IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(July 12, 1999 Session)

BRENDA DIANE COOKSEY,	)	
	)	
Plaintiff/Appellee,	)	HARDIN CIRCUIT
	)	
v.	)	W1998-00103-WC-R3-CV
	)	
CNA INSURANCE COMPANY and CLAYTON MOBILE HOMES, INC.,	)	Honorable Julian P. Guinn, Judge
	)	
	)	
Defendants/Appellants.	)	

FILED

December 20, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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M E M O R A N D U M O P I N I O N

Members of Panel:

Justice Janice M. Holder
Senior Judge F. Lloyd Tatum
Senior Judge L. T. Lafferty

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED

L. T. LAFFERTY, SENIOR JUDGE

OPINION

This worker's compensation appeal has been referred to the Special Worker's Compensation Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e) for a hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This case involves a work-related back injury. The trial court's written judgment found that the plaintiff was returned to employment by the pre-injury employer but not at a wage equal to or greater than the wage the employee was receiving at the time of injury. Thus, the court found that the plaintiff is not limited to the two and one half (2½) times cap for permanent partial disability benefits as set forth in Tennessee Code Annotated § 50-6-241(a)(1). The court also found that the plaintiff meets three of the four requirements of § 50-6-242, particularly portions of § 50-6-242(1)(3) & (4), and, as a result, the plaintiff suffered a seventy-five (75) percent permanent partial disability to the body as a whole.

Review of the findings of fact made by the trial court is *de novo* upon the record, accompanied by a presumption of the correctness of the findings, 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 depth the factual findings and conclusions of the trial court in a worker's compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988). However, considerable deference must be given to the trial court, who has seen and heard the witnesses, especially where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Accident & Indem. Co.,* 811 S.W.2d 516, 521 (Tenn. 1991).

The defendant asserts that the trial court erred when it found that the plaintiff suffered a seventy-five (75) percent permanent partial disability to the body as a whole as a result of a lumbar strain and submits the following issues for our review:

1. Whether the trial court erred in exceeding the twelve and one-half (12½) percent permanent partial disability benefits to the body as a whole based upon Tenn. Code Ann. § 50-6-241(a)(1)?

2. Whether the trial court erred in applying the "escape provision" of Tenn. Code Ann. § 50-6-242 where the plaintiff did not prove by clear and convincing evidence three of the four items as required by the statute?

For the following reasons, we affirm in part, reverse in part, and modify the trial court's judgment.

EVIDENTIARY FACTS

The plaintiff, age 45, a ninth grade drop-out, is an employee of Clayton Mobile Homes and has been for ten (10) years. The plaintiff's prior work experience was as a cook in a junior high school and at a shoe manufacturing plant. The plaintiff injured her back in June, 1996, while stapling floor decking. At the time of the injury, the plaintiff was a "swing person" building mobile homes and was primarily involved in the installation of electrical components. The plaintiff testified that this work required a lot of bending, stooping, pulling and lifting. The plaintiff testified that she was paid an hourly rate of $7.80 plus an incentive, but she would lose her incentive pay if she failed to show up for work or left early without permission. According to the plaintiff, she had participated in this program since it was first began at the company. The plaintiff also stated that prior to her injury, she was a "team leader" with some supervisory responsibilities. According to the plaintiff, she made over $20,000 in 1994, $26,000 in 1995, and $22,000 in 1996.

Since the accident, the plaintiff stated that her physical life has changed. She can no longer do housework or participate in her hobbies, such as fishing, golf, and yard work. Due to her lost income, the plaintiff testified that she and her husband had to sell their pontoon boat, a camper, and a car. The plaintiff testified that she was released back to work by Dr. John W. Neblett in April, 1997, and has not seen Dr. Neblett since that date; however, the plaintiff has been in constant daily pain. She stated that Clayton Homes created her present position as a quality control clerk upon her return to work after the injury. Her duties include using a calculator to calculate heat loss figures. When asked if she knew what she was doing, the plaintiff responded, "Not really--I mean--I mean, I know how to do what I'm doing, but I don't know what I'm doing." Prior to her injury, if the plaintiff received less than $300 a week, she testified that it was a bad week. According to the plaintiff, she works every day and performs her duties as expected, but she testified that she did not receive any incentive pay upon her return to work in the quality control

clerk position. However, she was aware that the quality control inspector, Paul Wright, earned incentive pay as well as some women in the front office.

Richard Steve Cooksey, the plaintiff's husband, testified that they had been married six years. Mr. Cooksey stated that, prior to his wife's injury, she did most of the yard work, gardening, and housework. They no longer can play golf, which they did about four to five times a week, or go fishing. Mr. Cooksey's testimony corroborated his wife's testimony about having to relieve financial pressure resulting from the plaintiff's injury.

