IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CYPRESS CREEK NURSERY
and CLAIMS CENTER,

Petitioners,

vs.

FLORENCE EAGLE,

Respondent.
_____/

Case No.: 72,710

First D.C.A. Case No.: 87-01183

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the Petitioners, CYPRESS CREEK NURSERY and CLAIMS CENTER, will be referred to herein as the "Employer/Servicing Agent" or by their separate names. The Respondent, FLORENCE EAGLE, will be referred to herein as the "Claimant."

References to the record-on-appeal will be cited as "T" and followed by the applicable page number.

References to the Initial Brief of the Petitioners will be referred to as "IB" and followed by the appropriate page number.

STATEMENT OF THE CASE

On or about April 23, 1987, the Claimant, FLORENCE EAGLE, filed a Claim for Compensation Benefits for injuries sustained as a result of an industrial accident arising out of and in the course and scope of the Claimant's employment with the Employer herein on June 10, 1985 (T-58). The Claimant was seeking, inter alia, temporary total or temporary partial disability benefits prior to MMI, wage loss benefits subsequent to MMI, payment of incurred medical bills, authorization of appropriate medical care, costs, interest, penalties and attorney's fees (T-58).

Thereafter, on August 19, 1987, a hearing was held on the aforesaid Claim for Compensation Benefits (T-1). At the hearing, the parties limited the issue to compensability (T-1). Specifically, the Employer/Carrier was contending that the Claimant did not suffer an accident arising out of and in the course of her employment, and that the Claimant's symptoms and conditions were unrelated to her employment (T-56).

Thereafter, on August 3, 1987, the Honorable Deputy Commissioner William M. Wieland entered his Compensation Order (T-165-169). In that Order, Deputy Commissioner Wieland found that the Claimant, FLORENCE EAGLE, had failed to prove by competent substantial evidence that she sustained an injury arising out of her employment with Cypress Creek Nursery on or about June 10, 1985 (T-167). To the contrary, Deputy Commissioner William M. Wieland found that the Claimant did not suffer an accident arising out of her employment with the Employer herein, but that the Claimant's condition predated her employment and that her current symptoms and conditions are unrelated to it (T-167).

As a result of these finding, Deputy Commissioner Wieland denied the Claimant's Claim for Compensation Benefits (T-168).

Thereafter, on September 4, 1987, the Claimant appealed Deputy

Commissioner Wieland's Order contending that the order erred in finding the Claimant's condition non-compensable. On or about June 24, 1988, the First District Court of Appeal entered its opinion in the above-referenced matter, Eagle v. Cypress Creek Nursery, 527 So. 2d 906 (1st D.C.A. Fla. 1988). In that opinion, the First District Court of Appeal reversed Deputy Commissioner Wieland's Order of August 3, 1987.

Thereafter, on or about July 5, 1988, the Petitioners/Employer/Servicing Agent filed their Notice to Invoke Discretionary Jurisdiction with this Honorable Court. On October 13, 1988, this Honorable Court entered an order accepting jurisdiction and dispensing with oral argument. This Answer Brief of Respondent is being filed pursuant to this Honorable Court's Order of October 13, 1988.

STATEMENT OF THE FACTS

It is respectfully submitted that the Statement of the Facts as set forth by Petitioners in their Initial Brief is incomplete. As such, the Respondent herein supplements the Statement of the Facts as set forth by Petitioners in their Initial Brief, Metropolitan Life & Travelers Insurance v. Antonucci, 469 So. 2d 952 (1st D.C.A. Fla. 1985), Rule 9.210(c), Florida Rules of Appellate Procedure.

The Claimant, FLORENCE EAGLE, was born on May 24, 1925 (T-2, 71), and was 62 years old at the time of the hearing (T-2). The Claimant began the second grade but did not finish it (T-3, 71). She can read and write a little (T-3, 71). The Claimant's past employment has consisted of manual labor, in that she has picked oranges and fruit (T-3), and she has pulled weeds (T-71).

Prior to the Claimant working for the Employer herein, the Claimant picked fruit for Cal Eagle for 14 years (T-4, 5). The Claimant picked fruit until November of 1984 (T-5, 6, 72). During this period of time, the Claimant would climb ladders and pick fruit, or pick some fruit on the ground, and would also carry her ladder moving from one tree to the next (T-5-7, 72). During this period of time, the Claimant had no trouble with her knees, and no problems climbing these ladders (T-6, 72).

The Claimant did acknowledge that she had been under the care of a physician for high blood pressure during this period of time (T-8, 20, 76). The Claimant also had diabetes (T-75, 76).

The Claimant testified that the last supervisor that she worked for in 1984 while picking fruit was her husband (T-6, 98). After the Claimant and her husband split up, the Claimant did not have transportation to her former fruit picking job, and needed a job where they would pick her up and take her to her job (T-7).

The Claimant began working for Cypress Creek Nursery in November of 1984 (T-4). The Claimant's main job for Cypress Creek Nursery was pulling weeds and potting flowers (T-4, 71). The Claimant testified that when she went to work for the Employer herein, she had no problems with her right knee at all (T-8). The Claimant testified that she would take a few days off from work to be treated for her high blood pressure (T-8, 99). However, the Claimant testified that prior to the accident, she was able to do all of the work that she was required to do (T-8). The Claimant testified that she had no problems with her right knee until the day that she fell on June 10, 1985 (T-78, 87).

Petitioners state in their Statement of the Facts that the Claimant specifically testified that her knee hurt "just a little" before she fell the first time (IB-3). However, it is respectfully submitted that the Claimant has clearly testified in this case that she had no problems with her right knee until the day that she fell on June 10, 1985 (T-78, 87).

Petitioners refer to Page 16 of the transcript for the contention that the Claimant finally admitted that she had indeed testified that her right leg was in fact hurting prior to June 10, 1985 (IB-3). However, as argued by counsel for Claimant at the hearing, counsel for Petitioners were taking that statement out of context. In fact, on Page 17 of the transcript, the Claimant specifically stated that her right knee couldn't have been hurting prior to time that she fell the first time (T-17).

The Claimant testified that on or about June 10, 1985 she was involved in an industrial accident during the course and scope of her employment with the Employer herein. The Claimant testified that she was bending over pulling weeds (T-81). Petitioners state in their Statement of the Facts that Claimant fell two or three times when her knee spontaneously gave way on her without any external cause (IB-3). However, the Claimant testified that at that time she was pulling a weed which

turned loose and the Claimant stumbled and fell on her right knee (T-9, 82). The Claimant testified that she went down on the ground, and that the ground was hard (T-9, 10, 82). The Claimant testified that after she hit her right knee, it started hurting her (T-10). The Claimant also testified that a co-worker named Minnie Grace was there when this occurred (T-10, 82). The Claimant testified that she had never fallen prior to that day (T-9).

After the Claimant fell, the Claimant tried to keep working but it hurt her to stand on her right leg (T-10, 11). The Claimant testified that she had trouble walking (T-12). The Claimant testified that she then fell a second time approximately thirty (30) minutes later (T-12, 82). The second time the Claimant testified that she tripped over some vines and landed on her right knee again (T-12, 13, 82). The Claimant testified that she then was taken home by a co-worker (T-86).

