THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0717624

Appellate Case No. 2014-002354

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

v.

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

PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC

The Appellant, by and through his undersigned attorneys, hereby files this Petition for Rehearing and Rehearing en banc. On March 30, 2016, this Court issued an opinion affirming the the Decision and Order on Remand of the South Carolina Workers' Compensation Commission. Fragosa v. Kade Construction, LLC, Op. No. 2016-UP-139 (S.C.Ct.App. filed March 30, 2016). The Court had previously 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, law and arguments raised on the issues of (1) substantial evidence requires more than a scintilla; (2) the Commission exceeded its authority on remand by making new findings of fact contradicting its previous findings; (3) the determination of physical brain damage must be made at MMI; (4) Fragosa would not be permanently and totally disabled but for the physical brain damage; and (5) application of section 42-9-10(c) to established facts is an issue of law. Appellant would further show that additional issues were raised in his original Petition for Rehearing following the November 27, 2013 opinion which have not yet been addressed by the South Carolina Supreme Court. The Petitions for Rehearing filed following that decision is hereby attached and incorporated by reference.

As this case involves significant issues never decided by our appellate courts, Appellant petitions for *en banc* review and rehearing of this case. Appellant would show that no case has yet applied the two part test set forth in Crisp and Sparks. In Sparks, the South Carolina Supreme Court held "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., 406 S.C. 124, 130, 750 S.E.2d 61, 64 (2013). In Crisp, the court further explained: "Inherent in the requirement that the damage to the brain be severe is the requirement that the **worker is unable to return to suitable gainful employment.**" Crisp v. SouthCo., Inc., 738 S.E.2d 835, 401 S.C. 627 (2013). The court further affirmed the proposition stated in Pearson that the brain damage not be *sole* cause of the employee's inability to return to work. See Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998)((affirming award of lifetime benefits for physical brain damage despite evidence in the record that psychological deficits contributed to claimant's disability).

ARGUMENT

1. The Court applied an incorrect and improperly deferential Standard of Review to workers' compensation cases.

In its decision, the Court cited the correct standard of review: "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 the administrative agency reached in order to justify its action." Fragosa II, *quoting* Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005). However, it appears the Court may have actually applied the outdated "any evidence" standard used before the passage of the Administrative Procedures Act (APA) in 1977. S.C. Code Ann. § 1-23-310, et seq. (1977 and as amended).

Prior to passage of the APA, "an award of the [Workers' Compensation Commission was] conclusive and binding on judicial review as to all questions of fact, if such factual findings are supported by *any competent evidence*." Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981)(emphasis added). In Lark, the Supreme Court held the "substantial evidence" standard of review supplanted the "any evidence standard." Id. The Lark definition was reaffirmed yesterday in Hartzell v. Palmetto Collision, LLC, Op. No. 27260 (S.C.Sup.Ct. filed April 13, 2016)(Shearouse Adv.Sh. No. 15 at 14).

In the instant case, there is not substantial evidence to affirm the Commission's finding that Fragosa's "brain injury" did not rise to the level of physical brain damage. The Commission, on remand, disregarded its original findings – findings which would have conclusively supported an award of lifetime compensation for permanent physical brain damage. Instead the Commission

pored over 800 pages of medical records to find any possible notation of somewhat normal brain function – ignoring competent evidence and resorting to speculation. It then cobbled together these random nuggets to bolster its already erroneous conclusion that Fragosa did not meet the criteria for physical brain damage.[1]

Respectfully, the Court overlooked the two key findings in the original Decision and Order which *require* a finding of physical brain damage under the Crisp and Sparks framework. In its original Order, the Commission found "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled . . . " [R. p. 20, lines 5 - 10]. These two findings do not appear in the Order on Remand. Appellant believes the Court may have repeated the same error made by the Commission in removing these most critical findings from the analysis, instead endorsing the Commission's "unusual finesse of reasoning" to identify any scintilla that might support the original ruling. Appellant respectfully requests the Court reconsider the opinion and reverse based on a lack of *competent* substantial evidence to support the Commission's conclusion that Fragosa's permanent loss of normal brain function did not rise to the level of physical brain damage set out in S.C. Code Ann. 42-9-10(c)(2007).

2. The Court overlooked the Commission's previous Findings of Fact confirming physical brain damage when it limited review to the Order on Remand.

In its original Order, the Commission found "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled . . .." [R. p. 20, lines 5 - 10]. Despite these findings – and the evidence supporting them – the

[1]The original conclusion was erroneous because the Commission required brain damage that can be seen" on an MRI or CT scan. This methodology was rejected by the Supreme Court in Crisp.

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. p. 21, lines 11 - 14 (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.

Respectfully, the remand resulted from the Commission's "confusion as to what constitutes a 'finding of fact' and what constitutes a 'conclusion of law'." Black v. Barnwell County, 134 S.E.2d 753, 243 S.C. 531 (1964)(Bussey, J., dissenting). The Commission's findings regarding the 46% permanent impairment for a traumatic brain injury and total disability are unquestionably findings of fact. These findings meet the classic definition as "a specific setting forth of the ultimate facts established by the evidence and which are determinative of the judgment which must be given." Black's Law Dictionary 632 (6th Ed. 1990); cf. Aristizabal v. Woodside-Division of Dan River, 268 S.C. 366, 234 S.E.2d 21 (1977)(where material facts are in dispute the administrative body must make specific, express findings of fact.). These findings are sufficiently specific to meet the permanent and severe standard.

The error lies in Finding of Fact 18, to wit "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. 21, lines 11 - 14 (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 mere happenstance it is labeled as a finding of fact, does not make it so.

The distinction was ably explained a half-century ago in a dissent by Justice Bussey:

> The general rule seems to be that where an ultimate conclusion can be arrived at only by applying a rule of law, the result so reached embodies a 'conclusion of law' and is not a finding of fact and not binding upon the reviewing court. Courts from other jurisdictions have held so-called finding of facts almost identical in wording to the so-called findings of fact here, to be mere conclusions of law. Black v. Barnwell County, 134 S.E.2d 753, 243 S.C. 531 (1964)(Bussey, J., dissenting).

In this case, the Commission was applying the facts – as it found them – to a legal definition of *physical brain damage,* thus making a conclusion of law.

The original findings must remain in place. The Commission on remand does not have authority to dispense with them. It may add to them to explain its reasoning – it cannot ignore what it has already established as fact merely to find different grounds to support an already erroneous decision. Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011)("A court may not . . . exceed its authority and assume the role of a second jury. Rather, the appellate court's instructions circumscribe the trial court's authority on remand.").

As the Court issued a memorandum decision in this case, no analysis was made of the Commission's error of law in discarding its original findings. The Commission did not comply with the remand instructions from this Court. Appellant respectfully requests the Court analyze the Commission's decision and hold the Commission erred in *replacing* its previous findings of fact rather than *explaining* the inconsistency between a 46% permanent impairment from a brain injury accompanied by total disability with a conclusion that the criteria for physical brain damage have not been met.

3. The evidence at MMI confirms physical brain damage.

Hector Fragosa was hit in the head with a crane which knocked him off a roof onto the ground. He suffered a skull fracture with subdural and epidural hematomas along with frontal lobe

contusions – all of which were confirmed with MRI and CT scans. He remained in a coma for 15 days following his accident.[2] Since then, he has suffered from proven cognitive deficits, balance problems, dizziness, seizures, and difficulty with complex tasks – resulting in permanent and total disability. Dr. Sandoz (treating neurologist); Dr. Wagner (Respondent's forensic neuropsychologist) and Dr. Brabham (psychologist and certified brain injury specialist) confirm the permanency of the cognitive deficits. Dr. Sandoz has repeatedly and explicitly stated to a reasonable degree of medical certainty that Fragosa is permanently and totally disabled due to traumatic brain injury resulting in physical brain damage. **He made this determination at the point Fragosa reached MMI.** The evidence of physical brain damage is simply overwhelming. See Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997)(affirming award of lifetime benefits for physical brain damage when "[a]t most, one physician, Dr. Woodward, indicated that he could not determine whether the greater cause of Pearson's disability was his psychological deficits or his organic brain damage [and] [n]ot one physician has stated that Claimant's disability is not due to physical brain damage.").

Fragosa has reached MMI. He suffered severe permanent physical brain damage – sufficiently severe for the Commission to find in its original order "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury as stated by Dr. George M. Sandoz in his August 20, 2009 letter." [R. p. 20, lines 5 -7]. The Commission further found "that the Claimant is permanently and totally disabled and is unable to return to any type of work that

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[2]The CDC developed a definition of traumatic injury for the Department of Defense and Veterans Administration. Under the CDC's definition, a loss of consciousness longer than 24 hours is classified as a *severe* traumatic brain injury. See Department of Defense and Department of Veterans Affairs (2008). "Traumatic Brain Injury Task Force" http://www.cdc.gov/nchs/data/icd9/Sep08TBI.pdf

he has performed in the past." [R. p. 20, lines 8 - 10]. These twin findings plainly meet the permanent and severe standard set forth in Crisp and Sparks.[3]

The new findings made by the Commission do not comply with this analysis – nor the instructions on remand. Instead, the Commission abandoned the previous findings *in toto* – mining the record for inconsequential nuggets – each less than a scintilla of evidence and which, when compiled into a whole add up to less than a scintilla. This approach is simply a means of justifying the initial erroneous legal conclusion. It is not meaningfully applying the Crisp and Sparks framework to the established facts of this case.

