STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 TERM

NO. 2019-0115

APPEAL OF ELIZABETH DOODY

APPEAL FROM WORKERS' COMPENSATION APPEALS BOARD PURSUANT TO RSA 541:6

RESPONDENT'S BRIEF

Respectfully submitted,

LACONIA SCHOOL DISTRICT

By Its Attorneys,

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Oral Argument on behalf of Respondent:
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QUESTIONS PRESENTED

1. Whether the claimant, having expressly urged the CAB to determine if her workplace floor *caused her fall*, is now estopped from arguing to this Court that the CAB erroneously focused on the "cause of the claimant's fall"?

2. Whether the record contains sufficient evidence to support the CAB's determination that the workplace floor was not defective and therefore did not constitute an employment risk?

3. Whether the record contains sufficient evidence to support the CAB's determination that the claimant's injury did result from a neutral risk but did not arise out of her employment because her employment presented no greater risk to her than that to which the general public is exposed?

TEXT OF RELEVANT STATUTES

NH RSA 281-A:2 XI DEFINITIONS

XI. "Injury" or "personal injury" as used in and covered by this chapter means accidental injury or death arising out of and in the course of employment, or any occupational disease or resulting death arising out of and I the course of employment, including disability....

NH RSA 541:3 MOTION FOR REHEARING

Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

NH RSA 541:4 SPECIFICATIONS

Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been made, no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds.

STATEMENT OF THE CASE

On December 5, 2018, the Compensation Appeals Board (hereinafter "CAB") reviewed exhibits and heard approximately two hours of testimony from three witnesses as part of its *de novo* hearing of the matter now before this Court. A Department of Labor hearing officer had previously determined the claimant had failed to prove her work floor was hazardous or defective or that her unexplained fall resulted from any increased hazard associated with her employment.

Following its *de novo* hearing, the CAB similarly determined the claimant failed to prove "a defect in the floor surface or door mat posed an actual risk that caused the claimant's fall". The CAB also found the claimant failed to prove her unexplained fall satisfied the "the increased risk test under Appeal of Margeson". (App[1]. at 11).

The claimant filed a motion for rehearing pursuant to RSA 541:3. The motion for rehearing provides a mechanism whereby administrative agencies may reconsider their decision and correct any mistakes. Appeal of Briand, 138 N.H. 555, 557-558 (1994). In her motion for rehearing, the claimant preserved the following issues: 1) the CAB erred by affording

[1] "App." refers to Appendix to Respondent's Brief.

greater weight to the "unreliable employer witness" than it afforded the claimant's evidence on the question of a "defective, slippery, or uneven surface" (App. at 12), 2) the CAB erroneously applied a direct risk test in analyzing the claimant's alternative theory of neutral risk compensability (App. at 16); and, 3) the CAB erroneously contrasted the claimant's work risk with her non-employment risk instead of contrasting the claimant's work risk with that faced by the general public. (App. at 18).

The CAB denied the motion for rehearing and specifically adopted "the positions forwarded in Attorney Falkenham's Objection to Request for Motion for Rehearing/Reconsideration". (App. at 30).

Among the positions set forth in this Objection, and adopted by the CAB were the following: 1) the claimant's first argument is nothing more than a request that the CAB reweigh the evidence (App. at 21), 2) during the CAB hearing the claimant neglected to argue, and therefore waived, any assertion that the mere frequency of her work related walking was enough to qualify under the increased risk test, and, in any event, such argument, lacks merit (App. at 22); and, 3) even if the CAB is obligated to apply the increased risk test the claimant has failed to prove her frequency of walking

across commercial flooring is any greater than that encountered by the general public. (App. at 24).

The claimant then filed a Notice of Appeal with this court citing two issues. The claimant asserted the CAB erroneously applied a heightened standard of proof stating "[s]pecifically, the CAB required the Claimant to prove without a doubt and with exact specificity, *what* caused her fall." (NOA[2] at 18). In the alternative, the claimant argued, "the Claimant's evidence of increased risk at the site and by virtue of her frequency of use, should have been enough to render her claim compensable had the CAB applied the correct test, but it did not." (NOA at 18-19).

