THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0115

ELIZABETH DOODY,

Plaintiff - Appellant,
v.
LACONIA SCHOOL DISTRICT,

Defendant-Appellee.

ON APPEAL FROM THE COMPENSATION APPEALS BOARD
OF THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR

PLAINTIFF - APPELLANT'S PRINCIPAL BRIEF

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2 A. Larson, Larson's Workers' Compensation Law § 3.01, at 3-4 (Matthew Bender ed. rev. 2011) 15

TEXT OF RELEVANT STATUTES

281-A:48 Review of Eligibility for Compensation, Appendix, page 42

281-A:2 XI, XIII Causal Relationship of Injury to Employment, Appendix, page 43

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Compensation Appeals Board's (hereinafter, CAB or Panel) finding that the Claimant failed to prove "...that a defect in the floor surface or door mat posed an actual risk that caused the Claimant's fall" was erroneous as a matter of law and/or abuse of its discretion, and/or unjust or unreasonable given the facts in evidence.

II. Whether the CAB erred as a matter of law, having found the Claimant's fall was due to a neutral risk, by applying the incorrect test for a neutral risk injury as would be required by and in accordance with NH RSA 281-A:2, XI and Appeal of James Margeson, 162 N.H. 273 (N.H. 2011).

STATEMENT OF THE CASE

A DOL Hearing was held on July 10, 2018 on the issues of RSA 281-A:2,XI, XIII, 281-A:23 and 281-A:48. A decision denying the claim was issued on July 20, 2018. Notice of Appeal, App. 1-6. The Hearing Officer found there was "no dispute that the claimant's injury occurred in the course of her employment, the claimant has not met her burden of showing her injury arose out of her employment," where "The evidence presented does not support that the floor was slippery and the fact that 400+ students and faculty traverse the same area daily do not support that the claimant had a greater or increased risk." Notice of Appeal, App. 6.

A CAB Hearing was held on the same three issues on December 5, 2018 with a decision issued on December 12, 2018. P. 32-39. The CAB found "...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" and further found that the claimant failed to prove that her "...unexplained fall was a neutral risk that met the increased risk test under Appeal of Margeson. P. 39. Accordingly, all benefits were denied.

In rendering its decision the Panel specifically adopted the Carrier's argument regarding the neutral risk as "more persuasive." The decision articulated the Carrier's argument as follows:

> "In support of this argument, the carrier points to the absence of testimony that the claimant walked more at work than in her personal life. Likewise there was no testimony or other evidence submitted that the commercial flooring the claimant walked on at her workplace 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." P. 38-39.

In the Carrier's closing argument, he stated "I think in Margeson they talk about, you know, if you're going up and down the stairs a lot more than you would in your nonoccupational life. There's been no testimony that that was the case." Notice of Appeal, App. 70.

On January 10, 2019, the Claimant filed a Motion for Rehearing/Reconsideration

(Notice of Appeal, App. 15-23) and the Defendant filed an Objection to this Motion on January 16, 2019. Notice of Appeal, App. 24-32. A decision was issued by the Compensation Appeals Board on January 28, 2019 denying the Claimant's Motion for Rehearing/Reconsideration. P.40-41.

Thereafter, the Claimant filed a timely appeal to this Court.

STATEMENT OF FACTS

The facts establish that on April 18, 2017, the Claimant fell twice in the same location in the hallway at her place of employment. P. 34. Both falls took place in front of an exit where she was assigned to door duty for approximately 100 students entering the building in the morning and exiting in the afternoon. P. 32-39. The Claimant first fell in the morning on her way to the door, just before she reached the door and did not sustain any injury. P. 34. However, she did note that she had sand and grit on her hands and pants after the fall. Notice of Appeal, App. 52. She reported this fall. Notice of Appeal, App. 44. She fell a second time the same day, in the afternoon. She fell in the same location as she fell in the morning. She testified that she had never fallen before or since at work and more, she had never fallen before or since wearing the shoes she had on. Notice of Appeal, App. 50-51. The second time she fell on April 18, 2017, she did suffer an injury, sustaining a fracture of her right humerus, which required surgery with open reduction and fixation (Notice of Appeal, App. 77-79.) as well as several months of physical therapy. The Claimant was taken from the scene to the emergency room and did not inspect the area of her fall or fill out her first report of injury until later. Notice of Appeal, App. 48. The First Report of Injury indicates the Claimant "slipped on floor going from the waxed floor to the rug." Notice of Appeal, App. 80-83.

On the date of the injury, the Claimant was working at Woodland Heights School (Laconia School District), as a Speech Assistant. P. 33. The Claimant had at that time been employed by the Laconia School District for the last 27 years. Notice of Appeal, App. 35-38. At the time of her injury she was a speech assistant at Woodland Heights Elementary School (WHES) and had worked in this position for 12 years. Id. Prior to that, she was a classroom paraprofessional. Id. In her capacity as a speech assistant, the Claimant typically worked with students in a workspace that housed the occupational therapy, special education and the speech pathologist. She had her own workspace there. Notice of Appeal, App. 37. Whether she worked in her office space or in a classroom, she was required to walk from her special services room to the various classrooms where her assigned students were located. Notice of Appeal, App. 35-38. When she worked with

students in her office she would pick the student(s) up from their location and accompany them back to her office. Id. After her lesson, she would then walk the students back again to the classroom. Id. This would be up to four trips per student, per day as she traveled the halls down and back to get the students and down and back again to return them. Id. She worked with approximately 20 students a day on average, some individually and some in small groups. Notice of Appeal, App. 38. The Claimant estimated she traversed back and forth in the hallway at work 20-25 times a day. Notice of Appeal, App. 43. She also had two duties each day as part of her work requirement. P. 33. Her duty was to monitor the locked side egress, one of two entries where the children entered and left in the morning and the afternoon. Id. The side entrance consisted of an outside concrete area that was plowed and "heavily" treated with sand and salt in the winter and spring. Notice of Appeal, App. 53-54. Photographs showing the mat, commercial tile and pock marks on the tile in the area of the fall were provided at the CAB Hearing. P. 33. Approximately 100 children used that locked door and it was the Claimant's job to let them in and out each day. Id. The school building was locked and thus, the children had to be let into the building. Notice of Appeal, App. 39-40. Most children arrived by bus and are not dropped off or picked up by their parents, but some walk or are dropped off. Notice of Appeal, App. 40. The children who use the side entrance are then allowed into the school by the Claimant. Notice of Appeal, App. 39.

The school hallways where the Claimant walked were constructed with commercial grade flooring that is a hard, waxed, tile surface that has a shiny gloss to it and is without grout. Notice of Appeal, App. 49, 67. The halls where she did her door duty were floored in that same commercial tile and then transitions to a rubber mat area in front of the door. Notice of Appeal, App. 66. This mat was specifically there for anticipated slippery conditions. Notice of Appeal, App. 62.