After the Claimant was taken home, she went to Winter Garden Hospital Emergency Room (T-14, 86, 87). The Claimant testified that her right knee was hurting her and it had swollen up (T-86). The Claimant testified that she was initially seen by Dr. Edward Bradford, who was the Claimant's treating physician, and that he put her in the hospital (T-87).

The deposition of Dr. Edward Bradford taken October 2, 1986 was introduced into evidence (T-111). Dr. Bradford testified that he has been a doctor since 1949, specializing in medicine and general surgery (T-112).

Dr. Bradford testified that he initially saw the Claimant on July 5, 1982 for high blood pressure (T-113). The Claimant's blood pressure at that time was 208/98 (T-113). Dr. Bradford put the Claimant in the hospital for a few days to get the blood pressure down (T-113, 114). Dr. Bradford also undertook to treat the Claimant's diabetes at that

time (T-114). Dr. Bradford got the Claimant's blood pressure and diabetes under control (T-114, 115).

Dr. Bradford continued to see the Claimant periodically. On January 11, 1983, the Claimant's weight was 190 lbs. and she asked Dr. Bradford to check her left knee because it was hurting (T-116). Dr. Bradford indicated that the Claimant had osteoarthritis and was losing her cartilages at the time (T-116). Dr. Bradford gave the Claimant Motrin in 1983 and gave her one injection in her left knee (T-116, 129). The Motrin was never refilled (T-129). Dr. Bradford testified that between January 11, 1983 and June 10, 1985, the Claimant did not complain of knee pain again (T-117). Dr. Bradford testified that all of his treatment for the Claimant prior to June of 1985, with the exception of the Motrin that had never been refilled and the injection to the left knee, had been for the Claimant's high blood pressure and her diabetes (T-129, 130). Dr. Bradford indicated that the Claimant was not at any time having any trouble with her right knee (T-117).

On or about June 10, 1985, the Claimant presented herself to West Orange Memorial Hospital Emergency Room (T-161). The emergency rrom record states:

> "Patient states her right hip and right leg have been hurting since 6/8/85." (T-161).

Additionally, the admitting diagnosis states:

> "Pt. states pain R knee, hot, swelling, this started last night, ambulated OK yesterday. Has fallen 4 x today because knee hurts also has pain R hip." (T-161).

Dr. Bradford testified that he admitted the Claimant to West Orange Memorial Hospital on June 10, 1985 because the Claimant's right knee was swollen and feverish (T-121). The Claimant's diagnosis was right knee swollen and feverish plus severe degenerative cartilage of the knee, right; diabetes mellitis, uncontrollable; and hypertension

(T-121, 122). The Claimant remained in the hospital from June 10, 1985 through June 28, 1985 (T-123).

Dr. Bradford indicated that the Claimant did not give him any history of an accident initially (T-124). Dr. Bradford indicated that the Claimant just said that her leg collapsed on her (T-124).

However, approximately 8 to 10 days after the Claimant was initially admitted, Dr. Bradford testified that the Claimant's daughter said the Claimant thinks she hurt herself on the job (T-124, 131, 132). The Claimant also told Dr. Bradford about hurting herself on the job, when the Claimant's daughter was present (T-127, 131, 133). Dr. Bradford remembers that the Claimant was telling him that she was pulling weeds (T-133).

Dr. Bradford testified that while the Claimant was in the hospital, he referred the Claimant to Dr. James Johnson, an orthopedist in Orlando, Florida for a consultation (T-127). Dr. Bradford also stated that he would defer to Dr. Johnson as far as causal relationship between the Claimant's knee condition and the industrial accident that she gave by history (T-131).

The deposition of Dr. James C. Johnson taken August 12, 1986 was introduced into evidence (T-137). Dr. Johnson is an orthopedic surgeon in Orlando, Florida (T-139). Dr. Johnson testified that he first saw the Claimant on June 25, 1985 and treated her through July 17, 1986 (T-139).

Dr. Johnson's office notes reflecting his initial consultation on June 25, 1985 state:

> "The patient fell while working at a nursery where she had been employed for two years. She stumbled while working when her right knee buckled." (T-160).

In his deposition Dr. Johnson stated that the Claimant had told him that she was working at the nursery when she stumbled while she was doing her usual job and walking along her right knee buckled and she

fell down, and that she bumped her knee (T-148).

Dr. Johnson testified that the Claimant was complaining of pain in her right knee, and that she was extremely symptomatic when he saw her on June 25, 1985 (T-140). Dr. Johnson diagnosed the Claimant's condition as extremely severe degenerative arthritis of the right knee joint certainly aggravated by the fall (T-142, 143). The additional diagnosis would be right knee strain, right knee sprain, contusion to the right knee, superimposed on pre-existing severe osteoarthritis of the knee joint (T-142, 143).

Dr. Johnson testified that the history that the Claimant gave was that he knee was asymptomatic prior to the fall (T-143).

Dr. Johnson was asked the following hypothetical question, to wit:

> "Q. Assume if you will, doctor, that Mr. Pyle has taken her deposition and that the patient testified under oath that on or around June 10, 1985, she was at work at Cypress Creek Nursery where she had worked for some time, that she was pulling weeds which was in her normal type of work duties, and as she pulled the weeds she fell, she testified that she had not had any trouble with her knee before she feel and that was the only time she had fell on that particular day, she had not fallen before or after, that she didn't tell Minnie Grace or Valerie Cooper, her co-worker and supervisor, that she had had any difficulty walking prior to the time she pulled the weeds and fell. She also testified that she stumbled over the weeds after that and fell a second time, that the plants were about at knee high and that she went down on her right knee when she fell and that the ground was hard and she fell on the plastic injuring her right knee, and that she went down on her right knee on both occasions when she fell and the second fall was near the gate at the time she fell.
>
> Assume, doctor, that that is her testimony under oath. Do you have any opinion within reasonable medical probability as to whether those industrial accidents which I've described to you at her place of employment are causally related to your visits with this patient when you saw her on June 25, 1985. (T-141-142).
>
> ...

A. I do.

Q. All right, sir. And do you have an opinion as to whether the industrial accidents are causally related to what you saw when you saw the patient, doctor, on June 25, 1985?

A. Yes.

Q. And what is that opinion?

A. That it was causally related to the immediate problem." (T-141, 142).

Dr. Johnson also testified that the industrial accident made the Claimant's pre-existing osteoarthritic condition symptomatic (T-143).

Petitioners state in their Initial Brief that Dr. Johnson testified that the Claimant suffered from severe osteoarthritis in both knees (IB-6). Petitioners then state that Dr. Johnson testified that based on the Claimant's arthritic condition, it would not be inconsistent for her leg to buckle or give way (IB-6, 7).

However, as noted previously hereinabove, the Petitioners have failed to state that Dr. Johnson testified, within a reasonable degree of medical certainty or probability, that the Claimant's present condition with her knees was causally related to the Claimant's industrial accident of June 10, 1985 (T-141, 142).

