

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5171 (S.C. Ct. App. filed Sept. 4, 2013)

Carolyn M. Nicholson, Claimant,

Petitioner,

v.

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

Respondents.

RETURN TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has Petitioner stated any grounds upon which this Court should grant a writ of certiorari?

STATEMENT OF THE CASE

Petitioner Carolyn Nicholson (“Nicholson”) worked as a supervisor in the investigations department at the South Carolina Department of Social Services (“SCDSS”). (R. p. 49, lines 21-23). As a part of her job with SCDSS, Nicholson attended internal audit meetings every Thursday to review and update the case files. (R. p. 51, lines 4-9). On Thursday, February 26, 2009, Nicholson was scheduled for a regular, internal audit meeting, which was held on the lower floor of SCDSS’s building. (R. p. 51, lines 4-16). That day, Nicholson grabbed her files, left her office, signed out on the sign out board, and began walking down the hallway to the audit meeting. (R. p. 55, line 15–p. 56, line 1). The floor in the hallway was a normal, level, carpeted floor. (R. p. 56, lines 2-12). The carpet on the floor in the hallway was free from defect, and there was no debris on the floor. (R. p. 56, lines 13-22).

While walking down the hallway, Nicholson’s shoe “frictioned” the carpet, causing her to fall. (R. p. 52, lines 7-13). As a result of her fall, Nicholson alleged that she sustained compensable injuries to her neck, left shoulder, and back. (R. p. 27). SCDSS and its insurance carrier, the State Accident Fund, denied that Nicholson’s fall constituted a compensable injury by accident under the Workers’ Compensation Act. (R. p. 29). The original hearing in this matter was held before the Single Commissioner on March 16, 2011. (R. p. 17).

At the hearing, Nicholson testified that there was nothing peculiar about the hallway or floor in SCDSS’s building that caused her to fall on February 26, 2009. (R. p. 57, lines 7-13). Nicholson testified that the sole reason for her fall on February 26, 2009 was that her shoe

“frictioned” the carpet. (R. p. 57, lines 17-21). While Nicholson was carrying case files in her hands at the time of her fall, the files she was carrying had nothing to do with her fall. (R. p. 64, lines 2-7; p. 65, lines 18-21). Finally, Nicholson specifically testified that her fall could have happened on any level, carpeted surface outside of SCDSS’s building and that the only thing connecting her fall to her employment was that she happened to be at work when her fall occurred. (R. p. 60, lines 1-7; p. 61, lines 2-8).

On April 26, 2011, the Single Commissioner issued his Decision and Order finding that Nicholson failed to prove by a preponderance of the evidence that her alleged injury arose out of her employment with SCDSS. (R. p. 25). The Single Commissioner specifically found that Nicholson failed to prove a causal connection between her fall on February 26, 2009 and her employment with SCDSS. (R. p. 24). Additionally, the Single Commissioner found that Nicholson’s fall was “wholly unrelated to her employment,” that Nicholson’s employment with SCDSS was not a contributing cause of her alleged injury, and that Nicholson’s employment with SCDSS did not contribute to the effect of her fall. (R. pp. 24-25).

Nicholson appealed to the Appellate Panel of the South Carolina Workers’ Compensation Commission (“Commission”). (R. pp. 30-32). In a split decision, the Commission reversed the Single Commissioner and found that Nicholson sustained a compensable injury to her neck, back, and left shoulder by accident arising out of and in the course of her employment with SCDSS. (R. pp. 9-11). SCDSS timely filed an appeal to the South Carolina Court of Appeals. (R. pp. 33-44). By Opinion filed September 4, 2013, the Court of Appeals reversed the Commission and held that Nicholson did not sustain an injury by accident “arising out of” her employment because she failed to show a causal connection between her injuries and her employment. (Appendix, pp. 54-65).

ARGUMENTS

In response to Petitioner Nicholson's questions presented and related arguments, Respondents offer the following arguments in support of their position that this Honorable Court should not issue a writ of certiorari.

I. The Court of Appeals properly determined that Nicholson's fall did not arise out of her employment with SCDSS.

In order to be entitled to workers' compensation benefits, a claimant must show that he or she sustained an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2012). The two parts of the phrase "arising out of and in the course of employment" are not synonymous. Osteen v. Greenville Cnty. Sch. Dist., 333 S.C. 43, 508 S.E.2d 21 (1998). The mere fact that an injury occurred in the course of employment is *not* a basis for an award. Lorick v. South Carolina Elec. & Gas, 245 S.C. 513, 141 S.E.2d 662 (1965); Evans v. Jones-Wilson, Inc., 235 S.C. 219, 110 S.E.2d 851 (1959); Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1955)(Emphasis added). Rather, to sustain an award under the Workmen's Compensation Act, it must appear that the injury resulted from an accident which both "arose out of" *and* "in the course of" employment. Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965)(Emphasis added). "Arising out of" refers to the injury's origin and cause, whereas "in the course of" refers to the injury's time, place, and circumstances. Osteen, 333 S.C. at 50, 508 S.E. 2d at 24 (1998).

Since it was undisputed that Nicholson's injuries occurred "in the course of" her employment, the sole issue before the Court of Appeals was whether Nicholson's injuries arose out of her employment. (*See* Appendix, p. 58). In her Petition, Nicholson first argues that the Court of Appeals misapprehended the "arising out of" the employment requirement because the Court focused on definitions that "exclude injuries from a hazard to which a worker 'would be

equally exposed apart from the employment' and require the source of the injury to be a risk 'peculiar to the work and not common to the neighborhood.'" (See Petition, p. 3). Nicholson contends that these definitions have been abandoned by this Court in favor of a broader requirement that to meet the "arising out of" the employment prong, there need only be a causal connection between the conditions under which the work is performed and the resulting injury. Nicholson's argument is clearly without merit.

