SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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CYPRESS CREEK NURSERY and CLAIMS CENTER,

Petitioners,

vs.

FLORENCE EAGLE,

Respondent.

CASE NO.: 72, 710

1ST DCA CASE NO.: 87-1183

PETITIONERS' BRIEF TO THE FLORIDA SUPREME COURT

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PRELIMINARY STATEMENT

In this Petitioners' Brief, the Respondent, Florence Eagle, shall be referred to as the "claimant", or by her name. The Petitioners, Cypress Creek Nursery and Claims Center, shall be referred to as the "employer/servicing agent" or by their separate names. Designations to the transcript of record shall be referred to as "TR" followed by the appropriate page number. References to the Appendix shall be referred to as "A" followed the applicable page number.

STATEMENT OF THE CASE

After the filing of the Claim for Benefits on behalf of Florence Eagle, a hearing was held before the Honorable William M. Wieland, Deputy Commissioner, on August 19, 1987. On August 31, 1987, an order was entered by Deputy Commissioner Wieland denying the claim of Florence Eagle for a determination of maximum medical improvement, temporary total or temporary partial disability benefits prior to MMI, wage loss benefits subsequent to MMI, payment of incurred medical bills, continued treatment with Dr. James Johnson, costs, interests, penalties and attorney's fee.

A Notice of Appeal was filed on behalf of the claimant, and on or about June 24, 1988, an opinion regarding the above-referenced matter was filed by the First District Court of Appeal. A copy of said Opinion is attached hereto as Appendix "A". At that time, Deputy Commissioner Wieland's Order of August 31, 1987 was reversed by the First District Court of Appeal.

A Notice to Invoke Discretionary Jurisdiction was timely filed on July 5, 1988. Thereafter, the Supreme Court of Florida, on Thursday, October 13, 1988, issued an order accepting jurisdiction and dispensing with oral argument. This Petitioners' Brief is in response thereto.

STATEMENT OF THE FACTS

On June 10, 1985, Florence Eagle, an employee of Cypress Creek Nursery fell two or three times when her knee spontaneously gave way on her without any external cause. Although the claimant testified at the hearing of August 19, 1987, that she was not having trouble with her knee prior to June 10, 1985 (TR 8), she also had previously specifically testified:

> "Q. Your knee was hurting you then after the first time?
>
> A. Yeah. I went down on this right leg.
>
> Q. Was it hurting you before you fell the first time?
>
> A. Just a little." (TR 85)

Further, the claimant initially denied that her right leg was hurting prior to June 10, 1985, but later finally admitted that she had indeed testified that her right leg was, in fact, hurting prior to June 10, 1985 (TR 16).

The Deputy Commissioner, unlike the First District Court of Appeal, was able to observe the candor and demeanor of all the witnesses and to consider the live testimony adduced at the hearing (TR 166).

The Deputy Commissioner stated that the claimant had a financial interest in the outcome of the matter (TR 167). Ms. Minnie Grace did not have a financial interest in the matter (TR 167). In fact, after observing all of the witnesses, the Deputy Commissioner made the following statement regarding Minnie Grace:

> "It was also obvious from the testimony of Minnie Grace, which I accept,

> that she had come to the hearing reluctantly, pursuant to a subpoena, but felt impelled to give truthful testimony notwithstanding the fact it adversely affected her friend and former co-worker, Florence Eagle." (TR 167)

It was the testimony of Minnie Grace, upon cross-examination by the claimant's attorney, that the claimant had complained about her knees hurting in the wintertime prior to the falls of June 10, 1985 (TR 44). At that time, prior to June 10, 1985, the claimant's knee was swollen (TR 39). Due to the claimant's knee swelling and pain, Minnie Grace told her friend (TR 37), Florence Eagle, to take it easy (TR 39). All of the above took place in the winter proceeding the summer of 1985 when the falls occurred (TR 39).