Testimony of the Claimant and a former employee, witnesses, noted that there was a frequent issue with ceiling leaks in the area of the fall with water on the ground. Notice of Appeal, App. 55-56. In the week prior to her fall, there had been a leak in the ceiling and a bucket was collecting water near the area she had fallen. Notice of Appeal, App. 56,

42. The former teacher, who saw the Claimant after both her falls at work, testified that the Claimant fell in the same place both times. Notice of Appeal, App. 55. She also testified that during the spring and winter the area outside the entry door where the Claimant fell was heavily sanded and salted due to the fact that the area was slippery. Notice of Appeal, App. 53-54. She also testified there had been problems with leaks and water in the hallway within the two-week time period of the fall, (Notice of Appeal, App. 55-56.) and that the hallway was consistently having leaks there when it rained. Notice of Appeal, App. 56. More, she testified that there had been water on the floor in that area in the past. Id. The same teacher saw the Claimant after both of her falls, in the morning and afternoon and remarked "...her body was in the same exact spot that she had landed when she first fell in the morning..." Notice of Appeal, App. 55. In Claimant's description of the fall she stated, "In the afternoon going to do my second duty I walked down the hall, same way to the right, always to the right when you walk down, and I got just to the entrance to the kindergarten classroom and – um – just about there, and the same place I felt like my feet stopped, and my body kept going." Notice of Appeal, App. 45.

In a taped statement, the Claimant told the adjuster for the Carrier, "I didn't have any reason to fall. I just fell. I don't know what it was. I don't know if it was the floor." She then went on to tell the adjuster about the buckets, that had been in the hall the week prior to catch the leaking water from the ceiling. Notice of Appeal, App. 51.

The employer's representative, the school nurse, testified at the DOL and CAB Hearings that she inspected the scene for her employer. She was a member of the employer's safety committee (Notice of Appeal, App. 64.) And joint loss committee Notice of Appeal, App. 65. She agreed that the school hall floors consisted of hard "commercial" tiling without grouting and at the location of the fall, the hard tiling then transition ed to a rubberized area right in front of the door. Notice of Appeal, App. 66. The nurse acknowledged that these commercial type floors were different from floors at her house. Notice of Appeal, App. 67. The floors, which were auto scrubbed daily (P. 35.) were also supposed to be burnished at least three days per week. Id. The nurse offered

conflicting testimony between the two hearings at which she testified. She first testified she inspected the area on her way to the fall. Notice of Appeal, App. 71-71. This was determined to be inaccurate at the CAB Hearing when she admitted she did not travel to the scene in the same direction as the fall. Notice of Appeal, App. 46-47. She also testified in the first hearing that she and the principal inspected the area on the same day as the fall. Notice of Appeal, App. 71. She later agreed they did not go back until the next day. Notice of Appeal, App. 58-59. Further, she admitted when she did go back, she looked at the area, but did not feel for wet or grit and did not bend down or touch the flooring. Notice of Appeal, App. 68-69. She indicated she did not see the pock marks that were depicted in the photos, but also had received no report of new damage to the area to account for the pock mark. Notice of Appeal, App. 60-61.

The Claimant was driven from the school to the emergency room where she had X-rays and treatment. She was diagnosed with a fractured right humerus. Notice of Appeal, App. 73-76. The Claimant followed up with an orthopaedic surgeon in Gilford, ultimately transferring her care to Concord Orthopaedics where she underwent surgery on May 4, 2017 to repair her fracture. Her surgery included an open reduction with internal fixation. Notice of Appeal, App. 77-79. The Claimant then followed post operatively with her surgeon and underwent several months of physical therapy.

The Claimant was out of work from April 19, 2017 through August 28, 2017 as a result of her injury and treatment. Her medical care currently consists of treatment from April 18, 2017 to September 20, 2018.

SUMMARY OF THE ARGUMENT

The Claimant, Ms. Doody, asserts she was wrongfully denied workers' compensation benefits. It is the Claimant's contention that the Panel erred as a matter of law and fact in denying her claim for benefits.

The Claimant asserts that underscoring the errors of fact and law, as made by the Panel under both risk theories, is a fundamental misunderstanding of the law regarding the Claimant's burden to establish causation. The Claimant submits that in both of the Panel's determinations (regarding the claim for injury due to employment and neutral risk) the Panel applied the incorrect burden and focus in assessing causation and in contradiction to NH RSA 281-A et seq. and common law. The Panel required the Claimant prove the cause of her "fall" in order to prevail, thereby, erroneously focusing on the "fall" rather than the injury and its relationship to employment. It is the Claimant's contention that the Panel's error in the misapplication of the law resulted in imposing an altered and heightened burden of proof upon the Claimant in contradiction to the law, but also which undermines the equity of the workers' compensation scheme and defy the remedial purpose of the statute.

The Claimant asserts that having rejected her claim under the theory of direct risk and having instead found the Claimant's injury was due to a neutral risk, the Panel applied the incorrect analysis to her claim, in contradiction to the law as established by the New Hampshire Supreme Court in Appeal of James Margeson, 162 N.H. 273 (2011); 27 A.3d 663. The Claimant asserts the Panel erred in its application of the increased risk test, thereby incorrectly finding the Claimant did not incur an increased risk and did not suffer a compensable work injury.

Specifically, the Panel erred when it compared Ms. Doody's work activity to her activity in her personal life. The increased risk test requires a comparison to the general public.

Second, the Panel erred by only considering how often the Claimant walked at work. A neutral risk analysis is a question of fact. In failing to take into consideration the circumstances of the injurious activity such as the location and surface upon which the

Claimant walked, fell, and landed, the Panel also failed to properly consider the hazards of risk associated with her injury.

Finally, the Panel's findings of fact were clearly erroneous when viewed upon proper application of the burden and increased risk test. The Panel thus erred in finding Ms. Doody did not suffer a compensable work related injury.

ARGUMENT

I. The CAB erred as a matter of law and fact by failing to apply the correct burden to the Claimant's employment-related and neutral risk categories considered in the claim

Ms. Doody made a claim for workers' compensation benefits as a result of her April 18, 2017 work related injury, alleging she suffered an injury that arose out of and in the course of her employment as a Speech Assistant, at the Woodland Heights Elementary School. Ms. Doody suffered a severe injury to her right shoulder when she fell in the hallway at work as she was walking to her assigned duty as a door monitor.

In making this claim, for workers' compensation benefits Ms. Doody argued alternatively as to the applicable injury causing risk. In the first instance Ms. Doody argued she suffered this injury due to an employment related risk when she was injured from a fall on a defective, slippery and\or an uneven, hard floor surface. Alternatively, she argued that her injury was due to a neutral risk and as such, she was entitled to benefits under the increased risk test as she was exposed to an increased risk of injury due to her employment by virtue of the frequency of her use of the floors\hallways at work, as compared to the use of those hallways by the general public. The Claimant asserts that in its decision regarding both categories of risk, the CAB applied the law incorrectly by altering and heightening the burden of proof in contradiction to RSA 281-A:2, XI and common law. Specifically, the Panel improperly focused on the Claimant's fall as opposed to her injury. Further, with respect to legal causation, the Panel required not just proof of a relationship between the injury and work, but proof of the exact mechanism of injury. As a result, the Claimant asserts the Panel's decision denying her claims is in error.

The burden to prove causation is upon the worker, who, in order to make a claim for workers' compensation, must prove that she suffered an injury that arose "out of and in the course of [her] employment."

To meet this burden, the law requires the Claimant prove more probably than not, "that the injury occurred within the boundaries of time and space created by the terms of

employment" and that it "occurred in the performance of an activity related to employment." Margeson, at 277, citing Murphy v. Town of Atkinson, 128 N.H. 641, 645; 517 A.2d 1170 (1986). Both prongs of the burden must be met to prevail in a claim for benefits.