Donald Lee Stewart, plant manager, testified that the plaintiff was currently employed at Clayton Homes at $7.80 an hour. If the plaintiff worked overtime, then her wage was based on the hourly rate at time and a half. Mr. Stewart described how Clayton Homes calculates a team profit sharing bonus for a month's work:

> We know our profits each month from our profit and loss statement and we multiply .25 times the profit, divide that by the number of people and then divide that by 4.33 being the average number of weeks in a month and that determines the weekly bonus that's going to be paid for that month.

Mr. Stewart testified that production people, about 140 persons, receive this bonus. He stated that the company breaks down the employees into two types of labor. He explained that direct labor consists of employees that physically assemble parts for the products, and indirect labor consists of support personnel. Mr. Stewart testified that the employees are only guaranteed a base hourly rate for work, and, if there are no profits at the end of the month, no bonus is paid.

Mr. Stewart testified that the plaintiff, upon her release by Dr. Neblett, was given a job in the quality control department. He denied that the company created this job as a ruse to get over the "hump of this workers' comp case." At the time the plaintiff returned to work, Mr. Stewart explained that the company was in the process of adding an additional plant to its facility, which increased the need for additional administrative staff. Mr. Stewart testified that he believed the plaintiff was well qualified to be in the quality control department, based upon her past work experience in production, and she seemed a perfect fit at the time. He stated that if the plaintiff had not been hired in that position, someone else would have been placed in the job. During cross-examination, Mr. Stewart testified that company policy dictated that the plaintiff was not entitled to a bonus share,

since she is now considered to be in indirect labor. Mr. Stewart agreed that the plaintiff currently makes approximately $16,000 a year at her hourly wage rate.

MEDICAL EVIDENCE

Dr. John W. Neblett, plaintiff's treating physician, first saw the plaintiff on November 12, 1996, with a complaint that she could not straighten up due to pain in her back. The plaintiff related to him that she had hurt her back while installing flooring on her job. She complained that the pain radiated down the back of her right thigh. Dr. Neblett felt that the plaintiff had sustained a lumbosacral strain but believed an MRI was appropriate. The plaintiff was ultimately placed on medication and physical therapy. On November 26, 1996, Dr. Neblett advised the plaintiff that the MRI revealed a broad based disc that was more to the left than the right, but the doctor did not believe surgery was necessary. Dr. Neblett instead recommended a functional capacity examination to determine the strength and weaknesses in the plaintiff's back.

On December 10, 1996, the plaintiff advised Dr. Neblett that she had seen Dr. Frank Jordan and had undergone an epidural block. When a second nerve block did not help the plaintiff, Dr. Neblett ordered a myelogram to determine the cause of the plaintiff's pain in her hip and right leg. The myelogram revealed that the plaintiff had a mild bulge at the left L4-5 disc. Dr. Neblett opined the plaintiff to have a lumbosacral strain. The plaintiff was then referred to Dr. Sharon Thompson for occupational rehabilitation.

On March 25, 1997, Dr. Neblett noted that he had nothing neurosurgical to offer the plaintiff and that she could return to work with the restrictions given by Dr. Sharon Thompson. On October 14, 1997, Dr. Neblett opined that the plaintiff sustained a permanent partial anatomical impairment of five (5) percent to the body as a whole based on Table 75 of the AMA Guides for her back strain with leg pain but no nerve root involvement. The doctor limited her activities to carrying a maximum of twenty-five (25) pounds, occasionally lifting and carrying less than ten (10) pounds, standing or walking less than three (3) hours, sitting less than three (3) hours, and occasionally climbing, balancing, stooping, kneeling, crouching, crawling, and twisting. Pushing and pulling, as well and use of plaintiff's hands and arms, was unlimited.

The medical reports of Dr. Sharon Thompson, Occupational Rehabilitation Center,

reflect the plaintiff had chronic low back pain and L5 radiculopathy. Dr. Thompson first saw the plaintiff on January 14, 1997. The plaintiff was treated with physical and occupational therapy but still complained of increased pain. Dr. Thompson recommended that the plaintiff's activities be restricted, including bending or stooping, squatting, crawling, climbing stairs, crouching, kneeling, and balancing. Dr. Thompson also recommended that the plaintiff's lifting be restricted to various degrees, including pushing or pulling twenty (20) pounds occasionally.

