THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

ON WRIT OF CERTIORARI FROM THE
SOUTH CAROLINA COURT OF APPEALS



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CASE NO.: 2007-CP-21-2065

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Clifton Sparks, ..... Petitioner,

vs.

Palmetto Hardwood, Inc. and Palmetto Timber S.I. Fund
c/o Walker, Hunter & Associates ..... Respondents

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# REPLY BRIEF OF PETITIONER

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## STATEMENT OF THE CASE

Petitioner hereby adopts and incorporates by reference the Statement of the Case as set forth in Petitioner's prior Brief.

## PETITIONER'S RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

Petitioner objects to Respondents' Statement of the Case to the extent it includes factual inaccuracies, contested factual matter, misstatements, and argument.

## I. DID THE COURT OF APPEALS OVERLOOK OR MISAPPREHEND THAT THE APPELLATE PANEL ERRED IN FAILING TO COMPLY WITH THE CIRCUIT COURT REMAND ORDER REQUIRING IT TO DEFINE ITS KEY TERMS AND EXPLAIN ITS CONTRADICTIONS, AND IN FAILING TO APPLY THE PROPER DEFINITION OF "PHYSICAL BRAIN DAMAGE?

### A. The proper construction of "physical brain damage," in conjunction with the unappealed findings of the Appellate Panel, necessitates finding as a matter of law that Petitioner is entitled to lifetime benefits.

#### 1. Introduction

The heart of the controversy in this case remains with the statutory significance and meaning of the phrase "has suffered physical brain damage." Whether or not Petitioner proved "physical brain damage" cannot be determined without applying the correct definition of "physical brain damage." If the definitions suggested by Petitioner are deemed correct, Petitioner suffered physical brain damage and is entitled to lifetime compensation as a matter of law.

Respondents contend the 2007 Appellate Panel decision applied the proper definition of "physical brain injury," yet the Appellate Panel made no attempt to define that phrase. Respondents have not pointed to any explanation from the Panel of what it meant by "physical brain injury," and whether this differs from the term "physical brain damage." It is still unclear how this Appellate Panel believes the terms "physical brain damage," "physical brain injury," "physical," "brain damage," and "compensable brain injury" should be defined and used. However, what is clear is that the Panel chose to make no attempt to honor the directive of the circuit court remand order to explain its key words and phrases and apparent contradictions.

Respondents' brief resorts to supposition and wishful thinking rather than analysis. Wishing the Panel had defined the key words and phrases, and wishing it had done so in Respondents' favor, is not helpful to the Court. This is especially true where the wished-for definitions proffered by Respondents are counter to the statutory language, dictionary definitions, and common usage by the Commission and courts.

### 2. Dictionary Definitions

Respondents criticize Petitioner for defining the key words and phrases by reference to dictionary definitions. Neither *Merriam-Webster* nor any other dictionary had an entry for "physical brain damage," so Petitioner noted the definitions for each word individually.[1] Defining each term individually is appropriate. In fact, Respondents rely on a website dictionary to define "physical."[2] So long as the words of the statute are ascribed their plain and ordinary meaning, without subtle or forced construction, this is the appropriate method for determining the meaning of words and phrases. *See, e.g.*, *Catawba Indian Tribe v. State*, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007).

### 3. "Injury" and "Damage" Mean the Same Thing and Are Used Interchangeably by the Commission and Courts

Respondents accuse Petitioner of imputing intentions and beliefs to the Appellate Panel when Petitioner pointed out that the Panel used the terms "injury" and "damage" interchangeably. Respondents contend this assertion is based upon nothing more than conjecture. Respondents themselves try to obscure and belittle the Commission's interchangeable use of the terms by arguing the Appellate Panel's use of the terms interchangeably was merely a mistaken,

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[1] It is permissible to rely on both medical text and common usage dictionaries to define terms undefined by statute, but defining words by the "commonly held stereotypes of the terms they describe" appears to be frowned upon. *Reed-Richards v. Clemson Univ.*, 371 S.C. 304, 308-09, 638 S.E.2d 77, 78-79 (Ct. App. 2006).

[2] Respondents' definition of "physical" is not greatly different from Petitioner's. Both acknowledge "physical" to mean "of or pertaining to the body." Additionally, Respondents note this implies an external, material force as the cause of the brain damage, which is precisely what is present in this case. Alternatively, Respondents argue "physical" is intended to distinguish between psychological damage and actual damage to the material of the brain. This is also cohesive with Petitioner's position. The pressurized block of steel that flew into Petitioner's head caused a compensable injury to his brain. The presence of comorbid psychological overlays resultant from the impact does not negate the physical nature and harm caused by the initial impact. This is described in detail *Infra*.

"inadvertent error." Respondents acknowledge that the Panel again repeated the phrase "physical brain injury" in its 2007 decision. But, instead of focusing on the significance of the interchangeable use of those words and phrases by the Appellate Panel, Respondents cavalierly dismiss this as "unfortunate," and "no more than an inadvertent error." (Resp. Brief. P. 15).

One cannot help but to appreciate the irony of Respondents' position. In the same paragraph wherein Respondents accuse Petitioner of imputing intentions to the Appellate Panel based on their own word choices, they ignore the chosen words of the Panel's Orders and argue its interchangeable use of "injury" and "damage" was just a mistake, presumably done by oversight, scrivener's error, or sloppy drafting.

If the Panel had used such terms interchangeably only once in the initial order in this case, there may have been some slight plausibility to Respondents' argument. However, there was not one but a multitude of examples of the Panel, the Commission, and the courts using those words and phrases interchangeably. In several other cases, the Commission and the courts addressed not "physical brain damage" but "physical brain injury."[3] Interchangeable use of key words and phrases is crystalized by the Panel's use of the phrase "physical brain injury," rather than "physical brain damage," in identifying the key issue to be addressed in its second Decision and Order. That Order was issued in response to a remand order from the circuit court directing the Panel to explain whether physical brain "injury" and "damage" are the same or different and to explain the apparent contradictions in its first order.

