

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

RECEIVED
DEC 23 2013
SC Court of Appeals

Op. No. 5185 (S.C.Ct.App. filed November 7, 2013)

Hector G. Fragosa, (Employee/Claimant), Appellant,
v.
Kade Construction, LLC (Employer) and
Key Risk Management Services, Inc. (Carrier), Respondents.

**RESPONDENTS' RETURN TO APPELLANT'S
PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC**

Respondents, by and through the undersigned attorney, hereby file this Response to Appellant's December 12, 2013 Petition for Rehearing and Rehearing en banc. The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is the purpose of a petition for rehearing to have the case tried in the appellate court a second time. Kennedy v. South Carolina Retirement System, 564 S.E.2d 322, 349 S.C. 531 (S.C. 2001). In this case, the Court did not overlook or misapprehend any evidence or arguments of the Appellant, and the Court appropriately remanded the case to the Commission for further findings under the new tests set forth in the cases of Crisp v. SouthCo, Inc., 401 S.C. 627, 738 S.E.2d 835 (2013) and Sparks v. Palmetto Hardwood, Inc., 401 S.C. 619, 738 S.E.2d 831 (2013).

I. The Court did not overlook or misapprehend Appellant's argument that the inconsistency in the Commission's findings is an error of law requiring reversal rather than remand.

In his petition, Appellant first argues the Court overlooked or misapprehended the evidence and arguments raised on the issues of *traumatic brain injury* as a medical term synonymous with the legal term *physical brain damage*. Specifically, Appellant argues the Court overlooked or misapprehended two critical factual findings made by the Commission, which Appellant claims when taken together, confirm the presence of physical brain damage under the Sparks and Crisp decisions.

Appellant points to the Commission's Finding of Fact No. 8 "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury as stated by Dr. George Sandoz in his August 20, 2009 letter." (R. p., 22) Appellant then points to the Commission's Finding of Fact No. 9, "That, after considering the Claimant's multiple impairment ratings, we find that the Claimant is permanently and totally disabled and is unable to return to any type of work that he has performed in the past." (R., p. 22) Appellant incorrectly asserts that these two findings together conclusively decide the issue of whether Appellant suffered physical brain damage as contemplated by §42-9-10(C) and the Crisp and Sparks cases. The Commission's Finding of Fact No. 9 states the Appellant was found permanently and totally disabled after considering the Claimant's *multiple* impairment ratings.(R. p. 18) The Commission's Finding of Fact No. 7 sets forth that this finding also included a 40% impairment rating to the right lower extremity, 1% to the left lower extremity, and 17% to the whole person as a result of his right foot and left shoulder injuries. (R., p. 18).

The Commission was clear that the finding of permanent and total disability was based on the combined multiple ratings, and there is nothing in the Order to suggest that the 46% impairment to the brain alone was the cause of the Claimant's inability to return to suitable employment. Appellant's argument that the 46% impairment to the brain confirms that the brain damage rendered Appellant unemployable because it was the most a significant rating is purely speculative and lacks merit.

Appellant goes on to argue that the Commission's conclusion that Appellant had not suffered physical brain damage as it does not meet the criteria established under the South Carolina Workers' Compensation Act was an error of law since the *criteria* the Commission was referring to was the presence of the physical brain damage on MRI or CT scans. First, there is nothing in the Order stating that the MRI or CT scan is the criteria upon which the Commission ruled. Second, the Court in the Crisp and Sparks cases did not reject the presence of a brain injury on MRI and CT scans as part of the decision making process, but instead the rejected the use of diagnostic testing as an issue determinative requirement.

II. The Court did not overlook or misapprehend Appellant's argument that the distinction is not between the terms traumatic brain injury and physical brain damage, but instead, whether the "brain damage [is] so severe that the person could not subsequently return to suitable gainful employment.

Appellant's second argument is the Court overlooked or misapprehended the Supreme Court's holding in Crisp. Specifically, Appellant argues that the Court confuses the issues by stating that the nexus of the case was the distinction between *physical brain injury* and *physical brain damage*, and instead the sole question for the Court should have been whether the Appellant's brain damage was severe enough to render him unable to return to suitable employment.

Appellant's argument fails because Appellate Panel found that Appellant was permanently and totally disabled as a result of his *multiple* impairment ratings, not based on his 46% rating to the brain alone. Again, the Court did not overlook or misapprehend anything in pointing to the distinction of physical brain injury versus brain damage, and it correctly cited the permanency and severity tests set forth in Crisp and Sparks. The Court is correct in remanding the case to the Commission for a determination of whether Appellant's brain *injury* rises the level of the most serious injuries contemplated by law to allow for lifetime benefits under the new standards set forth in Crisp and Sparks.