In her brief, recently filed with this court, the claimant set forth some version of the above arguments along with other several others. The brief includes the following arguments: 1) the CAB committed error by "focusing on the cause of the fall instead of the work relatedness of the hazard" (Pet. Brief[3] at17), 2) the claimant "presented facts sufficient to establish she was injured at work and the injury was more probably than not due to one of several work risks" (Pet. Brief at 19), 3) the CAB's "focus on the causation of the fall" "threatens to undermine the equity of

[2] "NOA" refers to Appellant's/Claimant's Notice of Appeal.
[3] Pet. Brief" refers to Appellant's /Claimant's Brief

the workers' compensation system" and "defies the remedial purpose of our statutes in New Hampshire" (Pet Brief at 21), 4) in applying the increased risk test, the CAB "used the wrong comparator" and "never considered the manner and frequency of the Claimant's use of the hallway as compared to the general public's use of these or similar floors." (Pet. Brief at 23); 5) the CAB "erred when it compared Ms. Doody's work activity to her activity in her personal life" (Pet. Brief at 23), 6) the CAB "erred by only considering how often the claimant 'walked' at work in applying the increased work test", (Pet. Brief at 25); and, 7) the conditions of her injury including the location and surface upon which she fell were relevant to her risk of injury and thus to the analysis of increased risk. (Pet. Brief at 28).

SUMMARY OF THE ARGUMENTS

The claimant urged the CAB to determine if her work place floor caused her fall and is therefore estopped from her current attempt to characterize the CAB's focus on that issue as somehow erroneous. The claimant herself urged the CAB to determine whether the condition of the work floor caused her fall, or in the alternative, whether the condition of the floor presented a greater risk of causing a fall.

Consistent with the law and the claimant's urging, the CAB first applied the employment risk test and found the floor was not defective The CAB noted the school nurse, who came upon the scene shortly after the fall, did not see any defects in the flooring when she examined the area. The CAB further found the claimant's close-up photograph exhibit, purportedly showing blemishes in the flooring, was not taken until a month had passed and in all that time, no other falls were known to have occurred in that area of the school.

The CAB next addressed the increased risk test and found the non-defective floor presented no qualitative increased risk. Similarly, the CAB found no quantitative increased risk by virtue of the claimants' alleged frequent walking on the non-defective floor. In Appeal of Margeson, this

Court formulated the quantitative increased risk test and expressly established the CAB's role to make "explicit findings regarding whether the employee used the stairs more frequently than a member of the general public". Appeal of Margeson, 162 N.H. 273, 284 (2011).

By remanding the matter to the CAB to make such explicit findings, this Court expressly determined that the comparative frequency of use in this context is a question of fact to be determined based on evidence, not supposition. The claimant produced no evidence of how frequently the general public uses commercial flooring. Despite the actual remand instructions expressed in Margeson, the claimant insists she has no obligation to present such evidence. She argues the quantitative measure for frequency of general public use is instead derived from Nevada case law.

The record contains sufficient evidence to support the CAB's determination that the workplace floor was not defective and therefore did not constitute an employment risk. The claimant's own testimony supports a finding the work floor was free of defects. Far from identifying some defect purportedly depicted in exhibit photos, the claimant testified she did not know why she fell.

The school nurse testified the floor where the claimant fell was level. The school nurse addressed the photo exhibits during her testimony as well. She testified she did not see the blemish purportedly depicted in the photo. She stated she had not received any reports that there were problems with the floor.

The record contains sufficient evidence to support the CAB's determination that the claimant's injury did result from a neutral risk but did not arise out of her employment because her employment presented no greater risk to her than that to which the general public is exposed. The claimant has failed to present any evidence that the commercial nature of the floor rendered it qualitatively more dangerous than any other floor. The testimonial evidence presented to the Board constitutes competent evidence upon which the CAB reasonably based its findings.

Ultimately, the claimant relies upon her alternative argument that the number of times she walked across this level non-defective floor is itself sufficient evidence to prove she faced an increased quantitative risk of injury. The claimant has provided no evidence of how frequently the general public walks similar floors. The claimant's failure to offer any evidence addressing a required element of her claim is fatal to her case.

More fundamentally it is not clear that an employee's frequent use of a level non-defective floor somehow creates the same potential for increased risk as does an employee's frequent use of stairs. While stairs may represent some common risk to all of us, and an increased frequency of exposure to that common risk at work may render a fall on those stairs work related, the same has not been said of frequent exposure to a level floor. Rather in worker's compensation law, the non-defective level floor has traditionally been treated as a benign factor in attributing risk for a particular injury.

