

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

APR 25 2016

SC Court of Appeals

WCC File No. 0717624

Appellate Case No. 2014-002354

Hector G. Fragosa, (Employee/Claimant), .....Appellant,  
v.  
Kade Construction, LLC (Employer), and  
Key Risk Management Services, Inc. (Carrier), ..... Respondents.

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

Respondents, by and through the undersigned attorney, hereby file this return to Appellant's April 14, 2016 petition for rehearing and rehearing en banc. A petition for rehearing must state with particularity the points to have been overlooked or misapprehended by the court. (Rule 221(a), SCACR). The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is the purpose of a petition for rehearing to have the case tried in the appellate court a second time. Kennedy v. South Carolina Retirement System, 564 S.E.2d 322, 349 S.C. 531 (S.C. 2001).

Appellant argues that this Court overlooked or misapprehended the evidence, law, and arguments raised on the following issues:

- 1) The Court's application of the standard of review;
- 2) The Court's failure to take into account the Single Commissioner's previous Findings of Fact confirming "brain damage" when it limited its review to the Order on Remand;
- 3) The Court's failure to determine that the evidence at maximum medical improvement ("MMI") confirms physical brain damage;
- 4) The Court's failure to address the argument that "even if Appellant'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."
- 5) The Court's failure to rule that the Single Commissioner's original Decision and Order finding is an error of law requiring reversal rather than remand.

Finally, Appellant argues that are additional issues "which have not yet been addressed by the Supreme Court," which were raised in Appellant's previous December 12, 2013 petition for rehearing, following receipt of this Court's November 27, 2013 opinion (Appellant's Petition, p.2) Appellant does not elaborate on that argument further, but attaches and incorporates his previous December 12, 2013 petition for rehearing by reference.

Appellant's motion also requests rehearing en banc. A rehearing en banc is not favored and ordinarily will not be ordered except when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or when the proceeding involves a question of exceptional importance. *See, e.g. Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 325 S.C. 507, 482.S.E.2<sup>nd</sup> 569 (SC. 1997), *aff'd as modified*, 333. S.C. 71, 508 S.E.2<sup>nd</sup> 6565 (S.C. 1998). Although the issue of what constitutes brain "damage" pursuant to S.C. Code Ann. §42-9-10(C) is an important legal issue, it is an issue that has already been decided by Supreme Court in the *Crisp v. SouthCo, Inc.* and *Sparks v. Palmetto Hardware, Inc.* decisions issued on March 6, 2013. *See* 738 S.E.2<sup>nd</sup> 835, 401 S.C. 627 (S.C. 2013); 406 S.C. 124, 750 S.E.2<sup>nd</sup> 61 (S.C. 2013). The Supreme Court handed down the "permanency and severity" test

that is to be applied for a determination of whether a claimant's injury to the brain meets the heightened criteria standard created by the legislature for physical brain "damage" as one of only two exceptions to the 500 week cap on benefits. Appellant argues that this case is appropriate for rehearing en banc because is the first application of the test handed down by the Supreme Court, but the "legal issue" of what continues brain "damage" pursuant to §42-9-10(C) has already been decided. Further, the Supreme Court in Sparks already applied the "permanency and severity" test when they affirmed the Commission's decision that the substantial evidence in the record did not support a finding of brain damage pursuant to §42-9-10(C). The fact that the Workers' Compensation Commission and our appellate courts will continue to evaluate cases under the Supreme Court's "permanency and severity" is not a new issue of importance, but instead direction for ongoing application of the Supreme Court's ruling on the issue for future cases.

The Court in this case did not misapprehend or overlook any material fact or principle of law, and the Court appropriately affirmed the September 30, 2014 Decision and Order of the South Carolina Workers' Compensation Commission Appellate Panel ("Full Commission"). For the reasons set forth below, the Court should deny Appellant's petition for rehearing and petition for rehearing en banc.

**I. The Court properly applied the standard of review and did not overlook previous findings of the Commission when it limited review to the Order on remand.**

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 "(APA)", 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.