Dr. Johnson further testified that as a result of the Claimant's industrial accident, Dr. Johnson eventually did a right total knee replacement on October 9, 1985 (T-144, 159). Dr. Johnson testified that the right knee replacement was caused by the industrial accident which aggravated the pre-existing osteoarthritic condition in the Claimant's right knee (T-143).

Dr. Johnson also testified that because of the excess weight that the Claimant has placed upon her left leg because of the right knee replacement, that this has partially caused some of the problems that the Claimant is now having with her left knee (T-146). Dr. Johnson testi-

fied that the Claimant was not employable at the present time (T-146).

Dr. Johnson also testified that the Claimant reached maximum medical recovery on March 24, 1986 with a permanent physical impairment of 15% to the body as a whole (T-146, 147).

The Claimant testified that she now walks with the aid of a walker (T-14, 15). The Claimant testified that her leg is real weak and she cannot stand on it (T-15). The Claimant has not worked since the date of her industrial accident on June 10, 1985 (T-15). The Claimant also has not received any workers' compensation benefits (T-15). The Claimant also testified that she did not tell the hospital that her knee had been hurting before the accident (T-17, 18).

The Claimant also presented the testimony of Mrs. Zara Rodgers, a long time resident of Winter Garden, Florida, who has known the Claimant for approximately 17 years (T-21). Mrs. Rodgers testified that she has worked with the Claimant picking fruit (T-21, 22). She testified that prior to June of 1985 she would see the Claimant 2 to 3 times a week (T-23). Mrs. Rodgers testified that prior to June of 1985, she had never seen the Claimant walk with a limp (T-23). Mrs. Rodgers testified that the Claimant had never complained about any trouble with her right knee (T-23, 24). Mrs. Rodgers testified that when she worked picking oranges with the Claimant, the Claimant could go up and down the ladders without having any trouble (T-24).

Mrs. Rodgers also testified that when she knew that the Claimant and her husband split up, she suggested that the Claimant work for Cypress Creek Nursery because there was a truck that the company would send by to pick people up (T-22).

The Claimant also presented the testimony of Geraldine Bostwick, a resident of Winter Garden, Florida, who has known the Claimant for approximately 20 years (T-25). The Claimant was living in Mrs. Bostwick's

house when the Claimant went to work for the Employer herein (T-25, 26). Mrs. Bostwick testified that the Claimant lived upstairs, and that she saw the Claimant daily (T-26). Mrs. Bostwick testified that the Claimant had no trouble going up and down the stairs when the Claimant lived there (T-26, 27). Mrs. Bostwick further testified that prior to June of 1985, the Claimant never complained about her right knee, and Mrs. Bostwick never saw the Claimant have any trouble walking (T-26, 27).

The Employer/Servicing Agent presented the testimony of Mrs. Valerie Cooper who is employed at Cypress Creek Nursery (T-29). Mrs. Cooper testified that she was employed with the Employer in June 1985 and that she knows the Claimant (T-29, 30). Mrs. Cooper testified that she first became aware that the Claimant had a problem with her knee when she went out to check on the Claimant and Minnie Grace who was working with the Claimant (T-30). Mrs. Cooper testified that she went up and asked what had happened and Mrs. Grace said that the Claimant had been falling (T-30). Mrs. Cooper testified that she said that she would then take the Claimant to the office, and as they were getting into the golf car, the Claimant's leg gave way again (T-30, 31). Mrs. Cooper testified that the Claimant had raised her left leg and her weight was on her right leg and that is the one that gave way (T-31). Mrs. Cooper testified that the Claimant did not trip on any vines or weeds (T-31).

Petitioners state in their Statement of the Facts that Mrs. Cooper witnessed the Claimant's leg give way while she was attempting to step into the golf cart (IB-5). However, Claimant respectfully points out that Claimant was getting into the golf cart with Mrs. Cooper after the Claimant had already fallen and injured her right knee (T-30).

The Employer/Servicing Agent also presented the testimony of Minnie Grace who was employed with the Employer in June of 1985 (T-36). Mrs. Grace testified that she knew the Claimant and she worked with the

Claimant for the Employer (T-37). Mrs. Grace testified that she and the Claimant primarily pulled weeds (T-37). Additionally, sometimes she and the Claimant would have to put wires on hanging baskets, and they would also have to open and close the doors on the greenhouse (T-38). Mrs. Grace testified that her job did require quite a bit of traveling around, and that they would have to walk (T-38). Mrs. Grace testified that prior to the Claimant falling she would complain about her knee hurting (T-38).

Mrs. Grace also testified that the Claimant would show her that her knee was swollen (T-39). Mrs. Grace also testified that here would be times that the Claimant would say that her knee was hurting, and the Claimant would be taking it easy while Mrs. Grace covered for her because the Claimant's knee was hurting 9T-39).

Mrs. Grace also testified that she observed the Claimant prior to the accident rubbing different things like Ben Gay or alcohol on her knee (T-40).

Mrs. Grace testified that she was working with the Claimant on June 10, 1985 (T-40). Mrs. Grace testified that on that day they were pulling weeds and all of a sudden the Claimant's knee slipped (T-41). Mrs. Grace testified that the Claimant did not trip, but the Claimant's knee just gave way like it slipped or something (T-41). Mrs. Grace testified that the first time they did not think too much of it, and then the second time it slipped again and the Claimant started crying (T-41). Mrs. Grace testified that the Claimant then slipped 4 to 5 times before Valerie Cooper came up (T-42).

Petitioners state in their Statement of the Facts that it was the testimony of Minnie Grace that the Claimant had complained about her knees hurting in the winter time prior to the falls of June 10, 1985 (IB-4). Petitioners also state that Minnie Grace testified that prior

to June 10, 1985, the Claimant's knee was swollen (IB-4).

However, on cross-examination, Mrs. Grace testified that she did not know exactly what knee it was that was swollen, and that the Claimant was rubbing (T-46, 47). Mrs. Grace also testified that she did not know which knee was buckling on the Claimant although she thought it was her right knee (T-47, 48).

Furthermore, on cross-examination, Mrs. Grace testified that she did know that prior to the Claimant working for Cypress Creek Nursery, the Claimant had picked fruit and had been up and down ladders (T-43). Mrs. Grace also testified that the Claimant did not have complaints about her knees when she first started working for Cypress Creek Nursery, and she did not recall how long the Claimant had been working there before she started to complain about her knees (T-43, 44).

Mrs. Grace also testified that she did not see the Claimant pulling weeds, having the weed come loose, and the Claimant falling (T-49, 50). Mrs. Grace did testify, however, that the Claimant did fall while working at Cypress Creek Nursery, and that she did fall on her knees (T-51, 52).

A more specific reference to facts will be made during argument.

POINTS ON APPEAL

POINT I

WHETHER OR NOT THE DISTRICT COURT OF APPEALS ERRED IN APPLYING THE LAW OF GRIMES V. LEON COUNTY SCHOOL BOARD TO THIS CAUSE.

POINT II

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL COMMITTED ERROR IN FINDING THAT THE CLAIMANT'S ABILITY TO CONTROL HER ACTIVITIES AND POSITIONAL CHANGES WAS NOT AT GREAT AT WORK AS IT WOULD HAVE BEEN AT HOME.

