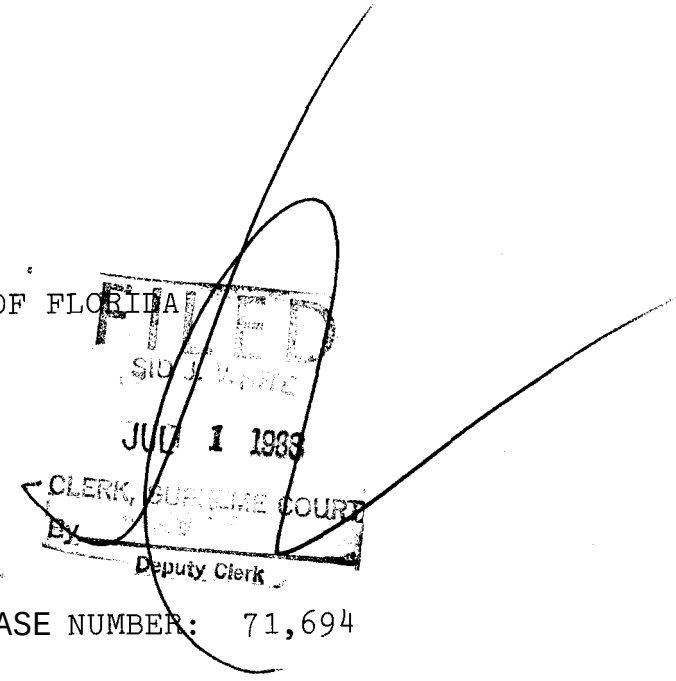
IN THE SUPREME COURT OF FLORIDA



LEON COUNTY SCHOOL BOARD and
ROYAL INDEMNITY COMPANY,

Petitioners,

v.

THELMA J. GRIMES,

Respondent.

_____/

CASE NUMBER: 71,694

APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

The employee augments the employer's statement of the case and of the facts as follows:

The employee walks not only with a full right leg brace but also with crutches. She testified at the hearing that when she goes outside the confines of her own office, that is, into the halls or another part of the building, she uses her crutches which permit her to "go faster" and to "feel more secure". (R-8; R-32). She also testified, and the deputy commissioner and District Court so found, that her employment requires her to get up and down from her desk "constantly" and that her office work area is "very, very crowded". (R-11, 12).

Though not specifically addressed by the deputy commissioner's order or the opinion of the First District Court of Appeal, the issue of handicap discrimination was presented in both forums and will again be presented to this Court. (R-82 et seq.; Employee's Initial Brief filed in the First District Court of Appeal).

SUMMARY OF ARGUMENT

The District Court applied the increased-hazard doctrine to the facts of the instant case and correctly concluded that the conditions of the workplace substantially contributed to the employee's risk of injury, and that consequently the employee's injury arose out of her employment. The certified question, if answered in the affirmative, would have prospective application only. The District Court did not depart from established precedent in its decision, nor did it overrule this Court as suggested by Petitioners.

Though argued in but not decided by the District Court, a denial of workers' compensation benefits to this physically handicapped employee would constitute unlawful discrimination on the basis of handicap in contravention of the constitutions of the United States and Florida and contrary to Federal and Florida law.

The certified question is not directly applicable to the result reached by the District Court in this case. An affirmative answer to the certified question would affect the instant case only if this Court reversed the District Court on other grounds. Notwithstanding the direct application of the certified question to this case, it should be answered in the affirmative for the well-considered reasons given in the District Court's lengthy opinion.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR OR DEPART FROM ESTABLISHED PRECEDENT IN HOLDING THAT THE EMPLOYEE'S INJURY AROSE OUT OF HER EMPLOYMENT.

The District Court clearly reviewed this case in accordance with the increased-hazard doctrine: [1], [2]

> . . . This case is subject to the increased-hazard doctrine, which holds that an injury resulting from risks or conditions solely personal to the claimant does not meet the statutory definition of injury in section 440.01(14) requiring it to be caused "by accident arising out of and in the course of employment," unless the employment contributes to the risk or aggravates the injury.

