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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CYPRESS CREEK NURSERY and
CLAIMS CENTER,

Employer/Carrier/Petitioners,

Case No.: ~~87-1183~~ 72,710

vs.

1ST DCA Case No.: 87-01183

FLORENCE EAGLE,

Claimant/Respondent.

______________________________________/

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Respondent in this case, FLORENCE EAGLE, will be referred to in this brief as the "Claimant." The Petitioners, CYPRESS CREEK NURSERY and CLAIMS CENTER, will be referred to as the "Employer/Carrier." References to the transcript on appeal will be designated as "T" followed by the appropriate page number. References to the Appendix will be referred to as "A" followed by the applicable page number.

STATEMENT OF THE CASE

On August 3, 1987, the Honorable Deputy Commissioner William M. Wieland entered a Compensation Order finding that the Claimant 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 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 findings, Deputy Commissioner Wieland denied the Claimant's claim for compensation benefits (T-168).

Thereafter, the Claimant appealed Deputy Commissioner Wieland's Order contending that the Order erred in finding the Claimant's condition non-compensable (A-1). On or about June 24, 1988, the First District Court of Appeal entered its opinion in the above-referenced matter (said opinion is attached hereto as Appendix "A"). In that opinion, the First District Court of Appeal reversed Deputy Commissioner Wieland's Order of August 3, 1987 (A-1).

Thereafter, on or about July 5, 1988, the Petitioners/Employer/Carrier filed their Notice to Invoke Discretionary Jurisdiction with

the Florida Supreme Court.

STATEMENT OF THE FACTS

The Claimant, FLORENCE EAGLE, was born on May 24, 1925 (T-2, 71), and was 62 years old at that time of the hearing (T-2). The Claimant began the second grade, but did not finish it (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 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 had no problems with her right knee until the day that she fell on June 10, 1985 (T-78, 87).

On or about June 10, 1985, the Claimant testified that 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). At that time, she testified that 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).

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

Dr. Bradford testified that during the period of time that he had treated the Claimant previously, the Claimant had complained once of pain in the left knee on January 11, 1983 (T-116). Other than that one time, the Claimant had never complained of knee pain again between January 11, 1983 and June 10, 1985 (T-117). Dr. Bradford also indicated that the Claimant was not at any time having any trouble with her right knee (T-117).

On June 19, 1985, Dr. Bradford admitted the Claimant to the hospital because the Claimant's right knee was swollen and feverish (T-121). The Claimant was diagnosed as having right knee swollen and feverish plus severe degenerative cartilage of the knee, right (T-121, 122).

The Claimant also came under the care of Dr. James C. Johnson, an orthopaedic surgeon in Orlando, Florida (T-139). Dr. Johnson treated the Claimant from June 25, 1985 through July 17, 1986 (T-139). Dr. Johnson diagnosed the Claimant's condition as extremely severe degenerative arthritis of the right knee joint 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 Claimant's physical condition was causally related to the Claimant's accident of

June 10, 1985 (T-141, 142). Dr. Johnson also testified that the industrial accident made the Claimant's pre-existing osteoarthritic condition symptomatic (T-143). Dr. Johnson further testified that as a result of the Claimant's industrial accident, he 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 testified 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 also presented the testimony of two witnesses, Zara Rogers and Geraldine Bostwick, both of whom testified that the Claimant had no problems with her right knee prior to her accident of June 1985 (T-23, 24, 26, 27).

The Employer/Carrier presented the testimony of only Minnie Grace, who testified that prior to the Claimant's fall, the Claimant would complain about her knee hurting and would show Mrs. Grace that her knee was swollen (T-38, 39).

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

SUMMARY OF ARGUMENT

It is respectfully submitted that the decision of the First District Court of Appeal does not conflict with any prior decisions of this Honorable Court. The First District Court of Appeal correctly concluded that the Claimant's injuries were compensable under two theories, the "actual risk" doctrine, as espoused by the First District Court of Appeal in _Grimes v. Leon County School Board_, 518 So. 2d 327 (1st D.C.A. Fla. 1987), or

the "increased hazard" doctrine as espoused by the First DCA in Cheney v. F. E. C. News Distribution Company, 382 So. 2d 1291 (1st D.C.A. Fla. 1980).

It is respectfully submitted that since the decision of the First District Court of Appeal in the case at bar does not conflict with any prior decisions of this Honorable Court, or of any of the other district courts of appeal, it is respectfully submitted that the Petitioners' Petition to Invoke Discretionary Jurisdiction should be denied.

ARGUMENT

WHETHER OR NOT THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT IN FEDERAL ELECTRIC CORP. V. BEST, 274 So. 2d 886 (FLA. 1973), SOUTHERN CONVALESCENT HOME v. WILSON, 285 So. 2d 404 (FLA. 1973), HACKER v. ST. PETERSBURG KENNEL CLUB, 396 So. 2d 161 (FLA. 1981), MEDEIROS v. RESIDENTIAL COMMUNITY OF AMERICA, 481 So. 2d 92 (1st D.C.A. Fla. 1986), OR GORE NEWSPAPERS CO. v. LOVETT, 393 So. 2d 1152 (1ST D.C.A. FLA. 1981).

The Petitioners/Employer/Carrier herein seek to invoke the discretionary jurisdiction of this Honorable Court pursuant to Article V, Section 3(b)(3), Florida Constitution; and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure, which provide that the discretionary jurisdiction of the Supreme Court may be sought to review decisions of the district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law.