SUMMARY OF ARGUMENT

POINT I

WHETHER OR NOT THE DISTRICT COURT OF APPEALS ERRED IN APPLYING THE LAW OF GRIMES V. LEON COUNTY SCHOOL BOARD TO THIS CAUSE.

It is respectfully submitted that the First District Court of Appeal in the case at bar, and in Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987), has not in effect legislated away the requirement that an industrial accident and injury must arise out of the employment.

Rather, the First District Court of Appeal, by adopting the "actual risk" doctrine in Grimes v. Leon County School Board, supra, has held that in idiopathic falls, an injury arises out of employment, when it occurs within the period of employment, at a place where the employee may be reasonably be, and while he is reasonably fulfilling the duties of employment, or engaging in something incidental to it. It is respectfully submitted that this finding of "arising out of employment" is totally consistent with other types of workers' compensation injuries, such as injuries sustained by traveling employees, or injuries dealing with the "personal comfort" doctrine. For example, the First District Court of Appeal has consistently held that an injury to a traveling employee arises out of employment, when it occurs within the period of employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of employment, or engaging in something incidental to it. This is true, even though the conditions of employment themselves had nothing to do with the cause of the claimant's accident. Thus, in Pan American World Airways v. Wilmot, 492 So. 2d 1373 (1st D.C.A. Fla. 1986), a worker who was having dinner during a layover and burned her hand while lighting a cigarette was found to have sustained an injury

"arising out of" the course of her employment. Similarly, an employee in Gray v. Eastern Airlines, Inc., 475 So. 2d 1288 (1st D.C.A. Fla. 1985) who was injured while engaging in a sports activity for personal health and recreation reasons during an enforced layover, was found to have sustained an injury "arising out of" employment. It is obvious in both of these cases that the conditions of the claimant's employment had absolutely nothing to do with the claimant's accident, but since the accident occurred "during the course of the claimant's employment" and at a place where the employee was reasonably expected to be, the injuries were compensable.

Similarly, in idiopathic cases, by adopting the "actual risk" doctrine, the First District Court of Appeal has now done away with the requirement that the claimant show that the employment conditions exposed the claimant to conditions that substantially contributed to the risk of the injury. It is respectfully submitted that this is consistent with other workers' compensation cases, as noted previously, such as the traveling employee cases and the "personal comfort" cases.

Furthermore, Claimant would respectfully submit that the First District Court of Appeal in the case at bar found the Claimant's claim to be compensable under both the "actual risk" doctrine and the "increased hazard" doctrine. Thus, even if the principles laid down in Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987) are rejected by this Court, it is respectfully submitted that the Claimant's injuries are still compensable under the "increased hazard" doctrine.

POINT II

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL COMMITTED ERROR IN FINDING THAT THE CLAIMANT'S ABILITY TO CONTROL HER ACTIVITIES AND POSITIONAL CHANGES WAS NOT AS GREAT AT WORK AS IT WOULD HAVE BEEN AT HOME.

Prior to the First District Court of Appeals' decision in Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987), the rule dealing with idiopathic falls was that injuries caused by idiopathic falls do not arise out of employment unless the employment in some way contributes to the risk personal to the claimant or aggravates the injury, Legakis v. Sultan & Sons, 383 So. 2d 938 (1st D.C.A. Fla. 1980), Foxworth v. Florida Industrial Commission, 86 So. 2d 147 (Fla. 1955).

In other words, there is a basis for recovery for injuries resulting from a fall caused by idiopathic conditions where either the employment conditions contribute to the fall, Cheney v. FEC News Distribution Company, 382 So. 2d 1291 (1st D.C.A. Fla. 1980), or where the injuries from the fall can be attributed to some increased hazard attendant to the job such as where the fall is into dangerous or hard objects, Legakis v. Sultan & Sons, 383 So. 2d 938 (1st D.C.A. Fla. 1980), Foxworth v. Florida Industrial Commission, 86 So. 2d 147 (Fla. 1955).

In the case at bar, the First District Court of Appeal properly found that the Claimant is entitled to compensation under the "increased hazard" doctrine, because the Claimant's ability to control her activities and positional changes was not as great at work as it would have been at home. There is competent substantial evidence in the record to support this finding by the First District Court of Appeal, since the Claimant's job required her to continually bend or stoop over pulling weeds (T-9, 81), and according to the Employer/Servicing Agent's primary witness, Minnie Grace, required the Claimant to do a good deal of walking, which Minnie Grace testified hurt the Claimant's knee (T-38).

Additionally, it is respectfully submitted that the uncontradicted evidence in the case at bar is that the Claimant fell on "hard" ground (T-82), and since the ground that the Claimant fell on was irrefutably "hard" the hard ground was an increased hazard attributable to the Claimant's

employment, in the same manner as a concrete floor or exceedingly floor would constitute a hazard of employment.

Therefore, the First District Court of Appeal properly found that the Claimant's injuries are compensable, under either the "increased hazard" doctrine or the "actual risk" doctrine.

ARGUMENT - POINT I

WHETHER OR NOT THE DISTRICT COURT OF APPEAL ERRED IN APPLYING THE LAW OF GRIMES V. LEON COUNTY SCHOOL BOARD TO THIS CAUSE.

Prior to the decision of the First District Court of Appeal in Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987), the rule dealing with idiopathic falls, i.e. falls caused by a condition personal to the claimant, was that injuries caused by idiopathic falls do not arise out of employment unless the employment in some way contributes to the risk personal to the claimant or aggravates the injury, Medeiros v. Residential Community of America, 481 So. 2d 92 (1st D.C.A. Fla. 1985), House v. Preferred Auto Leasing, 476 So. 2d 1337 (1st D.C.A. Fla. 1985), Lovett v. Gore Newspapers Company, 419 So. 2d 306 (Fla. 1982), Cheney v. FEC News Distribution Company, 382 So. 2d 1291 (1st D.C.A. Fla. 1980), Legakis v. Sultan & Sons, 383 So. 2d 938 (1st D.C.A. Fla. 1980), Foxworth v. Florida Industrial Commission, 86 So. 2d 147 (Fla. 1955). Thus, it was held that an injury "arises out of" employment when the employment necessarily exposes the claimant to conditions that substantially contribute to the risk of injury, conditions which the claimant would not normally encounter during his non-employment life, Medeiros v. Residential Communities of America, 481 So. 2d 92 (1st D.C.A. Fla. 1986).

In other words, there was a basis for recovery for injuries resulting from a fall caused by idiopathic conditions where either the conditions of employment somehow aggravated the claimant's idiopathic condition, or increased the chances of the claimant falling, see e.g. House v. Preferred Auto Leasing, 476 So. 2d 1337 (1st D.C.A. Fla. 1985), Lovett v. Gore Newspapers Company, 419 So. 2d 306 (Fla. 1982), Cheney v. FEC News Distribution Company, 382 So. 2d 1291 (1st D.C.A. Fla. 1980), or where the injuries from the fall can be attributed to some increased hazard attendant

to the job such as where the fall is into dangerous object, Legakis v. Sultan & Sons, 383 So. 2d 938 (1st D.C.A. Fla. 1980), Foxworth v. Florida Industrial Commission, 86 So. 2d 147 (Fla. 1955).

