

DECISION AND ORDER
OF THE
APPELLATE PANEL
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

COMMISSION PANEL: SUSAN S. BARDEN, CHAIR; ANDREA C. ROCHE; H. GENE
MCCASKILL

SCWCC FILE NO.: 0717624
APPELLATE CASE NO.: 2012-212279

HECTOR G. FRAGOSA,

CLAIMANT

V.

KADE CONSTRUCTION, LLC,

EMPLOYER, AND

KEY RISK INSURANCE COMPANY OF S.C.,

CARRIER, DEFENDANTS.

ON REMAND FROM THE COURT OF APPEALS OF SOUTH CAROLINA

Filed:

January 31, 2014

RECEIVED

1

JAN 31 2014

Division of Claims
Claims Administrator
S.C. Workers' Comp. Comm.

STATEMENT OF THE CASE

This matter comes to before the Commission by way of remand from the Court of Appeals of South Carolina. *See Fragosa v. Kade Construction, LLC*, --- S.E.2d ---, 2013 WL 6192428 (November 27th, 2013). In accordance with the decision of the Court of Appeals, the Commission makes the following findings on remand:

FINDINGS OF FACT AND RULINGS OF LAW

1. In the Court's "CONCLUSION," the Appellate Panel is asked for "clarification regarding the existence of a physical brain injury."
2. As the Court states in its opinion under "LAW/ANALYSIS," "Respondents do not deny that Claimant suffered a physical brain injury." Therefore, the Appellate Panel has re-reviewed the record, and concludes that Claimant did not suffer physical brain damage. Based upon the evidence--and Respondents' concession--we find that Claimant suffered a physical brain injury, but not physical brain damage.
3. The Appellate Panel fully recognizes the seriousness and significance of Claimant's accident, which could have proven fatal: Claimant sustained a skull fracture, sustained hematomas, sustained myriad other injuries, was unconscious at the scene, and had to be intubated for 16 days while hospitalized. However, the significance of the mechanics of an accident and the initial diagnoses are not dispositive in light of the standard set forth by the Supreme Court as to whether Claimant sustained permanent and serious physical brain damage (thereby entitling a claimant to receive lifetime benefits). We base this finding on the medical evidence in its entirety, including but not limited to APA, pages 417 and 430.
4. Claimant's skull fracture was not a depressed skull fracture (*i.e.*, no bone fragment actually pressed into the brain), and no surgical intervention was required for Claimant's

head injury. We base this finding on the deposition testimony of Dr. Sandoz, page 6, and on the medical evidence in its entirety.

5. As to Claimant's mastoiditis, the mastoid is not part of the brain, but part of the skull. We base this finding on the deposition testimony of Dr. Sandoz, pages 19-21, and on APA, page 699).
6. Two days after the date of the accident, Claimant was able to "answer yes/no to questions with simple words." We base this finding on APA, page 85.
7. Three days after the date of the accident, Claimant could follow simple commands. We base this finding on APA, page 107.
8. Four days after the date of the accident, Claimant opened his eyes on command, and nodded appropriately to questions. We base this finding on APA, page 124.
9. Eight days after the date of the accident, Claimant was able to follow verbal commands. We base this finding on APA, page 210; *See also* APA, page 239).
10. Nineteen days after the date of the accident, Claimant was "able to indicate that he lives in an apartment in Myrtle Beach with 5 other people." Claimant was also "able to communicate basic needs through gestures, head nods, or mouthing words," and was able to follow commands. We base this finding on APA, pages 389, and 392, and 394. *See also* pages 399, 401, 403, and 410, relating to the 20th day after the date of the accident).
11. Twenty-two days after the accident, Claimant asked for water by name (in Spanish), and was "alert" and able to follow simple commands. We base this finding on APA, pages 423 and 531.
12. Twenty-three days after the accident, Claimant was alert, followed commands, "conversive and makes sense," such that he is noted to be "mentally much improved."

Claimant inquired as to when his trach would be removed. We base this finding on APA, pages 425-426.

13. Twenty-five days after the date of the accident, Claimant was walking with his therapist in the hospital hall, conversing, oriented, and “more aware and alert.” Claimant’s memory is medically documented as “intact” and within normal limits. We base this finding on APA, pages 434 and 549, and accord these records great weight.
14. Twenty-seven days after the date of the accident, Claimant’s memory is documented as intact and within normal limits. We base this finding on APA, pages 558, 563, and 567, and accord these records great weight.
15. Twenty-eight days after the date of the accident, Claimant’s memory is documented as intact and within normal limits. We base this finding on APA, page 570, and accord this record great weight.
16. Twenty-nine days after the date of the accident, Claimant’s memory is documented as intact and within normal limits. We base this finding on APA, page 575, and accord this record great weight.
17. As Claimant suffered respiratory failure on the date of the accident and ultimately had to undergo a tracheostomy and other myriad procedures, Claimant was chemically sedated with Propofol and ventilated/intubated for a good portion of his hospital stay. The following records document the fact that Claimant was comatose, chemically sedated, and unresponsive during portions of his stay (*e.g.*, APA, pages 1, 29, 39, 68, 87, 109, 126, 132, 135, 137, 152, 158, 163, 175, 184, 188, 198-199, 208, 211, 219, 274, 282, 285, 295, 308, 313, 315, 330, 332, 340, 343, 353-354, and 385).
18. Slightly less than one month after the date of the injury, Claimant expressed understanding of his foot condition and gave consent (on “2 separate occasions” via an interpreter) to the surgery that was to be performed. Other than the language barrier (for

