THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 0901585

Carolyn M. Nicholson, Claimant, Petitioner,

v.

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

BRIEF OF RESPONDENTS

L. Brenn Watson
Zachary M. Smith
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
(864) 527-3292
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

I. DID THE SOUTH CAROLINA COURT OF APPEALS PROPERLY HOLD THAT NICHOLSON'S INJURY ON FEBRUARY 26, 2009 DID NOT "ARISE OUT OF" HER EMPLOYMENT WITH SCDSS?

STATEMENT OF THE CASE

On January 3, 2011, Appellant Carolyn Nicholson ("Nicholson") filed a Form 50, Request for Hearing before the South Carolina Workers' Compensation Commission, alleging she sustained injuries by accident to her neck, left shoulder, and back on February 26, 2009, which arose out of and in the course of her employment with the South Carolina Department of Social Services ("SCDSS"). (R. p. 27). Respondents, SCDSS and the State Accident Fund, filed a Form 51 on January 31, 2011 denying that Nicholson sustained a compensable injury by accident arising out of and in the course of her employment. (R. p. 29). A hearing was scheduled before Commissioner Derrick L. Williams ("Single Commissioner") on March 16, 2011 in Greenville, South Carolina. (R. p. 17).

At the hearing, Nicholson maintained she sustained a compensable injury by accident arising out of and in the course of her employment on February 26, 2009 when she fell while walking down a hallway. (R. p. 19). Nicholson sought payment of past causally related medical treatment, as well as additional medical treatment to her neck, left shoulder, and back. Id. Nicholson also sought temporary total disability benefits for her time out of work. Id. SCDSS continued to deny that Nicholson sustained a compensable injury. Id. Specifically, SCDSS asserted that Nicholson's injury did not "arise out of" her employment. Id.

On April 26, 2011, the Single Commissioner issued a Decision and Order finding 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 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 filed a Form 30, Request for Commission Review, on May 11, 2011. (R. pp. 30-32). Oral arguments were held before the Appellate Panel of the South Carolina Workers' Compensation Commission ("Commission") on September 20, 2011. (*See* R. p. 1). On December 29, 2011, the Commission filed a Decision and Order reversing the Single Commissioner's Order. Id. In a split decision, the Commission found Nicholson sustained compensable injuries to her neck, back, and left shoulder arising out of and in the course of her employment with SCDSS. (R. pp. 9-11).

On January 13, 2012, SCDSS timely filed a Notice of Appeal with the South Carolina Court of Appeals. (R. pp. 33-44). The Court of Appeals heard oral arguments on February 12, 2013. (*See* App. p. 54). 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. (App. pp. 54-65).

On September 18, 2013, Nicholson filed a Petition for Rehearing to the Court of Appeals and suggested a rehearing en banc. (App. pp. 68-86). The Court of Appeals denied both Nicholson's Petition for Hearing and her suggestion for rehearing en banc on January 24, 2014. (App. pp. 91-94). On February 19, 2014, Nicholson filed a Petition for Writ of Certiorari with this Court. This Court subsequently granted her Petition for Writ of Certiorari on May 29, 2014.

STATEMENT OF THE FACTS

The facts of this case are undisputed. (*See* App. p. 31). Nicholson worked as a supervisor in the investigations department at 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). 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 injuries to her neck, left shoulder, and back. (R. p. 47, lines 19-21).

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). 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). 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).

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Brown v. Greenwood Mills, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005). Under the scope of review established in the APA, the Court's review of the Workers' Compensation Commission's findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. S.C. Code Ann. § 1-23-380(5) (2008); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987). The Court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987). However, an award from the Commission cannot be based upon mere possibilities, probabilities, surmise or conjectures. Broughton v. S.C. Game & Fish Dep't., 219 S.C. 50, 64 S.E.2d 152 (1951).

Additionally, S.C. Code Ann. § 1-23-380(5) also provides that:

> **...The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:**
>
> **...**
>
> **(d) affected by other error of law; [or]**
>
> **(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; ...**

S.C. Code Ann. § 1-23-380 (5) (2008)(Emphasis added).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005)[citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)].