Common examples of employment conditions which cause an increased risk to employee include a fall from heights or onto dangerous objects, Legakis v. Sultan & Sons, 383 So. 2d 938 (1st D.C.A. Fla. 1980). Additionally, things considered dangerous objects are such things as a sawhorse, hot stove, a spot welding machine, a sharp corner of a wooden table, a fire built by a night watchman, and heights, Foxworth v. Florida Industrial Commission, 86 So. 2d 147 (Fla. 1955).

Furthermore, it has specifically been held that a concrete floor or exceedingly hard floor may constitute a hazard of employment where it aggravates injuries otherwise suffered, Honeywell, Inc. v. Scully, 289 So. 2d 393 (Fla. 1974), Protectu Awning Shutter Company v. Cline, 16 So. 2d 342 (Fla. 1944).

Thus, prior to the First District Court of Appeal's decision in Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987), idiopathic falls were subject to the "increased hazard" doctrine which as noted hereinabove, held that an injury resulting from risks or conditions solely personal to the claimant did not "arise out of and in the course of employment" unless the employment condition contributes to the risk or aggravates the injury, Grimes v. Leon County School Board, supra at 329.

In the case of Grimes v. Leon County School Board, supra, the claimant was afflicted with polio as a child and was required to wear a full brace on her right leg at all times. The brace contained a lock at the knee joint, which must be manually locked each time the claimant stands. On the day in question, the claimant was meeting with a supply salesman who requested to see one of her files. When the claimant arose

from her desk to retrieve the file, she manually locked the brace as usual. The brace, however, gave way, causing the claimant to fall and fracture her left ankle. The claimant had testified that in her job the working conditions were very crowded, much more so than at home, and that she was required to constantly get up and down from her desk.

The First District Court of Appeal in Grimes v. Leon County School Board, supra, found that it was less likely that the claimant would have fallen at home where she could have better and more selectively controlled her positional changes. Additionally, the First District Court of Appeal found that the claimant could have controlled the amount of her activities at home, while she could not do so at work. As such, the First District Court of Appeal held:

> "... 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." Grimes v. Leon County School Board, supra at 329.

The First District Court of Appeal in Grimes, supra, however, went further, and re-examined the origin and logic of the "increased hazard" doctrine as applied to idiopathic falls. The First District Court of Appeal felt that difficulties inherent in the application of the "increased hazard" doctrine had left the decisional law in a state of confusion with inconsistent results and that the increased hazard doctrine was simply bad law. After a detailed discussion of the illogical and inconsistent results arising out of the "increased hazard" doctrine, the First District Court of Appeal in Grimes v. leon County School Board, supra, concluded that Chapter 440 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 require 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." Grimes v. Leon County School Board, supra at 331.

The First District Court of Appeal then certified the following question as one of great public importance to this Honorable Court, to wit:

> "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 injuries from collision with the floor, equipment or other conditions of the work place, permissibly treated as arising out of the employment irrespective of any showing of increased risk or hazard attributable to the work place?"

Petitioners contend that the First District Court of Appeal in Grimes v. Leon County School Board, supra, improperly usurp the function of the legislature by eliminating the need for there to be a finding that the injury "arose out of" the employment (IB-11).

Claimant would respectfully point out that the First District Court of Appeal in Grimes, supra, has not usurped the function of the legislature, and has not done away with a finding that the injury "arose out of" the employment. The First District Court of Appeal in Grimes, supra, is interpreting Florida Statutes §440.02(1) and (14) and Florida Statutes §440.09(1985), statutes which require that a workers' compensation injury must "arise out of" employment. Furthermore, the First District Court of Appeal in Grimes, supra, has interpreted those sections in a manner consistent with the interpretation rendered by this Honorable Court in the case of Protectu Awning Shutter Company v. Cline, 16 So. 2d 342 (Fla. 1944). As noted by the First District Court of Appeal in Grimes v. Leon County School Board, supra, this Honorable Court in Protectu Awning Shutter Company v. Cline, supra, found that the claimant's fatal injury was compensable when the claimant fell and struck his head

on a concrete floor, even though the claimant's fall occurred because of a prior idiopathic condition which caused the claimant to have fainting spells.

It is further respectfully submitted that the First District Court of Appeal in Grimes v. Leon County School Board, supra, is not, contrary to the contention of the Petitioners, espousing a new theory or doing away with the requirement that an injury "arise out of" the employment, but rather it is respectfully submitted that the First District Court of Appeal's decision in Grimes, supra, is entirely consistent with other decisions defining "arising out of employment," particularly decisions dealing with the "traveling employee" rule or the "personal comfort" rule. Furthermore, it is respectfully submitted that the "actual risk" doctrine as espoused by the First District Court of Appeal in Grimes v. Leon County School Board, supra, is more consistent with the no-fault concept of workers' compensation than is the "increased hazard" doctrine, which focuses on the cause of the accident, an approach more similar to a fault system.

As noted previously, prior law involving idiopathic falls held that injuries caused by idiopathic falls do not arise out of employment unless the employment in some way contributes to the risk personal to the claimant or aggravates the injury, Legakis v. Sultan & Sons, 383 So. 2d 938 (1st D.C.A. Fla. 1980), Foxworth v. Florida Industrial Commission, 86 So. 2d 147 (Fla. 1955). Thus, where an idiopathic fall is involved, a claimant would be required to show, that some how, the claimant's working condition aggravated the prior idiopathic condition, or in some way contributed to the fall. Thus, in Lovett v. Gore Newspapers Company, 419 So. 2d 306 (Fla. 1982), the claimant's injuries were held compensable when the claimant who had a pre-existing congenital condition, fainted and fell on her way to the bathroom, on a night when the claimant

was required to work two hours beyond her normal eight-hour shift.

Similarly, in Cheney v. FEC News Distribution Company, 382 So. 2d 1291 (1st D.C.A. Fla. 1980), a claimant with a pre-existing condition which caused the claimant to have recurrent symptoms of headaches and dizziness which occurred mostly when he was bending down, who fell when bending down to pick up and put magazines on a rack because he became dizzy, was found to have sustained an accident and injury arising out of and in the course of his employment, since the activity demanded by claimant's employment increased the chances of his becoming dizzy and thus aggravated his pre-existing physical condition.

Yet on the other hand, the First District Court of Appeal had previously held that a claimant's injuries were non-compensable where the claimant fell on a stairway while delivering a package because the cause of the fall allegedly was solely attributable to the claimant's personal condition and the employment conditions did not increase the risk of injury, Medeiros v. Residential Communities of America, 481 So. 2d 92 (1st D.C.A. Fla. 1985). Similar results were reached in Honeywell, Inc. v. Scully, 289 So. 2d 393 (Fla. 1974) (where injuries resulting from a fall caused in turn by a fainting spell were held to be non-compensable because the hazard of employment did not aggravate the injuries); and Southern Convalescent Home v. Wilson, 285 So. 2d 404 (Fla. 1973) (injuries suffered by claimant following fall caused by epilepsy arose from a risk or condition personal to him, and did not arise out of his employment).