In order to invoke jurisdiction of the Florida Supreme Court under this provision of the Constitution, antagonistic principles of law must have been announced in a case, or cases, by the lower court based on practically the same facts as another district court of appeal. The conflict must be obvious and patently reflected in the decisions relied on. The conflict must result from an application of law to facts, which are in essence on all fours, without any issue as to the quantum and character of proof, Trustees of Internal Improvement Fund v. Lobean, 127 So. 2d 98 (Fla. 1961).

In those instances where the said decision of the court of appeals is not in "direct conflict on the same point of law" with any decision of this Honorable Court or other district courts of appeal, the petition to invoke discretionary jurisdiction should be denied, City of Miami Beach v. Tanner, 186 So. 2d 514 (Fla. 1966).

In the case at bar, Petitioners contend conflict with this Honorable Court's decision in Federal Electric Corp. v. Best, 274 So. 2d 886 (Fla. 1973). It is respectfully submitted that there is no conflict between the two decisions. In Federal Electric Corp. v. Best, supra, this Honorable Court denied the compensability of the claimant's accident because no "hazard of employment" contributed to the claimant's injury. On the other hand, in the case at bar, the First District Court of Appeal found that the Claimant was entitled to compensation because, inter alia, the Claimant's ability to control her activities and positional changes was not at great at work as it would have been at home, and therefore, the Claimant's employment activity in the case at bar did contribute to the Claimant's injury, Cheney v. F.E.C. News Distribution Company, 382 So. 2d 1291 (1st D.C.A. Fla. 1980). Thus, the First District Court of Appeal in the case at bar applied the "increased hazard" doctrine to the case at bar, which is the same doctrine applied by this Honorable Court in Federal Electric Corp. v. Best, 274 So. 2d 886 (Fla. 1973). The only difference between the two cases is that the First District Court of Appeal in the case at bar found that the Claimant's work created an increased hazard to the Claimant, whereas in Federal Electric, this Honorable Court found that the claimant's work did not create an increased hazard to the claimant.

Additionally, the First District Court of Appeal in the case at bar also found the Claimant's claim compensable under the "actual risk" theory espoused by the First DCA in Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987) which provides 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. Under the "actual risk" doctrine,

the focus of analysis shifts from emphasis on the cause of the accident (an approach more familiar to a fault system) to emphasis on the cause of the injury (more consistent with the no-fault concept of workers' compensation), Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987). The First District Court of Appeal in Grimes, supra, concluded that the "actual risk" doctrine was espoused by this Honorable Court in the case of Protectu Awning Shutter Company v. Cline, 16 So. 2d 342 (Fla. 1944). As the First District Court of Appeal noted in Grimes, supra, decisions in this area of the law in Florida drifted from the "actual risk" theory espoused in Protectu Awning, supra, to the increased hazard doctrine discussed previously hereinabove. The First District Court of Appeals' decision in Grimes v. Leon County School Board, 518 So. 2d 327 (1st D.C.A. Fla. 1987), brings Florida law back in line with the "actual risk" doctrine which was initially espoused by this Honorable Court in Protectu Awning Shutter Company v. Cline, 16 So. 2d 342 (Fla. 1944).

Claimant/Petitioner would respectfully point out that the First District Court of Appeal in the case at bar found the Claimant's claim to be compensable under both the "increased hazard" doctrine and the "actual risk" doctrine.

Additionally, the other cases cited by Petitioners in their brief, to wit: Southern Convalescent Home v. Wilson, 285 So. 2d 404 (Fla. 1973) and Honeywell, Inc. v. Scully, 289 So. 2d 393 (Fla. 1974), were simply determinations by this Honorable Court that the claimant's injury was not compensable, because there was no "increased hazard" of employment which either caused or aggravated the injury. As noted previously, the First District Court of Appeal in the case at bar found that there was an increased hazard in the Claimant's employment, to wit: the Claimant's inability to control her activities and positional changes, and therefore,

the increased hazard at work did contribute to the Claimant's injury in the case at bar. It is respectfully submitted that the decision in the case at bar is not in direct conflict with these former decisions of this Honorable Court, but simply arrives at a different result utilizing the same theory of law as espoused in those cases cited by Petitioners in their Initial Brief.

It is respectfully submitted by Respondent herein that conflict between decisions must be express and direct, i. e., it must appear within the four corners of the majority decision, Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986). In the case at bar, it is respectfully submitted that there is no express and direct conflict within the four corners of the First District Court of Appeals' decision with any decisions cited by Petitioners.

Respondent would also state that those decisions of the First District Court of Appeal which Petitioners contend are in conflict with the First District Court of Appeals' decision in the case at bar, to wit: Medeiros v. Residential Communty of America, 481 So. 2d 92 (1st D.C.A. Fla. 1986), and Gore Newspapers Co. v. Lovett, 393 So. 2d 1152 (1st D.C.A. Fla. 1981), are also not in conflict with this Honorable Court's decision in the case at bar. However, Respondent would further respectfully submit that to obtain conflict jurisdiction of this Honorable Court, the conflict must exist between the decision of this Honorable Court and a decision of "another district court of appeal" or of the Supreme Court on the same question of law, Article V, Section 3(b)(3), Florida Constitution. Therefore, even if there were a conflict between the decision by the First District Court of Appeal in the case at bar, and prior decisions of the First District Court of Appeal, it is respectfully submitted that such a conflict is insufficient to invoke the jurisdic-

tion of this Honorable Court.

CONCLUSION

Respondent respectfully submits that the decision of the First District Court of Appeal is not in conflict with any of the decisions cited by Petitioners in their Initial Brief. For the reasons set forth in Respondent's Brief, the Respondent respectfully requests that this Honorable Court deny the Petitioners' Motion for this Court to invoke discretionary jurisdiction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U. S. Mail to B. C. PYLE, Esquire, 715 North Ferncreek Avenue, Orlando, Florida, 32803, this 1st day of August, 1988.

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