

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

November 29, 2005, Session

**CORA JEAN EARLS v. SOMPO JAPAN INS. CO. of AMERICA, ET AL.**

**Direct Appeal from the Chancery Court for Warren County  
Nos. 7291, 8345 and 8449    Larry B. Stanley, Jr., Chancellor**

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**No. M2004-02223-WC-R3-CV - Mailed - March 10, 2006  
Filed - April 11, 2006**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court our findings of fact and conclusions of law. In this appeal, the employer asserts that the trial court erred in finding the employee had sustained a compensable injury during the course of her employment with Calsonic Yorozu Corporation and in awarding the employee 44% permanent partial disability. We conclude that the evidence presented does not preponderate against the findings of the trial judge and, in accordance with Tennessee Code Annotated section 50-6-225(e)(2), affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Trial Court  
Affirmed.**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and WILLIAM H. INMAN, SR. J., joined.

Mary M. Little, McMinnville, TN, for the Appellants, Sompo Japan Insurance Company of America and Calsonic Yorozu Corporation.

Barry H. Medley, McMinnville, TN, for the Appellee, Cora Jean Earls.

## MEMORANDUM OPINION

### I. FACTUAL BACKGROUND

Cora J. Earls was fifty-nine years old at the time of trial. She completed the twelfth grade but had no special skills or training. She has never been a lead person, foreman or supervisor. She has never been a member of management and has never had management training.

She was first employed by Calsonic Yorozu Corporation (Calsonic) in October 1989. On January 28, 2002, she was working a robot assembly line. As welded parts came down a shoot, Ms. Earls picked them up, inspected them, and, if there were no defects, rotated to her right, bent over and placed the parts in a basket. On that date, as she turned and bent over, she felt a sharp pain in her back. She left her position and reported to the nurse's station. An accident report was completed and Ms. Earls was treated with ice packs. She completed her shift and attempted to work for the next 3 to 4 days even though her back continued hurting and there was pain in her hip radiating down into her legs.

Eventually, she decided that she needed medical treatment and chose Dr. Warren McPherson from the panel of physicians offered her. Dr. McPherson examined her and ordered x-rays of her lower back. He gave her a medicine dose pack and recommended therapy and an MRI. Neither the therapy nor the MRI were approved by the workers' compensation insurance carrier.

Ms. Earls had a prior workers' compensation suit involving her neck and shoulder. After her first injury, she continued working at the Calsonic plant without any absences. That claim was tried before the court, was decided in her favor and the employer appealed. On January 8, 2002, shortly after the appeal was resolved, she took the restrictions imposed by a physician who had examined her for the first injury to Calsonic and asked they be accommodated. Calsonic initially refused to accept the restrictions, but after she injured her middle and lower back, Calsonic instructed her to go home until they decided how to respond to them. On February 13, 2002, Ms. Earls received a letter stating that she had been terminated because Calsonic could not accommodate the restrictions imposed as a result of her first injury.

Thereafter, she sought medical attention on her own for her more recent injury. She saw Dr. C. R. Dyer who examined her, recommended physical therapy and ordered an MRI. Following the therapy and MRI, Dr. Dyer suggested an epidural steroid injection and recommended nerve testing. These recommendations were not followed because Ms. Earls' personal medical insurance, newly obtained as a result of her termination by Calsonic, contained a twelve month exclusion for medical expenses relating to pre-existing injuries.

Because of her neck and shoulder injuries she finds, at intersections, it is difficult to turn her head to the left or right in order to observe oncoming traffic. Her arms and shoulders ache from holding the steering wheel. As a result of her mid and low back injury, there is no comfortable way to sit in an automobile. Standing is painful and walking jars her mid and low back causing pain.

When stooping or bending, it is difficult for her to return to an upright position. She has difficulty doing housework that involves reaching, bending or lifting. Her recreational activities have been curtailed because of her inability to ride her bicycle or to walk as much as she did prior to her injury. She takes Ibuprofen for the pain. She does not feel she is physically capable of working because she is unable to move around, and because of the pain.

