IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 23, 2013 Session

# JOHNNIE HUDSON v. PRO LOGISTICS, CHEROKEE INSURANCE COMPANY, AND SUE ANN HEAD, ADMINISTRATOR OF THE SECOND INJURY FUND

**Appeal from the Chancery Court for Rutherford County**
**No. 10CV-277, Robert E. Corlew, III, Judge**

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**No. M2013-00387-WC-R3-WC - Mailed January 9, 2014**
**Filed February 20, 2014**

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The trial court found the employee suffered compensable injuries to his neck and back stemming from a motor vehicle accident and awarded him 54% permanent partial disability to the body as a whole. The employer has appealed, asserting the trial court's award is excessive. Having carefully reviewed the record, we reverse the trial court's judgment with respect to the impairment to the cervical spine and affirm in all other respects.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed**

DON R. ASH, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and E. RILEY ANDERSON, SP. J., joined.

Stephen K. Heard and Adam O. Knight, Nashville, Tennessee, for the appellants, Pro Logistics and Cherokee Insurance Company

Donald D. Zuccarello and Marshall H. McClarnon, Nashville, Tennessee, for the appellee, Johnnie Hudson

## OPINION

### Factual and Procedural Background

Johnnie Hudson ("Employee") worked as a truck driver for Pro Logistics ("Employer"), a transportation company engaged in delivering parts to automobile manufacturers, beginning in September 2006. Employee, who was sixty-four years old at the time of trial, had not completed high school and did not have a GED. His employment history includes working in landscaping and in construction, operating heavy equipment, operating a farm, owning and operating an automobile body shop, performing mechanical work, and driving trucks.

Employee had several injuries prior to those which are the subject of this appeal, including on his rotator cuff in 2002 and to remove a bone spur from his shoulder in 2004. He has also undergone surgeries on his back to remove a cyst, to repair a disc damaged from lifting a transmission, and a lumbar laminectomy. According to Employee, he experienced no pain or other problem with his back following these surgeries, and he could "pick up a 200-pound block of hog feed" with no problem following prior surgery. All of these conditions predated his employment

with Employer, and none of his pre-existing problems affected his ability to perform his job as a truck driver. Employee testified he had no difficulty performing his job for Employer, which entailed driving a truck to states such as Texas, South Carolina, and Michigan. He stated he passed Department of Transportation physicals until the accident giving rise to this case. Prior to the accident, Employee testified he had no difficulty performing any physical activity, including mountain climbing.

On August 20, 2010, Employee filed a complaint against Employer and its insurer, Cherokee Insurance Company, seeking workers' compensation benefits for injuries resulting from a motor vehicle accident on April 29, 2009.[1] Employee stated he was returning from a delivery to Michigan when he drove his truck onto a highway overpass in Kentucky and saw a traffic jam in front of him. He brought his truck to a complete stop and was hit in the rear by another tractor-trailer. Employee testified he felt as though he had "been hit by a board" and his neck hurt on the day of the accident. He testified he experienced swelling in his neck and between his shoulders, and also felt pain in his low back, which he described as a "big dull toothache." The pain continued down his legs and he experienced a stinging sensation in his feet,

[1] Employee also sued the Second Injury Fund, which filed a motion for summary judgment. The motion went unopposed, and the Second Injury Fund did not participate in the trial. The parties agreed at trial the Fund had no liability.

which made it difficult for him to drive. He also experienced pain between his shoulder blades up to the base of his neck, along with pain in his hands. Eventually, he was diagnosed with a neck strain and underwent surgery for a herniated disc in his lower back.

When the case was tried in November 2012 – more than three years after the accident – Employee had pain in his neck, pain in his back, and difficulty walking due to pain in his legs and feet. He denied having these problems before the accident on April 29, 2009. Employee testified he has difficulty sleeping and performing household chores, such as washing dishes and doing laundry. He could mow his yard for only about fifteen minutes, after which his feet would start stinging. He also had trouble driving and could no longer engage in hobbies such as riding a bicycle, mountain climbing, tennis, or hunting. Further, Employee stated he could no longer drive a truck - particularly since failing a Department of Transportation physical, and he could not return to farm work, auto body work, or any other type of work in which he was experienced. At the time of trial, he was unemployed.

On cross-examination, Employee admitted he previously told a physician he hurt his shoulder during a fall when, in fact, he injured it "pulling a bull pin on a big

truck." Employee explained he did not tell the physician how he actually hurt his shoulder because he wanted his health insurance carrier, rather than his employer, to pay for the treatment. When asked whether he would lie in order to "get money or get something paid for," Employee responded, "I didn't really tell them a lie. I just didn't [tell] them all the truth."