Thus, under the increased hazard doctrine, an element of fault at least on the employment conditions must be found in order to find that injuries sustained as a result of the idiopathic fall are compensable. As noted by Petitioners in their Initial Brief, when the Florida Workers' Compensation Law was enacted, it dispensed with the need to

prove the employer was negligent in order for the injured employee to receive compensation (IB-11). Under the increased hazard doctrine, Claimant/Respondent recognizes that there is no requirement to prove the employer was "negligent," but as noted hereinabove, there does appear to be a requirement to hold that either the condition of employment is somehow at fault in causing the claimant to fall, or the condition of employment is somehow at fault, by creating "increased hazards" when the claimant does fall. The requirement that a claimant who has an idiopathic fall must somehow show that his conditions of employment are at "fault" in either causing the fall or causing the injury, are not only contrary to the no-fault concept of workers' compensation, but are also contrary to the requirements of a claimant in other types of accidents, such as traveling employee cases or personal comfort cases.

For example, in Gray v. Eastern Airlines, Inc., 475 So. 2d 1288 (1st D.C.A. Fla. 1985), the claimant was an Eastern Airlines' flight attendant. The claimant had flown from Miami to Rochester, New York where he had a scheduled layover for two days. Eastern paid the claimant's lodging at a Holiday Inn in Rochester. On an afternoon during the claimant's stay, he broke his nose while playing in a "pick-up" basketball game at at YMCA near the hotel.

The First District Court of Appeal held that for the claimant's injury to arise out of employment,

> "It must occur within the period of employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of employment, or engaging in something incidental to it." Gray v. Eastern Airlines, Inc., supra at 1289.

As such, the claimant's injuries were held to be compensable.

It should be noted that the definition of an injury to "arise out of" employment in Gray v. Eastern Airlines, Inc., supra, is virtually

identical to the First District Court of Appeal's determination in Grimes v. Leon County School Board, supra, that the claimant's injury "arises out of employment" when the claimant sustains an injury resulting from a fall at any place where the claimant's duties require him to be regardless of whether the act of falling was initiated by a condition personal to the claimant. In Gray v. Eastern Airlines, Inc., there can be no question but that the injury to the claimant's nose was initiated by a condition personal to the claimant, to wit: the claimant's personal desire to play in a pick-up basketball game for the claimant's personal health and comfort. The conditions of the claimant's employment in Gray v. Eastern Airlines, Inc., supra, had absolutely nothing to do with the claimant's accident, other than the fact that the claimant was within his period of employment at a place where he could reasonably be expected to be. Similarly, in idiopathic cases, and in particular in the case at bar, the accident occurred to the Claimant within the period of the Claimant's employment, at a place where the Claimant was reasonably expected to be, and while the Claimant was reasonably fulfilling her duties of employment.

Similarly in N & L Auto Parts Company v. Doman, 111 So. 2d 270 (1st D.C.A. Fla. 1959), a claimant who traveled out-of-town on a sales trip was injured while returning from the movies. Specifically, in N & L Auto Parts v. Doman, supra, the claimant had gotten out of a taxicab, and walked along the horseshoe shaped driveway in the direction of the room which the claimant would occupy for the night. Upon arriving at a point in the driveway directly in front of the door to the claimant's room, the claimant left the driveway and started walking across the lawn. After three or four steps in the direction of the door to his room, the claimant's ankle turned and he fell, breaking his leg. The claimant's condition was held to be compensable in that it arose out of and during

the course and scope of the claimant's employment. Again, in N & L Auto Parts Company v. Doman, supra, the claimant's condition of employment did not in any way contribute to the claimant's accident, and the claimant's fall was unquestionably "personal" to the claimant, in that he simply turned his ankle causing him to fall. It is respectfully submitted that the claimant's fall in N & L Auto Parts Company v. Doman, supra, is no different than the fall of a claimant caused by a prior idiopathic condition since both falls are personal to the claimant (one because the claimant turned his ankle, and the other because of a prior idiopathic condition), but both falls occurred within the period of employment of a claimant, at a place where the claimant may reasonably be, and while he is reasonably fulfilling the duties of employment.

Another similar situation is Pan American World Airways v. Wilmot, 492 So. 2d 1373 (1st D.C.A. Fla. 1986). In the Wilmot case, supra, the claimant was a flight attendant employed by Pan American Airlines. In her capacity, while having dinner at one of several restaurants assigned by her employer during a layover in Caracas, Venezuela, the claimant attempted to light a cigarette and burned her hand when the entire matchbook went up in flames, resulting in the loss of four weeks work and her payment of unreimbursed medical bills. The employer argued that an airline employee during a layover is in the course of employment, but argued that smoking is a hazardous habit which does not arise out of the course of employment.

The First District Court of Appeal held that the personal comfort doctrine, which approves compensation under the theory that

> "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 than an intent to abandon the job temporarily may be inferred ..." Pan

American World Airways v. Wilmot, supra at 1374.

As such, the claimant's injuries were found to be compensable.

It is respectfully submitted that in Pan American World Airways v. Wilmot, supra, the claimant's injuries were totally personal to the claimant, in that the claimant injured herself while trying to light cigarettes. The claimant's condition of employment in Pan American World Airways v. Wilmot, supra, did not contribute in any way to the claimant's injuries to her hand, and the only reason that the claimant's injury was in fact found to be compensable and arising out of the claimant's employment, was because the claimant's injury occurred within the claimant's period of employment, at a place where the employ was reasonably expected to be, and while the employee was reasonably fulfilling the duties of employment, or engaging in something incidental to it.

Since there is absolutely no requirement in the traveling employee or personal comfort cases that a claimant show any "fault" on the conditions of employment in order to have the injuries found to be compensable, it is further respectfully submitted that there is no logical reason to require a claimant to somehow show "fault" in the conditions of employment in order to have injuries sustained as a result of an idiopathic fall at work held to be compensable.

There are numerous other cases under the traveling employee doctrine, or the personal comfort doctrine, where a claimant's injuries have been held to be compensable, simply because the injury occurred within the period of employment at a place where the employee was reasonably expected to be while he was reasonably fulfilling the duties of his employment or engaging in something incidental to it, even though the employment conditions themselves did not in any way contribute to the claimant's injuries or accident, see e.g. Holly Hill Fruit Products, Inc. v. Krider, 473 So. 2d 829 (1st D.C.A. Fla. 1985), Citrus Memorial Hospital v. Cabrera,

388 So. 2d 345 (1st D.C.A. Fla. 1980).

It is respectfully submitted that in an idiopathic fall case, there is a sufficient nexus between the claimant's injury and the claimant's employment, if the injury results from a fall at any place where the claimant's duties require him to be regardless of whether the act of falling was initiated by a condition personal to the claimant. The fact that the claimant falls from an idiopathic condition which was not caused by the claimant's employment condition, is still consistent with the concept in workers' compensation that an employer takes an employee in such physical condition as the employer finds him, and the employer assumes the risk of a diseased condition aggravated by an injury, Alexander v. People's Ice Company, 85 So. 2d 846 (Fla. 1955), Davis v. Artley Construction Company, 18 So. 2d 255 (Fla. 1944). It is respectfully submitted that an employer in a case involving an idiopathic fall is well-protected in that the employer is not solely responsible for all costs associated with the claimant's injuries, but the employer's liability remains subject, in the proper case, to the rights of apportionment and reimbursement from the Special Disability Trust Fund, Eagle v. Cypress Creek Nursery, 527 So. 2d 906 (1st D.C.A. Fla. 1988), Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987) at 335.