STANDARD OF REVIEW

The CAB's findings of fact will not be disturbed if they are supported by competent evidence in the record, and upon which its decision reasonably could have been made. See Appeal of Northridge Environmental, 168 N.H. 657, 660 (2016). As long as competent evidence supports the CAB's decision, this Court will not reverse a finding supported by evidence in the record even if other evidence would lead to a contrary result. See Appeal of Anheuser Busch Company, 156 N.H. 677, 682 (2008).

ARGUMENT

I. The claimant urged the CAB to determine if her work place floor caused her fall and is now estopped from her current attempt to characterize the CAB's focus on that issue as somehow erroneous.

During her closing statement to the CAB, the claimant made the following arguments:

> "Does she say that she knows exactly what caused her fall? No, she doesn't. But I don't think that is the final blow to her. The question is can we determine that, based on the circumstances, there was some reasonable cause?" (App. at 54).
>
> " . . .if you don't think that you can conclude that given the circumstances there was a defect or an uneven or a slippery surface, that's what we would have to be able to show more probably than not that caused her fall as opposed to something else, then we do move onto Margeson." (App. at 54-55).
>
> ". . . if we get to Margeson, that – and I'm going to be as accurate as I can on saying what that standard is. Um- the analysis turns to whether or not the injury results from a greater risk to which the general public is exposed. That's it. And generally has to show more probably than not. Did she fall by virtue of a greater risk?" (Appt. at 56).
>
> "The floor. The floor being the cause of what happened" (App.at 56).
>
> "You have a surface that when it does get wet or pocked it is more likely to cause falls, we would submit" (App. at 57).

> "She just has to show more probably than not the floor surface either caused her fall because it was uneven, pocked , take your pick, or that the floor and her frequent use of it, the type of floor that it was, increased the risk and that's it. Just increased the risk. So certainly we know she fell there." (Emphasis added). (App. at 58).

The above quotes establish empirically the claimant herself urged the CAB to determine whether the condition of the work floor caused her fall, or in the alternative, whether the condition of the floor presented a greater risk of causing a fall.

Given the claimant's presentation to the CAB, she cannot credibly argue to this Court that the CAB somehow, "improperly focused on the *fall* as opposed to the *injury*". The claimant identified no such distinction in her presentation to the CAB. Indeed, the claimant never cited Appeal of Kelly, 167 N.H. 489 (2015), in either her closing statement to the CAB or in her motion for rehearing to the board.

Moreover, the claimant insists:

> "[t]his choice of language was not a mere scrivener's error at the tail end of the CAB's decision in which the CAB mistakenly swapped the word fall for injury. It was the holding of the decision and a reflection of the CAB's erroneous understanding of the law." (Pet. Brief at 17).

The claimant further insists the CAB's references to the "cause of the fall" somehow:

> "reveals the Panel's fundamental misunderstanding of the burden in this case and with respect to the proof required for compensability under New Hampshire workers' compensation law." (Pet. Brief at 18).

On the contrary, upon review of the claimant's own prior arguments we see the references to the claimant's fall and its cause reflect the claimant's own earlier framing of the issue.

More significant however, is the fact that the CAB did properly articulate the correct two part standard, the very standard the claimant now urges upon this Court. Contrary to the claimant's current allegations, the CAB actually held:

> 1) "[T]he Panel found that the claimant failed to prove, more probably than not, that a defect in the floor surface or door mat posed an actual risk that caused the claimant's fall."
>
> 2) "Further the Panel found that the clamant failed to prove, more probably than not, that the claimant's unexplained fall was a neutral risk that met the increased risk test under Appeal of Margeson." (Emphasis added). (App. at 11).

The increase risk test under Appeal of Margeson requires the claimant prove her injury results from a greater risk than that to which the general public is exposed. Appeal of Margeson, 162 N.H. 273, 283 (2011).

The CAB applied the first part of the above test to the case facts. The CAB noted the claimant did not allege a wet or slippery floor, rather she testified her feet stopped and her body kept going. Also, the school nurse did not see any defects in the flooring when she examined the area shortly after the claimant's fall. (App. at 9). (It bears mentioning that though claimant refers to the school nurse in her brief as the "employer's representative", and is critical of her testimony, it was the claimant who called the school nurse as a witness during the presentation of her evidence (App. at 41)). The CAB found the close-up photograph showing blemishes in the flooring was not taken until a month had passed and in all that time, no other falls are known to have occurred in that area of the school." (App. at 9).

