IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 23, 2010 Session

TIMOTHY RUSKIN v. LEDIC REALTY SERVICES, LTD.

Appeal from the Chancery Court for Shelby County
No. CH-08-0641 Kenny W. Armstrong, Chancellor

No. W2009-02595-WC-R3-WC - Mailed January 19, 2011; Filed February 25, 2011

In this workers' compensation action, the employee, Timothy Ruskin, worked as a maintenance technician for Ledic Realty Services, Ltd. (Ledic), which managed several apartment buildings. Mr. Ruskin was injured while responding to an after-hours call from a tenant of one of the apartment buildings. In response to his compensation claim, Ledic asserted as an affirmative defense that Mr. Ruskin's injuries resulted from his intoxication. After a hearing, the trial court ruled in Ledic's favor, and Mr. Ruskin appealed.[1] We affirm the judgment of the trial court.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and TONY CHILDRESS, SP. J., joined.

Joseph Michael Cook, Germantown, Tennessee, for the appellant, Timothy Ruskin.

R. Scott Vincent (on appeal and at trial), Tracy A. Overstreet (on appeal), and Candice Hargett-Laine (at trial), Memphis, Tennessee, for the appellee, Ledic Realty Services, Ltd.

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[1] 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.

Gary C. McCullough and Curtis H. Goetsch, Germantown, Tennessee, for the intervenor, Shelby County Health Care Center d/b/a/ Regional Medical Center.

MEMORANDUM OPINION

Factual and Procedural Background

Ledic manages several residential apartment buildings in downtown Memphis, Tennessee. Mr. Ruskin, a maintenance technician, provided varied repair and upkeep services in those buildings. His normal working hours were Monday through Friday, 8 a.m. to 5 p.m. During his non-working hours, however, he remained on call to provide service to tenants with problems requiring immediate attention. As part of his compensation, he lived in an apartment at Gayoso House, one of the three buildings that he serviced.

It is undisputed that Mr. Ruskin was injured while responding to an "after hours" call on Sunday, September 2, 2007. At approximately six o'clock that evening, he received a request to assist Kamarious Butler, a tenant of the Adler Hotel Apartments. Mr. Butler reported that he dropped his keys into the elevator shaft of the building and was locked out of his apartment. Mr. Ruskin obtained the tools he thought he needed to retrieve the keys and walked two or three blocks to the Adler building, where he met Mr. Butler.

Mr. Ruskin sent the elevator to the third floor of the building and "locked it out," so that it would not operate.[2] He manually opened the elevator doors on the first floor, climbed down a ladder affixed to the wall of the elevator shaft, and retrieved Mr. Butler's keys. There was a standard fee of twenty-five dollars for "lock-out" service. Mr. Butler took the stairs to his apartment to obtain the money to pay the fee. Mr. Ruskin apparently followed him. When Mr. Butler came out of his apartment with the money, Mr. Ruskin was climbing the last flight of stairs to the third floor. Before reaching the third floor, Mr Ruskin fell backwards over the handrail and sustained numerous injuries including a closed head injury, fractures of the femur, pelvis, several ribs, and cervical and lumbar vertebrae. Mr. Ruskin was hospitalized at the Regional Medical Center at Memphis (the "Med") for approximately six weeks, and spent an additional two weeks in outpatient rehabilitation.

Mr. Ruskin filed a claim for workers' compensation benefits. Ledic's insurer denied the claim on the ground that Mr. Ruskin's injuries were caused by intoxication and that recovery was therefore barred by Tennessee Code Annotated section 50-6-110(a) (2008). In the alternative, Ledic contended that recovery was barred because Mr. Ruskin's injuries

[2] There is some conflict in the evidence as to whether Mr. Ruskin rode the elevator to the third floor and then walked down, or simply sent the elevator to the third floor and turned it off.

were the result of willful misconduct. See Tenn. Code Ann. § 50-6-110(a). Specifically, Ledic asserted that Mr. Ruskin disregarded its rules by responding to an after-hours assignment after he had been drinking.