Furthermore, it is respectfully submitted that if a claimant, who knows of a prior idiopathic condition, fails to disclose that prior idiopathic condition to an employer on an employment application, and the claimant is thereafter injured as a result of a fall from that idiopathic condition, the employer would be absolved from liability because of the employee's falsification of the employment application, Martin Company v. Carpenter, 132 So. 2d 400 (Fla. 1961).

Furthermore, it is respectfully submitted that the "actual risk" doctrine as espoused by the First District Court of Appeal in Grimes

v. Leon County School Board, supra, is also consistent with all other types of falls in workers' compensation cases, in that in all the other cases, a claimant need not show that the claimant fell into a dangerous object, or fell into some other increased hazard attendant to his job, as a claimant is required to do under an idiopathic fall case. As noted by the First District Court of Appeal in Grimes v. Leon County School Board, supra,

> "... There is no real statutory basis for insisting upon a peculiar or increased risk, as long as the employment subjected claimant to the actual risk that injured him." Grimes v. Leon County School Board, supra at 332.

Therefore, it is respectfully submitted that the First District Court of Appeals' approach to idiopathic falls in Grimes, supra, is not legislating away the requirement that an injury "arise out of" the employment, as alleged by Petitioners in their Initial Brief, but rather, brings idiopathic fall cases in line with other injuries, particularly injuries to "traveling employees" or injuries sustained under the "personal comfort" doctrine. In all such cases, the claimant's injuries are found to have "arisen out of" the claimant's employment, so long as the injury occurs within the period of employment, at a place where the employee may reasonably be, and while the claimant is reasonably fulfilling the duties of employment or engaging in something incidental to it.

Additionally, the "actual risk" doctrine, as espoused by the First District Court of Appeal in Grimes v. Leon County School Board, supra, is more consistent with the no-fault concept of workers' compensation, than is the "increased hazard" doctrine, which was in approach more similar to the fault system.

Claimant/Respondent would note that Petitioners state as their Point on Appeal herein, that the District Court of Appeal erred in applying the law of Grimes v. Leon County School Board to this case. Claimant/

Respondent would point out that the First District Court of Appeal, in finding that the Claimant's injuries in the case at bar were compensable, did so under the "increased hazard" doctrine, and not under the "actual risk" theory as espoused in Grimes. Specifically, the First District Court of Appeal indicated:

> "We therefore hold ... that the claimant is entitled to compensation because her ability to control her activities and positional changes was not as great at work as it would have been at home ... While application of the increased hazard doctrine to idiopathic fall cases is, in our view, less desirable than application of the actual risk theory espoused in Grimes, we fell constrained to apply it, albeit expansively, unless and unti our Supreme Court directs otherwise." Eagle v. Cypress Creek Nursery, supra at 908.

It is therefore respectfully submitted by Claimant/Respondent herein, that the First District Court of Appeal in Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987) has properly interpreted the applicable sections of Chapter 440, to conclude that the actual risk doctrine is the appropriate approach to idiopathic falls. However, even if this Honorable Court were to reverse the First District Court of Appeals in Grimes v. Leon County School Board, supra (which case is still pending before this Honorable Court), it is respectfully submitted that the injuries sustained by the Claimant in the case at bar would still be compensable, since the First District Court of Appeal specifically found the Claimant's injuries compensable under the "increased hazard" doctrine. Thus, even if this Honorable Court were to disagree with the First District Court of Appeal in Grimes v. Leon County School Board, supra, that would not require reversal of the First District Court of Appeal's decision in the case at bar, since the decision in the case at bar was based on the "increased hazard" doctrine, and not the "actual risk" doctrine.

ARGUMENT - POINT II

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL COMMITTED ERROR IN FINDING THAT THE CLAIMANT'S ABILITY TO CONTROL HER ACTIVITIES AND POSITIONAL CHANGES WAS NOT AS GREAT AT WORK AS IT WOULD HAVE BEEN AT HOME.

Petitioners contend that the First District Court of Appeal committed error in finding that the Claimant was entitled to compensation because her ability to control her activities and positional changes was not as great at work as it would have been at home (IB-16).

As noted under Point I hereinabove, the First District Court of Appeal in Eagle v. Cypress Creek Nursery, 527 So. 2d 906 (1st D.C.A. Fla. 1988), found that the Claimant's injuries in the case at bar were compensable based on the "increased hazard" doctrine to idiopathic fall cases.

Furthermore, as pointed out previously under Point I hereinabove, the "increased hazard" doctrine provides that injuries caused by idiopathic falls do not arise out of employment unless the employment in some way contributes to the risk personal to the claimant or aggravates the injury, Legakis v. Sultan & Sons, 383 So. 2d 938 (1st D.C.A. Fla. 1980), Foxworth v. Florida Industrial Commission, 86 So. 2d 147 (Fla. 1955).

Thus, an idiopathic fall will be found to be compensable under the "increased hazard" doctrine if the claimant can either show that there were conditions associated with the employment that somehow aggravated or caused the idiopathic condition to manifest itself, thereby causing the claimant to fall, or the injuries themselves which were sustained as a result of the fall could be attributed to some increased hazard attendant to the job such as where the fall is into dangerous objects.

It is respectfully submitted that in the case at bar, the First District Court of Appeal specifically found that the Claimant was entitled to compensation under the "increased hazard" doctrine, because the Claimant's condition of employment in effect aggravated or caused the Claimant's pre-existing idiopathic condition to manifest itself, and therefore, the Claimant's conditions of employment caused the Claimant to fall.

For example, in Cheney v. FEC News Distribution Company, 382 So. 2d 1291 (1st D.C.A. Fla. 1980), the First District Court of Appeal found that the claimant's injuries sustained as a result of an idiopathic fall were compensable because the claimant at home could control the amount of twisting, turning and bending that he did, but not at work. As such, the First District Court of Appeal found that the employment activity contributed to the injury, and that it was less likely that the employee would have fallen at home where he could have better and more selectively controlled his positional changes. See also Protectu Awning Shutter Company v. Cline, 16 So. 2d 342 (Fla. 1944).

In the case at bar, the First District Court of Appeal found that the Claimant was entitled to compensation because her ability to control her activities and positional changes was not as great at work as it would have been at home, Eagle v. Cypress Creek Nursery, 527 So. 2d 906 (1st D.C.A. Fla. 1988) at 908.

Petitioners contend that there is no evidence in the record to support this finding by the First District Court of Appeal (IB-16-19).

However, it is respectfully submitted that there is competent substantial evidence to show that the Claimant's ability to control her activities and positional changes clearly was not as great at work as it would have been at home. For example, the Claimant testified that at work she pulled weeds and potted flowers (T-4, 71). The Claimant testified that she would be bending and stooping over to pull weeds (T-9, 81).

Furthermore, according to the testimony of Minnie Grace, upon whom the Employer/Servicing Agent heavily relies, the Claimant's job required the Claimant to do a great deal of walking (T-38). Minnie Grace testified that the Claimant complained about walking, and that the Claimant would state that her knee was hurting (T-38). Specifically, Minnie Grace stated:

> "Q. Did that require a good bit of traveling around?
>
> A. Yes.
>
> Q. Did you have available to you those golf carts all the time or did you have to walk some?
>
> A. We had to walk.
>
> Q. Did Florence ever complain to you about the walking?
>
> A. Yeah. Her knee was hurting.
>
> Q. When was this now, before she actually fell?
>
> A. Yes, sir." (T-38).

It is respectfully submitted that it is difficult to comprehend how the Claimant would not be able to better control her activities and positional changes at home than at work. It is respectfully submitted that at home the Claimant was not required to do a good deal of walking, and that the Claimant would not be required to continually bend over and stoop over pulling weeds.

Furthermore, Claimant/Respondent would also respectfully submit that the Claimant's injuries are compensable in the case at bar under the "increased hazard" doctrine, in that the injuries from the fall can be attributed to some increased hazard attendant to the job.

It has specifically been held that a concrete floor or exceedingly hard floor may constitute a hazard of employment where it aggravates

injuries otherwise suffered, Honeywell, Inc. v. Scully, 289 So. 2d 393 (Fla. 1974), Protectu Awning Shutter Company v. Cline, 16 So. 2d 342 (Fla. 1944).

In the case at bar, the unrefuted testimony of the Claimant is that the ground that she fell on was "hard" (T-82). It is therefore respectfully submitted that since the ground that the Claimant fell on was irrefutably "hard," that the hard ground was an increased hazard attributable to the Claimant's employment in the same manner as a concrete floor or exceedingly hard floor would constitute a hazard of employment, Honeywell, Inc. v. Scully, 289 So. 2d 393 (Fla. 1974), Foxworth v. Florida Industrial Commission, 86 So. 2d 147 (Fla. 1955), Protectu Awning Shutter Company v. Cline, 16 So. 2d 342 (Fla. 1944). Claimant/Respondent would note that the Petitioners do not discuss Claimant's argument that the ground was "hard," and that this caused an increased hazard attributable to the Claimant's employment.

The Claimant would also point out that the evidence in the case at bar is abundantly clear that the Claimant's present condition was caused by the Claimant's fall at work on June 10, 1985.

The deputy commissioner in his Order of August 31, 1987 found:

> "... that Claimant's condition predated her employment and that her current symptoms and conditions are unrelated to it. ..." (T-167).

This particular finding by the deputy commissioner was challenged by Claimant herein on her appeal to the First District Court of Appeal.

The Claimant would respectfully submit that she testified that she never had any problems with her right knee prior to the time that she fell on June 10, 1985 (T-8, 78, 87). Prior to coming to work for the Employer herein, the Claimant had picked fruit for 14 years (T-4, 5, 72). During this period of time, the Claimant would climb up and down ladders, pick fruit on the ground, pick fruit in the trees and carry

her ladder from tree to tree (T-5, 6, 72). The Claimant testified that she had no problems climbing the ladders and that she had no problem with her right knee (T-6, 72).

The Claimant's testimony concerning the fact that her right knee never hurt her prior to her fall of June 10, 1985 was confirmed by Zara Rodgers who had known the Claimant for 17 years (T-23, 24), and Geraldine Bostwick who knew the Claimant for 20 years (T-25-27).

In fact, even the assistant production manager for the Employer testified that she did not become aware of the fact that the Claimant was having problems with one of her legs until the date the Claimant fell on June 10, 1985 (T-30).

Furthermore, and particularly compelling concerning the Claimant's condition prior to her fall of June 10, 1985, is the testimony of Dr. Edward Bradford, a physician in Florida since 1949 (T-112). Dr. Bradford testified that he first saw the Claimant on July 5, 1982 for a high blood pressure problem (T-113). Dr. Bradford treated the Claimant on a somewhat regular basis from July 5, 1982 through June 10, 1985 for high blood pressure and diabetes (T-114, 115, 130).

The only time during this period of time that Dr. Bradford treated the Claimant for any condition in connection with the Claimant's knees was on January 11, 1983 when Dr. Bradford checked the Claimant's left knee because it was hurting (T-116). Dr. Bradford testified that between January 11, 1983 and June 10, 1985, the Claimant did not complain of knee problems again (T-117). Dr. Bradford also testified that the Claimant did not at any time have any problems with her right knee (T-117). In fact, Dr. Bradford even checked the Claimant's right knee and found that the Claimant did not have any problem with it (T-117).

Wherefore, the Claimant/Respondent respectfully submits that there is competent substantial evidence to support the First District

Court of Appeal's determination that the Claimant's ability to control her activities and positional changes was not as great at work as it would have been at home. Furthermore, it is respectfully submitted that the uncontradicted evidence in the record establishes that when the Claimant fell at work, she fell on a "hard" ground which Claimant contends was an increased hazard attributable to the Claimant's employment, in the same manner as a concrete floor or exceedingly hard floor would constitute a hazard of employment. It is further respectfully submitted that the evidence unquestionably establishes that the condition of the Claimant's right knee is causally related to the fall that the Claimant sustained on June 10, 1985. It is therefore respectfully submitted that the only competent substantial evidence in the record establishes that the Claimant's injuries are compensable under even the "increased hazard" doctrine, and as such, it is respectfully requested that the decision of the First District Court of Appeal in the case at bar be affirmed.

CONCLUSION

It is respectfully submitted that the First District Court of Appeal in the decision of Grimes v. Leon County School Board has properly concluded that idiopathic falls should be decided under the "actual risk" doctrine, and not under the "increased hazard" doctrine. Applicability of the actual risk doctrine to idiopathic falls brings idiopathic falls in line with other types of workers' compensation cases, such as those involving the "traveling employee" or those involving the "personal comfort" doctrine. Furthermore, application of the actual risk doctrine is more consistent with the no-fault concept of workers' compensation and eliminates the approach more familiar to a fault system previously required by the "increased hazard" doctrine.

Furthermore, it is respectfully submitted that even under the increased hazard doctrine the Claimant's injuries are compensable, because the Claimant's employment condition contributed to her fall since her ability to control her activities and positional changes was not as great at work as it would have been at home. Furthermore, the Claimant's employment conditions contributed to the Claimant's injury because the Claimant fell on "hard" ground, which constituted an increased hazard attributable to the Claimant's employment.

Wherefore, it is respectfully requested that this Honorable Court affirm the First District Court of Appeal's decision in the case at bar.

Respectfully Submitted,

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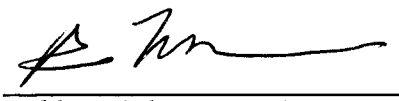
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Answer Brief on the Merits has been furnished by regular U. S. Mail to B. C. Pyle, Esquire and Michael Wall Jones, Esquire, B. C. PYLE, P.A., 715 North Ferncreek Avenue, Orlando, Florida, 32803, this 28th day of November, 1988.



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