## II. MEDICAL EVIDENCE

Dr. Robert P. Landsberg, who testified by deposition, saw Ms. Earls on January 14, 2004, for an independent medical examination. He is certified by the American Board of Orthopaedic Surgery. Ms. Earls related to Dr. Landsberg the history of her recent back injury and the prior injury to her neck and shoulder. She reported having no significant problem with her thoracic or lumbar spine prior to January 28, 2002, and no previous experience of pain radiating into her legs. She related that on January 28, 2002, she felt a sudden, sharp pain with stinging and burning in the mid-thoracic spine which radiated all the way down from there to her sacrum. She continued having significant pain over the next three days and was sent home.

She saw Dr. Warren McPherson, a neurosurgeon in Murfreesboro, on February 4, 2002. He recommended therapy and gave her a dose pack called Medrol, a steroid medication used to decrease inflammation. Mrs. Earls reported that she did not improve following that treatment and was re-assessed on February 19. After both visits, Dr. McPherson recommended physical therapy and an MRI but they were not approved.

She continued to have discomfort in the mid and low thoracic spine and pain in the lumbar spine radiating down the right leg. Because of her continuing symptoms, she went to see Dr. C. R. Dyer, an orthopaedic surgeon, using her personal insurance. He arranged for physical therapy and ordered an MRI. Dr. Dyer discussed epidural steroid injections but she wanted to avoid them. He did not recommend surgery.

At the time Dr. Landsberg saw her, Mrs. Earls was complaining of pain in her low back going around to the side in the lumbar and thoracic spine. Her maximum pain was in the low back radiating into the right buttock and down the right leg all the way to her toes. She had some numbness and tingling intermittently in the calf. Her back and leg pain became worse with activity. She was not able to do her housework or vacuum. She had to alternate standing and sitting and her low back pain was worse when sitting or bending. She had trouble resting at night because of her back.

Dr. Landsberg reviewed her past medical records, both those relating to her prior neck and shoulder injury and those relating to the injury to her mid and low back. He reviewed notes from Dr. Dyer starting on July 22, 2002, when she first consulted him about the problem to her low and mid back. Dr. Landsberg was able to personally review the MRI dated August 28, 2002. It revealed Ms. Earls had multi-level degenerative disc disease and facet arthritis that appeared to have some degenerative changes. There was central stenosis, meaning the canal where the nerve root exited was

narrowed centrally, at L3-4 and L4-5. There was a right lateral disc bulge at L4-5 with disc material abutting the exiting nerve root at L4 but the nerve root was not displaced. The MRI showed a narrowing of the canal at that location. This can contribute to intermittent or sometimes constant irritation of the nerve root causing pain to radiate down the leg. The pain described by Ms. Earls correlates with the MRI findings observed by Dr. Landsberg.

Dr. Landsberg also performed a physical examination of Mrs. Earls. Flexion of her spine caused low back pain and some pain to the right buttock. She had worse pain in the low back and thoracic spine with back extension. She had some thoracic spine pain in the mid to lower thoracic spine with flexion and rotation. There were no obvious muscle spasms. Range of motion in her thoracic spine and lumbar spine were measured with the inclinometer three times in each direction both at the upper and lower levels of these segments of the spine. She exhibited a decreased range of motion with muscle guarding in her thoracic spine.

According to Dr. Lansberg, the stenosis and arthritic problems are not specifically caused by her employment. The facet arthritis obviously pre-existed her injury. Some people are born with a more narrow spinal canal and that condition would likewise have pre-existed her injury. Part of the narrowing, however, is due to the disc bulge at L4-5. That condition, according to Dr. Landsberg, is probably related to her work injury. Obviously, there was a change because she had not had mid-thoracic or low-lumbar and leg pain prior to this episode. According to Dr. Landsberg, the disc bulge that was pushing up against the L4 nerve root was obviously contributing to part of the spinal stenosis. It narrows the canal. Part of the stenosis was due to pre-existing facet changes caused by arthritis and Ms. Earls' degenerative disc disease but some was due to the new work injury. When a person already has spinal stenosis, meaning the canal is already narrowed, the disc bulging even a small bit further can cause inflammation around the facet joints. In Dr. Lansberg's opinion, Ms. Earls had a pre-existing condition that was dormant and non-disabling which was aggravated and made disabling by the work-related injury to her lumbar spine. With increased activity, the inflammation usually gets worse and the symptoms are aggravated. Rest will normally decrease the inflammation and relieve the symptoms.