Several individuals testified regarding Employee's limitations since the accident. One of these witnesses, Charles Phillips, stated he had known Employee for at least thirty years and Employee "worked all the time . . . worked day and night" before the accident. Mr. Phillips testified since the accident, however, Employee "doesn't get around very well," rarely drives, and needs to stop to stretch during long rides in the vehicle. Another of Employee's longtime associates, Charles Nixon, testified Employee was a hard worker before the accident, but is a "totally different person" since the accident because "he's very limited in what he can do" physically. Mr. Nixon occasionally drives Employee to doctors' appointments because Employee's pain in his legs and feet makes it difficult for him to drive. Randall Beel testified Employee could do "anything he wanted to do" and never complained before the accident. Since the accident, however, he complains of pain in his legs, pain in his feet, and inability to sleep. Mr. Beel also stated the two men no longer go hunting

together.

Employer presented the testimony of its operations manager, Frankie Henson. Mr. Henson testified Employee had notified Mr. Henson shortly before the accident regarding Employee's need to take time off for surgery on his neck or shoulder. After the accident, when Employee was released to work light duty, he was assigned to do paper work in Employer's office. Mr. Henson testified Employee worked light duty only a few times, and he did not stay for more than a couple of hours on those days. Mr. Henson also acknowledged a person cannot drive for Employer if he cannot pass a Department of Transportation physical.

The proof at trial also included the deposition testimony of three physicians, Dr. Vaughan Allen, Dr. Richard Fishbein, and Dr. David Gaw.[2] Dr. Allen, a neurosurgeon, was Employee's treating physician. Dr. Allen first saw Employee on July 23, 2009, and Employee stated he was rear-ended by a truck hauling logs, causing his head to snap back and his body to be thrown sideways. Employee also

[2] The medical evidence in this case is extensive for a routine workers' compensation case, filling seven volumes of record. In fact, defense counsel stated to the trial judge "there are more medical records than you would ever care to look at." Much of evidence, however, focuses on issues not before us on appeal. Accordingly, we limit our discussion of the medical proof as it relates to the extent of Employee's vocational disability.

reported experiencing pain in his neck and arms following the accident. Dr. Allen initially thought Employee could be treated symptomatically and ordered physical therapy. After placing Employee on light work duty in September 2009, Dr. Allen saw Employee in October 2009, upon which time Employee reported having severe back pain and leg pain to his feet. Dr. Allen ordered an MRI, which showed a "very large disc herniation that created pretty severe spinal stenosis. It was an impressive disc rupture." Dr. Allen performed lumbar laminectomy surgery for a disk rupture on December 4, 2009. On March 11, 2010, Dr. Allen said Employee was better, so Employee underwent a functional capacity evaluation which showed he could perform light to medium work.

Dr. Allen opined Employee retained a seven per cent (7%) permanent anatomical impairment to the body as a whole based upon the injury to his back. He assigned no permanent impairment on Employee's neck injury, which he diagnosed as a cervical strain. Allen attributed Employee's back and neck injuries to the motor vehicle accident on April 29, 2009. Employee returned to see Dr. Allen in April 2012 and reported he was not doing well. Dr. Allen repeated an MRI scan and ordered an EMG to determine if Employee had nerve damage, but both tests were negative. The doctor testified he does not foresee any need for further surgery on Employee.

Employee underwent an independent medical evaluation performed by Dr. David Gaw, an orthopaedic surgeon, on October 1, 2012. Employee told Dr. Gaw of his experiences of neck and low back pain continuing into his legs as a result of the collision on April 29, 2009. He also informed Dr. Gaw about treatment he received from Dr. Allen and complained of continuing pain in his back and neck and tingling in his hands and feet. After conducting a physical examination and reviewing Employee's medical records, Dr. Gaw diagnosed employee as having degenerative cervical disc disease and degenerative lumbar disc disease. Dr. Gaw testified the accident on April 29, 2009, aggravated these conditions. He also agreed the surgery performed by Dr. Allen was necessary, and Employee suffered permanent injuries as a result of the accident. Dr. Gaw opined an appropriate assignment of anatomical impairment rating to Employee's cervical spine was two per cent (2%) stemming from his neck strain and was seven per cent (7%) for the low back injury. He also apportioned the impairment between Employee's prior conditions and the April 29, 2009, accident at fifty per cent (50%) each. As such, Dr. Gaw attributed to the accident an anatomical impairment rating of one per cent (1%) to Employee's cervical spine stemming from his neck strain and four per cent (4%) for the low back injury for a total of five per cent (5%) to the body as a whole. Dr. Gaw also opined it would be unsafe for Employee to return to driving a truck, stating he "would be very

concerned about [Employee] driving if his feet go to sleep and resulted in a loss of function of brakes or clutch driving."