The vast majority of new findings made by the Commission address Fragosa's condition during his slow progress towards MMI – not his condition *at MMI* when the determination must be made. For example, at oral argument, the Court inquired about the Commission putting "great weight" on records from Dr. Norcross and Dr. Takacs. The Commission found "Dr. Norcross of MUSC terms Claimant's neurological recovery as "actually remarkable.' Dr. Takacs (also of MUSC) states that Claimant has 'no neurological sequala.'" [R. P. 38 (Finding of Fact 20).

The full statement by Dr. Norcross reads: "His injuries included . . . a closed head injury with a skull fracture and epidural hematoma. He underwent a tach and a PEG-tube while in the Intensive Care Unit, but made a remarkable neurologic recovery." [R. P. 640]. Dr. Norcross made this statement on December 17, 2007 – a mere 48 days after Fragosa's accident. Moreover, in the same record, Dr. Norcross states "Given the severity of his injuries, I think [an appointment with Neurosurgery] should be appropriate, and a consultation was filled out with Dr. Takacs, who saw

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[3]The Commission also found "The Claimant did not have problems with his brain prior to the 2007 accident. He has headaches at least once a week and has short term memory problems. The Claimant is constantly dizzy." [R.P. 9 (Finding of Fact 5)].

the patient in-house." [R. P. 640]. Considering that Fragosa nearly died and spent a full month in the ICU with a traumatic brain injury, the fact that he could now breath and eat on his own (48 days later) would indeed constitute a remarkable neurological recovery – even though Dr. Norcross noted "ongoing headaches and some dizziness" on the same day. [R. P. 644]. However, this non-specific characterization by Dr. Norcross has no probative value as to Fragosa's brain damage at MMI.

Dr. Takacs is a neurosurgeon. His Assessment and Plan states: "27-year-old Hispanic male status post closed head. No neurological sequala. His fingertip numbness could possibly be form a whiplash injury for which I do not have a surgical solution. Patient is not in need of neurosurgical at this time." [R. P. 661]. Dr. Takacs saw Fragosa one time on January 31, 2008 – three months after the accident – for a *surgical evaluation*. The only fair reading of his report is to take it in the context of a neurosurgeon evaluating whether a patient required surgery. Finding no surgical option, Dr. Takacs never saw Fragosa again.

In its original Order, the Commission found "The Claimant did not have problems with his brain prior to the 2007 accident. He has headaches at least once a week and has short term memory problems. The Claimant is constantly dizzy." [R.P. 9 (Finding of Fact 5)]. Headaches, dizziness and short term memory are all neurological sequelae – still present at MMI. The Commission cannot take back its original finding of neurological sequalae still present four years after the accident. The remand did not allow the Commission nor Respondents a second bite of the apple. They cannot change their minds and give "great weight" to records which they previously (and correctly) found to be inconsequential.

The Court should reconsider and reverse the decision below.

4. The Court did not address the argument that "Even if Fragosa's other physical impairments contribute to his disability, he is still entitled to lifetime compensation because he suffered physical brain damage within the meaning of the Act."

In the Order on Remand, the Commission added another conclusion, to wit: "The combination of Claimant's injuries (including but not limited to his foot and his dizziness) are what totally disable him. As Claimant's brain injury is compensable pursuant to Regulation 67-1101, he is subject to the 500 week statutory limitation." [R. p. 42, Finding 28]. The Appellate Panel makes this conclusion without reference to any particular evidence nor with any analysis. It is simply a conclusion without a foundation. This finding should be reversed, both as unsupported by the evidence and contrary to the law.

The same situation occurred in Pearson. This Court held "Employer's argument to avoid the lifetime benefit provision of section 42-9-10 because of Pearson's psychological problems is meritless." Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998). In Sparks, the South Carolinia Supreme Court confirmed Pearson is still good law, rejecting the concept that lifetime benefits should not be awarded merely because the employee suffers from additional ailments which contribute to his disability. The Court held: "§ 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 absence of brain damage, Fragosa's other injuries would not disable him. Fragosa's neurologist, Dr. Sandoz explicitly opined: "At this moment from the injury that the patient has

suffered, he is totally and permanently disabled. After evaluation of the AMA Guidelines, he is totally and permanently disabled." [R. p. 763 (emphasis added)]. Dr. Sandoz tied his opinion on disability directly to the brain damage – as did Dr. Brabham. [R. pp. 915, 926-927].