which an interpreter was utilized), Dr. Woolf does not note any cognitive problems in his medical records. We base this finding on APA, *e.g.*, pages 413 and 440.

19. On the date of Claimant's hospital discharge, Claimant is documented as "ambulating without any difficulties" and "alert and oriented x 3." Discharge instructions were given to Claimant (not just to his family) via interpreter, and he is noted to have voiced no concerns with his hospital discharge. We base this finding on APA, pages 417-418, 444, and 578.
20. Dr. Norcross of MUSC terms Claimant's neurological recovery as "actually remarkable." Dr. Takacs (also of MUSC) states that Claimant has "no neurological sequela." We give great weight to the records of these two physicians, as they are supported by the sequential hospital records (cited *supra*). This finding is based upon APA, pages 593, 614, and 597.
21. Approximately one year after the date of the accident, Dr. Wagner found Claimant's cognitive deficits to be "relatively mild," and his Glasgow Coma Scale 15/15. The Panel finds that an assessment of "relatively mild" does not rise to the level of "most serious cases of injury to the brain," as set forth by the Supreme Court. Further, Dr. Wagner attributes some of Claimant's cognitive complaints to situational depression and pain. We find the entirety of Dr. Wagner's report compelling, as his report specifies the reasons for his conclusions. We base this finding on APA, pages 652-655.
22. Claimant's ENG shows an "incomplete right-sided vestibulopathy," and Dr. Hoy noted (in 2009) that Claimant "has improved rather significantly" after performing vestibular exercises. We base this finding on APA, page 664.
23. Although not dispositive to our decision, the Appellate Panel also notes that evidence (*i.e.*, statements and testimony from Claimant himself) shows that Claimant is able to drive (and does in fact drive), an activity which requires more than physical skill. We find this factor compelling in that Dr. Brabham bases his opinion on the fact that

Claimant “knew how to drive prior to the TBI,” but now that Claimant is “unable to drive” in part because of “cognitive deficits which would result in ‘errors’ when driving.” In fact, Claimant’s only impediment to driving (as documented in physical therapy records) is restricted range of motion with regard to his neck and restricted use of his left arm. After physical therapy, Claimant was noted to be “able to turn head to drive with less difficulty...” Claimant himself admitted at the hearing that he is able to drive. The fact that Claimant denied an ability to drive to Dr. Brabham (a) results in the Panel’s doubt regarding the alleged severity of Claimant’s symptomatology, and (b) dilutes the strength of the Brabham opinion, as the opinion is based in part on the “fact” that Claimant is no longer able to drive (in part) because of cognitive difficulties. We base this finding on Hearing Transcript page 48, and on APA, pages 735, 744, 746, 760, 762, 812, and 869-870).

24. The Appellate Panel finds other inconsistencies in the record which call into question the alleged severity of Claimant’s residual condition:

(a) Claimant contends his brain/skull injury was of a sufficient degree so as to cause hearing loss. In an intake sheet dated August 2008 (a date by which the Panel finds hearing loss would have presented itself after a November 2007 injury), Claimant responded that he had no present or past hearing loss. Further, Dr. Sandoz found Claimant’s hearing “intact” at several separate medical visits. When Claimant later reported hearing loss to Dr. Sandoz (approximately a year after the date of the accident), it was on the right side. By contrast, Claimant inconsistently told Dr. Wagner that his hearing loss is “especially on the left side. Finally, Dr. Hoy (of MUSC’s Otolaryngology department) found Claimant’s audiogram as “entirely normal,” and Claimant’s examination “entirely benign.” We give great weight to the findings of Dr. Hoy, and find they are consistent with Claimant’s intake sheet. We base this finding on APA, pages 652, 656, 664, 666, 670-671, 674, 680, 696, 698, 700, and 702).

