on the part of the employer, regardless of fault ...." Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57, 65

(1960). Negligence and contributory negligence are of no consequence in workers' compensation cases. Jordon, *supra*. at 656; Allsep v. Daniel Const. Co., 216 S.C. 268, 57 S.E.2d 427 (1950).

> The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. **Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues**. Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.

Larson, Workers' Compensation Law, § 1.03 (2005).

Here, the Court has reintroduced fault into the equation by erroneously requiring some fault or hazard in the flooring in order to find a trip or fall on a level floor compensable under the Workers' Compensation Act. To the contrary, as often stated in workers' compensation law, it is the unexpected result of work activity that is the compensable injury. Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785 (2002). The Supreme Court in Pee specifically stated:

> Under § 42-1-160, a claimant is entitled to benefits for an "injury by accident arising out of and in the course of employment." In Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492 (1939), we interpreted for the first time the meaning of "injury by accident" under the newly enacted Workman's Compensation Act. We noted that two lines of cases had evolved in other jurisdictions: some jurisdictions, including North Carolina upon which our Act is modeled, held there must be some unusual or unlooked-for mishap resulting in injury to constitute an accident; other jurisdictions held no mishap was required for an accident so long as there was an unexpected injury occurring while the employee was performing his usual duties in his customary manner. **We chose the latter**

> **definition, focusing on the unexpected nature of the *injury* rather than requiring that the event causing the injury be unexpected**. This definition of accident as an unexpected injury has been reiterated in a long line of cases. See, e.g., Colvin v. E.I. DuPont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955) (injury by accident is an injury occurring unexpectedly without the prior occurrence of any external event of an accidental nature); Hiers v. Brunson Const. Co., 221 S.C. 212, 70 S.E.2d 211 (1952) (injury by accident is an injury that is accidental in that it is unforeseen and unexpected).[3]
>
> > 3 In Hiers, we noted the policy reason for adopting such a definition: **If [the injury] results from the conditions under which the work is carried on, there is no reason why it should not be held compensable**. In such case, it is one of the casualties of business; and it is the purpose of the compensation statutes to place the burden of casualties upon the business and not upon the unfortunate employee. [Hiers,] 70 S.E.2d at 221.
>
> As we more recently stated, "in determining whether something constitutes an injury by accident the focus is not on some specific event, but rather on the injury itself." Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991). Further, an injury is unexpected, bringing it within the category of accident, if the *worker* did not intend it or expect it would result from what he was doing. Colvin, 227 S.C. at 468-69, 88 S.E.2d at 582 (emphasis added). Therefore, if an injury is unexpected from the worker's point of view, it qualifies as an injury by accident.

Pee v. AVM, Inc., 352 S.C. 167, 170-71, 573 S.E.2d 785, 787 (2002). Stated succinctly, "no slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself the compensable accident." Sigmon v. Dayco Corp., 316 S.C. 260, 262, 449 S.E.2d 497, 498 (1994). See also Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct. App. 1996); Clade v. Champion Lab., 330 S.C. 8, 496 S.E.2d 856 (1998); Pee v. AVM, Inc., 344 S.C. 162, 543 S.E.2d 232 (Ct. App. 2001). In these cases and Jordan, the law is clear: so long as there is apparent to the rational mind,

upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury, the injury arises out of the employment.

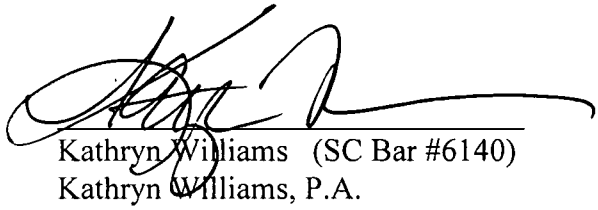
Here, Nicholson was clearly undertaking her work activities at the time she tripped and fell. Her activities at the time of her trip and fall were incidental to and consistent with her employment and arose from an aspect of her job, specifically walking to her meeting. When all the circumstances here are considered, the causal relationship between the work Nicholson was performing and her injury is abundantly apparent. Her injury arose out of her employment. Fault – whether on her part, the employers part, or even in the flooring – is not relevant.

