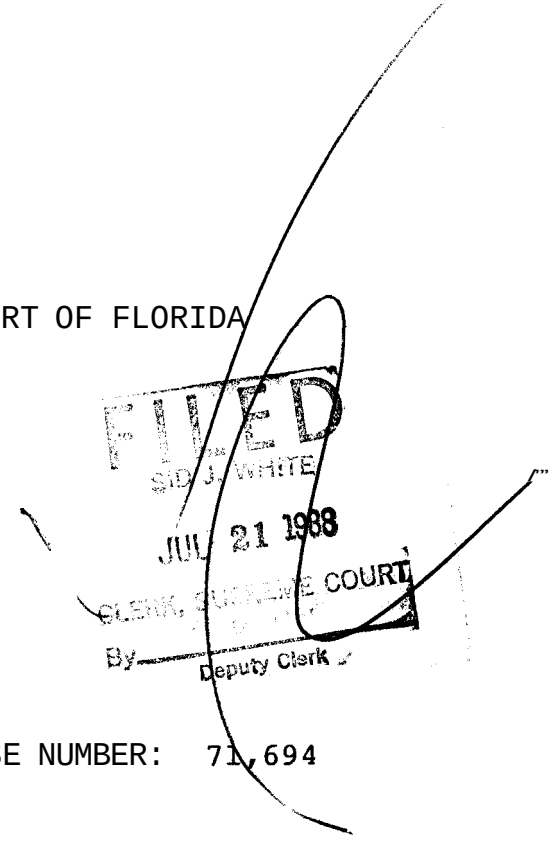
IN THE SUPREME COURT OF FLORIDA



LEON COUNTY SCHOOL BOARD and
ROYAL INDEMNITY COMPANY,

Petitioners,

vs. CASE NUMBER: 71,694

THELMA J. GRIMES,

Respondent.
_____/

APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

PETITIONERS' REPLY BRIEF

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PRELIMINARY STATEMENT

In this brief, Petitioners are referred to as employer, carrier. Respondent is referred to as claimant. References to the record on appeal are designated by the symbol "R" followed by the appropriate page number.

Petitioners would note that despite this court's clear instruction in Dania Jai Alai Palace v. Sykes, 450 So. 2d 1114 (Fla. 1984), Respondent has unfortunately chosen not to join the issues or respond to employer/carriers' points on appeal. Petitioners have elected to retain the format used in Petitioners' initial brief.

ARGUMENT I

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE DECISION OF THE DEPUTY COMMISSIONER WHEN THE DEPUTY COMMISSIONER'S DECISION WAS BASED ON LONGSTANDING SUPREME COURT PRECEDENT.

The claimant, in his answer brief, contends that the district court made its finding in the instant case in a manner consistent with the longstanding "increased risk" doctrine.

Claimant argues that this court's ultimate decision on the certified question is of little importance since the district court's finding was "clearly" based on an application of the "increased risk" doctrine.

A careful analysis of the district court's opinion below and the relevant case law reveals, however, that a reasoned application of the "increased risk" doctrine, as explained by this court in Foxworth v. Florida Industrial Commission, 86 So. 2d 147 (Fla. 1955), and Southern Bell Telephone and Telegraph v. McCook, 355 So. 2d 1166 (Fla. 1977), does not support the claimant's contention. For the reasons outlined in employer/carrier's initial brief, the district court's finding of compensability is not supported under the established "increased risk" doctrine.

The district court obviously did not think the issue to

be as "clear" as the claimant contends:

> Our conclusion that this case is more like Cheney than other cases disallowing compensability for idiopathic falls is a close call, and was made extremely difficult by the diverse decisions on this issue.

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

In its opinion of December 15, 1987, the district court candidly admitted that its ruling in the instant case was somewhat inconsistent with the established Supreme Court precedent. 518 So. 2d at 335. In fact, as fully developed in the employer/carrier's initial brief, the district court acknowledged that it was ruling inconsistently with its own findings in Medeiros v. Residential Communities of America, 481 So. 2d 92 (Fla. 1st DCA 1986), [See also The Bison Company v. Shubert, 494 So. 2d 253 (Fla. 1st DCA 1986) and Market Food Distributors, Inc. v. Levenson, 383 So. 2d 726 (Fla. 1st DCA 1980)]. A brief review of the above cited cases confirms the court's candid observation.