The issue of whether a particular event constitutes a compensable accident is for the Court. Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977). The question of whether an injury arose out of or in the course of the employment is one of law where the facts are admitted. Williams v. City of Columbia, 218 S.C. 287, 62 S.E.2d 469 (1950). Additionally, if the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965).

ARGUMENTS

I.

THE COURT OF APPEALS PROPERLY HELD THAT NICHOLSON DID NOT SUSTAIN A COMPENSABLE INJURY "ARISING OUT OF" HER EMPLOYMENT WITH SCDSS ON FEBRUARY 26, 2009.

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); Owings v. Anderson Cnty. Sheriff's Dep't, 315 S.C. 297, 433 S.E.2d 869 (1993). 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. S.C. 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. S.C. State Hosp., 245 S.C. 377, 140 S.E.2d 601 (1965)(Emphasis added). The term "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); Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965); Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998).

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. Crisp v. SouthCo., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013). However, 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 equally been exposed apart from the employment, does not arise out of the employment. Douglas, 245 S.C. 265, 140 S.E.2d 173 (1965); Crosby, 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998). Therefore, 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." Id.; *See also* Hicks v. Piedmont Cold Storage, Inc., 324 S.C. 628, 479 S.E.2d 831 (S.C. App. 1996); Cyrus v. Miller Tire Service, 208 S.C. 545, 38 S.E.2d 761 (1946).

In the present case, it is undisputed that Nicholson's injury occurred "in the course of" her employment. The sole issue is whether Nicholson's injury "arose out of" her employment with SCDSS. As discussed below, the Court of Appeals properly concluded Nicholson's injury did not "arise out of" her employment as required by the Act, and thus, was not compensable under South Carolina's workers' compensation laws.

A. The Court of Appeals properly interpreted the "arising out of" requirement.

In her Brief, Nicholson first argues that the Court of Appeals misapprehended the "arising out of" the employment requirement because it 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.'" (Brief of Petitioner, p. 7). Nicholson contends that these definitions have been abandoned by this Court in favor of a broader requirement: 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. (Brief of Petitioner, p. 9). Nicholson's argument is clearly without merit.

In Eargle v. S.C. 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.

Eargle, 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, 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, 218 S.C. 73, 61 S.E.2d 654 (1950)." (*See* Brief of Petitioner, p. 9). However, Nicholson's assertion is misplaced.

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, 218 S.C. at 76, 61 S.E.2d at 655. 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. Nicholson contends this Court "embraced" the removal 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 she alleges the Court of Appeals erred by not considering this change in the definition. (Brief of Petitioner, pp. 9-10). However, these contentions misapprehend 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." Jordan, 218 S.C. 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 (1946),[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***

[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 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 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(1936)); *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.'" (App. p. 64).

B. There was no causal connection between Nicholson's alleged injury on February 26, 2009 and her employment with SCDSS.

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 common to the neighborhood.

Nicholson's own testimony explicitly establishes the complete lack of a causal connection between her fall on February 26, 2009 and her employment and that her fall was wholly unrelated to her employment. Nicholson testified her fall occurred while she was walking down the hall to her weekly, in-house case file audit. (R. p. 51, line 4 – p. 52, line 13). Upon questioning by her attorney, Nicholson described exactly how her February 26, 2009 fall occurred:

Q: [Ms. Williams] Okay. And then what did you do?

A: I stacked them (her case files) from my desk and went around to go out the door. I was speaking to a worker on my way there that stopped me. And by the time I got midway from my office to going down the hall, the friction from my foot caught me and I fell, files and all, my left side. That was the gist of the story.

(R. p. 52, lines 7-13). When asked what she believed caused her fall on February 26, 2009, Nicholson specifically testified that the "friction from the carpet" caused her fall:

Q: [Ms. Williams] So, what is it that you think caused you to fall?

A: Friction from the carpet.

Q: Did your foot get stuck?

