

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 0901585

RECEIVED

OCT 21 2013

SC Court of Appeals

Carolyn M. Nicholson, Claimant,

Respondent,

v.

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

Appellants.

RETURN TO PETITION FOR REHEARING

Respondent Carolyn M. Nicholson ("Nicholson") sets forth in her Petition for Rehearing two grounds as a basis for this Court to reconsider its decision, Opinion No. 5171, filed September 4, 2013. However, as discussed in detail below, neither of Nicholson's grounds for rehearing is sufficient for this Court to grant her Petition for Rehearing, and the Petition should be denied.

I. The Court properly defined and interpreted the "arising out of" the employment requirement in S.C. Code Ann. § 42-1-160.

Nicholson's first argument is that the Court misapprehended the "arising out of" the employment requirement because it concluded that "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.*'"

(Emphasis added). Nicholson contends that this language has been rebuffed and modified by our Supreme Court in favor of a requirement that to meet the “arising out of” the employment prong, “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.” However, Nicholson’s argument is clearly without merit.

In Eargle v. South Carolina Elec. & Gas Co., the Supreme Court of South Carolina quoted with approval the following definition of “arising out of” the employment:

It [the injury] arises “out of” the employment, when there is apparent to the rational mind up on 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 is 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 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.

205 S.C. 423, 32 S.E.2d 240 (1944)(quoting Re Employers’ Liability Assurance Corp., 102 N.E. 697 (Mass. 1913)(Emphasis added).

In her Petition, Nicholson attempts to cast doubt on the Supreme Court’s definition of “arising out of” in Eargle by referencing decisions from the Supreme Judicial Court of Massachusetts. Nicholson specifically highlights the fact that years after its decision in Re Employers’ Liability Assurance Corp. (the case from which the Eargle Court quoted), the Massachusetts Court subsequently abandoned the requirement that “the causative danger must be

peculiar to the work and not common to the neighborhood.” See Caswell’s Case, 26 N.E.2d 328 (Mass. 1940). Nicholson notes that the Massachusetts Court broadened its definition of “arising out of” by holding that “an 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.” Id. However, the Massachusetts Court’s decision in Caswell’s Case has absolutely no effect on our Supreme Court’s decision in Eargle, and since this Court is bound by the decisions of the Supreme Court of South Carolina, any decision from the Massachusetts Court has absolutely no bearing on this Court’s decision.

That being said, it should be noted that while Nicholson dedicates approximately two pages of her Petition to citing and outlining irrelevant decisions from the Massachusetts Courts regarding the definition and interpretation of “arising out of” the employment, she fails to point out that Caswell’s Case was decided four years *prior to* the Supreme Court of South Carolina’s decision in Eargle. Thus, when deciding Eargle, our Supreme Court could have adopted the broader definition of “arising out of” by quoting the Massachusetts Court’s decision in Caswell’s Case. However, it instead chose to quote the definition enunciated in Re Employers’ Liability Assurance Corp., which included the language that “the causative danger must be peculiar to the work and not common to the neighborhood.”

Additionally, even though Nicholson asserts that “[t]he South Carolina Supreme Court embraced this change [*i.e.*, the removal of the requirement that ‘the causative danger must be peculiar to the work and not common to the neighborhood’] in the definition of ‘arising out of’ by quoting approvingly from Caswell’s Case in its decision in Jordan v. Dixie Chevrolet,” her assertion is clearly misplaced and unsound.

In Jordan, the claimant, who worked in a paint and body shop and who had been idle all day because he had not been assigned any work by his employer, was sitting in the front seat of a police car that had been brought to the shop for repairs. Jordan v. Dixie Chevrolet, 218 S.C. 73, 76, 61 S.E.2d 654, 655 (1950). While another employee was working on the police car, the claimant removed an object from the glove compartment. Id. Not knowing that the object was a tear gas bomb, the claimant pulled the cotter pin, which released the contents of the bomb, and as a result, the claimant sustained an injury to his eye. Id. The Commission denied the claimant's claim for benefits on the grounds that he did not sustained an injury arising out of his employment because "his handling of the tear gas bomb was merely to pass the time and his pulling of the cotter pin thereof was in pursuit of natural curiosity which resulted so unfortunately to himself." Id. at 77, 61 S.E.2d at 656. On appeal, the Supreme Court reversed the Commission's decision and found the claim compensable. Id. at 86, 61 S.E.2d at 660. The Court noted that the case fell into a specific class of cases, "where one, while awaiting a work assignment during working hours at his place of employment in idle curiosity tampers with a strange object, *which is present by reason of the nature of the employer's business*, is injured, bearing in mind that negligence and contributory negligence are of no consequence in Workmen's Compensation cases." Id. at 77, 61 S.E.2d at 656. (Emphasis added). The Court noted that since this was the first 'curiosity' case to come before the Court, it looked at other jurisdictions for guidance. Id.

During its thorough review of other jurisdictions, the Court cited and quoted directly from several cases, including Caswell's Case. Id. However, while Nicholson contends that the Supreme Court "embraced" the removal of the necessity that "the causative danger must be peculiar to the work and not common to the neighborhood" in the definition of "arising out of"

by quoting Caswell's Case and while she alleges that this Court "overlooked or misapprehended" this change in the definition, it appears that Nicholson overlooked or misapprehended the Supreme Court's decision in Jordan. First, before divulging into its review of case law from other jurisdictions, the Court stated: "**It is obvious in the instant case that without the employment the injury would not have occurred, as it arose from a danger which was part of the work environment and not common to the neighborhood.**" Id. at 77, 61 S.E.2d at 656. (Emphasis added). Additionally, the Court noted that the "most recent and enlightening decision in point" was the Maryland District Court's decision in Bethlehem Steel Co. v. Parker, D.C., 64 F.Supp. 615,¹ which held that a claimant's injury, which occurred while looking up a ship's dump waiter shaft out of curiosity, was compensable because it arose out of her employment since "her action was not in any sense a striking or intentional departure from her duties but at most a slight and casual one occasioned apparently by not unnatural curiosity on her part to see something which attracted her *in her unusual environment* arising in the course of her general duty to return to her work on the upper deck." Id. at 81-84, 61 S.E.2d at 658-59. (Emphasis added).

It is clear that the Supreme Court's decision in Jordan did not alter or modify its prior interpretation of the "arising out of" the employment requirement. Moreover, following its decision in Jordan, the Supreme Court restated and affirmed the necessity that "the causative danger must be peculiar to the work and not common to the neighborhood" in order for an injury to "arise out of" the employment. See Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965). Accordingly, despite Nicholson's argument to the contrary, this Court correctly stated

¹ This case involved the Federal Longshoremen's and Harbor Workers' Compensation Act, which our Supreme Court noted "is identical with the requirement of our Compensation Act that a compensable accident must be one which arises out of and in the course of employment." Jordan, 218 S.C. at 81, 61 S.E.2d at 658.

that “under the standard enunciated in *Douglas*, 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.’”

Applying this standard to the present case, this Court appropriately determined that Nicholson’s injury did not “arise out of” her employment because the alleged causative danger – the carpet – was not peculiar to her employment and was a risk that was common to the neighborhood. The sole reason for Nicholson’s fall was that her shoe “frictioned” the carpet. Nicholson’s own testimony establishes that the carpet in SCDSS’s in building was very common and that it was level, free from defect, and did not buckle or move when her foot scuffed it. Additionally, there were no other conditions or obligations of her employment that contributed to her fall or subsequent injuries.

II. The Court’s current decision does not introduce fault into the workers’ compensation system.

Nicholson also argues that the Court’s decision in this case introduces fault and premises liability concepts into the no-fault workers’ compensation system; however, this argument is nothing more than an attempt to confuse the issue in this claim. SCDSS has never argued negligence or fault as a defense to her claim, and it is undisputed that negligence and contributory negligence are of no consequence in workers’ compensation cases. *See Jordan*, 218 at 77, 61 S.E.2d at 656.

Additionally, in her Petition, Nicholson specifically states:

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 compensable under the Workers’ Compensation Act. To the contrary, as often stated in workers’ compensation law, it is the unexpected result of the work activity that is the compensable injury. *Pee v. AVM, Inc.*, 352 S.C. 167, 573 S.E.2d 785 (2002).

However, Nicholson's reliance on this Court's decision in Pee is misplaced. In Pee, the employer admitted causation, and the sole issue before this Court was whether the claimant's repetitive trauma injury was an "*injury by accident.*" Pee, 352 at 170, 573 S.E.2d at 787. The issue in the present case was not whether Nicholson sustained an "injury by accident," but rather whether her injury "arose out of" her employment. Thus, since this Court was not asked to address the "arising out of" requirement in Pee, its holding is not applicable or pertinent to the present case.

Further, while Nicholson argues that her injury should be compensable simply because she was undertaking her work activities at the time she tripped and fell, her position is obviously debunked by our Supreme Court's prior decisions. See Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1955) ("To say that an injury arises out of the employment in every case where an employee was required to be at the place where the injury occurred would effectively eliminate an essential requirement of the statute."); Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010) ([M]erely being on an employer's premises, without more, does not automatically confer compensability for an injury."); Bright v. Orr-Lyons Mills, 285 S.C. 58, 328 S.E.2d 68 (1985) ("An accidental injury is not rendered compensable by the mere fact that it occurred on the employer's premises. To so hold, would be to abandon the requirement that an accident bear some logical causal relation to the employment.").

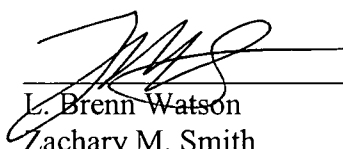
As indicated by this Court's decision in the present case, if Nicholson's interpretation of the "arising out of" the employment prong was the actual law in South Carolina, then the Supreme Court in Pierre would not have examined whether there was evidence that "the source of the injury was a risk associated with the conditions under which the employees were required to live," and the Court would have held that the claimant's injury was compensable because he

was on the employer's premises performing activities that were incidental to and consistent with his employment. Instead, in determining that the claimant's injury arose out of his employment, the Court analyzed the evidence and concluded that since the claimant's injury arose from a hazard on the employer's premise (i.e., the wet sidewalk), and thus, the requisite work connection was established. Pierre, 386 S.C. at 549, 689 S.E.2d at 623.

Therefore, based on the foregoing, Nicholson's Petition for Rehearing fails to include a sufficient ground for rehearing, and the Petition should be denied.

Respectfully submitted,

October 15, 2013



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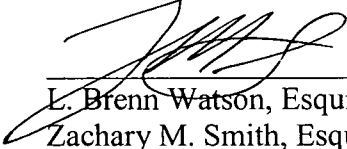
S.C. Dep't. of Social Services, Employer, and
State Accident Fund, Carrier, Defendants,

Appellants.

PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing on Carolyn M. Nicholson by depositing a copy of it in the United State Mail, postage prepaid, on October 15, 2013, addressed to her attorney of record, Kathryn Williams, 619 N. Main Street, P.O. Box 10693, Greenville, South Carolina 29603.

October 15, 2013



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October 15, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Carolyn M. Nicholson vs. SCDSS
Case Tracking No.: 2012-206507
WCC File No.: 0901585 DOI: 2/26/2009
Carrier: State Accident Fund - Claim No.: 2009-733
WJC&B File No.: 0385.00406

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of Defendants' Return to Petition for Rehearing in the above-referenced case. I am also enclosing a Proof of Service indicating that a copy of the Return has been served on Ms. Nicholson's attorney, Kathryn Williams, Esquire.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



L. Brenn Watson

LBW/zms

Enclosures

cc: Ms. Kathryn Williams
Ms. Lindsay Sadler (via e-mail)

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