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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2014-002354

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MAY 27 2015

SC Court of Appeals

Hector G. Fragosa, Claimant,

Appellant,

v.

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

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favor of claimants”).

Although the term “traumatic brain injury” is not defined in the Act, it is defined elsewhere in the South Carolina Code of Laws at the regulations for “Criteria for Entry into Programs of Special Education for Students with Disabilities.” The definition states:

Traumatic Brain Injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a student’s educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. S.C. Code Ann. § 43-243.1 (L)(1)(2011).

Fragosa’s condition plainly meets this definition. He suffered an acquired injury to the brain resulting in most of the listed impairments. While there is no requirement that the Commission follow this definition, it is far better than arbitrarily making up a rule that for it to be “a physical brain injury you’ve got to be able to see it.” [R. p. 111, lines 11-13). Cf. Reed-Richards v. Clemson University, 638 S.E.2d 77, 371 S.C. 304 (Ct.App. 2006)(rejecting counsel’s lay definition of paraplegia as a “commonly held stereotype”).

The most common brain injuries are not visible on imaging scans – even acutely. In Krepps, this Court recounted expert testimony from a neuropsychologist about physical brain injuries which are not visible on CT scan:

Dr. Lesser testified it was possible for the brain to be injured without any damage to the skull or any bleeding inside the skull. He stated that closed head injuries often result in postconcussive syndrome, which is evidenced by physical symptoms such as personality change, drop in school performance, headache, fatigue, sleep disturbance, mood alteration, irritability, and memory loss. Dr. Lesser further indicated it was possible for a person to sustain a closed head injury, or postconcussive syndrome, and have little pain, very few complaints, a normal

neurologic exam, a normal MRI, and a normal CAT scan. He was “ninety-nine percent” certain that Shohn sustained a closed head injury. Krepps by Krepps v. Ausen, 479 S.E.2d 290, 324 S.C. 597 (Ct.App. 1996).

It is well-established that neuropsychological evaluation is a scientifically legitimate method for proving the existence of a traumatic brain injury - even in the absence of visual evidence. Id. Indeed, Dr. Wagner made the same diagnosis in this case as Dr. Lesser made in Krepps. [R. p. 299].

In the instant case, there was never any doubt that Fragosa suffered a serious physical brain injury – nor is there any doubt that he suffers from multiple permanent impairments as a result of that physical brain injury.⁴ Moreover, unlike the injury in Krepps, Fragosa’s brain injury was visible on CT scan. The neurological and neuropsychological testing merely confirmed the impairments which resulted from the brain injury.

The statute merely states that a person “who has suffered physical brain damage . . . shall receive the benefits for life.” S.C. Code Ann. § 42-9-10 (C) (2007). Fragosa has suffered physical brain damage. The physical brain damage resulted in serious permanent impairments. As such, he meets all the legislative criteria for lifetime benefits. The decision below must be reversed.

⁴Respondents conceded this point in their brief to the Appellate Panel:

Defendants have never denied the existence of residual deficits from the Claimant’s condition, but these alleged deficits must surely be classified as *loss of use* of the Claimant’s brain, not *physical injury* to the Claimant’s brain. Otherwise, there is no need for the Act to draw a distinction between loss of use of the brain and a physical brain injury. [Brief of Respondents to the Appellate Panel, page 6 (emphasis in original)].

B. The evidence overwhelmingly supports a finding that Fragosa suffered physical brain damage.

Despite the overwhelming evidence, the Appellate Panel found as a fact that “based on the greater weight of the evidence, we find there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers’ Compensation Act.” [R. p. 23, Finding of Fact 18]. The only finding of fact which could even remotely support such a conclusion is Finding of Fact 12: “That Dr. Mark Wagner noted that the Claimant sustained a skull fracture with acute underlying minor structural change to the brain, but Dr. Wagner concluded that functional studies, such as EEGs, CTs and MRIs, were read as unremarkable ‘demonstrating structural resolution of the work-related injury.’” [R. p. 22, Finding of Fact 12].

This isolated statement in Dr. Wagner’s report is *not* evidence that Fragosa did not suffer physical brain damage. Dr. Wagner himself confirms the presence and effect of the physical brain damage in the very same paragraph of his report, noting:

[Mr. Fragosa] had a very serious work-related injury resulting in trauma to his body and skull. 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 excellent neurologic recovery, it is probably that he is exhibiting symptoms of postconcussive syndrome. The cognitive findings while mostly normal, do contain abnormal findings largely in the domain of complex attention and concentration. In addition, he may have some element of decreased intellectual efficiency, although this was not measured. [R. p. 299].

Throughout his report, Dr. Wagner consistently notes the “persisting cognitive complaints” and “abnormal findings” shown by neuropsychological testing.

Dr. Wagner is a neuropsychologist. Neuropsychologists are qualified to testify as experts on physical brain damage *as shown* by neuropsychological testing. In this case, Dr. Wagner’s testing

confirmed the existence of cognitive deficits due to “structural change to the brain.” The comment about the imaging studies “demonstrating structural resolution of the work-related injury” is not an opinion about physical brain damage, nor could it be as Dr. Wagner is not qualified to interpret or opine on imaging studies. Dr. Wagner never explicitly opined on physical brain damage one way or the other (nor did he ever state his opinions to a reasonable degree of medical or neuropsychological certainty). See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel’s conclusion as based on “rank speculation”). The only inference which can be drawn from his report is that Fragosa suffers persistent cognitive deficits due to the brain injury, thus supporting Fragosa’s claim of physical brain injury.

The doctor who is qualified to interpret and opine on imaging studies is Dr. Sandoz, the authorized treating neurologist. Throughout his reports, Dr. Sandoz opined Fragosa had suffered physical brain damage. He based his opinions on the entire course of his treatment of Fragosa – including the patient history, imaging studies, physical examination and response to treatment. He assigned a 46% whole person impairment rating under the 5th Edition of the AMA Guides and a 20% whole person impairment under the 6th Edition. These ratings were strictly for the damage to the brain.⁵ [R. p. 237-242].

Respondents’ argument is that the brain hematomas shown on the CT scans have resolved. Respondents’ counsel used the analogy of “Well, I hit my arm at my house the other day and I have a hematoma on my arm and it is going to resolve.” [R. p. 65, lines 10-15]. This is an interesting analogy – and it would have some superficial appeal if Fragosa’s brain (like counsel’s arm) had fully

⁵Fragosa’s other doctors assigned impairment ratings of 11% to the spine (Dr. Merrell), 1% to the left shoulder (Dr. Wolfe), and 40% to the right foot (Dr. Wolfe). [R. p. 295, 305].

healed with no residual deficits. Tragically, it did not. Counsel retains full use of his arm; Hector Fragosa lost as much as 46% of the use of his brain.

Dr. Sandoz explained the distinction in his deposition testimony:

- Q. Now, we've arrived at this because of what you called traumatic brain injury, correct?
- A. That's correct.
- Q. As far as physical findings on his brain, if you were to look at scans, is it fair to say there is no physical damage to the brain *that we can see*; is that right?
- A. There's no evidence of any damage on the brain *that we can go and see*, that's correct.
- Q. Okay. So what we're dealing with here are these – the traumatic brain injury, and sometimes I like to call it because I don't know what else to call it, but I see it often, is the post concussive syndrome –
- A. Got it.
- Q. Injury suffered to the brain.
- A. That's why traumatic brain injury is the preferred term.
- Q. What's the difference between the jar that a brain takes in a concussion and what he may have had?
- A. The concussion should resolve.
- Q. Okay. So we're looking at – so we call it traumatic brain injury because it's a longer period of time?
- A. Because *there's been some damage and injury to the function of the brain*.

[R. p. 262, line 21-page 263, line 24 (emphasis added)].

Hematomas are like tsunamis. The blood is absorbed back into the body, just as the tidal wave retreats back to the ocean. But just like a tsunami, the hematoma leaves destruction in its wake. The tidal wave is gone – you can no longer see it – the damage remains.

It is not at all unusual for a physical brain injury not to be visible on conventional CT and MRI scans - even once the initial bleed reabsorbs. Most brain injuries involve widespread microscopic damage to neurons and axons within the cerebrum. To actually see the residual damage, more sophisticated imaging is required – such as PET scans and 3.0 Tesla MRI scans – and even then, the injury may be so diffuse and microscopic as to be unseen by current technology. Otherwise,

the evidence of physical brain injury is shown by evidence of continuing symptoms and functional deficits – all of which were confirmed here by Drs. Wagner, Sandoz and Brabham.

Respondents' point to testimony by Dr. Sandoz which, they contend, shows no evidence of physical brain damage. Respondents take Dr. Sandoz's testimony out of context. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 660 S.E.2d 260, 377 S.C. 346 (2008) ("A review of the record, however, indicates that the testimony relied upon is taken completely out of context and does not support the Court of Appeals' conclusion."). The question and answer relied on by Respondents had a qualifier. Counsel did not ask Dr. Sandoz *whether* Fragosa had suffered physical damage to his brain; counsel asked *if you could see* any evidence of physical damage to the brain on the later MRI and CT scans. [R. p. 262, line 24-page 263, line 4]. When Dr. Sandoz was asked the ultimate question, he confirmed his opinion to a reasonable degree of medical certainty that Fragosa is permanently and totally disabled due to physical brain injury. [R. p. 286]. The opinion of Dr. Sandoz is the sole statement on physical brain damage tendered by an expert qualified to give such an opinion.

As the evidence of physical brain damage is overwhelming, the Court should reverse the Appellate Panel and find as a fact that Fragosa suffered physical brain damage. As such, he is entitled to lifetime compensation and medical treatment.

2. The IME Report from Dr. Wagner cannot be used to support a finding of no physical brain damage as a neuropsychologist is not qualified to give an opinion based on imaging studies.

The Appellate Panel's reliance on Dr. Wagner's statement regarding imaging studies having been read as unremarkable is legal error. Dr. Wagner never rendered an opinion – or "concluded" as the Order puts it – that Fragosa had not suffered physical brain damage or even that the brain

damage had somehow been cured with no deficits. At most, he merely commented that the later imaging studies were read as unremarkable.

As a neuropsychologist, Dr. Wagner is qualified to give an opinion as to the existence, extent and severity of a traumatic brain injury – subject to the limitation that his opinion be based on the neuropsychological testing he is qualified to administer and interpret. He is not a medical doctor nor a radiologist; he cannot interpret imaging studies. He merely parrots the reports themselves – and parrots them inaccurately. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel’s conclusion as based on “rank speculation”).

Furthermore, his unqualified interpretation that the imaging studies “have been read as unremarkable demonstrating structural resolution of the work-related injury” is wrong on its face. The last CT scan was completed on January 16, 2008. The report states: “There has been interval resolution of previously visualized left parietal and right temporoparietal soft tissue swelling.” [R. p. 303]. The mere fact the acute swelling has gone down does not equate to “structural resolution” of the brain injury – not when Fragosa is left with permanent cognitive, balance and memory deficits.

More importantly, Dr. Wagner’s opinion *supports* the conclusion that Fragosa suffered a physical brain injury. Dr. Wagner’s testing revealed cognitive deficits. He attributed the deficits to the brain injury; not to medication, not to psychological issues, not to any other cause – only the brain injury.

A further concern over Dr. Wagner’s opinion is that it is not stated to a reasonable degree of medical certainty (or even neuropsychological certainty). A traumatic brain injury is a medically complex case – defined as “sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment excluding MRIs, CAT scans, x-rays, or other similar diagnostic

techniques.” S.C. Code Ann. § 42-1-160 (2007). The testimony from Dr. Sandoz that the brain injury exists, but cannot be visualized on a CT scan, shows how this case plainly meets the definition.

Such cases must be proven by medical evidence. The term *medical evidence* is defined as “expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician.” *Id.* An IME by definition must be explicitly stated to a reasonable degree of medical certainty. Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012). As Dr. Wagner’s report is not so stated, his opinions are incompetent (as they would be on interpreting imaging studies in any case) and were improperly relied on as evidence against physical brain injury.

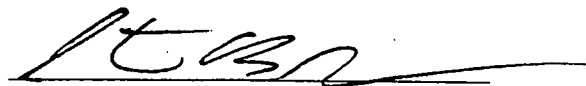
3. The Workers’ Compensation Commission should have addressed and ordered additional medical treatment.

Respondents admit Fragosa requires additional medical treatment to lessen his period of disability. This specific issue was not addressed by the Workers’ Compensation Commission in its Order one way or the other. Appellant requests that the Appellate Panel be ordered to modify the Order to provide for lifetime medical treatment as required under S.C. Code Ann. § 42-15-60 (2007).

CONCLUSION

For the foregoing reasons, 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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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0717624

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

v.

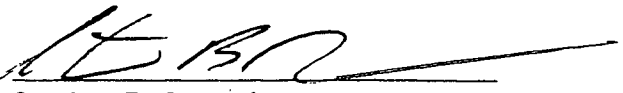
Kade Construction, LLC, Employer, and Key Risk Management Services, Inc., Carrier,
..... Respondents.

CERTIFICATE OF COUNSEL

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

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SC Court of Appeals

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ARGUMENT

1. As Hector Fragosa has suffered permanent physical brain damage so severe that he is unable to return to suitable gainful employment, he is legally entitled to workers' compensation benefits for life (in Reply to Respondents' Argument at pages 10-12).

In their Brief, "Respondent's do not deny that Appellant suffered an injury to the brain, but Appellant's brain injury is properly compensated for loss of use under Regulation 67-1101 and not physical brain *damage* under S.C. Code § 42-9-10(C)." [Brief of Respondents, page 11 (emphasis in original)].

The Supreme Court recently clarified the definition of physical brain damage in two recent cases. In Sparks, the Court held "we conclude that 'physical brain damage' as used in § 42-9-10(C) is physical brain damage that is both permanent and severe." Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 19). In Crisp, the Court further explained that entitlement to lifetime compensation was predicated on "a brain injury so severe that the person could not subsequently return to suitable gainful employment."¹ Crisp v.

¹ Regulation 67-1101 was promulgated under the authority of § 42-9-30(22). The purpose is to expand the list of scheduled members to ensure that injured workers who do not suffer actual loss of earnings capacity are compensated for permanent physical injury. "A claimant may obtain disability for a scheduled physical injury included in S.C. Code Ann. § 42-9-30 (1976). The claimant is not required to show lost earning capacity because the compensation is based on the character of the injury and lost earning capacity is conclusively presumed." Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 354 S.C. 100 (2003). The legislature merely expanded the list of scheduled members to encompass a myriad of diverse body parts from the teeth to the gall bladder to the heart to the brain. 25A S.C Code Ann. Reg. 67-1101 (2007).

The inclusion of the brain in the regulation is to compensate people who suffer permanent physical brain damage, *i.e.* loss of use, but are not permanently and totally disabled. By including the brain in the list of scheduled members, people with such brain injuries are not left without a remedy. Some people with brain damage are properly compensated under the regulation. However, because Fragosa's brain damage was severe enough to render him totally disabled, he is properly compensated under S.C. Code § 42-9-10(C).

SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21).

In so doing, the Court simply restated the requirement which, to practitioners, has always been part of the statute: proof that the injured worker (1) is “totally and permanently disabled . . . as a result of a compensable injury” and (2) “has suffered physical brain damage . . .” S.C. Code Ann. § 42-9-10 (C)(2007). The total and permanent disability need not be solely the result of the brain damage; “the statute only requires that a claimant be totally and permanent disabled and suffer physical brain damage as a result of the injury.” Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998).²

By their own admission, Respondents effectively concede both of these elements: “Respondents are not arguing that Appellant did not suffer an injury to the brain, or even one that caused permanent loss of use” and “Respondents admit the Appellant is entitled to lifetime causally-related medical benefits pursuant to the Hearing Commissioner’s finding of permanent and total disability . . .” [Brief of Respondents, pages 12, 17].³ “The General Assembly . . . intended ‘physical brain damage’ to denote damage that is permanent and therefore necessarily continues to have effect into the present.” Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed

²In Sparks, the Supreme Court cited Pearson favorably for the proposition 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 at page 19. This confirms that the Court merely clarified existing law.

³To be clear, Respondents qualify their admission on permanent and total disability by referring to S.C. Code Ann. § 42-9-10(B)(2007). [Brief of Respondents, page 18]. However, the combination of physical brain damage and permanent total disability resulting therefrom meets the required proof for lifetime benefits under S.C. Code Ann. § 42-9-10(C)(2007). See Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998)(“the statute only requires that a claimant be totally and permanent disabled and suffer physical brain damage as a result of the injury.”).

March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 19).

Respondents remaining argument essentially boils down to this: “Lifetime benefits for physical brain damage presuppose a more serious condition in which there is permanent physical damage to the brain, *damage that can be physically seen*.” [Brief of Respondents, page 9 (emphasis added)]. As to the first part, the requirement of permanent physical brain damage has never been disputed and, indeed, was affirmed in Sparks and Crisp. However, the Supreme Court explicitly rejected the second argument stating: “We thus decline to impose a requirement that the injury be proved through an ‘objective diagnostic medium,’ since some indisputably physical injuries may not be revealed by diagnostic instruments that can detect only relatively gross physical abnormalities.” Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 18-19).

In Crisp, the Supreme Court went further, explicitly rejecting the same argument made here, to wit: “Respondents contend that the determination of whether Petitioner sustained ‘physical brain damage’ in the instant case hinges on the fact that no objective measure, *i.e.* a CT or MRI scan, confirmed such damage.” Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 35). The Court first cited expert testimony from a neurologist who opined, “there are essentially three ways to determine whether a person has sustained physical brain damage: (1) CT or MRI scanning; (2) cognitive behavioral level of functioning; and (3) neuropsychological testing.” Id. It then concluded, “In light of this testimony, we are reluctant to require use of a specific diagnostic tool in proving these medically-technical brain injury cases.” Id.

The Appellate Panel erred in adopting a requirement that “if it is a physical brain injury

you've got to be able to see it." [Tr. Page 16, lines 11-13; March 19, 2012). In the instant case, the fact Fragosa sustained severe, permanent physical brain damage was proven by all three methods. The Appellate Panel's error requires reversal.

2. As there is no substantial evidence to support the Appellate Panel's finding that "there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers' Compensation Act," the decision below must be reversed (in Reply to Respondents' Argument at pages 13-16).

The Appellate Panel found "there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers' Compensation Act." [FC Order]. This finding was based on the erroneous requirement that "if it is a physical brain injury you've got to be able to see it." [Tr. Page 16, lines 11-13; March 19, 2012). See Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 18-19)(rejecting "requirement that the injury be proved through an 'objective diagnostic medium'"). As this is not the correct criteria, the decision below must be reversed as it is based on an error of law and not supported by substantial evidence in the record.

Physical brain damage can be proven by "(1) CT or MRI scanning; (2) cognitive behavioral level of functioning; and (3) neuropsychological testing." Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 35). All three of these measures showed significant physical brain damage – of sufficient severity to require lifetime compensation.

Respondents primary argument is to point to imaging studies which they contend are "clear that there is no objective evidence of any ongoing or permanent "damage" to the brain. [Brief of Respondents, page 14]. They specifically point to the radiologist's report of the September 16, 2008, MRI of the brain as unremarkable. [Brief of Respondents, page 14]. They overlook the fact that

Dr. Sandoz also reviewed the same MRI. In his office note of October 24, 2008, Dr. Sandoz reported:

The patient reported here secondary to the complaint of having symptom status post work related injury with neck pain with episodes of dizziness, episode of syncope in the past. This has been worked up and has shown no evidence of any seizure and nor any evidence of any damage of the brain. **Despite that review of the MRI shows some mild abnormality in the temporal lobe.** [R. p. 696 (emphasis added)].

Thus, while the clinical evidence of physical brain damage at that stage was apparently somewhat equivocal (before neuropsychological testing), the MRI showed visible evidence of abnormality in the temporal lobe.⁴ This finding and the earlier proof of bleeding on the brain is consistent with the residual cognitive deficits, balance problems and headaches shown by other medical evidence. More importantly, the MRI is only part of the equation – as “some indisputably physical injuries may not be revealed by diagnostic instruments that can detect only relatively gross physical abnormalities.” Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 18-19). The argument that “the cognitive complaints and abnormal findings” referred to by Dr. Wagner “are not . . . evidence of physical brain *damage*” fails in light of Sparks and Crisp.

One the “you have to see it” argument is dispensed with, Respondents remaining argument is to argue that both parties presented conflicting medical evidence, such that they win by default under the substantial evidence standard. This is simply not correct. All three experts gave opinions which support a finding of physical brain damage.

Dr. Brabham opined: “to a high degree of professional certainty . . . he has experienced a (Physical) Traumatic Brain Injury and must be expected to permanently remain, unable to engage

⁴The MRI was ordered because Fragosa had been “Complaining of headaches, memory loss, slurred speech since injury at work November 2007.” [R. p. 215].

in full-time gainful, competitive employment as a result of his medical conditions resulting from his on-the-job injuries in November 2007. [R. p. 283-284].

Dr. Wagner opined:

He has persisting cognitive complaints. While he has had excellent neurologic recovery, it is probably that he is exhibiting symptoms of postconcussive syndrome. The cognitive findings while mostly normal, do contain abnormal findings largely in the domain of complex attention and concentration. In addition, he may have some element of decreased intellectual efficiency, although this was not measured. [R. p. 299].

Persistent cognitive deficits on neuropsychological testing done one year after the accident are strong indicators for permanent physical brain damage. See Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 35)(physical brain damage can be proven by cognitive level of functioning and neuropsychological testing).