VOCATIONAL DISABILITY

At the request of the defendant, the plaintiff was seen by Dr. Robert W. Kennon, psychologist, for evaluation. Dr. Kennon's report revealed that he saw the plaintiff on May 28, 1998, and determined that the plaintiff cannot read or write at the eighth (8th) grade level. Dr. Kennon concluded that the plaintiff is functioning in the upper limits of the low average intellectual abilities. Dr. Kennon opined that the plaintiff, based upon her past work experience, has transferrable skills from her prior vocational background and training which would allow her to enter into the open labor market. Dr. Kennon suggested that a number of jobs, such as light production assembly work or cashiering, would not exceed plaintiff's medical restrictions. Dr. Kennon noted that the plaintiff is still employed. Dr. Kennon believed, based upon plaintiff's medical restrictions, that the plaintiff would be restricted from 39.4 percent of the available jobs in the national economy, leaving a remaining 60.06 percent of the jobs remaining in the sedentary and light work strength rating categories available to plaintiff.

Dr. William M. Jenkins, professor and coordinator of the Rehabilitation Counselor Education Program at the University of Memphis, examined the plaintiff on November 26,1997, at the request of her attorney for the purpose of a vocational rehabilitation assessment. Based upon a Wide Range Achievement Test, Dr. Jenkins determined that the plaintiff was functioning below average with a reading level slightly below the eighth (8th) grade. Taking into consideration the plaintiff's work history, family history, educational background, and medical restrictions, Dr. Jenkins opined that the plaintiff was 100 percent vocationally disabled. Although the plaintiff was currently employed, Dr. Jenkins recommended that the plaintiff be involved in some kind of a comprehensive vocational

rehabilitation program consistent with her functional restrictions.

When defendant's attorney asked the doctor how the plaintiff could be 100 percent vocationally disabled and still work every day at almost $8 an hour, Dr. Jenkins responded that, if the plaintiff were to lose her current position at Clayton Homes and had to apply for a job on the open market, she does not have the academic or clerical skills to get a light duty position elsewhere.

LEGAL ANALYSIS

ISSUE 1.

The defendant asserts that the plaintiff's award should be limited to no more than twelve and one-half (12½) percent permanent partial disability benefits to the body as a whole, based upon the two and one-half (2½) times the anatomical impairment rating cap in Tennessee Code Annotated § 50-6-241(a)(1). Alternatively, the defendant asserts that, if Tennessee Code Annotated § 50-6-241(a)(1) is not applicable, then the plaintiff's award is limited to six (6) times the anatomical rating, which would give the plaintiff a maximum of thirty (30) percent permanent partial disability pursuant to Tennessee Code Annotated § 50-6-241(b). The plaintiff contends that she did not return to work at a wage equal to or greater than that which she was making prior to the injury, and, thus, she is not limited to the twelve and one-half (12½) percent impairment rating.

In our *de novo* review, we must first determine if the trial court was correct in finding that the plaintiff did not return to work at a wage equal to or greater than the wage the plaintiff was receiving at the time of the injury.

For injuries arising after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability, and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that an employee may receive is two and one-half (2½) times the medical impairment rating pursuant to the AMA Guidelines. Tenn. Code Ann. § 50-6-241(a)(1). In making such determinations, trial courts are to consider all relevant factors, including lay and expert testimony, the employee's age, education, skills, training, local job opportunities for the disabled, and the capacity to work at types of employment available in the claimant's disabled condition. *Id.*

Because our workers' compensation law is construed liberally for the benefit of the worker, Tennessee courts have recognized that an employee's wages are not limited to a guaranteed base salary. Bonuses, overtime, and other incentive pay given to the employee as part of his overall compensation for services are also considered part of his wages. *See, e.g., Bryson v. Benton*, 395 S.W.2d 794 (Tenn. 1965) (where both employer and employee treated tips as part of wages, tips used to compute average weekly wage); *Moss v. Aluminum Co. of America*, 276 S.W. 1052, 162 Tenn. 249 (1925) (attendance bonus given to encourage workers to put in regular hours held to be part of employee's wages).

For example, the court in *P. & L. Construction Co. v. Lankford*, 559 S.W.2d 793 (Tenn. 1977), stated, "It has been said that the earnings of an employee include anything received by him under the terms of his employment contract from which he realizes economic gain." *Id.* at 795 (citing 2 Lawson Workmen's Compensation Law § 60.12*).*

Although the courts mentioned above were looking at wages in the context of calculating the average weekly wage, we believe that the same principles apply in determining whether the employee was returned to work at the same wage. All portions of the statute should be harmonized if possible, and it would yield an irrational result to consider bonuses and incentive pay as wages when calculating the average weekly wage but not include them when determining if the employee was returned to work at the same or higher wage. To hold that wages only include guaranteed base pay and not incentive pay would allow an employer to return an injured employee to work at a lower salary than he was making before his injury simply by designating part of his wages as a bonus. This result is contrary to the purpose of the workers' compensation statutes and the public policy that our legislature has carefully crafted into law.

