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IN THE DISTRICT COURT OF APPEAL OF THE FIRST DISTRICT OF FLORIDA

CASE NO.: 87-1183

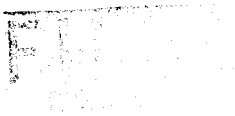
CYPRESS CREEK NURSERY and CLAIMS CENTER,

Defendant, Petitioner,

vs.

FLORENCE EAGLE,

Plaintiff, Respondent.



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AMENDED BRIEF OF PETITIONER RE: JURISDICTION

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PRELIMINARY STATEMENT
STATEMENT OF THE CASE

An Appendix has been added by the Petitioner and reference will be made to items therein. As this Court's rules provide that it is inappropriate to argue issues in chief, we will attempt to confine the Brief of Petitioners' to matter involving jurisdiction.

Petitioners seek discretionary review by the Court of the decision of the First District Court of Appeal (see Appendix) of June 24, 1988, which reversed the Deputy Commissioner's finding that the claimant's condition was non compensable.

The Petitioner now seeks review of that decision because it expressly and directly conflicts with a decision of the Supreme Court on the same question of law.

The First District Court of Appeal also reversed the Deputy's denial of all benefits claimed, with directions that the claimant's entitlement to specific benefits be considered.

A Notice to Invoke Discretionary Jurisdiction was timely filed on July 5, 1988, and this Petitioners' Brief regarding jurisdiction is in support thereof.

SUMMARY OF THE ARGUMENT

A matter which merits much consideration is the opportunity Deputy Commissioner Wieland had to observe the witnesses at the trial of this cause. The Order clearly indicates that Deputy Commissioner Wieland considered the stipulation of the parties, the testimony adduced at hearing, and all other evidence presented before making his findings of law and fact.

Further, this Court has indicated that when the Deputy Commissioner has the opportunity to observe the behavior and demeanor of a witness, he is in a better position to judge the credibility than the Court. This Court has indicated it will not reweight the evidence.

In this cause, the Deputy Commissioner specifically rejected the testimony of the claimant in favor of that of Minnie Grace who the Deputy Commissioner felt was impelled to tell the truth.

Despite the claimant's protestations to the contrary, there is ample evidence in the record that would indicate the claimant had problems with her right knee prior to June 10, 1985.

First, it was the testimony of Minnie Grace, accepted by Deputy Commissioner Wieland, that the claimant had been complaining of pain in her knee for a long time prior to June 10, 1985 and that the claimant had of her own volition, pointed out to Minnie Grace that the claimant's knee was swollen prior to June 10, 1985. Ms. Grace testified that she believed the swollen and painful knee to be the claimant's right knee. Ms. Grace also observed the claimant rubbing something like Ben Gay or alcohol

on her knee the night prior to June 10, 1985.

Despite her later denials, the claimant stated under oath that her knee was hurting prior to June 10, 1985. In fact, the claimant, prior to any litigation of this matter, informed her treating physician at the West Orange Memorial Hospital that her right leg and hip had been hurting since June 8, 1985, two days before her falls at Cypress Creek Nursery and that her right knee began to hurt the night before.

Therefore, it is respectfully submitted that there was ample evidence that the claimant's condition pre-existed her alleged injury at Cypress Creek Nursery, and that her current symptoms are unrelated to it. Further, as this Honorable Court has indicated, the Deputy Commissioner is in the best position to properly weigh the testimony and evidence. In this cause, the Deputy Commissioner has performed his duties and followed this Court's mandate.

In its wisdom, this Honorable Court had the foresight to certify as of great public importance the question raised in Grimes v. Leon County School Board, 518 So.2d 327 (Fla. App. 1 Dist. 1987).

The claimant's almost total reliance in points two and three of her argument on Grimes, Supra, must fall for two reasons.

First, in Grimes, Supra, this Court was dealing with compensability for idiopathic falls. It is respectfully submitted that Florence Eagle's falls were not idiopathic. To be idiopathic, the claimant's falls must have been from an unknown

or obscure cause. In the case at bar, Dr. Johnson stated that the claimant suffered from severe osteoarthritis in both knees and that she had a severe diabetic disease, called diabetic myopathy, in the knee which pre-existed the claimant's falls at Cypress Creek Nursery. Based on these conditions, Dr. Johnson stated that it was not inconsistent that the claimant's leg would give way and buckle.