A: Yes, from the friction. As I went to walk, the friction from the carpet just grabbed me and I fell.

(R. p. 52, lines 20-24).

Furthermore, while it is undisputed Nicholson was carrying case files at the time of her fall, Nicholson confirmed upon examination by the Single Commissioner that the case files in her hands had nothing to do with the cause of her fall:

Q: [Single Commissioner] And the files you were carrying, the files didn't make you fall? I think you testified to it and I just want to be clear.

A: No, the files did not make me fall.

(R. p. 65, lines 18-21). Additionally, the files Nicholson was carrying did not contribute to her fall or subsequent injuries. (*See* R. p. 8).

Based upon her description of the fall, it is clear Nicholson's alleged injury occurred as the result of her simply failing to lift her foot a sufficient distance from the floor as she was walking, which caused her foot to "friction" the carpet and fall. In fact,

Nicholson specifically testified that the only thing connecting her fall to her employment was the fact that she happened to be at her job at the time of her fall:

Q: [Mr. Watson] The only thing connecting this fall to your employment was that you happened to be at your job at the time; is that right?

A: Yes.

(R. p. 61, lines 5-8) (Emphasis added). Based on her own testimony, it is clear there was absolutely nothing about her employment with SCDSS that caused or contributed to her fall or subsequent injuries.

In addition, Nicolson's testimony clearly establishes the alleged causative danger (i.e., the floor in SCDSS's building) was "common to the neighborhood" and not peculiar to her employment. Nicholson testified the floor at Employer's building was a normal, level, carpeted floor that was free from any defect:

Q: [Mr. Watson] Now, you told me at your deposition, and I just want to make sure this right, this is a pretty normal hallway, right?

A: It is.

Q: That you would see here or anywhere really, right?

A: Same carpet that we have here.

Q: Fair enough. And the floor was carpeted; is that right?

A: Correct.

Q: And it was a level floor; is that right?

A: Yes, sir.

Q: And I think you told me at your deposition that the carpet was free from defect?

A: As far as I know.

Q: You don't recall seeing anything –

A: No, sir.

Q: – even after your accident that would have caused you to think, "Hey, I might have tripped over that."?

A: No, sir. No debris.

Q: It was just simply level floor, carpeted level floor?

A: Yes, sir.

(R. p. 56, lines 2-22). Additionally, when questioned by the Single Commissioner, Nicholson confirmed that the carpet did not buckle or move and that the cause of her fall was solely the friction between her shoe and the carpet that caused her fall:

Q: [Single Commissioner] In terms of – now, when you say your foot frictioned, did the carpet kind of buckle up or did the carpet move at all when you frictioned?

A: Not that the carpet, it's just that the friction from it caught my shoe. It wasn't that it moved or anything.

(R. p. 65, lines 12-17). Based on Nicholson's own testimony, there was nothing peculiar about the flooring in SCDSS's building that caused her to fall. In fact, it is undisputed that the floor was a level, carpeted floor, which was free from any defect or debris.

Importantly, Nicholson's testimony also establishes that the floor in SCDSS's building was a type of flooring she would have been equally exposed to outside of her employment. Nicholson specifically testified that her fall could have occurred on any level, carpeted floor free from defect and that her fall could have happened anywhere, including the hearing room, *which had the same type of carpet*:

Q: [Mr. Watson] ... Would you agree with me that since you were walking down a normal hallway on a level floor on carpet free of defect, that this event, your foot frictioning against the carpet thus causing you to fall, could have happened anywhere? It could happen here in this room.

A: That's possible.

(R. p. 60, lines 1-7).

Q: [Mr. Watson] . . . So it could have happened anywhere?

A: It could have happened anywhere.

(R. p. 61, lines 2-4). Nicholson's testimony that her fall "could have happened anywhere" clearly illustrates her accident did not "arise out of" her employment as required by the Act.