The CAB then applied the second part of the above test to the case facts. As the claimant concedes, the CAB determined the claimant's fall was an unexplained fall. The board then accurately reiterated the neutral risk test:

> "Neutral risks result from some unexplained cause not directly attributable to either the employee the employee or the employer. In order to be compensable, a neutral risk must result from a greater risk than that to which the general public is exposed. The increased risk can be qualitatively peculiar to

> the work environment or exposure to the risk can be quantitatively greater". (App. at 10).

In applying the neutral risk test, the CAB found first that the work floor did not constitute a greater qualitative risk than that faced by the general public. The Board found specifically there was

> no testimony or other evidence that the flooring the claimant walked on at her work place is more slippery than other types of flooring that she or the general public routinely encounter in retail establishments, medical facilities, business offices, or homes. (App. at 11).

The CAB's language actually tracks the language used by this Court in Margeson where the Court described the act of descending a staircase as "an everyday, commonplace activity, which most people must undertake on a daily basis, whether at home, work, or in a shopping mall." Margeson at 283- 84.

The CAB also determined the claimant failed to demonstrate her alleged frequent walking on the non-defective floor somehow constituted a quantitative increased risk. As noted previously, the claimant instructed the CAB as to the analysis she wanted applied:

> ". . . the floor surface either caused her fall because it was uneven, pocked, take your pick, or that the floor and her frequent use of it, the type of floor that it was, increased the risk and that's it." (Emphasis added). (App. at 58).

Accordingly the claimant described her own burden as requiring a showing that the type of floor and her frequent use of it combined to create a greater hazard than that faced by the general public. The CAB addressed the two criteria in tandem as the claimant had requested and found the claimant's frequency of walking was no greater than that of her non-employment life, and that the work floor was no more slippery than the other types of floors that she or the general public routinely encounter. (App. at 11).

The claimant filed a motion for rehearing in part challenging her own articulation of the test. She now insisted she should not have to prove:

> "the comparable slipperiness of the flooring at work as compared to other types of flooring in retail establishments, medical facilities, businesses or homes." (App. at 19).

The claimant also challenged the Board's comparison of the claimant's frequency of walking at work with her frequency of walking during her personal life. The claimant noted the comparison should be between the frequency of the claimant's walking at work and the general public's frequency of walking. (App. at 18).

In its denial of the motion for rehearing, the CAB adopted the employer's reasoning as articulated in the objection to the motion for rehearing. The employer reasoned specifically that "the claimant's failure

to present evidence of the frequency with which the general public traverses similar [surfaces] is fatal to her ability to meet the burden of persuasion." (App. at 23). In describing the Margeson holding, the employer argued, and the CAB adopted, the following language:

> "[p]art of what is required is proof that the extent of risk encountered by the employee is greater than the risk faced by the general public in their normal non-employment lives. This element of proof, by definition, requires quantification of the general public's level of activity" (emphasis added). (App. at 24).

The claimant's proof was lacking because she offered partial evidence of only one part of a two part comparison. The claimant's only evidence was that she traversed the work floor 20 times per day. She offered no evidence as to the actual distance traveled within each trip or the total distance traveled. More significantly, the claimant offered no evidence as to the frequency or distance of daily walking trips undertaken by the general public.

The claimant repeatedly cites the Margeson test and references its minimum requirement that the claimant show quantitatively that she used the stairs more frequently than a member of the general public. Leaving aside for now the question of whether walking on a level surface in this context is analogous to climbing stairs, the test expressly mandates the

claimant prove her job requires she walk more frequently than members of the general public. To prove the former is greater than the latter, the claimant must quantify each.

Yet, the claimant has failed to offer any evidence of the frequency or distance walked by members of the general public. In place of evidence the claimant cites a Nevada case, specifically Rio All Suite Hotel & Casino v. Phillips, 240 P. 3d 2 (Nev. 2010).

The claimant reasons that since the Rio court found 25,000 trips up and down stairs over 17 years necessarily exceeded the general public's use of stairs, then her own 97,000 walks of unspecified length across hard commercial floors exceeds, as a matter of law, the frequency of the general public's walks across similar floors. Even assuming *arguendo* the Nevada Court established some per se frequency rate for general public stair use, it did not do so for level floor use. More significantly, this Court has never adopted a per se frequency rate for either general public stair or level floor use.

