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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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Roger L. Couch, Circuit Court Judge

S.C. Supreme Court

Opinion No. 4746 (S.C. Ct. App. filed Sept. 29, 2010)

Michael D. Crisp, Jr., Employee, Petitioner,

vs.

SouthCo, Inc., Employer, and Pennsylvania
National Mutual Casualty Insurance Co.,
Carrier, Respondents.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Court of Appeals err in reversing the Circuit Court and finding that substantial evidence supports the Workers' Compensation Commission's finding that Crisp has not sustained physical brain damage where the Commission's specific finding directly contradicts another of the Commission's findings?
- II. Did the Court of Appeals err in reversing the Circuit Court and finding that substantial evidence supports the Commission's finding that Crisp has not sustained physical brain damage where the Commission's specific finding is not supported by substantial evidence?
- III. Did the Court of Appeals err in reversing the Circuit Court and finding that substantial evidence supports the Commission's finding that Crisp has not sustained physical brain damage where the Commission rejected the other expert's neuropsychological report such that the only conclusion that could be reached on the evidence is that Crisp has sustained physical brain damage within the meaning of the Workers' Compensation Act?

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. Michael Crisp sought additional benefits for injury by accident he sustained on March 10, 2004 while working for SouthCo, Inc. He specifically contended he sustained injuries to his head, brain, neck, back, right upper extremity, and psyche as a result of the accident, and he sought continued temporary compensation benefits and continued medical treatment, including treatment in a traumatic brain injury program.

SouthCo, and its workers' compensation insurance carrier Pennsylvania National (together "SouthCo"), admitted Crisp sustained injury by accident as alleged and admitted that he sustained compensable injury to his neck, back, and right upper extremity. However, SouthCo denied Crisp sustained compensable injury to any other body part or system. SouthCo specifically denied Crisp sustained a brain injury and physical brain damage as a result of the accident.

By Order dated August 1, 2006, the Hearing Commissioner found Crisp sustained compensable injuries to his neck, back, right upper extremity, head, and psyche as a result of the admitted injury by accident. While the Commissioner found Crisp sustained a compensable head injury and made very specific findings concerning the facts and the conditions diagnosed, including compensable neuropsychological and cognitive disorders, the Commissioner found that he had not sustained a physical brain injury. Nevertheless, the Commissioner ordered additional psychological and neuropsychological treatment, including

evaluation and treatment in a brain injury center. (R. pp. 15-35)

SouthCo did not appeal the Commissioner's order. Crisp appealed to the Full Commission Panel contending the Commissioner erred in finding he has not sustained physical brain damage. By Order dated April 3, 2007, the Commission's Appellate Panel affirmed and adopted the Hearing Commissioner's Order. (R. pp. 12-14)

Crisp appealed to the circuit court for Spartanburg County, again contending the Commission erred in finding he has not sustained physical brain damage as a result of his injury by accident. The appeal came before the Honorable Roger L. Couch on June 10, 2008, and he filed an Order dated June 30, 2008. (R. pp. 1-10) Judge Couch reversed the Commission's conclusion concerning Crisp's alleged brain injury.

From the foregoing, it is apparent the Commission made findings consistent with all of the symptoms and conditions on which Dr. Moss made his diagnosis of traumatic brain injury and physical brain damage, including chronic headaches, mild verbal memory problems, attention and concentration problems, problem solving and inhibition problems, probable personality change due to head injury, exacerbation of obsessive-compulsive tendencies, decrease in the sense of smell, frontal lobe brain injury, traumatic closed head injury, and Cognitive Disorder NOS. (Finding of Fact #6) . . . Nevertheless, despite finding Dr. Moss credible, adopting the findings of brain injury related symptoms and conditions that he used to diagnose frontal lobe brain injury and physical brain damage, and awarding treatment in a "brain injury program" he recommended, the Commission determined that claimant had not sustained physical brain injury. That conclusion contradicts the Commission's findings of brain injury related conditions, such as Cognitive Disorder NOS, and is clearly erroneous. The Commission rejected the other expert's report, so there is no other credible evidence on the record on which the Commission can base its finding that claimant did not sustain physical brain damage.

Therefore, because the only evidence on the record is that claimant has sustained frontal lobe brain injury and physical brain damage, it is the determination of this Court that the Commission's finding to the contrary is erroneous, is not supported by substantial evidence, and is reversed. Furthermore, since the only conclusion that can be reached on this evidence is that claimant has sustained frontal lobe brain injury and physical brain damage, this Court finds as a matter of law that claimant has sustained physical brain damage within the meaning of the Act.

(R. pp. 4-10)

The effect of Judge Couch's Order is to reverse only that part of Finding of Fact #23 that states Crisp "has not sustained a physical brain injury." (R. p. 31, Finding of Fact #23) Because SouthCo did not appeal the Commission's Order, the rest of the Hearing Commissioner's Order is final and is not subject to collateral attack. See Reese v. CCI Constr. Co., 334 S.C. 600, 514 S.E.2d 144 (Ct. App. 1999)(unappealed order of the Commission is the law of the case and not subject to collateral attack).