Dr. Landsberg diagnosed Ms. Earls as having a work-related lumbar strain with a bulging disc and intermittent radiculopathy and a work-related thoracic strain without apparent signs of radiculopathy. With regard to her thoracic spine, Dr. Landsberg noted she had decreased range of motion with muscle guarding and an injury. According to the *AMA Guides*, she fit into DRE Category II which provides for an impairment of 5-8%. Dr. Landsberg believed she was at the lower end of that range and assigned a 5% impairment. With regard to the lumbar spine, she has an intermittent radiculopathy. Category III is for radiculopathy. Because her radiculopathy was not constant, and she had not had surgery, Dr. Landsberg believed she fit more realistically in Category II, again providing for an impairment of 5-8%. Dr. Landsberg placed her at the 6% level. Combining the 6% lumbar spine impairment and the 5% thoracic spine impairment, equates to an 11% whole person impairment that resulted from the January 28, 2002, injury Ms. Earls sustained at Calsonic.

According to Dr. Landsberg, Ms. Earls was already on significant restrictions for her cervical spine injury including a ten pound lifting restriction. He believed she should be further restricted from bending and stooping, and prolonged sitting or standing in one position. She should alternate standing, sitting and walking. Sitting should be limited to thirty minutes at a time, standing in one position fifteen to twenty-five minutes and walking ten to fifteen minutes without resting. Dr. Landsberg described the impairment and the restrictions as being permanent.

Dr. Douglas B. Haynes testified by video deposition. Dr. Haynes is certified by the American Board of Orthopaedic Surgery. He performed an independent medical evaluation of Cora Jean Earls on February 25, 2004, at the request of Calsonic. He did not observe any instability, atrophy or spasm of either lower extremity. She had good motion of the hips, knees and ankles. He measured the range of motion in her low back. She had sixty degrees for forward flexion, eighteen degrees of extension, thirty degrees of right lateral flexion, and twenty-eight degrees of left lateral flexion. There was no spasm, instability or atrophy of the low back. He reviewed the reports of her previous x-rays which were felt to show spondylolisthesis at L-5 and facet changes at L4-5. He also had access to the MRI scan and reviewed those films personally. He was not able to see any objective evidence of neurological dysfunction. In Dr. Haynes opinion, the anatomical conditions that he observed from his review of the diagnostic films did not provide evidence of an acute injury.

Dr. Haynes noted that Mrs. Earls had some degenerative changes, both in the thoracic spine and the lumbar spine. She had spondylolisthesis, a condition where part of the bone does not form solidly allowing slippage between the bones, at L5 in the lumbar spine. There was disc bulging at several levels, mostly significantly at the L4-5 level, with some disc material abutting the L4 nerve root, but there was no displacement of the nerve root. These anatomical anomalies did not cause any neurological dysfunction. Dr. Haynes did not believe the noted abnormalities were caused by the incident described by Ms. Earls as giving rise to the onset of low back pain.

Dr. Haynes believes that, in accordance with the *AMA Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> Edition), she would be placed in a DRE lumbar Category I which would cause him to assign no permanent impairment. According to the *Guides*, an individual in Category I has only subjective findings. In Category II, the individual has objective findings, but no radiculopathy or alteration of structural integrity. For Category III, radiculopathy with objective verification must be present. Mrs. Earls complained of back pain and described the pain as radiating into her leg. According to Dr. Haynes, that complaint would be referred to as a non-verifiable complaint of radicular pain. According to the *Guides*, the individual must have objective findings to be included in Category II. Using this definition, a non-verifiable radicular complaint would not qualify. Dr. Haynes was of the opinion that there should be no restrictions placed on Mrs. Earls' activities as a result of the incident she reported causing the onset of her low back pain.

Dr. Haynes agreed that an acute injury can aggravate or exacerbate pre-existing degenerative disc disease and cause a previously asymptomatic condition to become disabling. He further agreed that a disc bulge can be caused by acute injury as well as by degenerative changes. Dr. Haynes confirmed that Dr. Dyer had noted Mrs. Earls complained of radiating pain into the L4 nerve

distribution. He agreed that his review of the MRI showed the bulging disc at L4-5 and the radiologist's impression was that "right lateral focal bulge L4-5 disc material abutting the exiting L4 root without displacement." Dr. Haynes admitted the MRI is an objective test and that the objective findings on the MRI scan were consistent with Ms. Earls' subjective complaints of pain in the right leg.