Mr. Ruskin filed a complaint in Shelby County Chancery Court.[3] Upon Mr. Ruskin's motion, the trial court conducted a bifurcated trial. During the compensability phase of the trial, Mr. Ruskin testified that Sunday, September 2, 2007, was the day before Labor Day. He was scheduled to be off work on Saturday, Sunday, and Monday, but remained on call. He testified that, on Saturday, September 1, he went to a farmer's market with Diane Raines. Ms. Raines was his girlfriend and resided with him at Gayoso House. Upon their return, he received a maintenance call concerning the air conditioning of an apartment at the Adler building. He and Ms. Raines both went to the apartment. Mr. Ruskin testified that the tenant had corrected the problem by the time he arrived. The tenant, Darius Townsend, testified that Mr. Ruskin was stumbling and his speech was slurred. Mr. Townsend believed him to be intoxicated. He also believed Ms. Raines was intoxicated. The next day, Mr. Townsend called the manager of the apartments, Sandra Gorman, to complain about the condition of Mr. Ruskin and Ms. Raines. On cross-examination, Mr. Townsend stated that he did not smell alcohol on Mr. Ruskin's breath at the time of the maintenance call.

Mr. Ruskin denied that he had consumed any beer or other intoxicant before going to Mr. Townsend's apartment. He testified that, after leaving Mr. Townsend's apartment, he drank some beer at his apartment, and he and Ms. Raines went to a music festival that was being held nearby, where he had more beer. Mr. Ruskin estimated that he drank five beers altogether on Saturday.

Mr. Ruskin testified that on Sunday morning, he and Ms. Raines hung pictures in their apartment. They ate lunch and he had a beer at about one o'clock. They repotted some plants in the courtyard of their building, and Mr. Ruskin testified that he returned to the apartment and drank another beer. He then washed Ms. Raines' automobile. He and Ms. Raines had supper, and she left to care for her invalid mother. Mr. Ruskin watched a NASCAR race on television, during which he had two more beers. He received the call from Mr. Butler and proceeded to the Adler building. He remembers arriving at the building but remembers nothing else until awakening in the hospital some weeks later.

[3] After Mr. Ruskin filed his workers' compensation complaint, the Med intervened "to protect its interest in obtaining reimbursement for the medical services rendered" to Mr. Ruskin. Upon its dismissal of Mr. Ruskin's claim, the trial court also dismissed the Med's intervenor complaint. The Med filed its brief in this appeal to protect its interests in the event Mr. Ruskin prevailed before this Panel.

Mr. Ruskin testified that he was not intoxicated at the time of his injury. He denied that he had been intoxicated at any time within the last fifteen years. Mr. Ruskin testified that he normally consumed one forty-ounce bottle of beer every other day. When the trial court asked him directly whether he was "a heavy drinker prior to the accident," Mr. Ruskin responded, "No, I wasn't."

Ms. Raines testified concerning Mr. Ruskin's drinking habits. She had lived with him for about nine years. She said that he "would have a beer when he came home from work and we would maybe have one for dinner." She had seen him intoxicated on one occasion, in 2001. She testified that, on the date of his injury, he had consumed four beers between one o'clock in the afternoon and five o'clock, when she left to take care of her mother. She denied that he was intoxicated or impaired when she last saw him.

