

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

September 27, 2010 Session

RICHARD BLANKENSHIP v. ACE TRUCKING, INC., ET AL.

Appeal from the Probate Court for Humphreys County

No. P-1355-03 Anthony Sanders, Judge

No. M2010-00597-WC-R3-WC - Mailed - January 26, 2011

Filed - April 14, 2011

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. In 2002, the employee was involved in a motor vehicle accident in the course and scope of his employment. The employee filed suit for benefits. The employer disputed the claim, asserting that the employee had failed to give proper notice and had not sustained any permanent injury as a result of the accident. The trial court awarded benefits, and the employer has appealed. After careful review, we affirm the judgment of the trial court.

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

SHARON G. LEE, J., delivered the opinion of the Court, in which JON KERRY BLACKWOOD, SR. J., and JERRI S. BRYANT, SP. J., joined.

David M. Rich, Nashville, Tennessee, for the appellants, Ace Trucking, Inc. and Ace Trucking Company, Inc.

Terry Leonard, Camden, Tennessee, for the appellee, Richard Blankenship.

MEMORANDUM OPINION

Factual and Procedural Background

Richard Blankenship (“Employee”) began working for Ace Trucking, Inc. (“Employer”) in July of 2001 as an over-the-road truck driver. He was involved in a motor vehicle accident in Missouri on May 17, 2002, when the tractor-trailer he was driving was caught by a crosswind, jackknifed, crossed over the median into the oncoming lane of travel, and overturned. Employee testified that he ended up lying on the passenger side of the truck and had to climb out the driver’s door. Employee declined medical treatment at the scene. Employee called Employer’s president after the wreck and reported the damage to the vehicle and requested transportation from Missouri to Tennessee. The president told him he would have to find his own way home. Employee told the president that he was sore all over, had a knot on his head, and that his back and right side hurt. Employee admitted later telling a representative of Employer that the only thing he hurt was his pride.

Employee’s parents traveled to Missouri to bring him back to Tennessee. His father testified that Employee complained of back pain and that he laid in the back seat most of the way home. A company representative told Employee to take a few days off to recover. After several days, Employee called Employer and reported that he was still hurting and having back problems; again he was told to stay off work for a couple more days. A few days later, Employee called Employer and was offered an opportunity to drive a load to Detroit, Michigan. He said he would try, but later decided he was not able to drive the load to Detroit. He called Employer and said that he was still having back problems, needed to see a doctor, and could not take the load. Employer fired Employee shortly thereafter. Employer never offered Employee a panel of doctors, medical treatment, or any temporary total disability.

On June 14, 2002, Employee applied for a job with Arnold’s Fabricating & Machine, Inc. (“Arnold’s Fabricating”). On his job application, he stated that he had no physical defects which would prevent him from performing any work for which he was being considered, and also that he had never been injured. At trial, Employee admitted that these statements were untrue and explained that he made these statements because he was trying to provide for his family and needed to work. Employee was hired by Arnold’s Fabricating to drive an equipment truck. He could not do all the things they wanted him to do, and he was terminated from that job after a period of time.

From January/February 2003 through June 2005, Employee worked for several trucking companies. He frequently changed jobs, and often the change was due to his back problem. In August 2005, Employee applied for a job as a custodian at the Henry County

Medical Center (“Henry County”) and was hired in September 2005. On the Henry County job application, he stated in answer to a health question that he had no diseases of the spine, no problems with his back, and no conditions which would interfere with his ability to perform his job duties. Employee admitted at trial that these statements were untrue.

Employee first sought medical treatment for his back injury on January 8, 2003, when he saw Dr. Roy Dedmon, a chiropractor in Camden, Tennessee. He explained at trial that he did not seek treatment sooner because he could not afford to pay the charges and did not have health insurance until he went to work for Arnold’s Fabricating. He reported to Dr. Dedmon that he was having low back pain, neck pain and stiffness, headaches, and shoulder and knee pain arising from an accident in St. Louis, Missouri, on May 17, 2002, when his truck overturned. He was thrown onto the right side of the truck and had bruising on his back and knots on his forehead. His pain had been “constant and progressively worse.” Dr. Dedmon treated Employee on January 8, 2003; January 15, 2003; January 22, 2003; February 3, 2003; and February 18, 2003.

On June 2, 2005, Employee consulted Dr. Carl Spivak, a neurosurgeon in Jackson, Tennessee. Employee’s chief complaint was “severe back pain with minor right leg pain.” He told Dr. Spivak that the back pain developed after he was in a truck wreck in May of 2002. Since that time, the pain became progressively worse and at the time of the examination was constant. The pain in his back radiated into his right leg. Dr. Spivak ordered an MRI of the lumbar spine, which showed multilevel degenerative disc disease and a herniated disc at the L4-5 level causing compression of the left L5 nerve root.