Dr. Sandoz opined “to a reasonable degree of medical certainty [that] Mr. Fragozo has suffered physical brain damage that has rendered him totally and permanently disabled.” [R. p. 286]. His opinion is prescient – as it virtually mirrors the standard explicated in Crisp. Furthermore, it is consistent with his other opinions expressed in his records and deposition.

Respondents contend Dr. Sandoz has rendered inconsistent opinions regarding physical brain damage, such that this Court must defer to the Appellate Panel. First off, as previously noted, the Appellate Panel used an incorrect standard for determining physical brain injury. Secondly, Dr. Sandoz has not rendered inconsistent opinions; indeed, he has consistently and repeatedly diagnosed Fragoza “with traumatic brain injury, headache, dizziness, difficulty with complex tasks.” [R. p. 239].

Respondents arbitrarily reject Dr. Sandoz’s explicit opinion on physical brain damage and

then take his testimony completely out of context in stating: "it is evident he only opined the Appellant has some residual damage to the *function* of the brain, but there is actually no *physical damage*." [Brief of Respondents, page 15 (emphasis in original)]. This argument is not only wrong; it's illogical. Dr. Sandoz gave a positive answer to a leading question which did not ask whether there was physical brain damage, but whether there was physical brain damage which could be seen "if you were to look at scans." [R. page 319, line 21-page 320, line 24]. No objective person reading the entire passage could reasonably conclude Dr. Sandoz was opining "there is actually no *physical damage*." Furthermore, Dr. Sandoz dispensed with any such suggestion a few moments later when he testified, "[we call it traumatic brain injury] [b]ecause *there's been some damage and injury to the function of the brain*." [R. page 320, lines 20-24(emphasis added)].

There is no distinction between permanent "damage and injury to the function of the brain" and permanent "physical brain damage." They are the same thing. This was shown by the explicit adoption in Crisp of "cognitive behavioral level of *functioning*" as a valid test to determine whether a person has sustained physical brain damage. See Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 35)(emphasis added). Most physical brain injuries are confirmed by later testing of brain function. Brain function is impaired because of the physical brain damage. When the impairment is sufficiently severe to render the worker unemployable, it meets the definition of physical brain damage set out in S.C. Code Ann. § 42-9-10(C)(2007).

There is no conflict in the evidence. The medical evidence overwhelmingly supports the conclusion that Hector Fragosa has suffered "a brain injury so severe that [he] could not subsequently return to suitable gainful employment." Id. The decision below must be reversed.

3. The Appellate Panel erred to the extent it relied on the statement in Dr. Wagner's report that "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." (in Reply to Respondents' Argument at pages 116-18).

As argued in Appellant's Brief at pages 16-18, it was error for the Appellate Panel to rely on Dr. Wagner's statement that "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." [R. p. 299]. This statement is not Dr. Wagner's opinion; it is merely an isolated comment on other medical reports – reports which Dr. Wagner, as a neuropsychologist, is not qualified to interpret. The Appellate Panel must consider expert reports in their entirety. They cannot cherry pick an isolated passage from a report to support a pre-ordained opinion with a scintilla of evidence. "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

A neuropsychologist is unquestionably qualified to diagnose physical brain injury. However, his expertise is limited to evaluating cognitive behavioral level of functioning and neuropsychological testing; not EEG, CT and MRI. On the ultimate question – whether Fragosa had sustained permanent physical brain injury - Dr. Wagner never gives an opinion one way or the other. However, the fact his testing revealed permanent cognitive deficits supports the inference of permanent physical brain damage.⁵

Respondents also argue that Dr. Wagner's opinions need not be stated to a reasonable degree

⁵The cognitive deficits are permanent because Dr. Wagner also stated Fragosa had reached "maximum medical improvement in terms of his neurological/brain status. [R. p. 299].

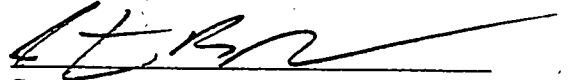
of medical certainty because “Respondents are not required to *disprove* a medically complex case by medical evidence.” [Brief of Respondents, page 17 (emphasis in original)]. See S.C. Code Ann. § 42-1-160(2007)(requiring expert opinion or testimony to be stated to a reasonable degree of medical certainty in complex cases). This suggestion was categorically rejected by the Supreme Court in Michau v. Georgetown County, 723 S.E.2d 805, 396 S.C. 589 (2012). In Michau, the employer obtained an expert opinion from a non-treating physician specifically to *disprove* the opinion of the employee’s doctor. The opinion was not stated to a reasonable degree of medical certainty as required in medically complex cases. The court excluded the IME report as it was not competent evidence due to this defect. The court also rejected the employer’s argument that the statutory requirement “applies only to claimants and not defendants.” Id.

Dr. Wagner’s report is explicitly denoted as an “Independent Medical Evaluation.” [R. p. 296]. It is not competent evidence and cannot be relied on as substantial evidence to outweigh the opinions of Dr. Brabham and Dr. Sandoz.

CONCLUSION

For the foregoing reasons, 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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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, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b),
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SC Court of Appeals

APPENDIX B
EMPLOYEE COMPLAINTS

Employee Complaints

Appendix

State of Georgia, Department of Transportation

Logan Management Services, Inc. (Logan)

Respondents

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission correctly determined "[t]hat based on the greater weight of the evidence, I find there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers' Compensation Act. This award is made under § 42-9-30 and § 42-9-10 and physical brain damage does not apply."
2. Whether The Workers' Compensation Commission properly relied on the findings and opinions of Dr. Mark Wagner and Dr. George Sandoz in support of their conclusion that Appellant did not sustain physical brain damage.
3. Whether the Workers' Compensation Commission erred as a matter of fact and law in failing to order additional medical treatment in its Order.

STATEMENT OF THE CASE

Appellant contends he sustained work-related injuries to his brain (including headaches), vision, spine, both arms, left shoulder, hips, both legs, right foot, and psychological overlay on November 1, 2007. Appellant filed a Form 50 Request for Hearing on April 8, 2011, seeking compensation for past medical care, future medical treatment, permanent and total disability, and an award of lifetime benefits due to physical brain damage. (R. p. 27).

On April 19, 2011, Respondents timely filed a Form 51 admitting that 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. (R. p. 28). Respondents also sought credit for temporary total benefits paid in excess of the award and sought to stop payment of the Appellant's temporary benefits pursuant to the Form 21 filed on March 25, 2011. A hearing was held in Conway, South Carolina on June 28, 2011 to determine 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 contended Appellant was not permanently and totally disabled, and they were entitled to stop payment of the Appellant's temporary benefits because the Appellant had reached maximum medical improvement. Respondents further contended the 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. S.C. Code Ann., Regulation 67-1101 (2007).

The Hearing Commissioner issued a Decision and Order on November 21, 2011, finding Appellant permanently and totally disabled on account of his multiple impairment ratings. (R. p. 12, Finding of Fact #9). The Hearing Commissioner further found that Appellant had not suffered a physical brain damage, so he was not entitled to lifetime compensation benefits in accordance with S.C. Code Ann. §42-9-10(C). (R. p. 13; Finding of Fact #18 and Conclusion of Law #3). Appellant timely filed a Form 30 Request for Commission Review on December 5, 2011. (R. p. 25).

The Appellate Panel of the Workers' Compensation Commission heard the matter on March 19, 2012. The Appellate Panel issued a Decision and Order adopting and affirming the Hearing Commissioner's decision on May 23, 2012. (R. p. 24). Appellant served and filed its notice of appeal in this Court on June 18, 2012.

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. (R. p. 71, lines 7-8). Appellant testified that he was unmarried, had no children, and his education background consisted of completing middle school in his home country of Mexico. (R. p. 71, lines 9-18). Appellant

testified he came to the United States in the year of 2002 or 2003. (R. p. 71, lines 19-21). Appellant's prior work history included security work, retail sales, and construction. (R. p. 71, lines 22-25; R. p. 72, lines 1-18). At the hearing, Appellant described the occurrence of his work injury and the course of his medical treatment. In addition, Appellant testified regarding his symptoms and the difficulties he still experienced as a result of his injury. Appellant testified he has headaches at least once a week (R. p. 79, lines 16-20), and he has short term memory problems and dizziness. (R. p. 80, lines 21-23; R. p. 81, lines 17-19). Despite these symptoms, Appellant testified he is still able to drive a car. (R. p. 93, lines 19-20).

The discharge summary from the Medical University of South Carolina (MUSC) Medical Center 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. (R. p. 179). A CT scan of the Claimant's head performed on the date of the accident revealed a fracture of the skull with a small extraoccipital hematoma and the possibility of a small epidural hematoma. (R. p. 127).

Dr. Mark Wagner, a Clinical Neuropsychologist, saw Appellant on October 30, 2008 and completed 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." (R. p. 208).

Dr. Mark Hoy of MUSC Department of Otolaryngology, Head and Neck Surgery, treated Appellant from December 1, 2008 until April 13, 2009 for ear pain associated with closed head

injury. Despite Appellant's continued complaints of ear pain, Dr. Hoy noted most of the Appellant's tests to be normal (R. p. 209). Dr. Hoy opined in a Form 14B prepared March 16, 2010 that Appellant reached maximum medical improvement with regard to his ear pain on April 13, 2009, and Appellant would not need future medical care with regard to his ear pain. (R. p. 210). Dr. Hoy did not assign Appellant any impairment rating on the Form 14B, but he instead placed a question mark ("??") in the space where the impairment rating is to be written. (R. p. 210).

Dr. George M. Sandoz, a neurologist with Strand Regional Specialty Associates, LLC initially 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. (R. p. 313, lines 20-25; R. p. 322, lines 15-20). Dr. Sandoz described mastoiditis as an inflammation of the mastoid, which is a part of the skull, not of the brain. (R. p. 327, lines 3-5 and lines 14-20). On August 20, 2009, Dr. Sandoz drafted a letter stating that Appellant had a forty-six percent (46%) impairment to the whole body for a traumatic brain injury. (R. p. 242). Dr. Sandoz further stated that Appellant was permanently and totally disabled, but interestingly Dr. Sandoz made no mention of physical brain *damage*. (R. p. 242). 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 an inability to follow commands and due to the inner ear injury which caused Appellant to be unsteady and dizzy. (R. p. 324, lines 17-23). Dr. Sandoz also stated in his deposition that Appellant suffered some damage and injury to the *function* of the brain. (R. p. 320, lines 23-24).

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." (R. p. 320, lines 3-4). Appellant's medical records are void of any neurological medical treatment from August 12, 2009

through August 6, 2010, the date of Dr. Sandoz's deposition. Dr. Sandoz did not treat Appellant from August 12, 2009 until November 12, 2010. Despite both Appellant's lack of 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 questionnaire drafted by Appellant's counsel which asked if Appellant sustained physical brain damage, rendering him permanently and totally disabled. (R. p. 286). It is significant to note that with the exception of the questionnaire drafted by Appellant's attorney, Dr. Sandoz never uses the word "damage" in his notes to describe the injury to the brain.

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. APPELLANT IS NOT ENTITLED TO LIFETIME WORKERS COMPENSATION BENEFITS AS A RESULT OF PHYSICAL BRAIN DAMAGE, PURSUANT TO S.C. CODE ANN. § 42-9-10(C).

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 under §42-9-30 and Regulation 67-1101 which compensate for injuries to specified “scheduled members.”

Looking closer at permanent and total disability under §42-9-10, such disability exists “[w]hen the incapacity to work resulting from an injury is total.” S.C. Code Ann. §42-9-10(A). 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) then specifically sets forth the only three (3) exceptions in the entire Act in 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 work injury that could arise in the workers’ compensation arena and then narrowly limit the exceptions to the five hundred (500) week cap into only the three categories listed above. Each limited exception presupposes a level of more serious and permanent disability that triggers the 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 that has suffered an “injury” to the brain. Instead, the statute specifically adds the qualifier of physical brain “*damage*.” S.C. Code Ann. Regulation 67-1101 identifies a list of specific body parts, including the brain, and sets forth a range of weeks for each body part to award for total loss, partial loss, or loss of use for each specific body part. Specifically, S.C. Code Ann. Regulation 67-1101 allows for between twenty five (25) and two-hundred and fifty (250) weeks for partial or total loss of use of the brain.

Respondents respectfully direct this Court to the nexus of the issue at the core of this argument: the distinction between a physical brain *injury*, which is properly compensated pursuant to S.C. Code Ann. Regulation 67-1101, and the exponentially more serious condition of physical brain *damage*, pursuant to S.C. Code Ann. §42-9-10(C). Clearly, the fact that the Workers' Compensation Act specifically designates a range of weeks for disability caused by the partial or total loss of use of the brain leads to the only logical conclusion that the Act contemplated different levels of injuries to the brain. Some brain injuries have residual effects that result in a varying level of loss of use to the brain which is compensated under Regulation 67-1101. Lifetime benefits for physical brain damage presuppose a more serious condition in which there is permanent physical damage to the brain, damage that can be physically seen.

A. Appellant Improperly Argues That The Hearing Commissioner's Decision And Order Is Facially Inadequate And Must Be Reversed On That Basis Alone.

Appellant argues that while the Workers' Compensation Commission made a legal conclusion that "there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers Compensation Act," the Workers Compensation Commission never specified what the criteria must have been or what particular criterion was not met. As a result, Appellant argues that the Decision and Order is facially inadequate and must be reversed on that basis alone. Appellant raises this argument for the first time in his Initial Brief to the Court of Appeals, and Appellant failed to raise this ground for appeal in his Form 30 Pleadings or his argument to the Appellate Panel of the Workers' Compensation Commission.

Generally, claims or defenses not presented in the pleadings will not be considered on appeal. See *McNeely v. South Carolina Farm Bureau Mut. Ins. Co.*, 259 S.C. 39, 190 S.E.2d 499 (1972). This rule is consistent with the general restriction that one cannot present and try a case

on one theory and then attack the result below by presenting another theory on appeal. *Butler v. Town of Edgfield*, 328 S.C. 238, 493 S.E.2d 838 (1997); *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995). In this case, Appellant previously presented arguments that the Workers Compensation Commission erred in concluding that Appellant never met the criteria for physical brain damage, but he never raised the argument that failure to define the criteria rendered the Decision and Order facially inadequate, requiring immediate reversal. As such, Appellant failed to preserve this theory of the case, and it is not properly before this Court.

Notwithstanding Appellant's failure to raise the argument that the Decision and Order is facially inadequate and requires immediate reversal, the specific finding of fact referenced by Appellant does state that "[t]his award was made under §42-9-30 and §42-9-10 and physical brain damage does not apply." (R. p. 13, Finding of Fact #18). Appellant is correct that no specific criteria for physical brain "damage" is set forth in §42-9-10(C); however, the Act's use of the word "damage" as opposed to "injury", or "total/partial loss of use" clearly suggests a heightened criteria that is necessary in order to contemplate lifetime benefits as opposed to the 25-250 week range set forth in Regulation 67-1101. In no other section of the Act is the word "damage" used to describe the extent of disability.

B. Appellant Has Set Forth Evidence Of A Physical Brain Injury; However, Appellant Has Failed To Demonstrate Evidence Of Physical Brain *Damage* As A Result Of The November 1, 2007 Work Related Accident.

In support of his argument for physical brain *damage*, Appellant cites several examples of proving a physical brain *injury*. First, Appellant directs this Court to the initial skull fracture, hematomas, and frontal lobe contusions confirmed by diagnostic testing at the time of the accident. Appellant then directs this Court to the ongoing cognitive difficulties caused by the

injury to the brain which he states are confirmed by the opinions of Dr. Sandoz and Dr. Wagner. Relying on *Pearson v. JPS Converter & Indus. Corp*, 327, S.C. 393, 489 S.E.2d 219 (Ct. App. 1997), Appellant argues these facts serve as “overwhelming” evidence of physical brain injury. It is significant to note the sentence Appellant pulled from the *Pearson* case refers to “organic brain damage” and disability due to “physical brain damage.” Again, Respondent’s do not deny that Appellant suffered an injury to the brain, but Appellant’s brain injury is properly compensated for loss of use under Regulation 67-1101 and not physical brain *damage* under S.C. code §42-9-10(C).

Appellant looks to other sections of the S.C. Code of Laws in an effort to define “traumatic brain injury.” Appellant references the S.C. Code of Laws regulations for criteria for entry into programs of special education for students with disabilities. The statute states:

Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a student’s education performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. S.C. Code Ann. §43-234.1(L)(1)(2011).

The symptoms of a traumatic brain injury described in the definition above still do not make any references the specific qualifier of physical brain *damage*. Even if an injured worker suffers from the symptoms described, the Workers Compensation Act properly compensates for this partial or total loss of use of the brain in Regulation 67-1101.

Appellant seems to be of the opinion that the Workers’ Compensation Commission arbitrarily created a rule that one must be able to actually see the damage to the brain to qualify for lifetime benefits, but he does not provide any insight into why then the Workers

Compensation Act adds the additional requirement of brain *damage*. Although the Act does not set forth a definition for “damage” in S.C. Code Ann. §42-9-10(C), the Act clearly contemplated two (2) scenarios in which a claimant has an injury to the brain; one resulting in partial or total loss of use and the other physical brain damage. In the absence of these two options, there would be no reason to include the brain in Regulation 67-1101 since every injury to the brain would result in lifetime benefits. Clearly, the inclusion of the brain in Regulation 67-1101 demonstrates that the Legislature did not intend to award every physical brain injury with lifetime benefits. It created the limited exception only for those with physical brain *damage*.

In further addressing whether there exists a requirement that the physical brain damage be seen on imaging scans, Appellant cites *Krepps by Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996) to argue that most common brain injuries are not visible on imaging scans. Again, Respondents are not arguing that Appellant did not suffer an injury to the brain, or even one that caused permanent loss of use, but Appellant still fails to address the heightened requirement of physical brain damage. When asked in his deposition whether there was physical brain damage that could be seen on a “scan, CT, MRI, *or anything else*,” Appellant’s authorized treating neurologist, Dr. Sandoz, testified that they were not going to see anything, “not in this case.” (R. p. 321, lines 8-13).

C. The Preponderance Of The Evidence Shows That Claimant Did Not Suffer Physical Brain Damage As A Result Of His November 2, 2007 Work Related Accident

In evaluating whether the evidence in this case supported a finding of physical brain damage, the Workers Compensation Commission focused primarily on the reports and opinions of Dr. Mark Wagner, a neuropsychologist, and Dr. George Sandoz, a neurologist.

Dr. Wagner saw Appellant for a neuropsychological evaluation on October 30, 2008. (R. pp. 296-301). At his evaluation, Dr. Wagner noted the Appellant's admitting diagnosis from MUSC on the date of accident to be skull fracture, open complex scalp wound with epidural and subdural hematoma, and bilateral frontal contusions. The report further reflects a CT of the head on November 1, 2007 (date of accident) showed comminuted fracture with small extra occipitoparietal hematoma at the midline at the vertex, worrisome for small epidural hematoma. (R. p. 297). Dr. Wagner goes on in his report and references several additional scans and tests which showed a resolution of his previous findings, and Dr. Wagner gave his opinion as follows:

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. (R. p. 299).

Appellant incorrectly interprets Dr. Wagner's statement as confirmation of the presence and effect of physical brain damage by noting the persisting cognitive complaints and abnormal findings. Again, Appellant fails to acknowledge that the cognitive complaints and abnormal findings he refers to can and should be properly compensated for loss of use to the brain under Regulation 67-1101. They are not, however, evidence of physical brain *damage*. The testing performed to measure the presence of physical brain damage instead showed the structural resolution of his work related injuries.

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 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. (R. p. 303) 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. (R. p. 215). 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. (R. p. 302).

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 of Dr. Sandoz, dated March 10, 2011, in which he opined the Claimant suffers from physical brain damage, rendering him permanently and totally disabled. (R. p. 286). On the contrary, Dr. Sandoz's circling "YES" on the bottom of this medical questionnaire hand crafted by opposing counsel is far from "unrefuted." The questionnaire is in direct contravention of the records and previous statements of Dr. Sandoz himself. Further, counsel's insertion of the word "damage" in the questionnaire is the first time Dr. Sandoz' reports make reference to brain "damage." Dr. Sandoz notes consistently refer to the Appellant's brain "injury" which is properly compensated under S.C. Code Ann. Regulation 67-1101 for loss of use.

At his deposition, Dr. Sandoz testified the Appellant suffered a traumatic brain injury, since "there's been some damage and injury to the *function* of the brain." (R. p. 320, lines 23-24, emphasis added). Dr. Sandoz further testified "there's no evidence of any damage on the brain that we can go and see." (R. p. 320, lines 3-4). When Dr. Sandoz's statements are examined in detail, it is evident he has only opined the Appellant has some residual damage to the *function* of the brain, but there is actually no *physical damage*.

Even if this Court finds the Dr. Sandoz questionnaire response and deposition testimony to be inconsistent with each other, 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.”).