According to the *AMA Guides* Category I requires no significant clinical findings. Dr. Haynes admitted that 18 degrees of extension that he measured in Ms. Earls' back is less than normal. He noted, however, the *Guides* state that range of motion techniques are of limited value for estimating impairment secondary to arthritis in many individuals.

### III. VOCATIONAL EVIDENCE

Dr. Rodney Caldwell testified on behalf of the plaintiff. He is a vocational consultant in private practice with a Ph.D. in vocational psychology from Walden University in Minneapolis, Minnesota, and a Master of Science in vocational rehabilitation from Drake University in Des Moines, Iowa. He evaluated Cora Earls for the purpose of a vocational analysis on December 10, 2003. In doing a vocational analysis, he reviews the person's work history and education. He evaluates the types of work they have performed to determine if there are transferable skills. He attempts to determine what types of jobs a person might be qualified to do prior to and following a work injury. He considers medical records and looks particularly at the restrictions a person might have from a doctor to see how those restrictions might reduce the number of jobs a person is able to perform. He then compares the before and after and calculates the percentage of jobs the person is no longer able to perform which he refers to as vocational disability. Dr. Campbell performed this analysis with Mrs. Earls and evaluated her both for her prior neck and shoulder injury and the later injury to her back. He evaluated them both separately and in combination.

Mrs. Earls reported completing the twelfth grade with no other formal vocational training. She had worked at Calsonic for thirteen years and prior to that had been a material spreader at Lyon's Uniforms, a cashier and pin chaser at Pioneer Bowling Lanes and a press operator, cutting out shoe parts at a shoe company. He administered the Wide Range Achievement Test to determine her reading and arithmetic skills. She has very good reading skills, post-high school level and math skills at the ninth grade level.

After Ms. Earls injury to her neck and shoulders she was restricted to lifting no more than ten pounds. Because of that restriction, she would have had a vocational disability of eighty percent, in the opinion of Dr. Caldwell, leaving only sedentary and some light work. According to Dr. Caldwell, 10% of all the jobs in the Dictionary of Occupational Titles fall within the sedentary category and 60% fall within the light category. Because a significant number of those jobs are professional jobs, however, those percentages are significantly reduced as a person's educational level drops. After the low back injury, Dr. Landsberg recommended minimal bending or stooping. She should alternate sitting, standing, and walking with no prolonged sitting or standing in one position. If the restrictions imposed by Dr. Landsberg for her mid and low back injury are

considered appropriate, Mrs. Earls would have a 73% vocational disability. If one considers both the restrictions that resulted from the neck and shoulder injury and those imposed by Dr. Lansburg for the low back injury, she would be totally disabled. Since Dr. Haynes imposed no restrictions, if his recommendations are considered appropriate, there would be no vocational disability.

The report of a Functional Capacity Evaluation was admitted into evidence. The evaluation was conducted on April 13, 2004. The report revealed Ms. Earls demonstrated full and consistent effort and was cooperative with all tests requested. Ms. Earls experienced pain when carrying ten pounds, walking for five minutes at one and two tenths miles per hour and climbing stairs. Her statements of increased pain correlated with increased blood pressure and pulse. The report indicated Ms. Earls should be restricted to lifting ten pounds occasionally and five pounds frequently, no overhead lifting, climbing stairs occasionally and no bending or squatting. The report concluded that Ms. Earls demonstrated the ability to work in the light Dictionary of Occupational Titles category.

#### IV. RULING OF THE TRIAL COURT

The trial court found that Ms. Earls had sustained a work related injury and, as a result of that injury, retained a 44% percent vocational disability. From these findings, the employer has appealed.

#### IV. 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. *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989); Tennessee Code Annotated section 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review since the trial court had the opportunity to observe the witness' demeanor and to hear the in-court testimony. *Long v. Tri-Con Indus., Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). 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 depositions and the reviewing court may draw its own conclusions with regard to those issues. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

