THE STATE OF SOUTH CAROLINA
In The Court of Appeals

70659

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.

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SC Court of Appeals

PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC

The Appellant, by and through his undersigned attorney, hereby files this Petition for Rehearing and Rehearing en banc. On November 27, 2013, this Court issued an opinion affirming in part and remanding the Decision and Order of the South Carolina Workers' Compensation Commission. Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 76).

As grounds for granting his Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the evidence and arguments raised on the issues of (1) *traumatic brain injury* as medical term synonymous with the legal term *physical brain damage*; (2) the Commission's finding confirming that Fragosa had suffered severe permanent physical brain damage, and (3) whether the Commission erred in finding as a fact an opinion that a

neuropsychologist is not qualified to make.

ARGUMENT

1. The inconsistency in the Commission's findings is an error of law requiring reversal rather than remand.

The Court remanded the case back to the Commission for further findings because "it is unclear whether the Appellate Panel found these injuries included an injury to the brain." Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 82). Respectfully, Appellant believes the Court may have misapprehended the factual findings made by the Appellate Panel. The Panel made two critical findings – which taken together confirm that Fragosa suffered physical brain damage as defined in Crisp and Sparks. Crisp v. SouthCo., Inc., 738 S.E.2d 835, 401 S.C. 627 (2013)("only in cases of physical brain damage that is both permanent and severe would an employee-claimant be entitled to benefits for life.").

The Commission found as a fact "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury as stated by Dr. George M. Sandoz in his August 20, 2009 letter." [R. page 22, Finding of Fact 8]. This is plainly a finding that Fragosa sustained a permanent injury to the brain. There is nothing at all ambiguous about it. Moreover, 46% to the whole person is a significant permanent impairment.[1] This finding satisfies the requirement that the brain damage be permanent.

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[1]The finding itself is amply supported by substantial evidence. Much of the impairment is based on a "Clinical Dementia Rating" correlating to an "impairment [which] requires direction of some activities of daily living." [AMA Guides to Permanent Impairment (5th Edition), page 320]. In the description of the rating, Dr. Sandoz specified it was "for a traumatic brain injury. At this moment from the injury that the patient has suffered, he is totally and permanently disabled." [R. Page 242].

The Commission went on to find "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. page 22, Finding of Fact 9]. This finding meets the second part of the test – "brain damage so severe that the person could not subsequently return to suitable gainful employment." Id. at 843. There is nothing ambiguous in this finding either. Indeed, Respondents concede Fragosa is permanently and totally disabled. The reference to "multiple impairment ratings" – of which the 46% for traumatic brain injury is by far the most significant – confirm that the brain damage rendered Fragosa unemployable. See Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998)("the statute only requires that a claimant be totally and permanent disabled and suffer physical brain damage as a result of the injury.").

The apparent confusion arises over the finding "That based on the greater weight of the evidence, we find there has not been a physical brain injury *as it does not meet the criteria* established under the South Carolina Workers' Compensation Act." [R. page 23, Finding of Fact 18]. Unlike the other two findings, this is not a finding of fact – it is a conclusion of law. More specifically, it is the application of Finding of Facts 8 and 9 to the law – as the law was understood prior to Crisp and Sparks.

The criteria the Commission was referring to was the requirement consistently relied on by Respondents that *physical brain damage* must be visible on MRI or CT scans. The Commissioners plainly believed this was the dispositive criterion.[2] Their belief was not unreasonable as the Supreme

[2]At oral argument before the Appellate Panel, Commissioner McCaskill asked Respondents' counsel, "As I understand what you're saying if it is a physical brain injury you've got to be able to see it." Counsel responded affirmatively, stating "That is our position there

Court had not yet addressed the issue. Now that Crisp and Sparks have rejected "use of a specific diagnostic tool in proving these medically-technical brain injury cases," the Commission's conclusion is affected by an error of law and must reversed. Id. Cf. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(medical opinion of a commissioner is not evidence).

Appellant respectfully believes the Court may have overlooked the two critical findings of fact which confirm that Fragosa sustained serious, permanent physical brain damage under the Crisp/Sparks standard. Appellant requests the Court reconsider these findings in light of Crisp.

2. The distinction is not between the terms *traumatic brain injury* and *physical brain damage*, but whether the "brain damage [is] so severe that the person could not subsequently return to suitable gainful employment.

In its opinion, the Court wrote: "The nexus of this case is the distinction between a physical brain injury, which is compensated pursuant to Regulation 67-1101, and physical brain damage, which is compensated pursuant to section 42-9-10(C)." Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 80). Respectfully, this statement misapprehends the Supreme Court's holding in Crisp v. SouthCo., Inc., 738 S.E.2d 835, 401 S.C. 627 (2013). Respectfully, the distinction lies not between physical brain injury and physical brain damage, but between less serious and more serious brain damage. As the Crisp court stated, the General Assembly intended lifetime compensation to be available "in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent physical brain damage." Id. at 842. The Supreme Court further defined the statutory term "physical brain damage" as "brain damage so severe that the person could not subsequently return to suitable

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would be some physical change that something would pick up on a Scan . . ." [R. Page 16, lines 11-17].

gainful employment." Id. at 843. In less serious cases, disability for permanent impairment is awarded under "the other avenues of compensation available under the scheme for brain injuries that do not render the worker unemployable." Id.

The confusion arises because the statute uses terminology different from the language used by medical doctors. In medicine, the term "traumatic brain injury" is synonymous with physical brain damage. As explained by Dr. Sandoz, *traumatic brain injury* is the "preferred term" in medicine "[b]ecause there's been some *damage* and injury to the *function* of the brain." Traumatic brain injury is permanent, as opposed to a mere "concussion [which] should resolve." [R. p. 320, lines 15-24]. This description mirrors the definition of physical brain damage adopted in Sparks, to wit: "The General Assembly meant to require severe, *permanent impairment of normal brain function* in order for an injured worker to be deemed physically brain damaged under § 42-9-10 C." Sparks v. Palmetto Hardwood, Inc., 738 S.E.2d 831, 401 S.C. 619 (2013)(emphasis added).

To return to the Court's opinion, only brain injuries which result in "permanent impairment of normal brain function" will support an award of disability compensation. This is because permanent disability compensation can only be awarded when there is some level of permanent physical impairment. "A permanent impairment, by definition, lasts for a lifetime." James v. Anne's Inc., 701 S.E.2d 730, 736, 390 S.C. 188 (2010).

This means even disability compensated under Regulation 67-1101 requires some level of permanent impairment of normal brain function. The nexus is the severity of the brain damage. See Crisp at 844-845 ("only in cases of physical brain damage that is both permanent and severe would an employee-claimant be entitled to benefits for life.").

The point being made here is not an attempt to reargue Crisp and Sparks, nor to argue that

any level of brain injury or damage results in lifetime benefits. The idea that *de minimus* brain damage *per se* qualifies for lifetime benefits (as argued in Sparks) is and always was untenable.

The concern here arises where the Court states:

> throughout his brief Fragosa cites examples to support his position that he suffered a brain *injury*. Respondents do not deny that Fragosa suffered a physical brain *injury*. Instead, they maintain Fragosa failed to show he suffered physical brain *damage*. Fragosa at 80 (emphasis in original).

Fragosa should not be penalized because his doctors used correct medical terminology in describing his condition.[3] Describing Fragosa's position as arguing for brain injury over brain damage is elevating form over substance. This case has always been about physical brain damage.[4] Indeed both parties and the Commission itself used the term "physical brain injury" and "physical brain damage" interchangeably. *Physical brain damage* is a legal term of art given new meaning by Sparks and Crisp. That meaning plainly refers back to the medical term *traumatic brain injury.*

The disputed issue was whether the damage must be visible on an MRI or CT scan – an issue decided in Fragosa's favor by Crisp. The question for this Court is simply whether Fragosa suffered "brain damage so severe that the person could not subsequently return to suitable gainful employment." Id. at 843. Appellant believes the description of the issue as "physical brain injury" versus "physical brain damage" results in confusion over the issues before the Commission in this case, as well as potentially confusing the issue in later cases.

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[3]Dr. Sandoz removed all doubt regarding terminology by answering "YES" to the question "to a reasonable degree of medical certainty whether Mr. Fragosa has suffered physical brain damage that has rendered him totally and permanently disabled." [R. p. 286].

