IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2012 Session

LAWRENCE OWSLEY v. CON-WAY TRUCKLOAD, INC. ET AL.

Appeal from the Chancery Court for McMinn County
No. 2010-CV-266 Jerri S. Bryant, Chancellor

No. E2011-02631-WC-R3-WC- Mailed-February 5, 2013 / Filed-March 7, 2013

Pursuant to Tennessee Supreme Court Rule 51, this 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. In this appeal, the employee alleged that he injured his back as a result of a fall from his tractor trailer during the course and scope of his employment. The employer contended that the employee's workers' compensation claim was barred by the affirmative defense of misrepresentation of his physical condition, that a compensable injury had not been sustained and that his permanent partial disability award was excessive. The trial court found that the employee did not intentionally misrepresent his physical condition, that the employee had sustained a compensable injury and that the award should be 70% permanent partial disability benefits. The employer has appealed, contending that the evidence preponderates against each of the trial court's findings. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right; Judgment of the Trial Court Affirmed

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which GARY R. WADE, C.J., and J. S. "STEVE" DANIEL, SP. J., joined.

Jennifer P. Keller and Christie M. Hayes, Johnson City, Tennessee, for the appellants, Con-Way Truckload, Inc. and Travelers Insurance Company.

David H. Dunaway, LaFollette, Tennessee, for the appellee, Lawrence Owsley.

MEMORANDUM OPINION

Factual Background

Lawrence Owsley ("Employee") was employed as a truck driver by Con-Way

Truckload, Inc. ("Employer") on April 8, 2009 when he fell to the ground and injured his lower back while attempting to dismount from the rear of his empty tractor trailer at a truck stop in Niota, Tennessee. Employee felt sharp pain in the middle of his back, but drove to North Carolina, picked up a loaded trailer and drove for several days towards his destination in California. Each day the pain became more severe until he finally had to stop driving in Reno, Nevada. He notified his Employer of his injury and flew back to Tennessee.

Employee initially saw Dr. Kenneth Chapman, an anesthesiologist at Sweetwater Hospital, but was then referred by Employer to Dr. Paul Boulos, a neurosurgeon, who was a member of Neurosurgery & Spine Consultants of East Tennessee PC. Dr. Boulos first saw Employee on July 1, 2009. After examination and testing, his diagnosis was right L5-S1 radiculopathy caused by a disc protrusion on the right. He treated Employee conservatively for a few months with traction and physical therapy, which was ineffective in dealing with the severe pain caused by the inflamed nerve root. There was no improvement. Dr. Boulos then recommended microdiscectomy surgery, i.e. surgical removal of the herniated disc creating pressure on the nerve root on the right, which was performed on October 6, 2009. Employee had modest improvement of his symptoms, but continued to have mechanical low back pain and numbness in his right leg. Finally, in April 2010, Dr. Boulos ordered a functional capacity examination. Based on those findings he placed restrictions on Employee that included lifting no more than twenty pounds frequently and no more than occasional stooping, bending or crouching.

Dr. Boulos testified that the April 8, 2009 fall caused Employee's radiculopathy. He also stated that he was aware that Employee had a prior surgery in 1990 at L5-S1 because of a disc herniation on the left posterior lateral, but the symptoms from the 2009 injury were on the right. Dr. Boulos reviewed a number of MRI reports performed after the 1990 injury and after the April 2009 work injury. It was his opinion that the 2009 work injury had caused an anatomical change in the spine. Dr. Boulos placed Employee at maximum medical improvement on May 17, 2010 and assigned 12% anatomical impairment to the body as a whole as a result of the work injury. Thereafter, in June 2010, Dr. Boulos left Tennessee to practice in Delaware. Employee was referred to Dr. James Fox, a physiatrist, for pain management. Dr. Fox has continued to treat Employee for pain and filed a Form C-32 medical report with the court in which he assigned 3% permanent impairment for pain.

Dr. C. M. Salekin, a neurologist, examined Employee at the request of Employee's attorney. After his examination, he filed a Form C-32 medical report with the court, and Employer exercised its right to take a cross-examination deposition. Dr. Salekin testified that the April 8, 2009 injury had advanced Employee's pre-existing disc injury. He stated that he had reviewed MRI reports before and after the 2009 injury and that both showed right-sided disc protrusions at L5-S1, but the post-2009 injury report referred to the right protrusion as "broad-based." Dr. Salekin assigned 14% permanent anatomical impairment

to the body as a whole. On cross-examination, he stated that he was unaware of the restrictions placed upon Employee after the 1990 injury and had limited knowledge of the treatment of Employee's back problems prior to 2009.

When Employee returned to Tennessee after his injury, he saw Dr. Kenneth Chapman, an anesthesiologist at Sweetwater Hospital, on April 29 and May 6, 2009. Dr. Chapman administered steroid injections. Thereafter, Employer referred Employee to Dr. Boulos, the neurosurgeon. Dr. Chapman, however, had treated Employee earlier at Sweetwater Hospital for back pain from his 1990 back injury from 2000 to 2009. The treatment over a nine-year period included a total of twenty-six epidural steroid injections. Dr. Chapman testified that he reviewed Employee's MRI reports before and after the 2009 work injury and that the injury did not cause an anatomical change. He also testified that Employee was able to work without any restrictions during his nine-year treatment.

Employee and his wife first applied for work in 2007 as a "no touch or drop and hook" truck driver team with Con-Way Truckload at its Memphis office. The terms "no touch or drop and hook" mean the truck driver does not lift any freight. During the application process, Employee and his wife personally met with their employee recruiter, Deena Sandford, and Employee testified that he told her about his 1990 injury to his back and his inability to load freight. He passed a physical examination and was hired in January 2007 as a truck driver and worked until June 2007. During that time he was never required to lift freight. He left the company because of a dispute over reimbursement of trip expenses.

Employee testified that in September 2008, he telephoned Con-Way Truckload to again apply for a job as a truck driver. He said he called from his home in McMinn County, Tennessee to the Memphis, Tennessee office and was referred to the Joplin, Missouri office. A recruiter named Angie Mason answered the phone and conducted a telephone interview. During the interview, Employee stated that he was asked a number of questions about his capabilities, including whether he could lift seventy pounds. He testified that he answered "no" because of his 1990 back surgery, and because he thought they were a "no touch company." He said that Angie Mason responded that they were 99% "no touch." He testified he was never given a copy of the telephone application but he later learned that the application had the answer "yes" to the seventy-pound lifting question. He was then told by Angie Mason to go to Cookeville, Tennessee and complete the application process, including a physical examination. After being approved, Employee began driving in September 2008 and drove until his work injury in April 2009. During that time he was never required to lift any freight.

Dana Smith, a recruiter for Employer, testified that she, not Angie Mason, had conducted the telephone interview with Employee in 2008. Dana Smith denied that Employee had told her about any injury or lifting restriction, and stated that the application

process would have ended if he had made such a disclosure. Angie Mason had worked for Employer in the past but could not be located by Employer. The certificate of Employee's physical examination, signed by him, states he did not have "chronic low back pain" and that he took "occasional naproxen." Employee testified that he did not consider his back pain to be chronic because it did not interfere with his ability to be a truck driver.

At the time of his work-related injury and surgery in 1990, Employee received a workers' compensation award in Florida and was restricted to lifting no more than twenty-five pounds. Although he did not include the restriction in some of his application documents, he testified that he told Employer's recruiters that he could not lift seventy pounds. Employee maintained that he was not restricted at the time of his employment application because the restrictions were imposed in 1990, eighteen years before, and he had worked regularly as a truck driver until his 2009 injury. In addition, Dr. Chapman testified that he placed no work restrictions on Employee from 2000 to 2009.

The named defendant in this case was Con-Way Truckload, Inc. Employee applied for employment with Con-Way Truckload in an office in Memphis, Tennessee in 2007, and in 2008 he applied for employment by telephone with Con-Way Truckload in an office in Joplin, Missouri. Employee testified that he thought it was the same company because it had the same name and assumed that his 2007 disclosures about his surgery and lifting restrictions would be known by the company in Joplin, Missouri. As the trial court noted, there was a merger and Con-Way Truckload, Inc. in Joplin, Missouri was not the same company as Con-Way Truckload in Memphis.

Employee was forty-nine years old when the trial occurred on October 7, 2011. He had a ninth-grade education. He had worked primarily as a truck driver all his life and had been self-employed in that field on two occasions, but had not been successful. Employee had not worked since his work injury in April 2009 and has continued under the care of Dr. Fox for pain management, receiving steroid injections and taking pain medications that include oxycodone and oxycontin. Employee testified that he continues to have severe back pain and that he was not capable of working as a truck driver or performing any of the jobs he had held in the past. His activities are restricted to limited sleep, light housework, walking and watching television.

The trial court found that the misrepresentation defense raised by Employer did not bar Employee's action because he did not make any intentional misrepresentation of his physical condition and because there was no causal relationship between the alleged misrepresentations and his injury. The 2009 work injury was not caused by lifting but rather by a fall from a tractor trailer. The trial court found Employee credible and thought his explanation plausible that he believed he was not restricted since he had been working most of the time since his 1990 surgery. In addition, the court found that it was not unreasonable

for Employee to assume that Employer had knowledge of his 2007 disclosures during the application process since both companies had the same name, i.e. Con-Way Truckload, even though legally they were different companies. The trial court found after examining the medical evidence that the April 8, 2009 work injury had caused an anatomical change and an advancement of Employee's pre-existing spinal condition, which was compensable. The trial court adopted Dr. Boulos' impairment rating of 12% and Dr. Fox's additional 3%, for a total impairment of 15% to the body as a whole. Finally, the trial court found that Employee had sustained a 70% permanent partial disability to the body as a whole. Judgment was entered in accordance with those findings. Employer has appealed, contending that the trial court erred in its findings concerning misrepresentation, causation and extent of disability, and that the evidence preponderates against each of the trial court's findings.

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 evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2012). When credibility and the weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009). "When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues." *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008) (citing *Orrick v. Bestway Trucking Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006)). 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

Misrepresentation

Employer first contends that the trial court erred by finding that Employee did not intentionally misrepresent his physical condition during the application process.

The rationale for, and the elements of, the affirmative defense of misrepresentation of physical condition were set out by our supreme court in *Shelton v. Clevepak Container Corp.* as follows:

> An employer takes a worker as he finds him. Consequently, in making application for employment, the worker is required to give full and truthful information regarding his physical health on inquiry by a prospective employer. And, if the worker knowingly and wilfully misrepresents his physical condition and the employer relies on the misrepresentation in

> employing the worker, the worker will be denied compensation benefits on a showing of a causal connection between the false representation and the injury suffered by the worker.

752 S.W.2d 508, 509 (Tenn. 1988) (citations omitted).

In this case, Employee's injury occurred when he misstepped and fell to the ground while attempting to alight from the trailer of his truck. The medical restrictions placed on Employee as a result of the 1990 work injury primarily dealt with limiting the poundage he was allowed to lift. He was not engaged in lifting when he fell. There was no evidence that Employee's previous back injury placed him at greater risk for such a fall. Accordingly, the trial court correctly found that there was no causal relationship between Employee's failure to completely disclose his medical history during the 2008 application process and his fall from the truck.

Because a causal relationship is a required element of the misrepresentation defense, we find that the evidence does not preponderate against the trial court's finding that the defense does not bar Employee's recovery.

In addition, however, the trial court found that Employee did not intentionally misrepresent his physical condition to Employer. The court found Employee's explanation plausible that he had worked consistently most of the time since his 1990 injury and did not feel that he was restricted from working as a truck driver. The trial court found that he disclosed his back surgery and his seventy-pound lifting restriction to Employer. The court also found that it was not unreasonable for him to assume that Employer had knowledge of his 2007 disclosures during the application process since both employers had the same name, i.e. Con-Way Truckload, even though legally they were different companies.

We note that when credibility and the weight to be given to testimony are involved, considerable deference is given to the trial court when the trial court had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. *Madden,* 277 S.W.3d at 898.

Employee testified in person and the trial court found him credible. As a result we find that the evidence does not preponderate against the trial court's finding that Employee did not intentionally misrepresent his physical condition. Accordingly, the misrepresentation defense is not a bar to Employee's recovery.

Compensability

Employer contends that the trial court erred when it found that Employee sustained his burden of proof in establishing causation of his 2009 work injury. It states that Tennessee

law is well settled that an employee seeking workers' compensation benefits has the burden of establishing the claim by a preponderance of the evidence. *Parker v. Ryder Truck Lines, Inc.*, 591 S.W.2d 755, 759 (Tenn. 1979).

The Tennessee Supreme Court has summarized as follows the standard to be applied in evaluating evidence concerning the issue of causation in workers' compensation cases:

> Generally speaking, a workers' compensation claimant must establish by expert medical evidence the causal relationship between the alleged injury and the claimant's employment activity, [e]xcept in the most obvious, simple and routine cases. The claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses. As we observed in *Cloyd* [*v. Hartco Flooring Co.*], the claimant is granted the benefit of all reasonable doubts regarding causation of his or her injury:
>
> > Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain[.] All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee.
>
> The trial court may properly award benefits based upon medical testimony that the employment could or might have been the cause of the employee's injury when there is also lay testimony supporting a reasonable inference of causation.

Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-75 (Tenn. 2009) (first alteration in original) (citations omitted) (quoting *Cloyd v. Hartco Flooring Co.,* 274 S.W.3d 638, 643 (Tenn. 2008); *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005)) (internal quotation marks omitted).

In examining expert testimony, a judge may consider (a) the qualifications of the experts, (b) the circumstances of the examination, (c) the information available to them, and (d) the evaluation of the importance of that information by other experts. *Cloyd*, 274 S.W.3d at 644.

Employer states that Employee attempted to establish causation through the testimony of Dr. Boulos, his treating physician. Employer points out that Employee admits he did not tell Dr. Boulos about any restrictions resulting from his 1990 injury and surgery, nor his pre-

2009 injury right leg symptoms. Employer asserts that Dr. Boulos knew Employee had received steroid injections in the year 2000, but was unaware that he had received them regularly between 2000 and 2009.

Employer concedes that Dr. Boulos opined that the 2009 work injury advanced Employee's spinal condition and that there was an anatomical change, but argues that Dr. Boulos' opinion was based in part on his review of some, but not all, of the pre-2009 MRI reports rather than examining the actual films.

Employer contends that Dr. Kenneth Chapman had the advantage of examining all of the MRI reports when he testified that no anatomical change had occurred after the 2009 work injury. In addition, Dr. Chapman testified that Employee had bilateral leg pain prior to his 2009 work injury. Employer argues that Dr. Chapman treated Employee both before and after his 2009 work injury, and that his opinion was based on more extensive and reliable information, such that it should have been regarded as more persuasive by the trial judge.

Employer contends that Tennessee law is clear that aggravation of a pre-existing condition which results only in an increase in pain is not compensable. *Cunningham v. Goodyear Tire & Rubber Co.*, 811 S.W.2d 888, 889 (Tenn. 1991). Employer argues that the only clear and competent evidence of causation was Dr. Chapman's testimony that no anatomical change took place and, accordingly, that Employee's 2009 work injury is not compensable.

We note that when there is a conflict between expert opinions, a trial court generally has the discretion to choose which expert to accredit. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990); *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996).

Employee contends that the preponderance of the evidence supports the trial judge's finding of compensability in this case. Among the three medical experts, the trial judge gave the greatest weight to Dr. Boulos, a well-qualified neurosurgeon who was the treating physician. The trial judge commented: "I accept Dr. Boulos' rating at 12% plus I find . . . an additional 3% [based on Employee's pain] for a medical impairment of 15%."

Dr. Boulos first saw Employee on July 1, 2009. After examination and testing his diagnosis was right L5-S1 radiculopathy caused by a disc protrusion on the right at that level in the back.

Dr. Boulos was aware that Employee had some back pain since 2000, which had been treated by his general practitioner, Dr. Chapman, with steroid injections on an approximate six-month basis. There was nothing that kept Employee from working regularly as a truck

driver during that time. Dr. Boulos thought that "the past low back pain was moderate in nature, but certainly nothing compared to what he has now and that he certainly did not have the leg component he has now." Dr. Boulos also noted that "he had the left sided symptoms initially but he presented to us with right sided symptoms."

Dr. Boulos treated Employee conservatively for a few months with traction and physical therapy, which was ineffective in dealing with the severe pain caused by the inflamed nerve root. There was no improvement. He then recommended microdiscectomy surgery, i.e. surgical removal of the herniated disc creating pressure on the nerve root on the right, which was performed on October 6, 2009. Employee had modest improvement of his symptoms, but continued to have mechanical low back pain and numbness in his right leg. Finally, in April 2010, Dr. Boulos ordered a functional capacity examination. Based on those findings, he placed restrictions on Employee including lifting no more than twenty pounds frequently and no more than occasional stooping, bending or crouching.

Dr. Boulos testified that the April 8, 2009 fall caused Employee's radiculopathy. He also stated that he was aware that Employee had a prior surgery in 1990 at L5-S1 because of a disc herniation on the left posterior lateral, but the symptoms from the 2009 injury were on the right.

Dr. Boulos reviewed the MRI performed on April 22, 2009, which revealed an abnormality at the L5-S1 segment causing significant neural foraminal stenosis. He also testified that he received MRI reports dating back to 2000 that showed a disc bulge, but after the work injury of 2009, there was a herniated disc, an inflamed nerve root on the right side and an anatomical change. Dr. Boulos confirmed his interpretation of the April 2009 MRI when he performed the surgery in October 2009.

Dr. Boulos placed Employee at maximum medical improvement on May 17, 2010 and assigned 12% anatomical impairment to the body as a whole as a result of the work injury. Dr. Boulos testified that if Employee's lower back pain did not improve within a year to eighteen months, stabilization fusion surgery should be considered. Dr. Boulos left in June 2010 to practice in Delaware. At the time of trial in October 2011, fourteen months later, Employee's back pain had not improved.

Although the trial court found Dr. Salekin's testimony less persuasive, he assigned Employee a similar anatomical impairment, i.e. 14%, and agreed with Dr. Boulos that the April 2009 work injury had advanced Employee's pre-existing back injury. He also reviewed the MRI reports and testified that the post-2009 injury report referred to the right disc protrusion as "broad based."

Dr. Chapman was an anesthesiologist at Sweetwater Hospital who, as a general

practitioner, had treated Employee for back pain at irregular intervals over a nine-year period before his 2009 work injury. He was not qualified as a neurosurgeon or an orthopedic surgeon. His treatment was limited to epidural steroid injections and some medication. Dr. Chapman testified that Employee was able to work without any restrictions during the nine-year period. He saw Employee shortly after the 2009 work injury and for the first time he was complaining of severe radicular pain. Dr. Chapman again treated him with steroid injections. Employer then referred Employee to Dr. Boulos, a well-qualified neurosurgeon, and Dr. Chapman never saw him again. Dr. Chapman testified that based on his review of the post-2009 injury MRI, "it appeared to be without change from previous findings," and that the work injury did not cause an anatomical change. He, however, conceded that he was not an expert in reading MRIs. Taking all of these factors into consideration, we conclude that the evidence does not preponderate against the trial court's decision to give greater weight to the testimony of Dr. Boulos, and accordingly we find that Employee sustained his burden of proof on the issue of compensability.

Extent of Disability

Employer's final contention is that the award of 70% permanent partial disability benefits is excessive and that the evidence preponderates against the award. Employer points to the twenty-five-pound lifting restriction placed on Employee after his 1990 work injury and contrasts it with the higher weight limit restriction imposed by Dr. Boulos. Accordingly, Employer argues that the 2009 back surgery actually improved Employee's vocational disability. Employer also asserts that Employee presented very little evidence concerning vocational disability.

The extent of an injured worker's permanent disability is a question of fact. *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005) (citing *Jaske v. Murray Ohio Mfg. Co.*, 750 S.W.2d 150, 151 (Tenn. 1988)). In evaluating that issue, the trial court "shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(d)(2)(A) (2008 & Supp. 2012). Further, the injured employee's own assessment of his physical condition and resulting disabilities cannot be disregarded. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 170 (Tenn. 2002); *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn. 1975).

Employee was forty-nine years old at the time the trial took place. He had a ninth-grade education, had worked primarily as a truck driver for most of his adult life and had no specialized job training. The trial judge adopted Dr. Boulos' impairment rating of 12% and Dr. Fox's additional rating of 3% for pain for a total impairment of 15% to the body as a whole. Employee has continued under the care of Dr. Fox, the pain management specialist who continues to prescribe strong pain medication including oxycontin and oxycodone.

Employee testified that he continues to have severe back pain and that he is not capable of performing any of the jobs he held in the past. His activities are extremely limited. The trial court found him credible. Dr. Boulos testified if he did not improve in a year to eighteen months, stabilization fusion surgery should be considered, which would cause even greater disability. Employer's witnesses testified that any medical restrictions would disqualify an applicant for a driving position from consideration. In our view, these facts provide a sufficient basis for the trial court's award of 70% permanent partial disability benefits, and the evidence as a whole does not preponderate against that finding.

Conclusion

The judgment is affirmed. Costs are taxed to Con-Way Truckload, Inc., Travelers Insurance Company and their surety, for which execution may issue if necessary.

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E. RILEY ANDERSON, SP. J.

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE, TENNESSEE
October 22, 2012 Session

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McMinn County Chancery Court
No. 2010-CV-266

No. E2011-02631-WC-R3-WC

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 Opinion of the Panel should be accepted and approved; and

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

The costs on appeal are taxed to Con-Way Truckload, Inc., Travelers Insurance Company and their surety, for which execution may issue if necessary.

PER CURIAM