Mr. Butler was an eleventh grade English teacher with the Memphis City Schools and a member of the Army National Guard. He testified that he was waiting outside the Adler building when Mr. Ruskin arrived on September 2. He described the procedure that Mr. Ruskin followed to turn off the elevator, climb down the shaft, and retrieve his keys. Mr. Butler testified that Mr. Ruskin "stumble[d] a little bit getting off the ladder and I remember thinking either he's drunk or clumsy." Mr. Butler also stated he waited on the first floor with Mr. Ruskin for the elevator to return. At that time he observed that Mr. Ruskin's "equilibrium seemed to be off a little bit, he kind of swayed a little bit while he was standing there." He also stated that Mr. Ruskin smelled of alcohol. As previously described, Mr. Butler decided to take the stairs to his third-floor apartment to get the money to pay the lock-out fee. Mr. Butler testified that Mr. Ruskin was ascending the last flight of stairs as Mr. Butler came out of his apartment. Mr. Ruskin gripped the right handrail, leaned backwards, and made a remark about twisting his ankle. Mr. Butler described Mr. Ruskin's actions as follows:

> Well, he seemed to be struggling a little bit to make it up the stairs. I asked him if he needed some help and he said no, he was okay and he was walking pretty slow and I remember observing him, he was holding onto the railing, he was wiggling his left ankle or his left foot around. I asked him twice if he needed some help and he said he was okay and he continued to walk up but I was concerned with the way he was -- it was like he was holding onto the rail but he was leaning back and it kind of concerned me a little bit.

Mr. Butler later offered the following details:

> [The] thing that was odd to me about him balancing himself and holding his leg out in front of him, the rail is here on his right side, he didn't just hold his

> left foot out in front of him this way (indicating), he was leaning back over the railing this way and holding his foot out that way towards the other wall (indicating), that was the thing that was odd to me that he would lean back over the rail instead of straight back like this. When he was holding his left foot out in front, it wasn't like this, it was here, leaning that way back over the rail, that is what prompted me to say do you need some help because I feared that he would fall over the rail.

Because of his concern that Mr. Ruskin would fall, Mr. Butler put his money in his pocket in preparation to help him. Before Mr. Butler could assist him, Mr. Ruskin's "eyes kind of rolled back in his head," and he fell backwards over the railing, coming to rest on a landing approximately twenty feet below. Two other residents of the building reached Mr. Ruskin before Mr. Butler, so Mr. Butler decided to run to a nearby fire station to get help. Mr. Butler testified that he was with Mr. Ruskin for approximately twenty minutes before the fall occurred. Based upon his observations, Mr. Butler believed that Mr. Ruskin was intoxicated at the time.

On cross-examination, Mr. Butler stated that he had never met Mr. Ruskin before the day of the injury. As a result, he had no knowledge of Mr. Ruskin's agility or balance. He stated that Mr. Ruskin's eyes were not bloodshot, his speech was not slurred, and described the odor of alcohol as "a hint of alcohol on his breath."

Sandra Gorman, the manager of the apartment complex, testified that Mr. Ruskin was a good worker. She had received no complaints about his work until the phone call from Mr. Townsend. She testified that Mr. Ruskin had been instructed not to answer off-hours calls if he had been drinking. In that event, the calls would be directed to Mr. Ruskin's supervisor, Kerry Helms, or to Ms. Gorman. She had visited Mr. Ruskin at the hospital on the night of the accident, and he did not smell of alcohol. She stated that, on a previous, unspecified date she and Mr. Helms had counseled Mr. Ruskin after smelling alcohol on him during working hours. Ms. Gorman also testified that she requested the hospital to test Mr. Ruskin's blood alcohol level, but no such test was given.

Kerry Helms, Mr. Ruskin's immediate supervisor, confirmed that Mr. Ruskin was a good worker and that he and Ms. Gorman had counseled him after smelling alcohol about his person during work hours. He also stated that he had verbally instructed Mr. Ruskin not to enter the elevator shaft for any reason.

Steven Phillips testified that he was the EMT who transported Mr. Ruskin from the scene of the accident to the hospital. He testified that he had placed the notation "PT ETOH" on the EMT records. He explained that this notation meant that he had reason to believe Mr.

Ruskin had been drinking prior to his injury, but that it did not indicate that he had an opinion that Mr. Ruskin was intoxicated. He placed the notation in the record because Mr. Ruskin smelled of alcohol and told him that he consumed two beers earlier in the day.

Dr. George Maish, a trauma surgeon, testified by deposition. He was Mr. Ruskin's attending physician during his stay at the Med. He was questioned concerning notations in the emergency room admission record that described Mr. Ruskin as intoxicated. Dr. Maish said that those notations were made by a member of the trauma team, most likely by Joe Parks, a surgical resident. He did not know the reason for Dr. Parks's notation. The same record contained a notation that Mr. Ruskin consumed eight to ten beers per day. Dr. Maish stated that information was probably placed on the record by a nurse in the Emergency Room and that he did not know the source of that information. He also noted that the records reflected that Mr. Ruskin developed symptoms of alcohol withdrawal a few days after his admission to the hospital. An "alcohol drip" was initiated, which relieved those symptoms. Mr. Ruskin was gradually weaned off of the alcohol drip. On cross-examination, Dr. Maish confirmed that Mr. Ruskin sustained a traumatic brain injury, and that the effects of such an injury can mimic intoxication.

Mr. Ruskin was examined by a urologist, Dr. Justin Kropf, on September 21. Dr. Kropf's report includes a history that: "[Mr. Ruskin] also has a heavy alcohol history drinking approximately 8 to 10 beers per day." The records of the Med also show that Mr. Ruskin received psychological evaluation while hospitalized after his injury. A note dated October 29, 2007, states that Mr. Ruskin "admits he was a very heavy drinker. Not interested in [alcohol] rehab. Says his wife will make him stop drinking after [discharge]."

Ledic introduced additional medical records from St. Francis Hospital in Memphis concerning a hospitalization of Mr. Ruskin for abdominal pain in November 2006. Those records include statements from Dr. Shervin Rahmani that Mr. Ruskin has been his patient for "many, many years," and that "[Mr. Ruskin] drinks beer almost every day, and drinks about 12 cans of beer. He knows what delirium tremens is and he believes that he might go into that as he has before." A consulting physician's report states, "[Mr. Ruskin's] ethanol intake at present time averages 10 to 12 cans of beer per day." A second consultation report says: "[Mr. Ruskin] drinks beer, six to eight beers a day."

Dr. David Stafford, a toxicologist, testified at the request of Ledic. When asked about the effects of intoxication upon a person's balance, he explained that "the individual is not able to maintain his balance as well with alcohol present as he can if he didn't have it so he's liable to sway, he may stumble, he may fall, that sort of thing." Based upon his review of the relevant medical records, witness statements, and Mr. Ruskin's discovery deposition, Dr. Stafford was of the opinion that Mr. Ruskin was an alcoholic, that he was intoxicated at the

time of his injury, and that his intoxication contributed to causing the injury. Dr. Stafford testified that if Mr. Ruskin had consumed eight to ten beers, as suggested by various medical records, he would have had a blood alcohol content of 0.16% to 0.19%. He testified that intoxication at this level would affect judgment, reaction time, and equilibrium. Based upon Mr. Ruskin's testimony at trial that he had consumed four beers prior to the injury, Dr. Stafford believed that he would have had a blood alcohol content of 0.05% to 0.08%. He testified that this level of intoxication would also impair Mr. Ruskin's reaction time and equilibrium, although he could not say to what extent. On cross-examination, he admitted that he had no actual knowledge of Mr. Ruskin's blood alcohol content at the time of his injury, or whether his consumption of alcohol earlier in the day caused him to fall.

The trial court took the case under advisement and requested that the parties file proposed findings of fact and conclusions of law. The trial court entered an Order of Judgment on November 17, 2009, finding that Ledic had sustained its burden of proof that Mr. Ruskin's injury was the proximate result of intoxication and dismissing the complaint. In support of its ruling, the trial court made numerous findings of fact, including specific findings that Mr. Ruskin's "testimony regarding his beer consumption on the day of his fall was not credible" and that Mr. Ruskin "consumed far more alcohol on the day of his fall than he admitted to." As to causation, the trial court found as follows:

> there is no other plausible explanation for Mr. Ruskin falling in the manner in which he did other than his intoxication and loss of balance which is one of the side effects of intoxication as noted by toxicologist Dr. David Stafford during his testimony at trial. The Court also finds it significant that Mr. Ruskin did not slip or trip on anything on the stairway and, more importantly, took no action to break his fall which should have been instinctive but for his intoxication.

The trial court also noted that it had visited the scene of the accident.

Standard of Review

We review issues of fact de novo upon the record of the trial court. The trial court's findings are accompanied by a presumption of correctness 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 to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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 deposition, and we may draw our own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). Where medical expert testimony is presented by deposition, the reviewing court may independently assess the medical proof to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 665 (Tenn. 2008).

Analysis

I. Admission of Evidence

Mr. Ruskin contends that the trial court erred in admitting portions of two medical records into evidence, specifically the two notations on the hospital admission record at the Med which refer to Mr. Ruskin as "intoxicated." Dr. Maish testified that these notations were probably made by Dr. Parks, the surgical resident who initially assessed Mr. Ruskin minutes after his arrival at the hospital. Dr. Maish did not know the reason Dr. Parks made these notations.

Mr. Ruskin relies on Tennessee Rule of Evidence 803(6), which bars the admissibility of otherwise admissible business records where "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Mr. Ruskin argues that the notations at issue lack trustworthiness because (1) their authorship is uncertain and (2) even if Dr. Parks made the notations, the statements are inherently unreliable because Dr. Parks may not have known that Mr. Ruskin had suffered a traumatic brain injury, which can cause symptoms similar to intoxication.

We are not persuaded. First, uncertainty about the authorship of particular information contained in an otherwise admissible business record does not necessarily preclude admissibility. See Alexander v. Inman, 903 S.W.2d 686, 700 (Tenn. Ct. App. 1995). Rather, Rule 803(6) requires that the notes have been made "by a person with knowledge and a business duty to record" the information. As to medical records generated upon a patient's admission to the hospital, the doctor initially assessing the patient meets those criteria. Here, Mr. Ruskin does not contend that the person who made the notes concerning his initial assessment was not qualified to do so. Rather, he seems to imply that Dr. Maish's uncertainty about which doctor made the initial assessment notes is sufficient to render the notes themselves unreliable and inadmissible. We disagree. Moreover, Mr. Ruskin does not contend that the statements were made for any purpose other than diagnosis and treatment or that the doctor who made them acted improperly in placing them in the

records. The trial court did not err in admitting the contested portions of the medical records on the basis that their authorship was not certain.

We also disagree that the notations are inherently unreliable because they were based on an initial assessment made before testing was complete. The very nature of an initial assessment, made minutes after a patient arrives in the emergency room, renders it subject to later modification. Thus, complaints about the accuracy of an initial assessment go to its weight rather than to its admissibility.

The admission of evidence is within the sound discretion of the trial court and will only be overturned on appeal where there is a showing of abuse of discretion. Otis. v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). A trial court abuses its discretion only when it applies an incorrect legal standard or reaches a decision that is without logic or reasoning and the result of that decision prejudices the complaining party. State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999) (citing State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)). The notations in the hospital admission record were admissible and the trial court therefore did not abuse its discretion.

II. Preponderance of the Evidence

Ledic defended against this action on the basis that, pursuant to Tennessee's workers' compensation law, "[n]o compensation shall be allowed for an injury or death due to the employee's willful misconduct or . . . due to intoxication . . . ." Tenn. Code Ann. § 50-6-110(a). This affirmative defense requires proof that (1) the employee was intoxicated and (2) that the employee's intoxication proximately caused his injury. See Dobbs v. Liberty Mut. Ins. Co., 811 S.W.2d 75, 77 (Tenn. 1991). All parties agree that the burden of proof was on Ledic to establish the elements of the affirmative defense of intoxication. See Tenn. Code Ann. § 50-6-110(b).