In Medeiros, the claimant fell down a flight of stairs at work. The district court ruled that the claimant's injuries were not compensable because she had not demonstrated that her physical surroundings on the job contributed to the risk of the injury any more than they would have at home. The court arrived at the above

conclusion despite the fact that claimant had no stairs in her home.

In Shubert, the district court denied compensability for a back injury suffered by a claimant while reaching to open a bottom desk drawer. The basis for the court's finding of non-compensability was that the claimant sneezed simultaneous with his effort to reach for the drawer. The claimant argued that the dirty and dusty conditions found in his workplace were responsible for his sneeze, and thus his injury. The district court denied compensability and stated:

> We cannot accept claimant's argument that his injury is compensable because the employment conditions exposed him to a greater risk of injury than that which he was exposed in his non-employment life. Although the evidence discloses that the work-related conditions may have exposed the claimant to a greater risk of frequency in sneezing than in his non-employment environment, such fact does not mean that the workplace exposed claimant to a greater risk of injury than he would have necessarily encountered in his non-employment life. (Emphasis by the court).

494 So. 2d at 254.

In Levenson, the district court denied compensability to a claimant who injured his back when he bent over to pull out a twenty to thirty pound desk drawer. In Levenson, the district court acknowledged this court's clear precedent in McCook and stated:

> Levenson's claim is controlled by Southern

> Bell Telephone & Telegraph v. McCook, 355 So. 2d 1166, 1168 (Fla. 1977), holding that when a claimant suffers from a pre-existing condition and is injured in the course of employment, that injury is compensable only if the claimant can show it arose out of the employment. Amplifying upon this rule, Commissioner Wentworth, specially concurring in Orange County Board of County Commissioners v. Jordan, I.R.C. Order 2-3785 (April 25, 1979), stated that in order for there to be a causal connection between the employment and the aggravation of a pre-existing condition, the employment circumstances must have presented a risk different from those necessarily encountered in non-employment life.

383 So. 2d at 727. (Emphasis supplied).

Yet, in the instant case, despite a complete lack of evidence that the employment conditions in any way, shape or manner contributed to the employee's injury, and despite uncontroverted evidence that the sole source of the claimant's fall was that her leg brace gave way at the knee joint (R 8-9), the district court found the claimant's injury compensable.

The district court's decision below is even inconsistent with the cases it cites in support of its interpretation of the "increased risk" doctrine. This inconsistency is evidenced by the manner in which the certified question is phrased:

> In applying the pertinent provisions of Chapter 440, are accidents suffered by employees in falls which are attributable

> to idiopathic causes personal to the employee and result in injury from collision with the floor, equipment or other conditions of the workplace, permissibly treated as arising out of the employment irrespective of any showing of increased risk or hazard attributable to the workplace?

518 So. 2d at 336. (Emphasis supplied).

As fully developed in employer/carrier's initial brief, no medical evidence was presented at hearing that the claimant in the instant case fractured her ankle as a result of a collision with the employer's carpeted floor. In fact, the evidence presented tended to show that the claimant fractured her ankle as a result of trapping it underneath her when her leg brace buckled. (R 8-15).

This distinction is significant. The district court cites Protectu Awning Shutter Company v. Cline, 16 So. 2d 242 (Fla. 1944) and Cheney v. S.E.C. News Distribution Company, 382 So. 2d 1292 (Fla. 1st DCA 1980), to support its finding below. Yet in Protectu and Cheney, the evidence was clear that the injuries to the respective claimants, in each case skull fractures, resulted directly from a collision with the hard floor. In both cases, the analysis of the respective courts focused primarily on the "increased risk" presented by the hard floor.

In the instant case, there was no medical evidence to substantiate that the hardness of the floor had anything to

do with the claimant's injury. The evidence suggests that the claimant injured herself in the course of the fall, not as a result of her impact with the floor.

Is the district court implying, by ignoring this distinction, that the claimant's injury would be compensable even had she not fallen? If so, then the district court has severed the last remaining tendril tying its analysis to the "increased risk" doctrine.

As the above case law shows, a proper application of the increased risk doctrine does not justify a conclusion that the employee's working conditions increased the risk of injury. Nor does it support a conclusion that the employer's carpeted floor aggravated the injury, or in fact caused the injury at all. The court's decision is simply not consistent with prior case law.

To state that the district court has had a distinct change of heart regarding its interpretation of the "increased risk" doctrine is to engage in masterful understatement. The court's logic and reasoning in the instant case flies in the face of its prior holdings and this court's decisions in McCook and Foxworth. The district court's decision cannot be supported under the "increased risk'' doctrine, and to its credit, the district court does not so claim. Witness the excerpt below:

> We strongly question whether a construction of the statute that has produced such inconsistent and uncertain results remains workable. Recognizing that such inconsistency and uncertainty is usually avoided by a simple, straightforward construction of the statute, we believe consistent with the decision in Protectu Awning and Shutter Company v. Cline, 154 Fla. 30, 16 So. 2d 342, that it should be given a straightforward construction to provide compensability of any injury to a worker during the course of his or her employment resulting from a fall at any place where the employee's duties required him to be, regardless of whether the act of falling was initiated by a condition personal to the claimant-a view we shall refer to for lack of a better term, as the actual risk doctrine. After careful research and analysis, we consider this doctrine to embrace the most logical and reasonable meaning of the statutory language to carry out the manifest purpose and intent of the workers' compensation action.

518 So. 2d at 331.

Clearly, the district court has decided that despite the existing case law, the actual risk test is the "most logical" solution to idiopathic injury cases. In view of the clear incongruity between the results in the instant case and the court's prior interpretation of the "increased risk" doctrine, employer/carrier respectfully submits that the district court, despite its pronouncement, decided this case based on its preference for the "actual risk test" it now champions.

Moreover, a careful examination of the "actual risk"

doctrine makes it clear that Professor Larson would not apply it to the facts of the instant case:

> [T]here is a distinction between neutral-risk situations (where there is no personal element contributing to the risk) and personal-risk situations (where a personal risk contributes to the injury, although perhaps in a relatively small degree).
>
> As to situations not involving any personal-risk element whatever, we have seen tht the better rule goes beyond the old rule demanding increased or peculiar risk contributed by the employment, and accepts actual risk . . . . The reason is that there is no competing personal risk to overcome. Any employment contribution, even merely putting the employee in the place where the injury from a neutral force occurred, is enough, because it is greater than the zero employee contribution.
>
> But when the employee contributes some personal element of risk-e.g., by having a personal enemy or a personal disease -we have been seen that the employment must contribute something substantial to increase the risk. The reason is that it must offset the causal contribution of the personal risk. The result in idiopathic fall cases in most jurisdictions is that there is no compensation unless some height or object associated with the work adds to the risk. . . . .
>
> If there is some personal contribution . . . the employment contribution must take the form of an exertion greater than that of non-employment life.

1 Larson, The Law of Workmen's Compensation, §38.83(b), 7-

278,279.

It is quite clear in this case that the claimant's polio, which was entirely personal to her, was the cause of this fall. Accordingly, it is equally clear that Professor Larson would require the employment to substantially contribute to the risk before finding the accident compensable. The district court has misunderstood and misapplied the "actual risk" test.

ARGUMENT II

THE FIRST DISTRICT COURT OF APPEAL'S "ACTUAL RISK" TEST IS CONTRARY TO THE CLEAR LEGISLATIVE INTENT OF THE STATUTE.

Instead of addressing the argument presented above, the claimant has instead chosen to resurrect an argument she made unsuccessfully to the deputy commissioner and district court. Claimant has "rephrased" this issue to allege that denial of workers' compensation benefits to her would constitute unlawful discrimination on the basis of a physical handicap. (Claimant's answer brief, page *6)*.