The phrase "in the course of" employment refers to whether the injury "occurred within the boundaries of time and space created by the terms of employment" and "occurred in the performance of an activity related to employment." Id.

In the case at hand, there is no dispute that the employee was injured while at work, i.e., "In the course" of employment. This is because according to the undisputed facts, the Claimant fell in the hallway at work, during work hours and on her way to a work duty. Thus, she met her burden of proof with respect to the first prong of the causation analysis; that she was injured "in the course of" employment. Therefore, the dispute focuses on the second prong; whether Ms. Doody suffered an injury "arising out of" her employment.

The phrase "arising out of" employment refers to the causal connection between the injury and risks of employment, and requires proof that the injury "resulted from a risk created by the employment" Margeson at 277; See also Rio All Suite Hotel and Casino v. Phillips, 240 P.3d 2, 4-5 (Nev. 2010); 1A. Larson, Larson's Workers Compensation Law § 3.01, at 3-4 (Matthew Bender ed. rev. 2011). This relationship between risk and employment must be established regardless of the category of risk. However, the test used to establish this relationship, and thus to meet the second prong of the burden, depends on the type of injury-causing risk faced by the employee.

The Court in Margeson identifies the four most common categories of injury-causing risks. These include: 1) risks directly associated with employment; 2) risks personal to the claimant ; 3) mixed risks; and 4) neutral risks. Margeson at 277; 1 Larson, supra § 4.01-4.03, at 4-2 to 4-3. The Court in Margeson then goes on to instruct, "...in determining the appropriate test in future cases, the CAB should first make a finding regarding the cause of the Claimant's injury." Margeson at 284-285

According to the First Report of Injury, the Claimant was injured when she "slipped on floor going from the waxed floor to the rug." Notice of Appeal, App.80-83 Indeed, the weight of evidence revealed the flooring in the particular location of the accident, was of such a nature that more probably than not, the Claimant fell from an employment risk. However, when interviewed, the Claimant stated "I didn't have any reason to fall. I just fell, I don't know what it was, I don't know if it was the floor, I do know that the week before we had a bucket just in the middle of the hall, right there for water because the roof was leaking, but didn't see anything on the floor, I just fell." Thus, in the alternative, if the Claimant can't prove the conditions of the floor, more probably than not, caused her fall, then her injury should be analyzed as a neutral risk.

Therefore, as above and based on the facts of her injury, the Claimant must establish that her injury arose out of and in the course of her employment either as a result of an employment related risk or alternatively, due to a neutral risk.

A. The Panel's error in the misapplication of the law resulted in imposing an altered and heightened burden of proof upon the Claimant in contradiction to the law.

The Claimant asserts that in its decision regarding both categories of risk, the CAB applied the law incorrectly by focusing on the Claimant's fall instead of her injury and further requiring the Claimant to show what exactly caused her to fall. In accordance with RSA 281-A:2 XI, XIII, in order to prove legal causation, the Claimant must establish she suffered an injury that arose out of and in the course of her employment. This is true whether the injury is an employment related or neutral risk.

The Claimant must prove that her injury resulted from a hazard of employment (Heinz v. Concord Union School Dist.,117 N.H. 214, 218; 371 A.2d. 1161 (1977), and that the injury resulted from "The conditions and obligations of the employment and not merely from the bear existence of the employment" to be compensable. Appeal of Lockheed Martin, 147 N.H. 322, 325-6; 786 A.2d 872 (2001) The Claimant is not however, obligated to prove how she fell. The requirement for compensability is work relatedness, and thus, each test views a Claimant's injury through that lens. Whether

positional, increased risk or comparative, all tests identified by the law are aimed at determining if Claimant's injury is adequately related to her work to warrant coverage. Nowhere in the law is the Claimant required to prove the mechanism of her injury.

Certainly, consideration of the mechanism and location of injury is part and parcel of any determination of compensability, especially one in which the claimant presents a claim for injury due to an employment related risk. However, the law is clear in considering the cause of injury to determine if it arose out of and in the course of work. It is not the proper to focus on the accident rather than the injury. In the case of Appeal of Brandon Kelly, 167 N.H. 489; 114 A.3d 316 (2015) the Court found the Compensation Appeals Board had erred in denying benefits to a truck driver in a mixed risk case, when it focused "... upon the accident, rather than the nature or extent of the injury." Id. at 495. By improperly focusing on the cause of the accident, the CAB in that case overlooked the hazard of employment that produced the ultimate injury.

However, this is precisely what the CAB did here, by finding "the claimant failed to prove, more probably than not, that a defect in the floor surface or doormat posed an actual risk that caused the claimant's *fall*." (Emphasis added) This 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.

The CAB's error in focusing on the cause of the fall instead of the work relatedness of the hazard, appears elsewhere in the decision. The CAB characterized the Claimant's argument the same way, indicating:

> "The claimant argues in the first instance that the claimants **fall** resulted from defect in the floor surface. Alternatively, the claimant argues that the claimant's unexplained **fall** constitutes a neutral risk and occurred because the claimant was exposed to a greater risk of **falling** than that to which the general public is exposed due to the amount of time she spent traversing shiny, commercial grade flooring that is, ostensibly more slippery than a typical flooring. In this case, the Claimant bears the burden of proof" (Emphasis added)

It might be argued that this emphasis on "fall" rather than "injury" in describing the Claimant's argument was not necessarily fatal by itself, but it is more than semantics. The Panel applied that same focus on falls to its decision, thereby altering and heightening the Claimant's burden of proof. In its order the Panel held 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. "Further, the Panel found that the claimant 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." P. 39. Accordingly, the Panel denied the Claimant's request for benefits, not because she failed to establish that more probably than not, she was injured due to a work risk, but for failure to establish the cause of her fall. The difference, though subtle, has profound consequences on the Claimant, and also on the law.

This finding when read in the context of the entire opinion, 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. The Panel not only improperly focused on the *fall* as opposed to the *injury,* but it also altered the burden by considering whether the Claimant could prove the *cause of her fall,* as opposed to what the law actually requires; that the Claimant proves she suffered an injury that arose "out of and in the course of [her] employment." (RSA 281-A:2, XI); i.e that it occurred in the boundaries of time and space created by employment, Murphy at 645, and that it was in some way work related. To prove legal causation, the Claimant must show the injury is in some way work related. Appeal of Redimix Companies, Inc. 158 N.H. 494 (2009), cited in Margeson. This is true regardless of the legal causation test applied. Indeed, all four categories of injury causing risks are viewed through the lens of the employment relationship,

It is noted that in the Appeal of Margeson, there is language in which the Court instructs the CAB to hence forth "...make a finding regarding the cause of the claimant's injury."Margeson at 284-285. From the context of the entire holding, it is clear the Court was not instructing the CAB to alter the long held burden and standard of workers'

compensation and now require a determination of cause of injury in each case, but this is what appears to be happening. The court's holding that the CAB must first determine which of the four injury causing risks apply, has morphed into a burden to show more probably than not, the exact cause of the injury. The CAB here required that Ms. Doody prove the exact mechanism and/or cause of her fall in order to meet her burden to establish legal causation. Thus, she was erroneously required to prove how she was injured and more, how she fell. This tainted the CAB's view of the facts which Claimant asserts were sufficient to establish that she was eligible for benefits.