It was also the testimony of Minnie Grace, who no longer works at Cypress Creek Nursery (TR 36), that the claimant fell four or five times on June 10, 1985 (TR 42), even though there was nothing to cause the claimant to slip or trip (TR 41). Minnie Grace, who on June 10, 1985 was working side by side with the claimant (TR 50), stated that on June 10, 1985 she and the claimant were pulling weeds out of small, six inch pots, which they held in their hands (TR 49).

Minnie Grace specifically stated that she did not want to testify against the claimant because they were friends. Even so, she was at the hearing to tell the truth (TR 53). Unlike the First District Court of Appeal, the Deputy Commissioner had the opportunity to observe the candor and demeanor of all the witnesses and to hear the live testimony adduced at the hearing (TR 166).

On cross-examination, Ms. Grace reiterated her contention that the claimant had been complaining about knee pain for quite some time before the incident at Cypress Creek on June 10, 1985 (TR 44). Minnie Grace visited the claimant at her home before June 10, 1985 and testified that the claimant was having problems with her knee at that time (TR 40). In fact, at that time, Ms. Grace witnessed the claimant rubbing something like Ben Gay or alcohol on her knee (TR 40).

Upon further questioning by the claimant's attorney, Ms. Grace testified:

> "Q. All right. And when her knee, you say, was buckling on her, you don't know which knee that was either, do you?
>
> A. No.
>
> Q. Okay.
>
> A. But I think, I really do think it was the right knee." (TR 47)

The Deputy Commissioner specifically accepted and relied upon the testimony of Minnie Grace (TR 167).

Valerie Cooper is the Assistant Production Manager at Cypress Creek Nursery (TR 35) and the claimant worked for her (TR 30). Ms. Cooper witnessed the claimant's leg give way while she was attempting to step into a golf cart (TR 30). Ms. Cooper testified that the claimant did not trip on any vines or weeds or anything else at that time (TR 31). After witnessing the claimant's right leg give way (TR 31), according to Ms. Cooper she had the following conversation with the claimant:

> "Q. Did you have some conversation with Ms. Eagle on the way to the of-

> fice or where ever you were taking her?
>
> A. Yeah. I had asked her what had happened or, you know, whether she had tripped on something and hurt her leg at that point.
>
> Q. What did she tell you?
>
> A. She said, no, it just gave way."

In her deposition of January 7, 1986, the claimant testified that her knee was hurting prior to her first fall at Cypress Creek (TR 85). In fact, the claimant gave a history of right hip and leg pain beginning two days prior to June 10, 1985 (TR 161). The claimant made the following statement at the West Orange Hospital Emergency Room on or about June 10, 1985:

> "Patient states her right hip and right leg have been hurting since 6/8/85.
>
> Pt. states pain R knee, hot, swelling, this started last night, ambulated okay yesterday. Has fallen four x today because knee hurts also has pain R hip." (TR 161)

The Deputy Commissioner considered the testimony of both Dr. Bradford and Dr. Johnson and found it not to be determinate of the issue of compensability (TR 168).

Dr. Johnson testified that he could have no way of knowing that the claimant's fall caused the necessity for a replacement of her knee other than what the claimant told him (TR 153). Dr. Johnson also testified the claimant suffered from severe osteoarthritis in both knees (TR 151). He further testified that the claimant had a severe diabetic disease in the knee (TR 152). Finally, Dr. Johnson testified that based on the claimant's arthritic condition it would not be inconsistent for

her leg to buckle or give way (TR 154).

Dr. Bradford indicated that the claimant initially did not give him any history of an accident (TR 124). Dr. Bradford also stated that the claimant just said her leg collapsed on her (TR 124).

Sarah Rogers was called as a witness in behalf of the claimant (TR 20). Ms. Rogers testified she saw the claimant two or three times a week (TR 23). Ms. Rogers also testified that she suggested to the claimant that the claimant seek employment at Cypress Creek Nursery (TR 22).