In workers' compensation appeals, an appellate court may only 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).

Appellant argues that the Court in this decision correctly cited the standard of review, but instead "may have actually applied the outdated 'any evidence' standard used prior to the passage of the APA in 1977." (App. Petition p. 3). In support of this position, Appellant argues there is not substantial evidence in the record to support the Commission's finding that Appellant did not suffer brain "damage" as set forth in S.C. Code An. §42-9-10(C), and this Court removed two critical findings from their analysis and instead endorsed the Commission's "unusual finesse of reasoning to identify any scintilla that might support the original ruling." (Appellant's Petition for Rehearing, p. 4)

Respondents argue that this Court is completely familiar with the applicable standard of review, and there is no evidence in the record to suggest that they removed any previous findings of the Commission from their analysis. Appellant's argument ignores the fact that the Full Commission on remand appropriately followed this court's instructions. The Full Commission did not remove any findings, but instead made additional findings of fact and conclusions of law in response to this Court's request. The Full Commission's September 30, 2014 Order starts by recognizing the significance of Appellant's injuries to his multiple body parts, but the Full Commission concludes that the "ultimate, residual effects of Claimant's head injury are not of sufficient severity to reach the level of physical brain damage as contemplated in Section 42-9-10(C)." (R. p. 42). In support of this decision, the Full commission cites over twenty-five (25) additional medical records in evidence.

As stated above, the Commission is the trier of fact, and the appellate courts can only overturn the conclusion of the Commission if it is clearly erroneous in light of the substantial evidence in the record. In this case, the Court appropriately applied the substantial evidence standard of review and affirmed the conclusions of the Full Commission.

**II. The Court did not overlook or misapprehend the Full Commission's previous Findings of Fact when it limited review to the Order on remand.**

Appellant argues that this Court removed two critical findings of the Single Commissioner's June 28, 2011 Order from their analysis and instead endorsed the Commission's "unusual finesse of reasoning to identify any scintilla that might support the original ruling." (Appellant's Petition for Rehearing, p. 4) Appellant cites the two (2) key findings in the Single Commissioner's Order, stating "That the Claimant sustained 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled...." (App.

Petition, p. 4) Appellant has repeatedly made this identical argument beginning with his December 12, 2013 petition for rehearing and continuing in his June 22, 2015 Appellant's Brief and March 9, 2016 oral arguments before this Court.

Appellant continues to performing his own finessing of the Single Commissioner's Order and conveniently replaces the Single Commissioner's actual combined findings with one incomplete quotation, while ignoring what the Order actually states in total. The Single Commissioner's June 28, 2011 Order states that Appellant sustained an 11% impairment to the whole person for his cervical spine per Dr. Christopher Merrill, 40% impairment to his right lower extremity and a 1% impairment to the left upper extremity, for a combined rating 17% impairment to the whole person per Dr. Shane Wolfe (R. pp. 9-10, Findings of Fact #6 & #7). The Order goes on to state, "*That after considering the Claimant's multiple impairment ratings, the Claimant is permanently and totally disabled and is unable to return to any of type of work he has performed in the past.*" (R. p. 10, Finding of Fact #9). The Order further states "Under S.C. Code Ann. §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. 11, Conclusion of Law #2).

Appellant continues to argue that the Single Commissioner "inexplicably concluded there has not been physical brain injury as it does not meet the criteria established under the Workers Compensation Act" in Finding of Fact #18, and instead the Commissioner erroneously made a conclusion of law as the law was understood prior to the Crisp and Sparks decisions. This Court already specifically addressed the inconsistency in the Single Commissioner's Finding of Fact #18, and this Court cited that specific finding as the basis of their request for remand to (1)

clarify if there was a brain injury, and if so, (2) determine whether the injury to the brain met the level of “damage” as contemplated in S.C. Code. §42-9-10(C). (R. p. 29).

In response to this Court’s request, the Full Commission went on to make *additional* Findings of Fact and Conclusions of Law, supported by cited medical evidence in the record, and the Commission concluded that “the ultimate, residual effects of the Claimant’s head injury are not of sufficient severity to reach the level of damage as contemplated in section 42-9-10(C)” and “the combination of the Claimant’s injuries (including but not limited to his foot and his dizziness) are what totally disable him.” (R. p. 9).

Appellant now asks this Court to ignore its own November 27, 2013 decision to remand the case to the Commission for clarification of the presence of a brain injury and application of the “permanency and severity” test, and disregard the Commission’s subsequent Order on Remand. There is no evidence in the record to support Appellant’s claim that the Full Commission ignored any of the previous findings in the case. The Full Commission’s Order states that they are issuing “additional” Findings of Fact and Conclusions of Law, and they properly followed the instructions given by this Court in the November 27, 2013 Decision. Nothing in the Full Commission’s Order on Remand replaces or removes the previous finds of the Single Commissioner, with the exception of stating that the Full Commission was not relying on objective diagnostic mediums, since the Supreme Court held that diagnostic evidence of damage to the brain was not outcome determinative. (R. p. 42).

As this exact argument has been presented to the Court by Appellant several times through briefs and oral arguments, Respondents contend that this Court did not overlook or misapprehend any material fact or principal of law, and Appellant’s petition for rehearing should be denied.

**III. The Court did not overlook or misapprehend any material fact of principle of law that the evidence at maximum medical improvement confirmed physical brain damage.**

For the first time in the current petition for rehearing, Appellant argues that the “vast majority of the Commission’s new findings (Appellant fails to identify which specific findings he is not including) address Appellant’s condition during his slow progress towards MMI – not his condition at MMI when he argues the determination must be made.” (App. Petition, p. 8) As previously stated, the purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is the purpose of a petition for rehearing to have the case tried in the appellate court a second time. Kennedy, 564 S.E.2d 322, 349 S.C. 531 (S.C. 2001).

Regardless of Appellant’s failure to cite evidence supporting this court’s failure to observe or apprehend the argument of when the determination of permanency should be made, Respondents argue the Full Commission addressed this exact point in their Order on Remand.

The Court states:

The Appellate Panel fully recognizes the seriousness and signifance of Claimant’s accident, which could have proven fatal: Claimant sustained a skull fracture, sustained hematomas, sustained a myriad of other injuries, was unconscious at the scene, and had to be intubated for 16 days while hospitalized. However, the significance of the mechanics of an accident and the initial diagnoses are not dispositive in light of the standard set forth by the Supreme Court as to whether Claimant sustained permanent and physical brain damage (thereby entitling a claimant to lifetime benefits). We base this on the medical evidence in its entirety, including but not limited to APA, pages 417 and 430. (R. p. 35).

Based on the fact that the Full commission, in response to a specific request from this Court, made an ultimate determination based on the medical records in its entirety, this Court appropriately affirmed the Full Commission’s decision, and Appellant’s petition for rehearing should be denied.

**IV. The Court did not overlook or misapprehend the argument that even if Appellant'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 his petition, Appellant argues that the Full Commission's finding that "the combination of Claimant's injuries (including but not limited to his foot and dizziness) are what totally disable him" is a conclusion without a foundation and is unsupported by the evidence and contrary to the law. This argument is without merit and contradicts the evidence in the record.

Appellant attempts to minimize the extent of the "myriad" of other injuries sustained in his accident, in addition to his brain injury, and their resulting disability, in an effort to argue that they would not disable him. This argument contradicts the multiple impairment ratings assigned to Appellant's additional body parts, Appellant's four amputated toes, and his permanent work restrictions of no climbing greater than 6 steps and limited overhead reaching. The argument further ignores Appellant's own hearing testimony under oath that his shoulder pain leaves him feeling like "I just don't want to do anything..." and he can't walk for long distances due to sharp pains in his foot. (R. p. 1143, lines 9-16).