SouthCo appealed to the Court of Appeals arguing primarily that Judge Couch erred in reversing the Commission. The Court determined that the circuit court erred in reversing the Commission's finding that claimant did not sustain physical brain damage because it found substantial evidence on the record to support that finding. (Appendix, pp. 82-89) Crisp's Petition for Rehearing was denied by Order dated November 22, 2010. (Appendix, pp. 106-107)

STATEMENT OF FACTS

The evidence on the record shows that Crisp testified he was employed by SouthCo to hydroseed grass and perform construction related work. (R. p. 124, line 24-p. 125, line 3; p. 125, line 23-p. 126, line 15) Crisp readily admitted that he has had difficulty with abuse of alcohol and drugs in the past but stated that he has been sober since May 29, 2003 with the aid of daily Narcotics Anonymous meetings. (R. p. 125, lines 4-22; p. 152, lines 1-4; p. 159, line 24-p. 160, line 3)

On March 10, 2004, Crisp was assisting his coemployees to erect a silt fence, and to accomplish this task, Crisp held a pole while a coemployee pressed the pole into the ground by lowering the bucket of a Bobcat earthmover. Unfortunately, while performing this procedure, the bucket detached from the Bobcat and fell onto Crisp covering him. Crisp stated that he had simply bent down to place another pole, and the next thing he remembered was running toward the truck looking at his bleeding hand. He stated that his co-workers also indicated to him that his head was bleeding. (R. p. 126, line 16-p. 128, line 23) He was taken to the emergency room and subsequently underwent treatment for injuries to his right arm/hand, neck, and back and for headaches and psychological difficulties. (R. p. 128, line 24-p. 129, line 19; p. 134, lines 4-15; p. 149, line 5-p. 150, line 20)

Crisp testified that he also developed difficulty with focus and absent-mindedness following this accident, along with severe headaches. He stated that he complained to each of his doctors about the headaches but that he first noticed his problems focusing in January

2005. He explained that his wife had mentioned to him after his accident and before January 2005 that he needed to get medical evaluation and treatment for his difficulty focusing, but that he first noticed the problem after she left and was no longer available to do things for him. (R. p. 129, line 20-p. 133, line 4) He denied ever having any similar problems prior to his injury by accident. (R. p. 145, line 16-p. 146, line 7) Crisp was evaluated specifically for these problems by neuropsychologist Dr. Robert Moss in April 2005. (R. p. 133 line 5-p. 134, line 1; pp. 373-403)

Crisp stated that he continues to experience pain from his hips, through his low back, and up to his neck. He stated that the pain in his neck is constant, the pain in his low back is very sharp, and as a result, he cannot get comfortable at night to sleep more than a few hours. If he tries to do anything around the house during the day, he will have to take pain medication and spend the evening on the couch. His hand is better, but he has trouble with activities such as pumping gas with that hand. He still gets severe headaches some three to four times per week. Crisp stated that he is also still experiencing depression and does not feel worthy as a human being since he can no longer provide adequately for his family. (R. p. 137, line 9-p. 138, line 13; p. 134, lines 6-13) He stated that he is also still having difficulty focusing on doing more than one thing at a time and with completing tasks. He cannot take in information that is given to him too rapidly. He also continues to have trouble remembering things that he needs to do or appointments that he needs to keep, and he has to rely on his daughter to remind him. He has to set an alarm in the afternoon to remember to pick up his children from school. Crisp stated that his daughter is very responsible and helps him a lot, and his father helps with his children and with his household. (R. p. 132, lines 4-24; p. 136, line 8-p. 137, line 8; p. 138,

line 14-p. 139, line 12; p. 141, line 18-p. 142, line 9; p. 144, lines 16-p. 145, line 15; p. 160, lines 4-22)

Crisp testified that he has not worked since the accident and is not able to work. He has done some very occasional odd jobs, such as picking up scrap, helping his landlord pick up around the mobile home park, and helping build a deck. However, he had trouble doing even these simple things due to increased pain in his neck and back. He stated that he was only able to pick up the scrap for one day, was only able to work on the deck for an hour at a time and only for three hours total, and was unable to use a hand drill. (R. p. 134, line 16-p. 136, line 7; p. 139, lines 13-17; p. 152, line 20-p. 159, line 23)

The medical records show that the emergency room physicians at Mary Black Hospital recorded that Crisp had been struck on the back of his head and neck and on his right hand by a falling Bobcat bucket. On examination, it was noted that Crisp had abrasions and contusions on his posterior head and neck and an open fractures of his right hand. (R. pp. 297-299) He underwent surgery on his hand with Dr. James Essman, and he was referred for further treatment of his neck and back injuries. (R. pp. 297-306)

Dr. John Klekamp evaluated Crisp on April 16, 2004 and noted that he complained of neck pain, back pain, and headaches following his work injury. A diagram filled out by Crisp for Dr. Klekamp on that date indicates that he was experiencing pain over the front and back of his head. (R. 336-337, 341-345) After examination and radiological evaluation, he diagnosed a left paracentral disc herniation at C6-7 and degenerative changes at T12-L1. (R. pp. 337-340, 351-352) He was subsequently referred for pain management treatment. (R. p. 340)

Dr. Kevin Kopera evaluated Crisp on August 12, 2004 and noted complaints of headaches and continued neck, back, and arm pain. He noted that Crisp's back and neck pain were aggravated by bending, prolonged sitting, turning, twisting, and rotating his head and that he described some numbness in the hip area. After examination, Dr. Kopera diagnosed cervical and lumbar strains, in addition to the hand fractures, and he recommended physical therapy, medications, and work restrictions, but he also noted that the employer had no light duty available. (R. pp. 360-363, 369) Dr. Kopera's in-office physical therapist specifically noted that Crisp described experiencing continued severe headaches, and despite treatment for his neck injury and other problems, these headaches persisted. (R. pp. 353-359)

On September 23, 2004, Dr. Kopera noted that Crisp and his wife returned to the office and that Crisp's wife inquired about further diagnostic testing for Crisp's head since he was continuing to experience severe headaches since being struck on the head in the initial accident. Dr. Kopera ordered an MRI scan of the brain, and this was subsequently reported to be normal, but Crisp continued to complain of headaches. (R. pp. 364-365)