Claimant has chosen not to join the issues or respond to employer/carriers' argument despite the clear language of Fla.R.App.P. 9.210(c) and the equally clear instructions of

this court in Dania Jai Alai Palace v. Sykes, 450 So. 2d 1114 (Fla. 1984).[1]

Employer/carrier would respectfully point out to this court that the claimant's reworded Argument II is not a proper basis for appeal in the instant case. This court's jurisdiction has been invoked by way of certification of the question presented. Nothing in the certified question or in the district court's opinion below as much as hints that the claimant's argument formed even a partial basis for the district court's opinion in the instant case.

Nevertheless, employer/carrier feels compelled to briefly respond to the claimant's argument.

Claimant has reached the conclusion that granting or denying her workers' compensation benefits somehow turns on her status as physically handicapped. This conclusion is clearly erroneous.

The claimant's eligibility for workers' compensation benefits turns on the question of whether her accident "arose out of" her employment. In other words, claimant's ineligibility for workers' compensation benefits has nothing

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[1] See also American Baseball Corporation, Inc. v. Duzinski, 308 So. 2d 639 (Fla. 1st DCA 1975), In the interest of C.L. and T.L. Lester v. State of Florida & H.R.S., 13 F.L.W. 1530 (Fla. 1st DCA, July 8, 1988).

to do with her handicap. Rather, she is not entitled to benefits because the cause of her accident, a faulty knee brace, did not "arise out of" her employment. The above stated rule is applicable to handicap workers and non-handicap workers equally. No discrimination exists.

The claimant's unusual interpretation of the relevant issues notwithstanding, employer/carrier would again urge this court that the certified question should be answered in the negative. In arriving at its "actual risk" test, the district court is formulating a rule of law which clearly ignores the plain language of S440.09, Fla. Stats. Section 440.09 states in its relevant portion:

> Compensation shall be payable under this chapter in respect of disability or death of an employee if the disability or death results from an injury arising out of and in the course of employment.

(Emphasis supplied).

This court has stated that the terms "in the course of" and "arising out of" were not intended to be identical in meaning. Bituminous Casualty Corporation v. Richardson, 148 Fla. 323, 4 So. 2d 378 (Fla. 1941). Accordingly, this court must presume that if the Legislature had intended for the "arising out of" requirement to have no independent significance from the "in the course of" requirement, it was fully capable of drafting the statute in that fashion.

American Bankers Life Assurance Company of Florida v. Williams, 212 So. 2d 777 (Fla. 1st DCA 1968). The district court cannot now modify or shape clearly expressed legislative intent in order to uphold a policy favored by the court. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). To do *so* would be an abrogation of legislative power. Holly, 450 So. 2d at 219.

Deleting the Legislature's plainly expressed "arising out of" requirement would result in a standard in which all injuries, which by fate, happen to occur at work are compensable, even if the conditions of employment add nothing to the hazards or risk of injury. Such a standard would, in effect, convert the workers' compensation statute into a mandatory general health insurance policy. Such a standard is not and was never the intent of workers' compensation in Florida. General Properties Company v. Green, 18 So. 2d 908 (Fla. 1944).

If such a momentous policy decision is to be made, then a transformation of that magnitude must be made by the Legislature. McCook, 355 So. 2d at 1169.

CONCLUSION

Based on the foregoing, employer/carrier would respectfully request that this court answer the certified question in the negative, quash the decision of the district court, and reinstate the order of the deputy commissioner.

Respectfully submitted this 21st day of July, 1988.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Mr. H. George Kagan, Esquire, Miller, Hodges, Kagan and Chait, 455 Fairway Drive, Suite 101, Deerfield Beach, Florida 33441, and Mr. Richard M. Powers, Esquire, 850 Barnett Bank Building, 315 South Calhoun Street, Tallahassee, Florida 32301, this 21st day of July, 1988.

Gus Vincent Soto, Esquire