The Single Commissioner had ample support in the record for the finding that Appellant did not sustain a physical brain injury under S.C. Code Ann. § 42-9-10(C). Dr. Sandoz testified the Appellant suffers from mastoiditis, a condition of the skull, “and that’s why he’s dizzy.” (R. p. 322, lines 15-20). Dr. Wagner noted that the Appellant suffered from mild post-concussive syndrome. The Single Commissioner noted the Appellant underwent no neurological medical treatment from August of 2009 to November of 2010, indicating Appellant did not suffer from a debilitating physical brain injury. (R. p. 8). Dr. Wagner noted the Appellant sustained a skull fracture with acute underlying minor structural change to the brain, but he concluded functional studies, such as EEGs, CTs and MRIs, were read as unremarkable “demonstrating structural resolution of the work-related injury.” (R. p. 299). Even the testimony of Dr. Sandoz qualified the Claimant’s injury as one to the *function* of the brain, and Dr. Sandoz admitted there was no physical damage. (R. p. 321, lines 8-13). Aside from a single and conflicting pre-written medical questionnaire on which Dr. Sandoz circled the word “YES,” every piece of evidence available makes it clear that Appellant did not suffer physical brain damage. At the most, Appellant suffers

from residual deficits and cognitive symptoms – all of which are compensable under Regulation 67-1101.

II. THE WORKERS' COMPENSATION CORRECTLY RELIED ON THE FINDINGS AND OPINIONS OF DR. MARK WAGNER AND DR. GEORGE SANDOZ IN REACHING THE CONCLUSION THAT APPELLANT DID NOT SUFFER PHYSICAL BRAIN DAMAGE IN ACCORDANCE WITH S.C. CODE ANN. §42-9-10(C).

Appellant argues that a neuropsychologist's expertise does not extend to reading and interpreting EEGs, CTs and MRIs. Specifically, Appellant argues Dr. Wagner, "is not a medical doctor, nor a radiologist; he cannot interpret imaging studies. He merely parrots the reports themselves – and parrots them inaccurately." Appellant is correct that Dr. Wagner is not a radiologist, and he did not attempt to interpret the studies himself. However, Appellant's statement that Dr. Wagner "parroted them inaccurately" is unfounded. Dr. Wagner simply restated the findings made by the doctors who did interpret the studies.

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. (R. p. 303). 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. (R. p. 215). 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. (R. p. 302). Dr. Wagner's reliance on the interpretations of other professionals was proper since all of the doctors who treated the Appellant relied on the diagnostic testing to determine the proper course of treatment despite the fact that they were not radiologists specifically trained to interpret the films themselves.

Regardless, Appellant seems to be of the position that since Dr. Wagner is a neuropsychologist, he is not able to consider the diagnostic studies and findings of other doctors

in the formation of his opinion. Appellant readily criticizes Dr. Wagner, yet he does not cite any authority suggesting that it was improper for Dr. Wagner to rely on the conclusions of the doctors who performed the diagnostic testing. It is also important to note the Appellant's criticism of Dr. Wagner's statement is new to his appeal efforts only. In his medical summary submitted to the Hearing Commissioner, Appellant was happy to rely on his own redacted version of Dr. Wagner's opinion to demonstrate that Appellant "had skull fracture with acute underlying minor structural change to the brain." (R. p. 32). Appellant had no problem with Dr. Wagner's use of other doctor's findings to support his argument that he sustained a skull fracture with underlying minor structural change to the brain, but he conveniently omitted, and now tries to argue as improper, the rest of Dr. Wagner's statement regarding structural resolution of the injury.

The Appellant also contended the Hearing Commissioner erred in improperly relying on Dr. Wagner's opinions "against physical brain injury" because they must be explicitly stated to a reasonable degree of medical certainty. Appellant is correct that a physical brain damage is a medically complex case which must be *proven* by medical evidence. This rule, however, is not a double-edged sword; Respondents are not required to *disprove* a medically complex case by medical evidence. Indeed, Respondents are not required to prove anything in this case. The burden is on Appellant, and the Hearing Commissioner correctly found the Appellant failed to meet this burden. The Commissioner reviewed the entirety of the evidence and found that the greater weight supported a finding that the Appellant did not sustain physical brain damage under § 42-9-10(C).

Regardless of Appellant's issues with Dr. Wagner's use of the diagnostic test results in forming his medical opinions, Appellant argues that Dr. Sandoz is the appropriate doctor to

interpret and opine on these results. As discussed in the arguments above, when asked in his deposition whether there was physical brain damage that could be seen on a "scan, CT, MRI, or *anything else*," Dr. Sandoz testified that they were not going to see anything, "not in this case." (R. p. 321, lines 8-13).

III. THE DEFENDANTS ADMIT THE CLAIMANT IS ENTITLED TO LIFETIME CAUSALLY-RELATED MEDICAL BENEFITS BECAUSE THE CLAIMANT WAS FOUND TO BE PERMANENTLY AND TOTALLY DISABLED BY THE SINGLE COMMISSIONER.

Respondents contend that this issue does not need to be addressed or held in abeyance. Respondents admit the Appellant is entitled to lifetime causally-related medical benefits pursuant to the Hearing Commissioner's finding of permanent and total disability, in accordance with S.C. Code Ann. § 42-9-10(B) and §42-15-60(C).

CONCLUSION

The substantial evidence in the record leads to the conclusion that Appellant is not entitled to an award of lifetime benefits as a result physical brain damage, in accordance with S.C. Code Ann. §42-9-10(C). The Workers Compensation Commission's Decision that Appellant is permanently and totally disabled, but he has not suffered physical brain damage, is clearly not erroneous in light of the substantial evidence in the record. Accordingly, this Court should affirm the Workers' Compensation Commission's decision.

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April 15, 2013
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)

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

v.

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

PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC

The Appellant, by and through his undersigned attorney, hereby files this Petition for Rehearing and Rehearing en banc. On November 27, 2013, this Court issued an opinion affirming in part and remanding the Decision and Order of the South Carolina Workers' Compensation Commission. Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 76).

As grounds for granting his Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the evidence and arguments raised on the issues of (1) *traumatic brain injury* as medical term synonymous with the legal term *physical brain damage*; (2) the Commission's finding confirming that Fragosa had suffered severe permanent physical brain damage, and (3) whether the Commission erred in finding as a fact an opinion that a

neuropsychologist is not qualified to make.

ARGUMENT

1. The inconsistency in the Commission's findings is an error of law requiring reversal rather than remand.

The Court remanded the case back to the Commission for further findings because "it is unclear whether the Appellate Panel found these injuries included an injury to the brain." Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 82). Respectfully, Appellant believes the Court may have misapprehended the factual findings made by the Appellate Panel. The Panel made two critical findings – which taken together confirm that Fragosa suffered physical brain damage as defined in Crisp and Sparks. Crisp v. SouthCo., Inc., 738 S.E.2d 835, 401 S.C. 627 (2013)("only in cases of physical brain damage that is both permanent and severe would an employee-claimant be entitled to benefits for life.").

The Commission found as a fact "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. page 22, Finding of Fact 8]. This is plainly a finding that Fragosa sustained a permanent injury to the brain. There is nothing at all ambiguous about it. Moreover, 46% to the whole person is a significant permanent impairment.¹ This finding satisfies the requirement that the brain damage be permanent.

¹The finding itself is amply supported by substantial evidence. Much of the impairment is based on a "Clinical Dementia Rating" correlating to an "impairment [which] requires direction of some activities of daily living." [AMA Guides to Permanent Impairment (5th Edition), page 320]. In the description of the rating, Dr. Sandoz specified it was "for a traumatic brain injury. At this moment from the injury that the patient has suffered, he is totally and permanently disabled." [R. Page 242].

The Commission went on to find “That, after considering the Claimant’s multiple impairment ratings, we find that the Claimant is permanently and totally disabled and is unable to return to any type of work that he has performed in the past.” [R. page 22, Finding of Fact 9]. This finding meets the second part of the test – “brain damage so severe that the person could not subsequently return to suitable gainful employment.” *Id.* at 843. There is nothing ambiguous in this finding either. Indeed, Respondents concede Fragosa is permanently and totally disabled. The reference to “multiple impairment ratings” – of which the 46% for traumatic brain injury is by far the most significant – confirm that the brain damage rendered Fragosa unemployable. See Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998)(“the statute only requires that a claimant be totally and permanent disabled and suffer physical brain damage as a result of the injury.”).

The apparent confusion arises over the finding “That based on the greater weight of the evidence, we find there has not been a physical brain injury *as it does not meet the criteria* established under the South Carolina Workers’ Compensation Act.” [R. page 23, Finding of Fact 18]. Unlike the other two findings, this is not a finding of fact – it is a conclusion of law. More specifically, it is the application of Finding of Facts 8 and 9 to the law – as the law was understood prior to Crisp and Sparks.

The criteria the Commission was referring to was the requirement consistently relied on by Respondents that *physical brain damage* must be visible on MRI or CT scans. The Commissioners plainly believed this was the dispositive criterion.² Their belief was not unreasonable as the Supreme

²At oral argument before the Appellate Panel, Commissioner McCaskill asked Respondents’ counsel, “As I understand what you’re saying if it is a physical brain injury you’ve got to be able to see it.” Counsel responded affirmatively, stating “That is our position there

Court had not yet addressed the issue. Now that Crisp and Sparks have rejected “use of a specific diagnostic tool in proving these medically-technical brain injury cases,” the Commission’s conclusion is affected by an error of law and must be reversed. Id. Cf. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(medical opinion of a commissioner is not evidence).

Appellant respectfully believes the Court may have overlooked the two critical findings of fact which confirm that Fragosa sustained serious, permanent physical brain damage under the Crisp/Sparks standard. Appellant requests the Court reconsider these findings in light of Crisp.

2. The distinction is not between the terms *traumatic brain injury* and *physical brain damage*, but whether the “brain damage [is] so severe that the person could not subsequently return to suitable gainful employment.

In its opinion, the Court wrote: “The nexus of this case is the distinction between a physical brain injury, which is compensated pursuant to Regulation 67-1101, and physical brain damage, which is compensated pursuant to section 42-9-10(C).” Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 80). Respectfully, this statement misapprehends the Supreme Court’s holding in Crisp v. SouthCo., Inc., 738 S.E.2d 835, 401 S.C. 627 (2013). Respectfully, the distinction lies not between physical brain injury and physical brain damage, but between less serious and more serious brain damage. As the Crisp court stated, the General Assembly intended lifetime compensation to be available “in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent physical brain damage.” Id. at 842. The Supreme Court further defined the statutory term “physical brain damage” as “brain damage so severe that the person could not subsequently return to suitable

would be some physical change that something would pick up on a Scan . . .” [R. Page 16, lines 11-17].

gainful employment.” Id. at 843. In less serious cases, disability for permanent impairment is awarded under “the other avenues of compensation available under the scheme for brain injuries that do not render the worker unemployable.” Id.

The confusion arises because the statute uses terminology different from the language used by medical doctors. In medicine, the term “traumatic brain injury” is synonymous with physical brain damage. As explained by Dr. Sandoz, *traumatic brain injury* is the “preferred term” in medicine “[b]ecause there’s been some *damage* and injury to the *function* of the brain.” Traumatic brain injury is permanent, as opposed to a mere “concussion [which] should resolve.” [R. p. 320, lines 15-24]. This description mirrors the definition of physical brain damage adopted in Sparks, to wit: “The General Assembly meant to require severe, *permanent impairment of normal brain function* in order for an injured worker to be deemed physically brain damaged under § 42-9-10 C.” Sparks v. Palmetto Hardwood, Inc., 738 S.E.2d 831, 401 S.C. 619 (2013)(emphasis added).

To return to the Court’s opinion, only brain injuries which result in “permanent impairment of normal brain function” will support an award of disability compensation. This is because permanent disability compensation can only be awarded when there is some level of permanent physical impairment. “A permanent impairment, by definition, lasts for a lifetime.” James v. Anne’s Inc., 701 S.E.2d 730, 736, 390 S.C. 188 (2010).

This means even disability compensated under Regulation 67-1101 requires some level of permanent impairment of normal brain function. The nexus is the severity of the brain damage. See Crisp at 844-845 (“only in cases of physical brain damage that is both permanent and severe would an employee-claimant be entitled to benefits for life.”).

The point being made here is not an attempt to reargue Crisp and Sparks, nor to argue that

any level of brain injury or damage results in lifetime benefits. The idea that *de minimus* brain damage *per se* qualifies for lifetime benefits (as argued in Sparks) is and always was untenable.

The concern here arises where the Court states:

throughout his brief Fragosa cites examples to support his position that he suffered a brain *injury*. Respondents do not deny that Fragosa suffered a physical brain *injury*. Instead, they maintain Fragosa failed to show he suffered physical brain *damage*. Fragosa at 80 (emphasis in original).

Fragosa should not be penalized because his doctors used correct medical terminology in describing his condition.³ Describing Fragosa's position as arguing for brain injury over brain damage is elevating form over substance. This case has always been about physical brain damage.⁴ Indeed both parties and the Commission itself used the term "physical brain injury" and "physical brain damage" interchangeably. *Physical brain damage* is a legal term of art given new meaning by Sparks and Crisp. That meaning plainly refers back to the medical term *traumatic brain injury*.

The disputed issue was whether the damage must be visible on an MRI or CT scan – an issue decided in Fragosa's favor by Crisp. The question for this Court is simply whether Fragosa suffered "brain damage so severe that the person could not subsequently return to suitable gainful employment." Id. at 843. Appellant believes the description of the issue as "physical brain injury" versus "physical brain damage" results in confusion over the issues before the Commission in this case, as well as potentially confusing the issue in later cases.

³Dr. Sandoz removed all doubt regarding terminology by answering "YES" to the question "to a reasonable degree of medical certainty whether Mr. Fragosa has suffered physical brain damage that has rendered him totally and permanently disabled." [R. p. 286].

⁴In his Brief, Fragosa captioned the first argument as "Hector Fragosa has suffered physical brain damage and is legally entitled to workers' compensation benefits for life." Brief of Appellant, page 9.

3. The Appellate Panel erred to the extent it relied on the statement in Dr. Wagner's report that "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."

Respectfully, Appellant asks the Court to reconsider its holding with regards to Dr. Wagner's report. The specific error by the Commission was to make a finding of fact based on a mere observation by Dr. Wagner – an observation he was not qualified to make. Thus, while an expert can refer incidentally to various records in his report, he cannot base his opinion on matters outside his expertise.

Neuropsychologists are qualified to testify as experts on physical brain damage *as shown* by neuropsychological testing. In this case, Dr. Wagner's testing confirmed the existence of cognitive deficits due to "structural change to the brain." The comment about the imaging studies "demonstrating structural resolution of the work-related injury" is not an opinion about physical brain damage, nor could it be as Dr. Wagner is not qualified to interpret or opine on imaging studies. Dr. Wagner never explicitly opined on physical brain damage one way or the other (nor did he ever state his opinions to a reasonable degree of medical or neuropsychological certainty). See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion as based on "rank speculation"). The only inference which can be drawn from his report is that Fragosa suffers persistent cognitive deficits due to the brain damage, thus supporting Fragosa's claim of physical brain damage.

CONCLUSION

For the foregoing reasons, Appellant requests the Court grant the Petition for Rehearing, reconsider the original opinion, reverse the Appellate Panel and hold Hector Fragosa suffered physical brain damage, is not subject to the five hundred week limitation, and shall receive disability and medical benefits for life.

Appellant further petitions the Court for rehearing *en banc*. This is the first case to come up on appeal in the wake of Crisp and Sparks. It is ripe for a determination of physical brain damage as Fragosa has reached maximum medical improvement. Moreover, the Commission has already made findings of fact confirming that Fragosa has sustained serious, permanent brain damage so severe that he could not subsequently return to suitable gainful employment.”

Respectfully Submitted

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)

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

v.

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

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

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

ARGUMENT

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

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

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

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

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

In the instant case, the fact of physical brain damage is confirmed by the Commission’s finding of a “46% impairment to the whole person for a traumatic brain injury.” “A permanent impairment, by definition, lasts for a lifetime.” James v. Anne’s Inc., 701 S.E.2d 730, 736, 390 S.C. 188 (2010). Impairment ratings are not made until the injured person reaches maximum medical improvement. “Maximum medical improvement is a term used to indicate that a person has reached

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

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

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

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

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

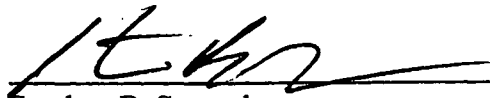
The Commission's factual findings confirm Fragosa suffered physical brain damage as defined in Sparks and Crisp v. SouthCo., Inc., 738 S.E.2d 835, 401 S.C. 627 (2013). The Commission's legal conclusions to the contrary are based on an error of law, such that the decision below should be reversed outright.

CONCLUSION

For the foregoing reasons, Appellant requests the Court grant the Petition for Rehearing, reconsider the original opinion, reverse the Appellate Panel and hold Hector Fragosa suffered physical brain damage, is not subject to the five hundred week limitation, and shall receive disability and medical benefits for life.

Appellant further petitions the Court for rehearing *en banc*. This is the first case to come up on appeal in the wake of Crisp and Sparks. It is ripe for a determination of physical brain damage as Fragosa has reached maximum medical improvement. Moreover, the Commission has already made findings of fact confirming that Fragosa has sustained serious, permanent brain damage so severe that he could not subsequently return to suitable gainful employment.

Respectfully Submitted



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Columbia, South Carolina
December 31, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

RECEIVED

Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)

APR 30 2014

S.C. Supreme Court

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 31, 2014.

QUESTIONS PRESENTED

1. Whether the Commission's factual findings that Petitioner suffered a "46% permanent impairment to the whole person for a traumatic brain injury" and "is permanently and totally disabled" meet the statutory requirements for lifetime compensation for physical brain damage under Section 42-9-10 (C).
2. Whether a decision of the Court of Appeals remanding a case back to the Commission is immediately appealable when the decision is based on an error of law.
- 3.. Whether the Court of Appeals erred in holding that the Workers' Compensation Commission "did not err in relying on the opinion of [a neuropsychologist] when a neuropsychologist's expertise does not extend to reading and interpreting EEGs, CTs and MRIs.

STATEMENT OF THE CASE

This workers' compensation appeal arises out of an accident suffered by the Appellant, Hector Fragosa, on November 1, 2007. Fragosa's Employer, Kade Construction, LLC, and its Carrier, Key Risk Management Services, Inc., accepted liability and began providing benefits. Employer and Carrier are the Respondents in this appeal.

On March 25, 2011, Respondents filed a Form 21 (Employer's Request for Hearing) seeking to terminate temporary compensation.

Appellant filed a Form 50 (Request for Hearing) on April 8, 2011, alleging he was entitled to lifetime compensation and medical treatment due to permanent and total disability accompanied by physical brain damage. [R. p. 27]. Respondents timely filed a Form 51 (Employer's Answer to

Request for Hearing) on April 19, 2011. Respondents admitted the work injury, but denied Fragosa sustained injuries to the extent alleged in the Form 50. [R. p. 29].

The Workers' Compensation set the hearing on the Forms 21, 50 and 51.

The hearing was held on June 28, 2011, before Commissioner Avery B. Wilkerson. The primary issue in dispute was whether Hector Fragosa was permanently and totally disabled with physical brain damage.

Commissioner Wilkerson issued an Order on November 21, 2011, Fragosa: "has not suffered a physical brain injury and is not entitled to lifetime compensation benefits under the South Carolina Workers' Compensation Act." [R. p. 13-14, Conclusion of Law 3] He found as a fact that "based on the greater weight of the evidence, I find there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers' Compensation Act. This award is made under 42-9-30 and 42-9-10 and physical brain damage does not apply." [R. p. 13, Finding of Fact 18]. He further found "Under 42-9-30 and Reg. 67-1101, the Claimant's multiple impairment ratings to his right lower extremity, left upper extremity, head and inner ear render the Claimant permanently and totally disabled." [R. p. 13, Conclusion of Law 2]

Fragosa timely appealed to the Appellate Panel of the Full Commission on December 5, 2011. [R. p. 25-26]. Oral argument was held before the Appellate Panel on March 19, 2012. The Appellate Panel affirmed the Single Commissioner's Order on May 23, 2012. [R. p. 16-24].

Fragosa timely appealed to the South Carolina Court of Appeals on June 18, 2012. Oral arguments were heard by the court on October 10, 2013. On November 27, 2013, the court of appeals issued a published opinion which affirmed in part and remanded. The court remanded the case back to the Commission for further findings because "it is unclear whether the Appellate Panel

found these injuries included an injury to the brain.” Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 82).

Fragosa timely filed a Petition for Rehearing and Rehearing en Banc on December 12, 2013. The Court of Appeals denied the Petition on March 31, 2014. [Appendix p. 26].

This Petition for Writ of Certiorari followed.

STATEMENT OF THE FACTS

Hector Fragosa is 32 years old and originally from Mexico where he obtained the equivalent of a middle school education. He does not speak English and testified through a Spanish interpreter.

On November 1, 2007, Fragosa was working on a construction project for the Employer in Marion, South Carolina. Fragosa was on the roof of a parking garage. He was hit in the head with part of a construction crane which fell onto him knocking him off the roof and onto the ground.

He was transported to MUSC by helicopter. Fragosa was hospitalized for one month following his accident – the first two weeks of which he was in a coma. He has no memory of the accident.

Fragosa suffered numerous injuries, to wit (drawn from the discharge summary at MUSC):

1. Subdural and epidural hematomas.
2. Bilateral frontal contusions.
3. Respiratory failure.
4. Hypotension that was treated with intravenous fluid.
5. Scalp laceration with large complex, status post repair.
6. CT and T1 spinous process fractures.
7. Right rib fractures which include 7, 8, 9, 10.
8. Bilateral transverse process fractures of L1 and L2, right L3.
9. Right big toe fracture.
10. Right fifth toe fracture.
11. Fracture of skull, midline to sagittal through frontal and parietal.
12. Placement of percutaneous endoscopic gastrostomy.
13. Tracheostomy.

