THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Andrea C. Roche, Commissioner
Gene McCaskill., Commissioner

WCC File No. 1214612

James Smoak,..... Respondent,

v.

Husqvarna and Ace American Insurance Company.....Appellants.

FINAL BRIEF OF APPELLANTS

May 21st, 2014

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STATEMENT OF THE CASE

This is a denied claim. On October 17, 2012, the Appellant, James Smoak, (Claimant), contends that he injured his back when he had to **bend** over a lawnmower to plug in the electrical safety plug. The claimant was wearing a white back brace at the time of the incident and was actively treating with his chiropractor for back problems.

After several employees came to the aid of the claimant, he informed his supervisor, Jacqueline Holman that his back was hurting and that he had this problem all the time. He further stated that he was having a flare up and that a flare up had not occurred on the job before. He told the witnesses that he sees the chiropractor on a monthly basis for his ongoing back problems. His father drove the Claimant to the family chiropractor immediately after this incident.

The claimant's history of back problems is extensive. The most recent incident prior October 2012 was when he felt back pain while moving furniture at home in June of 2012. The

pain was so intense that he had to visit his doctor on June 19, 2012 and be put on pain medications. He was back at the doctor on June 22, 2013 with back pain, on July 20, 2012 with back spasms and on September 24, 2012, weeks before this incident, with back pain. The defendants denied the claim on the basis that the claimant did not suffer an injury by accident. The Single Commissioner found that the claimant did suffer an injury by accident and the defendants appealed. The Full Commission affirmed the Single Commissioner's determination. The Appellants Husqvarna and Ace American Insurance (Defendants) appealed to this court.

ARGUMENT I

THE CLAIMANT DID NOT MEET HIS BURDEN OF PROVING AND THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT SUSTAINED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF HIS COURSE AND SCOPE OF EMPLOYMENT, THUS ENTITLING HIM TO WORKERS COMPENSATION BENEFITS.

In order to be entitled to Workers Compensation benefits, the employee must show he sustained an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160. The term "arising out of" in the Workers' Compensation Act refers to the origin of the cause of the accident, while the term "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Owings v. Anderson County Sheriff's Department,* 315 S.C. 297, 433 S.E.2d 869 (1993). "An 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." *Id.* Excluded from the Act, however, is 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. *Jones v. Hampton*

Pontiac, 304 S.C. 440, 405 S.E.2d 395 (1991) (quoting *Eargle v. South Carolina Electric and Gas,* 205 S.C. 423, 32 S.E.2d 240 (1944)).

An injury by accident includes not only an injury the means or cause of which is itself and accident, that is, an injury occurring **unexpectedly** from the operation of internal or subjective conditions without the prior occurrence of any external event of an accidental character. *Linen v. Beaufort County Sherriff's Dept..* 408, S.E.2d, 250 (Ct. App. 1991). The claimant's resulted back problems were not unexpected. On August 21, 2005, the claimant was taken by the ambulance to from Carowinds to the Emergency Room. The Claimant's medical records state that his lower back was injured when he "**bent** over to pick something up and felt like my back exploded. " (R. Vol. I, p. 108). At his June 22, 2007 visit with the chiropractor, the claimant was cautioned at work to not do any lifting **bending** or twisting. (R. Vol. II, p. 648). When questioned about this doctor's report, the claimant stated that "anytime he does any deep **bending**, he will either feel it tighten up in his back." (R. Vol. I. p. 51; lines 12-15). On October 17, 2012, after this incident, the claimant tells the chiropractor that he **bent** over the lawn mower and felt sharp **catching** pain. (R. Vol. II. p 653). The claimant was again warned by the chiropractor to do no **bending**, lifting or twisting. Dr. Sweet states in his report of December 11, 2012 that the claimant has some pain 1-2, unless he "**bends** over and has more pain in back." (R. Vol. II p. 673). The claimant in our case would have had this problem if he did deep bending anywhere and the bending was not unique to his employment. It is clear that the claimant's problem was not from a hazard that he would have equally been exposed to apart from employment.