On the contrary, in Margeson, this Court expressly remanded the case to the CAB to make "explicit findings regarding whether the employee used the stairs more frequently than a member of the general public".

Margeson at 284. The CAB had already quantified Margeson's frequency of stair use at four times per hour. The only additional finding needed on remand would have been a finding as to the frequency of such stair use by the general public and a determination of whether Margeson's stair use was indeed more frequent than that of the general public.

By remanding the matter to make "explicit findings regarding whether the employee used the stairs more frequently than a member of the general public", this Court expressly determined that the comparative frequency of use in this context is a question of fact to be determined based on evidence not supposition. In her brief, the clamant fails to even acknowledge the specific terms of this Court's remand ruling and the accompanying remand instructions found in the Margeson decision. The claimant certainly has provided no argument as to why the Court should abandon this established precedent.

Similarly, the claimant presents no argument as to why this Court would substitute its own judgment for that of the CAB members on the factual question of frequency of level floor use as between the claimant and the general public. The claimant has not asserted the CAB's finding was somehow numerically incorrect. Indeed, the claimant cannot assert error

on this point since she has failed to present any evidence whatsoever as to the frequency of level floor use by the general public.

While the Court in Margeson remanded that case to enable the parties to produce the evidence necessary to contrast employee risk with general public risk, the Court did so because prior to its holding in 2011, the parties would have been unaware of the evidentiary burden necessary to meet the newly adopted test. At present however, Margeson has been established law for nine (9) years and the claimant was on notice of the particulars of her burden of proof. Despite the actual remand language found in Margeson, the claimant persists in arguing that she has no obligation to present evidence as to the general public's frequency of use commercial floors.

Accordingly, the CAB has in no way required the claimant to prove the exact mechanism or cause of her fall. Rather, the CAB has merely held the claimant to her lawful burden by requiring she show:

1) that a defect in the floor surface or door mat posed an actual risk that caused the claimant's fall; or,
2) that the claimant's unexplained fall was a neutral risk that met the increased risk test under Appeal of Margeson, which increased risk

test required the claimant prove her injury results from a greater risk than that to which the general public is exposed.

II. The record contains sufficient evidence to support the CAB's determination that the workplace floor was not defective and therefore did not constitute an employment risk.

Relevant portions of the hearing transcript are set forth below. The claimant's own testimony supports a finding the work floor was free of defects. The claimant agreed there was nothing in her path which she needed to avoid. She agreed she had told the school nurse there was no reason she fell, that she had not tripped on the mat, and that the floor was not wet.

(App. at 33)
A: Yes.
Q: Okay, And you say, "And I didn't see anything." Right?
A: Yes.
Q: So there was nothing that you saw that you felt you needed to avoid.
A: No.

(App. at 34)
Q: Okay. Um – and down on the bottom of that paragraph you said, "The nurse came, and she asked me why I was falling."
A: Um-hum.
Q: "And I said I didn't have any reason to fall. I just fell."
A: Um-hum.

(App. at 35)

Q: All right. But you're not saying that you tripped on the mat.
A: I am not.
Q: All right. And do you – there's been a lot of conversation about – or some conversation about the roof and the buckets. You're not saying the floor was wet where you fell, correct?
A: Correct.
Q: All right. And you have no evidence that the floor was wet where you fell, correct?
A: Correct.

The claimant testified relative to her photographs of the floor and conceded those photos were taken either just prior to the appeal hearing itself (held 12/05/2018) or at least a month and a half to two months after the incident. The claimant's photos failed to identify a defect and the claimant testified she did not know why she fell.

(App. at 36)

Q: Okay. The photos that we're looking at, they were either taken very recently or a month and a half or two months after the incident?
A: Correct.

(Appt. at 37)

Q: All right. And did you tell her that you just don't – didn't know why you fell?
A: Absolutely.
Q: Okay.

In fact, the mechanism the claimant did describe was in some respects the opposite of a "slip". The claimant testified her foot stopped and her body fell forward.

(App. at 38)
18 Q: All right. So you were walking, your foot
19 stopped, and your body fell forward.
20 A: Correct.