As noted above, the term "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). Nicholson argues this Court should find her February 26, 2009 alleged injuries arose out of her employment simply because they occurred while she was at work. (*See* Brief of Petitioner, p. 10). Her argument focuses on the "time, place, and circumstance" of her injury, yet ignores the "origin and cause." Nicholson is asking this Court to completely eliminate the "arising out of" requirement.

For an injury to arise out of the employment, it must appear to have originated in a risk connected with the employment and to have come from that source as a rational consequence. Douglas, 245 S.C. 265, 140 S.E.2d 173 (1965). As the Court of Appeals stated, "[t]he fact that Nicholson's injuries occurred in the carpeted area, in itself, is insufficient to establish the requisite causal connection between her injuries and her employment." (App. p. 64). The Court of Appeals' decision is consistent with this Court's previous decision in Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1955).[2]

[2] SCDSS admits that the facts in Bagwell are distinguishable from the facts in the present case. Bagwell was an unexplained, "idiopathic" injury case; whereas, Nicholson's fall was due to a specific, non-idiopathic reason – her shoe "frictioning" the carpet. However, this Court's decision in Bagwell is clearly instructive in determining whether an employee's injuries from an explained, non-idiopathic fall arose out of the employment.

In Bagwell, the claimant, while in the performance of his duties on the premises of his employer, suddenly fell backward on a level concrete floor, lost consciousness, and later died as a result of a subdural hemorrhage. Id. at 447, 88 S.E.2d at 612. This Court affirmed the Circuit Court's denial of compensability on the basis that the claimant's accident did not arise out of his employment with his employer. Id. at 457, 88 S.E.2d at 617. This Court held that there was no causal connection between the claimant's fall and the claimant's employment. Id. at 452, 88 S.E.2d at 614. Additionally, this Court held that the claimant's employment was not a contributing cause of the claimant's alleged injury. Id. at 454, 88 S.E.2d at 615. In fact, this Court addressed the issue of whether a level, concrete floor was a hazard of employment. This Court specifically stated:

> **We are not prepared to accept the contention that, in the absence of special condition or circumstance, a level floor in a place of employment is a hazard.** Cement floors or other hard floors are as common outside industry as within it. The floor in the instant case did not create a hazard which would not be encountered on a sidewalk or street or in a home where a hard surface of the ground or hard floor existed.

Id. (Emphasis added). Furthermore, citing Cinmino's case, 251 Mass. 158, 146 N.E. 245 (1925), this Court stated:

> To hold a concrete floor in a place of employment is a danger which effects the risks which an employee encounters and is a hazard which arises out of an employment, would require a further holding, when the occasion arose, that any flooring of any material is a hazard of employment against which the statute gives compensation whenever there is a causal relation between the hazard and the injury. **The causal relation in such a case is too remote and speculative for practical application.**

Id. at 455, 88 S.E.2d 616. (Emphasis added).

Much like the level, concrete floor in Bagwell, the level, carpeted floor in SCDSS's building, which was free from any defect or debris, is as common outside of industry as within it. The floor in SCDSS's building did not create a hazard or risk that would not be encountered on any other level, carpeted floor outside of SCDSS's building. Walking on carpet is an activity that is common to general public, and the risk of "frictioning" a shoe and falling while walking on carpet is a risk that the general public is constantly and equally exposed to. As such, the Court of Appeals correctly held that walking on a carpeted area was not a sufficient risk of employment to render Nicholson's fall and subsequent injuries compensable.

Additionally, this Court's more recent decision in Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010), also supports the Court of Appeals holding that Claimant's injury did not "arise out of" her employment with SCDSS. In Pierre, this Court held the claimant sustained a compensable injury arising out of and in the course of his employment and reversed "the Commission's finding that the risk was not associated with Pierre's employment because the sidewalk was no different in character from other sidewalks." Id. at 548, 689 S.E.2d at 622. This Court specifically held, "Pierre's accident occurred **as a result of *a hazard*** that existed on the employer's premises, **i.e., Pierre slipped and fell on a *wet* sidewalk just outside the employees' housing facility.**" Id. (Emphasis added). This Court specifically noted that "the sidewalk was wet because another person was using the outside sink and the water ran down the sidewalk." Id. This Court held that "the employer's placement of the sink and the apparent lack of drainage created **the *wet* conditions that caused Pierre to fall.**" Id. (Emphasis added).