- (b) Dr. Sandoz and Dr. Glaser found Claimant's gait "normal" or "basically normal" (Claimant had toes amputated), and his coordination intact. By contrast, Claimant told Dr. Brabham "I walk like a drunk." This factor calls into question the actual severity of Claimant's alleged symptoms. We base this finding on APA, pages 646, 692, and 715; *Cf.* APA, pages 868-869).
- (c) Although Claimant testified at the hearing that his head injury has caused a "clog" in his ears, Claimant's intake sheet (10 months after the date of the accident) mentions no problem with his ears. We base this finding on Hearing Transcript, page 39, and on APA, page 670. *e.g.*).
- (d) Contrary to Claimant's hearing testimony that he has difficulty swallowing, Claimant's intake sheet (completed 10 months after the date of the accident) says otherwise. We base this finding on Hearing Transcript, page 39, and on APA, page 670).
- (e) Claimant did not report blurred vision on an intake sheet (completed 10 months after the date of the accident). We base this finding on APA, page 671; *See also* APA, page 430.
- (f) Although Claimant testified at the hearing that he has headaches every day, Claimant reported to physical therapy personnel (beginning in December 2008) that his headaches are now "intermittent." The Panel does not dispute the fact that Claimant has headaches. We do note that Claimant reported to one provider that medication helps relieve his headaches (but we further note that Claimant did not seek medical treatment for a period of one year until the fact of the lapse was mentioned at the deposition of Dr. Sandoz). We base this finding on APA, pages 724, 740, 744, 746, 760, 762, 773, 775, 783, 801, and 803, and on the evidence as a whole.
- (g) Claimant reported to Dr. Brabham that he quit smoking after his head injury because cigarettes tasted differently, leading Dr. Brabham to state that a brain injury (which

Dr. Brabham diagnosed) can often affect one's sense of taste. In fact, Claimant continued to smoke after his accident (refuting Claimant's statement upon which Dr. Brabham, in part, bases his opinion). We base this finding on the evidence in its entirety, including but not limited to APA, page 877; *Cf. e.g.*, pages 623, 630, 669 (intake sheet completed by Claimant 10 months after the date of the accident), and 673 ("half a pack per day").

(h) Dr. Merrell documents Claimant's "questionable effort" on examination. We base this finding on APA, page 630.

(i) In his treatment notes, Dr. Sandoz notes that Claimant is able to write normally, and has "good orientation to time, date, and space." We base this finding on APA, page 673).

(j) On a visual memory test, Claimant scored in the normal range. We also note that by the end of Claimant's hospital stay, his memory is noted to be intact and within normal limits. We base this finding on APA, pages 654, 707, 709, and 712-714; *Cf.* APA, pages 717; *See also* Deposition of Dr. Sandoz, pages 7 and 9-10).

(k) We find it more than coincidental that Claimant did not return to Dr. Sandoz for one year to receive any treatment. After the lapse was alluded to at Dr. Sandoz's deposition, Claimant returned 3 months later to Dr. Sandoz alleging memory loss and other ongoing problems. We believe and find that if Claimant had "serious" or "most serious" brain damage, he would have returned for treatment (for headache medication, etc.) before his failure to seek treatment was duly noted at a deposition in anticipation of litigation. We base this finding on APA, page 717, and on the deposition testimony of Dr. Sandoz, pages 6 and 15-16).

25. As to the intake sheets, we note that Claimant differentiated among "past," "present," and "never" in his responses. This factor leads the Panel to conclude that Claimant gave some

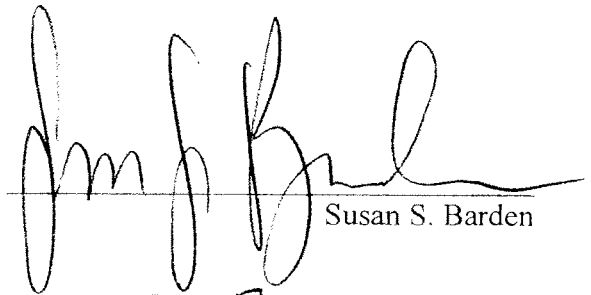
thought to his responses, and therefore we find the intake sheets reliable (APA, pages 668-671).

26. In reaching its conclusions, the Panel does not rely on the fact that Claimant's latest diagnostic tests are "unremarkable," as Claimant is not required to prove physical brain damage through an objective diagnostic medium.
27. Based upon these findings, the Appellate Panel finds that the ultimate, residual effects of Claimant's head injury are not of sufficient severity to reach the level of physical brain damage as contemplated in Section 42-9-10(C).
28. The combination of Claimant's injuries (including but not limited to his foot and his dizziness) are what totally disable him. As Claimant's brain injury is compensable pursuant to Regulation 67-1101, he is subject to the 500 week statutory limitation.

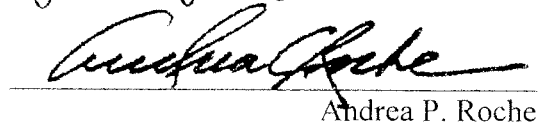
ORDER

IT IS THEREFORE ORDERED that Claimant is permanently and totally disabled and is entitled to benefits as provided in S.C. Code Ann. § 42-9-10(A) (1976, as amended). Claimant is not entitled to benefits under S.C. Code Ann. § 42-9-10(C).

AND SO IT IS ORDERED!



Susan S. Barden



Andrea P. Roche



H. Gene McCaskill

January 31, 2014

South Carolina Workers' Compensation Commission
Columbia, SC

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kellie Lindler on January 31, 2014