The Panel chose to disregard the directive from the circuit court and merely note in conclusory terms, in its Finding of Fact # 11, its assertion that compensable injury by accident to the brain is not the same as physical brain damage. Any implied assertion that physical brain "injury" is different from physical brain "damage" is belied by the fact that the same Panel, in

[3] *See, e.g.*, *Whitman*, 2005 SC Wrk. Comp. LEXIS 1259 (November 2, 2005); *Crisp v. SouthCo, Inc.*, 390 S.C. 340, 344, 701 S.E.2d 762 (Ct. App. 2010); *Floyd v. C.B. Askins & Co. Contrs.*, 382 S.C. 84, 86, 675 S.E.2d 450, 451 (Ct. App. 2009).

the same Order, stated that the pivotal issue was whether or not Petitioner sustained physical brain "injury." There is no doubt that the Commission routinely uses the words "injury" and "damage" interchangeably. There is no doubt the Commission uses "physical brain injury" and "physical brain damage" interchangeably.

Unlike Respondents, Petitioner bases his argument on the words found in the Order and the inferences that may be drawn therefrom, consistent with dictionary definitions. Respondents have no special insight into any secret, hidden intentions behind the Appellate Panel's chosen words. There is no indication that the selected word choice was anything other than deliberate, and this Court should presume the Appellate Panel intended the words it wrote.[4]

Respondents erroneously assert not only this Appellate Panel, but other Appellate Panels and courts have inadvertently and accidentally used the words "injury" and damage" and the phrases "physical brain damage" and "physical brain injury" interchangeably. They argue *Crisp v. SouthCo, Inc.*, 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010) as an example of the Commission and the courts inadvertently using the phrases "physical brain damage" and "physical brain injury" interchangeably. Again, there is no evidence to support their position that the Appellate Panel or the court did so by mistake. Moreover, Respondents' contention that *Crisp* supports their position is misguided. In *Crisp*, the Court of Appeals simply held there was no physical brain injury. *Id.* at 344, 764, 701 S.E.2d 762. Unlike the case at hand, the court in *Crisp* did not make the determination that there existed a compensable brain injury, yet no physical brain damage. Accordingly, other than to show that courts use the phrases interchangeably, the case provides little guidance to the Court.

### 4. Lifetime Compensation Requires Total and Permanent Disability, But Not Permanent Brain Damage

[4] This is not to say that Petitioner agrees with those words; only that, for better or worse, they are the Appellate Panel's decision. Accordingly, Petitioner appeals from the findings of the written order, not the Respondents' machinations of what the Order really intended.

As an initial matter on the issue of permanency, Respondents contend in a footnote that there is no evidence Claimant appealed Finding of Fact # 14. (R. p. 19, n. 10). This is untrue. In this Finding, the Appellate Panel deleted the word "brain" from a list of permanent injuries, even though the related symptoms to the brain injury remained in the finding. (R. p. 73). In paragraph 16 of Petitioner's Notice of Intent to Appeal, Petitioner alleged error in the Appellate Panel's failure to make a Finding of Fact consistent with the single commissioner's Finding of Fact # 15, regarding the brain. Finding of Fact # 15 was the original finding that there was permanent brain damage. The Appellate Panel Order changed the numbers, but the Appellate Panel's Finding is essentially the same as the commissioner's, except for the deletion of the word "brain." Thus, Petitioner did appeal this issue and preserve it for appellate review.

Section 42-9-10(C) reads, "[A]ny person determined to be totally and permanently disabled who as a result of a compensable injury . . . has suffered physical brain damage is not subject to the five-hundred-week limitation . . . ." Thus, the Petitioner must establish: 1) that he has been determined to be totally and permanently disabled, and 2) that he has suffered physical brain damage as a result of a compensable injury.

Respondents erroneously argue that "physical brain damage" requires permanent, irreversible brain injury or damage. The statute speaks of one "who has suffered physical brain damage." *Id.* If the General assembly had intended to require permanent brain damage as a condition of lifetime compensation, it could surely have used clear language to that effect. It could easily have provided that lifetime compensation is available only where the brain damage or physical brain damage is permanent. No such language was enacted, however, despite the Respondents' wishful thinking. There is no reason to believe the legislature intended to create a permanency requirement by its choice of the words, "damage" and/or "physical." There is every reason to believe the choice of words and verb tense used was intentional and not accidental.

Neither the statutory language, nor dictionary definitions nor prior usage by the Commission or courts supports that supposition by Respondents.

Even if permanency were required, however, the Appellate Panel did not find the brain injury suffered by Petitioner to be temporary[5]; and there was absolutely no evidence of record to suggest the brain damage was temporary. The medical witnesses for Petitioner opined that the brain damage was permanent. (R. p. 505, 513, 525, 569-70, 625-26). The medical witnesses relied upon by Respondents opined that the brain damage may have been mild, but none asserted the brain damage was temporary. Not a single witness testified or reported that Petitioner's brain damage had resolved or would resolve during his lifetime. All of the witnesses who addressed permanency opined that petitioner's brain damage was permanent. *Id.* Many the symptoms attributable to brain damage were found by the Panel to be permanent, including tremors, loss of coordination, gait problems, bladder problems, and injury to Petitioner's psyche, which remained in the 2007 Commission Order as permanent injuries.

Petitioner's cognitive impairments were far worse than expected from a mild brain injury. (R. p. 599). The actual findings note that the claimant suffered a compensable injury to his brain, yet the Petitioner somehow had not met his burden of proving physical brain damage. The Appellate Panel's deletion of the word "brain" from Finding # 14 does not clarify the inconsistencies in either Order from the Panel, nor does it explain what "physical brain damage" means. Even if the deletion of the finding that Petitioner's brain was totally and permanently damaged is construed as a finding that Petitioner's brain damage was only temporary, that finding cannot stand because it is not supported by any evidence, much less substantial evidence.

### 5. Lifetime Compensation Does Not Require That Brain Damage Cause the Total and Permanent Disability

[5] Even though the standard for determining facts is by the "preponderance of the evidence," the Appellate Panel at Finding of Fact # 12 stated, "There is no *clear and convincing evidence* that following the admitted head injury, Claimant was dazed and confused and suffered nausea, vomiting, cognitive impairments, and post concussive headaches." Accordingly, the Appellate Panel imposed a more demanding standard of review than what is required by law in claims for Workers' Compensation.

To argue that a totally and permanently disabled claimant who has suffered physical brain damage is not to receive lifetime compensation unless the brain damage caused the disability is to misconstrue the statute. The relevant code section requires only that the injured worker be totally and permanently disabled and have suffered physical brain damage as a result of a compensable injury to qualify for lifetime compensation. There is no statutory language requiring that the brain damage have caused the total and permanent disability. If the legislature had so intended, it easily could have drafted the statute to read, "Any person who is determined to be totally and permanently disabled *because of* physical brain damage from a compensable injury is not subject to the five-hundred-week limitation." There are numerous iterations of the above example that the legislature could have drafted if it had intended what Respondents proclaim. The fact remains, however, that the statute requires only that the claimant be permanently disabled and that the claimant have suffered physical brain damage as a result of a compensable injury.