On December 17, 2005, Employer injured his back while at work for Henry County. On December 30, 2005, he returned to Dr. Spivak who ordered a new MRI study. On January 18, 2006, Employee saw Dr. Manuel Weiss, a neurosurgeon in Nashville, Tennessee. Employee reported to Dr. Weiss he was having back pain and pain down his left leg. Dr. Weiss compared the January 2006 MRI with the June 2005 MRI and stated in his medical records: “I do believe that this patient developed the actual, frank disc herniation as a result of this most recent injury at the workplace as a custodian, and that the previous June 2005, MRI scan demonstrates only non-surgical, modest, protrusion.” Dr. Weiss performed back surgery on Employee on March 14, 2006. He released Employee from his care on June 19, 2006, assigned a 10% impairment, and placed him under restrictions against repetitive bending and stooping and lifting more than forty pounds. Employee attempted to return to work for Henry County but left after only a day or two because of back pain. He later settled his workers’ compensation claim against Henry County.

Dr. Samuel Chung, an osteopathic physician, performed a medical evaluation at the request of Employee’s attorney on March 29, 2007. He completed a written report, which

was submitted to the trial court through a C-32 form as provided for in Tennessee Code Annotated section 50-6-235. He diagnosed Employee as having “[r]esidual from low back injury with some radiculopathy of the left lower extremity” as a result of the May 2002 truck accident. He opined that Employee had sustained an 8% permanent impairment as a result of that injury. Employer deposed Dr. Chung pursuant to Tennessee Code Annotated section 50-6-235. Dr. Chung conceded that the first medical documentation of Employee’s back problems was contained in the January 2003 notes of Dr. Dedmon. He testified that most patients seek medical attention fairly soon after their injury but that “everyone’s situation is a little different at times.” He related that Employee told him that he was having the back problem “all long, he just didn’t have any insurance coverage . . . I don’t think that it all resolved and then three years later he just went in to see a doctor and got an x-ray and it was positive and he wanted something done, it was really there all along unfortunately.” He stated that it was “difficult to assess” the relationship between the findings of the June 2005 MRI and the May 2002 accident because of the three-year time interval. He stated that he relied primarily upon the history given to him by Employee to reach his conclusions concerning the effects of the May 2002 injury.

Dr. Robert Dimick, an orthopaedic surgeon, performed a medical evaluation of Employee on October 4, 2007, at Employer’s request. Dr. Dimick testified by deposition that he could not attribute any symptoms or any of the anatomical conditions referenced in any of the diagnostic reports or medical records from Dr. Spivak, Dr. Weiss, or Dr. Dedmon to the May 17, 2002, truck accident. Dr. Dimick also added that Employee had no impairment or work restrictions due to the May 2002 motor vehicle accident.

Employer presented proof that on August 27, 2002, Employee was examined by his primary care physician, Dr. Jason Hollingsworth, for recertification of his commercial driver’s license (“CDL”). Employee completed a questionnaire concerning his health history in which he stated he had not had any illnesses or injuries during the previous five years and did not have “spinal injury or disease” or “chronic low back pain.” At trial, Employee admitted that these statements were untrue. He explained he gave these answers because he had to keep his CDL certification and could not lose his job because it was the only livelihood he had at the time. Dr. Hollingsworth’s report stated that Employee had no spine or other musculoskeletal problems. In May 2005, Employee returned to Dr. Hollingsworth for another CDL recertification. Once again, he stated in the health history portion of the CDL questionnaire that he did not have any spinal injury, disease, or low back pain. Employee testified that he had made these statements in an effort to keep his CDL certification. This time, Dr. Hollingsworth determined that Employee was “temporarily disqualified due to back pain.”

Employee was forty-three years old at the time of trial, had completed the tenth grade, and obtained his GED. His work experience consisted primarily of working in restaurants and warehouses and driving trucks. At the time of the trial, he was employed at Cornerstone, a home health care agency. His job consisted of “watch[ing] people at night and mak[ing] sure they are okay, just tak[ing] care of them and feed[ing] them their lunch and breakfast and whatever it is they need.” He testified he was unable to return to work as a truck driver because his back “[wouldn’t] allow [him] to do so.” He testified his back was better after the 2006 surgery, but “still bother[ed] [him] from time to time.” Employee’s father testified that before the May 2002 accident, his son had never complained of back pain. After the accident, however, his son complained of pain in his back and leg all the time.