This would usually be described as a trip or a stumble. In the context of the above testimony, the claimant's reference to the first report of injury description, that she "slipped on the floor going form the waxed floor to the rug" carries little weight. The claimant was asked about who authored the first report of injury form and responded as follows:

(App. at 32)
7 Q: Do you know who filled this out?
8 A: No Idea

When the school nurse was asked who authored the form, she testified similarly:

(App. at 44)
6 Q: Okay. So did you make sure that Betty
7 filled out this form?
8 A: Um – well, she wasn't in school at least
9 for a few days. I don't even remember after that
10 so I honestly don't know – remember how the rest
11 of the form got filled out. I remember it being
12 with the principal, the initial part that had
13 gotten filled out, and waiting for the rest of it

14 to be able to be filled out.

Moreover, Department of Labor regulations specifically provide the filing of a first report of injury shall in no way prejudice the employer's right to dispute compensability. Lab. 504.02 (e).

With respect to the claimant's reference to dirt and grit on her hands at the time of her initial non-injurious fall, the claimant conceded she did not notice any such dirt or grit at the time of her injurious fall. Nor did the claimant have any specific knowledge that the floors had been treated with sand or salt on the day of her fall.

(App. at 39)

Q: Okay. And you mentioned that the first time you fell you had to wipe off your pants and your hands of dirt and grit.
A: Correct.
Q: Do you recall, if you do, whether that same thing happened the second time you fell?
A: The second time I fell I didn't fall on my hands and knees, and if there was dirt or grit on me, I certainly probably didn't really notice it because I had a lot of pain. I knew I was hurt.

(App. at 40)

Q: All right. Do you have specific knowledge? as to April 17th whether it was treated on that day?
A: I don't have specific knowledge on that day.

The school nurse testified the floor where the claimant fell was level and that as she approached the scene she carefully surveyed the area. She confirmed she looked carefully at the floor.

(App. at 42)
THE WITNESS: No. This picture is a really tough picture, but it's totally flat past to that door.
MS. EATON: Okay.

(App. at 43)
Q: And what, if anything, did you do upon arrival?
A: I – you know, as I always do when coming upon an accident scene, I am assessing the situation, so the surroundings, the people around, the person that's injured and immediately assessing all that, and then go and help the person that is hurt.

(App. at 45)
Q: Okay. And you indicated at that time that when you were walking up to the scene of the accident you definitely looked at the floor. Do you recall looking at the floor when you walked up to the scene of the accident?
A: I definitely do recall looking at the floor.
Q: And the floor you were looking at is the floor that you were walking on towards the accident; is this correct?
A: Correct.

(App. at 46)

A: I guess I am because I believe I went up there, from what I'm remembering, by myself that day to go check out the site, but I don't think I walked up there until the next morning with Mr. Johnson.
Q: Okay. So now you're saying – as you did not tell us that you went twice. You told us you went once with Mr. Johnson. Are you sure you have a recollection of going that afternoon and then again the next day?
A: I know I went up there that afternoon –
Q: Okay.
A: - as I was writing up the report and just checking things out to make sure everything was Okay.

(App. at 47)

Q: Okay. Did you look at the tile carefully where she slipped?
A: I did look at the tile and the flooring.

The school nurse addressed the photo exhibits during her testimony as well. She testified she did not see the blemish purportedly depicted in the photo. She stated she had not received any reports that there were problems with the floor.

(App. at 48)

Q: This photograph was taken anywhere between a month and two months after the date of injury. Are you aware of any damage to the floor that occurred between the time of her injury and a month or two later?
A: I am not aware of any damage.
Q: Okay. So, in looking at that, do you see

this pockmarked area on the tile?
A: I see what that – I see that blemish that you're referring to, yes.
Q: Okay. And that's a very blown up picture, to be fair, correct?
A: Uh-hum. Yes.
Q: Okay. And at the time that you surveyed the area did you do so by standing? Were you standing and looking down at the floor is the question.
A: Yes.

(App. at 49)
Q: Okay. At the time that you looked did you see this?
A: I did not see that.
Q: Okay.
A: No.
Q: And at any time since this has anybody reported to you that there were problems with pockmarks on the floor?
A: No.

Moreover, the school nurse testified she did not recall any treatment to the accident area in terms of sand or salt on the day of the accident.

(App. at 49)
Q: Okay. The area in which my client fell, that is an entry and exit way to the exterior of the building, is that correct?
A: Yes.
Q: Okay. And in the exterior of that building in the time period of April, 2017, if you recall, was there treatment to the area outside in terms of sand and salt for the weather?
A: Not that I recall.
Q: You don't recall?

A: No.
Q: That area is not treated during the inclement weather in the winter and spring?
A: I would say yes, it's treated. I mean, if the weather conditions warrant it, then yes, it's treated.

