IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
May 23, 2016 Session

DAVID A. MAYES v. CITY OF TULLAHOMA, TENNESSEE

Appeal from the Circuit Court for Coffee County
No. 40345 J. S. "Steve" Daniel, Special Judge

No. M2015-01679-SC-R3-WC – Mailed August 16, 2016
Filed October 20, 2016

David A. Mayes ("Employee") suffered an injury to his left foot in April 2010 while working as a custodian for the City of Tullahoma, Tennessee ("Employer"). Employee's injury occurred when he twisted his left foot while stepping off a high step. Despite undergoing two surgeries, Employee continued to experience pain associated with the injury and was diagnosed with complex regional pain syndrome ("CRPS"). While being treated for his left foot injury, Employee fell and hurt his right foot, which also developed CRPS. Further, while recovering from these injuries, Employee became severely depressed. Based upon these physical and mental injuries, the trial court determined that Employee was permanently and totally disabled. Employer appealed, arguing that the trial court erred in its determination of permanent and total disability. Pursuant to Tennessee Supreme Court Rule 51, the appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Upon our review of the record and the applicable law, we affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(a)(2) (2014) Appeal as of Right; Judgment of the Circuit Court Affirmed

JEFFREY S. BIVINS, J., delivered the opinion of the Court, in which WILLIAM B. ACREE, JR., and PAUL G. SUMMERS, SR. JJ., joined.

Stephen W. Elliott and Fetlework Balite-Panelo, Nashville, Tennessee, for the appellant, City of Tullahoma.

R. Steven Waldron and Kerry E. Knox, Murfreesboro, Tennessee, for the appellee, David A. Mayes.

OPINION

Factual and Procedural History

David A. Mayes ("Employee") began working as a custodian for the City of Tullahoma, Tennessee ("Employer"), on February 26, 2009. While at work on April 14, 2010, Employee suffered an injury to his left foot when he stepped off a fifteen to eighteen-inch step at the police department/court building in Tullahoma. Employee immediately reported the injury to his supervisor and completed an injury report. Employee continued to work for approximately two weeks after the injury; however, he then went to the doctor because the swelling in his foot would not subside. While being treated for his left foot injury, Employee injured his right foot. Employee also suffered two mental breakdowns that he attributes to complications from his foot injury. A benefit review conference was held on April 23, 2013, but the parties were unable to reach a resolution. Employee then filed a complaint on April 29, 2013, in the Circuit Court for Coffee County. In its answer, Employer admitted that Employee's left leg injury was compensable but denied any liability for Employee's right leg and mental health injuries.

The case proceeded to trial on July 7, 2015. Employee testified that he was born on December 14, 1968; thus, he was forty-six years old at the time of trial. Employee graduated from Franklin County High School in 1987 and had been employed throughout many of his adult years in various jobs. From approximately 1987 to 1993, Employee worked at Wal-Mart, serving as a department manager for a period of time after receiving a promotion. Employee later worked in a janitorial business for an individual named Mickey Miller. From approximately 1994 to 2001, Employee was a stay-at-home dad, but he worked periodically for Mr. Miller. From 2007 to 2009, Employee worked as a retail sales clerk for Steve's Home Center. Employee began working as a custodian for Employer on February 26, 2009. He had been employed in this capacity for approximately one year when his left foot injury occurred.

Employee testified that, on the date of his work injury, he reported the injury to his supervisor and completed an injury report. He continued to work for the next two weeks before requesting referral to a physician due to swelling in his foot that would not subside. Employee subsequently began treatment with Dr. Martin Fiala, who ordered an MRI of Employee's leg. Dr. Fiala placed Employee in a leg cast in June, which he wore for approximately one month. Then, Employee transitioned to a walking boot. However, due to continued, "excruciating" pain, swelling, and discoloration, Dr. Fiala ordered a second MRI. Based on the results of the second MRI, Dr. Fiala recommended that Employee undergo surgery and referred Employee to Dr. Robert Bell. In January 2011, Dr. Bell performed a tendon repair procedure, which only increased Employee's pain. Employee stated that Dr. Bell then diagnosed him with a nerve injury and completed a second surgery in February 2011 to remove the nerve. The second surgery did not reduce Employee's pain. Instead, it merely kept his pain level constant. By the following