*Pearson v. JPS Converter & Indus.*, 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997), does not support Respondents' position. *Pearson* was a case where a worker became totally and permanently disabled because of physical brain damage and other impairments, thus entitling him to lifetime compensation. *Id.* at 400, 489 S.E.2d at 222. The Employer appealed, asserting that lifetime compensation required a finding that the total and permanent disability was caused by physical brain damage. The Court of Appeals rejected that argument because there was no such statutory requirement. The court noted that comorbidities, including brain damage, had caused the total and permanent disability, but the court's holding did not require proof of contributing causation. In fact, the court held that S.C. Code Ann. § 42-9-10 "does not require the total and permanent disability to be solely the result of physical brain damage – the statute only requires that a claimant be totally and permanent (sic) disabled and suffer physical brain

damage as a result of the injury." *Id.* This is consistent with Petitioner's position that in order for a claimant to receive lifetime benefits, he must first establish that he is permanently and totally disabled, and then establish a compensable accident caused physical brain damage. To the extent this dicta suggests an alternative meaning because of the court's usage of present tense "suffer" instead of past tense, this Court should base its decision upon the actual statutory language.

Even if there is a requirement that physical brain damage must contribute to the total and permanent disability to qualify for lifetime compensation, the Panel made no finding of an absence of disability causation from the brain damage. By deleting a prior finding of a causal connection, the Panel did not expressly find an absence thereof. If that deletion is considered a finding, however, it cannot stand because it is completely devoid of evidentiary support, much less support by substantial evidence. No witness testified that Petitioner's brain damage did not contribute to his total and permanent disability. Medical witnesses relied upon by the Respondents expressed an opinion the brain damage was mild, but not one stated it was not a contributing cause of Petitioner's total and permanent disability. The only inference that may be drawn from the testimony of record is that there was a causal connection. (R. p. 474, 476, 502, 505, 513, 519, 569-70, 605).

### 6. "Compensable" Brain Damage Does Not Simply Mean that Medical Treatment is Due.

Contrary to Respondents' argument, "compensable" brain injury does not mean simply that medical treatment is due. Where a worker has total and permanent disability and has suffered physical brain damage, he receives lifetime compensation under S.C. Code Ann. § 42-9-10. Where workers suffer permanent impairment from a compensable brain injury, but are not totally and permanently disabled, they receive compensation according to the Schedule of Benefits set forth in the regulations. Under Reg. 67-1101 Scheduled Losses, a worker who suffers injury to the brain who is not permanently and totally disabled receives between 25 and

250 weeks compensation. In the instant case, it was unnecessary for the Commission to assign a degree of disability to the brain, for the initial award was under S.C. Code Ann. § 42-9-10, and Respondents ultimately conceded that Claimant was totally and permanently disabled.

### 7. "Physical" Brain Damage Does Not Require Visualized Structural Brain Damage.

Respondents argue that "physical" means visualized structural brain damage caused by an outside trauma or stimulus. To their credit, Respondents are half right, for "physical" brain damage does mean brain damage caused by an outside trauma or stimulus. However, there is no statutory requirement for brain damage to involve visualized structural damage.

Respondents contend the cases cited by Petitioner to the effect that physical brain damage means an injurious force from outside the body impacting adversely upon the injured person's head and brain are irrelevant. Petitioner acknowledges the extrajurisdictional caselaw may not square perfectly with South Carolina's Workers' Compensation Act. Indeed, Petitioner could find no other jurisdiction which used the precise language "physical brain damage" in its workers' compensation statutes. Nevertheless, it is odd for respondents to criticize Petitioner on this point, for elsewhere in their brief, Respondents agree with the definition of "physical" proffered by Petitioner."[6] The caselaw is instructive at least on the point of how other courts have wrestled with defining brain injuries, whether they are physical or mental in nature, and whether MRI, CT or other scan evidence is necessary to establish physical brain damage.

As noted in *Whitman v. Standard Corp.*, other jurisdictions have analyzed what proof is sufficient to show "organic brain damage," which *Pearson* used interchangeably with "physical brain damage." In *Daniel Constr. Co. v. Tolley*, 480 S.E.2d 145 (Va. Ct. App. 1997), the court found claimant had suffered a physical brain injury resulting from a nearby dynamite explosion

[6] Specifically, Respondents stated, "The word 'physical,' is commonly defined as 'of or pertaining to that which is material,' or, alternatively, 'of or pertaining to the body,' which implies either some external, material force as the cause of the brain damage, or is intended to distinguish between psychological damage and actual damage to the material of the brain." (Resp. Br. p. 13, n.4)

that caused Claimant to suffer post-traumatic stress disorder, anxiety disorder, panic disorder, and depression. Claimant's treating physician testified to the neurochemical changes that occurred at the cellular level in Claimant's brain. *Id.* at 147. Moreover, the expert noted, "Recent evidence from the National Institute of Mental Health shows specific structural changes within the neurons that is permanent and irreversible. Damage is done to the neurosynaptic receptors and serotonergic neurotransmitters . . . ." *Id.* Accordingly, the court found the evidence sufficient to support a finding of physical injury to the brain, even though there was no brain damage that could be seen from currently available scan-based diagnostic tests. *Id.*

In *Ill. Mut. Ins. Co. v. Indus. Com*, 559 N.E.2d 1019 (Ill. App. Ct. 1990), the claimant suffered a head injury in a car accident. An initial CT scan showed an intracerebral hematoma, which ultimately subsided. However, problems with memory, headaches, and other issues continued. Expert witness testimony established that there can be organic brain injury that a CT or electroencephalogram cannot detect. *Ill. Mut. Ins. Co.*, 559 N.E.2d at 1029. Additionally, it noted that a CT scan will not show micro changes at the cellular level, that "brain imaging, CT scan, and neuroencephalogram" tests "depend upon structural findings," and "closed head injury problems rarely show up on [these types of tests] because such injury appears to cause multiple small injuries undetectable by these techniques." *Id.* at 1029-32. On this basis, the court found an organic brain injury.

