THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission Full Appellate Panel

WCC File No.: 0717624

Appellate Case No.: 2014-~~002345~~ 2354

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

v.

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

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission Full Appellate Panel correctly complied with Court of Appeals request for remand and determined that Appellant suffered a brain injury, but Appellant is not entitled to lifetime benefits for physical brain "damage" pursuant to S.C. Code Ann. §42-9-10(C).

2. Whether the Workers' Compensation Full Commission Full Appellate Panel correctly determined that Appellant's combined injuries rendered him permanently and totally disabled, and Appellant's brain injury is compensable pursuant to Regulation 67-1101, and Appellant is subject to the 500 week statutory limitation.

STATEMENT OF THE CASE

Appellant alleges work-related injuries to his brain (including headaches), vision, spine, bilateral arms, left shoulder, hips, bilateral legs, right foot, and psychological overlay as a result of an admitted November 1, 2007 work related accident. As a result of his injuries, Respondents provided Appellant with authorized causally related treatment pursuant to S.C. Code Ann. §42-15-60.

On March 25, 2011, Respondents filed a Form 21 Hearing Request, seeking to stop payment of the Appellant's temporary total disability ("TTD") benefits, payment of an award of permanency, and credit for overpayment of any TTD paid to Appellant after the date of MMI. On April 8, 2011, Appellant filed a Form 50 Request for Hearing, seeking compensation for past medical care, future medical treatment, a permanency award of permanent and total disability, and an award of lifetime benefits as a result of physical brain damage, pursuant to S.C. Code Ann. §42-9-10(C).

On April 19, 2011, Respondents timely filed a Form 51 Response to Appellant's Request for Hearing, admitting Appellant sustained a work injury by accident arising out of and in the course of his employment on November 1, 2007, but denying the extent of the injuries as alleged by the Appellant. A hearing was held on June 28, 2011 to decide the issues raised in the Forms 50, 51, and 21.

At the hearing, Appellant alleged he was entitled to (1) additional medical care as a result of his admitted work accident and (2) a finding that he was totally and permanently disabled based on the totality of his injuries. Appellant also sought lifetime benefits, claiming he suffered physical brain damage in accordance with S.C. Code Ann. § 42-9-10(C).

Respondents took the position that they were entitled to stop payment of the Appellant's temporary benefits because the Appellant had reached maximum medical improvement, and they sought credit for overpayment of any TTD benefits in excess of the award received by Appellant. Finally, Respondents took the position that Appellant did not suffer a physical brain "damage" as set forth in S.C. Code Ann. § 42-9-10(C), and any permanent disability compensation for an alleged injury to Appellant's brain properly fell under Regulation 67-1101, which sets forth the range of 25-250 weeks for either partial or total loss of use of the brain as a result of a work accident.

On November 21, 2011, the Single Commissioner issued a Decision and Order finding Appellant permanently and totally disabled on account of his multiple impairment ratings. (Single Commissioner Order, pp. 9 and 11, Finding of Fact #9 and Conclusion of Law #2). Specifically, the Hearing Commissioner stated "Under §42-9-30 and Reg. 67-1101, the Claimant's [Appellant's] multiple impairment ratings to his right lower extremity, left upper extremity, head, and inner ear render the Claimant [Appellant] permanently and totally disabled." (Single Commission Order, p. 11). The Single Commissioner further found that "physical brain damage does not apply." and Appellant was not entitled to lifetime compensation benefits in under the South Carolina Workers' Compensation Act." (Single Commission Order dated 11/21/11, p.11, Finding of Fact #18 and Conclusion of Law #3).

Appellant timely filed a Form 30 Request for Commission Review on December 5, 2011. The Full Commission Appellate Panel heard oral arguments on March 19, 2012 and subsequently issued a Decision and Order adopting and affirming the Single Commissioner's decision in full on May 23, 2012. (Full Commission Order, p.9)

On June 18, 2012, Appellant served and filed his notice of appeal in the Court of Appeals. Following the submission of Appellant and Respondent's Initial Briefs, but before the filing of Appellant's Reply Brief and both parties' Final Briefs, the Supreme Court issued two (2) new decisions on March 6, 2013 addressing the issue of what constitutes physical brain "damage" as contemplated by S.C. Code Ann. § 42-9-10(C). (*see* Crisp v. Southco, Inc., 401 S.C. 627; 738 S.E.2nd 835 (2013); Sparks v. Palmetto Hardwood Inc., 401 S.C. 619, 738 S.E.2nd 831 (2013)). Oral arguments were held before the Court of Appeals on October 10, 2013.

On November 27, 2013, the Court of Appeals issued a published opinion affirming the Commission's reliance on the opinion of Dr. Mark Wagener and remanding the case to the Full Commission Appellate Panel for clarification on whether Appellant sustained an injury to the brain, and if so, to determine whether the injury reached the level of permanent brain damage. Fragosa v. Kade Construction., LLC, 407 S.C. 424, 755 S.E.2d 462 (Ct. App. 2013). Specifically, the Court stated:

> Here, the Appellate Panel made inconsistent finds with regards to the existence of a physical brain injury. In finding of fact #8, the Appellate Panel found Fragosa sustained 46% impairment to the whole person for a traumatic brain injury. However, in finding of fact #18, the Appellate Panel found Fragosa did not suffer a brain injury. Based on this inconsistency, we remand to the Appellate Panel for clarification. It is undisputed that Fragosa suffered severe injuries as a result of his work accident, However, it is unclear whether the Appellate Panel found these injuries included an injury to the brain. If the Appellate Panel finds Fragosa did sustain a physical brain injury, it should, in light of Crisp II and Sparks, cite specific evidence to support its determination as to whether such injury was of sufficient severity to reach the level of physical brain damage as contemplated in section 42-9-10(C).

Id. at 466.

On December 12, 2013, Appellant filed a Petition for Rehearing and a Petition for Rehearing en banc, and Respondents timely responded on December 23, 2013. The Court denied both Petitions on March 31, 2014. Appellant filed a Petition for Writ of Certiorari on April 30,

2014, which was denied by the Supreme Court on July 24, 2014. On August 2, 2014, the Court of Appeals issued a Remittitur, remanding the case to the Full Commission Appellate Panel.

On September 30, 2014, the Full Commission Appellate Panel issued a Decision and Order, wherein it held that the "combination of Appellant's injuries (including but not limited to his foot and his dizziness) are what totally disabled him." (Full Commission Order dated 09/30/14, p.9). It went on to hold that Appellant's brain injury is compensable pursuant to Regulation 67-1101, but the residual effects of his head injury are not of sufficient severity to reach the level of physical brain "damage" as contemplated by section 42-9-10(C). Therefore, Appellant is subject to the 500 week limitation on his award for permanent and total disability. (Id). In support of its determination that Appellant suffered a brain injury, but not brain "damage", the Full Commission Appellate Panel provided an extensive list of evidence in the record to support the decision in light of the Crisp and Sparks, as specifically instructed by the Court of Appeals. (Id at pp. 2-9).

On October 27, 2014, Appellant filed a Notice of Intent to Appeal with the South Carolina Court of Appeals. This appeal follows.

STATEMENT OF THE FACTS/EVIDENCE

Appellant testified at the hearing in this matter, and his testimony allowed the Commissioner to observe the Appellant, to ask questions to the Appellant, and to judge the Appellant's credibility as a witness. It is significant to note that in this claim for alleged physical brain damage, Appellant testified without issue on his own behalf and did not request or require the appointment of a guardian of any kind.

Appellant testified he was twenty-nine (29) years old, unmarried, and has no children. (Hr. Tr., p.26). Appellant's education background consisted of completing middle school in his home

country of Mexico. (Id). Appellant testified he came to the United States in 2002 or 2003. (Id). Appellant's prior work history included security work, retail sales, and construction. (Hr. Tr., pp.26-27). At the hearing, Appellant described the occurrence of his work injury and the course of his medical treatment. In addition, Appellant testified regarding his ongoing symptoms and the difficulties he continues to have as a result of his injuries. Appellant testified he has headaches at least once a week (Hr. Tr., p. 34), and he has short term memory problems and dizziness. (Hr. Tr., pp. 35-36). Despite these symptoms, Appellant testified he is still able to drive a car. (Hr. Tr., p.90).

Appellant's discharge summary from the Medical University of South Carolina (MUSC) Medical Center following the accident shows that the Claimant's injuries included subdural and epidural hematomas, bilateral frontal contusions, respiratory failure, hypotension, a scalp laceration, C7 and T1 spinous process fractures, right rib fractures, bilateral transverse fractures, a right big toe fracture, a right fifth toe fracture, a fracture of the skull, a tracheostomy, an endoscopic gastrostomy, and an amputation of the second through the fifth toes of the right foot. (APA, p.419). A CT scan of the Claimant's head performed on the date of the accident revealed a fracture of the skull with a small extraocciptoparietal hematoma and the possibility of a small epidural hematoma. (APA, p.16).

Dr. Mark Wagner, a Clinical Neuropsychologist, saw Appellant on October 30, 2008 for a neuropsychological evaluation. Dr. Wagner noted the Appellant sustained a skull fracture with acute underlying minor structural change to the brain, but he concluded the functional studies, such as EEGs, CTs and MRIs, were read as unremarkable "demonstrating structural resolution of the work-related injury." (APA, p.655).

Dr. Mark Hoy at MUSC Department of Otolaryngology, Head and Neck Surgery, treated Appellant from December 1, 2008 through April 13, 2009 for ear pain associated with his closed head injury. Despite Appellant's continued complaints of ear pain, Dr. Hoy noted most of the Appellant's tests to be normal (APA, p.656). On a Form 14B prepared March 16, 2010, Dr. Hoy opined that Appellant reached maximum medical improvement with regard to his ear pain on April 13, 2009. (APA, p.666).

Dr. George M. Sandoz, a neurologist with Strand Regional Specialty Associates, LLC treated Appellant for dizziness and headaches from August 29, 2008 to August 12, 2009. Dr. Sandoz noted the Appellant had some damage to his right inner ear which caused some loss of hearing and mastoiditis. (Dr. Sandoz Deposition, p.7, lines 20-25; p. 16, lines 15-20). Dr. Sandoz described mastoiditis as an inflammation of the mastoid, which is a part of the skull, not of the brain. (Dr. Sandoz deposition p.21, lines 3-5 and lines 14-20). On August 20, 2009, Dr. Sandoz drafted a letter stating Appellant sustained forty-six percent (46%) impairment to the whole body for a traumatic brain injury. (APA, .p 716). Dr. Sandoz further stated that Appellant was permanently and totally disabled, but at that time Dr. Sandoz made no mention of physical brain "damage." (Id). Dr. Sandoz reaffirmed this position in his August 6, 2010 deposition, stating that Appellant was not able to return to any kind of former employment due to both his inability to follow commands and his inner ear injury which caused Appellant to be unsteady and dizzy. (Dr. Sandoz Deposition. p. 18, lines 17-23).

While Dr. Sandoz opined the Appellant suffered a traumatic brain injury, he also testified "There's no evidence of any damage on the brain that we can go and see." (Id at 14, lines 3-4). The Supreme Court has determined that objective testing is not outcome determinative in deciding whether a claimant has brain "damage," but the objective testing is still diagnostic evidence

allowed to be evaluated and considered as part of the evidence as a whole. Appellant's medical records are void of any neurological medical treatment from August 12, 2009 through November 12, 2010. Despite both Appellant's lack of neurological treatment for over a year, and Dr. Sandoz's testimony that there was no physical damage to Appellant's brain, Dr. Sandoz circled "Yes" in response to a carefully drafted questionnaire from Appellant's counsel asking if Appellant sustained "physical brain damage, rendering him permanently and totally disabled." (APA, p.882). Other than Dr. Sandoz's response to Appellant's attorney's questionnaire, no other authorized medical provider has indicated that Appellant suffers from physical brain damage.

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the "substantial evidence" rule as the standard for judicial review of a decision of the Commission:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> (d) affected by other error of law; [or]
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers' compensation appeals, 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 (1981).

> 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).

Therefore, an appellate court may overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT

I. The Workers' Compensation Commission Full Appellate Panel correctly complied with the Court of Appeals instructions to remand the claim for a determination of whether Appellant sustained an injury to the brain, and if so, whether the injury was of such severity to constitute "Permanent Brain Damage" as contemplated by S.C. Code Ann. §42-9-10(C) and in light of the Supreme Court holdings in Crisp and Sparks.

The South Carolina Workers' Compensation Act sets forth three (3) separate forms of permanent disability benefits: (1) permanent and total disability under §42-9-10; (2) permanent and total disability benefits which compensate for decreased wage earning capacity under §42-9-20; and (3) permanent partial disability benefits for "scheduled member injuries" set forth in §42-9-30 and Regulation 67-1101.

Under §42-9-10(A), such disability exists "[w]hen the incapacity to work resulting from an injury is total." Pursuant to S.C. Code Ann. §42-9-10(A), "[i]n no case may the period covered by the compensation exceed five hundred (500) weeks, except as provided in subsection (C)." Subsection (C) specifically sets forth the only three (3) exceptions in the entire Act to which the 500 week cap does not apply: (1) an injury resulting in paraplegia; (2) an injury resulting in quadriplegia; and (3) an injury resulting in physical brain "damage."

When drafting this section of the Act, the Legislature was forced to contemplate every possible injury that could arise in the workers' compensation arena and then narrowly limit the five hundred (500) week cap exceptions into only the three categories listed above. Each limited exception presupposes a heightened criteria required to justify a claimant's entitlement to lifetime benefits. When examining the language of S.C. Code Ann. §42-9-10(C), it is imperative to note the use of specific language in the statute. The statute does not allow an exception for a claimant who has suffered an "injury" to the brain, but instead it specifically adds the qualifier of physical brain "*damage*." An "injury" to the brain is properly compensated under Regulation 67-1101, which allows for between twenty five (25) and two-hundred and fifty (250) weeks of compensation for partial or total loss of use of the brain.

On March 6, 2014, the South Carolina Supreme Court issued two (2) opinions providing guidance to the lower courts on how to determine whether an injury to the brain constitutes brain

"damage" so as to trigger entitlement to lifetime benefits. In Crisp v. Southco, Inc., the Supreme Court rejected the argument that any physical brain injury, regardless of degree, triggers the operation of section 42-9-10(C), since it is "contrary to legislative intent and to the manner in which our courts have awarded compensation to the brain." The Court goes on to state:

> As we found in Sparks, we view the inclusion of "physical brain damage," along with quadriplegia and paraplegia, in section 42-9-10(C) as indicative of the General Assembly's intent to compensate an employee-claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in physical brain damage. As noted in Sparks, permanency and physicality are requirements. However, the *severity of the injury is the lynchpin of the analysis*." (Emphasis added)

Id at 842.

Respondents respectfully disagree with Appellant's statement that in Crisp, the Court explained that entitlement to lifetime compensation was predicated on "brain damage so severe that the person could not subsequently return to suitable gainful employment." The Court in Crisp actually states, "Inherent in the requirement that the injury to the brain be severe is the requirement that the worker in unable to return to suitable gainful employment." (Id. at 842). It is imperative to note the specific language used by the Court in this sentence. A finding of permanent and total disability is inherent in the requirement that the injury be severe, but the Court did not use the requirement of permanent and total disability as the sole outcome determinative test for finding brain "damage." Instead, it continued to rely on the "permanency and severity" requirement that is to be decided by the Workers Compensation Commission on a case by case basis.

It is worth noting that the Court used the phrase severity of the "injury" as opposed to severity of the resulting "disability" as the lynchpin of the analysis. This distinction used by the Court further supports the argument that a finding of permanent and total disability is not the outcome determinative factor, but instead, part of the evidence as a whole that the Workers'

Compensation Commission is directed to use when determining whether an injury to the brain reaches the severity level of brain "damage" as contemplated by §42-9-10(c).

In this case, Appellant suggests that the findings of the Single Commissioner's Order rendered Appellant permanently and totally disabled. Appellant bases this argument on his statement that the Single Commissioner's combined findings that (1) Claimant sustained 46% to the whole person for traumatic brain injury, and (2) Claimant is permanently and totally disabled meet the permanent and severe test in Crisp and Sparks. What Appellant conveniently leaves out is the first half of the Single Commissioner's finding that the Claimant is permanently and totally disabled as a result of his multiple impairment ratings to his right lower extremity, left upper extremity, head, and inner ear. (Single Commissioner Order, p10). This argument was already presented to the Court of Appeals at previous oral arguments, and instead of accepting Appellant's argument that these findings resulted in lifetime benefits, the Court of Appeals remanded to the Full Commission for clarification under the new case law, which was not available at the Single Commissioner hearing.

Based on the requirements set forth by the Supreme Court in Crisp II and Sparks, the Full Commission Appellate Panel properly following the Court of Appeals instructions on remand by reviewing the evidence to determine whether Appellant sustained a brain injury and whether the injury was of such severity as to rise to the level of "brain damage."

II. The Workers' Compensation Commission Full Appellate Panel correctly determined that Appellant's combined injuries rendered him permanently and totally disabled, and Appellant's brain injury is compensable pursuant to Regulation 67-1101, and therefore subject to the 500 week statutory limitation.

In evaluating whether the evidence in this case supported a finding that Claimant's

sustained an injury to the brain, but the injury was not of sufficient severity to reach the level of physical brain damage, the Full Commission went through a detailed analysis of the complete medical records and cited an extensive list of evidence in support of its decision as set forth below:

1. 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 a myriad other injuries, was unconscious at the scene, and had to be intubated for 16 days wile 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).(APA, pp 417 and 430).

2. 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. (Deposition testimony of Dr. Sandoz, p. 6.)

3. 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, p. 699).

4. Two days after the date of the accident, Claimant was able to "answer yes/no to questions with simple words." (APA, p. 85).

5. Three days after the date of the accident, Claimant could follow simple commands. (APA, p. 10).

6. Four days after the date of the accident, Claimant opened his eyes on command, and nodded appropriately to questions. (APA, p. 124).

7. Eight days after the date of the accident, Claimant was able to follow verbal commands. (APA, pp. 210 and 239).

8. 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. (APA, pp. 389, 392, and 394. *See also* pages 399, 401, 408, and 410, relating to the 20th day after the date of the accident).

9. Twenty-two days after the accident, Claimant asked for water by name (in Spanish), and was "alert" and able to follow simple commands. (APA, pp. 423 and 531).

10. 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. (APA, pp. 425-426).

11. 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. (APA pp. 434 and 549).

12. Twenty-seven days after the date of the accident, Claimant's memory is documented as intact and within normal limits. (APA, pp. 558, 563, and 567).

13. Twenty-eight days after the date of the accident, Claimant's memory is documented as intact and within normal limits. (APA, p. 570).

14. Twenty-nine days after the date of the accident, Claimant's memory is documented as intact and within normal limits. (APA, p. 575).

15. 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 (APA, pp. 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).

16. 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. (APA, pp. 413 and 440).

17. 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. (APA, pp. 417-481, 444, and 578).

18. Dr. Norcross of MUSC terms Claimant's neurological recovery as "actually remarkable." Dr. Takacs (also of MUSC) states that Claimant has "no neurological sequela." (APA, pages 593, 614, and 597).

19. 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. Further, Dr. Wagner attributes some of Claimant's cognitive complaints to situational depression and pain. (APA, pp. 652-655).

20. Claimant's ENG shows an "incomplete right-sided vestibulopathy," and Dr. Hoy notes (in 2009) that Claimant "has improved rather significantly" after performing vestibular exercises. (APA, p. 664).

21. 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. This is inconsistent with the opinion of Dr. Brabham,. Who opined Claimant "knew how to drive prior to the TBI," but not that Claimant is "unable to drive" in part because of "cognitive deficits which 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. (Hearing Transcript p. 48; APA, pp. 735, 744, 746, 760, 762, 812, and 869-870).

22. Claimant contends his brain/skull injury was of a sufficient degree so as to cause hearing loss. In an intake sheet dated August 2008, 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 found Claimant's audiogram was "entirely normal," and Claimant's examination "entirely benign." (APA, pp. 652, 656, 664, 666, 670-671, 674, 680, 696, 698, 700, and 702).

23. 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 called into question the actual severity of Claimant's alleged symptoms. (APA, pp. 646, 692, and 715; *Cf.* APA, pages 868-869).

24. 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. (Hearing Transcript, page 39; APA, p. 670, *e.g.*).

25. 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. (Hearing Transcript, page 39, APA, p. 670).

26. Claimant did not report blurred vision on an intake sheet (completed 10 months after the date of the accident). (APA, p. 671; APA, p. 430.

27. 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 based this finding on APA, pp. 724, 740, 744, 746, 760, 762, 773, 775, 783, 801, and 803), and on the evidence as a whole.

28. 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). (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").

29. Dr. Merrell documents Claimant's "questionable effort" on examination. (APA, page 630).

30. In his treatment notes, Dr. Sandoz notes that Claimant is able to write normally, and has "good orientation to time, date, and space." (APA, p. 673).

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

32. We find it more 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. (APA, page 717, and on the deposition testimony of Dr. Sandoz, pages 6 and 15-16).

33. 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, pp. 668-671).

While Appellant characterizes the Full Commission's findings as the Commission's lay speculation about a complex medical condition it doesn't understand, Respondents respectfully disagree. The Full Commission Appellate Panel cites extensive medical records in support of their position, as they were instructed to do by the Court of Appeals.

In addition to the new evidence cited by the Full Commission Appellate Panel in their September 30, 2014 Order, the medical evidence argued before the Court of Appeals at the original oral arguments still support a finding that Appellant does not suffer brain "damage" under the requirements of "severity and permanency" set forth by the Supreme Court. First, Dr. Mark Wagner, Appellant's neuropsychologist, stated the following:

> He had a skull fracture with acute underlying minor structural change to the brain. 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. He has persisting cognitive complaints. While he has had an excellent neurologic recovery, it is probably that he is exhibiting symptoms of post concussive syndrome. The cognitive findings, while mostly normal, do contain abnormal findings largely in the domain of complex attention and concentration. I do not think the severity of his cognitive deficits represents a major barrier for return to work, especially manual labor. Additionally, he does have findings positive for situational depression and pain are also contributing to his functional ability. (APA, .p 614).

Citing the tests referenced by Dr. Wagner, it is clear that there is no objective evidence of any ongoing or permanent "damage" to the brain. The Supreme Court was clear that objective evidence is not outcome determinative, but Respondents argue that it is still a critical tool in evaluating the severity of a brain injury. The radiologist performing and evaluating Appellant's January 16, 2008 CT of the brain found (1) no evidence of acute intracranial process and (2) healing skull fractures. (APA., p. 641) the radiologist who conducted Appellant's September 16, 2008 MRI of the brain found (1) right mastoiditis and (2) otherwise, unremarkable MRI of the brain. (APA, p. 676). Finally, Appellant's October 2, 2008 EEG was read by Dr. Sandoz to be within a wide range of normal limits, with no focal or seizure discharges noted. (APA, p.629).

Appellant argues that Dr. Sandoz, the authorized treating neurologist, was the appropriate doctor to interpret and opine on imaging studies in order to comment on whether Appellant suffered physical brain damage. Appellant relies heavily on the "unrefuted" questionnaire that was artfully drafted by Appellant's attorney, wherein Dr. Sandoz circled "YES" in response to Appellant's attorney's question of whether Appellant suffered brain damage rendering him permanently and totally disabled.

Even if this Court gives any credence to Dr. Sandoz's "yes" response to Appellant's attorney's drafted questionnaire, this Court recently held that when both parties presented conflicting medical evidence, "[t]he Single Commissioner, and ultimately the Appellate Panel, had the discretion to weigh the conflicting evidence in rendering its decision. Thus, we defer to its findings in its decision." Cranford v. Hutchison Construction, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012); *See* Mullinax v. Winn-Dixie Stores, Inc. 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995)("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

In addition, Appellant cites a list of varying forms of brain injuries, including focal brain damage, cortical contusions, frontal lobe contusions, and diffuse brain damage. Appellant argues that he has symptoms consistent with the various conditions he lists for the first time o his brief, but Appellant cites no reference to these conditions in the medical records. Nor does Appellant cite whether any of these conditions were discussed as prerequisites to brain "damage" as contemplated by the Supreme Court. Instead, they are simply Appellant's interpretation of how his symptoms fit into medical definitions never discussed in this case to date.

Aside from a single medical questionnaire drafted by Appellant's attorney on which Dr. Sandoz circled the word "YES," the overwhelming evidence available makes it clear that

Appellant may have suffered sustained a brain injury, but the injury was not of sufficient severity as to qualify as brain "damage" as contemplated in S.C. Code §42-9-10(C). In addition, the medical evidence in the record clearly supports that Appellant was permanently and totally disabled as a result of his combined injuries, and not just the injuries to the brain. This is evidenced by the 40% impairment to right leg, the 1% to the left arm, and a combined 17% impairment for his injuries to the right foot and shoulder.

CONCLUSION

The substantial evidence in the record leads to the conclusion that the Full Commission Appellate Panel appropriately followed the Court of Appeals specific instructions on remand and found that Claimant sustained an injury to the brain under Regulation 67-1101, Claimant is permanently and totally disabled as the result the combination of his injuries (including but not limited to his foot and his dizziness), and the residual effects of Appellant's head injury are not of sufficient severity to reach the level of physical brain damage as contemplated by S.C. Code Ann. §42-9-10(C). Accordingly, Respondents request that this Court affirm the Workers' Compensation Commission Full Appellate Panel's September 30, 2014 Decision and Order.

Respectfully Submitted,

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March 11, 2015
Columbia, South Carolina

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), ...Petitioner,

v.

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

PROOF OF SERVICE

I certify that I, Leigh Ball, legal assistant to J. Gabriel Coggiola, have properly served **Respondents' Initial Brief**, by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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March 11, 2014
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March 11, 2015

The Honorable Jenny Abbott Kitchings
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Re: Hector Fragosa vs. Kade Construction, LLC
WCC File No.: 0717624
DOI: 11/1/2007
Appellate Case No.: 2014-002354

Dear Ms. Kitchings:

Pursuant to Rules 208 and 209, SCACR, please find enclosed for filing one copy of the Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal, along with Proof of Service for the same.

By copy of this letter, I am also serving a copy of the Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal on the attorneys for the Appellant. I would also appreciate you returning a clocked copy to me in the self-addressed stamped envelope that I have provided.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

John Gabriel Coggiola

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