

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

JAN 03 2014

SC Court of Appeals

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.

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

The Appellant, by and through his undersigned attorney, hereby files his Appellant's Reply to Respondents' Petition for Rehearing and Rehearing en banc.¹

ARGUMENT

1. The inconsistency in the Commission's findings is an error of law requiring reversal rather than remand (in Reply to Respondents' Argument at pages 2-3).

In his Petition for Rehearing, Appellant suggests the Court overlooked or misapprehended the argument that the Commission's twin findings that Appellant suffered a "46% permanent

¹Although the Return was served by on Appellant by U.S. Mail on December 23, 2013, the Return was actually delivered by the Postal Service on December 31, 2013.

impairment to the whole person for a traumatic brain injury” and “is permanently and totally disabled” meet the statutory requirements for physical brain damage. ” [R. page 22, Findings of Fact 8-9]. In their Return, Respondents argue these findings are not dispositive because “there is nothing in the Order to suggest that the 46% impairment to the brain² alone was the cause of the Claimant’s inability to return to suitable employment.” [Return, pages 2-3].

Respondents’ argument misses the mark. In Pearson, the employer made the same argument made here: lifetime benefits should not be awarded because the employee suffers from additional ailments which contribute to his disability. See Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 400, 489 S.E.2d 219, 222 (Ct. App.1997)(holding “Employer’s argument to avoid the lifetime benefit provision of section 42-9-10 because of Pearson’s psychological problems is meritless.”). Sparks cited Pearson specifically for the opposite proposition, to wit: “§ 42-9-10 *does not require that total and permanent disability result solely from physical brain damage* but does require that the claimant suffer physical brain damage as a result of the compensable injury.” Sparks v. Palmetto Hardwood, Inc., 738 S.E.2d 831, 835, 401 S.C. 619 (2013)(emphasis added).

In the instant case, the fact of physical brain damage is confirmed by the Commission’s finding of a “46% impairment to the whole person for a traumatic brain injury.” “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). Impairment ratings are not made until the injured person reaches maximum medical improvement. “Maximum medical improvement is a term used to indicate that a person has reached

²The Commission found Fragosa suffered a “46% permanent impairment to the *whole person* for a traumatic brain injury.” Respondents characterization of the impairment as 46% to the brain confirms that the damage is permanent and severe, but understates the contribution of the brain damage as an impairment to the whole person is necessarily greater than an impairment to a given body part.

such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). There is also no doubt that a 46% whole person impairment is a serious one.

It is not "purely speculative" to suggest "that the brain damage rendered Appellant unemployable because it was the most significant rating . . ." [Return, pages 2-3]. His neurologist, Dr. Sandoz explicitly opined: "At this moment from the injury that the patient has suffered, he is totally and permanently disabled. After evaluation of the AMA Guidelines, he is totally and permanently disabled." [R. p. 242]. Dr. Sandoz tied his opinion on disability directly to the brain damage – as did Dr. Brabham. [R. p. 272, 283-284]. Moreover, Dr. Sandoz' opinion was made in the same paragraph the Commission relied on for the 46% whole person impairment rating.

Although not necessary under Sparks and Pearson, it should be pointed out that the 46% whole person impairment for the brain injury is by far the most serious of Fragosa's impairment ratings. 40% to the right lower extremity is equivalent to 16% of the whole person. 1% to the left lower extremity is a 0% whole person impairment. Table 17-3, AMA Guides to Permanent Impairment (5th Edition), page 527. Adding all the other listed impairments together (16% + 0% + 17% = 33%) is still less than 46% to the whole person.

The other impairment ratings merely confirm that Fragosa suffered other injuries in the accident. It would create an absurd result if he were barred from lifetime compensation for his brain damage because he also suffered other serious injuries. Trauma resulting in physical brain damage typically causes damage to other body parts as well – being knocked off a building by a crane undoubtedly does.

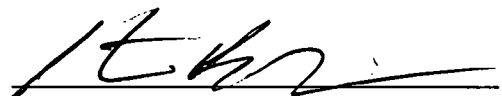
The Commission's factual findings confirm Fragosa suffered physical brain damage as defined in Sparks and Crisp v. SouthCo., Inc., 738 S.E.2d 835, 401 S.C. 627 (2013). The Commission's legal conclusions to the contrary are based on an error of law, such that the decision below should be reversed outright.

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



Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201

(803) 779-4000

Attorneys for Appellant

Jeff C. Chandler
CHANDLER LAW
Bank of America Building
2501 Oak Street
Myrtle Beach, SC 29578
(843) 448-4357

Columbia, South Carolina
December 31, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JAN 03 2014

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

SC Court of Appeals

WCC File No. 0717624

Hector G. Fragosa, Employee/Claimant, Appellant,

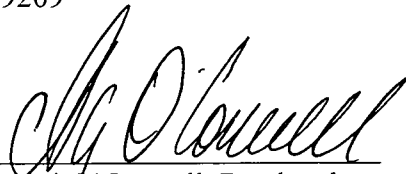
v.

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 **Appellant's Reply to Respondents' Return to 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 31, 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 31, 2013



STEPHEN B. SAMUELS
ROBERT P. JACKMAN
ATTORNEYS AT LAW

December 31, 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 the original and six (6) copies of **Appellant's Reply to Respondents' Return to Petition for Rehearing and Petition for Rehearing En Banc** for filing in the above-referenced matter.

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 **Appellant's Reply to Respondents' Return to 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

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SC Court of Appeals

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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