An unpublished opinion from the North Carolina Court of Appeals further sheds light on this issue. In this case, the Commission found that claimant suffered a mild-traumatic brain injury. *Irby v. The New Telephone Co., Inc.*, No. COA02-1359, p. 1 (N.C. Ct. App., Sept. 16, 2003). In *Irby*, on October 6, 1999, plaintiff fell approximately eight feet through a ceiling and landed on a concrete floor. *Id.* at 2. Plaintiff returned to work on Oct. 11, 1999. However, he subsequently began behaving erratically, had crying spells, and was depressed. *Id.* Imaging tests were negative. *Id.* His psychiatrist concluded that he had suffered "a personality change

secondary to a closed-head injury during the fall at work." *Id.* Ultimately, even with the absence of positive objective tests showing brain damage, and despite the lack of direct evidence of a head injury, the court found claimant had suffered mild traumatic brain damage. Id.

*Zach v. Neb. State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007), involved a state trooper who shot himself after learning that two individuals whom he had previously stopped robbed a bank and killed several people. *Zach*, 273 Neb. at 2, 208, 727 N.W.2d 206. The court explained, "The issue presented in this appeal is whether a work-related injury caused by a mental stimulus is compensable [under Nebraska workers' compensation.]" *Id.* Claimant's decedent asserted recovery should be permitted because claimant suffered physical changes to his brain. *Id.* at 3-4, 209, 727 N.W.2d 206. In denying coverage, the court held, "There is no allegation that such changes were caused by any *physical* stimulus," and the injury resulted only after "being advised of the consequences of an error." *Id.* at 8, 212, 727 N.W.2d 206. Accordingly, the court held "an injury caused by a mental stimulus" did not meet the state's requirement that a compensable injury involve "violence to the physical structure of the body." *Id.* at 9, 212, 727 N.W.2d 206.

These authorities support the position that neither radiographic visualization nor structural damage is required by the statutory phrase, "physical brain damage." Brain damage even at the cellular level suffices to meet the "physical" brain damage requirement.

**8. Petitioner's Interpretation of "Physical Brain Damage" Will Not Lead to Absurd Results.**

Respondents erroneously argue that Petitioner's position would lead to the absurd result of lifetime benefits for a mild and temporary concussion but limited compensation of 500 weeks for a more severely injured claimant who has, for example, lost both his legs. First, a claimant will not receive lifetime benefits for only a mild, temporary concussion. Such a result is contrary to the plain language of the governing statute. S.C. Code Ann. § 42-9-10(C) requires the claimant to be totally and permanently disabled and have suffered physical brain damage from a

compensable injury. A mild concussion of any assumed degree of severity would not give rise to lifetime compensation unless the injured worker was both totally and permanently disabled and have suffered physical brain damage as a result of compensable injury. Therefore, the result Respondents fear from Petitioner's position would never occur.

Secondly, the instant case does not present a situation where there has been only a mild and temporary concussion. The Appellate Panel Decision and Order acknowledges permanent symptoms of Petitioner's brain damage, including bladder problems, tremors, gait difficulties, loss of coordination, and injury to psyche, all which resulted after a blow to the head.[7] The record shows dramatic cognitive impairments far worse than would be expected from a mild concussion. (R. p. 512-517). Petitioner now has a markedly low IQ, in the low 60s. (R. p. 517). Accordingly, Respondents are incorrect in presuming that an award of lifetime compensation to Petitioner would open the floodgates to lifetime compensation awards to one with a mild, temporary concussion.

Third, Respondents' position that the maximum compensation of 500 weeks received by a double amputee is undeservedly worse than lifetime compensation for a totally and permanently disabled worker who suffered physical brain damage is overly simplistic. It ignores the various ways the two subsections may unfold, given the facts and circumstances of each unique case. Under S.C. Code Ann. § 42-9-10(B), the loss of both hands, arms, shoulders, feet, legs, hips or vision in both eyes is deemed to represent, in and of itself, total and permanent

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[7] *See* Findings of Fact # 7 and # 14 from the second Appellate Order:

> 7. The accident of May 21, 2001 was also admitted. Claimant sustained a compensable injury-by-accident not only to his head, but also to his neck (affects function of arms), bladder, head (headaches), brain and psyche. The evidence was insufficient to establish a causal link between the work-related accidents and bowel incontinence, hearing loss, and vision problems.
>
> 14. Claimant did suffer permanent injuries to his back (affecting lower extremities), neck (affecting upper extremities), bladder, and psyche. Related symptoms include tremors, loss of coordination, and gait problems.
>
> (R. p. 73).

disability. When a claimant presents with the loss of any two of the above-listed parts, he is deemed permanently disabled under the Act, without regard to whether or not he can still work. A double amputee is presumed to be totally and permanently disabled, without consideration given to whether he can work and, if so, whether his earning capacity has changed. A double amputee may, in some situations, be able to work and earn more wages after the injury, yet still draw compensation for 500 weeks. This differs dramatically from section 42-9-10(C), which first requires a determination of total and permanent disability, and a determination of quadriplegia, paraplegia, or brain damage from a compensable injury before any special award is made. The brain injured worker, therefore, receives no special consideration unless and until he first proves he is in fact totally and permanently disabled. He must also prove that he has suffered physical brain damage, as opposed to brain damage caused by mental stimulus.

Fourth, whether lifetime compensation is less than, equal to, or greater than 500 weeks compensation depends on how long the claimant lives after the injury. This is contrasted to recovery under (B), where 500 weeks compensation is guaranteed to the claimant or his survivors, irrespective of how long the claimant actually lives. *Floyd v. C.B. Askins & Co. Contrs.*, 382 S.C. 84, 675 S.E.2d 450 (Ct. App. 2009) brings this issue to light. In *Floyd*, the claimant was determined to be permanently and totally disabled. *Id.* at 86, 451, 675 S.E.2d 450. Additionally, the claimant was determined to have suffered a "*physical brain injury*" and was awarded benefits for the remainder of his life. *Id.* While his life expectancy was nearly nineteen years, the claimant died of an unrelated aneurism after receiving just 254 weeks of benefits. *Id.* at 86-87, 451-52, 675 S.E.2d 450. The claimant's widow sought the remaining balance from the nineteen years life expectancy. *Id.* The court held that a widow was not entitled to the balance of compensation remaining on a claimant's lifetime award. *Id.* at 88, 452, 675 S.E.2d 450.

In reaching its decision the court stated that S.C. Code Ann. § 42-9-280 determines when payment of the unpaid balance of an award may be received by the claimant's family members.