[4]In his Brief, Fragosa captioned the first argument as "Hector Fragosa has suffered physical brain damage and is legally entitled to workers' compensation benefits for life." Brief of Appellant, page 9.

3. <u>The Appellate Panel erred to the extent it relied on the statement in Dr. Wagner's report that "Follow-up structural and functional studies (i.e. EEG, CT and MRI) have been read as unremarkable demonstrating structural resolution of the work-related injury."</u>.

Respectfully, Appellant asks the Court to reconsider its holding with regards to Dr. Wagner's report. The specific error by the Commission was to make a finding of fact based on a mere observation by Dr. Wagner – an observation he was not qualified to make. Thus, while an expert can refer incidentally to various records in his report, he cannot base his opinion on matters outside his expertise.

Neuropsychologists are qualified to testify as experts on physical brain damage *as shown* by neuropsychological testing. In this case, Dr. Wagner's testing confirmed the existence of cognitive deficits due to "structural change to the brain." The comment about the imaging studies "demonstrating structural resolution of the work-related injury" is not an opinion about physical brain damage, nor could it be as Dr. Wagner is not qualified to interpret or opine on imaging studies. Dr. Wagner never explicitly opined on physical brain damage one way or the other (nor did he ever state his opinions to a reasonable degree of medical or neuropsychological certainty). <u>See</u> <u>Hutson v. South Carolina State Ports Authority</u>, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion as based on "rank speculation"). The only inference which can be drawn from his report is that Fragosa suffers persistent cognitive deficits due to the brain damage, thus supporting Fragosa's claim of physical brain damage.

CONCLUSION

For the foregoing reasons, Appellant requests the Court grant the Petition for Rehearing, reconsider the original opinion, reverse the Appellate Panel and hold Hector Fragosa suffered physical brain damage, is not subject to the five hundred week limitation, and shall receive disability and medical benefits for life.

Appellant further petitions the Court for rehearing *en banc*. This is the first case to come up on appeal in the wake of Crisp and Sparks. It is ripe for a determination of physical brain damage as Fragosa has reached maximum medical improvement. Moreover, the Commission has already made findings of fact confirming that Fragosa has sustained serious, permanent brain damage so severe that he could not subsequently return to suitable gainful employment."

Respectfully Submitted

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Columbia, South Carolina
December 12, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0717624

Hector G. Fragosa, Employee/Claimant, ... Appellant,

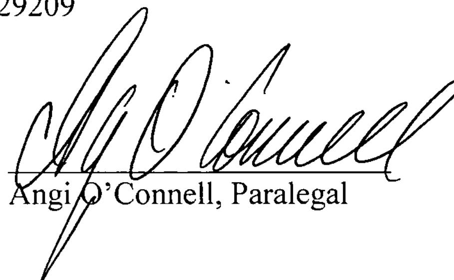
v.

Kade Construction, LLC, Employer, and Key Risk Management Services, Inc., Carrier,
.... Respondents.

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B. Samuels and I have served the **Petition for Rehearing and Petition for Rehearing En Banc** upon the Respondents by mailing copies of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **December 12, 2013**, addressed as follows:

Michael W. Burkett, Esquire
J. Gabriel Coggiola, Esquire
Attorneys for Respondents
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209



Angi O'Connell, Paralegal

December 12, 2013

STEPHEN B. SAMUELS
ROBERT P. JACKMAN
ATTORNEYS AT LAW

December 12, 2013

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Hector G. Fragosa v. Kade Construction, LLC and Key Risk Management Services, Inc.
Appellate Case No.: 2012-212279
W.C.C. File No.: 0717624

Dear Ms. Kitchings:

Please find enclosed **Petition for Rehearing and Petition for Rehearing En Banc** for filing in the above-referenced matter. Also enclosed is a check in the amount of $25.00 for the filing fee. Please date stamp the extra copy and return it to my courier.

By copy of this letter and enclosure to Michael Burkett, counsel of record for the Respondents, we are serving him with a copy of the **Petition for Rehearing and Petition for Rehearing En Banc** as indicated by the attached Proof of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/aro

Enclosures

cc w/encl.: Michael W. Burkett, Esquire
J. Gabriel Coggiola, Esquire
Jeffrey C. Chandler, Esquire

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