At the time of her injury, the plaintiff was making an hourly wage of $7.80, plus, at the end of the month, she received a bonus based on company profits. If the company made a profit, the plaintiff and some one hundred forty others received bonuses. If there were no profits, no production employees received a bonus. The proof in the record establishes that the plaintiff for the years, 1994, 1995, and 1996 made in excess of $20,000 for each year in base salary plus bonuses, well above the $16,000 base salary

earned by the plaintiff after her injury. Both the plaintiff and Paul Stewart, the plant manager, agreed the plaintiff was making a guaranteed $7.80 an hour prior to her injury. From the unconverted proof, the plaintiff returned to work as a quality control person at her previous hourly rate of $7.80; however, bonuses were no longer available to her. The plaintiff was unable to return to production due to her medical restrictions.

We agree with the trial court that the plaintiff was not returned to work at a wage equal to or greater than that received at the time of injury. The trial court correctly found that the plaintiff's award was not limited to two and one-half (2½) times the medical impairment rating in Tennessee Code Annotated § 50-6-241(a)(1). Therefore, the plaintiff's award will be capped at a maximum of six (6) times the medical impairment rating in § 50-6-241(b), unless the escape provision of § 50-6-242 applies. However, if the court awards a multiplier of five (5) times or greater, it must make specific findings detailing the reasons for maximizing the award. Tenn. Code Ann. § 50-6-241(c). The court is authorized to exceed even the six (6) times multiplier if the court finds that three of the four criteria in § 50-6-242 are present.

VOCATIONAL DISABILITY

ISSUE 2.

The defendant contends that the trial court erred in applying "escape provision" of Tennessee Code Annotated § 50-6-242, wherein the plaintiff failed to prove by clear and convincing evidence three of the four items required by the statute to entitle the plaintiff to a seventy-five (75) percent permanent partial disability benefit to the body as a whole. Naturally, the plaintiff asserts that she met the requirements of § 50-6-242 and that the trial court was correct in its ruling.

Since the trial court determined that the plaintiff met her burden of proof by clear and convincing evidence, we must determine if the record supports the trial court's conclusion.

The pertinent portion of Tennessee Code Annotated § 50-6-241(b) reads as follows:

> [W]here an injured employee is eligible to receive permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(I) and (F), and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may

> receive is six (6) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making such determinations the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

Tennessee Code Annotated § 50-6-242 provides:

> Notwithstanding any provision of this chapter to the contrary, the trial judge may award employees permanent partial disability benefits, not to exceed four hundred (400) weeks, in appropriate cases where permanent medical impairment is found and the employee is eligible to receive the maximum disability award under § 50-6-241(a)(2) or (b). In such cases the court, on the date of maximum medical improvement, must make a specific documented finding, supported by clear and convincing evidence, of at least three (3) of the following four (4) items:
>
> 1. The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
>
> 2. The employee is age fifty-five (55) or older;
>
> 3. The employee has no reasonably transferrable job skills from prior vocational background and training; and
>
> 4. The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

The record establishes that the plaintiff has met item No. 1 in that she cannot read on an eighth (8th) grade level. However, the plaintiff does not meet item No. 2, in that she is age 45. Thus, the contest focuses on whether the plaintiff has met her burden of proof as to items 3 and 4, in that the employee has no reasonably transferrable job skills from prior vocational background and training, and that no reasonable employment opportunities are available to her. The Supreme Court defined "clear and convincing evidence" as evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *Middleton v. Allegheny Electric Co., Inc.,* 897 S.W.2d 695, 697 (Tenn. 1995), *citing Hodges v. S.C.Toof Co.* 833 S.W.2d 896 (Tenn. 1992).

The opinion of a vocational expert is necessary to establish that an employee has "no reasonably transferrable job skills from prior vocational background and training" or that "the employee had no reasonable employment opportunities available locally considering the employee's medical condition," or both. *Ingram v. State Indus., Inc.,* 943 S.W.2d 381, 383 (Tenn. 1995). Dr. William Jenkins, vocational rehabilitation expert testified in his deposition that the plaintiff is 100% vocationally disabled, notwithstanding the fact that she was and had been employed by her employer for approximately eight (8) months at the time of his interview. Dr. Jenkins based this opinion on his testing of the plaintiff, her work history, and the severe medical restrictions. Dr. Jenkins opined that the plaintiff was in need of comprehensive vocational rehabilitation for some type of job consistent with her functional restrictions. He concluded that the plaintiff has no reasonable transferrable job skills within a reasonable degree of vocational certainty. On the other hand, Dr. Robert Kennon, psychologist, opined that the plaintiff has transferrable job skills which would not exceed her medical restrictions. Further, Dr. Kennon found that the plaintiff was locally employed and continues to maintain her employment at a pay rate commensurate to her previous position. Finally, Dr. Kennon concluded that the plaintiff was capable of engaging in a variety of light and sedentary type tasks.

When expert testimony differs, it is within the discretion of the trial court to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.,* 929 S.W.2d 333, 335 (Tenn. 1996). Where issues involving expert testimony are contained in the record by depositions or reports, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial court. *Krick v. City of Lawrenceburg,* 945 S.W.2d 709, 712 (Tenn. 1997). With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court. The trial court accredited the testimony of Dr. Jenkins. We disagree with the trial court's finding.

The plaintiff, at time of trial, was 45 years old and currently employed with her pre-injury employer. It is uncontroverted that the plaintiff is unable to perform her prior job skills due to her lumbosacral strain. With her medical restrictions, the pre-injury employer offered the plaintiff a job as quality control person, which the plaintiff performed every day

and was considered by the employer to be a very good employee. Thus, we are puzzled as to how the vocational expert, Dr. Jenkins, determined that the plaintiff is 100 percent vocationally disabled, has no transferrable job skills, or that the plaintiff has no reasonable employment opportunities locally available. We find the report of Dr. Kennon more credible. We find that the plaintiff has failed to meet her burden of proving items three (3) and four (4) of § 50-6-242 by clear and convincing evidence. We reverse the trial court's judgment as to the seventy-five (75) percent vocational disability.

It is well established that the extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony. *Henson v. City of Lawrenceburg,* 851 S.W.2d 809, 812 (Tenn. 1993). Factors to be considered in determining the extent of vocational disability include the employee's job skills and training, education, age, extent of anatomical impairment, duration of impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available to him or her in a disabled condition. *Collins v. Howmet Corp.,* 970 S.W.2d 941, 943 (Tenn. 1998).

In our review of the record, we find that the trial court did not make specific findings to justify an award using a multiplier of five (5) or greater as required by Tennessee Code Annotated § 50-6-241(c); therefore, no presumption of correctness exists as to the trial court's findings. On our *de novo* review, we find that the plaintiff's award is capped at six (6) times the medical impairment rating, or thirty (30) percent permanent partial disability. The plaintiff is a relatively young woman with only a five (5) percent anatomical impairment rating. Dr. Neblett testified that the plaintiff's use of her hands and arms was unlimited, with the exception of lifting weight over twenty-five (25) pounds. The vocational expert, Dr. Kennon, testified that jobs, such as cashiering or light production work, would be compatible with the plaintiff's medical restrictions. In fact, at the time of trial, the plaintiff was working in a sedentary position with her previous employer. However, because the plaintiff has such limited reading and writing skills, as well as limited job experience consisting mainly of production positions that require bending, stooping, pulling, and lifting, we find that the plaintiff is entitled to the maximum award of six (6) times the anatomical impairment rating. A vocational disability rating is not based on whether the plaintiff is

currently working, but to what extent the employee's earning capacity in the labor market has been diminished by the work-related impairment. *Perry v. City of Knoxville*, 826 S.W.2d 114, 116 (Tenn. 1991). Dr. Kennon testified that the plaintiff's disability restricted her from 39.4 percent of available jobs in the national labor force. We believe the maximum award of thirty (30) percent permanent partial disability is warranted in this case.

The trial court's judgment is affirmed in part, reversed in part, and modified. The costs of this appeal are taxed to the defendant.

L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

JANICE M. HOLDER, JUSTICE

F. LLOYD TATUM, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

BRENDA DIANE COOKSEY,	)	HARDIN CIRCUIT
	)	NO. 2761
Plaintiff/Appellee,	)	
	)	Hon. Julian P. Guinn,
vs.	)	Judge
	)	
CNA INSURANCE COMPANY AND CLAYTON MOBILE HOMES, INC.,	)	
	)	NO. W1998-00103-WC-R3-CV
	)	
Defendant/Appellant.	)	AFFIRMED IN PART,
	)	REVERSED IN PART AND
	)	MODIFIED

JUDGMENT ORDER

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 Defendant, for which execution may issue if necessary.

IT IS SO ORDERED this 20th day of December, 1999.

PER CURIAM