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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appellate Case No. 2014-000329
Opinion No. 27478 (Filed January 14, 2015)

Carolyn M. Nicholson, Claimant, Appellant,

v.

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

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Respondents South Carolina Department of Social Services and State Accident Fund (collectively "SCDSS") respectfully petition this Court for a rehearing in the above-entitled matter. This Court issued its Opinion on January 14, 2015, reversing the decision of the Court of Appeals, and holding that "Because Nicholson's fall happened at work and was not caused by a condition peculiar to her, it was causally connected to her employment. Therefore, her injuries arose out of her employment as a matter of law and she is entitled to workers' compensation." SCDSS respectfully submits that the Court not only misapprehended several decades of judicial precedent regarding the interpretation of the "arising out of" requirement, but also effectively eliminated the legislature's statutory requirement under S.C. Code Ann. §42-1-160(A) that an injury must "arise out of" the employment. Additionally,

the Court's decision overlooks the public policy ramifications and illogical effects it will have in the South Carolina workers' compensation arena.

ARGUMENTS

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. Branch v. Pacific Mills, 205 S.C. 353, 32 S.E.2d 1 (1944); Osteen v. Greenville Cnty. Sch. Dist., 333 S.C. 43, 508 S.E.2d 21 (1998). Both parts must exist simultaneously before any court will allow recovery. Id. 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).

I. The Court misapprehended the "arising out of" employment requirement under S.C. Code Ann. §42-1-160(A).

In the present case, the Court's Opinion specifically states:

> Quite simply, Nicholson was at work on the way to a meeting when she tripped and fell. The circumstances of her employment required her to walk down the hallway to perform her responsibilities and in the course of those duties she sustained an injury. We hold these facts establish a causal connect between her employment and her injuries – the law requires nothing more. Because Nicholson's fall happened at work and was not caused by a condition peculiar to her, it was causally connected to her employment.

The Court's decision that Nicholson's fall "arose out of" her employment focuses solely on the fact that Nicholson was at work and walking down a hallway to perform her job duties when her

fall occurred. The Court correctly determined that Nicholson was *in the course of* her employment, as stipulated, but the Court further determined that this fact alone fulfilled the *arising out of* requirement. This analysis misapprehends the legal issue.

As noted above, the "in the course of" employment requirement refers to the injury's *time, place, and circumstances*. Osteen, 333 S.C. at 50, 508 S.E. 2d at 24 (1998)(Emphasis added). Under the Act, an accident occurs "in the course of" employment "when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto." Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 200 S.E.2d 83 (1973). It is undisputed that Nicholson's fall occurred "in the course of" her employment. However, the Court has equated the "arising out of" requirement to the "in the course of" requirement by holding that Nicholson's fall **"arose out of"** her employment because it occurred while she was at work (*time*), while walking down a hallway in SCDSS's building (*place*), and while she was on her way to attend a meeting (*circumstances*). As such, the Court has effectively, and improperly, eliminated the legislature's mandatory two-pronged test in S.C. Code Ann. §42-1-160(A) that an injury must "arise out of and in the course of employment." *See* Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention"); Brown v. Martin, 203 S.C. 84; 26 S.E.2d 317 (1943) (The Court is not justified in construing it the Act as to do violence to a specific requirement).

Additionally, the Court's decision overlooks, and overrules, decades of judicial precedent interpreting the "arising out of" requirement. *See* Osteen, 333 S.C. 43, 508 S.E.2d 21 (1998) (The two parts of the phrase "arising out of and in the course of employment" are not synonymous); Lorick v. S.C. Elec. & Gas, 245 S.C. 513, 141 S.E.2d 662 (1965) (The mere fact

that an injury occurred in the course of employment is not a basis for an award); 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"); 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").

SCDSS further contends that the Court has overlooked the fact that its Opinion effectively shifts the burden of proof with regard to the "arising out of" requirement. In order to recover benefits, the claimant must show that the injury was the result of an accident which arose out of and in the course of the employment. Jake v. Jones, 240 S.C. 574, 126 S.E.2d 721 (1962); *See also*, Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998) ("Workers' compensation claimant has burden of proving facts that show that injury arose out of employment"). However, under the Court's Opinion, a claimant only needs to show that an injury happened at work while performing his or her job duties (i.e., that it occurred "in the course of" the employment). Once a claimant has established this, then his or her claim is compensable unless the employer can establish that the injury was due to some condition peculiar to the claimant. The shift of the burden of proof is clearly inconsistent with the decades of case law that require a claimant to prove the facts which render the injury compensable. *See* Mims v. Nehi Bottling Co., 218 S.C. 513, 63 S.E.2d 305 (1951); Jake, *supra*; Clade, *supra*.

II. The Court has overlooked the public policy ramifications its Opinion will have in South Carolina workers' compensation claims.

The Court noted in its Opinion that "Requiring an employee to prove a fall was the 'fault' of the employer in creating a danger or hazard is unfaithful to the principles underlying the creation of workers' compensation and turns the entire system on its head." (Opinion, p. 8). However, SCDSS contends that the Court has misapprehended its argument and confused the issue in this claim by concluding that that the Court of Appeals' decision injected fault into the workers' compensation law by requiring a claimant to prove the existence of a hazard or danger.[1] The real issue is not fault, but work connection.

The three most common lines of interpretation of the phrase "arising out of" are: (1) the increased-risk doctrine, (2) the positional risk doctrine, and (3) the actual-risk doctrine. 1 *Larson's Workers' Compensation Law* §3.01. Under the "increased-risk doctrine," an injury arises out of employment when the employment increases the risk of an injury. Id. The "positional-risk doctrine" provides that "[a]n injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he or she was injured." *Larson* §3.05. The "actual-risk doctrine" ignores whether the risk is common to the public and focuses on whether it is a risk of the particular employment. *Larson* § 3.04. Under this doctrine, an injury arises out of employment as long as the employment subjected the claimant to the actual risk that caused the injury. Id.

South Carolina has never formally adopted, or rejected, any of these doctrines; however, based on this Court's interpretation of the language in Douglas, it is apparent that the Court is embracing the "positional-risk doctrine." *See* Opinion p. 4 ("In our view, it simply establishes that an injury is not compensable absent some causal connection to the workplace. In other

[1] 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.

words, *but for* the claimant being at work, the injury would not have occurred"). SCDSS contends that this Court misapprehended the language in Douglas and has erroneously accepted the "positional-risk doctrine."

First, the "but for" test employed in the positional-risk analysis, and by this Court, ignores the "arising out of" requirement since it focuses only on time and location, but completely ignores whether the injury was actually caused by the employment. If merely being at work was sufficient to justify compensation, the legislature would not have required the "arising out of" test. Additionally, the "positional-risk doctrine" improperly treats the employment like a personal insurance policy since nearly every injury that occurs at work and that is not personal to an employee will be deemed to "arise out of" the employment. As such, under the "positional-risk doctrine" nearly every injury that occurs while an employee is at work performing his or duty will be compensable; the potential results are illogical. For example, if an attorney is at his house getting dressed for a court hearing and strains his knee while bending down to tie his shoe, it is clear that this injury would not be compensable. Conversely, if an attorney bends down to tie his shoe at his office, and subsequently strains his knee, his injury would be compensable because it occurred at work. The same could be said for a teacher who strains her back while bending over to put her purse on the floor. If her injury occurred at home, it would not be compensable. However, despite the fact that there is no connection to her employment, if she strains her back while putting her purse on the classroom floor in order to start teaching her class, her injury would be compensable because it occurred at work.

A further example of the illogical results that can occur by adopting the "positional-risk doctrine" is displayed in the Pennsylvania case of Carroll v. W.C.A.B., 750 A.2d 938 (Pa. Commw. Ct. 2000). In Carroll, the claimant sustained an eye injury, which left him blind in one eye, while attempting to suppress a sneeze at a meeting with co-workers. Id. In adopting what

amounts to a positional-risk stance, the court awarded benefits because the claimant was "injured while actually engaged in furtherance of the employer's business or affairs." Id. at 941; *See also* *Larson* §3.05.

Finally, workers' compensation laws increased the incentive for employers to prevent industrial accidents since an employee's negligence and fault were no longer material. Employers have the ability to prevent employee negligence through training, supervision, and safety rules; thus, there no issue assigning liability to employers when an employee's injury is due to his own negligence. However, the "positional-risk doctrine" inefficiently allocates liability since it assigns liability to employers for situations in which the employer has no control.

While the Court appears to embrace the "positional-risk doctrine" in its interpretation of the "arising out of" language in Douglas, Respondents respectfully assert that the Court has misapprehended or overlooked the fact that the language in Douglas is more consistent with the "increased-risk doctrine." The "increased-risk doctrine" is the prevalent test in the United States. *Larson* §3.03. Under the increased-risk doctrine, benefits are awarded "where there has been evidence that the conditions or nature of the employment increased the risk of injury beyond which the general public was exposed."[2] This is clearly consistent with the language in Douglas that states:

> [I]f 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**

[2] Campbell 66 Exp., Inc. v. Indus. Comm'n, 415 N.E.2d 1043 (Ill. 1980).

> **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.

245 S.C. at 269, 140 S.E.2d at 175 (emphasis added)(citation omitted).

Further, under the "increased-risk doctrine," an injury is compensable even if it resulted from a risk "common to the neighborhood" as long as the quantity of exposure to the risk exceeds the quantity faced by the general public. *See Larson* §3.03. The Court's examples in its Opinion of a chef cutting himself with a knife or a carpenter falling off of a ladder would clearly be compensable under the "increased-risk doctrine" since a chef uses a knife and a carpenter uses a ladder more than the general public.

In conclusion, the Court's decision misapprehends, and effectively eliminates the "arising out of" requirement. Additionally, the Court's decision to embrace the "positional-risk doctrine" overlooks significant policy issues and the monumental effects it will have on the workers' compensation law in South Carolina. Therefore, SCDSS requests the Court grant this Petition, rehear this matter, withdraw its previous decision, and issue a new opinion affirming the Court of Appeals' decision.

January 28, 2015

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CERTIFICATE OF SERVICE

I certify that the Petition for Rehearing was served on Appellant, Carolyn M. Nicholson, on January 28, 2015, by depositing a copy in the U.S. Mail, postage prepaid, addressed to her attorney of record:

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January 28, 2015

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January 28, 2015

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Carolyn M. Nicholson vs. SCDSS
Appellate Case No.: 2014-000329
WCC File No.: 0901585 DOI: 2/26/2009
Carrier: State Accident Fund - Claim No.: 2009-733
WJC&B File No.: 0385.00406

Dear Mr. Shearouse:

Enclosed herein, please find the following items for filing in the above-referenced matter:

1. Petition for Rehearing (original and six copies);
2. Certificate of Service.

By copy of this letter, we are serving a copy of the same on Kathryn Williams, Attorney for Appellant.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Zachary M. Smith

Enclosures

cc: Kathryn Williams, Esq.
Ms. Page Snyder (*via e-mail*)