IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(September 28, 2000 Session)

BONNIE ELLIOTT v. THE BLAKEFORD AT GREEN HILLS CORPORATION

Direct Appeal from the Chancery Court for Williamson County
No. II-25766 Russ Heldman, Chancellor

No. M2000-00512-WC-R3-CV - Mailed - March 29, 2001
Filed - May 1, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with *Tennessee Code Annotated* § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendant, The Blakeford at Green Hills Corporation appeals the judgment of the Chancery Court of Williamson County where the trial court found: 1) the plaintiff, Mrs. Bonnie Elliott suffered a compensable work-related injury when she ruptured three extensor tendons in her left hand while working for the defendant; 2) Mrs. Elliott entitled to temporary total disability benefits for 32 weeks, and permanent partial disability benefits for 150 weeks based on a seven percent (7%) permanent anatomical impairment and twenty-eight percent (28%) vocational disability; 3) the defendant failed or refused to offer or provide medical attention to Mrs. Elliott in violation of *Tennessee Code Annotated* § 50-6-204 entitling her to a judgment of $711.36 for reimbursement of medical and insurance premium expenses; and 4) the defendant wrongfully and in bad faith failed to pay Mrs. Elliott's claim for temporary total disability payments entitling her to an additional judgment of $711.36. For the reasons discussed in this opinion we find that the judgment of the trial court should be affirmed as modified.

Tenn. Code Ann. 50-6-225(e)(2000); Judgment of the Chancery Court Affirmed as Modified.

WEATHERFORD, SR. J., delivered the opinion of the court, in which BIRCH,J., and CATALANO, SP.J., joined.

Robert R. Davies, Nashville, Tennessee for the appellant, The Blakeford at Green Hills Corporation.

Dana C. McLendon III, Franklin, Tennessee for the appellee, Bonnie Elliott

MEMORANDUM OPINION

Mrs. Bonnie Elliott was 52 years old at the time of trial and had lived in Williamson County for 22 years. Mrs. Elliott quit school in the eleventh grade because she was going to have a child, but later obtained her GED. She has always worked in the food service industry and has taken a number of seminars and courses during her career. She has obtained a number of certificates including being only the second certified female with the Professional Chefs Association in the state of Tennessee. She was also an active member of the American Culinary Federation.

In the mid to late 1970's, Mrs. Elliott and her husband owned and operated a restaurant in Fairview, Tennessee, named Villa Capri. After closing the restaurant, she worked for three years at Belle Meade Country Club as a table side chef doing cooking, helping with banquets, washing dishes, and various other duties. She then worked at Maryland Farms for two years, first as assistant food director and then as food service director.

Mrs. Elliott then went to work for Park Manor Retirement Center as the Food Services Director of the entire facility. She supervised 35 to 45 employees during her 13 ½ years there. Her duties included hiring and firing of employees; training employees; work scheduling; attending budget meetings; preparing inventory; doing purchasing and occasionally dealing with workers' compensation issues. During her employment with Park Manor she handled workers' compensation claims for two employees and attended seminars where workers' compensation issues were presented. She left Park Manor in February 1995 because she felt like she needed a "break", and did not return to work in food services until December of 1996, when she obtained a job with the Williamson County School System as a Cafeteria Manager at the Hunters Bend Elementary School.

In the spring of 1997 she developed a cyst in her left hand. Dr. Joseph Chenger, M.D., board certified orthopedic surgeon first saw Mrs. Elliott on April 30, 1997 at which time she reported swelling in the back of her left hand for a month and a half, trouble extending her long finger, and a history of rheumatoid arthritis. Dr. Chenger concluded that she had an inflammatory synovitis and performed surgery to remove the cyst on June 10, 1997. The surgery did not reveal any torn or ruptured tendons in Mrs. Elliott's hand.

After the cyst was removed diagnostic tests revealed that her inflamation rate was "low" and that her "rheumatoid factor was within normal limits." She did not miss any work and had no work restrictions following the procedure. She continued to see Dr. Chenger for follow-up treatments until July 31, 1997. She remained employed with the Williamson County School System until August 1997 just before school resumed.

On August 27, 1997, Mrs. Elliott was hired as the Food Services Director for the defendant, The Blakeford at Green Hills Corporation, with an annual salary of $47,000. The Blakeford is a residential retirement facility with approximately 120 "independent living" apartments for singles or couples, 40 or more assisted living units and 35 to 40 skilled nursing beds.