month, the pain was so severe that Employee was using crutches to move around. Dr. Bell referred Employee to Dr. Gregory White, a physical medicine and rehabilitation consultant, to determine if Employee was suffering from complex regional pain syndrome ("CRPS").[1] According to Employee, Dr. White examined him and provided him with pain medication.

In May 2011, Employee began treatment with Dr. William Wray, a psychologist. Dr. Wray talked with Employee about CRPS and its side effects and provided "moral support." Around this time, Employee slipped and fell while he was at home on crutches. This fall caused pain in his right foot, which soon exhibited symptoms similar to those in his left foot. Later that month, after this second injury, Employee suffered a mental breakdown and was hospitalized for approximately one week. While hospitalized, Employee was treated by Dr. Richard Mauroner, a psychiatrist. Dr. Mauroner diagnosed Employee with severe major depression.

In early August 2011, Dr. White referred Employee to Dr. Robert Todd, an anesthesiologist specializing in pain management. In his deposition, Dr. Todd stated that he diagnosed Employee with "fully developed" CRPS and recommended surgery to implant a spinal cord stimulator. Employee underwent the surgery. Employee testified that his pain was reduced by about one half after the surgery. Unfortunately, on his way home from the surgery, Employee suffered a stroke. Employee testified that his doctors told him that the stroke was unrelated to the surgery. Employee described his symptoms from the stroke as being tremors to the right side of his body and memory issues. Soon after the stroke, Employee attempted suicide by overdosing on Xanax and was admitted to Parthenon Pavilion.

In April 2012, Employer terminated Employee because the custodial position had been eliminated. Employee stated that being terminated "hurt." However, he acknowledged that he was not physically able to work in the custodial position at that time. Even after the implementation of the spinal cord stimulator, his foot swelled, and he was unable to stand for long periods of time.

After his termination by Employer, Employee applied for jobs because, "in [his] mind, [he] believed [he] could do it." With each of these applications, absent an application to Amazon, Employee notified potential employers that he had to rest for fifteen to twenty minutes per hour because of his injury. In September 2013, Employee was hired to work at the Nissan plant in Decherd, Tennessee. He worked at the plant for three days, but on the fourth day, his foot swelled, which rendered him unable to put his foot in his work shoe. As a result, Employee then ended his employment with Nissan. Employee also completed some work renovating a rental home owned by his mother. He

[1] This condition is also known as reflex sympathetic dystrophy, but we will refer to it as CRPS for consistency.

did not receive payment for the work, but he did move into the home. The renovations lasted four or five weeks, but he did not work full days and took breaks when needed. Additionally, Employee was hired by Amazon but never showed up for the position because he did not feel that he could do the job. Employee never asked Amazon if it would be willing to make accommodations for his injury. Other than these instances, Employee has not worked since the custodial position was eliminated by Employer.

With regard to his physical state at the time of trial, Employee testified that he did not wear socks "[b]ecause the scar on [his] foot . . . [felt] like it's just being cut, and any pressure on it [was] extreme." He felt pain constantly "from the tip of [his] toes to about the middle of [his] shin." At the time of trial, Dr. Todd prescribed prescription ibuprofen and Tizanidine, which was used to address Employee's pain and control "flare-ups" of CRPS. With regard to his mental state, Employee testified that he felt the effects of depression every day but noted that "some days it's better and some days it's worse." "At least two or three days out of the month" he was unable to even leave the house because of his depression. Dr. Mauroner prescribed Abilify, Prozac, and Doxepin for Employee's depression.