14. Status post amputation of 2nd through 5th toes. [R. p. 418].

The specific diagnoses related to physical brain damage are (1) skull fracture; (2) open complex scalp wound with epidural and subdural hematoma; and (3) bilateral frontal contusions. [R. p. 418]. The attending physician at MUSC documented dramatic evidence of physical brain damage, reporting: "This patient incurred a large fracture through the skull, apparently it is open, with subdural and epidural fluid collections." [Claimant's APA, page 1].

While in the hospital, Fragosa required a "percutaneous endoscopic gastrostomy tube for continued enteral feeds and nutritional support." [R. p. 172]. The surgeon who implanted the tube, Dr. Stuart Leon, noted: "The patient sustained several injuries, the most significant of which was a closed-head injury with an epidural hematoma. **This injury has left Mr. Gomez neurologically devastated.**" [R. p. 172].

The Employer accepted Fragosa's claim and began providing benefits, including treatment from a neurologist, Dr. George Sandoz. Dr. Sandoz made numerous statements throughout his medical records confirming the physical brain injury – ultimately confirming that Fragosa had suffered physical brain damage.

On October 10, 2008 – nearly a year after the accident – Fragosa presented to Dr. Sandoz "with the complaint of dizziness [and] spells that suggest that the patient is having seizures . . . From the evidence of the brain, this was reviewed by me and it suggest that there is a **right temporal lobe injury.** [R. p. 222 (emphasis added)].

Several weeks later on October 24, 2008, Dr. Sandoz reported, "This has been worked up and has shown no evidence of any seizure and nor any evidence of any damage of the brain. **Despite that review of the MRI shows some mild abnormality in the temporal lobe.**" [R. p. 224(emphasis

added)).

On November 25, 2008, Dr. Sandoz noted, "The patient is a very complex white male who appears to have **traumatic brain injury**." [R. p. 227 (emphasis added)].

On January 6, 2009, Dr. Sandoz recorded, "The patient presented here status **post work-related injury where he had a traumatic brain injury** with the description that the patient suffer. At this moment, the **headaches appear to be chronic, posttraumatic in nature**." [R. p. 229 (emphasis added)].

Six months later on June 2, 2009, Doctor Sandoz continued with the diagnosis of: "**Intracranial injury** of other and unspecified nature." [R. p. 236]. The next day he wrote a letter confirming the brain injury and assigning a 20% impairment rating per the 6th Edition of the AMA Guide: "seen by MUSC Orthopaedics for cervical and lumbar injury as well for a **traumatic brain injury**. . . . From the traumatic brain injury, the patient's impairment rating is of 20% as noted on the table 13-8." [R. p. 237].

On a followup visit on July 7, 2009, Dr. Sandoz noted the specific problems resulting from the brain injury: "The patient is a 28-year old male with traumatic brain injury, headache, dizziness, difficulty with complex tasks." [R. p. 239].

On August 20, 2009, Dr. Sandoz wrote a detailed explanation of Fragosa's impairment and total disability as it relates specifically to the brain injury:

Mr. Fragosa is a patient of mine who I have seen since 09/16/2008 secondary to a **traumatic brain injury** on 11/01/2007. He ____ for a **traumatic brain injury**. **At this moment from the injury that the patient has suffered, he is totally and permanently disabled.** After the evaluation of the AMA Guidelines, Guides to Evaluation of the Permanent Impairment Rating, fifth edition as in table 13-5, the patient has a 29% of whole person. Superimposed to this is associated with the headaches that the patient has presented and this correlates to 2% impairment of the

whole body. From the standpoint of the dizziness, the patient has 10% impairment of the whole person. Utilizing a combined value chart, this is a 46% impairment of the whole body. This does not attend to the damage that the patient has suffered from his neck and back as well for his foot. [R. p. 242 (emphasis added)]

Table 13-5 is the chart for "Clinical Dementia Rating." [AMA Guides to Permanent Impairment (5th Edition), page 320]. The 29% whole person rating for the brain injury reflects an "impairment [which] requires direction of some activities of daily living." Id.

Dr. Sandoz was deposed on August 6, 2010. He confirmed, "This is not a concussion, this is an injury suffered to the brain. . . . That's why traumatic brain injury is the preferred term. . . . [The difference is the] concussion should resolve." [R. p. 320, lines 12-19]. He further testified that it is called a traumatic brain injury "Because there's been some damage and injury to the function of the brain." [R. p. 320, lines 20-24].

On March 10, 2011, Dr. Sandoz removed all doubt regarding his opinions by answering "YES" to the question "to a reasonable degree of medical certainty whether Mr. Fragosa has suffered physical brain damage that has rendered him totally and permanently disabled." [R. p. 286].

Defense counsel arranged an evaluation with Dr. Mark Wagner, a neuropsychologist. The evaluation took place on October 30, 2008. Dr. Wagner's report is replete with observations of physical brain injury – both the fact of the physical brain injury and the cognitive deficits resulting from that injury. He notes:

[Mr. Fragosa] had a very serious work-related injury resulting in trauma to his body and skull. He had a skull fracture with acute underlying minor structural change to the brain. . . . He has persisting cognitive complaints. While he has had excellent neurologic recovery, it is probably that he is exhibiting symptoms of postconcussive syndrome.¹ The cognitive findings while mostly normal, do contain abnormal

¹Post-concussion syndrome is a set of symptoms that a person may experience for weeks, months, or occasionally up to a year or more after a concussion—a mild form of traumatic brain

findings largely in the domain of complex attention and concentration. In addition, he may have some element of decreased intellectual efficiency, although this was not measured. [R. p. 299].

Included in the above description was the incidental statement that: “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.” [R. p. 299].

Fragosa was also evaluated by Dr. Robert Brabham, a psychologist and certified brain injury specialist, on October 27, 2010. [R. p. 272-285]. Dr. Brabham concluded:

With the passage of time, now more than 2.5 years after his injuries, *behavioral and cognitive changes have persisted, as will be noted, sufficient to conclude that the brain injuries he sustained, described as post-concussion injuries in multiple records, has resulted in continuing and severe symptoms clearly associated with a **physical traumatic brain injury**, the result of his on-the-job injuries.* [R. p. 272 (Italics in original; bold added)].

Dr. Brabham further opined: “to a high degree of professional certainty . . . he has experienced a (Physical) Traumatic Brain Injury and must be expected to permanently remain, unable to engage in full-time gainful, competitive employment as a result of his medical conditions resulting from his on-the-job injuries in November 2007. [R. p. 283-284].

As of the June 28, 2011 trial, Fragosa still suffered from daily headaches, dizziness, short and long term memory deficits, cognitive deficits, and buzzing in both ears – all of which resulted from the physical brain injury. [R. p. 79, line 5-page 83, line 16]. He remains physically and mentally incapable of returning to any kind of work that he has ever done. [R. p. 90, lines 12-15].

ARGUMENT

injury. The condition can cause a variety of symptoms: physical, such as headache; cognitive, such as difficulty concentrating; and emotional and behavioral, such as irritability. Continuing symptoms confirm the presence of physical brain damage.

1. The Petition should be granted because the inconsistency in the Commission's findings is an error of law requiring reversal rather than remand.

In 2013, the South Carolina Supreme Court issued two landmark opinions addressing “physical brain damage” in workers’ compensation cases. In Sparks, the Court held “we conclude that ‘physical brain damage’ as used in § 42-9-10(C) is physical brain damage that is both permanent and severe.” Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C. Sup. Ct. filed May 22, 2013) (Shearouse Ad. Sh. No. 23 at 40). In Crisp, the Court further explained that entitlement to lifetime compensation was predicated on “brain damage so severe that the person could not subsequently return to suitable gainful employment.” Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013).

Even though the Court has now defined “physical brain damage,” the Court has not yet reached a case applying the “permanent and severe” standard. In Crisp, the issue was not ripe because “the Commission’s order manifests a clear intention to delay a permanency finding with respect to Petitioner’s brain injury because Petitioner had not yet reached MMI . . .” Crisp. And in Sparks, although Sparks had reached maximum medical improvement (MMI), the Court affirmed the Commission’s finding that “Claimant has failed to carry his burden of proof to establish physical brain damage as contemplated by S.C.Code Ann. § 42-9-10.” Sparks.

This case squarely presents the issues left unanswered by Sparks and Crisp. As such, it is ripe for analyzing how the test for physical brain damage is applied in real life.

Fragosa has reached MMI. He suffered severe permanent physical brain damage – sufficiently severe for the Commission to find “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. page 22, Finding of Fact 8]. The Commission further found “that

the Claimant is permanently and totally disabled and is unable to return to any type of work that he has performed in the past.” [R. page 22, Finding of Fact 9]. These twin findings plainly meet the permanent and severe standard.

Despite these findings – and the evidence supporting them – the Commission inexplicably concluded “there has not been a physical brain injury *as it does not meet the criteria* established under the South Carolina Workers’ Compensation Act.” [R. page 23, Finding of Fact 18 (emphasis added)]. Unlike the other two findings, this is not a finding of fact – it is a conclusion of law. More specifically, it is the application of Finding of Facts 8 and 9 to the law – as the law was understood prior to Crisp and Sparks.

The criteria relied on by the Commission was the supposed, albeit erroneous, requirement that *physical brain damage* must be visible on MRI or CT scans – as had been argued below by Respondents. The Commissioners plainly believed this was the dispositive criterion.² At the time, their belief was not wholly unreasonable as the Supreme Court had not yet addressed the issue. Now that Crisp and Sparks have rejected “use of a specific diagnostic tool in proving these medically-technical brain injury cases,” the Commission’s conclusion is affected by an error of law and must be reversed. Cf. 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 issues were confounded further when the Court of Appeals declined to reverse, instead

²At oral argument before the Appellate Panel, Commissioner McCaskill asked Respondents’ counsel, “As I understand what you’re saying if it is a physical brain injury you’ve got to be able to see it.” Counsel responded affirmatively, stating “That is our position there would be some physical change that something would pick up on a Scan . . .” [R. Page 16, lines 11-17].

remanding the case back to the Commission because “it is unclear whether the Appellate Panel found these injuries included an injury to the brain.” Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 82). The court perceived a conflict that did not exist when it paraphrased the Commission’s order: “However, in finding of fact #18, the Appellate Panel found Fragosa did not suffer a brain injury.” Id.

The Commission found as a fact “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. page 22, Finding of Fact 8]. This is plainly a finding that Fragosa sustained permanent damage to the brain. There is nothing at all ambiguous about it. “A permanent impairment, by definition, lasts for a lifetime.” James v. Anne’s Inc., 701 S.E.2d 730, 736, 390 S.C. 188 (2010). Impairment ratings are not made until the injured person reaches maximum medical improvement. “Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician’s opinion there is no further medical care or treatment which will lessen the degree of impairment.” O’Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). There is also no doubt that 46% to the whole person is a significant permanent impairment.³ This finding satisfies the requirement that the brain damage be permanent and severe.

The Commission went on to find “That, after considering the Claimant’s multiple impairment

³The finding itself is amply supported by substantial evidence. Much of the impairment is based on a “Clinical Dementia Rating” correlating to an “impairment [which] requires direction of some activities of daily living.” [AMA Guides to Permanent Impairment (5th Edition), page 320]. In the description of the rating, Dr. Sandoz specified it was “for a traumatic brain injury. At this moment from the injury that the patient has suffered, he is totally and permanently disabled.” [R. Page 242].

ratings, we find that the Claimant is permanently and totally disabled and is unable to return to any type of work that he has performed in the past.” [R. page 22, Finding of Fact 9]. This finding meets the second part of the test – “brain damage so severe that the person could not subsequently return to suitable gainful employment.” *Id.* at 843. There is nothing ambiguous in this finding either. Indeed, Respondents concede Fragosa is permanently and totally disabled. The reference to “multiple impairment ratings” – of which the 46% for traumatic brain injury is by far the most significant – confirm that the brain damage rendered Fragosa unemployable. *See Pearson v. JPS Converter & Indus. Corp.*, 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998)(“the statute only requires that a claimant be totally and permanent disabled and suffer physical brain damage as a result of the injury.”).

Once the Commission made findings meeting the physical brain damage definition set out in *Crisp* and *Sparks*, it was an error of law to conclude Fragosa did not meet the criteria for lifetime compensation. The Court of Appeals erred in remanding the case. A remand was unneeded. The proper ruling was to hold that under the established facts, Fragosa had proven physical brain damage as a matter of law. “[T]he guiding principle undergirding our workers’ compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation.” *Hutson v. S.C. State Ports Authority*, 399 S.C. 381, 732 S.E.2d 500 (2012).

The issues presented in this case are sufficiently novel and important to our State’s public policy that they warrant a full analysis by our highest court. As such, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari and reverse the decisions below.

2. The Decision of the Court of Appeals is immediately appealable because

it is controlled by an error of law.

The Court of Appeals remanded “for clarification regarding the existence of a physical brain injury.” Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 83). As argued above, *supra* pages 10-13, the decision to remand was erroneous and unnecessary. The Commission made an error of law; our appellate courts exist to correct errors of law. Atlantic Coast Builders and Contractors, LLC v. Lewis, 722 S.E.2d 213, 396 S.C. 479 (2011)(“it is axiomatic that we sit to correct errors of law”).

A remand serves no purpose in this case. Workers’ compensation cases can be remanded for further proceedings for two possible reasons: (1) when the order is insufficiently detailed for appellate review; or (2) when the Commission must address issues not reached in the original order. See Brayboy v. Clark Heating Co., Inc., 306 S.C. 56, 409 S.E.2d 767 (1991)(impossible for court to determine basis of Commission’s conclusion where Commission failed to make specific, express findings of fact on conflicting evidence); Bone v. U.S. Food Service, 744 S.E.2d 552, 404 S.C. 67 (2013)(“An order as to compensability, without addressing the claimant’s current medical status and specific benefits to be awarded, is not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment.”).

Neither situation applies here. The key factual findings (# 8 and #9) are clear, detailed, and supported by substantial evidence. The Court need only correct the error of law in finding #14. Once that error is corrected, nothing further needs to be done by the Commission. As such, the decision below is a final judgment which is appealable to this Court. See Shatto v. McLeod Regional, Op. No. 27341 (S.C. filed December 18, 2013)(Shearouse Adv.Sh. No. 53 at 16).

3. The Commission erred to the extent it relied on the statement in Dr. Wagner's report that "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."

Respectfully, Petitioner asks the Court to review the holding below with regards to Dr. Wagner's report. The specific error by the Commission was to make a finding of fact based on a mere observation by Dr. Wagner – an observation he was not qualified to make. Thus, while an expert can refer incidentally to various records in his report, he cannot base his opinion on matters outside his expertise. The Court of Appeals held:

As a neuropsychologist, Dr. Wagner is able to consider the diagnostic studies and findings of other doctors in the formation of his opinion. Thus, the Appellate Panel did not err in relying on the opinion of Dr. Wagner.

Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 83).

Neuropsychologists are qualified to testify as experts on physical brain damage *as shown* by neuropsychological testing. In this case, Dr. Wagner's testing confirmed the existence of cognitive deficits due to "structural change to the brain." The comment about the imaging studies "demonstrating structural resolution of the work-related injury" is not an opinion about physical brain damage, nor could it be as Dr. Wagner is not qualified to interpret or opine on imaging studies. Dr. Wagner never explicitly opined on physical brain damage one way or the other (nor did he ever state his opinions to a reasonable degree of medical or neuropsychological certainty). See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion as based on "rank speculation"). The only inference which can be drawn from his report is that Fragosa suffers persistent cognitive deficits due to the brain damage, thus

supporting Fragosa's claim of physical brain damage.

This is not to suggest that the Commission cannot rely on neuropsychologists for determining the existence of physical brain damage. Most definitely it can: "there are essentially three ways to determine whether a person has sustained physical brain damage: (1) CT or MRI scanning; (2) cognitive behavioral level of functioning; and (3) neuropsychological testing." Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013).

What the Commission cannot do is base a finding on a neuropsychologist's paraphrase of a radiologist's interpretation of an MRI scan. A neuropsychologist can base his opinion on cognitive behavioral level of functioning and on neuropsychological testing; not CT or MRI scanning. Id. When the Commission cherry picks isolated tidbits from incidental comments buried within a report from an expert speaking as a layman, the Commission is essentially making its own medical opinions. Such findings must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages. Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012).

Petitioner respectfully requests that the Court include this issue in its grant of the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and permit further briefing of the issues.

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File No. 0717624

Hector G. Fragosa, :
 :
 Claimant, :
 :
 vs. :
 :
 Kade Construction, LLC, :
 :
 Employer, :
 :
 AND :
 :
 Key Risk Management Services, :
 Inc., :
 :
 Carrier/Defendants. :
 :

Deposition of GEORGE M. SANDOZ, M.D., taken before
Michele E. Starkey, Court Reporter and Notary Public in
and for the State of South Carolina, commencing at
the hour of 1:29 p.m., Friday, August 6, 2010, at
Strand Regional Specialty Associates, 8170 Rourk
Street, Myrtle Beach, South Carolina.

Reported by
Michele E. Starkey

Page 2

1

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For the Employer/Carrier:

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EXHIBITS

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There were no exhibits marked during this deposition.

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STIPULATIONS

It is stipulated by and between counsel for the respective parties that all objections are reserved until the time of trial, except as to the form of the questions.

This deposition is being taken pursuant to the South Carolina Workers' Compensation Act and all applicable rules.

- - - -

The reading and signing of this deposition is waived by the deponent and counsel for the respective parties.

Whereupon,

GEORGE M. SANDOZ, M.D., being duly sworn and cautioned to speak the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

BY MR. BURKETT:

Q Dr. Sandoz, my name is Michael Burkett and I represent the employer and its insurance carrier in this workers' compensation matter.

A You got it.

Q Have you had your deposition taken before?

A Yes, I have.

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1 Q And you understand the testimony you're going to
2 give today is sworn testimony just as if you were
3 testifying at a hearing for this matter?

4 A Yes, I'm aware.

5 Q And in fact, in workers' compensation, this
6 testimony will actually be your hearing testimony.
7 Are you aware of that?

8 A No, I wasn't, but okay.

9 Q Now you are. Okay, good. Just briefly, you're a
10 board certified neurologist?

11 A Yes, and ophthalmologist.

12 Q And ophthalmologist, okay. And how long have you
13 been in private practice here in Columbia -- I mean,
14 in Myrtle Beach?

15 A Myrtle Beach have been twelve years.

16 Q Twelve years? And how long have you been private
17 practice in general?

18 A Twelve years.

19 Q Twelve years, okay.

20 A I finished out my training in June of '98 and have
21 been in practice July '98 here in this practice.

22 Q All right. And just to make sure we establish this
23 for the record, it's my understanding you are fluent
24 in Spanish; is that correct?

25 A That's correct.

1 Q And that's probably, sounds like your native
2 language. Is that right?

3 A Yes, that's --

4 Q So did you have any trouble communicating with Mr.
5 Fragosa in this claim?

6 A No.

7 Q Okay. Basically want to talk to you a little bit
8 about the condition. You have diagnosed him with a
9 traumatic brain injury; is that correct?

10 A That's correct.

11 Q And it's my understanding that traumatic brain
12 injury is as a result of the blow he received to the
13 head which actually included a skull fracture; is
14 that correct?

15 A That's correct.

16 Q And the skull fracture itself is basically just a
17 break in the skull bone. Like if I were to break my
18 arm, I'd break the bone in my arm; you have a skull
19 fracture, you break your skull bone. Correct?

20 A Yes, it's a little bit more harder because the bone
21 is called -- it's protected a little bit more vital
22 organ, in this case the brain, so the force that it
23 need to go and inflict is much higher than let's say
24 for your hip.

25 Q Right.

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1 A Or your arm.

2 Q Okay. And but in this case, the records do not
3 indicate that it was a -- that there was no
4 indication of a depressed skull fracture; is that
5 correct?

6 A No. Basically appear to have just cracked open.

7 Q Just cracked open, all right. And just so we all
8 understand, the depressed skull fracture would
9 actually be where the -- some of that bone fragment
10 actually pressed into the brain itself?

11 A Well, or the architect of the bone is depressed.

12 Q Okay. All right. But no surgical intervention
13 required to repair the skull fracture in this case?

14 A That's correct.

15 Q All right. And the last note that I believe we all
16 have from you, as far as treatment dates for Mr.
17 Fragosa, is August of 2009. Does that sound
18 accurate to you, according to your records?

19 A 2009. Give me one second, I tell you. 12th of
20 August of '09, that's correct.

21 Q Okay. And you haven't seen him since then?

22 A No, he has not been seen since then.

23 Q Okay. And your -- if we look at -- do you have that
24 report in front of you, Doctor, or do you need my
25 copy?

1 A No, I do have -- sorry. I have everything is
2 electronic. We have electronic medical records and
3 I have, while I'm looking at the computer, it's --
4 I'm look at the notes.

5 Q All right, that's fine. I just want to make sure.
6 If you look at the August 12, 2009 note, where in
7 the section for physical exam.

8 A Yes.

9 Q And the subsection of neurological?

10 A Uh-huh.

11 Q You note "the level of consciousness is normal,
12 orientation is alert and oriented, memory is intact,
13 cranial nerves are intact. Motor reflexes, normal;
14 facial, normal." Looks like his hearing was normal.
15 For the most part, a normal neurological exam; is
16 that correct?

17 A Except that he has -- the test is where we testing
18 his inner ear function is lateralized into the left.

19 Q Okay.

20 A That's the damage -- that suggests that the inner
21 ear, the -- you have two inner ears. The one on the
22 right is damaged so he doesn't hear from that, and
23 that's the area that is damaged, so when you place a
24 tuning fork and give you a pitch sound, he's only
25 hearing on the left and not on the right; meaning

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1 that the right inner ear is damaged.

2 Q Okay. Is that from the accident or from something
3 else?

4 A That is from the accident.

5 Q From the accident. All right.

6 A Or directly related to the accident.

7 Q And just by way of explanation, how is that related
8 to the accident, the damage to that inner ear?

9 A At the time the concussive injury that the patient
10 had suffered had created an inner ear damage.

11 Q Okay. I was looking, for example, if you can just
12 look at the May 19, 2009 note, and tell me when you
13 have that in front of you and I will ask you the
14 questions.

15 A May 19. You got it.

16 Q Okay. I was looking, unless I'm missing it here,
17 under the neurological -- in the physical exam and
18 neurological, I don't see acoustic listed there. Am
19 I missing it?

20 A Got it. No, it wasn't --

21 Q Is it something you test every time or just --

22 A Not all the time.

23 Q Okay.

24 A I mean, I know that the guy had an inner ear damage,
25 and I test if he complains, or like in this case,

1 the September was just to give him an impairment
2 rating, or a more significant --

3 Q Right. Now, one of his other complaints that
4 appears to be fairly consistent, and correct me if
5 I'm wrong, throughout the claim or throughout your
6 treatment with him has been some dizziness; is that
7 correct?

8 A That's the dizziness, exactly.

9 Q And some headaches that come -- that sometimes are
10 more consistent than other times; is that right?

11 A Exactly, that's correct.

12 Q Even though in your August 12th -- I'm just curious
13 about this. In your August 12th, 2009 note that we
14 looked at a minute ago, you've noted memory was
15 intact, and in your clinical assessment, you note
16 mild or moderate memory loss.

17 A Exactly. When I said, you know, he's alert and
18 oriented times three and intact, is like you ask him
19 what day is it, the place, and the name. Those are
20 the three things, but for anything more complex, you
21 know, no, I don't ask him all the time so that's why
22 I said it's alert and oriented times three.

23 Q Okay, now --

24 A And those are the three things that I ask him,
25 what's your name, what's your date of birth, what --

Page 10

1 sorry. What day is today, and what's the place that
2 we are.

3 Q All right. Now, when we talk about the clinical
4 assessment things he reports to you when he sees
5 you, the dizziness and the headaches, when you put
6 those in your report, those are things we can't test
7 for; is that right? We're relying on the subjective
8 complaints of the patient?

9 A Yeah, the suggestive complaint of the patient and
10 the history that he had presented with.

11 Q And that would be -- those complaints would be
12 consistent with the post concussive --

13 A After the effects of the trauma that he suffer in
14 his head, yes, that's correct.

15 Q All right. Same thing with memory loss? Do you
16 rely on his subjective information or do you
17 actually test for that memory loss?

18 A Well, I tested some of that, you know, I give it
19 where and ask him and what he does. One of the
20 things that has always been asked about this one was
21 to do a neuropsych evaluation, a neuropsychological
22 evaluation, but to determine, you know, if this is
23 something that is really directly related or not.

24 Q Right. Okay. But as far as your concern that
25 headaches and dizziness and that moderate memory

1 loss, those are the results of that -- do I call it
2 post concussive symptoms?

3 A Traumatic brain injury.

4 Q Okay. All right. Now, let's look at -- you wrote
5 two notes; one was August 20, 2009, and one is June
6 3, 2009.

7 A Sorry, one is --

8 Q We'll do August 20th first.

9 A September, give me one second. August 20th, 2009,
10 yes.

11 Q All right. And I'm going to start with this one
12 first only because I was looking at all of this and
13 my interpretation is there might be a little error
14 here but I just want you to tell me if I'm right or
15 wrong.

16 A Okay.

17 Q You reference the fifth edition and table 13-5 --
18 the fifth edition of the AMA Guidelines in table
19 13-5.

20 A Yes.

21 Q Now, 13-5 is the table for dementia.

22 A Well, that's the only thing that I have available
23 for him to go and do the injury.

24 Q Okay. Well, and the reason I ask, because in the
25 June 3rd, 2009 note, you've got one on the screen,

Page 12

1 you reference the sixth edition of the guidelines
2 and table 13-8, which measures the mental status,
3 cognition, highest integrative function.

4 A Exactly.

5 Q Is there -- I know there's a difference because the
6 books are different.

7 A That's correct.

8 Q This one on the June 2009 report, you basically put
9 him in class two which is, you know, a moderate
0 category basically.

1 A Uh-huh.

2 Q Is that still accurate? Was there a reason you went
3 to the fifth edition? I'm trying to distinguish
4 between the two of them.

5 A Just because, you know, when I get like in June, I
6 have now that one, in August, I had this one only.

7 Q Okay.

8 A So that's the only reason.

9 Q Is the -- since the June -- since the sixth edition
0 actually gives you a bigger range where you can test
1 alteration of mental status, cognition, highest
2 integrative function, is the June one probably the
3 more accurate assessment since it gave you better
4 guidelines to go by, or what would you say?

5 A Doesn't really matter, it's just by the edition.

1 Q Okay. All right.

2 A You know, this year we're going to go and do this
3 part, I go do the assessment, and when I do the
4 assessment at one time, it's -- this was available.

5 Q All right.

6 A And when I do the other one, it's the other one
7 available.

8 Q I got you. Now, would you agree that -- do you
9 still stand by the two reports, even though you're
10 using two different books? You still agree with
11 both of those reports?

12 A Yes.

13 Q Okay. And just for the record, for the sixth
14 edition, we can submit this later, it says
15 alteration in mental status, cognition, highest
16 integrative function that interferes with the
17 ability to assume some normal roles or perform
18 activities of daily living. Is that --

19 A That's correct.

20 Q -- a fair assessment of Mr. Fragosa? All right.
21 Now, we've arrived at this because of what you
22 called traumatic brain injury, correct?

23 A That's correct.

24 Q As far as physical findings on his brain, if you
25 were to look at scans, is it fair to say there is no

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1 physical damage to the brain that we can see; is
2 that right?

3 A There's no evidence of any damage on the brain that
4 we can go and see, that's correct.

5 Q Okay. So what we're dealing with here are these --
6 the traumatic brain injury, and sometimes I like to
7 call it because I don't know what else to call it,
8 but I see it often, is the post concussive
9 syndrome --

10 A Got it.

11 Q -- which is the same thing.

12 A This is not a concussion, this is an injury suffered
13 to the brain.

14 Q Injury suffered to the brain.

15 A That's why traumatic brain injury is the preferred
16 term.

17 Q What's the difference between the jar that a brain
18 takes in a concussion and what he may have had?

19 A The concussion should resolve.

20 Q Okay. So we're looking at -- so we call it
21 traumatic brain injury because it's a longer period
22 of time?

23 A Because there's been some damage and injury to the
24 function of the brain.

25 Q And we're aware of that because of --

1 A The history that he gives, the findings that he had
2 initially, and the clinical presentation that he
3 has.

4 Q Right, and that clinical presentation today is still
5 the moderate memory loss, the dizziness, the
6 headaches?

7 A The headaches.

8 Q All right. But just to clarify again, as far as the
9 physical damage to the brain, physical, something we
10 can physically see on a scan, CT, MRI or anything
11 else, we're not going to see anything; is that
12 correct?

13 A Not in this case.

14 Q Okay. All right. As far as ongoing, you haven't
15 seen him since August, was he on any medications
16 when you released him or can you tell?

17 A Initially had placed him on medications but he has
18 been for loss to follow up. Some of the medications
19 that he has were used for the treatment of pain,
20 and -- and that is going into the cervical spine
21 therapy, and I've been giving him for the treatment
22 of the headaches that he has, so I haven't seen him
23 since then.

24 Q All right.

25 A I don't know why, and I don't know why he has not

8/6/2010

George M. Sandoz, M.D.

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1 presented.

2 Q Okay. Can you tell from your notes whether he's
3 called in for any refills or anything? I don't
4 think he has and I think he told me that, I'm just
5 checking with you.

6 A The last, you know, contact that I have with any of
7 them is the case nurse manager in 8/24.

8 MR. BURKETT: Okay. I don't have anything
9 else.

10 EXAMINATION

11 BY MR. CHANDLER:

12 Q Just want to ask you about the MRI findings, Dr.
13 Sandoz.

14 A Right.

15 Q You did one and it was -- you ordered one and it was
16 conducted on September 16, 2008. What is
17 significant at all about findings of severe
18 mastoiditis?

19 A Well, that's the part of the injury that he has
20 suffer and that's why he's dizzy.

21 Q Okay. So when the radiologist notes that he has
22 severe right mastoiditis, that's telling us what
23 about the injury to the brain?

24 A That suggests that he had an injury to his head, and
25 if you look, you know, there's also within the

1 dictation or within the body of the findings, in the
2 last paragraph, and it says sensitivity of the
3 artifact of the subcutaneous tissue of the left
4 skull could be from prior trauma.

5 Q What is artifact telling us?

6 A That there is some -- that there is things that
7 shouldn't be there because motion, metal, movement,
8 and it said that there is non-seen that will suggest
9 intracranial hemorrhage, but it doesn't mention
10 anything of sheer injury or what they call basically
11 damage to the brain in the more diffuse manner.

12 MR. CHANDLER: Okay. Do you --

13 MR. BURKETT: I don't have -- well, I
14 probably do but it's easier for me to look over your
15 shoulder. Do you have --

16 MR. CHANDLER: I don't have any other --
17 well, you know what, I do have a few.

18 Q I just wanted to clarify the one point about the MRI
19 studies because I thought there was an acute
20 finding.

21 A Exactly. This is after the, what do you call it,
22 this is here. Then he had done other testing at
23 MUSC.

24 Q Let me ask you some questions, Dr. Sandoz, about Mr.
25 Gomez Fragosa's cognitive deficits.

Page 18

1 A Uh-huh.

2 Q You believe that the traumatic brain injury has
3 affected Mr. Fragosa's ability to return to
4 employment?

5 A To gainful employment, yes.

6 Q Okay. I believe the history that this guy gave you
7 was that he was a construction worker and he was
8 injured in the construction-related accident. Is
9 that your understanding?

10 A That's correct.

11 Q Based on the condition that he has now and the
12 limitations that he has, do you believe that he can
13 return to any kind of former construction-related
14 employment?

15 A No, I don't think he will be able to.

16 Q Okay. Would --

17 A The reason being is because -- not only because of
18 the traumatic injury, I don't think he's able to
19 follow any type of commands, but the most
20 significant change is the inner ear injury that he
21 suffer which is making him unsteady, so any type of
22 high work or ladder or scaffold is out of the
23 question.

24 Q Okay. Is it your opinion to a reasonable degree of
25 medical certainty that he will need to take

1 medications for life to control his condition?

2 A With a certain degree of medical certainty, I
3 believe that the patient will require to take
4 medications on a permanent basis to control the
5 symptoms that he has.

6 Q Okay. Will he need to have periodic neurological
7 office visits and/or diagnostic studies to kind of
8 monitor his condition?

9 A That's correct.

10 Q Okay. Periodic blood work to see how the
11 medications are affecting his body overall?

12 A Yes. That's correct. Sorry.

13 MR. CHANDLER: I don't have any other
14 questions.

15 RE-EXAMINATION

16 BY MR. BURKETT:

17 Q Doctor, I'm looking back at this September 16, 2008
18 MRI study. Explain again, mastoiditis indicates
19 that there -- you could tell -- is that the
20 radiologist picking up on the actual old skull
21 fracture or is that something else?

22 A No, this is new. The old skull fracture was on the
23 left side. All the -- you know, the brunt of his
24 trauma was in the left side so this injury to the
25 brain, because it's kind of like a solid mass, can

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1 transmit the energy on the -- of the impact of the
2 bang to the opposite side. So said you hit here,
3 sometimes the injury that you suffer is in the
4 opposite side.

5 Q Okay. So that's my question. What exactly is the
6 mastoiditis?

7 A The mastoid is, if you imagine the skull, it will be
8 too heavy if you make it solid bone, so there is the
9 mastoid process like the one that is behind the ear
10 that is full of caverns so it make it lighter, the
11 mastoid.

12 Q The skull itself?

13 A It's part of the skull.

14 Q Part of the skull?

15 A The temporal bone -- sorry to technical -- the
16 temporal bone has a, you know, has like a con --
17 like a wave. It has the mastoid process and the
18 temporal bone itself. There are three bones that
19 are stuck together. And one is just to make it,
20 first of all, the head lighter, protect it more, and
21 allow the inner ear to tolerate a change in
22 pressures. Like a sponge there, that in case you go
23 too high or too low, it absorbs the pressure there
24 instead of popping the ear or breaking the ear like
25 sometimes it happens when the pressure goes too high

1 too quickly. And that's been damaged from the
2 injury that he suffer.

3 Q Okay. So the mastoid isn't part of the brain, it's
4 part of the --

5 A Skull.

6 Q -- skull. Okay. So all right. And --

7 A Which is the part of the skull that the right inner
8 ear is located, which when we do the testing, the
9 right inner ear is the one that appears to be
10 damaged. So the complaint that the patient is
11 having, the clinical signs, clinical symptoms, the
12 complaint that he has, and the findings that we do
13 on the studies, they're all correlate.

14 Q All right. The inner ear problem correlates with
15 that mastoiditis?

16 A Exactly.

17 Q Which is, I guess, sounds like an inflammation of
18 that area. Is that --

19 A Well, it's like fluid of the inflammation from the
20 response to the injury that he suffer.

21 Q Okay. All right. And as far as the cognitive
22 deficits, are you talking academic ability or
23 just -- what kind of things are you talking about
24 with cognitive deficits?

25 A When I ask him, I mean, I'm asking simple stuff,

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1 like can you -- how many bricks are -- can you lay
2 in a day, and how many are in a foot, so stuff that
3 he's able to relate, how many feets are there to
4 this, and he's not able to figure that stuff out.

5 Q All right. And you didn't know him before this
6 accident, did you?

7 A No, this is the first time I've ever seen him.

8 Q All right. So is it fair to say he may not have
9 known that stuff before the accident, we just don't
10 know?

11 A Exactly, I don't know. He's a construction worker.
12 I expected him to know, you know, that stuff.

13 MR. BURKETT: All right. I don't have
14 anything else.

15 MR. CHANDLER: I don't have anything. Thank
16 you.

17 (Deposition was concluded 1:52 p.m.)

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #0717624

HECTOR GOMEZ FRAGOSO)

CLAIMANT,)

VS.)

KADE CONSTRUCTION
EMPLOYER,)

AND)

KEY RISK INSURANCE
CARRIER.)

SC WORKERS' COMPENSATION COMMISSION

HEARING OF

HECTOR GOMEZ FRAGOSO

VS

KADE CONSTRUCTION, LLC

This is the Transcript of the South Carolina Workers' Compensation Hearing of Hector Gomez Fragoso versus Kade Construction, LLC, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 10:13 A.M., Tuesday, June 28, 2011, at Horry County Court House, 1301 Second Avenue, Conway, South Carolina.

COPY

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*Reporter's Note: -- Indicates incomplete thought or sentence, trailing off or interruption by speakers.

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I N D E X

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STIPULATIONS

Commissioner Wilkerson: Today's date is June the 28th, 2011. We're here in reference to Workers' Comp File Number 0717624. The Claimant is Hector G. -- is it -- how do you pronounce it?

Mr. Chandler: Fragoso.

Commissioner Wilkerson: Fragoso, okay. -- Fragoso. His Attorney is Jeff Chandler. The Employer is Kade Construction, LLC. The carrier is Key Risk Insurance Company of South Carolina and their Attorney is Michael W. Burkett or Burkett. The date of accident is 11/1 of 2007. The average weekly wage is four hundred dollars (\$400.00), thus the compensation rate is two sixty-six, sixty-eight (\$266.68). My understanding is this was initially set on a Form -- excuse me -- initially set for -- to determine if Employer/Carrier may stop payment and, if so, to determine if the Claimant is entitled to any future benefits, the carrier also requests credit for temporary total benefits paid in excess of award. That's when we were originally going to have the case on 5/11/2011, but we're also today are on the 50 and 51 is my understanding; is that correct, gentlemen? I think we pushed it back for

1 that reason.

2 Mr. Chandler: That's correct.

3 Commissioner Wilkerson: Is that correct? Okay.

4 Thank you. Are there any objections to APA's,
5 jurisdiction, venue or any other items from --
6 Michael, since you were the original moving party
7 I'll ask you that first?

8 Mr. Burkett: No, sir. I do -- or will make when
9 I -- when it's my turn to go I will make a comment
10 or two (2) on the synopsis of the issues that Mr.
11 Chandler handed up.

12 Commissioner Wilkerson: Yes, this is not
13 evidence.

14 Mr. Burkett: Right.

15 Commissioner Wilkerson: This is -- yes, this -- I
16 understand.

17 Mr. Burkett: Just a couple of arguments on it.

18 Commissioner Wilkerson: I don't have a problem
19 with that. Thank you.

20 Mr. Burkett: But, otherwise, no -- no objections,
21 Your Honor.

22 Commissioner Wilkerson: Okay. Jeff, anything
23 from you?

24 Mr. Chandler: I don't, Your Honor.

25 Commissioner Wilkerson: And that would -- let me

1 ask you, and that would encompass the 21 as well
2 as the 50/51 when I -- when I mentioned that. You
3 were just the initial moving party --

4 Mr. Burkett: Yes, sir.

5 Commissioner Wilkerson: -- as far as any
6 objections. Okay. Okay, thank you. No
7 objections. Since there are no objections, the
8 Commission's file becomes a part of the record
9 with the exception of self-serving declarations
10 and unstipulated medical reports. Do you all
11 prefer which one of you goes first? It would
12 probably be better --

13 Mr. Burkett: Jeff can go first.

14 Commissioner Wilkerson: -- yes, I would agree,
15 even though -- I would agree with that, so Jeff?

16 Mr. Chandler: I'll be happy to.

17 Commissioner Wilkerson: Sure, absolutely. If you
18 need -- you can stand up or sit down; whatever is
19 comfortable for you.

20 Mr. Chandler: Thank you, Your Honor. I'm here on
21 behalf of Mr. Fragoso here today arguing for
22 lifetime benefits for him under 42-9-10. We
23 believe that he's totally and permanently disabled
24 as a result of a combination of injuries to
25 include physical brain damage. And I think the

1 evidence is going to be proper -- properly before
2 you so that you can make that ruling. We have a
3 treating Neurologist that substantiates that he's
4 got permanent physical brain damage. And I want
5 to point you to some of the APA submissions. And
6 I know they're voluminous but I just wanted to
7 make sure that you have a -- a clear picture and I
8 provided that synopsis of the contested issues.
9 Dr. Sandoz was deposed. On page 14 of his
10 deposition he clearly states that there's been
11 damage and injury to the function of the brain.
12 Further, Dr. Sandoz was asked in a questionnaire
13 about whether he suffered physical brain damage
14 and he was provided CT scans to review; that's
15 page 882, APA Exhibit C. And he gives his opinion
16 to a reasonable degree of medical certainty that
17 he has suffered physical brain damage and that
18 physical brain damage has rendered him totally and
19 permanently disabled. And, Your Honor, I point
20 your attention to the MUSC discharge summary.
21 This guy had subdural epidural hematomas,
22 bilateral frontal contusions, respiratory failure,
23 hypotension that was treated intravenously with
24 fluids, a large scalp laceration, C-7 through T-1
25 spinous process fractures, rib fractures that

1 included 7, 8, 9, and 10, bilateral transverse
2 process fractures L-1, L-2, right L-3, right big
3 toe fracture, right fifth (5th) toe fracture,
4 fracture of the skull, midline to sagittal through
5 the frontal and the parietal, placement of a
6 percutaneous endoscopic gastrostomy; so they had
7 to feed him with a tube for weeks, a tracheotomy,
8 and his -- his foot was amputated from toes 2
9 through 5, okay?

10 Commissioner Wilkerson: Which foot? Both or --
11 Mr. Chandler: That is his right foot.

12 Commissioner Wilkerson: -- okay. That's fine.
13 Mr. Chandler: The only Vocational Expert that's
14 rendered an opinion says that he's totally and
15 permanently disabled as a result of physical brain
16 damage coupled with his other injuries; the
17 treating Neurologist says this. Even the IME
18 doctor, Dr. Wagner -- and I'll point you to the
19 APA's from Dr. Wagner, page 655, APA Number 4. He
20 determined that the Claimant had a skull fracture
21 with acute underlying minor structural change to
22 the brain. Now, Michael is going to tell you that
23 that resolved post -- I guess discharged from the
24 hospital. But I don't think 42-9-10 -- number one
25 (1), The language of the Statue says, "Suffered

1 physical brain damage". So, I -- I think that
2 it's clear that he suffered it. I guess maybe the
3 carrier and Michael believe that maybe he isn't
4 presently suffering from permanent physical brain
5 damage.

6 Commissioner Wilkerson: Yes --

7 Mr. Chandler: And maybe that's --

8 Commissioner Wilkerson: -- address --

9 Mr. Chandler: -- maybe that's the argument.

10 Commissioner Wilkerson: -- okay. Address that
11 with me a little bit. More so along the lines of
12 if brain damage did occur and it has resolved;
13 just --

14 Mr. Chandler: Well, I mean, I -- I think that's
15 often the case --

16 Commissioner Wilkerson: -- just for the record.

17 Mr. Chandler: -- sure. I think that's often the
18 case where someone has a frontal lobe contusion,
19 maybe the brain bleed absorbs back into the --

20 Commissioner Wilkerson: I agree.

21 Mr. Chandler: -- into the brain, into the body.

22 Commissioner Wilkerson: Right.

23 Mr. Chandler: But they're left with the cognitive
24 deficits. And it's clear in this case that he's
25 got the residual cognitive deficits.

1 Commissioner Wilkerson: He still has them?

2 Mr. Chandler: Still has them to --

3 Commissioner Wilkerson: Okay.

4 Mr. Chandler: -- this day.

5 Commissioner Wilkerson: Okay.

6 Mr. Chandler: He's got memory deficits. He's got
7 dizziness. He's got chronic headaches. And --
8 and that's -- he's got visual disturbances. So,
9 he -- he's got all the cognitive deficits; those
10 are supported by the Vocational Experts and his
11 treating Neurologist, and he's getting medicine
12 management for those things.

13 Commissioner Wilkerson: So, what you're saying is
14 the brain damage that was there, the damage itself
15 may have resolved -- I don't know -- but the
16 outcome is because of what happened he still has
17 these prolonged effects on --

18 Mr. Chandler: Certainly.

19 Commissioner Wilkerson: -- on the -- okay. I'm
20 fine with that.

21 Mr. Chandler: And -- and in addition to that, an
22 interesting finding that you can see presently on
23 an MRI is what Dr. Sandoz says is severe
24 mastoiditis. And he -- if you look at --

25 Commissioner Wilkerson: What's that? I don't

1 know.

2 Mr. Chandler: -- it's because of the trauma to

3 the brain.

4 Commissioner Wilkerson: Okay.

5 Mr. Chandler: Let me just point you to Sandoz's

6 deposition testimony with respect to the

7 mastoiditis. The deposition of Sandoz page 7 and

8 8 and also at pages 20 and 21.

9 Commissioner Wilkerson: Okay. And it's in here?

10 It's in the record, right?

11 Mr. Chandler: Right. And that's what has caused

12 a loss of hearing, okay? He got struck on the

13 left side of his head. And I'm going to show you

14 the skull fracture when we go on the -- on the

15 record --

16 Commissioner Wilkerson: Sure.

17 Mr. Chandler: -- with the Claimant. But Sandoz

18 says that because of this trauma that he ha to the

19 left side of the head it -- it refers over to the

20 right side.

21 Commissioner Wilkerson: Okay.

22 Mr. Chandler: That's why he had this hearing loss

23 on the right side.

24 Commissioner Wilkerson: Okay.

25 Mr. Chandler: So, I -- I believe the evidence is

1 clear for you; I don't think it could be much
2 clearer. And you've got a guy who was a
3 construction worker who cannot go back to any kind
4 of gainful employment. Even if we didn't have the
5 brain injury it's clear that he's totally disabled
6 as a result of the combination of injuries that we
7 can present to you. But there -- the evidence
8 couldn't be clearer in my opinion that we've got a
9 physical brain damage case and we've got a
10 lifetime case, okay?

11 Commissioner Wilkerson: Okay. Thank you.
12 Michael, I know you got a little different take on
13 it, so.

14 Mr. Burkett: Yes, sir, I do. I -- I think --
15 Commissioner Wilkerson: Do you want to address
16 this first? This --

17 Mr. Burkett: I -- I'll give it -- it's just one
18 (1) little correction I want to make in there --

19 Commissioner Wilkerson: -- okay.

20 Mr. Burkett: -- and Jeff kind of touched on it.
21 But --

22 Commissioner Wilkerson: And this is not evidence.
23 This is just to help me --

24 Mr. Burkett: -- that's right.

25 Commissioner Wilkerson: -- follow through? Okay.

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That's fine.

Mr. Burkett: And this is ninety-nine percent (99%) accurate. I think that the best way to look at this is you have the question of physical brain injury, which is what the Statue requires, versus just an injury to the brain, which is covered in Regulation 67-11-01. The law covers both of them. And I think the best example is if we take an injured worker who has his legs amputated, he's confined to a wheelchair for the rest of his life. Well, assume he can't go back to work. The most he's going to get is five hundred (500) weeks. He's got his two (2) body parts, he has no legs; he cannot walk. Now take someone who is a paraplegic. No functional use of the legs, can't work anymore, confined to a wheelchair, but their outcomes are different. The law gives one (1) of them lifetime benefits and the law gives the other one (1) five hundred (500) weeks because the law presupposes additional more complicated problems when you're a paraplegic as opposed to having your legs amputated. The law presupposes additional problems, significant problems, when you have a physical injury to your brain, something we can see, a physical damage to the brain as opposed to

1 what the law covers in the regulations, which says
2 he can get an award between twenty-five (25) and
3 two hundred and fifty (250) weeks. Now, Dr.
4 Sandoz unequivocally on page 13 of his deposition
5 --

6 Commissioner Wilkerson: Let me ask you a question
7 along those lines and I may get a response from
8 both. Are you saying that someone in an
9 automobile wreck who hits their head on the
10 dashboard or the window may initially have damage
11 to the brain but it may not be a brain damage
12 case; is that fair?

13 Mr. Burkett: I think you -- I think you -- I
14 think the law is very --

15 Commissioner Wilkerson: Based on the medicals,
16 right?

17 Mr. Burkett: -- you have to have physical brain
18 damage.

19 Commissioner Wilkerson: Okay. I'm fine with
20 that.

21 Mr. Burkett: A physical finding of the brain.

22 Commissioner Wilkerson: Okay. I'm fine with
23 that.

24 Mr. Burkett: A physical finding of the brain.

25 Commissioner Wilkerson: Okay.

1 Mr. Burkett: Now, Dr. Sandoz in his deposition,
2 on page 13, line 24, here's the question, "As far
3 as physical findings on his brain" --

4 Commissioner Wilkerson: Wait a minute, which --
5 is it -- show me -- tell me where.

6 Mr. Burkett: -- I'm sorry, page 13 of Dr. Sandoz.

7 Commissioner Wilkerson: Well, no, but I'm talking
8 about -- is it on here? You -- or --

9 Mr. Burkett: No, sir.

10 Commissioner Wilkerson: -- I'm sorry. Page 13 of
11 --

12 Mr. Burkett: Page 13 of the deposition --

13 Commissioner Wilkerson: -- of the deposition.

14 Okay. I'm sorry.

15 Mr. Burkett: -- of Dr. Sandoz.

16 Commissioner Wilkerson: Dr. Sandoz. I'm fine.
17 Go ahead.

18 Mr. Burkett: The question was, "As far as
19 physical findings on his brain, if you were to
20 look at the scans is it fair to say there is no
21 physical damage to the brain that we can see; is
22 that right"? And the answer, "There is no
23 evidence of any damage on the brain that we can go
24 and see; that's correct". All right. Now, after
25 this was done in August of 2010, within the last

1 two (2) or three (3) months, the date of it is --
2 I think it's the last page of the APA submissions.
3 They went and got a questionnaire from Dr. Sandoz,
4 March 10th, 2011, and he simply circled yes or no
5 on -- was there physical brain damage? Was there
6 physical brain damage? His answer is yes. It
7 doesn't say what CT scans he reviewed; it doesn't
8 say anything. So, we've -- we've rung the bell
9 and now we're trying to un-ring the bell. So,
10 Sandoz is talking out of both sides of his mouth
11 when he says --

12 Commissioner Wilkerson: Well, what -- let me ask
13 you a question on that. His deposition was taken

14 --

15 Mr. Burkett: -- August of 2010.

16 Commissioner Wilkerson: -- so about ten (10)
17 months ago --

18 Mr. Burkett: Yes, sir.

19 Commissioner Wilkerson: -- or eleven (11) months
20 ago. So, could there be, don't know until the
21 evidence is presented that's in here, could there
22 have been a progression or I've seen several times
23 where there's a progression for the worse; I've
24 also seen times where it's gotten better. So, my
25 question is, we don't know what Sandoz -- we know

1 what he said in August, nine (9) or eleven (11)
2 months ago -- ten (10) or eleven (11) months ago,
3 but now we've got a check off list.

4 Mr. Burkett: There's no evidence of any
5 progression because according to this letter that
6 was sent with the questionnaire he was sent the CT
7 scans. The Claimant has not had any CT scans in
8 2009 or 2010.

9 Commissioner Wilkerson: I'm fine with that.

10 Mr. Burkett: Now, keep this in mind too. The
11 argument here is that Mr. Fragoso has such a
12 significant level of physical brain damage, or has
13 physical brain damage, and he's entitled to
14 lifetime medical benefits -- I mean, I'm sorry,
15 lifetime indemnity benefits; just like I said the
16 law presupposes these additional problems.

17 Between August 2009 -- I'm sorry -- August 2000 --
18 yes, August 2009 --

19 Commissioner Wilkerson: Yes.

20 Mr. Burkett: -- and August 2010, there wasn't a
21 single appointment with the Neurologist, a single
22 prescription that he was asking to be refilled, no
23 visits whatsoever. It wasn't until after Dr.
24 Sandoz's deposition that suddenly Mr. Fragoso
25 started to go back and see him on a fairly regular

1 basis; which was fine, he's the authorized
2 treating doctor. But for somebody who has a
3 physical brain damage and can't function, and
4 needs lifetime indemnity benefits, there's no
5 neurological treatment between August 2010 -- I
6 mean August 2009 and August 2010. Now, this is
7 where it also gets important. There's a
8 Vocational Report, which is Tab -- I'm sorry --
9 page 868 of -- this is Tab B, page 868, of the
10 Claimant's APA submissions. And Dr. Brabham goes
11 into all sorts of conclusions about what the
12 medical issues are and things like that but he
13 makes one (1) important note that everybody gets
14 -- seems to pick up on on page 874, and I'll --
15 I'll -- when you get there. And -- and Jeff kind
16 of read it and this is the medical synopsis form,
17 too. But on page 874 --

18 Commissioner Wilkerson: Wait a minute. Let me
19 get there.

20 Mr. Burkett: -- okay. And I'm -- I'm going to be
21 on the -- the fifth (5th) paragraph down.

22 Commissioner Wilkerson: Eight seventy-four (874)?

23 Mr. Burkett: Yes, sir.

24 Commissioner Wilkerson: Fifth (5th) paragraph
25 down. It starts with on -- let's see, 1, 2, 3, 4

1 -- on 10/30/08, or is it the one (1) above that?

2 Mr. Burkett: Yes, sir. 10/30/08.

3 Commissioner Wilkerson: Okay. I'm fine.

4 Mr. Burkett: All right. This is Dr. Brabham's
5 take on this case. And he says, "Dr. Wagner --
6 Mark Wagner noted, "post concussive syndrome,
7 mild chronic pain disorders, situation depression,
8 very serious work related injury result in trauma
9 to his body and skull. Skull fracture with acute
10 underlying minor structural changes to the
11 brain"". And he just stops -- he just stops right
12 there; he stops the recitation of what Dr. Wagner
13 says because they know they need a finding of
14 physical brain damage. But here's what Dr. Wagner
15 really said. He said that but if you read the
16 next sentence of his report, which is --
17 Commissioner, I'll give you the -- the main stack.
18 It'll make it easier for you.

19 Commissioner Wilkerson: Please.

20 Mr. Burkett: On page 655.

21 Commissioner Wilkerson: 655, got it. Okay.

22 Mr. Burkett: All right. And where it says
23 discussions.

24 Commissioner Wilkerson: Wait a minute; let me
25 make my notes. Discussions, right.

1 Mr. Burkett: Here is the complete context that
2 everyone seems to want to leave out because it's
3 the most important detail; it's the one (1) thing
4 they need legally to get to what they need to get.
5 And it says, "He had a skull fracture with acute
6 underlying minor structural change to the brain.
7 Follow-up structural and functional studies EEG,
8 CT, MRI have been read as unremarkable and
9 demonstrating structural resolution of a work
10 related injury". So, the structural changes that
11 Jeff is going to point out to you the day of the
12 accident CT scans are his -- are the hematomas?
13 Well, I hit my arm at my house the other day and I
14 have a hematoma on my arm and it is going to
15 resolve.

16 Commissioner Wilkerson: Now, this -- this report
17 that's marked confidential, that report is done by
18 Dr. Wagner; is that correct?

19 Mr. Burkett: Yes, sir. Wagner is the -- is --

20 Commissioner Wilkerson: It's at the bottom.
21 Okay. I'm fine.

22 Mr. Burkett: -- is a Neurologist at MUSC.

23 Commissioner Wilkerson: And that was done on
24 11/4/08?

25 Mr. Burkett: Yes, sir.

1 Commissioner Wilkerson: Okay.

2 Mr. Burkett: Almost exactly a year after the
3 accident.

4 Commissioner Wilkerson: Okay. I'm fine with
5 that. Okay.

6 Mr. Burkett: All right. Now -- but once again
7 and -- you'll -- they all want to seem to leave
8 out that second opinion; Dr. Brabham, you know,
9 and what have you. After he was discharged from
10 the hospital you'll see -- for example on page
11 629, he's gotten normal studies. Page 641, he's
12 got a normal CT scan. Once again, the law makes
13 the allowance to get -- have an injury to the
14 brain without having physical brain damage, and
15 that's -- that's the argument here.

16 Commissioner Wilkerson: I understand.

17 Mr. Burkett: But we have this allegation of
18 physical brain damage that for the rest of his
19 life he needs indemnity benefits and it's -- and
20 it -- it's so horrific that -- that we need to
21 fall under that category. Yet there's been no
22 motion to appoint a guardian ad litem for Mr.
23 Fragoso. He's here today to testify on his own
24 behalf, to his own -- for his own benefit. I
25 don't doubt that he has had a -- he -- he got hurt

1 and he had a horrific injury, but he does not have
2 a physical brain damage that entitles him to
3 lifetime indemnity benefits.

4 Commissioner Wilkerson: Okay. Any --

5 Mr. Chandler: Unlike that hematoma that's going
6 to resolve on Michael's arm and that's not going
7 to cause him any lasting deficits, Mr. Fragoso
8 because of that skull fracture and the physical
9 brain damage that he suffered and is still
10 suffering from will have lifetime cognitive
11 deficits that has been un-refuted by a
12 Neuropsychologist, a Neurologist, a Neurosurgeon,
13 or any other kind of doctor. The evidence is
14 clear that he's got a physical brain damage and
15 that he's entitled to lifetime benefits.

16 Commissioner Wilkerson: -- and, gentlemen, that's
17 why we're here today.

18 Mr. Burkett: And just very briefly. The --
19 there's no -- I -- I'm not sitting here saying he
20 shouldn't get an award under 67-11-01 for an
21 injury to his brain; I'm okay with that.

22 Commissioner Wilkerson: Yes, that's what I took
23 it as, so.

24 Mr. Burkett: The one (1) -- the one (1) thing I
25 didn't address was the mastoiditis. You'll see

1 Dr. Sandoz gives a great explanation of this. The
2 mastoid is a -- is a structural part of the skull,
3 itself.

4 Commissioner Wilkerson: Okay.

5 Mr. Burkett: It's an area of the skull. It's the
6 -- it's the -- it's a process. It's a -- and so,
7 it's not part of the brain and it's -- that's
8 where the -- the hearing loss is coming because of
9 the mastoiditis, because of the fluid built up in
10 that -- in that bony process is what that is.
11 It's just a -- it's a part of the -- it's a
12 portion of the skull is what the mastoid is.

13 Commissioner Wilkerson: Okay. All right, thank
14 you. Anything else before we start taking
15 testimony?

16 Mr. Chandler: No, Your Honor.

17 Commissioner Wilkerson: Okay. Thank you.

18 Mr. Chandler: Do you have a --

19 Commissioner Wilkerson: Yes. Let me -- can we go
20 off the record just real quick?

21 Mr. Chandler: -- yes, sir.

22 Mr. Burkett: Yes, sir.

23 (Off The Record)

24 Commissioner Wilkerson: We're officially back on
25 the record. We went off the record to handle a

1 Motion Hearing real quick. Jeff, are we now ready
2 to hear from your client?

3 Mr. Chandler: Yes, Your Honor.

4 Commissioner Wilkerson: Okay. So, what we'll do
5 is we'll swear the Court Reporter in first -- no
6 -- is that backwards?

7 Court Reporter: The Interpreter.

8 Commissioner Wilkerson: The Interpreter, I'm
9 sorry. It's been a long week.

10 Court Reporter: The Court Reporter is going to
11 swear the Interpreter in.

12 Commissioner Wilkerson: Sir, I am sorry. It's
13 been a long week and it's only Tuesday.

14 Mr. Lailson: It's only Tuesday.

15 Commissioner Wilkerson: Is it or is it Friday?
16 I'm sorry. So, we'll --

17 Court Reporter: Do you want me to do it? Would
18 you raise your right hand, please?

19 Commissioner Wilkerson: -- yes. Would you raise
20 your right hand, Mr. Interpreter? Thank you. And
21 then we'll get you to swear the Claimant in.

22 Thanks.

23 Whereupon;

24 JAIME LAILSON, being duly sworn to translate from
25 English to Spanish the questions posed by counsel and

1 from Spanish to English the answers given by the
2 witness.

3 Court Reporter: Please state your full name for
4 the record.

5 Interpreter: Jaime Lailson.

6 Court Reporter: Please help me swear him in; ask
7 him to raise his right hand.

8 whereupon;

9 HECTOR GOMEZ FRAGOSO, being duly sworn and
10 cautioned to speak the truth, the whole truth, and
11 nothing but the truth, testified as follows:

12 Court Reporter: Please state your full name for
13 the record.

14 Witness: Hector Gomez Fragoso.

15 Court Reporter: Thank you, sir

16 Mr. Burkett: Commissioner, we've -- we've
17 discussed who -- Jeff, is going to -- I have --
18 with my blessing, is going to lead for a lot of it
19 just to get us through it.

20 Commissioner Wilkerson: That's fine.

21 Mr. Burkett: And I told him he would hear from me
22 the moment I thought that the leading was
23 inappropriate.

24 Commissioner Wilkerson: That's fine. I was going
25 to ask could he do that as well so, Mr. Chandler.

1 Mr. Chandler: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 By Mr. Chandler:

4 Q. Good afternoon, Mr. Fragoso. Are you thirty-one (31)
5 years old today?

6 A. No.

7 Q. How old are you?

8 A. Twenty-nine (29).

9 Q. Okay. Thank you. Mr. Fragoso, you're not married; is
10 that right?

11 A. Yes.

12 Q. You don't have any children; is that right?

13 A. No.

14 Q. You're from Mexico; is that correct?

15 A. Yes.

16 Q. And you went through middle school in your home
17 country; is that right?

18 A. Yes.

19 Q. And you came to the United States somewhere in around
20 2002 or 2003?

21 A. Yes.

22 Q. And in Mexico after you finished school you worked in
23 some jobs that involved security work?

24 A. Yes.

25 Q. And you worked in what I understand to be a retail type

1 of job in a perfume shop?

2 A. Yes.

3 Q. Are those the only types of jobs you that you held
4 working in Mexico?

5 A. Yes.

6 Q. And since coming to the United States I understand the
7 only type of work that you've been involved in is
8 construction; is that right?

9 A. I don't know if -- I worked five (5) to six (6) months
10 at a shop where they used to do kitchen counters;
11 that's all.

12 Q. Okay.

13 A. I don't know if that is the same as construction what I
14 do.

15 Q. Is that the only other type of work that he's done
16 since coming to the United States?

17 A. Yes.

18 Q. Okay. Did Mr. -- did you have any kind of problem, Mr.
19 Fragoso, with respect to your -- your head, your brain,
20 prior to 11/1/2007?

21 Interpreter: Excuse me. What year?

22 Mr. Chandler: 2007.

23 A. No.

24 Q. We're here about an accident that happened on November
25 the 1st of 2007. You were working on a construction

1 project over in Marion, South Carolina; is that right?

2 A. Yes.

3 Q. Do you have any specific memory of the accident that
4 you were involved in?

5 A. No.

6 Q. When is your first memory following the accident?

7 A. When I woke up from the hospital.

8 Q. Okay.

9 Mr. Chandler: Now, Commissioner, if we can start
10 -- so we don't have to start and stop during the
11 testimony, I'm going to ask you put on the record
12 the scarring that Mr. Fragoso has -- has suffered
13 as result of this; if you don't mind.

14 Commissioner Wilkerson: No, that's fine.

15 Mr. Chandler: And -- and --

16 Commissioner Wilkerson: And let -- and let me ask
17 you a question just because of the confines I have
18 here. Would it be best if you were to walk over
19 and let Michael come up and you describe it?

20 Mr. Chandler: -- if -- if you don't mind, can I
21 get him to come down in front of you?

22 Commissioner Wilkerson: Oh, I'm fine with that.
23 However you want me to do it, that's fine.

24 Mr. Chandler: Jaime, if you could ask that Mr.
25 Fragoso to step out of the witness box. And I'll

1 lay some foundation.

2 Commissioner Wilkerson: That's fine. I just --

3 Mr. Chandler: I just wanted to -- instead of
4 starting and stopping and going through his
5 different body parts.

6 Commissioner Wilkerson: -- okay. That's fine.

7 Mr. Chandler: Okay. And if you will, go ahead
8 and take off --

9 Commissioner Wilkerson: -- do you need to come
10 up?

11 Mr. Chandler: -- your shoe. Go ahead and
12 instruct him to take off his shoe and his sock.

13 Mr. Burkett: Here you go.

14 Mr. Chandler: Yes, I'll -- I'll get it.

15 Commissioner Wilkerson: Yes, you probably better
16 get him a chair because I'm not sure --

17 Mr. Burkett: Here you go.

18 Commissioner Wilkerson: -- I'm not sure I'm going
19 to be able to lean far enough over.

20 Q. Okay. Mr. Fragoso, as a result of this accident I
21 understand that you have numerous scars; some of those
22 scars came from the actual trauma when you sustained
23 the injury and some were the result of surgery?

24 A. Yes.

25 Q. Okay. And I -- I want to start at your head and I'm

1 going to work my way down to your feet.

2 A. Yes.

3 Q. Okay. Now, specifically, Mr. Fragoso, I understand as
4 a result of the trauma that you've had to the head that
5 you have a scar that still remains from what looks like
6 your temple -- on your forehead that looks like it
7 extends back in a zigzag fashion almost to the crown of
8 your head; is that right?

9 A. Yes.

10 Mr. Chandler: And, Commissioner --

11 Commissioner Wilkerson: I'd concur.

12 Mr. Chandler: -- if you can eyeball what you
13 believe that is in --

14 Commissioner Wilkerson: Gosh.

15 Mr. Chandler: -- inches? If you want to
16 stipulate I -- I --

17 Commissioner Wilkerson: Let's see.

18 Mr. Chandler: -- it looks to me like it's at
19 least six inches (6").

20 Commissioner Wilkerson: I'd say it's more than
21 that.

22 Mr. Burkett: I think it's about seven (7).

23 Commissioner Wilkerson: I think it's -- yes.

24 Seven is fine. At least -- let's say at least
25 seven inches (7"), I -- because it -- the way it

1 angles.

2 Mr. Chandler: Right.

3 Commissioner Wilkerson: I'm just trying to look
4 at a six-inch (6") ruler and try to -- it's at
5 least six inches (6"); it could be eight (8).

6 Mr. Chandler: Okay.

7 Commissioner Wilkerson: Okay.

8 Q. Mr. Fragoso, do you also have an area on your throat
9 where you had a -- a tracheotomy?

10 Mr. Chandler: Ask him to please -- please answer
11 the question.

12 A. Yes.

13 Commissioner Wilkerson: Can -- I say if you can
14 rotate back because it's -- with -- with the --
15 okay, I'm fine with that. It's hard to see with
16 the --

17 Mr. Chandler: And to me, Your Honor, that looks
18 like a keloid scar.

19 Commissioner Wilkerson: -- it looks like it's
20 raised on the outside from what I can tell.

21 Mr. Chandler: And it looks like there are also
22 keloid scars that are adjacent to the main scar.

23 Commissioner Wilkerson: Probably where they
24 attached the -- yes. So, that would be -- I'm
25 going to say keloid scarring in that area where

1 the tracheotomy was done.

2 Q. Do you have additional scars across your chest to your
3 abdominal area?

4 A. Yes.

5 Q. Please show the Commissioner where else you have
6 scarring?

7 Commissioner Wilkerson: But those -- those
8 wouldn't be seen in natural employment though. Is
9 that --

10 Mr. Chandler: Well, I think that this is --

11 Commissioner Wilkerson: -- significant enough?

12 Mr. Chandler: -- related to some of the other
13 issues.

14 Commissioner Wilkerson: Oh, I see what you're
15 saying. No, I'm -- I'm fine with that. No, I'm
16 fine with that. Okay, that's fine.

17 Q. And is this where they had to put the feeding tube in?

18 A. Yes.

19 Q. Any other scars on your abdomen?

20 A. Just a small one by my shoulder.

21 Q. Did they have to put medicines in through this?

22 A. Yes.

23 Commissioner Wilkerson: Okay.

24 Q. Okay. Anything on this right shoulder?

25 A. No.

1 Q. Okay. Any scars on your back?

2 A. No.

3 Q. Okay. Any scars on your arms?

4 Commissioner Wilkerson: On the left.

5 Q. So, on your left arm? Do you know what caused this
6 scar?

7 A. No.

8 Q. Okay. Any scars on your right arm?

9 A. No.

10 Q. Okay.

11 Mr. Chandler: I'll let you please button your --
12 your shirt as best you can.

13 Q. Okay. Do you have any scars on your legs?

14 A. No.

15 Q. Okay. Now, Mr. Fragoso, you've sustained an injury to
16 your right foot that resulted in a partial amputation
17 of your foot; is that right?

18 A. Yes.

19 Q. And all you have left is your residual right big toe on
20 that foot; is that right?

21 A. Yes.

22 Q. Okay.

23 Mr. Chandler: Thank you.

24 Commissioner Wilkerson: Sure. Thank you. No,
25 I'm fine. Thank you.

1 Mr. Chandler: I'll allow you to take your --
2 Commissioner Wilkerson: Take your -- take your
3 time, we're in no hurry.

4 Mr. Chandler: -- take you time.

5 Q. Thank you for doing that, Mr. Fragoso. I know that
6 that's difficult for you. Mr. Fragoso, I want to ask
7 you about any and all problems that you have as a
8 result of this claim. And I know you don't have a
9 memory of how it happened but I need your assistance
10 now in telling me what kind of problems that you're
11 left with to this very day. And I want to start, Mr.
12 Fragoso, with any symptoms that you have that you
13 relate to the head trauma or the brain injury that
14 we've alleged that you have. Do you have headaches?

15 A. Yes.

16 Q. How often -- well, frequent are your headaches?

17 A. Exactly, I don't know but I've got three (3), four (4)
18 times. Sometimes I have a headache once a week. The
19 pains that I have, they're very strong. Exactly, I'm
20 not too sure how often but I do have headaches.

21 Q. Do you have headaches at least once a week?

22 A. Yes.

23 Q. Do you have a headache every day?

24 A. Yes. I can't sleep.

25 Q. Okay. Do you have days of the week where your

1 headaches are stronger than other days of the week?

2 A. Yes.

3 Q. Okay. And on days that they seem to be the strongest
4 what kind of limitations or problems do the headaches
5 cause you?

6 A. I don't want to do nothing. I don't want to be around
7 anybody. I feel like when someone is talking I get
8 desperate and frustrated for the pain.

9 Commissioner Wilkerson: When it gets dark; is
10 that what he said?

11 Interpreter: When he's around people.

12 Commissioner Wilkerson: Oh, when he's around
13 people. Okay. I'm sorry. I apologize.

14 Q. Are you taking medicines that are prescribed by Dr.
15 Sandoz for your headache?

16 A. Yes.

17 Q. Do those medicines help your headaches?

18 A. Just a little bit.

19 Q. Are you taking those medicines every day?

20 A. Yes.

21 Q. Do you have any problems with your balance? Do you
22 have dizziness?

23 A. Yes.

24 Q. Is that problem with your balance related to your -- in
25 your opinion, related to your head injury or is in part

1 related to the fact that you're missing part of your
2 foot?

3 A. Both.

4 Q. How often do you experience dizziness?

5 A. Dizziness? Constantly.

6 Q. Have you been given any kind of prescriptions or have
7 you gone through therapy for the dizziness problems
8 that you have?

9 A. Yes.

10 Q. Did that therapy for the balance and dizziness provide
11 you any relief?

12 A. I didn't have -- I didn't have therapy for my balance;
13 it was just for my shoulder.

14 Q. Did you have any what they call vestibular exercises,
15 if you know, for the dizziness?

16 A. No, I was just given medicine.

17 Q. Now, do you have any problems with your short or your
18 long-term memory?

19 A. Yes.

20 Q. Do you have more problems with short term or long-term
21 memory?

22 A. I don't understand.

23 Q. If I were to tell you something today would you have a
24 problem remembering what I told you tomorrow?

25 A. Yes.

1 Q. Do you have any problems with directions, following
2 directions either to a location -- if I were to tell
3 you to go to the local Walmart would you have problems
4 with following directions that I would provide you in
5 writing?

6 A. Yes. Yes, but I would have more difficult than to find
7 out what am I looking for.

8 Q. Okay. So, do you notice that you have problems -- if
9 you have to go to a grocery store and pick up groceries
10 for your household do you have problems with
11 remembering what you came to the store to get?

12 A. Yes.

13 Q. Mr. Fragoso, did you have something to add?

14 A. Yes. About the headaches that I have, I have more
15 severe headaches when I'm trying to concentrate.

16 Q. Okay.

17 Commissioner Wilkerson: Are you having a headache
18 right now?

19 A. Yes. It's started a little bit more -- more than
20 regularly.

21 Q. Okay. So, being in this courtroom with me asking you
22 questions is causing you an increased amount of a
23 headache?

24 A. Yes.

25 Q. Mr. Fragoso, do you have problems with your hearing?

1 A. Yes.

2 Q. And do you have problems hearing out of one (1) ear,
3 both ears?

4 A. Both.

5 Q. You're obviously hearing me; you're answering my
6 questions. Tell me how the problem with your hearing
7 has affected you. Do you have problems hearing high
8 noises, low noises? Do you have -- have problems with
9 the clarity of what I'm saying?

10 A. I hear like a buzzing in my ears, like -- like it's a
11 clog -- like I have a clog in my ear.

12 Q. Are those sensations present with you all the time?

13 A. Not all the time.

14 Q. How often do those symptoms of buzziness -- buzzing and
15 clogged sensations affect you?

16 A. Between three (3) or four (4) times a week.

17 Q. Mr. Fragoso, I want to ask you -- I'm -- I'm going to
18 come back to your -- to your head and -- and brain
19 issues. I want to move to your shoulder. I understand
20 that you got some treatment for your shoulder; is that
21 right?

22 A. Yes.

23 Q. And is that your left shoulder?

24 A. Yes.

25 Q. Okay. And did Dr. Merrill treat you for your shoulder?

1 A. Yes.

2 Q. Okay. What problems do you have with your shoulder?

3 A. When I move my shoulder hurts. If I try to lift my arm
4 it will hurt. When I go to sleep it bothers me. I
5 don't have the same strength that I used to have. When
6 I try to grab something I couldn't hold it long enough.
7 When I try to turn my neck to either side it bothers
8 me.

9 Q. When you say when you turn your neck from either side
10 it bothers you; are you referring to your shoulder now
11 or are you telling me about your neck bothering you?

12 A. In both of them. Both.

13 Q. Okay. You had some fractures in your back that was
14 diagnosed down at the Medical University of South
15 Carolina. Do you still have ongoing problems with your
16 neck, your middle back, and your lower back?

17 A. Yes.

18 Q. Okay. Tell the Commissioner what kind of problems you
19 have with your neck, your middle back, and your lower
20 back.

21 A. If I sit down for a long period of time it starts
22 bothering me, like the lower back, my back. I cannot
23 stay too long of a time sitting down. My neck, I
24 cannot move it freely because it bothers me. I feel
25 like I have like a -- a something in my throat.

1 Q. And let me switch gears real quick since you mentioned
2 that. Do you believe that that's a problem that
3 relates back to the tracheotomy that you had done?

4 A. I -- I don't know. I don't understand.

5 Q. I believe you testified in your deposition that you
6 have problems with -- with choking on your saliva; do
7 you still have problems with that?

8 A. Yes.

9 Q. Describe for the Commissioner when you experience those
10 symptoms.

11 A. When I'm drinking any kind of liquid or my food I feel
12 like I'm choking. Even with my own saliva I feel like
13 I'm choking. I feel like it's dry -- dryness on my
14 throat.

15 Q. Does that affect you when you go to -- try to go to
16 sleep at night?

17 A. Yes. I have problems to breathe.

18 Q. Have you -- have you told the doctor about those
19 problems?

20 A. Yes.

21 Q. Did they offer you any treatment for that?

22 Mr. Burkett: Objection to hearsay.

23 Commissioner Wilkerson: You can't --

24 Mr. Chandler: I think he can --

25 Mr. Burkett: I mean, he's going to answer what

1 they told him but I think any treatment would be
2 in the medical records if they have recommended
3 anything. The medical records speak for
4 themselves.

5 Commissioner Wilkerson: -- yes. I mean, they
6 speak for themselves.

7 Q. Mr. Fragoso, you were talking about your neck and your
8 back symptoms. Do you have problems with your neck and
9 your back every day?

10 A. Yes.

11 Q. Are you prescribed medicines for those problems as well
12 as for the headaches?

13 A. For my headache, yes. But for my neck I think they
14 only gave me a couple of injections.

15 Q. Do you have problems with your hips?

16 A. Yes.

17 Q. What problems do you have?

18 A. When I bend down or when I'm trying to stand up I feel
19 like someone is cutting me out.

20 Q. Do you have problems with your legs?

21 A. No.

22 Q. Do you have problems with your right foot?

23 A. Yes.

24 Q. What problems do you have?

25 A. I cannot walk for a long period of time because I've

1 got inflammation. I have a lot of balance problems.
2 And I can't walk like I used to, like, just do some
3 walking. Occasionally I feel like a -- some kind of --
4 sort of a pain on where they cut my fingers -- I mean
5 toes and it's -- it's a permanent pain. I feel like --
6 I have a -- like a very sensitive part or section.

7 Q. Mr. Fragoso, do you have a -- a special pair of shoes
8 that were made for you?

9 A. Yes. Yes.

10 Q. Okay. And do you have those on today?

11 A. Yes.

12 Q. Do you wear those everywhere you go?

13 A. Yes.

14 Q. Do you also have a -- a special insert for your right
15 shoe?

16 A. Yes.

17 Q. Are your shoes still holding up or are they wearing out
18 at this point?

19 A. Well, it's just worn out. Yes, they're worn pretty
20 bad.

21 Q. Do you even wear shoes inside your house?

22 A. I try not to use them too much because I'll get tired.

23 Q. If you didn't have the shoes on or the special
24 prosthetic device inside of your shoe would you have
25 even more problems with walking and balance?

1 A. Oh, yes. Before I had the prosthetic insert I have a
2 lot of problems with trying to keep my balance. Yes,
3 the insert, the prosthetic -- the insert.

4 Q. Mr. Fragoso, who do you live with?

5 A. With two (2) friends.

6 Q. Okay. Do you provide financial support for that
7 household at all?

8 A. Yes.

9 Q. So, you use some of your weekly check to pay for things
10 like groceries, and the electric bill, and the rent?

11 A. Yes.

12 Q. Mr. Fragoso, have you had a relationship with a member
13 of the opposite sex since your accident in 2007?

14 A. No.

15 Q. And -- and why haven't you been able to engage in a
16 relationship with a -- a female since this accident?

17 A. I don't feel too social. I don't feel like I can't be
18 too social or socialize with -- with any -- anybody.

19 Q. Do you -- so, do you have problems socializing with
20 both men and women?

21 A. Yes.

22 Q. And, specifically, what problems do you have
23 interacting with other people?

24 A. I don't -- no, I don't feel comfortable talking to
25 them. It feels like they're going to renounce him, you

1 know, for his physical appearance on his foot.

2 Interpreter: Reject him, that's what I meant.

3 Q. Okay. So, you feel like you're going to be rejected?

4 A. Yes.

5 Q. Did you have relationships, physical and social, with
6 men and women before this accident?

7 A. Not very much, sir. I was social. I will talk to more
8 people and I would like to find more friends.

9 Q. And let me -- let me get that straight. Before this
10 accident is your testimony that you were a more social
11 and outgoing person?

12 A. Yes.

13 Q. Do you have depression now?

14 A. Oh, so the doctor told me.

15 Q. And I don't want you to tell us what the doctor told
16 you but I want you to tell us from your -- your
17 personal recollection of yourself knowing how you were
18 before this accident and knowing how you are now; do
19 you have -- do you have problems with your -- your
20 mental, your -- your personality. Has your personality
21 changed because of this accident?

22 A. Oh, yes, it has changed. I feel today like I -- I can
23 get irritated for any -- anything. I feel like I can't
24 maintain any kind -- some sort of a conversation with
25 anybody.

1 Q. So, do -- do you have mood changes?

2 A. Yes.

3 Q. And are those mood changes in a bad way; are you angry
4 easily?

5 A. Oh, yes.

6 Q. Are you frustrated easily?

7 A. Yes. I get so frustrated that I just go to my room and
8 shut the door.

9 Q. Are you sad?

10 A. Yes. There's times when I feel a few minutes happy and
11 other times I feel like I don't belong there or here.

12 Q. Mr. Fragoso, do you believe that you're physically or
13 mentally capable of returning to any kind of work that
14 you've ever done before in your working life?

15 A. No.

16 Q. And how do you spend your waking hours at home everyday?

17 A. I try to get up. I fix my breakfast, make my bed. I --
18 I try to distract myself by listening to the music.
19 When I can I just kind of try to dust up my room. And
20 in the afternoons I'll just fix myself something to
21 eat.

22 Q. Does he feel like that he's a prisoner in his own home?

23 Mr. Burkett: Objection to leading. It's a pretty
24 -- pretty heavy questioning, a very suggestive
25 question.

1 Commissioner Wilkerson: Yes.

2 Mr. Chandler: Well --

3 Mr. Burkett: It's the very definition of leading.

4 Commissioner Wilkerson: Just redirect it in a
5 different manner.

6 Mr. Chandler: -- okay.

7 Q. Do you feel like you have the mental or physical
8 ability to go outside of your home?

9 A. Sometimes I feel like doing something but my shoulder
10 pain won't let me. I feel like when I'm in pain in my
11 shoulder I just don't want to do anything and I -- I
12 have the other people do the cleaning and he just don't
13 feel like doing anything because his -- his pain in his
14 shoulder it -- it increases. And leaving the house is
15 kind of hard because he can't walk for a long distance
16 and he feels like a sharp pains in his foot.

17 Q. I forgot to ask you this earlier but the medical
18 records indicated that you have problems, and you
19 testified I think, in your deposition, that you have
20 problems with your vision. Do you still have problems
21 with your vision?

22 A. Yes.

23 Q. Tell the Commissioner what kind of problem you have
24 with your vision.

25 A. I have blurry vision. Occasionally I can see like a

1 sparkling lights especially when I have the dizziness.
2 I have a problem when I take a shower; I don't feel
3 comfortable doing it sometimes because I feel like I'm
4 going to go backwards losing my balance.

5 Q. Okay. And is that because of the dizziness that you
6 feel?

7 A. Yes.

8 Q. Okay. And when you have headaches that are bad
9 headaches how do you treat those headaches? Do you
10 have to go lay down? Do you have to go put ice packs
11 on your head? What do you do to treat it besides the
12 medicines that the doctor gives you?

13 A. I do take the medicine and it tends to slow down my
14 pains but it doesn't go away all the way.

15 Q. Okay. Answer any questions that Attorney Burkett has
16 for you.

17 Commissioner Wilkerson: Let me ask you one (1) more
18 question. Can he give me his month, day, and year of
19 birth?

20 A. October the 4th, 1980.

21 Commissioner Wilkerson: And that's his date of
22 birth? Okay.

23 A. Yes.

24 Commissioner Wilkerson: October 4th, 1980?
25 October the 4th, 1980; is that correct?

1 A. Yes.

2 Commissioner Wilkerson: Tell him we have the same
3 birthday. Mr. Burkett.

4 CROSS-EXAMINATION

5 By Mr. Burkett:

6 Q. Just briefly, Mr. Fragoso. You -- you live with two
7 (2) roommates and sometimes your uncle; is that right?

8 A. Yes.

9 Q. And -- and we already discussed you share the expenses
10 with your roommates, correct?

11 A. Yes.

12 Q. All right. And you use your weekly benefit check to
13 take care of the things you need to take care of,
14 correct?

15 A. Yes.

16 Q. And sometimes if you need to go places your roommates
17 will drive you; is that right?

18 A. Yes.

19 Q. And other times you'll drive yourself, correct?

20 A. Sometimes.

21 Q. Okay. And only because I know Mr. Chandler's going to
22 jump up, you testified you were twenty-nine (29) but
23 you're actually thirty (30); is that right? You'll be
24 thirty-one (31) this year, in October?

25 A. Yes.

1 Q. okay.

2 Mr. Burkett: I don't have anything further, Your
3 Honor.

4 Commissioner Wilkerson: Thank you. Anything
5 else?

6 Mr. Chandler: That's the Claimant's case.

7 Commissioner Wilkerson: Thank you. Thank you.

8 This concludes the hearing. If I could meet with
9 the Attorneys for a few minutes. Thank you.

10 (THERE BEING NO FURTHER QUESTIONS, THE HEARING CONCLUDED AT
11 11:38 A.M.)

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

CERTIFICATE

Be it known that I took the foregoing South Carolina Workers' Compensation Commission Hearing of Hector Gomez Fragoso, vs. Kade Construction, LLC;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript of 49 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action;

Witness my hand and seal this 19th Day of July, 2011.