The *Nicholson* court determined in reaching its decision that "the alleged causative danger , the carpet was very common." As the claimant's attorney states in his brief in this matter

"it was the strain of leaning and bending that caused the injury to the claimant's back." The alleged causative danger i.e bending is common as is the carpet was common in *Nicholson.* Based upon the recent decision of *Nicholson v. DSS*, this claim should be denied.

Assuming arguendo that the claimant did sustain an accidental injury for the mere reason that the claimant was bending or leaning over a lawnmower at the time that he got injured, there is no testimony as to how far he had to bend or lean across, or how long he bent or leaned. The claimant contends that he injured his back when he bent over to plug in an electrical safety plug while working on a lawnmower. (R. Vol. I p. 40 lines 7-25). In his Form 50, it states that he hurt his back while bending (R. Vol. I. p. 29). The doctor's notes state that he was bending over a lawnmower when he felt a sharp catching pain. (R. Vol. II p. 653). There was no testimony at any time as to: what type of lawnmower the claimant was working on, the height of the lawnmower in question, how far the claimant had to bend over the lawnmower, or how the claimant bent over the lawnmower. Therefore, for the Full Commission to determine that this act of "leaning" or "bending" was unique to the claimant's employment was speculation. Workers' compensation awards must not be based on surmise, conjecture or speculation. *Kennedy v. Williamsburg County,*242 S.C. 477, 131 S.E.2d 512 (1963).

The claimant contends that there is no evidence that shows that the claimant was having back problems while he worked for defendants. This is untrue. The claimant, on June 19, 2012, approximately four months before the accident and while working for the employer, visited the chiropractor and stated that he was bending and felt something catch. (R. Vol. II p. 647). The pain was so bad at that visit that he was put on Percocet, Motrin, and Flexeril. He also had to follow up with his chiropractor. The claimant was also apparently having back problems that

required him to wear a back brace the very day that he was injured. The claimant's attorney's contention that the claimant had no back problems while working for the employer is erroneous.

The claimant told Yvette Taylor, the Environmental Health and safety manager who was a first responder that he didn't want them to call an ambulance and that "this kind of thing happen (sic)to him all the time, he wanted to get to his chiropractor because his chiropractor knew exactly what to do to get him better." (R. Vol. I. p. 66; lines 17-24). The claimant further told Ms. Taylor that he had ice packs in his lunch bag for his use.(R. Vol. I. p. 67; lines 1-8) The claimant told witness Arthur Jamison that "his back from time to time would give out and that he just visited his chiropractor on Saturday, October 13th." (R. Vol. I. p. 143). Jacqueline Holman, who responded to the accident scene testified that the claimant was even wearing a back brace on the date of the incident. (R. Vol. I. p. 75; lines 8-13). Ms. Holman also states in her witness statement that the claimant told her that he split a disc in his back and that this did not come from the job. (R. Vol. I. p. 144). The Claimant told Eric Johnson who also came to his assistance after the injury that "he had been having this problem off and on for years." (R. Vol. I. p. 145). He told Tamara Martin, another witness, that "he dislocated a disc in his back again and that he has been suffering from this problem for twenty five years." (R. Vol. I. p. 146) He further told Ms. Martin that "he could not move at all" because "the last time this problem happened it was very painful." (R. Vol. I p. 146). The claimant has injured his back on numerous occasions and the injuries involved him "bending." Because this injury was not unexpected from his bending at work, it cannot be considered an injury by accident.

In *Havaird v. Columbia YMCA*, where the claimant, a masseuse at the YMCA, suffered from varicose veins, the court determined that the aggravation of the claimant's condition was a natural result of standing in his job, was not unexpected and did not constitute an accident.

Likewise in this case, the aggravation of the claimant's back condition was a natural result of the simple act of leaning or bending and was not an accident. Therefore, it was error to find it compensable.