*Id.* This statute provides for payment to next of kin where the injury was covered "by the second paragraph of § 42-9-10 or 42-9-30." *Id.* In its analysis, *Floyd* cited to *Stone v. Roadway Express*, 367 S.C. 575, 627 S.E.2d 695 (2006), which held a widow could not recover the unpaid balance awarded to her husband under S.C. Code Ann. § 42-9-10(A). *Id.* From the guidance provided by *Stone* the court in *Floyd* explained, "Section 42-9-280 does not include awards made under paragraph (C) among those that survive a claimant's death from an unrelated cause."[8] *Floyd*, 382 S.C. at 89-90, 675 S.E.2d at 453. Furthermore, the court noted that similar to paragraph (A), paragraph (C) "seems to focus on a claimant's inability to earn a wage" because the statute "conditions the lifetime award of benefits upon a finding of total and permanent disability." *Id.* Attempting to make sense of the reasons behind the difference, the court explained that a person who has been determined to be permanently and totally disabled; and who has suffered a catastrophic injury, such as paraplegia, quadriplegia, or physical brain damage; may require specialized healthcare without the means to earn a wage. *Id.* Accordingly, the court concluded it was "logical benefits would terminate upon such a claimant's death from an unrelated cause." *Id.*

Thus, Respondents attempt to engender fear that Petitioner's statutory interpretation would lead to innumerable lifetime benefits claims for every worker who has a concussion is unfounded. Under paragraph (C), a claimant must first establish that he is permanently and totally disabled.[9] Then, he must show that he has suffered physical brain damage. Additionally, a worker's claim for benefits for life will not inure to the benefit of his family members.

Finally, as the court in *Floyd* explained, where an individual is permanently disabled, and suffered an injury like a physical brain injury, then this person is at risk of needing specialized healthcare without a means to earn a wage. The legislature may have intended in this situation

[8] The carrier did not appeal the award of the balance of five-hundred weeks' compensation and so this ruling became the law of the case. *Id.* at 90, 453, 627 S.E.2d 695.

[9] *See Id.* at 90, 675 S.E.2d at 453 ("The statute conditions the lifetime award of benefits upon a finding of total and permanent disability.")

that the costs associated with the claimant's workplace injury be borne by the employer and not the taxpayers. This certainly makes sense. The employer is in a better position to prevent these types of injuries and insure against catastrophic costs. Accordingly, if such an injury occurs, it should be the employer, and not the taxpayers, who incur the associated costs. Therefore, where an employee has suffered the type of injury that is typically associated with special long-term care, and that person has also been determined to be permanently and totally disabled, then it is entirely reasonable that the legislature intended paragraph (C) to be a means to ensure this state's workers are protected and to ensure that the employer and not the taxpayers bear the expense.

Respondents argue the definition and application of statutory benefits for "paraplegia" and "quadriplegia" supports their position. However, caselaw regarding lifetime benefits for "incomplete paraplegia" puts this issue in its proper light. In *Reed-Richards*, 371 S.C. 304, 638 S.E.2d 77, the claimant sought lifetime benefits for "incomplete paraplegia." *Id.* at 305, 78, 638 S.E.2d 77. In 2004, the Appellate Panel awarded lifetime benefits. *Id.* at 304, 79, 638 S.E.2d 77. Appellants contended the circuit court erred in affirming this finding because, among other reasons, the statute did not provide for lifetime benefits for incomplete paraplegia; and permitting lifetime benefits for incomplete paraplegia would be absurdly inconsistent when considered with the workers' compensation statutory framework. *Id.* at 307, 79, 638 S.E.2d 77.

After referencing dictionary definitions of paraplegia and incomplete paraplegia, as well as the testimony, the appellate court held the circuit court "correctly interpreted the term 'paraplegic' to include a diagnosis of incomplete paraplegia." *Id.* at 309, 80, 638 S.E.2d 77. The S.C. Court of Appeals noted its decision was "consistent with the legislative purpose of construing workers' compensation laws in favor of claimant," and it did "not rise to the level of judicial legislation." [10] *Id.* Thus, the court makes clear that there are varying degrees of injury,

[10] Respondents also argue Petitioner incorrectly cited to *Dickert v. Metro. Life Ins. Co., 306 S.C. 311, 411 S.E.2d* 672 (Ct. App. 1991) for the proposition that any reasonable doubts should be resolved in favor of coverage because

even in terms of paraplegia, and the compensation for an injury which caused incomplete paraplegia must be assessed in light of the fact that statutes should be construed in favor of the claimant. Thus, an absurd result is not reached, but one well within the bounds of reasonableness for a legislature making necessary choices to address competing interests of multiple stakeholders.

### B. The Appellate Panel disobeyed the Circuit Court remand order requiring it to define key terms and explain its contradictions.

The Appellant Panel's decision turns on a few key words and phrases. These include "physical brain injury" and "physical brain damage." Accordingly, the Circuit Court asked the Appellant Panel to "explain what it means by the use of the term 'physical brain injury,' whether it is different from 'physical brain damage,' or is intended to be the same as 'physical brain damage.'" (R. p. 2). The court also sought clarification of the inconsistency between Finding of Fact # 7 and # 11. The Amended Decision and Order of the Appellant Panel did none of this. Instead, the decision simply concluded, without clarification, definition, or explanation, that while Finding of Fact # 7 noted an injury-by-accident to the brain, this did not constitute damage to the brain. (R. p. 73). Thus, confusion remains as to how the Appellate Panel could determine

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in *Dickert*, the court had to determine whether the claims fell within and were therefore barred by the workers' compensation statute. Respondents' assertion is incorrect. The Act is liberally construed to further "the beneficial purposes for which it was designed." *Carter v. Penney Tire & Recapping Co.*, 261 S.C. 341, 349, 200 S.E.2d 64 (1973). These laws were:

> enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents from becoming charges on society.
>
> *Cokeley v. Robert Lee, Inc.*, 197 S.C. 157, 168, 14 S.E.2d 889 (1941).

Moreover, because employees have lost their right to bring suit, "such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purpose for which they were enacted . . . ." *Id.* at 169, 14 S.E.2d 889. Thus, despite Respondents assertion that the rules for construing workers' compensation statues are liberally construed only when doing so bars the claimant from bringing tort claims, the rules are actually so construed *for the benefit* of the employee. *See Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 130, 623 S.E.2d 860, 864 (Ct. App. 2005). ([W]orkers' compensation laws in general . . . are to be liberally construed in favor of claimants and coverage.").

that being hit in the head with a chunk of steel represented compensable brain injury, but not physical brain damage.