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[1] Grimes v. Leon County School Board, 518 So.2d 327, 329 (Fla. 1st DCA 1987).

[2] The suggestion in Petitioner's brief appearing at pages 5 through 7 thereof that the District Court overruled this Court in arriving at its decision in this case is inappropriate. The well-considered analysis of the issue presented in the certified question as well as an affirmative answer to the certified question would have prospective application only:

> As the appellate court now charged with the primary responsibility to review all workers' compensation appeals to effectuate the uniform and indiscriminate application of chapter 440, we would, pursuant to this analysis, construe and apply the statutory phrase

In so doing, the District Court correctly held that conditions of the employee's employment substantially contributed to the risk of her injury and thus her accident arose out of her employment. In support of its decision the District Court compared the facts of the instant case to the facts in Cheney v. F.E.C. News Distribution Co., 382 So.2d 1291 (Fla. 1st DCA 1980): [3]

> The facts of the instant case are, we believe, similar to those in Cheney v. F.E.C. News Distribution Co., 382 So.2d 1291 (Fla. 1st DCA 1980), in which we reversed the deputy commissioner's

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> "arising out of employment" in accordance with the actual-risk theory for the reasons discussed above, believing that such construction is completely consistent with the supreme court's early decision in Protectu and more in keeping with the purposes of the act. But to do so we realize that we would have to rule somewhat inconsistently with supreme court decisions handed down subsequent to Protectu. Because it is not the province of a district court of appeal to so depart from or overrule established precedent of the Florida Supreme Court, we certify to that court the following question as one of great public importance: [Question omitted].

Grimes, at 335.

[3] Grimes, at 328-329.

> finding that claimant's injury did not arise out of employment. In Cheney, the claimant suffered from a preexisting injury which caused headaches and dizziness. While working in a job that required him to bend, turn, and twist, claimant became dizzy, fell, and injured his head. In the instant case, claimant's job required her to constantly get up and down from her desk, and to work in an area which was considerably more crowded than her home environment. As in Cheney, it is less likely that claimant would have fallen at home where she could have better and more selectively controlled her positional changes. As in Cheney, claimant could have also controlled the amount of her activities at home, while she could not do so at work. We hold that claimant's employment exposed her to conditions which substantially contributed to the risk of her injury, and that she suffered a compensable injury arising out of and in the course of her employment within the meaning of that term as used in chapter 440.

The District Court's decision is further supported by the fact that the employee was not using her crutches at the time of the accident. Though not fully developed at the hearing, the employee testified that she walked with crutches to give her more security and to enable her to walk faster or more normally. However, she did not use her crutches while actually within the confines of her "very, very crowded" office. The clear implication is that the crowded conditions of her office effectively prevented her

from using the cumbersome crutches. This additional fact supports the District Court's finding that the conditions of the workplace substantially contributed to the employee's risk of injury.

11. TO DENY THIS HANDICAPPED EMPLOYEE WORKERS' COMPENSATION BENEFITS WOULD CONSTITUTE UNLAWFUL DISCRIMINATION ON THE BASIS OF PHYSICAL HANDICAP.

Though the District Court recognized that the increased-hazard doctrine as applied to idiopathic falls has resulted in "discriminatory application of the workers' compensation statute and is simply bad law", the District Court did not specifically address the issue of whether in the instant case application of the increased-hazard doctrine might constitute unlawful discrimination on account of physical handicap.

In Protectu Awning Shutter Co. v. Cline, 154 Fla. 30, 16 So.2d 342, 343 (1944), this Court stated:

> . . . The Compensation Law is based primarily on social responsibility of one to another. It surely cannot be said that its benefits should be extended in a less degree to those less fortunate than the average worker.

The decision in Protectu would appear to protect against discrimination on the basis of physical handicap and give meaning to the language of the Florida Constitution and

various statutory enactments prohibiting handicap discrimination:

> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property , . . No person shall be deprived of any right because of race, religion or physical handicap.

Art.I, §2, Fla.Const.

> It is against the public policy of this state for the governing body of any county or municipal agency, board, commission, department, or office, solely because of . . . handicap to . . . discriminate against such individuals with respect to compensation, hire, tenure, terms, conditions, or privileges of employment . . .

§112.042(1), Fla.Stat.

> (1) It is an unlawful employment practice for an employer [including any governmental entity]: (a) . . . to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . handicap . . .

§760.10(1)(a), Fla.Stat.

However, as the District Court points out, decisions since Protectu applying the increased-hazard doctrine to idiopathic falls actually promote discriminatory results.

If it is assumed that a non-handicapped employee, who while arising from his desk fell and broke his ankle, would be compensated, then it is clear that but for this employee's handicap, she would be entitled to compensation regardless of the degree of contribution of the workplace to the risk of injury. In fact this was the result that was reached by the District Court in Distinctive Builders of Panama City, Inc. v. Walker, 518 So.2d 1351, 1353 (Fla. 1st DCA 1988):

> . The compensable injury must originate from ". . . some risk connected with the employment or flowing as a natural consequence from the employment." McCook at 1168, citing Suniland Toys & Juvenile Furniture, Inc. v. Karns, 148 So.2d 523, 524 (Fla. 1963). [fn.1: Cf. Grimes v. Leon County School Board, 518 So.2d 327 (Fla. 1st DCA 1987).] This case is distinguishable from McCook and its progeny in that no idiopathic condition was found to be present when appellee injured himself, and appellee's turning and bending motions were determined to be the sole cause of his sudden paralysis. Where such a determination is made based on evidence that no personal risk was involved, as in this case, "[a]ny employment contribution . . . is enough, because it is greater than the zero employee contribution.'' 1B A. Larson, The Law of Workmen's Compensation, sec. 38.83(b) (1987) at p. 7-278.

It is difficult if not impossible to avoid the conclusion that a handicapped person can be the subject of discrimination in the workplace by application of the

increased-hazard doctrine to accidents involving idiopathic falls. Such handicap discrimination is contrary to the protections of Art. I, §2, Fla. Const.; §112.042(1), Fla. Stat.; and §760.10(1)(a), Fla. Stat.[4]

III. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

Because the certified question concerns the prospective abandonment of the increased-hazard doctrine as applied to falls attributable to idiopathic causes personal to the employee, the answer to the certified question does not affect the District Court's decision in the instant case unless this Court reverses the District Court on other grounds.

Regardless of the direct application of the certified question to this case, the reasoning of the District Court for abandonment of the increased-hazard doctrine in cases encompassed by the certified question is sound: (1) Idiopathic and non-idiopathic falls would be

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[4] Handicap discrimination in Florida's Workers' Compensation laws would also violate the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

treated the same, thus avoiding discriminatory results and distinctions without meaning; (2) The actual risk doctrine implements the non-discriminatory principle announced in Protectu; and (3) The actual risk doctrine best carries out the meaning and purpose of the workers' compensation law by uniformly compensating injured employees on a no-fault basis.

CONCLUSION

It is respectfully submitted that this Court should affirm the District Court's decision and answer the certified question in the affirmative.

DATED this 1st day of July, 1988.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to David A. McCranie, Karl, McConnaughhay, Roland & Maida, P.A., Post Office Drawer 229, Suite 950, Monroe-Park Towers, 101 N. Monroe Street, Tallahassee, Florida 32301, Attorney for Petitioners, and H. George

Kagan, Miller, Hodges, Kagan and Chait, 455 Fairway Drive, Suite 101, Deerfield Beach, Florida 33441, by U.S. Mail this the 1st day of July, 1988.

Richard M. Powers