Employee was also evaluated by Dr. Richard Fishbein, an orthopaedic surgeon, on February 22, 2011. Employee reported to Dr. Fishbein he had been rear-ended by another tractor trailer, resulting in neck and back pain. Dr. Fishbein testified his physical examination of Employee "revealed some very significant problems," such as a poor gait, tenderness throughout his lumbar and cervical spine, reduced range of motion, and atrophy in his left side. Dr. Fishbein reviewed Employee's medical records, including diagnostic studies, and concluded his neck and back problems advanced due to the collision. Dr. Fishbein opined Employee retained a nine per cent (9%) permanent anatomical impairment as a result of his lumbar injury and an eight per cent (8%) impairment for the neck injury, equating to a whole body rating of sixteen per cent (16%). Dr. Fishbein advised Employee to avoid excessive squatting, stooping, flexing, and extension of his neck, but opined he could perform light sedentary work. He stated, "it would be very difficult for [Employee] to be in a large 18 wheel truck, with the bounces and the stress of the sitting."

The parties stipulated Employee suffered a compensable injury on April 29,

2009. They also agreed Employer received timely notice of the injury, Employee received all the temporary disability benefits to which he was entitled, and he reached maximum medical improvement on April 3, 2010. Further, the parties stipulated Employee did not return to work with Employer at the same or higher wage. Thus, when the case was tried, the only contested issue was Employee's extent of vocational disability. Employer argued Employee was not a credible witness and, therefore, any award of benefits should be minimal. Employee responded the lay and medical proof supported a significant award of benefits, as Employee had continuing issues with his back and legs and was unable to resume his pre-injury activities. Employee also asserted the evidence was unrefuted he had been a hard worker all his life and, despite his prior surgeries, he faced no physical impediment to working until the accident on April 29, 2009.

After hearing the evidence, the trial court found Employee suffered compensable injuries to his neck and back arising out of the accident on April 29, 2009. The trial court determined Employee suffered a seven per cent (7%) anatomical impairment to his lumbar spine adopted from Dr. Allen's testimony, along with two per cent (2%) for the cervical spine consistent with Dr. Gaw's testimony, for a total impairment rating of nine per cent (9%) to the body as a whole. The trial court

also found Employee did not make a meaningful return to work and, therefore, was eligible to receive up to six times his impairment rating. The trial court awarded fifty-four (54%) vocational disability for both injuries based upon Employee's age, lack of education, and "overall reduced capacity for employment." The trial court also found Employee was "very active prior to the injury, but following the accident he has not worked and has been restricted in his activities." The trial court further observed Employee has "very little" in the way of transferable job skills, and he can no longer safely drive a truck. The trial court determined Employee's job opportunities were "severely limited" given his education, skills, and age. Employer has appealed.

## Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). When credibility and weight to be given testimony are involved, considerable deference is given the trial court's decision when the trial judge had the opportunity to observe the witness's demeanor and hear in-court testimony. Tryon v. Saturn

Corp., 254 S.W.3d 321, 327 (Tenn. 2008). A reviewing court does not give such deference when weighing the credibility on documentary testimony, such as medical proof by deposition. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

**Analysis**

The issue on appeal is whether the evidence preponderates against the trial court's award of fifty-four (54%) permanent partial disability to the body as a whole. We first note the extent of an injured worker's disability is a question of fact. Lang v. Nissan North Am., 170 S.W.3d 564, 569 (Tenn. 2005). Vocational disability results when "the employee's ability to earn wages in any form of employment would have been available to him in an uninjured condition is diminished by an injury." Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988). In assessing the degree of an employee's vocational disability, factors which should be considered

include the employee's skills and training, education, local job opportunities, age, anatomical impairment rating, and capacity to work at the kinds of employment available in the employee's disabled condition. Tenn. Code Ann. § 50-6-241(d)(2)(A). In addition, "it is appropriate to consider how a work-related injury affects an employee's capacity to engage in normal, everyday activities insofar as inquiry is oriented toward establishing anatomical or vocational disability." Lang v. Nissan North Am., 170 S.W.3d at 572. The claimant's own assessment of his physical condition and resulting disabilities should be considered as well. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). The trial court should consider both expert and lay testimony when deciding the extent of an employee's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983).