This matter is also analagous to the situation decision of *Miller v. Springs Cotton Mills,* 225 S.C. 326, 82 S.E.2d 458 (1954). In *Miller*, our Supreme Court affirmed the denial of compensation based on the failure to show an injury by accident where claimant was not walking across a level floor, but was rising from a seated position when she twisted her knee; the court determined the injury was the result of some internal breakdown of the knee. *Miller v. Springs Cotton Mills,* 225 S.C. 326, 82 S.E.2d 458 (1954) *See also*; *Crosby v. Wal-Mart Store, Inc.*, 499 SE 2d 253 (Ct. App. 1998) (finding that when substantial evidence supports the conclusion that the cause of a fall is an internal breakdown of the knee, it is appropriate to deny workers' compensation benefits because of the lack of a causal connection between the injury and employment). Likewise in our case, the claimant was simply bending to plug in a safety plug. There was no injury by accident, but rather some sort of internal breakdown of the claimant's back. As such, the injury was not an accident and is not compensable.

In *Sharpe v. Case Produce Company*, the court held that in determining whether something constitutes and injury by accident, the focus is on the injury itself, not on some specific event. The Claimant suffered no "injury." The claimant had an incident at Carowinds in 2005 which resulted in medical treatment. (R. Vol. I pp 41-42). After that incident, he started going to the chiropractor (R. Vol. I pp. 41-42). The claimant visited Dr. Farnham on June 20, 2007 for back problems (R. Vol. II p. 649). At that time, he stated to the doctor that he had football lifting injuries over the years. He further stated that he has had problems with his back off and on since he was a teenager. (R. Vol. II p. 649). The claimant visited Dr. John Hayden on

August 17, 2010 for lower back pain and had to receive injections in addition to taking Flexeril (R. Vol. I p. 117). On June 19, 2012, approximately four months before the accident, the claimant visited the chiropractor and stated that he was bending and felt something catch. (R. Vol. II p. 647). He stated that "**any time he does any deep bending he will either feel it tighten up in his back" and "its almost like the disc wants to slip of place.**" The claimant even wore a back brace the day of the accident. The claimant knew that any bending would result in this sort of injury.

We respectfully request that this court review the evidence and make the determination that based upon the medical reports and testimony that the Claimant did not meet his burden of proving that he is entitled to benefits under the workers compensation act and that his benefits should be denied as a matter of law.

ARGUMENT II.

THE COMMISSION ERRED IN APPOINTING THE SOUTHEASTERN SPINE INSTITUTE AS THE AUTHORIZED TREATING FACILITY, THE ERROR BEING THAT THE DEFENDANTS HAVE THE RIGHT TO CHOSE THE TREATING PHYSICIAN PURSUANT TO MCKINNEY V. KIMBERLY CLARK CORP.

The Workers Compensation Commission committed an error of law when they appointed Southeastern Spine Institute as the authorized treating facility. There was no basis for this appointment and this was error because this is not a situation under 42-15-60(a),that calls for the Commission to appoint a treating physician because this is a denied case:

> (A) The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. In addition to it, the original artificial members as reasonably may be

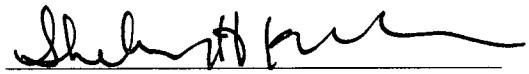
> necessary must be provided by the employer. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. The refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal, in which case the commission may order a change in the medical or hospital service. **If in an emergency, on account of the employer's failure to provide the medical care as specified in this section, a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, if ordered by the commission.**

The Employer did not fail to provide medical care as specified in this section because they were not obligated to do so under the statute. Therefore, there is no reason for the commission to order treatment by a specific physician. Pursuant to *McKinney v. Kimberly Clark Corp,* 658 S.E.2d 112 (App. 2008), the defendants have the right to chose the physician. Therefore, the Commission committed an error of law in appointing a physician in this instance for treatment.

CONCLUSION

Based on the above cited arguments, the Claimant would respectfully request that the Order of the Single Commissioner and Appellate Panel be reversed in its entirety.

Respectfully Submitted,



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In compliance with Rule 211, the Appellant's Final Brief is identical to the brief previously served under Rule 208 with the exception that it now contains references to the record.

May 21st, 2014

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants and Final Reply Brief by depositing a copy of the same in the United States Mail, postage prepaid, on May 21st, 2014 to the following parties, and or their representatives:

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