In addition to Employee's testimony, the trial court also considered the depositions of five medical professionals. Dr. Todd and Dr. David W. Gaw testified regarding Employee's physical impairments. Dr. Greg Kyser, Dr. Stephen Montgomery, and Dr. Mauroner testified regarding his mental impairments.

With regard to Employee's physical injuries, Dr. Todd concluded that Employee possessed six to seven percent impairment to the body as a whole based exclusively on his CRPS. Dr. Todd assigned this impairment due to Employee needing frequent breaks, about five to ten minutes every hour. He stated that the five to ten minute breaks would "be about the extent of [his] restrictions for the CRPS."

Dr. Gaw, an orthopedist, calculated Employee's permanent impairment as seventeen percent to the lower extremity, which equates to seven percent impairment to the whole body. Dr. Gaw's calculation was for tendinitis of the peroneal tendons and neurectomy of the sural nerve. Dr. Gaw did not consider Employee's CRPS because Employee "did not meet the criteria" for that diagnosis under the AMA impairment guidelines. Dr. Gaw did not suggest any specific restrictions for Employee. However, he stated that pain should be the limiting factor on what Employee can do.

With regard to Employee's mental injuries, Dr. Kyser, a psychiatrist, testified that he performed an independent medical examination on February 8, 2013. He opined that, prior to the work injury, Employee's mental health history was "unremarkable." Employee told him that he was experiencing constant depression, was frustrated by his inability to find work, continued to have memory problems since his stroke, and was fearful of reinjury. Dr. Kyser diagnosed Employee with "major depression, single

episode, moderate to severe without psychotic features, and probable pain disorder with psychological features." He attributed this condition to the work injury and its consequences. Dr. Kyser calculated Employee's psychiatric impairment to be fifteen percent. In addition, he stated, "Oftentimes, employers are reluctant to hire someone who's got a chronic pain condition." On cross-examination, Dr. Kyser stated that he was not aware that Employee was previously prescribed an antidepressant or that Employee was previously diagnosed with anxiety.

Dr. Montgomery, a forensic psychiatrist, performed an independent medical evaluation on June 12, 2015. Employee told him that his symptoms were good most of the time with only a few days per month of depression. His symptoms were not as intense as in the past, and he no longer had thoughts of suicide. Employee also stated that he had no recollection of receiving mental health treatment prior to April 2010. Dr. Montgomery opined that Employee had a five percent medical impairment rating to the whole body due to his mental injuries. Dr. Montgomery attributed one half of that impairment to a pre-existing mental condition and one half to the work injury.

Dr. Mauroner testified that, during the three years following Employee's hospitalization in May 2011, he treated Employee with a variety of antidepressant medications. As of September 2014, Dr. Mauroner described Employee as doing "pretty well." Although Employee was responsive to the prescribed medications, "most of the time [he was] kind of riding on the edge of mild depression." Dr. Mauroner further opined that Employee's work

> injuries and the resulting pain and the chronic ongoing pain that he suffers is the primary reason that he became depressed in the first place. And even though he's had aggressive pain management and they have had, you know, fairly good results, he continues to live with pain daily and clearly he gets more depressed every time that something happens and he has an increase in that pain. So I think it's very much causally related.

Dr. Mauroner stated that he planned to continue providing Employee psychiatric care, that Employee "needs ongoing treatment and management," and that he did not "foresee [Employee] . . . getting all the way off the antidepressant medication." Dr. Mauroner did not assign an impairment rating to Employee or assign him any restrictions.

