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, ... Respondent,

vs.

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

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**REPLY TO RETURN TO
PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC***

I. THE DECISION'S INTERPRETATION OF THE "ARISING OUT OF" REQUIREMENT IS UNNECCESSARILY RESTRICTIVE.

DSS points out that Caswell's Case, 26 N.E.2d 328, 330 (Mass. 1940) existed at the time of the South Carolina Supreme Court's decision in Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944) and that subsequent decisions by our appellate courts have sometimes continued to repeat the "peculiar to the work and not common to the neighborhood" language from Eargle and In Re Employers' Liability Assurance Corp., 102 N.E. 697 (Mass. 1913)(also known as

McNicol's Case). This is factually accurate, but it ignores the context in which this language has appeared.

While Eargle and other decisions repeat the language from McNicol's Case, this language is usually included as part of a boilerplate overview on the "arising out of" requirement. When these decisions are read closely, it is clear that this language has not controlled their outcomes. Cases like Eargle and Jordan v. Dixie Chevrolet, 218 S.C. 73, 61 S.E.2d 654 (1950) are representative of a shift away from language that proves onerous and unworkable, and these cases are not outliers. Many decisions that hinge on the "arising out of" prong have approvingly quoted the language that "[a]n injury arises out of employment when 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." These same decisions do not mention the "peculiar to the work and not common to the neighborhood" language. See Grant v. Grant Textiles, 372 S.C.196, 641 S.E.2d 869 (2007); Dukes v. Rural Metro Corp., 356 S.C. 107, 587 S.E.2d 687 (2003); Osteen v. Greenville Co. School Dist., 333 S.C. 43, 508 S.E.2d 21 (1998); Clade v. Champion Lab., 330 S.C. 8, 496 S.E.2d 856 (1998); Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); Loges v. Mack Trucks, Inc., 308 S.C. 134, 417 S.E.2d 538 (1992); Ardis v. Combined Ins. Co., 380 S.C. 313, 669 S.E.2d 628 (Ct.App. 2008); McGriff v. Worsley Co., 376 S.C. 103, 654 S.E.2d 856 (Ct.App. 2007); Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct.App. 2006); Stone v. Traylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct.App. 2004); Eaddy v. Smurfit-Stone Cont. Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct.App. 2003); Holley v. Owens Corning Fiberglas Corp., 301 S.C. 519, 392 S.E.2d 804 (Ct.App. 1990). This is the better view. This language—a rule of reason that is based on rational connections—supports the holdings of Caswell's Case and Jordan, and this rule is contrary to the language of McNicol's Case, which is based on causation.

The reason for this shift is that the "peculiar to the work and not common to the neighborhood" language sounds reasonable but proves unworkable and restrictive. Under DSS's reasoning, a happenstance injury—a scuffed trip-and-fall—on a level floor will not be compensable because level floors are common outside the workplace. By the same reasoning, a fall down the stairs will not be compensable; stairs exist outside of the workplace and are common to the neighborhood. Similarly, a chef or restaurant worker who accidentally cuts herself while working will not be compensated because knives exist outside the workplace and are common to the neighborhood. The possibilities are endless, and such outcomes are contrary to the purpose of the Workers' Compensation Act, as the courts noted in Caswell's Case and Jordan. It does not matter that the injury is not the employer's fault. What matters is that the injury has a reasonable and rational connection to the employee's work. That connection exists here. Ms. Nicholson was injured while she was trying to do her work.

DSS's reliance on Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965) is misplaced. While the Douglas decision does include the "peculiar to the work and not common to the neighborhood" language, the holding of the case did not turn on that language. Instead, it turned on the fact that there was no rational connection between Mr. Douglas' injury (he was in a car wreck while he was off of work and driving to a hearing) and his job. Ms. Nicholson's injury has a rational connection—she tripped while she was working. Douglas is meaningfully different.

The same is true for other cases. Consider the decisions in Shuler v. Gregory Electric and West v. Alliance Capital. Both of them cite Douglas and the same "common to the neighborhood" language, but both decisions affirm favorable results for the injured workers because the commission determined that the injuries occurred while the injured workers were fulfilling duties of their employment or involved in activities for the employer's benefit. See Shuler, 366 S.C. 435, 622

S.E.2d 569 (Ct. App. 2005); West, 368 S.C. 246, 628 S.E.2d 279 (Ct. App. 2006). That test is satisfied here.

II. THE CURRENT DECISION INDRODUCES FAULT INTO THE WORKERS' COMPENSATION SYSTEM.

DSS states that this Court's decision does not introduce fault into the no-fault workers' compensation system. Respectfully, DSS is wrong. The requirement that Nicholson show some fault in the flooring for her injury to be compensable focuses on the proximate cause of her injury, which as Professor Larson explained, is "suffused with the idea of fault" and has no place in workers' compensation. Larson, Workers' Compensation Law, § 3.06 (2005). See also Larson, Workers' Compensation Law, § 1.03 (2005). The proper test for whether an injury arises out of employment is the relationship of the injury to the employment, rather than the relationship of any fault to the injury. The language of Pee v. AVM, Inc., 352 S.C. 167, 170-71, 573 S.E.2d 785, 787 (2002) is relevant: "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." Pee v. AVM, Inc., 352 S.C. 167, 171 n. 3, 573 S.E.2d 785, 787 n.3 (2002).

Nicholson does not argue that her injury is compensable simply because she was on her employer's premises at the time of the fall. The reason her injury is compensable is that her performance of work activities brought her in contact with the risk that brought about her injury. This is precisely why the Supreme Court in Pierre v. Seaside Farms, Inc., 386 S.C. 534, 549, 689 S.E.2d 615, 623 (2010) looked to whether "the source of the injury was a risk associated with the conditions under which the employees were required to live."

Tellingly, DSS does not dispute that had claimant been on her way to the bathroom when this accident occurred, her injuries would have been compensable. It defies logic to deny compensation

because she was actively furthering her employers' business as opposed to attending to a personal need.

This Court's decision in this case is contrary to prior 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. Because of the exceptional importance of this issue, pursuant to Rule 219(b), SCACR, Nicholson suggests that such rehearing be considered *en banc*.

Respectfully submitted,

Kathryn Williams (SC Bar #6140)
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Dated: 10/28/13
Greenville, South Carolina

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

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

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause Respondent's Reply to Return to Petition for Rehearing to be served by first-class U.S. Mail, proper postage prepaid, on the 28th day of October, 2013, addressed to the following:

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

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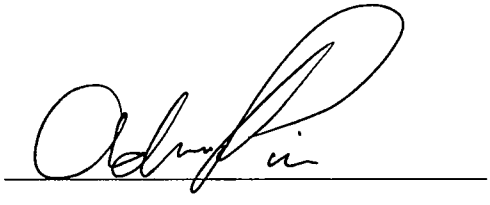

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October 28, 2013

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. Reply to Return to Petition for Rehearing (original and six copies);
2. Certificate of Service by Mail on Appellants.

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

Kindest regards,

Yours truly,

for
Kathryn Williams

KW:anp
Enclosure

cc: L. Brenn Watson, Esq.
Zachary M. Smith, Esq.
Willson, Jones, Carter & Baxley, P.A.

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