B. Having applied the wrong burden, the Panel further erred in failing to find the facts presented were sufficient to establish she suffered a work injury due to a risk directly associated with employment.

The Claimant asserts she presented facts sufficient to establish she was injured at work and that the injury was more probably than not due to one of several work risks that existed at the time and as described herein, in the statement of facts. However, as she could not prove which of the work risks she encountered caused her injury, she was denied benefits. It is the Claimant's position that the CAB's decision in this respect is both an error of law and a clearly erroneous finding of fact where the correct legal analysis is applied.

Here, the Claimant established she was injured at work, doing a work duty. She also presented facts sufficient to establish that she faced several risks at work that related to her work duties, and that more probably than not, one or more of these work risks resulted in her injury. Specifically, the Claimant presented evidence that she was injured at work twice on the same day, in the very same location, where approximately a hundred children go in and out to a sanded and salted area and where there is a combination of a commercial, buffed, hard tile, transitioning into a raised rubber matting, and that she had grit on her hands after she fell. She had no other personal risk and she had no history of falling. She also wore her same shoes on future occasions in other locations without falling. The one common denominator was that she fell twice, at work, in the very same

location. A witness noted her body was in the exact spot that she had landed when she first fell in the morning. Notice of Appeal, App. 55

She could not however prove which of these risks caused her fall and thus, she was denied her benefits. This was fatal, based on the standard of proof required by this CAB, but it should not have been. She presented evidence of risks related to employment and two falls in the "exact spot." She said "I felt like my feet stopped and my body kept going." Notice of Appeal, App. 45. However, she also said "I don't know what it was." In denying the claim on this basis the Panel pointed to the fact that the Employer's assessment of the floor conditions was more timely and the Panel noted the Claimant's lack of evidence as to the condition of the floor at the time of her fall. P.36-37 The Panel also noted the Claimant's lack of expert testimony. (P. 37). It was not surprising to learn the Claimant did not collect evidence at the scene at the time of the injury as efficiently as the employers' safety committee member. The school had a person at the ready to assess the scene (although it is submitted her testimony was clearly contradictory and not credible). By comparison, the Claimant was lying injured on the floor and then in the hospital. She, like most seriously injured employees was not in a position to do a forensic assessment of the location in which she fell and it is respectfully submitted the requirement of expert testimony to prove legal causation in workers' compensation defeats the intent of this social insurance system. Therefore, in a setting where she is required to present more timely evidence and establish an exact cause of her fall, she, and those like her, are fated to lose.

In this way, the Claimant asserts, having applied the wrong burden, the Panel erred in its assessment of the facts required to prove her burden, ignoring the weight of evidence in favor of compensability.

This focus on the cause of the fall is not only an error of law, and contrary to the remedial nature of the workers' compensation statute, but it is inequitable and undermines the intent of the workers' compensation scheme.

C. The CAB's decision represents a fundamental misunderstanding and misapplication of the workers compensation laws of this state that undermines the equity of the statutory scheme and defies the remedial purpose of the statute.

By deciding as it did, with its focus on causation of the fall, the CAB has acted in a way that threatens to undermine the equity of the workers' compensation system and which defies the remedial purpose of our statutes in New Hampshire.

To require the Claimant to prove the floor or door mat posed an "actual risk" that then "caused the claimant's fall," as the CAB did here, requires the Claimant to prove what exactly caused her fall, and this is not what the law requires. This is a critical departure from the statutory law, but also from the no fault model of the workers' compensation statute. The CAB employed a burden that begins to resemble a tort type claim in which the employee has a heightened standard of proof. This is contrary to law and equity. A system that requires the Claimant proves the cause of a fall by prompt gathering of evidence and even experts, is particularly unjust as injured employees are at a distinct disadvantage in such circumstances.

According to the Court, "...the intention of the Workers' Compensation Law was to 'make the business bear the burden of incidental and accidental injuries without regard to the question of negligence, either on the part of the employer or the employee.'". Appeal of Brandon Kelly at 496, citing Mulhall v. Nashua Manufacturing Co., 80 N.H. 194, 198 (1921); See also RSA 281-A:14; McKay v. N.H. Compensation Appeals Bd., 143 N.H. 722, 725 (1999) ("[T]he act provides for no-fault liability.") See, Appeal of N.H. Dep't of Health and Human Servs., 145 N.H. 211, 213 (2000): the Court liberally construes all reasonable doubts in the Workers' Compensation Law in a manner that favors the injured employee. See also, Appeal of George Gamas, 158 N.H. 646, 648; 972 A.2d 1025 (2009): We construe liberally the Workers' Compensation Law in order to give the broadest reasonable effect to its remedial purpose. Thus, when construing the statute, we resolve all reasonable doubts in favor of the injured worker. Appeal of Cote, 139 N.H. 575, 578 (1995).

The workers' compensation system was founded upon a compromise, or as it is sometimes referred to, a "grand bargain." This bargain eliminated the negligence\fault system for workers and employees by trading it for a social insurance system. In concept, this no fault system of coverage for work injuries reduces discovery requirements and the risks, cost, and antagonism associated with litigation. In New Hampshire, workers' compensation is an employee's exclusive remedy for work place injuries with only a few exceptions. Employees cannot sue their employees for the full range of damages permitted under the Tort system and there is no ability to opt out of this system as in some states. However, in exchange for this sacrifice of rights by some, a larger share of injured workers can receive compensation with greater predictability and less disruption to the workplace.

Some might argue that this no fault concept has been somewhat eroded over time, but the intentions of the Workers' Compensation Laws remain much the same as when they were enacted and this and the remedial purpose of the statute are still recognized. Therefore, it is submitted, the CAB's decision in which it requires proof of how an employee is injured, represents an affront to the purpose of our laws. It threatens to push the law to an assessment of fault and to require discovery and expert testimony where it has not before been required. It also undermines the bargain that was struck in which the employees of the state gave up their rights to sue for negligence in place of this system which is remedial and only requires the employee prove her injuries "arose out of and in the course of employment." This burden can be difficult enough and fills our Department of Labor with valid disputes on this point. However, to require proof to the degree and as the CAB did here, represents a dangerous revision of the law and its purpose that leaves the balance of the workers' compensation bargain off kilters.

II. The Panel applied the incorrect analysis to her claim for injury due to neutral risk, in contradiction to Appeal of James Margeson, 162 N.H. 273, 27 A.3d 663 (2011)

The Claimant asserts that having rejected her claim under the theory of direct risk and having instead found the Claimant's injury was due to a neutral risk, The Panel

applied the incorrect analysis to her claim, in contradiction to the law as established by the New Hampshire Supreme Court in Appeal of James Margeson, 162 N.H. 273, 27 A.3d 663 (2011).

Specifically, in applying the increased risk test, the Panel used the wrong comparator, and failed to consider the fact specific location and circumstances in which the injurious activity took place. As a result, the panel 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.

"Neutral risks are 'of neither distinctly employment nor distinctly personal character'." Margeson at 278 "Determining whether an injury resulting from a neutral risk arises out of employment is a question of fact to be decided in each case." Id. Neutral risks "...include cases in which 'the cause itself, or the character of the cause, is simply unknown'." Id. "An unexplained fall is considered a neutral risk." Id.

In this setting the Panel concluded this was a "case of unexplained fall which constitutes a neutral risk." P. 38. Therefore, where the injury was deemed a neutral risk, the Panel was required to apply the increased risk test to its analysis. The Panel erred in its application.

A. The panel erred when it compared Ms. Doody's work activity to her activity in her personal life.

An employee may recover under the increased risk test if his injury results from a "risk greater than that to which the general public is exposed." Margeson at 283. Therefore, as a threshold step, the increased risk test must employ a comparison between the injured employee and general public. The Panel failed to apply this comparison and thus its decision was in error.

In issuing its decision to deny benefits for a neutral risk injury, the Panel explained that it had adopted the Carrier's argument, finding it "more persuasive." However, the Carrier had incorrectly articulated the increased risk test. In his closing, Counsel for the Carrier articulated the test as, "I think in Margeson they talk about, you

know, if you're going up and down the stairs a lot more than you would in your non occupational life." However, this was the very error the Court had corrected in Margeson. The Claimant's personal risk is not relevant in the increased risk test, and to compare the work risk to the personal risk is an error of law. The proper application of the test requires the Panel to compare the Claimant to the general public.

Thus, in adopting the Carrier's position, the Panel adopted the wrong analysis and therefore erroneous concluded the Claimant was not entitled to coverage as there was "...an absence of testimony that the claimant walked more at work *than in her personal life.*" (Emphasis added) P. 39.

The Panel then committed further error by expressly adopting the Carrier's other erroneous position in which it asserted the Claimant was not entitled to coverage for a neutral risk injury due to the fact that "...there was no testimony or other evidence submitted that the commercial flooring the claimant walked on at her workplace 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." Id.

As above, the Carrier again made a comparison to the Claimant's personal life, which was an error in application of the increased risk test. However, in a kitchen sink rationale, that betrays the complete confusion of the Panel as to the standard of law, the Carrier then looped the general public into this second comparison. It did so by comparing only the slipperiness of the floors however and there was no comparison of the manner or frequency of use. This did not serve to correct its previous error. The increased risk test is not a mixed comparison of the employee's injurious work activity to that activity in her private life AND to the general public. The proper comparison under the test is between employee and general public only.

It is neither relevant nor proper to compare the slipperiness of the specific commercial flooring at the school-employer to "other types of flooring" at differing public, private and industrial locations. To compare the work specific, commercial tile floors at the Claimant's work place to "other types" of floors in general does not adequately consider or compare the work hazard faced by this employee

According to the law, determinations as to whether a neutral risk injury occurred, require a fact specific analysis which includes consideration of the risk faced by the particular employee, at her work and under the circumstances of her injurious activity. Margeson at 278. The point of the comparison in the test is to determine whether by virtue of working and the exposures of work, the employee is subjected to a greater risk than the general public. In the first instance this requires a comparison to the general public, but as more fully described below, it also requires a comparison of like activity and circumstance.

However, the Panel did not do that. Instead of employing an apples to apples comparison, the comparison conducted by the Panel here was akin to comparing work stairs to an escalator at a mall as well as to a ladder to an attic. Its close, they are all ways to change elevation, but they are not the same and not a proper or logical way to compare risk. Likewise, the Panel's comparisons as above failed to meet the standard of law and resulted in an erroneous finding that must be corrected. This was not the only error in the application of this test however.

B. The Panel erred by only considering how often the Claimant "walked" at work in applying the increased risk test

The Panel focused on the fall and not the hazard of risk by failing to consider the circumstances in which the injurious activity took place when it found there was "...an absence of testimony that the claimant *walked* more at work than in her personal life." (Emphasis added). Aside from using the wrong comparator, this comparison of "walking," absent any context of the injurious activity, fails to properly and fairly consider the actual risk faced by the employee.

While it is true, the Claimant's fall, like the claimants in Margeson and Rio All Suite Hotel & Casino, came about as a result of walking, the location in which she was walking and the surface upon which she was walking is also relevant. Comparisons absent the context of the fall are not valid and ignore the purpose of the increased risk test.

The claimant in Margeson was also walking, but he was walking on stairs. Thus the Court compared how frequently he walked *on stairs* as that was where he fell. The Court considered the context of the walking. The Court also recognized that stairs of an unusual height or the manner in which an employee is required to perform his job may also increase the risk of injury. Id. Similarly, the Panel should have considered the surface upon which the Claimant was walking when injured.

The act of descending a staircase like the act of walking, is an every day, common place activity, which most people must undertake on a daily basis, whether at home, work, or in a shopping mall. Margeson at 284; see also Dustin v. Lewis, 99 N.H. 404, 408 (1955). Therefore, the Court found that the act of descending a staircase at work does not in and of itself present a greater risk than that faced by the general public. Margeson at 284. However, "while the act of descending stairs in and of itself does not warrant compensation under the increased-risk test, the employee may still be entitled to compensation under certain circumstances. For example, an employee who must use stairs more frequently than a member of the general public as part of his job faces an increased risk of injury. Id.

As with stairs, floors are also a normal and customary incident in both industry and the home. Dustin at 408. Therefore, like walking on stairs, walking on work floors would not in and of itself warrant compensation under the increased risk test simply because the activity was preformed at work. However, where as here, by virtue of the Claimant's use of the hallway floors, in manner and frequency, she is exposed to a greater risk than the general public, her claim is compensable. "Importantly, even if the risk faced by the employee 'is not qualitatively peculiar to the employment, the injury may be compensable as long as (he) faces an increased quantity of risk'" Margeson at 283.

The Court reminds us that the facts and circumstances of an injury must be considered on a case by case basis when employing the increased risk test. "Determining whether an injury resulting from a neutral risk arises out of employment is a question of fact to be decided in each case." Margeson at 278. Therefore, it is incumbent upon the Panel to consider not just the Claimant's activity when she fell, i.e., walking, but to

consider the entirety of the circumstances to include the location and the surface upon which she walked. The Panel should also consider the frequency with which the Claimant traversed that particular floor as compared to the general public. Only then can the Panel assess the increase risk.

Commonsense dictates that the type of surface upon which one walks can have an impact on one's risk of injury. Not only does the surface upon which an employee walks potentially impact the risk of fall, but it also impacts the degree and severity of the injury resulting from the fall. Indeed, falls may be more injurious depending upon the height from which the individual falls or based upon the surface onto which the individual falls. For example, the risk of a fall may be different depending on whether one is walking on grass, a rug, or as here, on commercial tile, which is hard, highly buffed and without grout. The risk of fall also differs depending upon whether one is walking on a rough surface, a smooth surface, a shiny surface or a surface with an incline or decline. Walking in the hallway is different from walking on a stairway. Likewise, the risk of injury from a fall is different depending on the surface. A fall onto a soft surface is different from a fall onto a hard surface. Therefore, in an assessment of risk for injury in this case the Panel was compelled to consider the specific circumstances of the Claimant's employment, accident and injury. Specifically, the Panel must consider not just the activity being performed, but also the location of the activity and the surface upon which the Claimant was walking when she was injured; then, the Panel can accurately assess risk and whether by virtue of manner or frequency of use the Claimant has an increased risk when compared to the general public.

C. The Panel erred in finding the facts did not support a finding of compensability under the increased risk test

As detailed herein, the first Report of Injury states that the Claimant "slipped on floor going from the waxed floor to the rug." Notice of Appeal, App. 80-83. The evidence submitted supports this report and description and further adds that the floor upon which she was walking was a hard, commercial tile hallway. She was at a juncture of the

flooring where there was a raised rubber mat when she fell. Ms Doody also submitted credible evidence that the tile floor in this location was pitted where there had been a recent leak in the ceiling causing water to fall to the tile floor. Ms. Doody fell twice that day in the exact same location, first on her way to her morning door duty and again on her way to her afternoon duty. The exterior area from where the children entered, and in the location adjacent to where she fell, had been heavily salted and sanded that spring due to the weather. (She fell on April 17th) After Ms. Doody fell the first time, she had grit on her hands proving there was a gritty substance on the floor that day. Furthermore, the location of her fall was in the hallway, adjacent to an exterior locked door where hundreds of children came in and out. The Claimant was heading to serve as the door monitor when she was injured. (The employer had a locked facility with intentionally limited access by the general public.) Notice of Appeal, App. 43.

While this evidence was rejected for being insufficient to prove the cause of her fall as required by the panel in the employment risk analysis, the Claimant asserts, these facts are still relevant and persuasive to her claim for increased risk. The type and conditions of the flooring were due to the work environment; a school. Logically, the flooring was commercial hard and shiny for durability and ease of cleaning. Likely the grit on the clamant's hand upon falling was from the salt and sand used outside that entrance where she fell. The Claimant argued that the pitting was due to the constant leaking in the setting of the salt and on the tile. These conditions and this surface were work related and even if the Claimant couldn't show the direct cause of her injury based upon these facts, they remained relevant to the analysis of increased risk. The Claimant submits 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. Failure to take any of this into account in consideration of the risk and the comparison of the injurious activity was clearly erroneous.

Fortunately, even without consideration of the type of flooring, with proper application of the increased risk test Ms. Doody can prevail in her claim for neutral risk injury due to the uncontroverted evidence of the frequency with which she traversed the

tiled hallway at work. As part of her job duties, and due to the fact that she escorted groups of students back-and-forth repeatedly throughout the day, The Claimant walked on the commercial tile floors approximately 20 times a day. Notice of Appeal, App. 43. As an employee of 27 years, working full-time, five days a week, the Claimant's use of the hallways was estimated to exceed 97,000. In the case of Rio All Suites Hotel & Casino cited in Margeson, the Court found that where the claimant had used the stairs at work some 25,000 times over the course of her 17 years of employment, there was no need to remand her case. The Court in Rio concluded that the frequency with which the claimant, Ms. Phillips, was required to use the stairs, subjected her to a significantly greater risk of injury then the risk faced by the general public. Rio All Suite Hotel and Casino v. Phillips, 240 P.3d 2, 4-5 (NEV. 2010).

CONCLUSION

For all the reasons set forth herein, the Appellant respectfully requests that this Honorable Court reverse the Panel's decision based on its error of law and clearly erroneous application and conclusions of fact related thereto, and grant Claimant's request for benefits in accordance with RSA 281-A:48 and RSA 281-A:2 XI, XIII.

In the alternative, the Claimant asks that the Court remand this case with an order and direction regarding the correct burden and standard of law as should be applied to this case under both the employment related risk analysis and the increased risk analysis.

ORAL ARGUMENT

The Appellant, Elizabeth Doody, requests fifteen (15) minutes of oral argument in this case. Attorney Anne M. Rice will present oral argument on behalf of the Appellant.

CERTIFICATION

Counsel for the Claimant/petitioner hereby certifies that the appealed decision of the New Hampshire of Labor Workers' Compensation Appeals Board was produced in writing and that a copy has been appended to the instant brief. A copy of the Board's subsequent order on Claimant's Motion for Rehearing/Reconsideration is also appended to the instant brief. (See Claimant's Motion, Notice of Appeal, App. 15-23; See Insurer's Objection, Notice of Appeal, App. 24-32.)

Respectfully submitted,
Elizabeth Doody
By Her Attorneys
RICE LAW OFFICE PLLC

Dated: 9/11/19

By: Anne M. Rice

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September 2019, a copy of the foregoing was forwarded via the ECF filing system to Charles Giacopelli, Esquire, Eric Falkenham, Esquire, Respondent's Council, Gordon MacDonald, Attorney General and that one copy has been forwarded via U.S. mail, postage prepaid, first class, to Edward Sisson, Workers' Compensation Director, NH Department of Labor, 95 Pleasant Street, Concord, N.H. 03301-3836.

Dated: 9/11/19

Anne M. Rice, Esquire

State of New Hampshire

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December 12, 2018

DECISION OF THE WORKERS' COMPENSATION APPEALS BOARD

ELIZABETH DOODY

V.

LACONIA SCHOOL DISTRICT

DOCKET # 2091-L-0041

APPEARANCES: Attorney Anne Rice represented the interests of the claimant, Elizabeth Doody.

Attorney Charles Giacopelli represented the interests of the employer, Laconia School District, through its insurer, Primex[3].

ISSUES: RSA 281-A: 2XI, XIII – Causal Relationship of Injury to Employment
RSA 281-A: 48 – Review of Eligibility for Compensation, Extent of Disability
RSA 281-A: 23 – Medical, Hospital & Remedial Care.

DOI: April 18, 2017

WITNESSES: The claimant, Elizabeth Doody
Woodland Heights Elementary School Nurse, Jessica Ganchi
Former teaching colleague, Erin Robichaud

HEARING: A hearing of appeal was held *de novo* at the New Hampshire Department of Labor, Concord, New Hampshire, on December 5, 2018.

PANEL: The panel was composed of William Schubert, Esq., Thomas Parks and Anne Eaton.

BACKGROUND

This is an appeal of a decision from the Department of Labor dated July 20, 2018. In dispute is the causal relationship to employment of an injury that the claimant sustained at work on April 19, 2017. The carrier allows that the claimant sustained an injury to her right arm as the result of a fall that occurred at the claimant's place of employment during the course of her work day. However the carrier disputes that the claimant's injury arose out of a risk caused by the claimant's employment.

The claimant argues in the first instance that the claimant's fall resulted from defect in the floor surface. Alternatively, the claimant argues that the claimant's unexplained fall constitutes a neutral risk and occurred because the claimant was exposed to a greater risk of falling than that to which the general public is exposed due to the amount of time she spent traversing shiny, commercial grade flooring that is, ostensibly, more slippery than typical flooring. In this case, the claimant bears the burden of proof.

FINDINGS OF FACT

The claimant began her employment for the Laconia School District as a classroom paraprofessional in 1991. On the date of injury, she was employed at the Woodland Heights Elementary School as a Speech Assistant, a position she had held for the previous 12 years. In this job, the claimant worked with approximately 20 students in pre-kindergarten through grade 2 each day, some individually and others in small groups. The claimant worked with students in their classrooms or accompanied them from their location to the special services room in the school. Additionally, the claimant had other duties including manning the locked side entrance door from 8:30-8:45 AM to let in students who were being dropped off by parents and latecomers, a task that was repeated at dismissal in the afternoon. The school has approximately 300 students, 125 of whom typically used the side entrance. The side entrance consisted of an outside concrete area that was plowed and treated with sand and ice melt product in the winter weather, an exterior door that accessed a small atrium with a floor mat, and an interior door that accessed the corridor. Photographs were entered into evidence (p. 330-333) that show this corridor, the flooring, and a black floor mat just inside the doorway.

On 4/18/17, the claimant was walking down the corridor toward the side entrance for morning duty when she fell. The claimant described the incident as one in which her feet simply stopped while her body kept going. She landed on her hands and knees on the floor mat; felt embarrassed but not injured, got up, brushed herself off, and continued on with her door duty. The claimant was wearing new shoes that had a 1 1/2" inch heel and a sturdy sole but does not believe that they caused the fall. No injury or medical treatment arose from this event, so no report of injury was filed.

At dismissal time that day the claimant was on her way to the same side entrance when she once again fell in the same location. This time, however, the claimant landed on her right side and immediately knew that she had sustained an injury to her right arm. The school nurse, Jessica Ganchi, was summoned. She evaluated the claimant, determined that medical treatment was required, provided first aid, and arranged for the claimant to be transported to Lakes Region Hospital Emergency Department by a colleague.

A transcript of a recorded interview by the carrier's claims adjustor on 4/24/17 was entered into evidence. In this interview the claimant detailed her falls on 4/18/17 stating, "I just fell, I just don't even know – I don't even know what happened." (p. 328)

The treatment note from Lakes Region Hospital's Emergency Department states "pt reports she feel [*sic*] while at work in the hallway, fell forward, and landed on right arm, pt reports pain in upper arm, unable to move arm, pain is 8/10, currently immobilized with ace wrap." X-rays were taken which showed a proximal humerus fracture." The claimant was put in a sling and referred to an orthopedic surgeon (p. 203)

The claimant first saw Dr. Henning and shortly thereafter transferred her care to Dr. Burns at Concord Orthopedics. On 4/27/17 Dr. Burns and Karen Barry, PA-C evaluated the claimant. X-rays taken that day were compared with the 4/18/17 x-rays and found that the fracture had "shifted in a more Varus fashion" (p. 18). Surgical repair was recommended and carried out on 5/4/17. The claimant testified that a plate and 9 pins were inserted during this surgery.

The claimant was taken out of work by Dr. Henning the day following her injury (p. 15). Concord Orthopedics released the claimant to work part time with modifications effective 6/5/17, but the employer was unable to accommodate the restrictions, and the

claimant remained out of work until school resumed in the fall. The claimant participated in physical therapy and achieved an increased, but incomplete, range of motion in the shoulder. Physical therapy was discontinued in late October 2017.

At the current time the claimant is unable to lift her right hand over her head. When the claimant saw Dr. Burns in September 2018, she complained of continuing pain that could be related to the surgical hardware. Further surgery to remove the hardware was discussed (p. 43-45).

The claimant called two witnesses: a former teaching colleague, Erin Robichaud, and the school nurse, Jessica Ganchi.

Ms. Robichaud observed the claimant fall on the morning of 4/18/17 and confirmed the claimant's testimony that she landed on her hands and knees on the rug inside the side entrance door. Following the claimant's second fall, Ms. Robichaud observed the claimant being helped by others in the same location where the morning fall had occurred.

Ms. Ganchi testified that she had been summoned to the side entrance following the claimant's second fall. She assessed the situation and general environment on her way through to the claimant and provided first aid to the claimant before the claimant was taken to the hospital.

Ms. Ganchi was the person responsible for initiating paperwork related to in-school accidents, and she serves on district a loss-mitigation committee. For this reason, she returned to the site of the claimant's fall later than afternoon and again the next day to more closely examine the area. Ms. Ganchi testified that she looked carefully at the door mat and the flooring and did not identify any problems. She acknowledged that this was a visual inspection only; she did not touch the flooring to ascertain the presence of any grit or other changes to the floor's surface.

The claimant and other witnesses were uncertain about the type and frequency of floor cleaning done at the school. School district job specifications for day and night custodians were entered into evidence (p. 320-322). These job descriptions call for custodians to dust, clean, and "auto scrub" hallways daily. Burnishing of hallways is called for at least 3 days per week, typically Monday, Wednesday, and Friday (p. 320).

DISCUSSION AND CONCLUSIONS

Information provided by claimant in her testimony was consistent with that provided to the carrier's adjustor in the 4/24/17 recorded statement. In both the claimant reported that she fell twice at work on 4/18/17 in the same spot, first at about 8:30 AM and again about 3:00 PM. The area was covered in commercial grade tile flooring, and a large, black mat was located inside the entrance door.

When the claimant fell in the morning, she landed on the door mat on her hands and knees but was uninjured. As described by the claimant, she was walking along the corridor toward to school's side entrance door when her feet stopped and her body kept going forward. She did not know how or why she fell. She got up, brushed herself off, and continued with her morning duty at the side entrance.

The same thing occurred in the same spot later that day, but in the second event the claimant landed on her right side and felt immediate arm and shoulder pain. This injury required medical treatment, including surgery from which the claimant has not yet made a full recovery.

Considerable testimony was elicited from the claimant and other witnesses regarding sand and ice melt products that may have been tracked in from outdoors and about prior roof leaks that led custodians to place buckets in various spots around the school, including the hallway in question. No evidence or testimony was submitted that the floor was wet at the time of the claimant's fall. No evidence or testimony was submitted to establish that the floor was made more slippery by sand or ice melt products at the time of the claimant's fall. No evidence or testimony was submitted to establish that the door mat was damaged in any way or that the claimant tripped and fell because of the mat.

Considerable testimony was elicited from the claimant and witnesses about the nature of the flooring where the claimant fell and the maintenance of that flooring. Generally the flooring was described as shiny, commercial flooring, without grout. Witnesses were unsure about the frequency of floor cleaning. However job specifications for day and night custodians were entered into evidence (p. 320-322). These job descriptions call for custodians to dust, clean, and "auto scrub" hallways daily.

Burnishing of hallways is called for at least 3 days per week, typically Monday, Wednesday, and Friday (p. 320).

The claimant argued that shiny commercial flooring maintained in this way is more slippery than other types of flooring. However, the claimant did not testify that she slipped on a wet or slippery floor and then fell. The claimant consistently testified that her feet just stopped and her body kept going while she was walking toward the side entrance.

School Nurse Ganchi testified that she returned to examine the area where the claimant fell following the claimant's second fall on 4/18/17 and again on 4/19/17. Ms. Ganchi's visual inspection did not identify any defects in the door mat or the flooring. She did not see the blemishes on the tile that are shown in a photograph entered into evidence (p. 333).

Four undated photographs of the hallway where the claimant's fall occurred were entered into evidence. The claimant testified that some of these photographs were taken about a month after the date of injury; others were taken more recently. One photograph taken about a month after the claimant's injury is a close-up that shows blemishes in a floor tile (p. 333). The claimant asserts that the blemishes in the photograph are pitting or pocking that resulted from the tile's exposure to a combination of water, sand, and ice melt product. No expert testimony or evidence was submitted in support of that assertion. The photographs were all taken at least a month after Nurse Ganchi's examination of the area that did not find defects in the flooring.

The claimant testified that she had been wearing new shoes on the day of her falls. The shoes had a 1 ½ inch heel and a sturdy sole, but the claimant did not believe that those shoes contributed to her to fall.

The claimant argued in the first instance that the condition of the school's flooring created an actual risk of employment. Based on the evidence submitted, the Panel did not find this argument persuasive. Nurse Ganchi did not see any defects in the flooring when she examined the area shortly after the claimant's fall, 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.

Alternatively the claimant argued that the claimant's unexplained fall constitutes a neutral risk as outlined in the Appeal of Margeson, 162 N.H. 273 (2011) and that it meets the increased risk test requirements set forth in that decision.

The carrier disagrees, arguing that the claimant has not met her burden to prove more probably than not that any defect to the floor caused the claimant's fall and injury. The carrier points to the claimant's statement that she did not slip or trip and then fall but simply fell when her feet simply stopped and her body continued moving forward. The carrier points out that the close-up photograph of blemished flooring tile was not taken contemporaneously to the injury and those blemishes were not identified by Nurse Ganchi's inspection of the area. Lastly, the carrier points out that no other falls in that area were reported by any of the hundreds of individuals who walked through that area on a given day.

Having ruled out a defect that posed an actual risk, we must consider the standards set out in Margeson. In the Margeson case, the New Hampshire Supreme Court outlined four types of injury-causing risks that can occur in the workplace: risks that are clearly employment related, risks that are clearly personal to the injured worker, mixed risks, and neutral risks. Neutral risks result from some unexplained cause not directly attributable to either the employee or employer. In order to be compensable, a neutral risk must result from a risk greater than that to which the general public is exposed. This increased risk can be qualitatively peculiar to the work environment or exposure to the risk can be quantitatively greater.

In this context, the claimant argued that the claimant's employment exposed her to greater risk qualitatively because the flooring that the claimant traversed is hard, shiny, designed for heavy foot traffic, and therefore more risky to traverse than flooring that the general public encounters. Additionally, the claimant argued that the claimant was exposed to a greater risk quantitatively because she traversed the flooring as often as 20 times a day in the course of her work.

As for the claimant's alternative argument, the carrier agrees that this is a case of an unexplained fall which constitutes a neutral risk, but the carrier again asserts that the claimant has not met her burden of proof. In support of this argument, the carrier points to the absence of testimony that the claimant walked more at work than in her personal

life. Likewise there was no testimony or other evidence submitted that the commercial flooring the claimant walked on at her workplace 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.

The Panel found the carrier's argument more persuasive.

DECISION

Having heard all the testimony and reviewed all the evidence, the 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. Further the Panel found that the claimant 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. Accordingly the claimant's request for payment of medical bills and indemnity benefits is respectfully denied.

Respectfully submitted,

Anne C. Eaton, Panel Member
Compensation Appeals Board

ACE/tb

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January 28, 2019

DECISION OF THE WORKERS' COMPENSATION APPEAL BOARD

ELIZABETH DOODY

V.

LACONIA SCHOOL DISTRICT

Docket No.: 2019-L-0041

APPEARANCES: The interests of the claimant, ELIZABETH DOODY, were represented by Attorney Anne M. Rice. The interests of the employer/defendant, LACONIA SCHOOL DISTRICT, were represented, through their insurer, Attorney Eric Falkenham.

DATE OF INJURY: Indicated as April 18, 2017.

PANEL: The panel was comprised of: William J. Schubert, Esq.; Chair; Anne Eaton; and Thomas Parks.

ORDER:

Having reviewed the Motion for Rehearing/Reconsideration, filed by Attorney Anne M. Rice and the Objection filed by Attorney Eric Falkenham, this CAB panel is persuaded by the arguments outlined by Attorney Falkenham. As such, this CAB panel adopts the positions forwarded in Attorney Falkenham's Objection to Request for Motion For Rehearing/Reconsideration.

In adopting the positions forwarded in Attorney Falkenham's Objection to Request for Motion For Rehearing/Reconsideration, this CAB panel hereby denies the claimant's Motion for Rehearing/Reconsideration filed by Attorney Anne M. Rice.

So Ordered.

This was in all respects a unanimous decision of this CAB panel.

Respectfully submitted,

William J. Schubert, Esq., Panel Chair
Compensation Appeals Board

WJS/ws
Cc: Anne M. Rice, Esq.
Eric Falkenham, Esq.

APPENDIX

281-A:48 Review of Eligibility for Compensation

I. Any party at interest with regard to an injury occurring after July 1, 1965, may petition the commissioner to review a denial or an award of compensation made pursuant to RSA 281-A:40 by filing a petition with the commissioner not later than the fourth anniversary of the date of such denial or the last payment of compensation under such award or pursuant to RSA 281-A:40, as the case may be, upon the ground of a change in conditions, mistake as to the nature or extent of the injury or disability, fraud, undue influence, or coercion. This section shall not apply to requests for extensions of medical and hospital benefits, or other remedial care, which shall be governed solely by those sections of this chapter relating thereto. This section shall not apply to lump sum agreements, except upon the grounds of fraud, undue influence, or coercion.

II. Upon the filing of a petition and after notice to all interested parties and hearing, the commissioner shall enter an order, stating the reasons therefor, either:
(a) Granting or denying an original award of compensation if none has previously been paid; or
(b) Ending, diminishing, or increasing the compensation previously paid or fixed by award, subject to the maximum or minimum provided in this chapter.

III. If a petitioner files for reducing or for ending compensation, the petitioner shall submit along with the petition medical evidence that the injured employee is physically able to perform his or her regular work or is able to engage in gainful employment. On the basis of such medical evidence, the commissioner may authorize suspension of further payments pending a hearing on the petition; otherwise, compensation shall continue on the basis of the existing award pending the hearing and any further order by the commissioner. All procedure on a petition under this section shall be the same as provided in this chapter for original hearings.

IV. A review under this section shall not affect an award with respect to money already paid.

V. Any party at interest who is dissatisfied with the decision of the commissioner under this section may appeal to the compensation appeals board, established under RSA 281-A:42-a, in the same manner as provided in RSA 281-A:43. (Emphasis added).

281-A:2 XI, XIII Causal Relationship of Injury to Employment

1. 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 in the course of employment, including disability due to radioactive properties or substances or exposure to ionizing radiation. "Injury" or "personal injury" shall not include diseases or death resulting from stress without physical manifestation. "Injury" or " personal injury" shall not include a mental injury if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer. No compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself or injure another. Conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable only if contributed to or aggravated or accelerated by the injury. Notwithstanding any law to the contrary, "injury" or "personal injury" shall not mean accidental injury, disease, or death resulting from participation in athletic/recreational activities, on or off premises, unless the employee reasonably expected, based on the employer's instruction or policy, that such participation was a condition of employment or was required for promotion, increased compensation, or continued employment.

2. XIII. "Occupational disease" means an injury arising out of and in the course of the employee's employment and due to causes and conditions characteristic of and peculiar to the particular trade, occupation or employment. It shall not include other diseases or death therefrom unless they are the direct result of an accidental injury arising out of or in the course of employment, nor shall it include either a disease which existed at commencement of the employment or a disease to which the last injurious exposure to its hazards occurred prior to August 31, 1947.