Dr. Robert Moss provided a neuropsychological evaluation of Crisp on April 12-13, 2005. He recorded Crisp's description of the accident, as above, including inability to recall the impact of the bucket on him and lack of complete details surrounding the incident. He also noted that Crisp described continuing headaches and neck pain following the accident and more recent realization that he has difficulty with memory, bringing his mind to rest, and focusing on what he is trying to do. Crisp also related to Dr. Moss that since his accident, he has experienced increased irritability, increased intensity of washing and cleaning behaviors, and changes in his reading comprehension, ability to perform math calculations, receptive

language comprehension, word finding, planning and organization abilities, mechanical abilities, enjoyment of music, and his sense of taste and smell. Though Dr. Moss noted that Crisp described a substance abuse problem in the past, he also noted that Crisp had, at that time, been clean for a period of two years. (R. pp. 373-375)

Following the administration of an extensive battery of tests, including several tests designed to specifically measure level of effort, Dr. Moss observed that “all effort measures support the tests of cognitive functions as valid.” He also noted that the testing revealed a mild to moderate impairment in verbal memory, with several instances of confabulation, borderline auditory attention span, problems with impulsivity and attention, problems in establishing and maintaining cognitive set, difficulties with problem solving, concentration difficulties, significantly impaired repetition consistent with memory/concentration problems, and high levels of psychological distress. Of special note, behavioral testing showed significantly elevated levels in several areas, which Dr. Moss opined are consistent with behavioral changes associated with frontal lobe injuries. (R. pp. 375-378)

Dr. Moss ultimately diagnosed Cognitive Disorder NOS, polysubstance abuse in full sustained remission, probable personality change due to head injury, obsessive compulsive disorder, and traumatic brain injury. He stated that Crisp has experienced personality changes as a result of his injury, is experiencing psychological distress from his injury, and that the current findings, including exacerbation of obsessive-compulsive tendencies and decrease in the sense of smell, are consistent with frontal lobe injury. He recommended psychological and neuropsychological treatment, including medications, participation in a head injury program, and psychological counseling. (R. pp. 378-379) On March 6, 2006, Dr. Moss specifically

opined that Crisp has sustained physical brain damage as a result of his March 10, 2004 injury by accident. (R. p. 403) Dr. Moss clearly and unequivocally reiterated these opinions in his deposition on March 15, 2006. (R. p. 291, line 2-p. 293, line 16)

Neurologist Dr. Thomas Collings evaluated Crisp on May 24, 2005. He noted the same history described above and the medical reports of the other physicians, including the report and opinions of Dr. Moss. His report of Crisp's description of ongoing difficulty is similar to that related by Dr. Moss. (R. pp. 404-407) Dr. Collings noted that Crisp "does quite well on simple cognitive tasks asked of him during his examination today but more thorough neuropsychological testing and vocational testing reveal deficits which seem to exceed his premorbid state." (R. p. 407) He diagnosed traumatic brain injury/closed head injury due to the work-related injury by accident, polysubstance abuse in sustained remission, some personality change related to the head injury, and cervical strain and headaches related to the work injury, in addition to other physical injuries. (R. 407-408) Dr. Collings opined that Crisp has shown some slow improvement but has not yet reached maximum medical improvement and is in need of continuing neuropsychological and vocational support, including treatment at a brain injury center and ongoing psychological treatment and medications. (R. p. 408)

In his deposition, Dr. Collings stated that Crisp appears to have sustained a closed head injury, which he defined as global trauma to the brain, and he specifically reiterated his diagnosis of traumatic brain injury/closed head injury due to the work accident. (R. p. 186, line 20-p. 187, line 8; p. 237, line 20-p. 238, line 3; p. 241, lines 12-22) While he expressed some reservation due again to the differences he noted between his simple in-office examination and Dr. Moss's findings on neuropsychological exam, he also stated that the

neuropsychological examination was a better indicator of brain injury than his in-office examination and that “taking it at face value, I would say it’s the best information that would support that there’s . . . significant change between this pre- and post-condition.” (R. p. 213, line 2-p. 215, line 10; p. 226, lines 7-21) Dr. Collings stated that he put great weight on the neuropsychological report and that the recommendations in that report need to be followed in order to further delineate what has happened to Crisp and to treat his problems. (R. p. 235, line 20-p. 237, line 1; p. 239, line 23-p. 240, line 23; p. 242, line 24-p. 243, line 6)(see also R. pp. 400-402)

Psychologist Dr. David Price submitted a neuropsychological evaluation report on November 30, 2005. He interviewed Crisp and noted his medical evaluation and treatment to that point, including the evaluation provided by Dr. Moss. While Dr. Price submitted a very voluminous report, the majority of it is a recitation of the medical records and contains minimal testing. (R. pp. 428-483) The only testing that he administered was the MMPI-2 and the VIP. He stated that the MMPI showed severe psychological disorder and that the VIP, which he stated is a validity test, showed that responses were valid and that Crisp was compliant. (R. pp. 484-487) Dr. Price diagnosed Pain Disorder associated with both psychological factors and general medical condition, Adjustment Disorder with depressed mood, Obsessive-Compulsive Disorder, Polysubstance Dependence in current remission, Substance-induced Persisting Dementia, Partner Relational Problem, and Phase of Life Problem. (R. pp. 488-492) He opined that Crisp did not sustain a traumatic brain injury or concussion and that his symptoms are explained by the Substance-induced Persisting Dementia. He stated that psychologically, Crisp is able to perform some type of work. (R. pp.

489-492)

Dr. Moss responded to Dr. Price's report and explained why his diagnosis of Substance-induced Persisting Dementia is not appropriate in this case, specifically that Dr. Price is unable to support his contention that Crisp meets the recognized criteria. He further explained why, in his opinion, the diagnosis of Cognitive Disorder NOS is appropriate. Dr. Moss stated that there were several inconsistencies in Dr. Price's report, including for instance his diagnoses of several severe psychological conditions which would require significant impairment and his opinion that Crisp does not have significant impairment. He further stated that Dr. Price's evaluation was not a true neuropsychological evaluation, as he administered no neuropsychological testing. (R. pp. 394-399)

ARGUMENTS

The standard of review in workers' compensation cases is clear, in that a court may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, ___, 276 S.E.2d 304, 306 (1981). See also Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); S.C. Code Ann. § 1-23-380 (2004).

The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). However, "where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the Commission," Mullinax, 458 S.E.2d at 80. Furthermore, the court "may reverse where the decision is affected by an error of law." Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380 (2004).

I. **The Court of Appeals erred in reversing the Circuit Court and affirming the Workers' Compensation Commission determining that substantial evidence supports the Commission's finding that Crisp has not sustained physical brain damage.**

The Commission found that Crisp sustained a traumatic closed head injury as a result of his injury by accident and that the head injury caused compensable neuropsychological injuries and cognitive disorders. However, in direct contradiction to those findings, the Commission also found that Crisp did not sustain physical brain damage. While the Circuit Court recognized the inherent contradiction contained in these findings and reversed the Commission, the Court of Appeals thereafter reversed the Circuit Court determining the Commission's finding that Crisp did not sustain physical brain damage is supported by substantial evidence. The Court of Appeals specifically stated that "[e]ven though the record presents conflicting evidence on the issue of whether Crisp suffered a physical brain injury, we conclude the circuit court erred in reversing the Commission." However, the issue is not one of conflicting evidence, or even substantial evidence, but is an issue of the Commission's conflicting findings.

At issue is the General Assembly's provision in the third paragraph of §42-9-10 of the Workers' Compensation Act that

[n]otwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered *physical brain damage* is not subject to the five hundred week limitation and shall receive the benefits for life.

S.C. Code Ann. § 42-9-10 (2004)(emphasis added).

Crisp was employed as a general laborer by SouthCo, a firm which is involved in hydroseeding grass and rebuilding fire-damaged houses. On March 10, 2004, Crisp was working with his coemployees to erect a silt fence when the bucket of the Bobcat earthmover that they were using to accomplish the task became detached and fell onto him. Crisp stated that he had bent down to place a fence pole, and the next thing he remembers is running away looking at his bleeding hand. He stated that his co-workers also indicated to him that his head was bleeding. Crisp was taken to the emergency room and subsequently underwent treatment for injuries to his right arm/hand, neck, and back and for headaches and psychological difficulties. (R. p. 125, line 23-p. 129, line 19)

Crisp testified that he also developed difficulty with focus and absent-mindedness following this accident, along with severe headaches. He stated that he complained to each of his doctors about the headaches, but that he first noticed his problems focusing in January 2005. He explained that his wife had mentioned to him after his accident, and before January 2005, that he needed to get medical evaluation and treatment for his difficulty focusing, but that he first noticed the problem himself after she left and was no longer available to do things for him. He denied ever having any similar problems prior to his injury by accident. At that point, Crisp was evaluated specifically for those problems by psychologist Dr. Robert Moss. (R. p. 129, line 20-p. 134, line 15; p. 138, line 14-p. 139, line 17)

The medical records show that the emergency room physicians found abrasions and contusions on Crisp's posterior head and neck and an open fracture of his right hand. (R. pp. 299-300) He underwent surgery on his hand and was referred for further treatment of his neck

and back injuries. Dr. Hunter Leigh noted that Crisp complained of neck pain, nausea, and headache on March 26, 2004, and Dr. John Klekamp noted that he complained of neck and back pain and also headaches. (R. pp. 333-334, 336-340) A diagram filled out by Crisp for Dr. Klekamp on April 16, 2004 indicates that he was experiencing pain over the front and back of his head. (R. p. 343)

Crisp saw Dr. Kevin Kopera on August 12, 2004, and Dr. Kopera noted complaints of headaches and continued neck, back, and arm pain. (R. p. 360) Dr. Kopera ordered physical therapy, and the therapist specifically noted that Crisp described experiencing severe headaches. (R. p. 353) Despite treatment for his neck injury and other problems, these headaches persisted. (R. pp. 357, 359)

On September 23, 2004, Dr. Kopera noted that Crisp's wife inquired about further diagnostic testing since Crisp was continuing to experience severe headaches since being struck on the head in the initial accident. Dr. Kopera ordered an MRI scan of the brain, and this was subsequently reported to be normal but Crisp continued to complain of headaches. (R. pp. 364-365)

Psychologist Dr. Robert Moss performed a neuropsychological evaluation of Crisp on April 12-13, 2005. He recorded Crisp's description of the accident, as above, including inability to recall the impact of the bucket on him and lack of complete details surrounding the incident. (R. p. 373) He also noted that Crisp described continuing headaches and neck pain following the accident and more recent realization that he has difficulty with memory, bringing his mind to rest, and focusing on what he is trying to do. (R. pp. 373-374) Crisp also related to Dr. Moss that since his accident, he has experienced increased irritability, increased intensity

of washing and cleaning behaviors, and changes in his reading comprehension, ability to perform math calculations, receptive language comprehension, word finding, planning and organization abilities, mechanical abilities, enjoyment of music, and his sense of taste and smell. Though Dr. Moss noted that Crisp described a substance abuse problem in the past, he also noted that Crisp had, at that time, been clean for a period of two years. (R. p. 374)

Dr. Moss administered an extensive battery of tests, including several tests designed to specifically measure level of effort, and he opined that “all effort measures support the tests of cognitive functions as valid.” (R. p. 375) Other testing revealed a mild to moderate impairment in verbal memory, with several instances of confabulation, borderline auditory attention span, problems with impulsivity and attention, problems in establishing and maintaining cognitive set, difficulties with problem solving, concentration difficulties, significantly impaired repetition consistent with memory/concentration problems, and high levels of psychological distress. Of special note, behavioral testing showed significantly elevated levels in several areas, which Dr. Moss opined are consistent with behavioral changes associated with frontal lobe injuries. (R. pp. 375-378)

Dr. Moss ultimately diagnosed **cognitive disorder NOS**, polysubstance abuse in full sustained remission, **probable personality change due to head injury**, obsessive compulsive disorder, and **traumatic brain injury**. He stated that

[o]n the basis of current examination, there are clear indications of deficits in verbal memory, attention, problem solving, and inhibition tied to his work injury. There are indications that he has likely experienced personality changes as a result of his injury. . . . Mr Crisp is experiencing psychological distress from his injury as well. The

exacerbation of obsessive-compulsive tendencies can also be associated with brain injuries involving the orbito-frontal area. This area is often affected in head injury cases due to the irregular shape of the skull and [the sense of smell] is often affected since the olfactory bulbs are there. The current findings would be consistent with frontal lobe injury.

(R. p. 379) Dr. Moss recommended psychological and neuropsychological treatment, including medications, participation in a head injury program, and psychological counseling. On March 6, 2006, **Dr. Moss specifically opined that Crisp has sustained physical brain damage as a result of his March 10, 2004 injury by accident.** (R. p. 403) He stated that given the extent of Crisp's physical problems and his poor insight into his own cognitive difficulties, it is not difficult to understand why the initial evaluating physicians has been unable to identify the brain injury. (R. p. 397) Dr. Moss clearly and unequivocally reiterated these opinions in his deposition on March 15, 2006. (R. p. 291, line 2-p. 293, line 16) Of note, he also clearly stated in his deposition that **all brain injuries are physical in nature and that is what is meant by the term "brain injury."** (R. p. 260, lines 2-7)

Dr. Thomas Collings, a neurologist, evaluated Crisp on May 24, 2005. He noted the same history described above and the medical reports of the other physicians, including the report and opinions of Dr. Moss. His report of Crisp's description of ongoing difficulty is similar to that related by Dr. Moss. Dr. Collings noted that Crisp "does quite well on simple cognitive tasks asked of him during his examination today but more thorough neuropsychological testing and vocational testing reveal deficits which seem to exceed his premorbid state." **He diagnosed traumatic brain injury/closed head injury due to the work-related injury by accident, polysubstance abuse in sustained remission, some**

personality change related to the head injury, and cervical strain and headaches related to the work injury, in addition to other physical injuries. Dr. Collings opined that Crisp has shown some slow improvement but has not yet reached maximum medical improvement and is in need of continuing neuropsychological and vocational support, including treatment at a brain injury center and ongoing psychological treatment and medications. (R. pp. 404-408)

In his deposition, Dr. Collings stated that **Crisp appears to have sustained a closed head injury, which he defined as global trauma to the brain, and he specifically reiterated his diagnosis of traumatic brain injury/closed head injury due to the work accident.** (R. p. 186, line 20-p. 187, line 8; p. 237, line 20-p. 238, line 3; p. 241, lines 12-22) While he expressed some reservation because of the differences he noted between his simple in-office examination and Dr. Moss's findings on neuropsychological exam, he also stated that **the neuropsychological examination was a better indicator of brain injury than his in-office examination and that "taking it at face value, I would say it's the best information that would support that there's . . . significant change between this pre- and post-condition."** (R. p. 213, line 2-p. 215, line 10; p. 226, lines 7-21) Dr. Collings stated that he put great weight on the neuropsychological report and that the recommendations in that report need to be followed in order to further delineate what has happened to Crisp and to treat his problems. (R. p. 235, line 20-p. 237, line 1; p. 239, line 23-p. 240, line 23; p. 242, line 24-p. 243, line 6)

From this evidence, the Commission determined in part that "[a]s a result of his injury by accident, [Crisp] has sustained chronic headaches; mild verbal memory, attention and concentration, problem solving and inhibition problems; probable personality change due to head injury; exacerbation of obsessive-compulsive tendencies; decrease in the sense of smell;

traumatic closed head injury; and Cognitive Disorder NOS.” (R. p. 31, Finding of Fact #22) The Commission further correctly found that Crisp was not having any of these problems prior to his injury by accident. (R. p. 30, Finding of Fact #15) The Commission also specifically found that Dr. Moss’s report and opinions were more credible than the report offered by SouthCo’s expert, Dr. Price, who had disagreed with Dr. Moss. (R. p. 31, Finding of Fact #19) The Commission also found Crisp sustained neuropsychological injuries and awarded further medical treatment for those injuries in a “brain injury program.” (R. p. 32, Findings of Fact #25, 27; p. 34, Ruling of Law #5) These findings were not appealed by either party and are now the law of the case. See Reese v. CCI Constr. Co., 334 S.C. 600, 514 S.E.2d 144 (Ct. App. 1999)(unappealed finding of the Commission is the law of the case; failure to challenge finding is abandonment of issue).

Finding of Fact #22 is taken directly from the diagnoses made by Dr. Moss and Dr. Collings. (R. pp. 373-379, and specifically pp. 378-379; pp. 404-408, and specifically pp. 407-408) Significantly, **Dr. Moss specifically testified that these diagnoses, and specifically the diagnoses of traumatic closed head injury and Cognitive Order NOS, constitute physical brain damage.** (R. pp. 379, 403; depo of Moss at R. p. 251, lines 6-19, p. 254, line 12-p. 256, line 21, p. 258, line 7-p. 260, line 7, p. 292, line 2-p. 293, line 16) SouthCo presented no evidence contradicting Dr. Moss on that point. Finding of Fact #22 is therefore directly contradictory to the appealed Finding of Fact #23, which states that Crisp has not sustained physical brain damage.

Finding of Fact #23 is also internally inconsistent. The finding states that “claimant has sustained a head injury resulting in cognitive disorders to his brain, but has not sustained

a physical brain injury.” However, as Dr. Moss explained, **a head injury resulting in cognitive disorder is physical brain damage.** (R. pp. 378-379, 403; depo of Moss at R. p. 254, lines 12-20, p. 260, lines 2-7)

Finding of Fact #22 and Finding of Fact #23 cannot be reconciled. The internal inconsistency in Finding of Fact #23 cannot be reconciled. For this reason, it is simply not enough to say that there is substantial evidence to support the Commission’s finding that Crisp has not sustained physical brain damage. Finding of Fact #23 is clearly erroneous and cannot be supported by substantial evidence. In short, reasonable minds cannot reach the conclusion the administrative agency reached in order to justify its action. See Brown v. Greenwood Mills, Inc., 366 S.C. 379, 391-93, 622 S.E.2d 546, 553-54 (Ct. App. 2005). Accordingly, the Circuit Court correctly concluded as a matter of law that Crisp has sustained frontal lobe brain injury and physical brain damage within the meaning of the Workers’ Compensation Act, as that is “the only conclusion that can be reached on this evidence.” (R. p. 10) It is well settled that “where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the Commission.” Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, ___, 458 S.E.2d 76, 80 (Ct. App. 1995). The Court of Appeals erred in reversing the Circuit Court’s conclusion and Order.

II. **Under the facts and circumstances of this case, the Court of Appeals erred in relying on its decision in Pack v. South Carolina Dep't of Transp., 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009).**

The situation in this case is different than that found in the Court of Appeals' recent decision in Pack v. South Carolina Dep't of Transp., 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009). In Pack, the Circuit Court had found that "[t]he only medical evidence contained in the record supports the [Single Commissioner's] original finding that [Pack] sustained an injury to the brain" and concluded such as a matter of law. The Court of Appeals reversed the Circuit Court and held that the Commission's determination was conclusive because there was conflicting evidence on the issue of brain injury in the record.

Here, given the Commission's findings stating its view of the evidence in this case (see R. pp. 30-34, Findings of Fact #15, 19, 22, 25, 27 and Ruling of Law #5), which were not appealed, there is no conflict in the evidence. The Commission made findings which basically adopted the assessment and diagnoses of one neuropsychologist, Dr. Moss, and specifically rejected the assessment of the other neuropsychologist, Dr. Price. (R. pp. 30-31, Findings of Fact Nos. 17-19, 22) The only other expert, Dr. Collings, specifically diagnosed traumatic brain injury/closed head injury based on Dr. Moss's neuropsychological testing. (R. pp. 407-408; p. 237, line 20-p. 238, line 3)

Dr. Collings testified in his deposition that there were basically three ways to determine if a person has physical brain damage: 1) CT or MRI scanning, 2) cognitive behavioral level of functioning, and 3) neuropsychological testing. (R. p. 212, lines 4-22) Dr. Collings opined that the first two methods were inconclusive in this case. He stated that there can be physical damage to the brain that cannot be seen on such scans, and therefore, SouthCo's argument that

the normal MRI and CT scans are substantial evidence that Crisp has not sustained physical brain damage is simply erroneous. (R. p. 185, line 23-p. 186, line 7; p. 187, lines 16-25; see also depo. of Moss, p. 260, lines 2-18; p. 292, lines 6-14)

As to the second method, Dr. Collings further specifically stated that while his own in-office examination of functioning raised questions in his mind, Dr. Moss's neuropsychological examination was a better indicator of brain injury than his own in-office examination.

Dr. Collings opined that the third way to determine physical brain damage, neuropsychological testing, was "the best information that would support that there's . . . significant change between this pre- and post-condition," and he stated that he put great weight on that report. (R. p. 213, line 2-p. 215, line 10; p. 226, lines 7-21; p. 235, line 20-p. 237, line 1; p. 239, line 23-p. 240, line 23; p. 242, line 24-p. 243, line 6) Relying on that report, and despite the absence of radiological evidence and despite his questions about Crisp's level of functioning, Dr. Collings diagnosed traumatic brain injury/closed head injury. (R. pp. 407-408; p. 237, line 20-p. 238, line 3) He further opined that the findings of the neuropsychological report were a result of Crisp's work injury. (R. p. 241, lines 12-22) As such, the evidence is entirely consistent.

While the Court of Appeals relied heavily on evidence from Dr. Collings' records and deposition testimony in holding that the Commission's physical brain damage finding is supported by substantial evidence, the Court erred in ignoring the fact that despite such evidence, **Dr. Collings ultimately concluded that Crisp sustained traumatic brain injury as a result of his work accident.** He stated that Dr. Moss's testing was the best evidence in this case and is the basis of his diagnosis of traumatic brain injury. (depo of Collings at R. p.

197, line 22-p. 198, line 14, p. 226, lines 7-25, p. 235, line 1-p. 236, line 19, p. 241, lines 12-22) He stated that while he saw some inconsistencies between the neuropsychological testing and his own examination, those inconsistencies were not enough to discredit the neuropsychological testing and that he relies on the neuropsychological information since it is more in-depth than what he can do in the examination room. (depo of Collings at R. p. 198, lines 4-14, p. 242, line 24-p. 243, line 6)

As such, it is error to base a decision on Dr. Collings statement to the effect that he had found only slight evidence to support physical brain damage if he disregards the neuropsychological report. The neuropsychological report cannot be removed from the evidence, and Collings himself relied on it. In fact, in the opinions of both Dr. Moss and Dr. Collings, it is the best evidence that such an injury has occurred. As both doctors stated, **the neuropsychological testing results are the clear and conclusive indicator that Crisp has sustained traumatic brain injury and physical brain damage.**

Finally, to the extent that the Court relied on Dr. Collings' statement that any brain injury Crisp sustained appeared to be minor, the statute in question does not mandate that an injured worker sustain a particular degree of physical brain damage. Even minor physical brain damage can have severe consequences. The statute merely states that the physical brain damage must exist. Whether a worker has sustained minor physical brain damage or severe physical brain damage, the existence of physical brain damage satisfies the statute.

Here, all the probative expert evidence, including the neuropsychological evidence, proves Crisp sustained brain injury and physical brain damage within the meaning of the statute, and the Commission so found in Finding of Fact #22. That is the only conclusion that

can be reached on this record. As such, there is no truly conflicting evidence on this issue, and the Court of Appeals erred in taking its own view of the evidence to find such a conflict.

III. The Court of Appeals erred in reversing the Circuit Court and affirming the Commission as Finding of Fact #22 and Finding of Fact #23 are directly contradictory and cannot be reconciled.

The Court of Appeals failed to deal with the specific issue which is now brought before this Court. As shown above, the issue is not simply one of conflicting evidence on the record such that the findings of the Commission must be held conclusive, as in Pack v. State Dep't of Transp., 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009) and other decisions by the appellate courts. The issue is rather that the findings of the Commission on the issue of whether claimant has sustained physical brain damage as a result of his injury by accident are not conclusive at all and directly contradict each other. On this issue, the Commission is "talking out of both sides of its mouth."

Specifically, Finding of Fact #22 (R. p. 31) clearly and unequivocally states that every aspect of physical brain damage exists in this case and was caused by the injury by accident in question. That finding was not appealed and is the unassailable law of this case. See Reese v. CCI Constr. Co., 334 S.C. 600, 514 S.E.2d 144 (Ct. App. 1999)(unappealed finding of the Commission is the law of the case; failure to challenge finding is abandonment of issue). Finding of Fact #22 is even consistent with the first clause of Finding of Fact #23, which states that "claimant has sustained a head injury resulting in cognitive disorders to his brain." However, Finding of Fact #22 and the first clause of Finding of Fact #23 are in direct contradiction to the latter clause of Finding of Fact #23, which states that claimant "has not

sustained a physical brain injury.”

Finding of Fact #22 is taken **directly** from the diagnoses made by Dr. Moss and Dr. Collings. (R. pp. 373-379, and specifically pp. 378-379; pp. 404-408, and specifically pp. 407-408) It is not a weighing and choice between contradictory opinions from those doctors, but a statement of both doctors’ opinions concerning claimant. Dr. Moss specifically testified that these diagnoses, and specifically the diagnoses of traumatic closed head injury and Cognitive Disorder NOS, **constitute physical brain damage**. (R. pp. 379, 403; depo of Moss at R. p. 251, lines 6-19, p. 254, line 12-p. 256, line 21, p. 258, line 7-p. 260, line 7, p. 292, line 2-p. 293, line 16) Furthermore, Dr. Moss specifically explained that **a head injury resulting in cognitive disorder is physical brain damage**. (R. pp. 378-379, 403; depo of Moss at R. p. 254, lines 12-20, p. 260, lines 2-7)

Finding of Fact #22 and Finding of Fact #23 cannot be reconciled. The internal inconsistency in Finding of Fact #23 cannot be reconciled. For this reason, it is simply not enough to say that there is substantial evidence to support the Commission’s finding that Crisp has not sustained physical brain damage. If that is the case and the latter clause of Finding of Fact #23 is supported by substantial evidence, then the Finding of Fact #22 and the first clause of Finding of Fact #23 cannot be supported by substantial evidence. And of note, Finding of Fact #22 was not appealed by either party and is the law of the case. Reasonable minds simply cannot reach the contradictory conclusions the administrative agency reached. See Brown v. Greenwood Mills, Inc., 366 S.C. 379, 391-93, 622 S.E.2d 546, 553-54 (Ct. App. 2005).

SouthCo’s arguments in its return are merely “red herrings” and should not distract this Court. (see SouthCo’s Return to Petition for Cert.) Ms. Surrett may have testified that, in her

opinion, Crisp had some previous cognitive difficulties, but the Commission did not so find. In fact, the Commission specifically found that “Claimant denied having any similar cognitive problems, such as the inability to focus and absent-mindedness, prior to his injury by accident.” (R. p. 30, Finding of Fact #15) That finding was not appealed.

Further, the Commission specifically rejected the report and opinions of Dr. Price, stating that the report and opinions of Dr. Moss were more credible. (R. p. 31, Finding of Fact #19) That finding was not appealed.

Also, both Dr. Moss and Dr. Collings stated that the absence of findings on x-rays or scans is not conclusive, as such tests are not sophisticated enough to find many brain injuries. (R. p. 185, line 23-p. 186, line 7; p. 187, lines 16-25; see also depo. of Moss, p. 260, lines 2-18; p. 292, lines 6-14)

Dr. Collings did state reservations about his examination, but he ultimately concluded that Crisp sustained brain injury and physical brain damage consistent with and based on the report and opinions of Dr. Moss. Dr. Collings opined that neuropsychological testing was “the best information that would support that there’s . . . significant change between this pre- and post-condition,” and he stated that he put great weight on Dr. Moss’s report. (R. p. 213, line 2-p. 215, line 10; p. 226, lines 7-21; p. 235, line 20-p. 237, line 1; p. 239, line 23-p. 240, line 23; p. 242, line 24-p. 243, line 6) Relying on that report, and despite the absence of radiological evidence and despite his questions about Crisp’s level of functioning, Dr. Collings diagnosed traumatic brain injury/closed head injury. (R. pp. 407-408; p. 237, line 20-p. 238, line 3) He further opined that the findings of the neuropsychological report were a result of Crisp’s work injury. (R. p. 241, lines 12-22)

SouthCo repeatedly misrepresents the record and takes statements out of context. Dr. Collings stated that Crisp was performing some of the same activities pre- and post-accident, but then clearly stated that did not mean that Crisp did not sustain brain injury. (R. p. 213, line 2-p. 214, line 20) And the neuropsychological testing cannot be removed from the equation. The fact that there might not be conclusive evidence absent the neuropsychological report is irrelevant, as the neuropsychological report is the best evidence of brain injury and brain damage and clearly shows such injury and damage here. (R. p. 213, line 2-p. 215, line 10; p. 226, lines 7-21; p. 235, line 20-p. 237, line 1; p. 239, line 23-p. 240, line 23; p. 242, line 24-p. 243, line 6)

Further, there are simply *no* findings of fact in the Commission's Order concluding that "Crisp's need for medical treatment is as a result of long-standing preexisting psychological condition and drug use." (see SouthCo's Return to Petition for Cert., pp. 11-12) The citations SouthCo provides do not support that statement. To the contrary, the Commission's report and the evidence make clear that the physical injuries, including what is now an admitted head injury since SouthCo did not appeal the first clause of Finding of Fact #23, aggravated any preexisting psychological condition he may have had. (see R. pp. 30-32, Findings of Fact #17, 22, 24-26) And on that score, the Commission did *not* find that "Crisp needed additional medical treatment because of underlying psychiatric/psychological problems and prior drug addiction problems." (see SouthCo's Return, p. 13) The Commission found that further medical treatment is necessary because of all of Crisp's injuries related to his injury by accident, including his head/brain injury and his psychological injury. (see R. pp. 32-34, Findings of Fact #24-27 and Rulings of Law #3-5)

The Commission's Order, and specifically Finding of Fact #23, on the issue of brain injury and physical brain damage is flawed and, as shown above, cannot be supported by substantial evidence. Based on the posture of this case, the findings which were not appealed and which are now the law of this case, and the clear evidence cited above, Crisp urges this Court to recognize the inherent contradiction in the Commission's Order and find that Finding of Fact #23 is not supported by the evidence as found by the Commission or the other findings of the Commission, specifically Findings of Fact #15, 19 ,22 , 25, 27 and Ruling of Law #5. (R. pp. 30-34) As such, the Commission should have found that Crisp sustained physical brain damage as a matter of law. The Commission's finding to the contrary, Finding of Fact #23, is clearly erroneous and should be reversed. If left unanswered, the path created by the decision of the Commission and the Court of Appeals in this matter will lead to many more faulty and contradictory decisions prejudicing the injured workers of South Carolina.

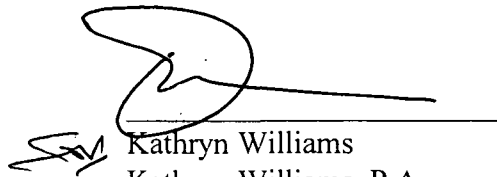
CONCLUSION

It is, therefore, respectfully submitted that the Commission's Findings of Fact #22 and #23 are directly contradictory. Finding of Fact #22 is taken directly from the diagnoses made by Dr. Moss and Dr. Collings, and Dr. Moss specifically testified that these diagnoses, and specifically the diagnoses of traumatic closed head injury and Cognitive Order NOS, constitute physical brain damage. That finding was not appealed by either party and is the law of this case. Finding of Fact #23 however states just the opposite – that Crisp has not sustained physical brain damage. Therefore, Finding of Fact #22 and Finding of Fact #23 cannot be reconciled. For this reason, it is simply not enough to say that there is substantial evidence to support the Commission's finding that Crisp has not sustained physical brain damage. Finding of Fact #23 is clearly erroneous and cannot be supported by substantial evidence. In short, reasonable minds cannot reach the conclusion the administrative agency reached in order to justify its action.

The issue in this case is not one of conflicting evidence. The Commission made specific findings on the evidence, and the parties are no longer in dispute on that evidence, as neither party appealed any finding other than Finding of Fact #23. The issue is rather one of conflicting findings. Finding of Fact #23 cannot be reconciled with the evidence or the Commission's other findings. As such, the Court of Appeals clearly erred in reversing the Circuit Court and finding that the Commission's Finding of Fact #23 is supported by substantial evidence.

Based on the posture of this case, the findings which were not appealed and which are now the law of this case, and the clear evidence cited above, Crisp urges this Court to recognize the inherent contradiction in the Commission's Order and find that Finding of Fact #23 is not supported by the evidence as found by the Commission or the other findings of the Commission. As such, the Commission should have found that Crisp sustained physical brain damage as a matter of law. The Commission's finding to the contrary, Finding of Fact #23, is clearly erroneous and should be reversed. If left unanswered, the path created by the decision of the Commission and the Court of Appeals in this matter will lead to many more faulty and contradictory decisions prejudicing the injured workers of South Carolina.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K.W.', is written over a horizontal line. The signature is stylized and somewhat cursive.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Opinion No. 4746 (S.C. Ct. App. filed Sept. 29, 2010)

RECEIVED

APR 16 2012

S.C. Supreme Court

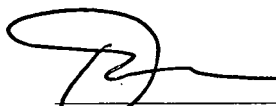
Michael D. Crisp, Jr., Employee, Petitioner,

vs.

SouthCo, Inc., Employer, and Pennsylvania
National Mutual Casualty Insurance Co.,
Carrier, Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief complies with this Court's August 13, 2007 Order concerning personal data identifiers and other sensitive information.


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CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the **BRIEF OF PETITIONER** to be served upon Respondents by mailing a copy of same to their attorney of record at the address shown below by U.S. Mail, proper postage prepaid, on the 13th day of April, 2012.

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