Michael Galloway, a vocational expert, also testified at trial. Mr. Galloway stated that, in 2012, he performed a vocational evaluation for Employee and provided his findings in a report, which was admitted into evidence. Mr. Galloway noted that Employee was a high school graduate who "has had no specific vocational training or certifications, diplomas of any kind, since leaving high school . . . [and has] had on-the-job training in terms of going into the workforce." He testified that Employee's vocational experience included skilled, semi-skilled, and unskilled work. However,

Employee's skilled position, as a department manager at Wal-Mart, had limited value for vocational purposes, because it had occurred more than fifteen years prior to the evaluation. Further, Mr. Galloway noted that each of Employee's previous jobs "ha[ve] all been sort of physically demanding . . . [e]ven the sales job."[2] After conducting a Wide Range Achievement Test on Employee, Mr. Galloway determined that Employee was at a twelfth grade level in word reading and sentence comprehension and was completing math slightly above an eighth grade level. These results placed him in the average to below average range for his age bracket.

At the time of the initial evaluation, Mr. Galloway's main source of medical information consisted of Dr. Todd's first deposition and medical records as of February 2012. He interpreted that testimony and those records to state that Employee was capable of less than sedentary work. On that basis, he opined in his initial report that Employee was 100% vocationally disabled. He subsequently received Dr. Todd's second deposition, post-2012 medical records, and the depositions of Dr. Kyser and Dr. Mauroner. He opined that Employee remained 100% disabled. In reaching that conclusion, Mr. Galloway considered Employee's unsuccessful attempt to work at Nissan, as well as the rental home renovations Employee performed for his mother. Mr. Galloway testified that neither of these events was equivalent to performing an actual job for a sustained period of time.

Mr. Galloway noted that Employee told him that he was very "time-limited" in performing any physical task. This report was consistent with information contained in the medical records. Mr. Galloway observed that Dr. Todd's statement that Employee would require a five to ten minute break each hour of the workday would be very difficult for any employer to accommodate. Mr. Galloway also considered Dr. Todd's statement that Employee would be capable of "lighter duties" but pointed out that Dr. Todd was not specific about the types of work included in that term. He added that the hourly break requirement interfered with nearly all levels of exertion. Further, Mr. Galloway opined that, even if Employee were capable of performing sedentary work, he possessed no job skills transferable to that type of work. Mr. Galloway also testified that Employee's limitations would prevent him from performing jobs that he was qualified to apply for.

Mr. Galloway then compared Employee's skills, abilities, and work history with employment opportunities in the local labor market. He explained what area constituted Employee's local labor market and discussed Employee's job prospects in the following testimony:

> I have defined [Employee's] local labor market as the counties of

[2] In the report Mr. Galloway issued following his vocational evaluation of Employee, Mr. Galloway stated that, "[a]ccording to the definitions of work contained in the *Dictionary of Occupational Titles, 4th edition*, [Employee] has been employed at heavy physical demand levels."

> Bedford, Coffee, Franklin, Grundy, Lincoln, Marion, Moore, and Sequatchie. And the relevance of that particular labor market is that, in my opinion, represents a local labor market that is based, in part, upon where [Employee] resides.
>
> Certainly, his past relevant work history has been more in these counties. It's certainly an easy commute, if you will, in terms of work or trying to find work.
>
> But, again, it's sort of his backyard, if you will, given where he lives at. So I felt that to be a relevant labor market when you looked at his past relevant work history and then also, again, where he resides at.
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> . . . .
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> And then, ultimately, by looking at the Bureau of Labor and Statistics work data, we identified what, if any, jobs were available post injury, given his limitations. And in this case, we concluded there were no reasonable employment opportunities, again based on his limitations.

Mr. Galloway testified that Employee's vocational disability was 97% based solely on Dr. Todd's recommended limitations. When mental health limitations described in Dr. Kyser's deposition were considered, Employee was 100% disabled.

The trial court issued findings from the bench and entered judgment on August 6, 2015. The court found that Employee's date of birth was December 14, 1968, and, therefore, he was forty-six years of age. The court also found that Employee was "a high school graduate with no training past high school" and that Employee had been employed in physically demanding jobs throughout his career. After acknowledging the impairment ratings established by the testifying medical professionals, the trial court made the following determination:

> [I] find that based on [Employee's] age, education, vocational background as basically being physically demanding activities for work, to gain income to support himself, together with the restrictions associated with rest for 10 minutes to 15 minutes an hour in any work activity, and in considering the labor market as presented by the expert, that [Employee] suffers a complete, total disability, 100 percent whole-body disability.