In his petition, Appellant relies heavily on the opinion of Dr. Sandoz, the treating neurologist, that the Claimant was permanently and totally disabled since the time of his injury. The Court in this case was clear in oral arguments that "permanent and total disability" does not in itself satisfy the "severity" factor of the brain damage test. Further, a detailed review of the evidence in the record shows Dr. Sandoz testified that Appellant could not return to his former work "...not only because of his traumatic brain injury, I don't think he's able to follow any type of commands, but the most significant change is the inner ear injury that he suffered which is

making him unsteady, so any type of high work or ladder or scaffold is out of the question.” (R. p. 1093, lines 17-23).

Appellant fails to cite any misapprehension of this Court in relation to this argument, and the Court appropriately affirmed the Full Commission’s decision that the substantial evidence supported a finding of permanent and total disability based on the combination of Appellant’s multiple injuries, but did not support a finding that Appellant’s brain injury reached the level of “damage” contemplated by S.C. Code. Ann. §42-9-10(C).

**V. The Court did not overlook or misapprehend an argument that the inconsistency in the Commission’s original findings was an error of law requiring reversal rather than remand.**

Appellant argues that the criteria relied on by the Single Commissioner was the requirement that physical brain damage had to be visible on some form of diagnostic testing, which was rejected by the Supreme Court in Crisp and Sparks, and therefore the Commission’s conclusion was affected by error of law and must be reversed. Appellant presented this exact argument in his December 12, 2013 petition for rehearing after the Court decided to remand the case, and his June 22, 2015 Appellant’s brief to this Court. Appellant does not cite any evidence in support of this Court’s failure to observe or apprehend the argument.

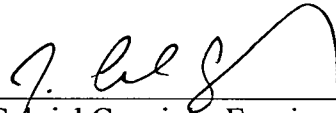
As previously stated in Argument Section II above, this Court already specifically addressed the inconsistency in the Single Commissioner’s Finding of Fact #18, and this Court cited that specific finding as the basis of their request for remand to (1) clarify if there was a brain injury, and if so, (2) determine whether the injury to the brain met the level of “damage” as contemplated in S.C. Code. §42-9-10(C). (R. p. 29). Appellant now asks this Court to ignore their previous decision and the subsequent Order from the Commission and instead reverse the whole case on an argument he has already presented to this Court through multiple briefs and a

second turn at oral arguments. The Court did not overlook or misapprehend any material fact or issue of law, and the Appellant's petition should be reversed.

**Conclusion**

For the reasons set forth above, Respondents respectfully request the Court deny Appellant's petition for rehearing and petition for rehearing en banc. Appellant has failed to demonstrate any material facts or principles of law that were overlooked or misapprehended by the Court, and instead simply restates the previous arguments made to this Court.

Respectfully Submitted,



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April 25, 2016  
Columbia, South Carolina

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**PROOF OF SERVICE**

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The undersigned certifies that on the date indicated below he served counsel for Appellant with a copy of **Respondents' Return to Petition for Rehearing and Petition for Rehearing En Banc** by mailing copies of the same by United States Mail postage prepaid on April 25, 2016 to the following addresses:

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April 25, 2016

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APR 25 2016

SC Court of Appeals

(Via Hand Delivery)

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1015 Sumter Street  
P.O. Box 11629  
Columbia, SC 29211

Re: Hector Fragosa vs. Kade Construction, LLC  
WCC File No.: 0717624 DOI: 11/1/2007  
Carrier: Key Risk Management - Claim No.: 1000021953  
WJC&B File No.: 0310.00420  
**Appellate Case No.: 2012-212279**

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of the **Respondents' Return to Petition for Rehearing and Petition for Rehearing En Banc** in connection with the above-referenced matter. By copy of this letter, I am serving the same upon Stephen B. Samuels, Esquire and Jeffrey C. Chandler, Esquire, attorneys for Appellant, as indicated by the enclosed Proof of Service.

Thank you for your attention to this matter, and please contact me if you have any questions or concerns.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



John Gabriel Coggiola

JGC/jgc

Enclosure(s)

cc: Mr. Stephen B. Samuels  
Mr. Jeffrey C. Chandler  
Mr. Scott Lacy