It was the testimony of the claimant, Florence Eagle, that some old lady got her the job (TR 7). The Deputy Commissioner had the opportunity to consider the candor and demeanor of all the witnesses who testified at the hearing of August 19, 1987 before making his findings of law and fact (TR 166).

POINTS ON APPEAL

POINT I

THAT THE DISTRICT COURT OF APPEAL ERRED IN APPLYING THE LAW OF GRIMES V. LEON COUNTY SCHOOL BOARD TO THIS CAUSE, AND IN EFFECT, LEGISLATING AWAY THE REQUIREMENT THAT AN INDUSTRIAL ACCIDENT AND INJURY MUST ARISE OUT OF THE EMPLOYMENT.

POINT II

THAT THE FIRST DISTRICT COURT OF APPEAL COMMITTED ERROR IN MAKING UNSUBSTANTIATED FINDINGS OF FACT 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.

SUMMARY OF ARGUMENT

POINT I

THAT THE DISTRICT COURT OF APPEAL ERRED IN APPLYING THE LAW OF GRIMES V. LEON COUNTY SCHOOL BOARD TO THIS CAUSE, AND IN EFFECT, LEGISLATING AWAY THE REQUIREMENT THAT AN INDUSTRIAL ACCIDENT AND INJURY MUST ARISE OUT OF THE EMPLOYMENT.

It is respectfully submitted that the First District Court of Appeal overstepped its judicial authority, both in the case at bar and in Grimes v. Leon County School Board, 518 So.2d 327 (Fla. 1st DCA 1987), and as a result has destroyed the mandate of the legislature that an employee's injury must arise out of the course and scope of his or her employment. Despite legislative authority and case law to the contrary, the above decisions of the First District Court of Appeal, if this Honorable Court permits them to stand, will turn the workers' compensation law into a general health program, thereby negating the original legislative intent.

Finally, in the instant cause, the claimant has failed to prove by competent, substantial evidence that her injury arose out of the course and scope of her employment at Cypress Creek Nursery. Conversely, there is competent and substantial evidence in the record that the claimant had been suffering from and complaining about the pre-existing osteoarthritis for a long period of time prior to June 10, 1985. There is also competent and substantial evidence that nothing arising out of the course and scope of the claimant's employment caused her to fall. There is, however, an abundance of competent

and substantial evidence that the claimant's knee just gave way.

POINT II

THAT THE FIRST DISTRICT COURT OF APPEAL COMMITTED ERROR IN MAKING UNSUBSTANTIATED FINDINGS OF FACT 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.

The First District Court of Appeal improperly found that the claimant's ability to control her activities and positional changes was greater at home than at work. There is no evidence in the record to support this finding. To the contrary, there is competent and substantial evidence in the record that the claimant had great freedom of movement and the opportunity to change her position, at will, while at work. Therefore, the First District Court of Appeal has ignored this Court's mandate that Appellate Courts are not finders of fact and therefore should not substitute its findings of fact for those of a Deputy Commissioner.

Based on the above, the opinion of the First District Court of Appeal should be reversed and the Order of the Deputy Commissioner should be affirmed.

ARGUMENT

POINT I

THAT THE DISTRICT COURT OF APPEAL ERRED IN APPLYING THE LAW OF GRIMES V. LEON COUNTY SCHOOL BOARD, TO THIS CAUSE AND, IN EFFECT, LEGISLATING AWAY THE REQUIREMENT THAT AN INDUSTRIAL ACCIDENT AND INJURY MUST ARISE OUT OF THE EMPLOYMENT.

The District Court of Appeal has, in this case, as well as in the case of Grimes v. Leon County School Board, Supra, improperly usurped the function of the legislature. The Court has, in effect, judicially enacted legislation which holds that for an injury to be compensable under the Florida Workers' Compensation Law, there need be no finding that the injury "arose out of" the employment. The holding in this and the Grimes case literally requires only that the accident occur in the "course of the employment."