The claimant's accident in Pierre, unlike Nicholson's accident in the present case and unlike the claimant's accident in Bagwell, was caused by *a special condition and circumstance* – the wet conditions on the sidewalk from the employer's outside sink. *See* Pierre, 386 S.C. at 548, 689 S.E.2d 622. This Court's decision in Pierre not only reinforces this Court's previous decision in Bagwell, it also supports the Court of Appeals' decision that Nicholson's alleged injury did not "arise out of" her employment.

As noted above, in Bagwell, this Court stated: "We are not prepared to accept the contention that, ***in the absence of special condition or circumstance***, a level floor in a place of employment is a hazard." 227 S.C. at 454, 88 S.E.2d at 615 (Emphasis added). Because the claimant in Pierre fell on a level sidewalk, which he would have encountered outside of his employment, this Court had to find a "special condition or circumstance" (i.e., the wet conditions) in order to hold that the claimant sustained a compensable injury by accident arising out of his employment. Pierre, 386 S.C. at 549, 689 S.E.2d 623. While there was a special condition in Pierre that was sufficient to justify a finding of a hazard or risk to which the claimant would not have been exposed to outside of his employment (the water on the sidewalk from the employer's outside sink), **there is absolutely *no* evidence in the present case of any such "special condition or circumstance."** As noted above, Nicholson's fall simply occurred as the result of her shoe "frictioning" a normal, level, carpeted floor that she would be equally exposed to outside of her employment with SCDSS.

The mere fact that Nicholson's injury occurred while walking on the level, carpet that was free from defect, in itself, is insufficient to establish the requisite causal

connection between her injuries and her employment with SCDSS.[3] Nicholson also has the burden to establish a causal relationship between her employment with SCDSS and her fall. *See* Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999). However, the evidence establishes no such connection. In fact, Nicholson's own testimony unequivocally verifies that there was nothing about the floor in SCDSS's building that increased the risk of her fall or caused her fall. Instead, it is clear that Nicholson's alleged injury occurred as the result of her simply failing to lift her foot a sufficient distance from the floor as she was walking, which caused her foot to "friction" the carpet and fall. There is no evidence of any defect in the carpeting which created a particular or increased risk of employment. Additionally, there is no evidence that the type of carpet in SCDSS's building presented any specific risk greater than that to which the general public is exposed. In fact, Nicholson specifically testified that her fall "could have happened anywhere," including the hearing room, which had the same type of carpet.

Accordingly, based on the foregoing, Respondents SCDSS and State Accident Fund respectfully request that this Court affirm the Court of Appeals' decision that Nicholson did not sustain a compensable injury by accident arising out of her employment on February 26, 2009.

---

[3] *See, e.g.,* Bagwell, 227 S.C. at 454, 88 S.E.2d at 615. ("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, 386 S.C. at 549, 689 S.E.2d at 623 ("[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, 60, 328 S.E.2d 68, 70 (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.").

II.

THE COURT OF APPEALS' DECISION DID NOT INTRODUCE FAULT INTO THE WORKERS' COMPENSATION SYSTEM.

Nicholson's second argument in her Brief 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 have no place 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 consequently, any injury 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 Brief, 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).

(Brief of Petitioner, p. 14).

Nicholson's reliance on this Court's decision in Pee is misplaced. In Pee, the employer admitted causation (i.e., "arising out of"), 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. This Court did not address the "arising out of" requirement in Pee. Id.

Further, while Nicholson argues 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, e.g.,* Bagwell, 227 S.C. at 454, 88 S.E.2d at 615 (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, 386 S.C. at 549, 689 S.E.2d at 623 (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, 60, 328 S.E.2d 68, 70 (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* App. pp. 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.