Gloria Davis
Notary Public for South Carolina
My Commission Expires 1/22/12

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BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0717624

HECTOR G. FRAGOSA,	)	
	)	FULL COMMISSION HEARING
CLAIMANT,	)	PANEL B
vs.	)	
	)	COMMISSIONER McCASKILL-CHAIR
KADE CONSTRUCTION, LLC,	)	COMMISSIONER BARDEN
	)	COMMISSIONER WILLIAMS
EMPLOYER,	)	
	)	
and	)	
	)	
KEY RISK INSURANCE	)	
COMPANY,	)	
	)	
CARRIER,	)	
DEFENDANTS.	)	
	)	

THE WORKERS' COMPENSATION HEARING, TAKEN BEFORE
CORA ELLIS BRUTON, A NOTARY PUBLIC IN AND FOR THE
STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF
2:50 P.M., MONDAY, MARCH 19, 2012, SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION, 1333 MAIN STREET,
COLUMBIA, SOUTH CAROLINA 29202.

**CORA ELLIS BRUTON
COURT REPORTER
131 BROWNING COURT
LEXINGTON, SOUTH CAROLINA 29073
803-397-0189**

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 803-397-0189

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(No Exhibits Proffered)

CORA ELLIS BRUTON - COURT REPORTER
 131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
 803-397-0189

1 THE COURT REPORTER: Today is March 19, 2012.

2 This is South Carolina Workers' Compensation Case
3 Number 0717624. This is the case of Hector G.
4 Fragosa, Claimant, versus Kade Construction, LLC,
5 Employer and Key Risk Insurance Company is the
6 Carrier. The Appellant is the Claimant represented by
7 Attorney Stephen B. Samuels. The Respondent is
8 represented by Attorney Michael W. Burkett.

9 Each side is allowed ten minutes for oral
10 argument and Appellant three minutes in reply. You
11 are requested to argue the grounds of exception and
12 stay within the record.

13 THE COURT: All right. Mr. Samuels.

14 BY MR. SAMUELS: Thank you, Your Honor. May it
15 please the Court. I think Mr. Chandler was intending
16 to be here but we got moved up a little bit and he was
17 not able to make it all the way from Myrtle Beach.

18 Regarding this case, Your Honors, November 1st,
19 2007 Hector Fragosa was working on a construction
20 project in Marion, South Carolina. He was on the roof
21 of a garage, a construction crane broke loose, hit him
22 in the head, fractured his skull and knocked him off
23 the roof onto the ground. He was transported to MUSC
24 by helicopter because he was not breathing; they
25 performed an emergency tracheotomy. He remained in a

1 coma for two weeks and remained at MUSC for a full
2 month. Ultimately Mr. Fragosa suffered too many
3 injuries to list, but we listed in the Brief. But the
4 most important injuries for this appeal; the matter
5 here today, he fractured his skull, midline sagittal
6 to the front and parietal. He had subdural and
7 epidural hematomas. He had bilateral contusions to
8 the frontal lobe of his brain. Why do these
9 particular injuries matter; because they are
10 conclusive evidence of physical brain injury? Here
11 it's undisputed that Mr. Fragosa is permanently and
12 totally disabled; undisputed that he requires lifetime
13 medical treatment. It's even undisputed he suffered
14 physical brain damage in this accident. Despite that
15 and these are the issues on Appeal, the Single
16 Commissioner held that Mr. Fragosa has not suffered a
17 physical brain injury and is not entitled to lifetime
18 compensation benefits. He found in the Facts, "Based
19 on the greater weight of the evidence I found there
20 has not been a physical brain injury as it does not
21 meet the criteria established under the South Carolina
22 Workers' Compensation Act."

23 Respectfully, Your Honors, these findings are
24 completely against the evidence. There's no way --

25 COMMISSIONER BARDEN: Well, what about awarding

1 the brain at a minimum pursuant to -- well, he got an
2 impairment rating in his favor, so I guess that's --
3 okay. All right. Go ahead, sir. I'm sorry. I'm
4 thinking out loud here.

5 MR. SAMUELS: You know, going through the record
6 and looking at the Findings and listening to the
7 arguments, there's really only one Finding that could
8 even remotely supports the Conclusion of no physical
9 brain damage and that's from the neuropsychologist
10 Mark Wagner's report. And the Finding there is -- and
11 this is Finding of Fact on page 10. Mark Wagner noted
12 that the Claimant sustained a skull fracture and acute
13 underlying minor structural change to the brain. Dr.
14 Wagner concluded the possible study such as the ENG,
15 CT and MRI were read as remarkable in quoting the
16 report, "Demonstrating structural resolution to the
17 work related injury." And I'll say two things on
18 that. First of all --

19 COMMISSIONER BARDEN: Did you say remarkable or
20 unremarkable?

21 MR. SAMUELS: Unremarkable.

22 COMMISSIONER BARDEN: Okay.

23 MR. SAMUELS: I'd say first off a
24 neuropsychologist while certainly qualified to give an
25 opinion on physical brain damage would have to do so

1 based within his level of competence in subliminal
2 testing not based on reading scans. And that quote
3 was actually a quote within a quote when they're
4 simply reading a scan. But essentially the argument
5 made by the Defendants is, well, yeah, he had a
6 physical brain injury but it got better and they argue
7 that means he's got a loss of use of his brain, but
8 not physical brain damage. Your Honors, that is
9 simply not true. He had a brain bleed; the brain
10 bleed reabsorbed; because it reabsorbed the hematoma
11 is no longer visible on the CT and MRI scan. There's
12 overwhelming evidence of a typical brain injury with
13 permanent deficit proving it's a physical brain
14 injury. The authorized treating neurologist, Dr.
15 Sandoz, opined to a reasonable degree of medical
16 certainty that Mr. Fragosa suffered physical brain
17 damage that has rendered totally and permanently
18 disabled. He assigned 46 percent whole person
19 impairment to the brain injury based on clinical
20 dementia and he repeated throughout his records,
21 throughout his deposition that this is physical brain
22 damage. In fact, Dr. Wagner agrees, because Dr.
23 Wagner says, "Trauma to the body and skull, acute
24 underlying minor structural change to the brain."
25 Structural change to the brain is physical brain

1 injury and while he goes on to say the previous quote
2 about demonstrating structural resolution he then goes
3 on to say, "He has persisting -- persisting cognitive
4 complaints, he has existing symptoms of a concussive
5 syndrome, he has abnormal sight, he has lost his
6 (inaudible) complex attention concentration. He may
7 have some degree of (inaudible) deficiency." What
8 that tells us, Your Honors, is that that's the
9 sequelae of the physical brain injury because the
10 reason for those problems is the brain damage. This
11 man has a severe residual damage. He's got proven
12 cognitive deficit, he's got health problems,
13 dizziness, seizures and difficulty in complex tasks
14 and it's from the brain injury; it's not from
15 medication, it's not a psychological overlay, not any
16 other cause but brain injury. And you've got a
17 qualified treating neurologist of physical brain
18 injury. You've got a neurologist who basically says
19 the same thing; just that the single Commissioner took
20 a long sentence out of context and that was the basis
21 for the erroneous rule. In fact, Your Honors, there
22 are plenty of brain injury cases; most of them are
23 close calls between many neuropsychologists and their
24 battle with the expert; many of them are close calls.

25 COMMISSIONER WILLIAMS: Y'all deposed Dr. Sandoz

1 and he said there was no physical brain injury or
2 damage on change in function. There is little
3 difference in the CT, ENG results (inaudible). Is
4 that correct or am I reading the record wrong?

5 MR. SAMUELS: I think you're reading the record
6 wrong; if I can specifically go to the testimony. Mr.
7 Burkett asked him in the deposition, "As far as
8 physical findings on his brain if you're to look at
9 the scans is it fair to say there is no physical
10 damage to the brain that we can see?" He doesn't ask
11 him is there physical damage to the brain or is there
12 no physical damage to the brain. He says is there
13 physical damage to the brain that we can see? Dr.
14 Sandoz replied, "There's no evidence of any damage on
15 the brain that we can go and see, that's correct."

16 COMMISSIONER WILLIAMS: I think the doctor opined
17 there's something that we can't see.

18 MR. SAMUELS: Because, Your Honor, what he's
19 talking about is the existing CT and MRI Scans, they
20 don't pick up the diffused actual injury. What they
21 can show -- what they will show is that the brain
22 bleed is reabsorbed. This is -- this is like a
23 tsunami.

24 COMMISSIONER WILLIAMS: Okay, so you could see it
25 before on the scan and not see it -- I think it's

1 almost where we couldn't see it before and it's still
2 there?

3 MR. SAMUELS: Because --

4 COMMISSIONER WILLIAMS: And again, would you
5 agree with me that the body part that's injured in the
6 brain can heal; the swelling can go down?

7 MR. SAMUELS: Well, if they -- if there's only
8 swelling and no damage then it can go down. The
9 swelling will go down, while swelling itself isn't
10 brain damage, it's circumstantial evidence of brain
11 damage.

12 COMMISSIONER WILLIAMS: So -- and maybe I -- and
13 maybe it's obvious. If the brain is injured can it
14 not heal? Or does the brain not heal, is that the one
15 organ that does it not heal?

16 MR. SAMUELS: I think, Your Honor, --

17 COMMISSIONER WILLIAMS: I guess -- probably that
18 you may not know. Probably not a fair question.

19 MR. SAMUELS: I don't think that specific
20 question was answered -- was asked, but I think the
21 doctor's opinion was --

22 COMMISSIONER WILLIAMS: How was the doctor not
23 speculating when he says -- Michael asked him, you
24 know, is there any physical brain damage that -- that
25 we can see? If you can't see it how else -- I mean if

1 you can't state that there's brain damage if you can't
2 see it I'm just wondering how he got to the conclusion
3 or how you can tell me that's the result of his injury
4 is brain damage.

5 MR. SAMUELS: Well, I have to go back to the
6 tsunami example, Your Honor. We have the tidal wave
7 that sweeps in and causes all sorts of damage; then it
8 -- the water recedes. You can't see the water
9 anymore, but the damage remains.

10 COMMISSIONER WILLIAMS: I agree with that. Was
11 there any neuro-psyche tests or any cognitive
12 functioning testing?

13 MR. SAMUELS: Yes, sir, by Dr. Mark Wagner.

14 COMMISSIONER WILLIAMS: Okay. And Dr. Wagner's
15 tests showed?

16 MR. SAMUELS: Dr. Wagner's tests showed
17 specifically that --

18 COMMISSIONER BARDEN: And that's on page 655?

19 MR. SAMUELS: It's on page 614 --

20 MR. BURKETT: It's on page 655.

21 COMMISSIONER BARDEN: 655 says that cognitive
22 findings were mostly normal with (inaudible) contained
23 no contact of (inaudible) concentration. Then it says
24 (inaudible) also contributed to his disability. Is
25 that what your record is saying?

1 MR. SAMUELS: It is page 655, Your Honor. I had
2 the wrong page and I apologize.

3 THE COURT: Thank you. Mr. Burkett.

4 MR. BURKETT: Thank you, Commissioners.

5 COMMISSIONER WILLIAMS: Mr. Burkett, let me ask
6 this. Off the hearing notes, if someone has a
7 contested finding, the finding then -- let me say
8 concussion and a lot of other physical damage, then
9 42-9-10(c), will it always result in finding as a
10 result of physical damage or can we go to the
11 Schedule? I think it was 67-1101.

12 MR. BURKETT: I think that's what the schedule
13 says. I think the law presupposes something and I can
14 give you an example. If you are a Claimant and you
15 lose both your legs to amputation, you're confined to
16 a wheelchair from right then for the rest of your
17 life; you're going to recover 500 weeks. If that same
18 person who may lose both of his legs because he's
19 paraplegic is confined to a wheelchair all the right
20 -- the result is the same; the law presupposes
21 additional medical complications because of the
22 paraplegia that goes along with it. So the law in
23 that case allows this 500 -- this exclusion of 500
24 weeks; we allow the lifetime indemnity benefits. In
25 this case -- and so we have is -- is does that kind of

1 law covers the physical brain damage, that's the
2 question is what is the physical brain damage and what
3 is covered under Regulation 67-1101. In this case I
4 think it's important to note that for all of the
5 things that we're alleging and how horrible this case
6 is a couple of things we noted; one, not at one time
7 ever did they make a motion to have anybody appointed
8 Guardian Ad Litem for the Claimant. In fact, he was
9 at the hearing and testified on his own behalf and how
10 he was doing, so yet he's entitled to -- he's got such
11 a significant brain injury that he's entitled to
12 lifetime benefits. Between August 2009 and November
13 -- I'm sorry, yeah, between August 2009 and November
14 2010 the Claimant didn't see the authorized doctor,
15 Dr. Sandoz one time, didn't have a single prescription
16 filled, didn't go to a single appointment. It wasn't
17 until after Dr. Sandoz' deposition where all of this
18 started to come up and the Claimant started going to
19 regular appointments again; which is fine, that was
20 the authorized doctor and he takes some medications
21 for headaches and things like that. So -- so somebody
22 who has such a severe physical brain damage case suit
23 and has lifetime indemnity, doesn't see a doctor for
24 the one condition that entitles him to that for over a
25 year; no Guardian Ad Litem is appointed. Like I said,

1 the law presupposes these things and they'll tell you
2 that -- and I think they even said in the Brief the --
3 the record is replete with Dr. Sandoz saying physical
4 brain damage. There are over 600 pages of medical
5 records in these three stacks and you won't find it;
6 you won't find the words physical brain damage used
7 until right before the hearing and seven months after
8 Dr. Sandoz' deposition on page -- I just had it --
9 page 882 of the APA submissions is a letter from the
10 Claimant's attorney with a yes or no circled, does the
11 Claimant have physical brain damage, and refers to CT
12 Scans and things like that, but it doesn't reference
13 what CT Scans. Now, there were no CT Scans after 2009
14 so whatever was in existence at the time of Dr.
15 Sandoz' deposition when I flat out asked him, "Is
16 there physical brain damage? Is there anything we can
17 see?" He said, "No.", except he used the work
18 traumatic brain injury. In the letters that he wrote
19 from page 711 and 716 APA submissions he used the term
20 "traumatic brain injury". So traumatic brain injury
21 is the same as physical brain injury; I admit I might
22 have a problem. But I think physical brain injury, in
23 fact, the General Assembly and Legislature has put a
24 burden on us with something we can physically see,
25 something that requires something more here. Now,

1 it's -- it's -- in their Brief there's a question
2 about Dr. Wagner and how much he can say and what he
3 can't say and everything like that, but if you look at
4 their -- their report from Dr. Brabham and Dr. Brabham
5 reaches a conclusion the Claimant has physical brain
6 damage, but what Dr. Brabham does he looks at page 655
7 of the APA submissions and says, "Mr. Gomez had a
8 serious -- a very serious work related injury
9 resulting in trauma to his body and skull. He had a
10 skull fracture with acute underlying minor structural
11 change to the brain", period. They left off the rest
12 of that which was, "Follow up structural and
13 functional studies have been read as unremarkable
14 (inaudible). Dr. Wagner didn't interrupt these; he's
15 saying what the radiologist who read the reports --
16 who produced the reports had said these are all -- all
17 resolved. So it's funny to sit here and say they
18 don't need this finding of physical, yet they're
19 leaving out Dr. Brabham's -- it's in the Commission's
20 file, there was a case synopsis handed up in the Trial
21 Brief. And in the Trial Brief by the Claimant's
22 attorney it said -- it mentions Dr. Sandoz' report on
23 number 3, the very last page and it leaves out that
24 very important, all these things have been resolved.
25 So to stand here and say this isn't important, this

1 isn't what we need and conveniently leave it out of
2 your vocational report and leave it out of your Trial
3 Brief is a little bit disingenuous. Really if you
4 boil this case down to its skeletal parts it's, what
5 is a physical brain injury for purposes of the
6 Workers' Compensation Act? Our position is that it's
7 something physical that you can see. I have a
8 Claimant had a nail go through his eye, it went into
9 his frontal lobe, when they did the surgery some of
10 his frontal lobe came out and you can see it. You can
11 take scans today and see where it's missing and that
12 is a physical change to the brain. Dr. Sandoz, like I
13 said, repeatedly said traumatic brain injury in his
14 physician and his notes, what have you. It's -- also
15 I want to point out that in their Brief on page 10 it
16 says, "It's not at all unusual for a physical brain
17 injury not to be visible on conventional CT and MRI
18 Scans." Once again, they're noting that you've got to
19 be able to see something. You need PET Scans and
20 (inaudible) MRI Scans, so they're acknowledging and --
21 this was necessary just to see what's here, the other
22 problem I have with that paragraph on page 10 is that
23 it's full of medical opinion that's not -- that's not
24 supported anywhere, nobody said that except for Mr.
25 Sandoz in this case, so in that paragraph themselves,

1 they are admitting that there are -- there's a need to
2 see something. And that's just not the case here and
3 so I'm -- I'm probably oversimplifying it, but I think
4 there's something you need to see. Dr. Sandoz said
5 you can look at all the Scans you want; you're not
6 going to see anything. He does have cognitive
7 deficits, what have you -- so that's why we have
8 Regulation 67-1101. So the short answer to your
9 question is, yes, you can be awarded for the brain and
10 not have a physical brain injury in South Carolina.

11 COMMISSIONER McCASKILL: As I understand what
12 you're saying if it is a physical brain injury you've
13 got to be able to see it?

14 MR. BURKETT: That is our position there would be
15 some physical change that something would pick up on a
16 Scan, whether it be -- I don't know what kind of Scan,
17 but any kind of Scan and this -- you won't see it in
18 any of these 700 pages of medical records; it's just
19 not there. The first time Dr. Sandoz -- the word
20 physical comes out of his mouth -- it didn't come out
21 of his mouth, he circles yes on page -- he circled yes
22 on the questionnaire page 882, APA submissions right
23 before the hearing. So at the very least he's got Dr.
24 Sandoz contradicting himself without any medical
25 explanation whatsoever because of what he testified

1 to.

2 Thank you.

3 THE COURT: Okay. Mr. Samuels.

4 BY MR. SAMUELS: Thank you, Your Honors. Again,
5 for the rest of us 67-1101, this is a simple
6 dichotomy. 67-1101 is how the Commission is supposed
7 to award a brain injury in a physical brain injury
8 case where the Claimant is not also permanently and
9 totally disabled by that. It's pretty darn easy; it's
10 just the same as 42-9-10, totally disabled, totally
11 disabled; 42-9-30 and 67-1101 is the disability for
12 somebody who's still working under the scheduled
13 member. The medical model, that Your Honors, is a red
14 herring, that's why we filed the Reply Brief. I think
15 that sort of explains that distinction. You go back
16 and look at the medical records. The argument I
17 heard, a brain injury can only be a physical brain
18 injury if you can see it; that reminds me of the
19 argument advanced in Reid Richards, but that would be
20 incomplete -- I believe the case where the Defense
21 position in that case was, we interpret paraplegia as
22 total loss of function below that level. The Court
23 said, no, that's not it, because the doctors can give
24 you an opinion on what the definition is and that's
25 what the doctor had done here. Both Dr. Sandoz and

1 Dr. Wagner have explained why this is physical brain
2 damage. Dr. Sandoz gave an explicit opinion. Now we
3 do have a little bit of a dichotomy between the terms
4 the doctors used, which is traumatic brain injury and
5 what lawyers use, which is physical brain injury, but
6 at his deposition as a follow-up to that mysterious
7 question about if you see the brain damage, the
8 question is "Was there a jar to the brain casing and
9 concussion in an area. The answer, "The concussion
10 should resolve." The case that we're looking at in
11 (inaudible) took a longer period of time." Answer;
12 The authorized treating neurologist said there had
13 been some damage and injury to the function of the
14 brain. And again -- once again, we know, we've got
15 dizziness, we've got proven cognitive deficits, proven
16 on neuropsychological examining. We've got a rating
17 -- 46 percent rating for brain damage, for clinical
18 dementia, including dizziness, vertigo, balance
19 problems and all these things that show that the brain
20 damage is permanent. And again, you can't see the
21 water, you can't see the blood, because that tsunami
22 has receded. But what we know about the testing on
23 this --

24 Is it all right if I finish my sentence, Your
25 Honors?

1 Is that the physical brain damage hasn't left
2 this poor man. He has all of these problems
3 documented by both of the doctors.

4 THE COURT: Thank you very much.

5 (The hearing concluded at 3:11 p.m.)
6
7
8

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON) CERTIFICATE

BE IT KNOWN THAT I TOOK THE FOREGOING
 WORKERS' COMPENSATION HEARING;

THAT I WAS THEN AND THERE A NOTARY PUBLIC IN
 AND FOR THE STATE OF SOUTH CAROLINA-AT-LARGE;

THE FOREGOING TRANSCRIPT CONSISTING OF 19
 TYPEWRITTEN PAGES REPRESENTS A TRUE, ACCURATE AND
 COMPLETE TRANSCRIPTION OF THE TESTIMONY SO GIVEN AT
 THE TIME AND PLACE AFORESAID TO THE BEST OF MY SKILL
 AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF
 ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE
 OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES
 HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

WITNESS MY HAND AND SEAL THIS 31ST DAY OF AUGUST,
 2012.

 CORA ELLIS BRUTON
 NOTARY PUBLIC FOR SOUTH CAROLINA
 MY COMMISSION EXPIRES JANUARY 18, 2015

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 MAY 27 2015
 SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2014-002354

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MAY 27 2015

SC Court of Appeals

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all
material proposed to be included by any of the parties and not any other material.



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May 27, 2015
Columbia, South Carolina