When the Florida Workman's Compensation Law was enacted, it dispensed with the need to prove the employer was negligent in order for the injured employee to receive compensation. In the place of proof of negligence, the requirement was established that it be proven the accident and injury "arose out of and in the course of the employment."

The Workman's Compensation Law was not designed to be a general health insurance program, City of Hialeah v. Warner, 128 So.2d 611 (Fla. 1961). The affect of the ruling in this case and the Grimes case would make it such to a large extent.

The District Court of Appeals, in doing away with the requirement of "arising out of" relied upon the case of Protectu

Awning Shutter Company v. Cline, 16 So.2d 342 (Fla. 1944). The Protectu Awning case was an unusual case arising out of extraordinary wartime circumstances and, by the terms of another of this Court's opinions, Foxworth v. Florida Industrial Commission, 86 So.2d 147 (Fla. 1955) represented "the outer limits of the doctrine," referring to the increased hazard doctrine.

Perhaps, a re-examination of the Protectu Awning case is in order and will give some indication of the error committed by the District Court in relying upon this case.

In the Protectu Awning Shutter Company case, the claimant was a 67 year old man who in February of 1942 was employed as a cabinet maker by Protectu Awning Shutter Company. This Court observed that "in this critical war period, industry required the services of the aged and infirmed." Thus, it can readily be seen that unusual circumstances existed because of the necessity of hiring older people resulting from the war time manpower shortage. Add to that the fact that this 67 year old man suffered from a heart ailment which caused fainting spells. Unless he could recline and relax when such an occurrance took place, he would fall and become unconscious. He had previously been warned by his physician against undue standing or physical exertion. He suffered such a spell causing him to fall at the end of a work day. When he fell, he struck his head against the concrete floor. This resulted in a skull fracture and resulting death.

This Court, in the Protectu Awning case also clearly stated "to our mind what impels us to uphold this judgement (of

compensability), primarily, is that the injury which actually produced death was the fracture." No such circumstance exists in the case at hand.

Thus, as a result of an extraordinary set of circumstances, the "increased hazard" doctrine was born.

As mentioned above, this Court later in the Foxworth case, Supra, saw fit to clearly state that the Protectu Awning case defined the outer limits of the doctrine.

Now, however, because the First District Court of Appeal has observed what it considers inconsistent Appellate rulings from applying the increased hazard doctine, it has elected to do away with the doctrine and, in its' place, substitute what it refers to as the "actual - risk" approach. This new theory is capsulized in the question certified to this Court out of Grimes v. Leon County School Board, Supra. The District Court of Appeals is saying, in effect, that "falls which are attributable to idiopathic causes personal to the employee and which result in injuries from collision with the floor, equipment, or other conditions of the work place, should be treated as arising out of the employment irrespective of any showing of increased risk or hazard resulting from the employment." Does this not, in actuality, completely destroy the legislative mandate requiring a showing that the accident and injury "arose out of" the employment?

Although it has long been recognized that the Workers' Compensation Law is to be liberally construed in favor of the working man, Aetna Casualty Insurity Company v. Bortz, 246 So.2d 114 (Fla 3rd DCA 1971), the law does not make industry the

insuror of the lives of its' employees, nor can industry be made so by judicial decree. Arkin Construction Company v. Simpkins, 99 So.2d 557 (Fla. 1957).

A Workers' Compensation claimant must show that his accident or injury happened not only in the course of his employment, but arose out of it, and there must have been a causal connection between the employment and the injury. General Properties Company v. Greening, 18 So.2d 908 (Fla. 1944). In spite of all the presumptions existing in favor of the working man, he has (until Grimes, Supra), not been relieved of the burden of proving that the injury arose out of and in course of his employment. Ft. Pierce Growers Association v. Storey, 21 So.2d 451 (Fla. 1945) and Westley v. Warth Paint and Hardware Company, 52 So.2d 346 (Fla. 1951).