A. Proof of Intoxication

Mr. Ruskin argues that his testimony concerning his activities prior to his injury tend to demonstrate that he was not intoxicated at the time. He also points out that Mr. Butler testified that he smelled a "hint" of alcohol, and that Mr. Phillips expressed no opinion as to whether or not Mr. Ruskin was intoxicated.

Mr. Butler, who was the only eyewitness and who had no stake in the outcome of the case, testified that Mr. Ruskin smelled of alcohol, was unsteady on his feet, and that he believed Mr. Ruskin was intoxicated at the time he fell. Mr. Phillips confirmed that Mr. Ruskin smelled of alcohol in the ambulance. Most significantly, the trial court found that

Mr. Ruskin's testimony concerning his consumption of alcohol was not credible. This finding was supported by a wealth of evidence. Although Mr. Ruskin testified that he was a moderate drinker and had not been intoxicated for fifteen years, medical records from his own physician, created a few months before the event, indicated that he regularly consumed eight to ten beers per day. A second independent witness, Mr. Townsend, testified that Mr. Ruskin smelled of alcohol and appeared to be intoxicated while making an after-hours call on the day before the injury. In the hospital, Mr. Ruskin received treatment for alcohol withdrawal, and that treatment alleviated the symptoms associated with his condition.

Upon our close review of the record, we hold that the evidence does not preponderate against the trial court's finding that Mr. Ruskin was intoxicated at the time of his injury.

B. Causation

Mr. Ruskin also argues that the proof preponderates against the trial court's finding that his intoxication was the proximate cause of his fall and resulting injuries. Mr. Ruskin contends in his reply brief that

> [a]s to the cause of Mr. Ruskin's fall, the sole testimony comes from Mr. Butler and Mr. Butler testified that Mr. Ruskin was at the top of the stairs attempting to balance himself on his right foot while holding his left foot in the air with his right hand back on the stair railing and stating that he had twisted his ankle at the precise moment of his fall. The [trial court's] finding, and [Ledic's] argument, that there is no other explanation for the fall other than intoxication ignores and/or disregards the eyewitness testimony of Mr. Butler.

We disagree.

Mr. Butler's eyewitness and disinterested testimony established that Mr. Ruskin was having trouble ascending the stairs and, while complaining that he had injured his left ankle, had turned to his left so that he could hold his left leg out in front of him. In this one-legged stance, Mr. Ruskin gripped the right-hand railing with his right hand and leaned back, causing his body to hover dangerously over the railing. Mr. Butler was so concerned by Mr. Ruskin's dangerous balancing act that he started down the stairs toward him. Before Mr. Butler could reach Mr. Ruskin, he saw Mr. Ruskin's eyes roll back and Mr. Ruskin fell over the railing. This testimony is consistent with the deleterious effects that, according to Dr. Stafford, consumption of alcohol has on a person's balance and equilibrium.

This Court made clear in Dobbs that intoxication need not be the sole cause of an employee's injury in order to make out the affirmative defense, but need only be "*a* cause of

the injury." 811 S.W.2d at 77 (emphasis added). In this case, there is more than sufficient proof to establish that Mr. Ruskin's alcohol consumption was at least "a" cause of his fall and resulting injuries. The evidence does not preponderate against the trial court's ruling that Ledic satisfied its burden of establishing the affirmative defense of intoxication.

Conclusion

The judgment of the trial court is affirmed. Costs on appeal are assessed against the appellant, Timothy Ruskin, for which execution may issue, if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 23, 2010

TIMOTHY RUSKIN v. LEDIC REALTY SERVICES, LTD.

Chancery Court for Shelby County
No. CH-08-0641

No. W2009-02595-WC-R3-WC - Filed February 25, 2011

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 on appeal are taxed to the Appellant, Appellant, Timothy Ruskin, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM