

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 A. Smoak,..... Emplòyee/Respondent,

v.

Husqvarna and Ace American Ins. Co. ....Carrier, Appellants.

---

**FINAL REPLY BRIEF**

---

21PT AK  
May 20, 2014



---

E. Ros Huff, Jr., Esquire #2767  
Shelby H. Kellahan, Esquire #74731  
HUFF LAW FIRM, LLC  
Post Office Box 1935  
.7244 Woodrow Street  
Irmo, South Carolina 29063  
(803) 252-2232 telephone  
Attorneys for Appellants

**RECEIVED**

MAY 21 2014

**SC Court of Appeals**

**TABLE OF CONTENTS**

Table of Authorities ..... 2

Arguments

**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..... 3**

**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...... 5**

Conclusion ..... 6

Certificate of Counsel..... 7

TABLE OF AUTHORITIES

Case Law

<i>Nicholson v. DSS, op. no. 5171 (S.C. Ct. App. filed Sept. 4 2013)</i> .....	4,5
<i>Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 109 (S.C. 1999)</i> .....	4

## ARGUMENTS

In response to Respondent/Claimant's Reply Brief, the defendants reply with the following:

### 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.**

#### **1. The claimant did not have an injury by accident.**

The claimant's attorney contends that this case is analogous to Sharpe v. Case Produce Co., 329 S.C. 534, 495 S.E.2d 790 (SC App. 1997). However, the claimant in Sharpe experienced problems with his back while loading tomatoes. The claimant in our case was not in the act of lifting or loading anything but rather, he was bending to plug in an electrical plug. Where lifting tomatoes was unique to Mr. Sharpe's employment, the claimant in our case could have had the same injury while bending anywhere. As the claimant states, "**any time he does any deep bending he will either feel it tighten up in his back" and "it's almost like the disc wants to slip out of place."** (R. Vol. I, p. 51 lines 12-15).

This matter is analogous to the recent decision of the South Carolina Court of Appeals in Nicholson v. SC Dept. of Social Services, Op. No. 5171 (S.C. Ct. App. filed Sept. 4, 2013). In Nicholson, the Appellate Panel of the Commission found that the claimant sustained compensable injuries to her neck, back and left shoulder when she fell while walking in a carpeted hallway of her workplace. DSS argued that the Commission erred because the claimant's injuries did not arise out of her employment. The South Carolina Court of Appeals

reversed the Commission's decision. The Court of Appeals noted in that decision that an injury is excluded from compensability under the Workers Compensation Act when it "comes from a hazard to which the workmen would have been equally exposed apart from the employment."

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. 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 June 19, 2012, the claimant visited the chiropractor for lower back pain when he was **bending** and felt a **catch** while moving furniture. (R. Vol. II, p. 647). 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 (R. Vol. II, p. 654). 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 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 Court determines 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, here is no testimony as to how far he had to bend or lean across, or how long he bent or leaned. A finding of compensability as to this simple act of bending or leaning would be based upon conjecture, speculation, and surmise.

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.

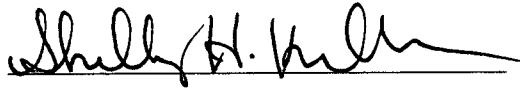
**2. The South Carolina Workers Compensation Commission Appellate Panel erred in determining that Southeastern Spine Institute is the authorized treating facility.**

The claimant's attorney contends that the Defendants refused to provide any treatment to the claimant and thus, the Commission can appoint a treating physician. This is untrue. The defendants did not refuse to provide treatment but rather denied that the claimant suffered a compensable injury thus entitling him to treatment. Once the case is found compensable, then it is the Defendants' right to choose the treating physician unless they refuse to provide treatment at that time. The South Carolina Workers Compensation Commission Appellate Panel committed error when they appointed SE Spine Institute as the treating physician.

**CONCLUSION**

Based on the above cited arguments, the Appellant/Defendants would respectfully request that the Order of the South Carolina Workers Compensation Commission Appellate Panel be reversed in its entirety.

Respectfully Submitted,

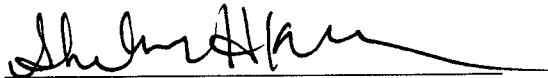
A handwritten signature in black ink, appearing to read "Shelby H. Kellahan", written over a horizontal line.

Shelby H. Kellahan, Esquire #74731  
Huff Law Firm, LLC  
Post Office Box 1935  
Irmo, South Carolina 29063-1935  
(803) 252-2232  
Attorneys for the Defendant

May 21, 2014  
Irmo, South Carolina

**Certificate of Counsel**

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



Shelby H. Kellahan, Esquire, #74731  
Huff Law Firm, LLC  
Post Office Box 1935  
Irmo, South Carolina 29063-1935  
(803) 252-2232  
Attorneys for the Defendants

May 21, 2014  
Irmo, South Carolina

**RECEIVED**  
MAY 21 2014  
**SC Court of Appeals**