Employee filed this action on January 3, 2003. After Employer’s answer was filed in March 2003, there was no further substantive activity in the lawsuit until July 2006, when Employer filed a motion to dismiss for failure to prosecute. The motion was withdrawn when Employee agreed to a scheduling order. A second motion to dismiss for failure to prosecute was filed in February 2007. Employee then filed a motion to set, and the trial court entered an order requiring Employee to complete his medical proof by April 30, 2007. Over a year later, on May 13, 2008, an order was entered setting the case for trial on July 1, 2008. Following a trial, the trial court issued some findings from the bench and *sua sponte* ordered that the proof would remain open to permit Employee to provide additional evidence concerning the reasonableness and necessity of certain medical expenses. The trial court also requested that the parties provide proposed findings of fact and conclusions of law. On January 8, 2010, the trial court entered its “Memorandum of Opinion,” which essentially adopted Employee’s proposed findings and conclusions of law. It found that Employee had sustained a compensable injury which had resulted in an 8% anatomical impairment to the body as a whole and awarded 40% permanent partial disability (“PPD”) to the body as a whole. 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 evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness’ demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (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). 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

Notice

Employer contends that the trial court erred by finding that Employee provided sufficient notice of his injury to comply with Tennessee Code Annotated section 50-6-201(a), which provides that “every injured employee . . . shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury . . . unless reasonable excuse for failure to give the notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.”

Employer argues that Employee did not notify Employer that he had been injured in the truck wreck, relying on Employee's testimony that he refused medical treatment at the scene, told a representative of Employer that he had only injured “his pride” in the accident, and delayed seeking medical treatment for seven months. Employee testified at trial, however, that after the tractor-trailer he was driving jackknifed and overturned, he called and reported the accident to the president of Employer. Employee told him that he was sore all over, had a knot on his head, and that his back and side hurt. Following his return home from Missouri, he also told a representative of Employer that he was in pain, could not work, and needed to see a doctor. Employer introduced no evidence to contradict Employee's testimony that he reported his injuries to Employer.

Given the circumstances of the accident and Employee's testimony, we conclude that the evidence does not preponderate against the trial court's findings on this issue. Employee notified Employer of the accident and the fact that he had suffered an injury. Employee was not required to provide to Employer information as to the extent of the injury in the initial report of injury. Quaker Oats Co. v. Smith, 574 S.W.2d 45 (Tenn. 1978). The trial court accepted the Employee's account as credible, and the evidence does not preponderate against this finding. See State Dept. of Children's Servs. v. A.M.H., 198 S.W.3d 757, 762 (Tenn. Ct. App. 2006) (stating “[o]n an issue which hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings”) (quoting Galbreath v. Harris, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990)).

Compensable Injury

Employer contends that the evidence preponderates against the trial court's finding that Employee sustained a compensable injury as a result of the May 2002 accident. In support of this contention, Employer relies on the contradictory statements made by Employee to subsequent employers and to Dr. Hollingsworth about the accident and the condition of this back. Although Employee claims he injured his back in the May 2002 accident, he stated in a June 14, 2002, job application to Arnold's Fabricating that he had no physical defects which would prevent him from performing any work for which he was being considered, and also that he had never been injured. He also made a similar denial of a back problem when he applied for a job in August 2005 with Henry County. In August 2002 and again in 2005, Employee went to Dr. Hollingsworth for a medical examination for Employee's CDL and told the doctor that in the previous five years, he had not suffered any spinal or other injuries. The first evaluation or treatment of any sort that Employee sought or received for his alleged injuries was in January 2003. After treating with Dr. Dedmon until February 18, 2003, he did not seek or receive treatment again until June 2005, when he consulted Dr. Spivak. Dr. Hollingsworth, after examining Employee for his CDL, stated that Employee had no spine or other musculoskeletal problems. In Dr. Hollingsworth's subsequent examination of Employee in May 2005, after Employee's injury while working for Henry County, he found that Employee was temporarily disqualified due to back pain.

In support of the trial court's ruling, Employee notes that the trial court found him to be a credible witness. Employee explained that he delayed seeking medical treatment after the accident because Employer terminated him, he did not have the money to pay for the treatment, and he did not have any medical insurance until he went to work for Arnold's Fabricating. Employer offered him no medical treatment, no panel of doctors, and no temporary disability benefits. Employer admitted making contradictory statements on his job applications to Arnold's Fabricating and Henry County about his back condition because he needed the jobs to support his family. He also admitted the false statements to Dr. Hollingsworth because he needed to get his CDL to make a living. Further, he points to his own testimony and that of his father concerning his lack of symptoms before the May 2002 wreck and his back problems after the wreck.

Employer also argues that the testimony of Dr. Chung, the only expert medical evidence of a causal link between the May 2002 accident and a permanent injury, is unreliable or less credible than that of Dr. Dimick. First, it notes that Dr. Chung is an osteopath without hospital privileges and not an orthopedic surgeon. Employer asserts that Dr. Chung did not examine Employee until almost five years after the May 2002 accident, after he had sustained a second injury, which resulted in surgical treatment. In light of the passage of time and the intervening events, Employer asserts that Dr. Chung's opinions about

the effects of the 2002 accident are speculative. It also notes that Dr. Chung's opinion is based almost entirely upon Employee's 2007 statements concerning his symptoms between 2002 and 2005, and that that information was unreliable in light of Employee's numerous admitted misrepresentations on that subject. Finally, Employer points to Dr. Weiss's remark, contained in his initial evaluation of Employee, that based upon a comparison of the June 2005 and January 2006 MRI scans, the injury at Henry County had objectively worsened the condition of Employee's spine. Employer also contends that Dr. Dimick had access to a larger amount of information about Employee than did Dr. Chung.

Admittedly, the evidence in this case presents a close question. Employee was obviously involved in a serious vehicular accident. The tractor-trailer he was driving jackknifed, crossed the median, and overturned. He was thrown to the passenger side of the tractor. He reported being sore all over and having head, back, and right side pain after the wreck. He related to Dr. Dedmon and Dr. Spivak that his back pain started as a result of the truck accident and got worse over time. He explained his delay in getting medical treatment on a lack of money and lack of insurance to pay for the treatment. Employer did not provide to Employee "such medical care and treatment made reasonably necessary" by the accident as required by Tennessee Code Annotated section 50-6-204. Therefore, Employee was left to his own limited resources in getting medical treatment. Employee's testimony that he injured his back in the wreck was supported by his father's testimony that Employee did not complain of back pain before the wreck but after the wreck complained of pain in his back and legs all the time. Employee was not truthful on his job applications to Arnold's Fabricating and to Henry County. His explanation that he needed to work to support his family certainly does not excuse his dishonesty, but it does explain why he denied having a back problem. Employee was also not truthful with Dr. Hollingsworth. Again, his desire to keep his CDL so he could work as a truck driver does not excuse his dishonesty, but it does explain his answers.

Dr. Chung opined that Employee sustained a permanent injury as a result of the accident. The medical proof in this case is complicated by the fact that Dr. Chung's examination of Employee did not take place until after Employee had sustained another injury to, and had surgery to, the same part of the body injured in the May 2002 accident. We note, however, that the June 2005 MRI scan established the presence of a herniated disc before Employee's December 2005 work injury at Henry County.

Although the evidence as a whole would permit a trial court to reach a different conclusion than the one here, we must defer to the trial court's findings of fact and conclude that the evidence does not preponderate against the trial court's finding that Employee sustained a permanent injury as a result of the May 2002 accident.

Employer contends, in the alternative, that the trial court erred by accepting Dr. Chung's impairment rating (8%) over that of Dr. Dimick (0%). Dr. Chung and Dr. Dimick arrived at different opinions in this cause. When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. Hinson v. Wal-Mart, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). We do not find that the trial court abused its discretion in accepting Dr. Chung's opinion over that of Dr. Dimick, considering all the evidence in this case.

Excessive Award

Employee did not have a meaningful return to work for Employer. Therefore, under Tennessee Code Annotated section 50-6-241(b) (2008), Employee's award of benefits is capped at six times the medical impairment rating. The trial court awarded Employee five times the medical impairment rating, resulting in 40% permanent partial disability to the body as a whole. Employer contends that this award is excessive and asserts that after the May 2002 injury, Employee "maintained a high vocational aptitude," was consistently employed after being terminated by Employer, and was working at the time of trial.

The extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179 (Tenn. 1999). 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 his on her disabled condition. E.g., Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995). The employee's own assessment of his physical condition and resulting disability is competent testimony that should be considered as well. Id.

Evidence was presented that Employee was forty-two years old at the time of trial, has a GED, and a job history of working as a truck driver, in warehouses, and in restaurants. He testified that he could not go back to his job of driving a truck because of his back. At the time of his injury he was earning an average weekly wage of \$761 per week and at the time of trial he was working in a home health care agency earning only \$7 per hour. Employee has not been able to hold down a job as a truck driver since the accident, and his earnings have been greatly diminished. Employee worked a series of jobs after the accident and changed jobs frequently because he was unable to perform the duties required of him. The trial court saw and heard the witnesses and considered lay and expert testimony in arriving at its decision. Considering all the evidence in this case, we conclude that the evidence does not preponderate against the trial court's decision.

Reopening the Proof

At trial, Employee attempted to offer several medical bills into evidence without presenting proof that they were reasonable or necessary. Employer objected on the ground that there had been no proof of the reasonableness or necessity of the treatments involved. The trial court sustained the objection, and the items were marked for identification only. At the end of the trial, the court, *sua sponte*, left the proof open for the specific purpose of permitting Employee to obtain proof of the reasonableness and necessity of the expenses. Employee did so, and the trial court awarded Employee the medical expenses.

An employer is required to provide “such medical care and treatment made reasonably necessary” by a compensable accident. Tenn. Code Ann. § 50-6-204(a)(1)(A). The employee is required to establish the “necessity and reasonableness” of charges incurred for treatment that has not been designated or approved by the employer. Russell v. Genesco, Inc., 651 S.W.2d 206, 210 (Tenn. 1983); Baggett v. Jay Garment Co., 826 S.W.2d 437, 439 (Tenn. 1992). Employee, therefore, had the burden to prove the necessity and reasonableness of his medical bills.

We do not find that the trial court erred in allowing Employee to submit additional proof. It is within the discretion of the trial court to allow additional proof after a party has rested its case. As our Supreme Court has stated, “[i]t is within the discretion of the trial judge to decide whether to reopen the proof for further evidence, and the decision of the trial judge thereon will not be set aside unless there is a showing that an injustice has been done.” Simpson v. Frontier Cmty. Credit Union, 810 S.W.2d 147, 149 (Tenn. 1991) (citing Higgins v. Steide, 335 S.W.2d 533, 540 (Tenn. 1959)); see also Psalms, Inc. v. Pretsch, No. W2008-00653-COA-R3-CV, 2008 WL 5424084, at *7 (Tenn. Ct. App. Dec. 31, 2008). The procedure followed by the trial court in this case was not an abuse of discretion.

Trial Court’s Findings and Conclusions

Employer argues that the trial court erred by adopting Employee’s proposed findings and conclusions, essentially verbatim, eighteen months after trial. The Supreme Court in Delevan-Delta Corp. v. Roberts, 611 S.W.2d 51 (Tenn. 1981), stated

We agree that the preparation of findings and conclusions is a high judicial function. We are committed to the requirement that the trial court’s findings and conclusions be its own. However, we are also aware that the thorough preparation of suggested findings and conclusions by able counsel can be of

great assistance to the trial court. In an effort to strike a balance between these considerations, we hold that although it is improper for the trial court to require counsel to prepare findings, it is permissible and indeed sometimes desirable for the trial court to permit counsel for any party to submit proposed findings and conclusions. Findings prepared by the trial judge which represent his independent labor are preferable, however we do not disapprove of party-prepared findings. . . . We wish to point out that before adopting findings prepared by counsel, the trial judge should carefully examine them to establish that they accurately reflect his views and conclusions, and not those of counsel. He should also ascertain that they adequately dispose of all material issues, and to assure that matters not a proper part of the determination have not been included.

Id. at 52-53. The procedure followed by the trial court was, therefore, permissible. However, we note that the entire context of the case, including the five-year period between the filing of the complaint and the commencement of the trial, despite the efforts of Employer to push the matter forward and the passage of an additional eighteen months between the conclusion of the trial and the trial court's verbatim adoption of Employee's proposed findings and conclusions, is troubling. Although the trial court's management of this case does not constitute reversible error, we find that it was inconsistent with the trial court's obligation to expedite workers' compensation matters. See Tenn. Code Ann. § 50-6-225(f). Delay in workers' compensation cases is not favorable to either party and should certainly be avoided.

Incorrect standard of evaluating the evidence

In its memorandum opinion, the trial court stated that it reviewed the evidence "in the light most favorable to employee." We agree with Employer that this is a misstatement of the law. However, it does not constitute reversible error in this case. We have examined the evidence in accordance with the appropriate standard and found it sufficient to support the judgment.

Conclusion

The judgment is affirmed. Costs are taxed to the appellants, Ace Trucking, Inc., and Ace Trucking Company, Inc., and their surety, for which execution may issue if necessary.

SHARON G. LEE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
September 27, 2010 Session

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Probate Court for Humphreys County
No. P-1355-03

No. M2010-00597-SC-WCM-WC - Filed - April 14, 2011

JUDGMENT

This case is before the Court upon the motion for review filed by ACE Trucking, Inc. and ACE Trucking Co., Inc. pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to ACE Trucking, Inc. and ACE Trucking Co., Inc., and their surety, for which execution may issue if necessary.

LEE, J., NOT PARTICIPATING