In Eargle v. South Carolina Elec. & Gas Co., this Court 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).

Nicholson attempts to cast doubt on this 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 did not change the law in South Carolina. In fact, while Nicholson provides a thorough history of Massachusetts Court’s interpretation and definition of the “arising out of” requirement, 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, this 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.” (See Eargle, 205 S.C. at 429, 32 S.E.2d at 243).

Additionally, even though Nicholson asserts that “[t]his 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’] 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 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, this Court reversed the Commission's decision and found the claim compensable. Id. at 86, 61 S.E.2d at 660. This Court noted 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 this 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 the Court of Appeals erred by not considering this change in the definition, it appears that Nicholson has 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 this 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, this Court restated and affirmed that the “proper rule” as to when an injury may be said to arise out of the employment is as follows:

It arises ‘out of’ the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection 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

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.

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.

Carter v. Penney Tire & Recapping Co., 261 S.C. 64, 200 S.E. 64 (1973)(citing Mazursky v. Industrial Comm., 364 Ill. 445, 449, 4 N.E.2d 823, 825); *See also* Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965). Accordingly, despite Nicholson’s argument to the contrary, the Court of Appeals correctly stated 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.’” (Appendix, p. 64).

Applying this standard to the present case, the Court of Appeals 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 of Appeals’ decision does not introduce fault into the workers’ compensation system.

Nicholson’s second argument in her Petition is that the Court of Appeals’ decision 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.

Nicholson's assertion that the Court of Appeals' decision introduces fault into the workers' compensation system is merely an attempt to distract this Court from focusing on the real issue – whether her accident arose “out of” her employment. In effect, Nicholson's argument asks this Court to “line-item veto” the longstanding and necessary requirement that an injury must result from an accident “arising out of” the employment in order to be compensable; and thus, any injury by accident occurring while an employee is on the “clock” would be compensable. To accept this argument would abandon the requirement that an accident bear some logical causal relationship to the employment.

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 on a level floor compensable. 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 this 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 the Court of Appeals’ decision in the present case, if Nicholson’s interpretation of the “arising out of” requirement was the actual law in South Carolina, then this 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 the claimant’s injury was compensable simply because he was on the employer’s premises performing activities that were incidental to and consistent with his employment. (See Appendix, p.p. 61-62). Instead, in Pierre, this Court determined that the claimant’s injury arose out of his employment because his 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.

Unlike Pierre, Nicholson’s injury did not arise from a special condition or hazard in SCDSS’s building. The sole reason for Nicholson’s fall was that she did not lift her foot high enough while stepping forward. The carpet in SCDSS’s in building was level, free from defect, and did not buckle or move when her foot scuffed it. (R. p. 56, lines 2-22). Further, based on Nicholson’s own testimony, her fall could have happened on any level, carpeted surface outside of SCDSS’s building, and the only thing connecting her fall to her employment was that she

happened to be at work when her fall occurred. (R. p. 60, lines 1-7; p. 61, lines 2-8). As this Court has previously held, a level floor in a place of employment, without any special condition or circumstance, is not a hazard or risk associated with the employment. Bagwell 227 S.C. at 454, 88 S.E.2d at 615. Accordingly, the Court of Appeals properly determined that Nicholson did not sustain an injury by accident arising out of her employment with SCDSS.

Nicholson also attempts to convolute the issue on appeal by arguing that the Court of Appeals' decision is illogical when comparing it to our prior appellate court decisions regarding the personal comfort doctrine. Nicholson asserts that the personal comfort doctrine is used to satisfy the "arising out of" requirement to bring such activities as eating, drinking, and seeking relief from discomfort, and she contends she would have been allowed compensation if her fall would have occurred while walking to the bathroom to seek relief. However, this argument is flawed.

The personal comfort doctrine aids a court in determining whether, and under what circumstances, entirely personal activities engaged in by an employee at work may be considered incidental to employment. Osteen, 333 S.C. at 46, 508 S.C. 2nd at 23. In his treatise, Professor Larson outlines the general rule as to personal comfort is stated in:

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave *the course of employment*, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Larson's Workers' Compensation Law, § 21.00 (2013). Thus, the personal comfort doctrine is designed to bring certain acts within the "course of employment."

Although the "arising out of" and "in the course of" employment requirements are somewhat overlapping, they are not synonymous and both must exist simultaneously to allow the

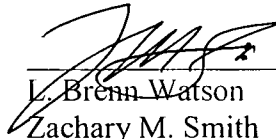
claimant to recover. Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007). Accordingly, even if Nicholson's fall would have occurred while she was walking to the bathroom, she would still have to show that her injury by accident arose out of her employment. *See Dukes v. Rural Metro Corp.*, 356 S.C. 107, 587 S.E.2d 687 (2003). Therefore, contrary to Nicholson's argument, the result would have been the same.

CONCLUSION

For the foregoing reasons, this Honorable Court should decline to grant Nicholson's Petition for Writ of Certiorari.

Respectfully submitted,

March 21, 2014



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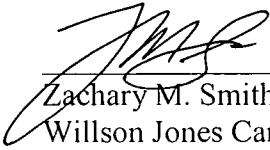
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PROOF OF SERVICE

I certify that I have served the Return to Petition for Writ of Certiorari on Carolyn M. Nicholson by depositing a copy of it in the United State Mail, postage prepaid, on March 21, 2014, addressed to her attorney of record, Kathryn Williams, 619 N. Main Street, P.O. Box 10693, Greenville, South Carolina 29603.

March 21, 2014



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