Employer challenges the award as excessive, contending Employee was not a credible witness and, therefore, his complaints of continued pain and inability to work should be discounted. Employer relies on the testimony of Employee that he falsely told a physician in 2008 he hurt his shoulder during a fall when he injured it "pulling a bull pin on a big truck." As noted above, the trial court is given considerable deference concerning credibility and weight of in-court testimony, as the trial judge has the opportunity to observe witness demeanor and hear testimony. Tryon v. Saturn

Corp., 254 S.W.3d at 327. We defer to the determination of the trial court and decline to substitute our own judgment for of the trial court regarding the credibility of the witnesses, including Employee.

The trial court adopted the seven per cent (7%) impairment rating assigned by Dr. Allen for Employee's back injury, along with two per cent (2%) for the neck injury consistent with Dr. Gaw's impairment rating, for a total impairment rating of nine per cent (9%) to the body as a whole. The trial court then awarded permanent partial disability benefits of six times impairment rating, or fifty-four (54%), the maximum permitted by Tennessee Code Annotated section 50-6-241(d)(2)(A).[3]

Employer claims Employee presented insufficient evidence to justify an award of six times his medical impairment rating under Tennessee Code Annotated section 50-6-241(d)(2)(A). Implicit in Employer's argument is the trial court erred by adopting Dr. Allen's seven per cent (7%) impairment rating for Employee's back

[3] In cases in which the employer does not return the injured 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 benefits the employee may receive is six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A). As noted above, the parties stipulated Employee did not return to work with Employer at the same or higher wage than before the accident.

injury. A trial court has the discretion to accept the opinion of one medical expert over another medical expert when the medical proof conflicts. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 644 (Tenn. 2008). When making this determination, a trial court may consider, among other things, the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of information by other experts. Id. Employer has provided no persuasive reason for the trial court to have not accepted the impairment rating provided by the treating doctor regarding Employee's lumbar spine injury. The trial court clearly acted within its discretion in adopting Dr. Allen's opinion the Employee sustained a seven per cent (7%) impairment to his back.

Dr. Allen assessed no impairment to the cervical spine, Dr. Gaw assessed a two per cent (2%) impairment rating and apportioned fifty per cent (50%) to the work-related injury, and Dr. Fishbein assessed Employee with a eight per cent (8%) impairment rating. Although the trial court could have accepted the higher impairment rating assigned by Dr. Fishbein, the trial court accepted the impairment rating of Dr. Gaw, two per cent (2%), without also adopting the apportionment of fifty per cent (50%) or making specific findings of fact why he chose not to do so. Within the Sixth Edition of the American Medical Association Guidelines, a

physician can apportion impairment related a work-related injury apart from other causes. Apportionment, according to the guidelines, is an allocation of the extent to which each of two (2) or more probable causes are found responsible for an effect, and, as appropriate, current impairment can be apportioned to more than one cause. Apportionment was also addressed in Schwamb v. Bridgestone Americas Tire Operations, LLC, M2010-01643-WC-R3-WC (Tenn. Workers Comp. Panel Aug. 9, 2011), wherein the panel discusses the apportionment of an injury to two different claims for worker's compensation. Here, Dr. Gaw provided medical expert testimony which included an fifty per cent (50%) apportionment of impairment to Employee's prior conditions.

The trial court erred by using a two per cent (2%) impairment rating for Employee's cervical spine injury instead of the one per cent (1%) total assigned by Dr. Gaw, which considered a fifty per cent (50%) apportionment to the prior or non-work-related cause. As stated in Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991), "when medical testimony differs, the trial judge must obviously choose which view to believe." Although we defer to the judgment of the trial court's judgment in the credibility of witnesses, as medical testimony was presented by deposition in this case, we may make an independent assessment of medical proof and

determine where the preponderance of evidence lies. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 665 (Tenn. 2008) (quoting Wilhelm v. Krogers, 235 S.W.3d 122, 127 (Tenn. 2007), Conner Bros. Excavating Co. v. Long, 98 S.W. 3d 656, 660 (Tenn. 2003). The trial court noted the varied impairment ratings given by the doctors who testified; however, the trial court did not adopt the apportionment or make findings to support its conclusion not to apportion any impairment to Employee's prior conditions. Dr. Gaw's analysis provided Employee had previous conditions in both his neck and lower back, which were aggravated by the 2009 motor vehicle accident. In utilizing the apportionment assessed by Dr. Gaw, the impairment rating to the Employee's cervical spine is one per cent (1%), which provides a total impairment rating to the body as a whole of eight per cent (8%).