#### V. ANALYSIS

In order to be eligible for workers compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tennessee Code Annotated section 50-6-102 (12). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have

thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Id.*

It is well settled in this state that a plaintiff in a workers' compensation case has the burden of proving every element of his or her case by a preponderance of the evidence. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992). Causation and permanency of an injury must be established in most cases by expert medical testimony. See, e.g., *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991). With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Both Dr. Landsberg and Dr. Haynes testified that a disc bulge like that observed on the MRI of Ms. Earls at L4-5 can be caused by acute injury. Because Ms. Earls related she had not had pain in her low back prior to the January 28, 2002, incident and had not previously experienced pain radiating into her leg, Dr. Landsberg related her condition to the twisting and bending at work and, thus, found a work-related injury. Dr. Landsberg candidly admitted the only way one could be certain as to whether the injury was work-related would be to compare an MRI taken the day before the incident with one taken the day after. Dr. Haynes, while admitting the disc bulge abutting the L4 nerve root could have been caused by acute injury, found no evidence it was caused in that fashion and, therefore, believed the condition was not work-related. Our review of the record indicates the determination as to which opinion is more accurate depends upon an evaluation of the credibility of Ms. Earls. In accepting the opinion of Dr. Landsberg, based as it was on the history given by Ms. Earls, we may infer the trial court found Ms. Earls to be a credible witness. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 733-34 (Tenn. 2002). An inference that the trial court found a particular witness credible is entitled to the same "considerable deference" afforded a trial court that makes an express finding as to credibility. *Id.* There being no significant evidence in the record that Ms. Earls was not credible, we must defer to the trial court's opinion that she was. Accordingly, we must also find the evidence does not preponderate against the trial court's finding that Ms. Earls sustained a compensable injury.

There was likewise a dispute between Drs. Landsberg and Haynes as to whether Ms. Earls sustained a permanent impairment as a result of the condition of her back. Our review of the record indicates this dispute centers on which of the DRE Categories established by the *AMA Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> Edition) applies to Ms. Earls. According to the testimony of these physicians, Category I describes an individual with subjective complaints of back pain with no objective or substantial clinical findings. Category II relates to an individual who has subjective complaints with objective findings confirming those complaints but no radiculopathy or alteration of structural integrity. Category III requires a finding of radiculopathy. Dr. Haynes stated that in his opinion Ms. Earls complaints were subjective, without objective confirmation placing her in DRE Category I precluding the finding of an impairment. Dr. Haynes admitted, however, that the MRI revealing a disc bulge at L4-5 abutting the L4 nerve root was an objective finding that correlated with the complaints made by Ms. Earls. He also agreed that the reduced range of motion he found in Ms. Earls' back was a significant clinical finding.



According to Dr. Landsberg, the disc bulge revealed on the MRI confirmed the complaints of Ms. Earls and placed her in Category II, indicating an impairment rating of five to eight percent. Dr. Landsberg assigned a six impairment because of the intermittent radiculopathy and her other symptoms. Similarly, because of the injury and the clinical finding of a loss of range of motion and guarding during the range of motion examination, Dr. Landsberg found objective evidence of injury to Ms. Earls' thoracic spine and assigned a five percent impairment. According to the *AMA Guides* these two impairments combine for an eleven impairment of the body as a whole. While the trial court made no specific finding as to impairment, we again infer that it found a permanent impairment. The evidence does not preponderate against such a finding.

The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court and, as stated above, are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 170 (Tenn. 2002); *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207 (Tenn. 1998). In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and his or her capacity to work at the kinds of employment available in his or her disabled condition. Tenn. Code Ann. § 50-6-241(b); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn. 1975); *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 778 (Tenn. 1972). Based upon the evidence outlined in this opinion, the inference we have made with regard to the trial court's evaluation of Ms. Earls' credibility and the deference we must afford that inference and Ms. Earls' own assessment of her ability to work, we are of the opinion the evidence does not preponderate against the trial court's finding that Ms. Earls sustained a 44% vocational whole body disability as a result of an injury during the course of her employment with Calsonic.

## VII. CONCLUSION

Finding that the evidence does not preponderate against the findings of the trial court, that Ms. Earls sustained a work-related injury and will retain a 44% permanent vocational disability as a result of that injury, we affirm the judgment of the trial court. The costs of this cause shall be taxed to the Appellant.

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DONALD P. HARRIS, SR. J.

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
NOVEMBER 29, 2005 SESSION

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**Chancery Court for Warren County  
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**No. M2004-02223-WC-R3-CV - Filed - April 11, 2006**

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**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 appeals to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

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

Costs will be paid by the Appellants, Sompo Japan Insurance Company of America and Calsonic Yorozu Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM