THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0717624

Appellate Case No. 2014-002354

Hector G. Fragosa, Claimant, ... Appellant,

v.

Kade Construction, LLC, Employer, and Key Risk Insurance Company of S.C., Carrier, Defendants ..... Respondents.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

ARGUMENT

1. Hector Fragosa has suffered physical brain damage and is legally entitled to workers' compensation benefits for life [in Reply to Respondents' Argument at pages 9-13].

In their brief, Respondents "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." [Brief of Respondents, page 11]. Respondents appear to be arguing that Appellant incorrectly paraphrased the Crisp holding. However, a simple reading of the opinion shows this is a direct quote from Crisp.[1] Crisp v. SouthCo Inc., 738 S.E.2d 835, 843, 401 S.C. 627 (2013).

Respondents instead focus on another sentence, where the Supreme Court states: "Inherent in the requirement that the damage to the brain be severe is the requirement that the worker is unable

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[1]Appellant wishes the Court to know that when using FastCase, the refiled opinion of May 22, 2013 appears to be misquoted, as FastCase includes the March 6, 2013 language. For that reason, the citations and quotes in this footnote are drawn directly from the Advance Sheets published by the Supreme Court. Respondents' brief quotes language from the March 6, 2013 opinion.

The full sentence reads: "Bearing these states' treatment in mind, we interpret the inclusion of 'physical brain damage' among the most serious impairments within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating brain damage so severe that the person could not subsequently return to suitable gainful employment." Crisp v. SouthCo Inc., 738 S.E.2d 835, 843, 401 S.C. 627 (2013). Regarding the specific language, the Supreme Court initially used slightly different terminology in the original opinion, wherein it stated: "Bearing these states' treatment in mind, we interpret the inclusion of 'physical brain damage' among the most serious *injuries* within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating *a brain injury* so severe that the person could not subsequently return to suitable gainful employment." Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 62)(emphasis added to indicate earlier language), *refiled,* Op. No. 27230 (S.C.Sup.Ct. filed May 22, 2013)(Shearouse Adv.Sh. No. 23 at 49, 62). The difference in terminology focuses more on "impairment" and "damage," thus emphasizing the permanency of the condition as the key.

to return to suitable gainful employment."[2] Id. at 842. There is little difference between the two statements; the language is almost identical. In both sentences, the Supreme Court emphasizes that the measure of severity is linked to the inability to return to "suitable gainful employment." Id.

The analysis makes sense when one looks at the posture of the claimant in Crisp. In Crisp, the claimant "argues that the mere presence of any physical brain injury or damage, regardless of degree, triggers the operation of section 42-9-10 (C)." Id. at 842. The Supreme Court rejected this argument as "not persuasive, as it is contrary to legislative intent and to the manner in which our courts have awarded compensation for injuries to the brain." Id. It was after rejecting the "mere presence or any physical brain injury or damage" argument, that the court then went on to expound on the Sparks "permanency and physicality" requirements by noting "the severity of the injury is the lynchpin of the analysis. Id.

The result is a two part test: to qualify for lifetime compensation under section 42-9-10 (C), the employee must have suffered physical brain damage that is both (1) permanent and (2) "so severe that the person could not subsequently return to suitable gainful employment." Id. at 842-843; Sparks v. Palmetto Hardwood, Inc., 401 S.C. 619, 738 S.E.2d 831, 834 (2013)("we conclude that "physical brain damage" as used in § 42-9-10(C) is physical brain damage that is both permanent and severe.").

In Fragosa's case, it is undisputed that his physical brain damage is permanent. In its original

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[2]The quoted language here is from the May 22, 2013 opinion. Respondents again quote the language from the March 6, 2013 opinion. The March 6, 2013 opinion read: " Inherent in the requirement that the *injury* to the brain be severe is the requirement that the worker is unable to return to suitable gainful employment." Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 62)(emphasis added to indicate earlier language), *refiled,* Op. No. 27230 (S.C.Sup.Ct. filed May 22, 2013)(Shearouse Adv.Sh. No. 23 at 49, 62).

Decision and Order, the Commission found "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. p. 20, Finding of Fact 8]. As "[a] permanent impairment by definition, lasts for a lifetime," Fragosa easily meets the first part of the test. James v. Anne's Inc., 390 S.C. 188, 199, 701 S.E.2d 730, 736 (2010).

Regarding the second part of the test, Respondents argue "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)." [Brief of Respondents, page 12]. Respondents want to read "the requirement that the worker is unable to return to suitable gainful employment" out of the test – presumably replacing it with the sort of arbitrary and capricious speculation the Commission engaged in its Order on Remand. Our appellate courts have rejected disability decisions based on such speculation. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability); Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding).

The difficulty with Respondents' approach is that most people who suffer traumatic brain injuries also suffer other disabling injuries in the same accident. Should someone with physical brain damage who also suffers disabling permanent impairments to other parts of the body be barred because he might have been disabled anyway – regardless of the severity of the brain damage? This very question was answered by this Court in Pearson. 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."). The test elucidated in Sparks and Crisp did not change the rule. Sparks quoted Pearson for the rule that "§ 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).

Respondents ask the Court to ignore the fact that Fragosa suffered a 46% whole person permanent impairment for the brain injury (which surely has to reach the level of "severe" by any standard) and has been "determined to be totally and disabled." S.C. Code Ann. 42-9-10 (C)(2007). Instead, Respondents argue "What Appellant 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." [Brief of Respondents, page 12].[3] Under Sparks and Pearson, the other impairments which contribute to Fragosa's disability cannot somehow trump the fact that he meets the test set out in Crisp as a matter of law.

The severity analysis focuses on inability to return to suitable gainful employment. The Crisp court looked to section 42-9-400(d) for the Legislature's definition of "permanent physical impairment" as "any permanent condition . . . of such seriousness as to constitute a hindrance or

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[3]The 46% whole person impairment for the brain injury is by far the most serious of Fragosa's impairment ratings. The spine rating is 11% whole person. 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% + 11% = 27%) is still less than 46% to the whole person.

obstacle to obtaining employment . . ." Crisp v. SouthCo Inc., 738 S.E.2d 835, 843, 401 S.C. 627 (2013), *quoting*, S.C. Code Ann. § 42-9-400(d)(Supp.2011).

In Fragosa's case, his treating 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. 763 (emphasis added)]. Dr. Sandoz tied his opinion on disability directly to the brain damage – as did Dr. Brabham. [R. pp. 915, 926-927]. There is no substantial evidence which would allow the Commission to find that Fragosa's traumatic brain injury was not – at a minimum – a significant contributing factor to his inability to return to gainful employment. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability). Cf. McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 474 (Ct.App.1989) ("Under Workers' Compensation Law 'total disability' does not require complete, abject helplessness. Rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them."). In adopting the finding that Fragosa suffered a 46% whole person impairment for his traumatic brain injury, the Commission must necessarily take the rest of Dr. Sandoz' opinion into account. As Dr. Sandoz stated, the permanent loss of function to the brain serious enough to qualify for a 46% whole person impairment rating, is serious enough to render the patient permanently and totally disabled.

Fragosa proved he suffered permanent physical brain damage sufficiently severe prevent him from returning to suitable gainful employment. As such, he is entitled to a finding that he suffered permanent physical brain damage.

2. Even if Fragosa's other physical impairments contribute to his disability, he is still entitled to lifetime compensation because he suffered physical brain damage within the meaning of the Act [in Reply to Respondents' argument at pages 12-19].

Pages thirteen through sixteen of Respondents' Brief are a cut-and-paste recital of the Commission's findings on remand. Respondents never address the fact that, according to the doctors who treated Fragosa's other permanent injuries, none of the other injuries would render him permanently and totally disabled.[4] There is no substantial evidence to support the Commission's finding on remand that: "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 on Remand, page 9]. Furthermore, the Commission applied an improper legal standard for physical brain damage. The requirement is not that the brain damage be the sole cause of total disability. It is sufficient for the brain damage to combine with other impairments to disable the injured worker. 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."). If substantial evidence does support the Commission's new finding that the combination of Fragosa's "are what totally disable him," then he has met his burden for lifetime compensation.

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[4]Fragosa had no work restrictions related to his inner ear problem. [R.p. 984]. His dizziness was the result of brain damage. [R. p. 765]. His restrictions from the foot injury were "No climbing > 6 steps & use safety equipment." [R. p. 986]. For the left shoulder and neck, Dr. Merrell assigned no true restrictions, only noting "Pain may limit overhead activities with the left arm. He may perform overhead activities unless symptoms preclude." [R. pp. 950, 985]. These restrictions are simply not enough to preclude a person from performing services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." See, e.g. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961).

Respondents seek to dismiss Dr. Sandoz's opinion on "physical brain damage" because it 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." [Brief of Respondents, page 18]. No matter how artfully an attorney phrases a question to a medical expert, the question itself is not evidence. The evidence is the answer in which the medical expert expresses his opinion. As Respondents concede, Dr. Sandoz unequivocally opined on the exact test for physical brain damage adopted by the Supreme Court in Crisp and Sparks.[5] Crisp v. SouthCo Inc., 738 S.E.2d 835, 843, 401 S.C. 627 (2013)("Inherent in the requirement that the damage to the brain be severe is the requirement that the worker is unable to return to suitable gainful employment.").

Respondents contend regardless of Dr. Sandoz's opinion, there is conflicting medical evidence. For this point, Respondents go back to their original argument at trial that brain damage can only be shown by "objective evidence" such as imaging studies. However, this is unavailing. The Supreme Court explicitly rejected the exact same argument in Crisp. The Court refused the invitation "to require use of a specific diagnostic tool in proving these medically-technical brain injury cases." Crisp at 844. Cf. Beckman v. Sysco Columbia, LLC., 408 S.C. 501, 759 S.E.2d 750 (Ct. App. 2014)(Commission's reliance on "no evidence of radiculopathy" on EMG was not substantial evidence where physician stated EMG is "an imperfect test" and maintained his diagnosis of radiculopathy).

Respondents contend "the overwhelming evidence available makes it clear that Appellant

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[5]Dr. Sandoz gave his opinion on March 10, 2011 – two years before Crisp and Sparks were decided. [R. p. 929].

may have suffered a brain injury, but the injury was not of sufficient severity as to qualify as brain 'damage' as contemplated in S.C. Code Ann. § 42-9-10(C)." [Brief of Respondents, page 19]. To suggest that a person hit in the head with a crane, knocking him off a building, fracturing his skull, causing bleeding in the brain and rendering him unconscious for a month *may* have suffered a brain injury is belittling to Hector Fragosa – as it is to the myriad of soldiers, athletes and workers who live with traumatic brain injuries. Fragosa unquestionably suffered a severe traumatic brain injury.[6] As to "overwhelming evidence," there is no substantial evidence that Fragosa did not suffer permanent physical brain damage of such severity to render him incapable of returning to gainful employment.

Dr. Sandoz's opinion was repeated in many more places than the questionnaire. The questionnaire merely cleared up any confusion between the medical term "traumatic brain injury" and the legal term "physical brain damage." Dr. Sandoz made it crystal clear that Fragosa's traumatic brain injury met the physical brain damage standard. Dr. Sandoz is a particularly important witness in this case because he is the sole neurologist who opined on Fragosa's condition. And he did so from the perspective of a Spanish-speaking physician who had followed his patient from the very beginning.

The Commission's findings on physical brain damage and disability are legally incorrect, do not comply with the instructions on remand, and are unsupported by substantial evidence. As such, the Court should reverse the Commission and hold Fragosa is entitled to lifetime compensation.

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[6]According to the Center for Disease Control and Prevention, a loss of consciousness longer than 24 hours is classified as a *severe* traumatic brain injury. See Department of Defense and Department of Veterans Affairs (2008). "Traumatic Brain Injury Task Force" http://www.cdc.gov/nchs/data/icd9/Sep08TBI.pdf

CONCLUSION

For the foregoing reasons and the reasons previously argued below and to the Court, the Court should 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.

Respectfully Submitted

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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

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Kade Construction, LLC, Employer, and
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PROOF OF SERVICE

I certify that I, Katherine Carter, am a paralegal to Stephen B. Samuels and I have caused the **Final Brief of Appellant** and **Final Reply Brief of Appellant** to be served on the parties below, by placing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed as follows:

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Via Hand Delivery
The Honorable Jenny Abbott Kitchings
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1015 Sumter Street
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RE: Hector G. Fragosa v. Kade Construction, LLC
Appellate Case No.: 2014-002354

Dear Ms. Kitchings:

Enclosed for filing are the originals and fifteen (15) copies of the **Final Brief of Appellant**, **Final Reply Brief of Appellant** and an original and one copy of our **Proof of Service,** in the above case.

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

Sincerely,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc
Enclosure(s) as stated

cc: Michael Burkett, Esq.
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