We also observe, despite Employee's pre-existing conditions, the trial court was presented evidence Employee had no difficulty performing his job for Employer until after the accident on April 29, 2009. Employee passed Department of Transportation physicals until after the accident. Indeed, Employee had no prior difficulty performing any physical activity, including mountain climbing. When the case was tried in November 2012, more than three years after the accident, Employee was still feeling pain in his neck and back and was having difficulty walking due to

pain in his legs and feet. In addition, he was having trouble sleeping, was having trouble performing household chores, and could no longer engage in hobbies such as riding a bicycle, playing tennis, or hunting. Further, he could no longer drive a truck or return to farm work, auto body work, or any other type of work in which he had experience. These limitations are significant given Employee was sixty-four years old at the time of trial and had not completed high school.

The trial court also heard the testimony of several lay people who had known Employee for many years. These individuals testified to Employee's difficulty driving, complaints of pain, and lack of participation in former hobbies. This evidence was unrefuted.

Finally, the medical proof supports the trial court's decision. Dr. Allen, Employee's treating physician, testified Employee suffered from a "very large disc herniation that created pretty severe spinal stenosis" caused by the accident. Dr. Gaw testified Employee suffered permanent injuries as a result of the collision, and opined it would be unsafe for him to return to driving a truck. Dr. Fishbein testified his physical examination of Employee "revealed some very significant problems," such as a poor gait, tenderness throughout his lumbar and cervical spine, reduced range of

motion, and atrophy in his left leg. Like Dr. Gaw, Dr. Fishbein believed "it would be very difficult for [Employee] to be in a large 18 wheel truck, with the bounces and the stress of the sitting." This evidence was likewise unrefuted.

Considering the evidence as a whole, we conclude the trial court did not err in awarding six (6) times the total impairment rating. The trial court considered the lay and expert testimony, the factors identified in Tennessee Code Annotated section 50-6-241(d)(2)(A) for assessing vocational disability, and detailed the reasons for awarding the maximum in accordance with Tennessee Code Annotated section 50-6-241(d)(2)(B).[4] However, the court did err by not utilizing the fifty per cent (50%) apportionment of which Dr. Gaw opined, reducing the cervical impairment rating to one per cent (1%). Utilizing the cervical impairment rating of one per cent (1%) and the lumbar impairment rating of seven per cent (7%), the impairment rating to the body as a whole is a total of eight per cent (8%). As such, instead of the fifty-four per cent (54%) permanent partial disability to the body as a whole awarded by the court, the permanent partial disability to the body as a whole is forty-eight per cent (48%).

[4] Tennessee Code Annotated section 50-6-241(d)(2)(B) provides: "[I]f the court awards a permanent partial disability percentage that equals or exceeds five (5) times the medical impairment rating, the court shall include specific findings of fact in the order that detail the reasons for awarding the maximum permanent partial disability."

Before concluding, we note Employee has requested an award of attorney's fees and expenses incurred on appeal. Employee cites no authority in support of his request and fails to make an argument or even explain the basis for the request. "[P]arties must thoroughly brief the issues they expect the appellate courts to consider," Waters v. Farr, 291 S.W.3d 873, 919 (Tenn. 2009) (Koch, J., concurring and dissenting), for it is "not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived," Sneed v. Bd. of Prof'l Responsibility, 301 S.W.3d 603, 615 (Tenn. 2010). Because Employee failed to develop an argument regarding attorney's fees and expenses and did not provide any relevant authority, we deem the issue waived. Even if the issue had been properly raised, we would find the appeal is not frivolous, and thus, this issue lacks merit. See Tenn. Code Ann. § 27-1-122 (if an appeal is "frivolous or taken solely for delay, the court may, either upon the motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal").

## Conclusion

The trial court's finding of two per cent (2%) impairment to the cervical spine, without also including a fifty per cent (50%) apportionment to other causes, is reversed. The Judgment is affirmed in all other respects. Accordingly, this matter is reversed and remanded to the trial court for entry of a judgment to include a total of one per cent (1%) impairment of the cervical spine and eight per cent (8%) impairment to the body as a whole, for a total of permanent partial disability of forty-eight per cent (48%), consistent with this opinion. Costs of this appeal are assessed equally to Employer, and its surety, and to Employee, for which execution may issue if necessary.

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DON R. ASH, SENIOR JUDGE

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
September 23, 2013 Session

**JOHNNIE HUDSON v. PRO LOGISTICS, ET. AL.**

**Chancery Court for Rutherford County**
**No. 10CV1277**

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**No. M2013-00387-WC-R3-WC**
**Filed February 20, 2014**

**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 equally by the Employer, and its surety, and by the Employee, for which execution may issue if necessary.

PER CURIAM