Therefore, the claimant's falls were not of an idiopathic nature because there was a medically recognized pre-existing condition.

Second, in Grimes, Supra, when the claimant's brace gave way the claimant fell and suffered a fracture to her left ankle. In other words, the emphasis in Grimes, Supra, is on the cause of the injury.

It is respectfully submitted that although Dr. Johnson felt the falls of June 10, 1985 made the pre-existing osteoarthritic condition symptomatic, he was unaware that the claimant had been suffering from pain and swelling in her right knee for months prior to June 10, 1985. The only history Dr. Johnson received was from the claimant.

On the other hand, the Deputy Commissioner had the benefit of the sworn testimony of the claimant that her knee had been hurting prior to June 10, 1985. Deputy Commissioner Wieland had the opportunity to observe all the witnesses and to base his findings on said observations.

The claimant's falls were not idiopathic. Further, there is ample evidence that any "injury" which the claimant suffered actually occurred prior to June 10, 1985. As a result,

the claimant's reliance on Grimes, Supra, fails.

Therefore, the Deputy Commissioner was correct in finding that the claimant did not suffer an accident arising out of her employment at Cypress Creek Nursery. The Deputy Commissioner was also correct in denying the claim for compensation benefits.

ARGUMENT

WHETHER THE SUPREME COURT SHOULD TAKE JURISDICTION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL WHICH REVERSED THE DEPUTY COMMISSIONER'S FINDING THAT THE CLAIMANT'S CONDITION WAS NON-COMPENSABLE.

The Supreme Court may take jurisdiction when a District Court of Appeal decision expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law.

It is respectfully submitted that the First District Court of Appeal's decision in the instant case is in express and direct conflict with former decisions of the Supreme Court of Florida.

In Federal Electric Corp. v. Best, 274 So.2d 886 (Fla. 1973), this Honorable Court stated:

> "The Judge of Industrial Claims found: '...the claimant was standing perfectly still at the time of the onset of this fall, did not slip or trip and fall, was not engaged in anything that created stress or physical exertion, and was not subjected to any unusual conditions. Therefore, I find that decedent employee fell and resulting injuries from which he died were the result of the convulsive or grand mal-type seizure that he suffered immediately prior to the fall, and had absolutely no relation to his work."

Based on the above, the Supreme Court in Federal Electric Corp. v. Best, Supra, held:

> "[4] Even though the Judge of Industrial Claims may have been medically mistaken in concluding what was the cause that precipitated deceased's fall, it is quite clear from the record his fall was not work related. The evidence is clear that deceased suffered no compensable accident arising out of his employment and that no 'hazard of employment' contributed to his injury. The evidence is ample to sustain the ultimate finding of the JIC in these particulars, even though it is not clear what sudden internal physical breakdown produced the de-

ceased's fall."

The circumstances in the case at bar are extremely similar. In his order of August 31, 1987, the Deputy Commissioner stated:

> "Therefore, I accept and rely upon the testimony of Minnie Grace to the effect that the day of the alleged accident she was working with the claimant; that she was aware the claimant had been having difficulty with her knees for some time; that on the day of the alleged accident the claimant's knee (which she believed to be the right) began buckling or giving way on her causing her to fall a number of times. Minnie Grace specifically testified that the claimant did not slip, trip or fall when the weeds she was pulling gave way suddenly as testified to by the claimant. It was the testimony of Minnie Grace that the claimant was not caused to fall by any external reason,..." (see Appendix page 7, 8).

A further incongruity between a Supreme Court mandate and the First District Court of Appeal's decision in the instant cause may be found in Southern Convalescent Home v. Wilson, 285 So.2d 404 (Fla. 1973), in which this Court held:

> "[1, 2] Sub judice the judge rightly found that there was not any hazard of employment that contributed in any degree to the claimant's injuries and it was solely the force of the non-occupational seizure that caused the injury of which the complainant complained. The cause of harm to the claimant was personal and due to the epileptic seizure."