In partial support of its' decision in the Grimes case (which directly affects the case at bar), the District Court relied upon the "positional - risk" theory as ennunciated in the case of Hacker v. St. Petersburg Kennel Club, 396 So.2d 161 (FLA. 1981). This Court, in that case, set forth the rule that "if an accident occurs while an employee is at his place of employment during working hours, under circumstances such that evidence of cause is unavailable, the burden shifts to the employer to show idiopathic cause, before claim for compensation may be denied."

In the Grimes case, as in the case at hand, the cause of the fall was not idiopathic or unexplained. In this case, a pre-existing progressive condition was the cause of the fall. Although the claimant denied this, the clear and unequivocal

testimony of Minnie Grace, a reluctant but truthful witness, established without question that the falls were nothing more than the giving way of the claimant's leg because of a pre-existing arthritic problem. Thus, an extension of the Hacker case, Supra, into an actual or positional risk basis for a reversal of the clear findings of the Deputy Commissioner below is error. Although the District Court assumed Florence Eagle fit the positional risk requirements, the evidence does not support this. See argument under Point II.

If the law is to be changed to totally abandon or disregard the requirement that the accident and injury "arise out of" the employment, then it should be the legislature to do so. The District Court has committed error. The District Court's Order should be reversed and the Order of the fact finder, the Deputy Commissioner, should be reinstated.

ARGUMENT

POINT II

THAT THE FIRST DISTRICT COURT OF APPEAL COMMITTED ERROR IN MAKING UNSUBSTANTIATED FINDINGS OF FACT 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.

In the Opinion filed June 24, 1988, the First District Court of Appeal held:

> "We therefore hold, as in Grimes v. Leon County School Board, 518 So.2d 327 (Fla. 1st DCA 1987), 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." (A-3)

It is respectfully submitted that the record is devoid of any evidence regarding the claimant's ability to control her activities and positional changes at home. Therefore, even if the Supreme Court decides to accept the judicial legislation promulgated by the First District Court of Appeal in Grimes, Supra, there is no basis for applying that decision to the instant cause. In Grimes, Supra, based on the testimony of the claimant, the Court stated:

> "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."

In Grimes, Supra, the claimant worked in a crowded environment. In the instant case, the claimant worked at a nursery pulling weeds (TR 37). At times, the claimant had to

bend over while pulling weeds (TR 9). On other occasions, the claimant was able to hold six inch pots in her arms while standing up and pulling weeds (TR 48, 49). Finally, it was the testimony of Minnie Grace that she and the claimant also picked weeds while sitting on buckets. Ms. Grace stated:

> "Q. Sitting on a bucket, what do you mean by that?
>
> A. We was pulling some weeds.
>
> Q. Okay. And you were able to sit down on a bucket while you did that?
>
> A. Uh-huh.
>
> Q. Was there ever any time when you told Florence just to kind of sit there and take it easy and you would cover for her because her knee was bothering her?
>
> A. Yes. Like I say, we were, in the winter time, they would tell us, our boss lady, Valerie, she would come and tell us to open the doors at 9:00 or 10:00 o'clock when it warmed up. And so we would open the doors and me and Miss Florence, sometimes would be more than her because it was more and her, us work together. And we would be walking and so she told me, you know, she told me, say, my knee hurting. And, you know, it was hurting her so bad until I told her, I said, you take it easy. We going to go back, you know, and sit on our buckets, you know, and you know, just take it easy til we get back there." (TR 38, 39).

There is no evidence in the record that the claimant did not have the ability to control her activities and positional changes while at work at Cypress Creek Nursery.

As indicated above, at work, the claimant had the opportunity to change positions as well as fellow-employees who were willing to help her out. At home, the claimant lived alone

(TR 2).

This Honorable Court has taken the opportunity to voice its opinion regarding the respective duties of a Deputy Commissioner and the Appellate Courts. In Foxworth v. Florida Industrial Commission, 86 So.2d 187 (Fla. 1955), the Supreme Court of Florida stated:

> "In no event should this Court grope through the record to make findings of fact thereby doing the task which by statute and our decisions is solely that of the Deputy Commissioner. This court is an Appellate Court, not a trier of the facts."