As outlined above, unlike Pierre, Nicholson's injury did not arise from a special condition or hazard in SCDSS's building. A level floor in a place of employment, without any special condition or circumstance, is not a hazard or risk associated with the employment. *See* Bagwell 227 S.C. at 454, 88 S.E.2d at 615.

Nicholson also attempts to cast doubt on the Court of Appeals' decision in this case by referencing the recent Court of Appeals decision in Shatto v. McLeod Reg'l Med. Ctr., Op. No. 5239 (Ct. App. filed June 11, 2014). In Shatto, the claimant, a nurse anesthetist, fell in the operating room when her "foot became caught on something" while walking around a patient's bed. Id. Although the claimant did not know exactly what her foot became caught on and caused her fall, she testified that it was either (1) the I.V. pole, (2) the electrical cord from the bed, or (3) the electrical cord for the I.V. pump. Id. The Commission found that the claimant's injury was compensable. Id. The employer appealed asserting that the claimant's injury was idiopathic in nature and not compensable. Id. The Court of Appeals affirmed. Id. In its decision, the Court stated that "[t]o be compensable, the injury is not required to be foreseen or expected, but after the event, it must appear to have originated in a risk connected with the employment and to have come from that source as a rational consequence." Id. (internal citations

omitted). Referencing this Court's decision in Douglas, 245 S.C. 265, 140 S.E.2d 173 (1965), the Court of Appeals held that while Shatto did not know what specifically caused her to fall, she presented satisfactory evidence that her fall was due to the conditions of her employment and that "the origin of the risk was connected with her employment." Id.

Nicholson argues "[t]here is no meaningful difference between Shatto and the present case. Like Shatto, Nicholson was walking while performing her job when she tripped because she came into contact with her place of employment." (Brief of Petitioner, p. 12). Her argument is erroneous. While the Court of Appeals did not specifically state what risk or conditions it was referencing when determining the causal connection to the claimant's employment in Shatto, it is clear that the Court was referring to the (1) the I.V. pole, (2) the electrical cord from the bed, or (3) the electrical cord for the I.V. Much like the "*wet* sidewalk" in Pierre, the I.V. pole and electrical cords on the floor around the patient's bed in Shatto were a special condition or hazard to the employment that caused the claimant's injury. Unlike Pierre and Shatto, Nicholson's injury did not arise from a special condition or hazard in SCDSS's building, and thus, her injury is not compensable.

Nicholson also attempts to convolute the issue on appeal by arguing the Court of Appeals' decision is illogical when comparing it to our prior appellate court decisions regarding the personal comfort doctrine. (*See* Brief of Petitioner, p. 17). 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. Id. 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. 2d 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.

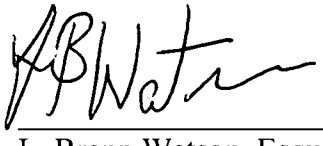
Larson's Workers' Compensation Law, § 21.00 (2013). Thus, the personal comfort doctrine is designed to bring certain acts within the "course of employment."

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

Based on the foregoing, Respondents SCDSS and State Accident Fund respectfully request the South Carolina Supreme Court affirm the holding of the Court of Appeals that Nicholson's injuries did not "arise out of" her employment and, therefore, are not compensable under the South Carolina Workers' Compensation Act.

Respectfully submitted,



L. Brenn Watson, Esquire
Zachary M. Smith, Esquire
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
(864) 527-3292
Attorneys for Respondents

July 25, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 0901585

Carolyn M. Nicholson, Claimant, Petitioner,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondents complies with Rule 211(b), SCACR.

July 25, 2014

L. Brenn Watson, Esq.
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
(864) 527-3272
Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 0901585

Carolyn M. Nicholson, Claimant, Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served the Brief of Respondents on Carolyn M. Nicholson by depositing a copy of it in the United State Mail, postage prepaid, on July 25, 2014, addressed to her attorney of record, Kathryn Williams, 619 N. Main Street, P.O. Box 10693, Greenville, South Carolina 29603.

July 25, 2014

L. Brenn Watson, Esq.
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
(864) 527-3292
Attorneys for Respondents