In his order of August 31, 1987, the Deputy Commissioner specifically held:

> "2. That the claimant, Florence Eagle, has failed to prove by competent substantial evidence that she sustained an injury arising out of her employment with Cypress Creek Nursery on or about July 10, 1985. To the contrary, I find that the claimant did not suffer an accident arising out her employment with Cypress Creek Nursery, but that claimant's condition pre-dated her employment and that her current symptoms and conditions are unrelated to it." (see Appendix page 7)

In another pertinent decision, the Supreme Court upheld a finding by the Judge of Industrial Claims who held:

> "I further find that the employee's employment did not contribute to the risk of injury experienced by her by being at work or that her employment aggravated her injury in any way. I further find that the employee was not exposed to an increased hazard attributable to her employment or was the employee exposed to a hazard peculiar to the employment and beyond which is ordinarily experienced by the public as a whole." See Honeywell, Inc. v. Scully, 289 So.2d 393 (Fla. 1974).

In the opinion filed June 24, 1988, the First District Court of Appeal once again reiterated that it had, in Grimes v. Leon County School Board, 518 So.2d 327 (Fla. 1st DCA 1987), certified the following question as one of great public importance:

> "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 workplace, permissably treated as arising out of the employment irrespective of any increased risk or hazard attributable to the work place?" (see Appendix page 4)

In reversing the Deputy Commissioner's decision that the claimant's condition was non-compensable, the First District Court of Appeal directly related the case at bar to Grimes, Supra, when it stated in the order filed June 24, 1988:

> "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." (see Appendix page 3).

In Hacker v. St. Petersberg Kennell Club, 396 So.2d 161 (Fla. 1981), this Court held:

> "Stated more precisely, the burden is upon the respondents to present substantial evidence that

> Hacker's injury did not arise from his employment, but from some other source. Presentation of such evidence would clearly necessitate denial of the claim."

In the instant cause, the employer/servicing agent presented substantial evidence, which the Deputy Commissioner accepted (see Appendix page 6, 7), that the claimant's fall did not arise from her employment and that the claimant had been having problems with her knee for quite some time.

The First District Court of Appeal was aware of the evidence presented to the Deputy Commissioner. In the opinion filed on June 24, 1988, the First District Court of Appeal stated:

> "He accepted the testimony of a co-worker, Minnie Grace, that Eagle's knee began buckling or giving way, causing her to fall to the ground a number of times. Grace testified that the falls were not caused by a slip or trip. She also testified that the claimant had problems with her knee before the falls in question." (see Appendix page 2)

The decision of the First District Court of Appeal is also in direct conflict with this Court's decision in Hacker v. St. Petersberg Kennell Club, Supra. Therefore, the decision of the First District Court of Appeal should be reversed by the granting of this petition.

The First District Court of Appeal's opinion in the case at bar is also in direct conflict with opinions it has previously filed. In Medeiros v. Residential Community of America, 481 So.2d 92 (Fla. 1st DCA 1986), the Court affirmed the Deputy Commissioner's order which found that injuries suffered when the claimant fell in a stairway while at work were non-compensable because the fall was caused by the claimant's dizziness which was a personal condition.

Finally, in Gore Newspapers Co. v. Lovett, 393 So.2d 1152 (Fla. 1st DCA 1981), the Court held:

> "The workers' compensation law cannot be converted 'into a mandatory general health insurance policy which does not limit the burden on industry to those ailments produced even remotely by the hazard of industry.' McCook, 355 So.2d at 1169. In this case, the claimant has suffered an injury which resulted by accident; i.e., fainting and falling to a floor. However, the law requires that the accident must not only be in the course of employment, but it must also arise out of employment. Section 440.02(6), Fla. Stat. The evidence here plainly shows that the claimant has not suffered a compensable accident arising out of her employment, nor did any condition of her employment pose a hazard, beyond that ordinarily experienced by the public as a whole, which increased the effects of the claimant's fall. Accordingly, the Deputy's Order is reversed."

CONCLUSION

The decision of the First District Court of Appeal is expressly and directly conflicting with prior decisions of the Supreme Court on the same question of law. Therefore, the decision of the First District Court of Appeal should be reversed by the granting of this Petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioners has been furnished, by U. S. Mail, this 12th day of July, 1988 to: J. David Parrish, Esquire, 1000 East Robinson Street, Orlando, Florida 32801 and to Bill McCabe, Esquire, Post Office Box 2226, Orlando, Florida 32802.

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