In Foxworth v. Florida Industrial Commission, Supra, the Court also included a discussion of its decision in Four Branches, Inc. v. Oechsner, 73 So.2d 222 (Fla. 1954). The Supreme Court stated:

> "In reversing the holding of the Circuit Court and thus affirming the order of the Deputy Commissioner, we observe that there was evidence sufficient to support the findings of facts and that neither the full commission nor this court is 'authorized to overthrow that finding thereby merely substituting its view of the evidence for that of the officer charged under the law with the finding duty'."

Finally, it is respectfully submitted, that competent, substantial evidence clearly indicates that the claimant's falls were not related to her ability or inability to control her activities or change positions. The claimant admitted to her supervisor, Valerie Cooper, that her falls were not attributable to any hazard of her employment. Valerie Cooper testified:

> "Q. Did you have some conversation with Ms. Eagle on the way to the office or where ever you were taking her?
>
> A. Yeah. I had asked her what happened or, you know, whether she had tripped on something and hurt her leg at that point.
>
> Q. What did she tell you?
>
> A. She said, no, it just gave way." (TR 30, 31)

In response to a question regarding the claimant's falls at the Cypress Creek Nursery, Minnie Grace, whose testimony the Deputy Commissioner specifically accepted (TR 167), stated:

> "Q. Okay. But it's your memory and your testimony that she fell four or five times before Valerie came up?
>
> A. Yeah. Uh-huh.
>
> Q. And on any of those fall, did she slip or trip or step on anything?
>
> A. No.
>
> Q. And each time, her leg just gave away with her?
>
> A. Yes, just give way." (TR 42).

Based on the above, it is obvious that the First District Court of Appeal, when it found that the claimant's ability to control her activities and positional changes was greater at home than at work, made an unsubstantiated finding based on facts not in the record. Therefore, the opinion of the First District Court of Appeal filed June 24, 1988 should be reversed and the Order of the Deputy Commissioner affirmed.

CONCLUSION

The workers' compensation law is a statute which is in derrogation of the common law. It is to be strictly construed. Notwithstanding this longstanding rule of statutory construction, the District Court of Appeal has elected to not only overturn the many prior decision of this superior court, but to usurp the power of the legislature in doing away with the requirement that an accident and injury "arise out of" the employment for compensability.

The District Court, in its opinion, however, made a puzzling statement contained on page three of its Order. It there stated:

> "While application of the increased hazard doctrine to idiopathic fall cases is, in our view, less desirable and application of the actual risk theory espoused in Grimes, we feel constrained to apply it, albeit expansively, unless and until our Supreme Court directs otherwise."

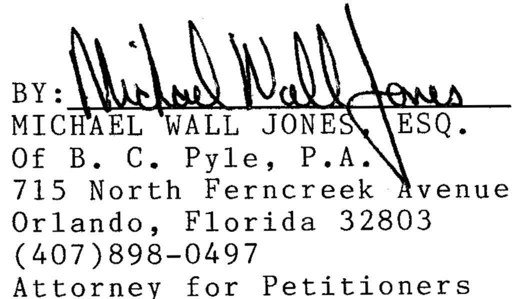
Nevertheless, the increased hazard doctrine was not applied. In its place, the Court applied the new rule it enacted in the Grimes, case and reversed the very well supported order of the Deputy Commissioner entered below. For all these reasons, a reversal of the District Court decision and a reinstatement of the Order of the Deputy Commissioner is warranted.

Respectfully Submitted,

MICHAEL WALL JONES, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Brief has been furnished, by U. S. Mail, this 4th day of November, 1988 to J. David Parrish, Esquire, 1000 East Robinson Street, Orlando, Florida 32801 and William J. McCabe, Esquire, 319 North Magnolia Avenue, Orlando, Florida 32802



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