(App. at 50)
Q: And they're treated with what? Are they treated with sand?
A: Um – probably over there mostly salt, but it could be the mixture of salt and sand.

The school nurse described as well the mat located in the area and the adjacent initial set of doors and dirt collection system pedestrians would have to pass before getting to the location of the accident.

(App. at 50)
Q: Okay. And there are mats in front of this door. What is your understanding of the requirement for these mats?
A: That they be in good repair, none of the edges are curling up, and not wet, like soaking wet, and –
Q: It was a poor –
A: - well-maintained.

(App. at 50)
doorway into that area, so you actually enter an ante room that has matting and grid bottoms that all the dirt falls through from the shoes, and then they enter then that second set of doors where that secondary mat is there to catch anything extra.

On cross examination the school nurse confirmed the following:

(App. at 53)
10 Q: The area where the claimant fell was flat,
11 correct?
12 A: Correct.
13 Q: You looked at the area – um – shortly
14 after the claimant fell, correct?
15 A: Correct.
16 Q: It was dry, correct?
17 A: Correct.
18 Q: You saw no visible defect that would cause
19 somebody to fall, correct?
20 A: Correct.

Given the above testimony, from multiple witnesses called by the claimant, there is ample evidence in the record to support the CAB's determination of no employment related risk.

III. **The record contains sufficient evidence to support the CAB's determination that the claimant's injury did result from a neutral risk but did not arise out of her employment because her employment presented no greater risk to her than that to which the general public is exposed.**

The above citations to the record suffice to demonstrate the work floor did not create a greater qualitative risk than that to which the general public is exposed. Indeed, the foregoing references establish the level nature of the floor, the lack of defects, and the dirt collection system used in

the adjacent ante room, likely render this floor safer than many to which the general public is exposed.

The claimant asserts the commercial nature of the floor itself somehow renders them more dangerous. The claimant's own witness, the school nurse testified the work floor was not slipperier than the floor at her residence.

(App. at 52)

Q: At one point I think you indicated the flooring there is definitely different than the kind of flooring you have in the hallways at your house, is that correct?
A: Correct.
Q: How is it different?
A: Well, it's more – it's a commercialized hard tiling without grouting, you know, versus my tiling at home that has grouting in between it.
Q: And would you say that the grouting provides you with greater or less traction?
A: I can't say that I've ever noticed a difference.

(App. at 53)

Q: The area where the claimant fell was flat, correct?
A: Correct.
Q: You looked at the area – um – shortly after the claimant fell, correct?
A: Correct.
Q: It was dry, correct?
A: Correct.
Q: You saw no visible defect that would cause somebody to fall, correct?
A: Correct.

The claimant asserts that as a "hard, commercial tile hallway", the accident scene necessarily represents a greater risk than that to which the general public is exposed. Yet, as this Court pointed out in Margeson, the general public is exposed to risks every day, whether at home, work or in a shopping mall. The claimant has failed to present any evidence that the commercial nature of the floor rendered it any more dangerous than any other floor.

The claimant cites the "raised mat" over which hundreds of students have apparently crossed without tripping. The claimant also cites the "pitted" floor which the school nurse, upon careful observation could not confirm ever existed. Some of the very features the claimant references as dangerous: the mat and debris collection system, the frequent cleaning of the floors, etc., are actually safety features.

Moreover, the claimant has pointed out that hundreds of school children have used this floor without falling. The claimant asserts she herself has walked across this floor 97,000 times prior to the day of her injury without falling. This evidence supports the CAB's finding that the floor did not present a qualitatively greater risk.

Even assuming, *arguendo*, that claimant could identify some evidence that the work floor constituted an increased qualitative risk, she would still not meet her burden. She would instead be left to argue that this Court should elevate selected evidence over other evidence credited by the CAB. The Court has repeatedly stated it will not do so. The standard of review is whether the record contains evidence which supports the CAB's finding. The above references to the testimonial evidence presented to the Board constitute competent evidence upon which the CAB was entitled to rely. The CAB had the opportunity to observe the demeanor of the witnesses and is in the best position to evaluate testimonial evidence.

Ultimately, the claimant relies upon the alternative argument that the number of times she walked across this level non-defective floor is itself sufficient evidence to prove she faced an increased risk of injury. But as noted previously, this evidences addresses but one part of a two part comparison. The claimant has provided no evidence of how frequently the general public walks similar floors. As the claimant has the burden of proof, her failure to offer any evidence addressing a required element of her claim is fatal to her case.

In addition, the claimant has drawn a false analogy between the "common risk" presented by stair use and the benign nature of a level non-defective floor surface. The Rio decision discusses it precursor, Mitchell v. Clark County School District, 121 Nev. 179 (2005) where an employee fell on a flat surface while walking toward a stair case. The Court in Mitchell held that because the employee could not show the conditions of her employment caused her to fall on a flat surface, the appeal officer correctly concluded she had failed to demonstrate the requisite causation.

The Rio Court further specified that its analysis applies where the employee is "exposed to a common risk" more frequently than the general public. The Rio Court does not dispense with the requirement to prove as a threshold matter that the employee has been exposed to at least some form of "common risk". Stairs may represent some common risk to all of us, and an increased frequency of exposure to that common risk at work may render a fall on those stairs work related. The same has not been said of exposure to a level floor.

Traditionally, a level floor in workers' compensation law represents a benign factor. In the separate, but illustrative category of personal risks, this Court has held that when considering an employee's:

> "idiopathic fall to a level floor, not from a height, not on to or against an object, not caused by the nature of the work or any condition of the floor, we are dealing with and injury which is in no real sense caused by an condition, risk or hazard of the employment." Dustin v. Lewis, 99 N.H. 404, 407 (1955).

It is by no means a forgone conclusion that Margeson intended to convert the proverbial benign non-defective level floor to a potential employment risk along with stair climbing. The element of height, referenced in Dustin v. Lewis, is present with the act of stair climbing but not with the act of level floor walking. A non defective level floor more closely reflects a neutral factor than it does the "common risk" discussed in the Rio case upon which the claimant so heavily relies.

As a factual matter, frequently walking across a level non-defective surface, even a hard shiny surface, presents no apparent greater risk of injury than does infrequent walking across such a floor, at least none that the claimant has identified. In fact, increased frequency of walking is commonly recommended as a healthy activity. Far from presenting an increased risk of injury, walking a minimum of 10,000 steps per day is encouraged in our current culture as a means to better health.

In its ruling on the motion for rehearing the CAB adopted the reasoning set forth in the employer's objection to motion for rehearing. Included among the arguments adopted by the CAB is the following:

> Even if the Board is somehow obligated to apply the increased [risk] test to the claimant's latest theory of recovery, the test result remains the same. The claimant has failed to prove her traversing across level, even, and dry surfaces, even at the rate of 20 trips per day of unspecified length, somehow presents a greater risk than is faced by the general public traversing similar surfaces. (App. at 24).

To briefly address the claimant's assertions regarding the so called "Grand Bargain", her arguments on this point would be more properly addressed to the legislature. This Court has established the precedent so carefully worked out in Margeson in part to retain the elements of a no fault system without drifting into a strict liability system. The legislature is free to change the law as interpreted by this Court and yet has not done so. The claimant has preserved no argument that Margeson was wrongly decided or requires revision. Indeed the claimant argues for the application of Margeson to the present case. The CAB has properly articulated and applied Margeson and the evidentiary record overwhelmingly supports the decision.

CONCLUSION

For the foregoing reasons we ask this Honorable Court to affirm the decision of the New Hampshire Workers Compensation Appeals Board.

The appellee requests fifteen minutes for oral argument.

CERTIFICATION

Pursuant to New Hampshire Supreme Court 2018 Supplemental Rules of the Supreme Court, the undersigned certifies that copies of this Brief and Appendix have been electronically filed on this day to the Clerk of the Supreme Court of New Hampshire.

Pursuant to New Hampshire Supreme Court 2018 Supplemental Rules of the Supreme Court,, the undersigned certifies that on this day copies of this brief have been electronically filed with Anne M. Rice, and the Office of the Attorney General. One (1) copy has been mailed to the New Hampshire Department of Labor.

Pursuant to New Hampshire Supreme Court Rule 16(10)(2), the undersigned requests oral argument and designates Eric G. Falkenham, Esquire to be heard. It is estimated that oral argument will require fifteen (15) minutes.

Respectfully submitted,

LACONIA SCHOOL DISTRICT

By its Attorneys,

DEVINE, MILLIMET & BRANCH,
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Dated: 9/27/2019 By: Eric G. Falkenham

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