Respondents' contend the language added to Finding of Fact # 11 makes clear that the Commission distinguished between compensable injury-by-accident to the brain and physical brain damage. This Finding reads, "Although Finding of Fact # 7 above notes an injury-by-accident to the brain, this does not constitute damage to the brain." However, this utterly fails to accomplish what The Commission was tasked to do by the Circuit Court. This cursory statement provides no insight into why a compensable injury to the brain does not constitute physical brain damage. It does not explain the differences between "physical brain damage" and "physical brain injury." It does not clarify how there can be a compensable injury to the brain, yet be a frivolous claim for physical brain injury. Instead of elucidating the areas deemed unclear by the circuit court, the modifications of the 2007 Commission order raised more unanswered questions.

In an attempt to glean compliance with the circuit court order from the Appellate Panel Decision, Respondents craft an argument based on inferences that supposedly should be drawn from the words eliminated and revisions made between the 2006 Commission decision and the 2007 Commission Decision. Respondents argue the Commission intended permanency and/or visualized structural damage to be incorporated into the phrase "physical brain damage."[11] However, the Appellate Panel failed to provide any explanations as instructed. Had the Panel done so, Respondents would not have to resort to divining the Panel's intentions by theorizing about the potential significance of words not used. If "physical brain damage" is intended by the Panel to convey a requirement of permanency or visualized structural damage, that is contrary to the plain language of section 42-9-10(C); and if this was what the Panel intended, the Panel intended it in error. *See Arguments IA, supra.*

[11] Petitioner's position is that the substantial evidence establishes physical damage to Petitioner's brain from being struck by a pressurized chunk of steel, which caused permanent injury, including reduced IQ, loss of memory, tremors, bladder problems, loss of coordination, gait, and psychological disturbances.

Citing to *Mohasco Corp., Dixiana Mill Div. v. Rising*, 292 S.C. 489, 357 S.E.2d 456 (1987), Respondents contend an "implicit" finding in the Commission's order is sufficient. However, the facts of *Mohasco* make it inapposite. In *Mohasco*, a worker exposed to dust and lint from cotton fibers contracted chronic obstructive lung disease. *Id.* at 490, 457, 357 S.E.2d 456. The Court of Appeals remanded to determine whether the disease was caused by a hazard peculiar to the worker's specific trade, as was required by section 42-9-10. *Id.* The South Carolina Supreme Court reversed, noting the finding of the disease as peculiar to the occupation was "implicit in the affirmance of the Commissioner's findings that the disease was peculiar to their employment." *Id.* In the case at hand, there was no affirmance of the Commissioner's findings. The Appellate Panel *reversed* the Commissioner on the findings which serve as the basis of this appeal. Accordingly, there is no affirmance from which to imply what the Panel means by physical brain injury or physical brain damage. The Order does not explain the term's meaning or how there can be a compensable brain injury but no physical brain damage.

It was error for the Appellate Panel to disobey the circuit court's remand to clarify and explain certain words and phrases, including "physical brain damage," and to fail to apply a proper definition of "physical brain damage." The second circuit court and the Court of Appeals erred in failing to enforce the prior circuit court order. Petitioner asserts he is entitled to lifetime compensation as a matter of law; or in the alternative, this Court is respectfully requested to provide the Commission and the bar, with its definitions of key words and phrases.

**II. THE COURT OF APPEALS OVERLOOKED OR MISAPPREHENDED THAT THE CIRCUIT COURT ERRED IN FAILING TO RULE THAT CLAIMANT SUFFERED PHYSICAL BRAIN DAMAGE AS A MATTER OF LAW, IN LIGHT OF THE UNAPPEALED FINDING THAT CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS BRAIN AND THE UNDISPUTED FACT THAT SUCH INJURY WAS CAUSED BY A TRAUMATIC FORCE OUTSIDE OF CLAIMANT'S BODY.**

Respondents contend the definitions proffered by Petitioner of "injury," "damage," and "physical brain damage" are concocted and unworkable. Again, Petitioner reiterates that his

definitions come from several dictionaries, and each dictionary definition was consistent with the others. Petitioner is unaware of how else to define terms undefined by statute other than by either referencing a dictionary, or looking to how the Commission and the courts have used the terms. As previously explained, the courts used brain injury, and brain damage interchangeably. Accordingly, if this Court agrees that "injury" by definition includes "damage" and that "physical brain damage" means brain damage caused by an outward force or trauma impacting adversely on the body, the unappealed finding that Claimant has sustained a compensable injury-by-accident to his brain signifies he has suffered physical brain damage as a matter of law. Claimant therefore respectfully submits he is entitled to have this Court rule he suffered physical brain damage as a matter of law.[12]

## III. THE COURT OF APPEALS OVERLOOKED OR MISAPPREHENDED THAT WHEN THE WHOLE RECORD IN THIS CASE IS CONSIDERED, REASONABLE MINDS MUST CONCLUDE THAT CLAIMANT SUFFERED PHYSICAL BRAIN DAMAGE, SIGNIFYING THAT THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLATE PANEL'S IMPLICIT FINDING OF NO PHYSICAL BRAIN DAMAGE.

Alternatively, even if one looks past the legal errors previously noted, the Order must still be reversed for lack of substantial evidence to support the Appellate Panel's implicit finding of no physical brain damage.[13] Whether Petitioner has suffered physical brain damage depends on how this phrase is defined, whether it requires any specified degree of permanency or severity, or

[12] Respondents incorrectly argue that "concrete evidence" such as a CT scan or MRI is required to prove physical damage to the brain. Neither South Carolina courts not the statutory code has imposed such a requirement. Respondents also incorrectly premise their argument on the supposition that Petitioner's brain injury has completely resolved. The Appellate Panel still acknowledged the existence of permanent injury to Claimant's psyche from being struck in the head by a block of steel. Moreover, the "related symptoms" of tremors, loss of coordination, and gait problems, which were attributed to brain damage in the Commissioner's Order remained in the Appellate Panel's Order.

[13] If this Court finds for Petitioner on its first issue, then it would not need to address this issue. A finding that physical brain damage is interchangeable with physical brain injury yields a finding in favor of Petitioner, no matter what the definition. There is no evidence of only temporary brain damage.

whether it excludes any specific types of physical damage, such as those that occur at the cellular level and therefore cannot be viewed radiographically.[14]

Viewing the evidence of this case in its entirety, reasonable minds can come but to one conclusion; Petitioner has suffered physical brain damage. This is so even under either of the dual definitions of "physical" offered by Respondents. Respondents continue to cherry-pick facts favorable to their position to the detriment of the record as a whole. The fact remains that Petitioner conclusively suffered a compensable injury to the brain. (R. p. 72, l. 4-6) Moreover, Finding of Fact # 14 still lists certain permanent symptoms the Panel attributed to the brain injury/damage, including tremors, gait problems, and loss of coordination. (R. p. 73).

Dr. James Evans, a neurologist, noted, "Status post cerebral concussion with closed head injury and cognitive dysfunction, hypersensitivity to sensory and emotional stimulation and probable posttraumatic stress disorder." (R. p. 502). Dr. Evans, utilizing the AMA Guides to the Evaluation of Permanent Impairment, gave Petitioner a 25% impairment rating due to Petitioner's physical brain injury. (R. p. 503). Dr. Evans also indicated that the physical brain injury was in fact permanent. (R. p. 513).

Dr. Brabham, a psychologist, explained that "the reports and behaviors are supportive of a finding of an obvious brain injury as opposed to being attributed to any of his other medical conditions." (R. p. 569). He further noted, "physical tremors in both hands, and problems with balance, including actually falling on numerous occasion does not result from depression; obvious muscle coordination problems in general; problems with recalling names of people or familiar objects . . . major memory deficits." *Id.* Dr. Brabham explained that the record

[14] Respondents wish to inject into S.C. Code. Ann. § 42-9-10(C) requirements of permanency, causality, severity, primacy, and disallow comorbidity. None of these is required by the language of the statute. To impose these restrictions runs contrary to the clear language of the statute and the rules governing construction of workers' compensation statutes. Nevertheless, Petitioner has established the existence of permanency, causality, severity, and primacy.

confirmed the physical injury to the head, and after observing Petitioner, and looking at the evidence, symptoms of a brain injury. *Id.* This includes a finding of "Cognitive Disorder, Secondary to (Physical) Traumatic Brain Injury." *Id.*

The testimony of those physicians who Respondents contend presented testimony contrary to a finding of physical brain damage fall short for several reasons, and often favor a finding of physical brain damage. Some of the testimony evaluates the patient according to a standard far greater than what a Petitioner is required to prove. Others assumed elements of to a claim for physical brain damage that are not present in the statute.

Dr. Waid, a neuropsychologist, administered neuropsychological tests in September of 2002 and again in March of 2005. He twice concluded that Petitioner suffered from severe permanent impairment of learning and memory skills, poor attention capacity, and numerous confusional errors. (R. pp. 512-517). Dr. Waid acknowledged Petitioner may have suffered a concussion, but believed that because Petitioner tested so poorly, Petitioner's performance could not be explained by just a mild concussion. Interestingly, Dr. Waid's second report became much more certain in his opinions regarding issues of brain damage. Dr. Waid stated in his second report, "There is no *compelling* evidence that Claimant has sustained physical injury to the brain, or that this is the *primary* mechanism mediating his current difficulties." *Id.* (Emphasis added). Petitioner does not have to establish injury by "compelling evidence." Moreover, Petitioner does not have to establish brain damage to the sole or primary problem. *See Pearson, Supra.*[15] Significantly, Dr. Waid did not opine that Petitioner's brain damage was temporary, or that it did not contribute to his disability.

[15] Petitioner previously explained the problems with Respondents' construction of *Pearson.* However, even if *Pearson* stands precisely for what the Respondents contend, Petitioner has still shown his case satisfies the requirement that the brain damage must be at least a cause of claimant's permanent disability.

Dr. Bumgartner, a neurologist, asserted that Petitioner's "*primary* problem is one of psychiatric dysfunction and chronic pain" and that a "mild concussion *alone* would not produce this clinical picture." (R. pp. 723, 726) (Emphasis added). Moreover, Dr. Bumgartner concurred with Dr. Waid's assessment of "significant psychiatric comorbidity." (R. p. 723). Respondents have not denied that the other morbidity referred to by Dr. Bumgartner is brain damage.

While Petitioner contends *Pearson* does not require a causal relationship between the brain injury and the total and permanent disability, it unquestionably establishes that Petitioner need not prove brain injury as the only cause. *Pearson, Supra.* Accordingly, questions whether a concussion alone would have caused all Petitioner's problems, or whether the brain injury is the primary problem, are irrelevant. Dr. Bumgartner did not opine that Petitioner's brain damage was temporary or that it did not contribute to his disability. For these reasons, Dr. Bumgartner's testimony actually helps support Petitioner's physical brain damage.

Interestingly, Petitioner was referred to Dr. Kang by the Commissioner for an opinion about pain management. Dr. Kang is a physiatrist. Somehow Dr. Kang became aware that someone might want his opinions regarding Petitioner's brain injury, even though Petitioner did not see him for this purpose. Petitioner testified that Dr. Kang treated him disrespectfully, shoved him in the back, and made him try to walk without his can, causing him to fall. (R. pp. 99, 107, 223). Dr. Kang opined that Petitioner had not suffered a serious head injury and even accused Petitioner of malingering.[16] No other health care provider even hinted at malingering.[17]

[16] This is in direct conflict with testimony provided by other physicians, including Dr. Waid. Dr. Waid stated, "It is my opinion that Mr. Sparks was giving his best effort and that results do not represent an exaggeration of symptomatology or conscious falsification of deficits." (R. p. 519).

[17] Dr. Gordon Waddell wrote an important book, The Back Pain Revolution, which recognized that unexpected signs of patient discomfort could often provide insight to additional diagnoses a clinician had previously missed. Those unexpected signs were given the moniker, "Waddell signs." Sometimes Waddell signs provide insight to physical abnormalities not previously recognized, and sometimes they can provide insight into psychological rather than physical conditions which had been missed. Occasionally, Waddell signs reflect symptom magnification. It is no

Ultimately, Commissioner Bass noted Dr. Kang's testimony was beyond his expertise and that it was unclear why he chose to venture an opinion about physical brain injury. (R. p. 51). Accordingly, Dr. Kang's opinion cannot possibly be construed as substantial evidence of no physical brain damage. Moreover, he also never asserted the absence of permanent brain injury or damage or that the brain damage did not contribute to Petitioner's disability.[18]

## IV. THE COURT OF APPEALS OVERLOOKED OR MISAPPREHENDED THAT THE APPELLATE PANEL'S REFERENCE TO CLAIMANT'S ALLEGED LACK OF CREDIBILITY REVEALS A DISTORTED AND CONFUSED CONCEPT OF BRAIN INJURY BY THE APPELLATE PANEL, WITH WHICH REASONABLE MINDS CONSIDERING THE WHOLE RECORD SHOULD NOT AGREE.