Conversely, the other three doctors who gave impairment ratings and restrictions for other injuries all opined Fragosa was able to return to work – either without restrictions or with minimal restrictions. The ENT, Dr. Hoy, found no impairment and no work restrictions. [R. P. 713]. The orthopaedic surgeon, Dr. Wolfe, assigned restrictions of "No climbing > 6 steps & use safety equipment." [R. Pp. 984-986]. Dr. Merrell gave no specific restrictions, only noting "Pain may limit overhead activities with the left arm. He may perform overhead activities unless symptoms preclude." [R. P. 950].

The opinions of Dr. Hoy, Dr. Wolfe and Dr. Merrell would not support a finding of permanent and total disability. As such, there is no substantial evidence that Fragosa's total disability resulted from his other injuries. The only evidence supporting permanent and total disability comes from Dr. Sandoz and Dr. Brabham – both of whom opined Fragosa was totally disabled because of physical brain damage. Indeed, Dr. Sandoz rendered his opinion specifically in the language adopted by Crisp and Sparks.

The Court did not address this issue in its decision. Appellant respectfully requests the Court address this issue, apply Pearson, and reverse the decision below. The case should be remanded for an award of lifetime compensation based on physical brain damage.

5. The Petition for Rehearing should be granted because the inconsistency in the Commission's original 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," our appellate courts have 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.[4] 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 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).

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[4]At 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].

The issues were confounded further when this Court declined to reverse, instead 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.[5] This finding satisfies the requirement that the brain damage be permanent and severe.

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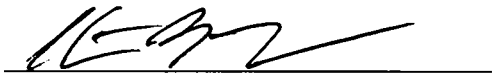
[5]The finding itself is amply supported by substantial evidence. Much of the impairment is based on a "Clinical Dementia Rating" correlating to an "impairment [which] requires direction of some activities of daily living." [AMA Guides to Permanent Impairment (5th Edition), page 320]. In the description 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.").

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. 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).

Appellant respectfully requests that this Court grant his Petition Rehearing and reverse the decisions below.

Respectfully Submitted



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In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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

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v.

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

PETITION FOR REHEARING
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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.

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[1]The 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

[2]At 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 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

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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.

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[3]Dr. 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].

[4]In 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.

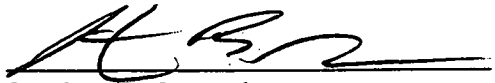
Neuropsychologists are qualified to testify as experts on physical brain damage *as shown* by neuropsychological testing. In this case, Dr. Wagner's testing confirmed the existence of cognitive deficits due to "structural change to the brain." The comment about the imaging studies "demonstrating structural 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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Columbia, South Carolina
December 12, 2013

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.

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B. Samuels and I have served the **Petition for Rehearing and Petition for Rehearing En Banc** upon the Respondents by mailing copies of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **December 12, 2013**, addressed as follows:

Michael W. Burkett, Esquire
J. Gabriel Coggiola, Esquire
Attorneys for Respondents
Willson Jones Carter & Baxley, P.A.
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Angi O'Connell, Paralegal

December 12, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2014-002354

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

v.

Kade Construction, LLC, Employer, and
Key Risk Insurance Company of SC, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I, Katherine Carter, am a paralegal to Stephen B. Samuels and I have caused the **Petition for Rehearing** to be served upon counsel for the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on April 14, 2016, addressed as follows:

Michael W. Burkett, Esquire
J. Gabriel Coggiola, Esquire
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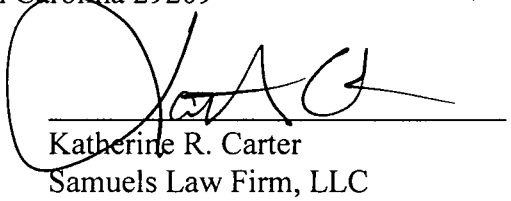

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April 14, 2016

SAMUELS LAW FIRM

STEPHEN B. SAMUELS
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ATTORNEYS AT LAW

April 14, 2016

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Hector G. Fragosa v. Kade Construction, LLC
Appellate Case No.: 2014-002354

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of **Petition for Rehearing** in the above-referenced matter. Also enclosed is a check in the amount of $25.00 for the filing fee. Please date stamp the extra copy of the Petition for our records.

By copy of this letter and enclosure to Michael Burkett, counsel of record for the Respondents, we are serving him with a copy of our **Petition for Rehearing** as indicated by the enclosed Proof of Service.

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

With kindest regards, I am

Sincerely,

Katherine R. Carter
Litigation Paralegal

/krc
Enclosure(s) as stated

cc: Michael Burkett, Esq.
J. Gabriel Coggiola, Esq.
Jeff Chandler, Esq.