III. The Court did not overlook or misapprehend argument that the Commission erred in finding as a fact an opinion that a neuropsychologist is not qualified to make.


Finally, Appellant argues that the Court overlooked or misapprehended the argument that the Commission erred in relying on the statement of Dr. Wagner, because as a neuropsychologist, Dr. Wagner was not qualified to base his opinion on matters outside of his expertise. Appellant already made this exact argument to the Court, and the Court clearly stated "As a neuropsychologist, Dr. Wagner is able to consider the diagnostic studies and findings of other doctors in the formation of his opinion." Fragosa v. Kade Constructions, LLC (S.C.Ct.App. filed November 17, 2013)(Shearhouse Ad.Sh. No. 50). The Court did not overlook or misapprehend Appellant's identical argument when it was made in his Brief to the Court or during oral arguments. Again, a petition for rehearing is not a chance to have issues tried in the appellate court a second time, but instead is a chance for the losing party to point out evidence or arguments that were overlooked or misapprehended. In this case, the Court squarely addressed

Appellant's argument on the issue, and there was no argument or evidence that was overlooked or misapprehended by the Court.

Conclusion

For the reasons set forth above, Respondents respectfully request the Court deny Appellant's Petition for Rehearing. Appellant has failed to demonstrate any points that were overlooked or misapprehended by the Court, and instead simply restates the previous arguments made before the Court. Further, Respondents respectfully request the Court deny the petition for rehearing *en banc*. A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Neither of these exceptions applies to the immediate case, and Appellant's petition for rehearing *en banc* should be denied.

Respectfully Submitted,



Michael W. Burkett, Esquire
J. Gabriel Coggiola, Esquire
Willson, Jones, Carter & Baxley
4500 Fort Jackson Blvd.
Columbia, SC 29209
(803) 782-2520
Attorneys for the Respondents

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 5185 (S.C.Ct. App. Filed November 27, 2013)

Hector G. Fragosa, (Employee/Claimant), Appellant,
v.
Kade Construction, LLC (Employer) and
Key Risk Management Services, Inc. (Carrier), Respondents.

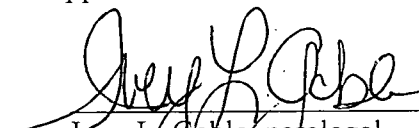
PROOF OF SERVICE

The undersigned certifies that on the date indicated below he served counsel for Appellant with a copy of **Respondents' Return to Petition for Rehearing** by mailing copies of the same by United States Mail postage prepaid to the following addresses:

Stephen B. Samuels, Esquire
Samuels Law Firm, LLC
1527 Blanding St.
P.O. Box 50349
Columbia, SC 29250
(803) 779-4000
Attorney for Appellant

Jeff C. Chandler, Esquire
Chandler Law Firm
Bank of America Building
2501 North Oak Street
Myrtle Beach, SC 29577
(843) 448-4357
Attorney for Appellant

RECEIVED
DEC 28 2013
SC Court of Appeals


Ivey L. Gable, paralegal
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209

December 23, 2013
Columbia, South Carolina

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH

John Gabriel Coggiola
Direct (803) 227-2889
Fax (803) 782-2527
jgcoggiola@wjlaw.net

4500 Fort Jackson Boulevard
Columbia, SC 29209
www.wjcbllaw.net

December 23, 2013

VIA HAND DELIVERY

Ms. Jenny Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

RECEIVED
DEC 23 2013
SC Court of Appeals

Re: Hector Fragosa vs. Kade Construction, LLC
WCC File No.: 0717624 DOI: 11/1/2007
Carrier: Key Risk Management Services, Inc. - Claim No.: 1000021953
WJC&B File No.: 0310.00420
Appellate Case No.: 2012-212279

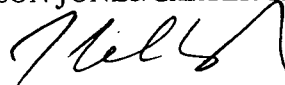
Dear Ms. Kitchings:

Pursuant to Rule 240, enclosed for filing please find one original and six (6) copies of the Respondents Return to Petition for Rehearing in the above-referenced matter. I have also enclosed the Proof of Service for the same.

By copy of this correspondence and enclosure, a copy of the Return to Petition for Rehearing is being provided directly to Stephen Samuels and Jeffrey Chandler, Appellant's counsel. Thank you for your attention to this matter, and please do not hesitate to contact me if you have any questions or concerns.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



John Gabriel Coggiola

JGC/jgc
Enclosure
cc: Mr. Stephen B. Samuels, Esquire
Mr. Jeffrey C. Chandler, Esquire