The trial court assigned seventy-five percent of the disability to Employee's physical injury and resulting CRPS and twenty-five percent to Employee's mental injury caused by the physical injury. The trial court found that Employee's mental injury was "related directly to and causally related to the pain associated with the complex regional pain

syndrome" and was "not related to the loss of work." The trial court also found that Employee's continued care for his mental injury "impact[ed] . . . his ability to return to the workforce."

In its judgment, the trial court noted that the parties did not dispute that Employee sustained a compensable physical injury and suffered mental injury, at least in part, from the physical injury. Furthermore, the court acknowledged that it was undisputed that Employee developed CRPS due to his physical injury. Lastly, the trial court added that, in rendering its decision, it also considered Dr. Todd's recommendation that Employee "take breaks of at least 5 to 10 minutes per hour" and Dr. Gaw's statement that Employee's pain should guide how he conducts his life. Employer appealed, arguing that the trial court erred in finding Employee permanently and totally disabled.

Standard of Review

This Court's review of the factual findings of the workers' compensation court is de novo with a presumption of correctness unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(a)(2); see also Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). That standard requires this Court "to examine, in depth, a trial court's factual findings and conclusions." Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 487 (Tenn. 2012) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). "When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge has had the opportunity to observe the witness' demeanor and hear in-court testimony." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008)); see Mansell v. Bridgestone Firestone N. Am. Tire, LLC, 417 S.W.3d 393, 399 (Tenn. 2013); Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898 (Tenn. 2009)). However, 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, 272 S.W.3d at 571. The trial court's conclusions of law are reviewed de novo with no presumption of correctness. Lambdin v. Goodyear Tire & Rubber Co., 468 S.W.3d 1, 9 (Tenn. 2015) (citing Wilhelm, 235 S.W.3d at 126).

Analysis

Employer's sole contention on appeal is that Employee is not permanently and totally disabled. An individual is permanently and totally disabled when he or she is incapable of "working at an occupation that brings the employee an income." Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 681 (Tenn. 2005) (citing Tenn. Code Ann. § 50-6-207(4)(B) (1999)). When determining whether an individual is permanently and totally disabled, this Court looks to "a variety of factors such that a complete picture of

an individual's ability to return to gainful employment is presented to the Court." Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535 (Tenn. 2006) (citing Vinson v. United Parcel Serv., 92 S.W.3d 380, 386 (Tenn. 2002)). Factors considered by the Court include "the employee's skills and training, education, age, local job opportunities, and his [or her] capacity to work at the kinds of employment available in his [or her] disabled condition." Cleek v. Wal-Mart Stores, 19 S.W.3d 770, 774 (Tenn. 2000) (quoting Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986)). Although this assessment is usually made and presented at trial by a vocational expert, "it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is 'competent testimony that should be considered.'" Vinson, 92 S.W.3d at 386 (quoting Cleek, 19 S.W.3d at 774).

Employer makes two assertions in support of its argument that the evidence preponderates against the trial court's finding of permanent and total disability. Employer first asserts that none of Employee's treating or evaluating physicians opined that he was unable to work at an occupation that brings an income. Specifically, Employer notes Dr. Todd's testimony that Employee would need a five to ten minute break each hour if he were to work at a job that required him to stand and Dr. Todd's statement that Employee "could resume some level of being a janitor that was less intense and required less walking and standing." Employer also cites Dr. Gaw's testimony that pain should be the limiting factor for Employee's activities and the fact that Dr. Gaw did not suggest any specific restrictions.