Respondent contends the Commissioner's credibility determination does not have to be supported by substantial evidence, or evidence from which reasonable minds would reach the same conclusion. *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Petitioner disagrees. First, the only fact-finder who actually had the opportunity to witness first-hand Claimant's testimony and demeanor found Petitioner to be credible.[19] Moreover, "It is well settled that '[t]he findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings.'" *Porter v. Labor Depot, 643 S.E.2d 96, 101, 372 S.C.* 560, 568-69 (Ct. App. 2007) (*quoting Heater of Seabrook v. PSC*, 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998)).

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surprise that the insurance industry tries to subvert the true significance of Waddell signs by arguing such signs are always evidence of symptom magnification or malingering. That is in fact unusual.

[18] He also noted that the CT scan was negative to any physical indications. Neither this court, nor South Carolina's workers' compensation system, however, necessitates a finding of brain damage upon objective diagnostic testing as provided from, for example, a CT scan. The current state of technology is such that objective scan-based testing will not show damage at the cellular level. Thus, it will not show many of the manifestations experienced from a closed-head injury.

[19] Petitioner notes, "[C]redibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." *Okatie River v. Se. Site Prep, 353 S.C. 327, 338, 577 S.E.2d* 468, 474 (Ct. App. 2003). However, in an appeal from a decision by the workers' compensation appellate panel, the single commissioner, *not the Appellate Panel*, was the only fact-finder who actually witnessed first-hand Claimant's testimony and was able to judge his demeanor throughout the hearing. Tellingly, the Hearing Commissioner found Claimant to be credible.

Disallowing a "substantial evidence" standard of review would permit one so motivated to commit abhorrent discrimination based on characteristics of the claimant or claim. Accordingly, such a standard cannot apply to an administrative fact-finder's credibility determinations.

Additionally, Respondents fail to adequately address the catch-22 argument. Respondents argue the Commission is not looking to see whether a claimant is smart and polished, but whether he testifies honestly about what happened. If a worker who has been struck in her head and afterwards suffers from memory lapses, a lower IQ, inability to hold her attention, and anxiety and depression, goes before the commissioner and presents well, is coherent, and intelligible; the Panel can say that person is not credible because she shows impeccable memory, has not shown deficiencies in IQ, and has listened to and answered all the questions that were asked. However, if the same person on that date acts in conformity with her condition and makes mistakes in past recollection, says things that don't make sense, or doesn't seem to answer the questions asked, she will be deemed to lack credibility. It is for these reasons that the Appellate Panel must show substantial evidence to support a finding either of credibility or a lack of credibility.

## V. THE COURT OF APPEALS OVERLOOKED OR MISAPPREHENDED THAT THE CIRCUIT COURT ERRED IN FAILING TO AWARD LIFETIME COMPENSATION, SINCE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED AND HAS SUFFERED PHYSICAL BRAIN DAMAGE AS A RESULT OF HIS COMPENSABLE INJURY.

Because Petitioner is totally and permanently disabled, and because Petitioner suffered a compensable injury-by-accident to his brain from an outward trauma, it is respectfully submitted that Petitioner has suffered "physical brain damage." The only evidence of record regarding permanency and causation support that Petitioner's brain damage is permanent and contributed to his total and permanent disability. Accordingly, he is entitled to an award of lifetime

compensation as a matter of law. The Court of appeals overlooked or misapprehended this, either as a matter of law or based on the only reasonable factual conclusions to be reached from the record as a whole. Accordingly, Claimant respectfully requests this Court find he is entitled to an award of lifetime compensation. § 42-9-10.

## CONCLUSION

For the reasons stated, Appellant requests this Court to reverse the Order of the Court of Appeals as to "physical brain damage" and rule that Claimant suffered "physical brain damage" as a matter of law or from the only reasonable factual conclusions to be drawn from the whole record and is thus entitled to lifetime compensation.

Respectfully submitted,

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September 6, 2012

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael Nettles, Circuit Court Judge

ON WRIT OF CERTIORARI FROM THE
SOUTH CAROLINS COURT OF APPEALS

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Case No.: 2007-CP-21-2065

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Clifton Sparks, ..... Petitioner,

vs.

Palmetto Hardwood, Inc., and Palmetto Timer
S.I. Fund c/o Walker, Hunter & Associates ..... Respondents.

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**CERTIFICATE OF COUNSEL**

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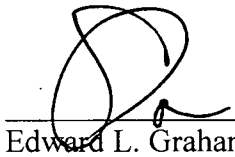
The undersigned certifies that this Petitioner's Reply Brief complies with the requirements and restrictions of Rule 211(b), SCACR.



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September 5, 2012

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael Nettles, Circuit Court Judge

ON WRIT OF CERTIORARI FROM THE
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**PROOF OF SERVICE**

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The undersigned, an attorney in this matter for the Petitioner, certifies that I have this 6th day of September, 2012 served copies of the Reply Brief of Petitioner by depositing them in the United States mail, first-class postage pre-paid, addressed to:

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Supreme Court Bldg.
1231 Gervais St.
Columbia, SC 29201

AND

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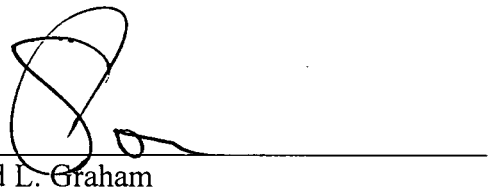

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September 6, 2012

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SEP 10 2012
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Supreme Court Building
1231 Gervais St.
Columbia, SC 29211

RE: *Clifton Sparks v. Palmetto Hardwood, Inc., and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates*
C/A No.: 2007-CP-21-2065

Dear Mr. Shearouse:

I am enclosing for filing the original and fifteen (15) copies of the Reply Brief of Petitioner Clifton Sparks, in the above referenced matter. By copy of this letter, I am serving attorneys Weston Adams, III, Helen F. Hiser and M. McMullen Taylor with a copy of the same.

With kindest personal regards, I am

Yours Very Truly,

Edward L. Graham

ELG/cah

Enc.

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