The Court's decision reversing the Workers' Compensation Commission's ruling overlooks or misapprehends this settled law. The decision is contrary to decisions of both this Court and the Supreme Court of South Carolina. The Court should grant this Petition, rehear this matter, withdraw its previous decision, and issue a new opinion affirming the Commission's ruling in its entirety.

The illogical result of the Court's decision in this case is perhaps best illustrated by the comparison with our appellate court decisions regarding the personal comfort doctrine. This doctrine has been consistently used to supply the "arising out of" requirement to bring such activities as eating, drinking, seeking relief from discomfort, and even smoking within the purview of workers' compensation. See e.g. Mack v. Post Exchange, 207 S.C. 258, 35 S.E.2d 838 (1945); Osteen v. Greenville Co. School Dist., 333 S.C. 43, 508 S.E.2d 21 (1998). Under the Court's opinion in this case, we are left with the unjustifiable result that had Nicholson been on her way to the bathroom at the time of her injury, compensation would have been allowed under the personal comfort doctrine; but since she was engaged in actual productive work activity, compensation is denied.

Furthermore, because of the exceptional importance of this issue, pursuant to Rule 219(b), SCACR, Nicholson suggests that such rehearing be considered *en banc*. This published decision will be used by the members of the Workers' Compensation Commission, workers' compensation defense attorneys, and workers' compensation insurance adjusters to deny benefits for any and all falls at work and demand proof of some fault on the part of the employer or employer's premises. Further, it is not difficult to see how this decision could be used to argue for a showing of fault in a wide number of situations beyond falls where the injury could arguably have occurred in some setting outside the place of employment. The importance of this issue to the workers' compensation bar cannot be overstated due to the significant change in the law it represents.

Respectfully submitted,



Kathryn Williams (SC Bar #6140)
Kathryn Williams, P.A.
P.O. Box 10693
Greenville, SC 29603
(864) 235-6254

Attorney for Petitioner

9/18/13

KATHRYN WILLIAMS, P.A.
ATTORNEYS AT LAW
POST OFFICE BOX 10693
GREENVILLE, SC 29603

KATHRYN WILLIAMS
DONALD E. KAMB, JR.
ANDREW N. PRICE
TOM J. ERVIN
OF COUNSEL

619 N. MAIN STREET
GREENVILLE, SC 29601
TELEPHONE (864) 235-6254
FAX (864) 233-6591

September 18, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: **Carolyn M. Nicholson v. S.C. Dep't of Social Serv., et al.**
WCC File No.: 0901585
Court of Appeals Opinion No.: 5171
Court of Appeals Case Tracking No.: 2012-206507

Dear Ms. Kitchings:

Enclosed herein please find the following items for filing in the above-referenced matter:

1. Petition for Rehearing (original and six copies);
2. Certificate of Service by Mail on respondent;
3. Filing fee.

By copy of this letter, we are serving defendants' attorneys with a copy of the same.

Kindest regards,

Yours truly,

Kathryn Williams

KW:d
Enclosure

cc: L. Brenn Watson, Esq.
Zachary M. Smith, Esq.
Willson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Dr.
Greenville, SC 29607

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2012-206507
Op. No. 5171, Filed September 4, 2013

Carolyn M. Nicholson, Claimant, ... Petitioner,

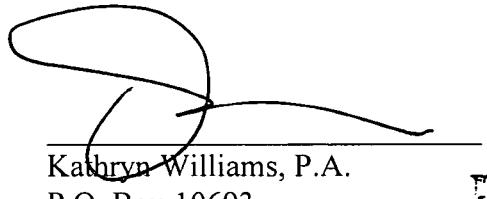
vs.

S.C. Dep't of Social Services, Employer, and
State Accident Fund, Carrier, Defendants, ... Respondents.

CERTIFICATE OF SERVICE

I certify that the Petition for Rehearing was served on Respondents on September 18th, 2013 by depositing a copy in the U.S. Mail, postage prepaid, addressed to the attorneys of record:

L. Brenn Watson, Esq.
Zachary M. Smith, Esq.
Willson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Dr.
Greenville, SC 29607



Kathryn Williams, P.A.
P.O. Box 10693
Greenville, SC 29603
(864) 235-6254
Attorney for Petitioner