Although Dr. Todd's remarks suggest that Employee may have the capacity to engage in full-time or part-time employment, they do not compel such a conclusion. Importantly, Dr. Todd does not assert that "less intense" janitorial work is available in or near Employee's local labor market. In fact, Mr. Galloway, using U.S. Department of Labor statistics, found that no such jobs were available within Employee's local labor market. Additionally, given Employee's testimony about the severity of his pain, Dr. Gaw's statement is consistent with a finding of total disability. Lastly, we note that none of Employee's psychiatrists assigned or proposed specific restrictions, but each agreed that Employee had a chronic pain syndrome that could interfere with his obtaining or maintaining employment.

Employer next asserts that Employee's work at Nissan and the rental home renovations he performed for his mother demonstrate that he is capable of working in some capacity. Employer also states that, "[t]he fact that Nissan and Amazon hired [Employee] is further proof of his employability in the open labor market."

We disagree. Employee was only able to work for three days at Nissan before one of his feet became so swollen that he was unable to fit it into his work shoe. This result illustrates Employee's inability to perform any type of job involving physical exertion.

The rental home renovations, for which Employee received no wages, also demonstrates his limitations. His uncontradicted testimony was that he worked two or three partial days per week for five weeks, assisting another worker, with the ability to take breaks when needed. We agree with Mr. Galloway's observation that neither of these episodes rises to the level of performing an actual job for a sustained period of time. Additionally, although Employee's being hired by Nissan and Amazon may support the conclusion that Employee is currently able to secure employment, Employee's unsuccessful attempt to work at Nissan demonstrates his inability to maintain employment. Moreover, Mr. Galloway opined that, considering Employee's physical and mental limitations, Employee could not perform any of the jobs he was qualified to apply for.

"For permanent total disability benefits to be awarded, the disability must prevent the employee from working at an occupation that brings the employee an income." Fritts, 163 S.W.3d at 681 (citing Tenn. Code Ann. § 50-6-207(4)(B) (1999)). The lay and expert testimony in this case establish that Employee is unable to work due to his physical and mental limitations resulting from his work injury. As the evidence in the record indicates, Employee's work injury causes him significant pain. Each of the testifying medical professionals agreed that Employee suffered from a chronic pain syndrome that could interfere with his obtaining or maintaining employment. Further, Employee's unsuccessful attempt to work at Nissan and the rental home renovations he performed for his mother demonstrate his limitations and inability to perform any type of job requiring physical exertion. Additionally, Dr. Mauroner testified that Employee suffers from depression as a result of his work injury and chronic pain. Dr. Mauroner stated that Employee needed ongoing psychiatric treatment and that he did not foresee Employee ever "getting all the way off the antidepressant medication." Lastly, Mr. Galloway opined that, in light of Employee's physical and mental limitations resulting from his work injury, there were no reasonable employment opportunities available to Employee in the local labor market.

As noted previously, the trial court considered the following in determining that Employee was permanently and totally disabled: "[Employee's] age, education, vocational background as basically being physically demanding activities for work, to gain income to support himself, . . . the restrictions associated with rest for 10 minutes to 15 minutes an hour in any work activity, and . . . the labor market as presented by the expert." Upon our thorough de novo review of the record and consideration of all relevant factors, we hold that the trial court correctly determined that Employee was permanently and totally disabled.

Conclusion

Based upon our review of the factors pertinent to a determination of permanent and total disability, the arguments raised by Employer, and the entire record, we hold that the trial court correctly determined that Employee was permanently and totally disabled.

Accordingly, the judgment of the trial court is affirmed. Costs are taxed to the City of Tullahoma and its surety, for which execution may issue if necessary.

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JEFFREY S. BIVINS, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DAVID A. MAYES v. CITY OF TULLAHOMA, TENNESSEE

Circuit Court for Coffee County
No. 40345

No. M2015-01679-SC-WCM-WC – Filed October 20, 2016

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by City of Tullahoma pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's 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 the City of Tullahoma and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Jeffrey S. Bivins, CJ., not participating