According to Mrs. Elliott, her typical day would begin when she arrived by 6:15 a.m. to supervise service of breakfast for 70 to 80 people, lunch for 90 or more, and dinner for 200 to 250. In between meals she helped wash dishes, put away stock and ordered supplies. She described her style of management as necessarily "hands on".

On October 6, 1997, she was in the stock room with two employees putting institutional size cans of food on the shelf. As she was handing a food can to one of the employees, she described what happened as follows:

> I just lost the use of my [left] hand. It just snapped . It was just gone. And like I said, I just stood there and looked at it. I didn't know – it didn't feel like a cramp. I didn't know what it was. I just knew I was in trouble.

Next she tried to help in the kitchen– "I reached to get a plate with my left hand, and when I did, the plate just fell out of my hand." Mrs. Elliott stated that she had never had any problems with her left hand while working for the defendant prior to October 6, 1997.

Mrs. Elliott testified that she went straight to the infirmary to seek medical attention and told a nurse: " I don't know what I've done to my hand, but I don't have any feeling in my hand. I don't have any use of my hand. She [the nurse] said 'Well, looks like to me you need to see the doctor. Go see your doctor....'" No one in the infirmary offered her a panel of physicians from which to seek medical care.

Mrs. Elliott called Dr. Chenger's office and arranged to see him that afternoon. She then went to see Mr. Dan Goldstein, Executive Director at the Blakeford: "[I] went around and told Dan...stuck my head in his doorway, and he was sitting at his desk, and I stuck my hand up and said, Dan, I hurt myself in the kitchen. I said I need to get some help." According to Mrs. Elliott, Mr. Goldstein did not make any response and did not offer a panel of three physicians from which to seek medical treatment. She told him she would be back from the doctor's office as soon as she could and he said "ok".

Dr. Chenger found that Mrs. Elliott had ruptured the tendons in her hand and would need semi-emergent surgery at a minimum cost of $1,000. Mrs. Elliott returned to work in a cast, neither Mr. Goldstein or any other employee at the Blakeford offered or suggested to Mrs. Elliott that her injury should be reported as a work-related injury. After learning that she did not qualify for group health insurance Mrs. Elliott had another discussion with Mr. Goldstein:

Q: Did you speak to Mr. Goldstein on October 7, the day after your injury?

A: Yes sir.

Q: What was said and by whom?

A: I just told him that I needed some help, that I hurt my hand, that it was going to take a thousand dollars for them to see me. I don't know if I can do this or not. So I began to talk to him, he wasn't making any moves. It was obvious he wasn't going to help me. So...

Q: On October 7 did you inform Mr. Goldstein that you had been hurt in the kitchen?

A: Of course

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Q: And what, if anything did Mr. Goldstein do at that point?

A: He didn't make any comments. ... I told him, I said, well, I guess I can go back to Williamson County schools and get COBRA. He said, 'That's the thing for you to do.'

Q: Did Mr. Goldstein, on that day, offer you a panel of physicians from which to choose for care and treatment of your injuries?

A: No, sir.

When asked why she did not ask that Mr. Goldstein to tum her injury in to workers' compensation at that time, Mrs. Elliott responded "I just didn't want to lose my job...." Mrs. Elliott obtained COBRA insurance through her former employer at a cost of $506.36.

She worked regularly every day between the date of her injury and October 16, 1997, the date Dr. Chenger performed surgery. Dr. Chenger found that Mrs. Elliott had ruptured the second, third and fourth extensor tendons in her left hand. He repaired her injury by sewing the broken tendons together and attaching them to her fifth extensor tendon.

She missed work on the 16th and 17th of October and then returned to work on October 19, 1997, in a post-operative cast until according to Mrs. Elliott she was terminated on November 3, 1997. On that day Mr. Goldstein said to her "looks like to me that you are having a tough time of it." Two days before this conversation she had had to return to the doctor to have the cast opened to reduce swelling in her hand. According to Mrs. Elliott she specifically asked Mr. Goldstein for workers' compensation benefits on November 3, 1997, and Mr. Goldstein replied "Sounded like the thing to do."

Shortly thereafter, Ms. Bonnie McCormick, an administrative assistant with the defendant, contacted Mrs. Elliott and asked her to meet with her at Joe's Village Inn, a local tavern. At that meeting on November 5, 1997, Mrs. Elliott filled out a first report of injury which the defendant later denied was compensable.

On November 10, 1997, Mrs. Elliott returned to Dr. Chenger for a follow-up visit and told him that his records of October 6, 1997 indicating that her injury occurred the day before she sought treatment were incorrect and went into a more elaborate history about what happened which he

recorded in a second entry for October 6, 1997. On the office visit of November 10, 1997, she related that on October 6, 1997 she was lifting some heavy objects at work, developed a cramp in her hand and was unable to extend her fingers.

After the surgery, Mrs. Elliott's left hand remained in a cast or other device until March of 1998. She also had rehabilitative therapy during this time. She saw Dr. Chenger six more times who indicated on her February 11, 1998 visit that she could return on an "as needed" basis and she should continue occupational therapy. Although Dr. Chenger could not recall what he did regarding taking Mrs. Elliott off work after the surgery, he "assume[d] she would have had to been off work due to the injury and treatment that was needed."

Dr. Chenger explained that a rupture of an extensor tendon is by definition an acute event and that a person who had done this would have pain which would bring it to their attention or would notice that they were not able to extend or lift up their fingers. He testified that her injury was consistent with the history Mrs. Elliott had given him of hurting her hand while lifting food cans at work. He found that the underlying rheumatoid arthritis and synovitis had weakened the tendons in her hand and that lifting objects at work created the extensor tendon ruptures and aggravated this pre-existing condition

On November 24, 1998, Mrs. Elliott saw Dr. Chenger and complained that she still had difficulty lifting more than three pounds with her left hand, needed both hands to lift more than 20 pounds, had difficulty with repetitive household chores and general weakness in her left hand. Dr. Chenger concluded that the limitations Mrs. Elliott expressed to him would in his opinion be permanent.

In Dr. Chenger's opinion less than 20 pounds would be the most that Mrs. Elliott could lift without risk of re-injury to her left hand; and that she should lift five to ten pounds only on an occasional basis. He agreed that she would not be able to effectively or easily handle institutional size pots, pans and food containers on a frequent or constant daily basis without risk of complication or injury.

He opined that Mrs. Elliott reached maximum medical improvement on November 24, 1998 and assessed a seven percent (7%) permanent partial impairment to the left hand as a result of the tendon ruptures and repair.

She testified that the injury has left her unable to work in food service as she has no strength in her left hand. "It's the lifting and the twisting of my hands that's the hardest. If I lift something with it I don't know how much weight I can lift with it. I don't want to snap my hand." She is unable to twist lids or unscrew jars and cannot sweep or mop for long periods of time.

Eight months after her injury, Mrs. Elliott and her husband opened a small gift shop but as of the time of trial it had not turned a profit.

The defendant did not offer any proof at trial.

The trial court awarded 1) temporary total disability benefits for 32 weeks at the rate of $492.00 per week totaling $15,744.00; 2) permanent partial disability benefits of 150 weeks totaling $20,664.00 based on finding of 7% anatomical disability and 28% vocational disability; 3) a judgment of $711.36 for reimbursement of insurance premium and medical expenses; and 4) an additional judgement of $711.36 as a bad faith penalty award for failure to pay temporary total disability benefits.

ANALYSIS

Review of findings of fact by the trial court shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

The defendant has presented four issues on appeal.

I. Whether the evidence preponderates against the finding of the trial court that Mrs. Elliott sustained a compensable work-related injury on October 6, 1997, arising out of and in the course of her employment resulting in an award of 28% permanent partial disability to the hand.

II. Whether the evidence preponderates against the trial court's award of temporary total disability benefits for 32 weeks.

III. Whether the trial court erred by awarding Mrs. Elliott reimbursement of medical expenses and insurance premium expenses in the amount of $711.36.

IV. Whether the trial court erred by awarding a bad faith penalty against the defendant pursuant to *Tennessee Code Annotated* § 50-6-225(j).

Mrs. Elliott has presented one issue.

V. Whether this Panel should impose sanctions on the defendant for this frivolous appeal.

I. Whether the evidence preponderates against the finding of the trial court that Mrs. Elliott sustained a compensable work-related injury on October 6, 1997, arising out of and in the course of her employment resulting in an award of 28% permanent partial disability to the hand.

To receive workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death...." *Tenn. Code Ann.* § 50-6-102(12). The phrase "arising out of " refers to causation and this requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Systems, Inc.*, 938 S.W. 2d 690, 692 (Tenn. 1997).

Our Supreme Court has found:

> Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be " the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury.

Reeser, 938 S.W.2d at 692 (citations omitted).

The trial court found: "The lay and expert medical opinion before the Court establishes clearly that Mrs. Elliott's injury was causally related to her work, is a compensable work-related injury and that the injury is permanent."

After thoroughly reviewing the record in this case, we find that there is ample evidence to support the finding of the trial court.

The defendant argues that Mrs. Elliott's injury is not compensable because it was due to a pre-existing condition and that her work at The Blakeford did not aggravate or advance the severity of her condition. The defendant did not put on any proof, medical or otherwise, at trial.

It is well settled that an employer takes an employee as he finds him, that is, with his pre-existing defects and diseases. *Rogers v. Shaw*, 813 S.W.2d 397, 399 (Tenn. 1991).

Work that aggravates an employee's pre-existing condition by increasing the amount of pain but does not otherwise injure or advance the severity of the employee's condition is not considered compensable under workers' compensation. *Cunningham v. Goodyear Tire and Rubber Co.*, 811 S.W.2d 888, 891 (Tenn. 1991). To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. *Sweat v. Superior Industries, Inc.*, 966 S.W.2d 31, 33 (Tenn. 1998).

The trial court found: "The injury, whether or not it was an aggravation of a preexisting condition, was acute. The injury did more than merely increase Mrs. Elliott's pain; it suddenly caused her to lose the ability to clinch her hand into a fist and to grip. The only means to treat the injury was semi-emergent surgery." The trial court then concluded that both as an acute injury and an aggravation of a pre-existing condition the ruptured tendons clearly constituted a work-related injury as a matter of law.

From our review of this case it is patently clear that the rupture of three extensor tendons in Mrs. Elliott's left hand was an acute injury, advanced the severity of a pre-existing condition and constituted a permanent anatomical change in that condition that required surgery in order to regain the use of her left hand. We find defendant's argument devoid of merit.

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Tenn. Code Ann.* § 50-6-241(c); *Worthington v. Modine Manufacturing Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The assessment of this disability is based on all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at the types of employment available in claimant's disabled condition. *Orman v. William Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991). The test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 459 (Tenn. 1988).

Mrs. Elliott has a G.E.D., was 52 at the time of trial, had never worked outside the food service industry and has limited transferable job skills. The trial court found that these factors substantially limited her ability to be retrained in a new line of work within her physical limitations; that her injury permanently disabled Mrs. Elliott from returning to work in the food service industry and severely limited her ability to earn wages.

The evidence does not preponderate against the trial court's award of twenty-eight percent (28%) permanent partial disability to the left hand.

II. Whether the evidence preponderates against the trial court's award of temporary total disability benefits for 32 weeks.

Temporary total disability "refers to the injured employee's condition while disabled to work by his injury and until he recovers as far as the nature of his injury permits...." *Redmond v. McMinn County*, 209 Tenn. 463, 468, 354 S.W.2d 435, 437 (1962). Temporary total disability benefits are terminated either by 1) the employee's ability to return to work or 2) the employee's attainment of maximum medical improvement. *Prince v. Sentry Ins. Co.* 908 S.W.2d 937 (Tenn. 1995).

Mrs. Elliott testified that she remained in a cast, brace or other device from October 6, 1997 through March 1998. Although Dr. Chenger could not recall what he did regarding taking Mrs. Elliott off work after the surgery he "assume[d] she would have had to been off work due to the injury and treatment that was needed." Eight months after she was terminated by the defendant, Mrs. Elliott and her husband opened a small gift shop that has yet to turn a profit. The undisputed medical proof shows that Mrs. Elliott reached maximum medical improvement on November 24, 1998, four months after Mrs. Elliott and her husband opened the gift shop.

The trial court found Mrs. Elliott entitled to 32 weeks of temporary total disability beginning November 4, 1997 and ending when she began work in the gift shop. We find that the evidence does not preponderate against the finding of the trial court. This issue is without merit.

III. Whether the trial court erred by awarding Mrs. Elliott reimbursement of medical expenses and insurance premium expenses in the amount of $711.36.

Tennessee Code Annotated § 50-6-204(a)(1) provides that the employer shall furnish free of charge to the injured employee medical treatment that is reasonably necessary due to the work-related injury.

The trial court found that the defendant failed or refused to offer or provide medical attention to Mrs. Elliott in violation of *Tennessee Code Annotated* § 50-6-204 and therefore the defendant was not entitled to any relief from liability for medical expenses and COBRA premiums incurred due to its failure to comply with the workers' compensation laws.

The defendant argues that Mrs. Elliott did not properly advise her employer that she had suffered a work related injury and never actually requested that this matter be turned in as a work-related injury until November 5, 1997. Therefore as they were not given an opportunity to provide a list of physicians, she should not be able to recover medical treatment expenses or insurance premiums paid prior to giving written notice on November 5, 1997.

The record fully supports the trial court's finding that the defendant had actual notice and knowledge of the time, date, place and specific nature of Mrs. Elliott's injury in accordance with *Tennessee Code Annotated* § 50-6-201. We find this argument devoid of merit.

IV. Whether the trial court erred by awarding a bad faith penalty against the defendant pursuant to *Tennessee Code Annotated* § 50-6-225(j).

Tennessee Code Annotated § 50-6-225(j) provides:

> If an employer wrongfully fails to pay an employee's claim for temporary total disability payments, the employer shall be liable, in the discretion of the court, to pay the employee, in addition to the amount due for temporary total disability payments, a sum not exceeding twenty-five percent (25%) of such temporary total disability claim; provided, that it is made to appear to the court that the refusal to pay such claim was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the employee; and provided further, that such additional liability shall be measured by the additional expense thus entailed.

The trial court found that the defendant wrongfully and in bad faith failed to pay Mrs. Elliott's claim for temporary total disability payments which caused her to incur COBRA premiums and co-payments for treatment of the ruptured tendons totaling $711.36 and entered an additional judgment against the defendant for that amount.

The defendant argues that it should not be penalized for bad faith in this case because 1) Mrs. Elliott is a sophisticated management-type department head with knowledge of workers' compensation issues and did not request that her injury be treated as a workers' compensation injury until after her termination; and 2) Dr. Chenger's notes from the initial office visit of October 6, 1997, were silent as to the work-related activity that caused the rupture of the tendons and it was only after her termination that Mrs. Elliott asked Dr. Chenger to prepare an addendum to his notes to reflect a specific work-related incident and his testimony was based on this subsequent history. We find these arguments without merit.

The defendant had actual notice that Mrs. Elliott had injured herself at work and failed to provide medical care as required by statute. The defendant allowed Mrs. Elliott to apply for COBRA coverage from a former employer to obtain necessary surgery and to pay additional medical expenses rather than treat it as a workers' compensation claim. The defendant's actions were in total disregard of the Workers' Compensation law. The defendant put on no proof at trial to dispute Mrs. Elliott's testimony and the trial court found her to be a credible witness. The defendant's conduct in this case is precisely the kind of behavior that the penalty statute is intended to deter.

The evidence does not preponderate against the trial court's assessment of the bad faith penalty in this case.

V. Whether this Panel should impose sanctions on the defendant for this frivolous appeal.

An appeal is frivolous if it is devoid of merit or if there is little prospect it can ever succeed. *Industrial Dev. Bd. v. Hancock*, 901 S.W.2d 382, 385 (Tenn. 1995). An appeal has no reasonable chance of success when reversal of the trial court decision would require "revolutionary changes in fundamental standards of appellate review." *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977). Under the *de novo* review standard, our Supreme Court has consistently denied motions for frivolous appeal where the appeal presented issues of factual dispute. *Boruff v. CNA Ins. Co.*, 795 S.W.2d 125, 128 (Tenn. 1990).

While we find the penalty awarded in this case well-deserved given the defendant's conduct in this case and some issues raised in this appeal to be devoid of merit, we also find other issues raised by the defendant make out at least a sufficient colorable claim for relief that we do not find this appeal to be frivolous.

The panel does find that Mrs. Elliott is entitled to interest on the lump sum judgment of $37,830.72 entered January 26, 2000, to present, pursuant to *Tennessee Code Annotated* § 50-6-225(g)(1) as the awards of permanent partial disability and temporary total disability benefits have accrued. This interest calculation does include the judgment for medical expenses since it represented reimbursement for expenses personally incurred by Mrs. Elliott as well as the judgment for the bad faith penalty. *See Staggs v. National Health Corp.*, 924 S.W.2d 79 (Tenn 1996); *West American Insurance Co. v. Montgomery*, 861 S.W.2d 230, 232 (Tenn. 1994).

CONCLUSION

The judgment of the trial court is affirmed as modified to include interest on the judgment and this case is remanded to the trial court for proceedings consistent with this opinion. Costs of this appeal are taxed to the defendant.

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JAMES WEATHERFORD, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

BONNIE ELLIOTT v. THE BLAKEFORD AT GREEN HILLS CORPORATION

Chancery Court for Williamson County
No. II-25766

No. M2000-00512-WC-R3-CV - Filed - May 1, 2001

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the defendant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM