THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners R. Michael Campbell, II, Avery B. Wilkerson, Jr., and T. Scott Beck

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Appellate Case No.: 2016-000325

Pedro A. Moran, Employee/Claimant, ... Appellant,

v.

JMR Siding, LLC, Employer, and
Hartford Underwriters Insurance Company, Carrier, ... Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred in failing to rule Pedro Moran's brain injury did not meet the statutory criteria for physical brain damage when the brain injury resulted in a 73% permanent impairment rating severe enough to result in permanent and total disability; and the medical evidence showed conclusively that the injury resulted in "physical brain damage [that] is both permanent and severe."

2. Whether the Appellate Panel erred by employing inherently unreliable "sit and squirm" jurisprudence to reach an arbitrary and capricious conclusion that Claimant was not brain damaged because he was not credible, and in so doing, arbitrarily disregarded the medical evidence in favor of speculation.

STATEMENT OF THE CASE

This is an appeal from a Decision and Order of the Workers' Compensation Commission. The primary issue is whether the Appellant, Pedro Moran, suffered permanent physical brain damage of sufficient severity to render him permanently and totally disabled.

The case was tried on March 2, 2015. Moran testified through a Spanish interpreter. In a Decision and Order dated July 24, 2015, the Single Commissioner found "Claimant is permanently and total disabled due to the combination of his pelvis, head/brain, and psychological overlay, and therefore entitled to receive lifetime causally-related medical and psychological benefits for these injuries/conditions." [Order, page 10-11, Finding of Fact 14]. She further found "Claimant does not meet the burden of proof for physical brain damage within the confines of S.C. Code 42-9-10. Claimant as described was being a 'good historian' when it came to his history and injuries. Further, Claimant's head injury is described as 'mild' throughout the records." [Order, page 9, Finding of Fact 9].

Appellant timely filed his Form 30 (Notice of Appeal) on August 5, 2015. Oral argument before the Appellate Panel was heard on October 19, 2015. On January 21, 2016, the Appellate Panel issued a Decision and Order affirming the Decision and Order of the Single Commissioner.

This appeal followed.

STATEMENT OF THE FACTS

Appellant Pedro Moran was employed doing siding and roofing for JMR, LLC. He is 40 years old and from Nicaragua. He does not speak English and testified through an interpreter. He is married with seven children.

This case arises out of an admitted work-related accident which occurred on June 22, 2010. Moran fell from a second story while working on the outside of a house. He suffered a traumatic brain injury (TBI)[1] with gross loss of consciousness for approximately 30 minutes, along with a pelvic fracture (sacrum and ramus). Moran has no memory of the accident and "has sketchy anterograde amnesia for 48 hours." [APA page 102].

At the beginning of the case, Moran was treated solely for his fractured pelvis – all of which was non-operative conservative treatment by Dr. James McIntosh. Dr. McIntosh documented headaches and repeatedly referred Moran to a neurologist – which was not authorized until Moran saw Dr. Joseph Healy on October 27, 2011 – sixteen months after the TBI.

Ultimately, Dr. McIntosh released Moran at MMI on March 26, 2012. He assigned a 10% lower extremity rating with permanent work restrictions of no ladder climbing or excessive stair climbing more than 5 steps. [APA page 27]. Dr. McIntosh specifically opined that Moran had no weight restrictions. [APA page 31]. *These are the only physical restrictions assigned by an authorized treating physician.*

Moran was examined by Dr. James Bethea on December 7 and 15, 2011 for low pack pain.

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[1]Throughout this brief, the medical term "traumatic brain injury" is used to describe Moran's injury, as this is the terminology used by medical professionals. The legal term "physical brain damage" is used in the legal argument explaining how a "traumatic brain injury" equates to physical brain damage when the damage is of sufficient severity (as here) that "the worker is unable to return to suitable gainful employment." Crisp v. SouthCo Inc., 738 S.E.2d 835, 843, 401 S.C. 627 (2013).

Dr. Bethea assigned a 2% impairment rating to the pelvis and opined "he should be able to work full duty." [APA page 35].

Moran underwent neuropsychological testing by Dr. Randolph Waid, Ph.D, on March 30, 2012. Dr. Waid opined:

> . . . Mr. Moran's memory problems and complaints of forgetfulness in day to day pursuits appear to be associated with the **residuals of physical injury to the frontal executive areas of the brain** that serves to compromise him with regard to immediate learning/memory capacities. Mr. Moran is capable of retaining and recalling information once it is effectively encoded/learned. This causal factor for day to day pursuits is commonly found in a mild head injury, being exacerbated to a more disruptive level by the somatic and emotional difficulties associated with a postconcussive syndrome.

[APA page 46].

On referral from Moran's treating neurologist, Dr. Healy, Dr. Waid retested Moran on October 22, 2013. Testing showed Moran had deteriorated. He reported "**severe difficulties** including experiencing bouts of dizziness, poor balance, poor coordination, headaches, nausea, sensitivity to light and noise, changes in taste/smell, diminished appetite, poor concentration, forgetfulness, difficulties making decisions, slowed thinking, fatigue, sleep disturbance, feeling anxious/depressed, irritability, and poor frustration tolerance." [APA page 53 (emphasis added]. Dr. Waid noted the "Current evaluation was most revealing of the manner in which Mr. Moran is more compromised due to functional/psychological disruption. **Neuropsychological testing was generally consistent with that obtained in previous evaluation as would be expected considering the length of time since Mr. Moran sustained physical injury to the brain.**" [APA page 53 (emphasis added)]. Dr. Waid opined that "There was evidence for more disruptive compromise affecting attention/concentration with slower processing speed, though certainly this could be attributable to the interfering effects of functional factors. In my opinion, Mr. Moran is in need of more aggressive psychiatric/neuropsychological intervention." [APA page 54]. At that time,

Moran was not at MMI for his TBI.

Moran was treated by the neurologist, Dr. Joseph Healy, continuously from October 27, 2011 through the date of the hearing. Dr. Healy noted "His memory is poor with decreased recall and retention. He complains of frequent headache and mood swings." [APA page 122]. Dr. Healy stated his "impression is that the patient has a post-traumatic encephalopathy." [APA page 122]. On March 28, 2012, Dr. Healy opined to a reasonable degree of medical certainty that: **"Pedro Moran has suffered physical brain damage.** Testing has confirmed that Mr. Moran has incurred an organic/structural injury to his brain as a result of his June 22, 2010 industrial injury." [APA page 125].

On July 9, 2012, Dr. Healy added "Testing has confirmed there is structural/organic damage to Mr. Moran's brain due to a traumatic brain injury with consequent dysfunction. These cognitive deficits are also being exacerbated by disruptive somatic and psychological difficulties." [APA page 129]. On August 7, 2012, Dr. Healy added **"He is totally disabled at this point and unable to return to work.** The predominant reason is that we haven't made much progress with his treatment which in my opinion is due to hold up with Workers' comp providing adequate care."[2] [APA page 131 (emphasis added)].

On August 3 and 17, 2012, Moran underwent a two-session psychiatric evaluation by a Spanish-speaking psychiatrist, Dr. Sergio Sanchez. Moran reported: "I have been depressed with horrible headaches and Workers' Comp wants me to come." [APA page 98 (translated from Spanish

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[2]The refusal to provide care for the TBI is a recurring theme in this case. Both treating physicians, Dr. McIntosh and Dr. Healy, express outright dismay over the inability to provide treatment for Moran's brain injury – as well as noting the damaging effects from this refusal to provide necessary care. Commissioner Wilkerson issued an Order on December 15, 2011 compelling Defendants to provide "evaluation and treatment for his back and head/psyche." Following this order, Moran began treatment with Dr. Healy and received an evaluation to his back from Dr. Bethea (who released him to work with no restrictions).

by Dr. Sanchez)]. Dr. Sanchez wrote to Dr. Healy, stating "Pedro handed me your note and **I agree completely with all that you have written**. . . . In short I believe the following: **He is suffering the symptoms of Post Concussion Syndrome which includes the encephalopathy.**[3] I am still not sure if workman's comp is asking that I simply evaluate or that I treat. Either way I feel it is my duty to do all I can to help him, especially since Spanish is also my first language." [APA page 95]. Moran never received any psychological treatment.[4]

Defendants obtained a second neuropsychological evaluation from Dr. John Taylor. The evaluation took place over two sessions on January 18, 2014 and March 21, 2014. Dr. Taylor opined "Current level of neuropsychologic functioning is indicating mild cognitive impairment." [APA page 105]. However, Dr. Taylor was "unable to provide an opinion regarding the presence or absence of postconcussive syndrome at this time." He was unable to provide an opinion *one way or the other* because Moran had not received *any* psychiatric treatment. Dr. Taylor added "It is recommended that Mr. Moran be referred for more aggressive psychiatric management of his symptoms. Once this has been achieved, it may then be possible to repeat testing and provide an opinion regarding the presence or absence of persistent postconcussion syndrome." [APA page 105].

During ths time, Moran continued treating with Dr. Healy. In fact, Dr. Healy has been the sole medical provider for Moran's TBI; and the only provider of any treatment since Dr. McIntosh

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[3]Post-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 traumatic brain 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 beyond a year confirm the presence of physical brain damage. Moran remained profoundly symptomatic more than 2 years after his injury.

[4]At this point in time, Dr. Healey was not recommending psychological treatment. Dr. Healey changed his opinion in May 2014 when Moran presented with suicidal ideations. [Defendants APA page 59].

released Moran on March 26, 2012. No psychological, psychiatric, or cognitive therapy was ever provided.

Dr. Healy placed Moran at MMI on July 28, 2014. Dr. Healy opined to a reasonable degree of medical certainty that "**Mr. Moran has a whole person rating of 73% due to his 6-22-10 injury causing physical brain damage.**" [APA page 160 (emphasis added)]. Dr. Healy also opined:

> Mr. Moran is considered unable to return to employment capacities. Considering Mr. Moran's permanent neurocognitive, emotional and somatic impairments in conjunction with his educational deficits and impairment to his pelvis/back/legs, I do not believe he could successfully meet the demands of any job in the competitive marketplace. He is assessed as totally disabled.

[APA page 158].

On April 8, 2014, Dr. Healy opined that "Mr. Moran's mild postraumatic **encephalopathy/physical brain damage is both permanent and severe.**" [APA page 157 (emphasis added)]. He explained that "His headaches, memory dysfunction and sleep disturbances have worsened. Therefore though the organic encephalopathy is mild **the neurological and psychological effects are severe.**" [APA page 157 (emphasis added)].

Moran underwent a vocational evaluation on July 30, 2014 by Joel Leonard. Mr. Leonard summarized Dr. Healy's reports regarding brain damage, ultimately concluding: "In short, Dr. Healy set forth a functional profile consistent with a job-preclusive designation. . . . As such, it is my opinion that Mr. Moran is vocationally disabled subsequent to the June 2010 injury at work. [APA page 117].

ARGUMENT

1. Pedro Moran has suffered physical brain damage and is legally entitled to workers' compensation benefits for life.

Pedro Moran suffered a traumatic brain injury when he fell from the second story of a house. Moran was unconscious for at least 30 minutes, waking up in the ambulance. He has retrograde amnesia with no recall of the fall itself.

Since then, he has suffered from proven cognitive deficits, balance problems, dizziness, headaches, and emotional lability (short temper and depression) – resulting in permanent and total disability. Dr. Healy (treating neurologist); Dr. Waid (neuropsychologist) and Dr. Sanchez (Spanish-speaking psychiatrist) confirm the permanency of the cognitive deficits with encephalopathy. Dr. Healy has repeatedly and explicitly stated to a reasonable degree of medical certainty that Moran is permanently and totally disabled due to traumatic brain injury resulting in severe permanent physical brain damage. 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.").[5]

The Appellate Panel erred by failing to apply the standards set out in Crisp, Sparks and Pearson. In fact, the Panel completely overlooked the 73% impairment rating and other opinions

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[5]As in Pearson, the Respondents' neuropsychological expert, Dr. John Taylor, was "unable to provide an opinion regarding the presence or absence of postconcussive syndrome at this time." [APA page 105]. Dr. Taylor could not determine whether Moran's cognitive deficits arose from psychological factors or brain damage. Dr. Sanchez, the psychiatrist who evaluated Moran (chosen by Defendants) wrote that he agreed with Dr. Healy's opinion regarding brain damage.

given by the treating neurologist, Dr. Healy. The Decision and Order confirms that Moran is permanently and totally disabled, but the finding on physical brain damage is based on speculation about credibility rather than reliance on the medical evidence in this medically-complex case.

A. The criteria established under the South Carolina Workers' Compensation Act for physical brain damage.

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, Inc., 406 S.C. 124, 130, 750 S.E.2d 61, 64 (2013). 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 Supreme 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 Supreme 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.

B. Confusion resulting from the legislature's use of "physical brain damage" when the equivalent medical term is "traumatic brain injury (TBI)."

An issue confounding the decisional law is the legislature's choice of the term "physical brain

damage" in the statute – rather than the medical term "traumatic brain injury."[6] This has led to confusion because medical professionals use the term "traumatic brain injury" to refer to all brain injuries resulting in physical brain damage of varying severity. Consequently, before Crisp, the medical opinions used to prove physical brain damage in workers' compensation cases always used the medical term traumatic brain injury - sometimes modified as *physical brain injury.* The Supreme Court noted this "inartful phrasing" in Crisp:

> From this inartful phrasing onward, the circuit court, the court of appeals, and the parties in their arguments to the various tribunals and in their briefs have alternatively referred to Petitioner's brain injuries in terms of "physical brain injury" and "physical brain damage," despite the marked difference in the length of time compensation may be awarded when the injury is "physical brain damage" contemplated under section 42–9–10(C) of the South Carolina Code.

A similar problem occurred in Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006). In Therrell, the Supreme Court was faced with reconciling statutory terminology with medical terminology. The court observed: "We believe a factor driving much of the confusion on this issue is that the scheduled member statutes speak in a different language from medical service providers . . ." Id.

Appellant makes this point simply to aid the Court as it reviews the medical evidence in the record. As in Crisp, Sparks and Therrell, the parties and medical providers sometimes use "inartful phrasing" in describing Moran's physical brain damage as a physical brain injury or traumatic brain injury.

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[6]The term "Traumatic Brain Injury" is used elsewhere in statutory law to describe what is essentially "physical brain damage" in the Workers' Compensation Act. See 25A S.C. Code Ann. Reg. § 43-243.1 (L)(1)(2011)(defining "traumatic brain injury" regulations for "Criteria for Entry into Programs of Special Education for Students with Disabilities.").

C. Moran's permanent impairments are consistent with physical brain damage.

According to the Centers for Disease Control, "[Traumatic Brain Injury] is generally categorized as mild, moderate or severe. Most TBIs are mild TBI (MTBI). MTBI refers to those in which the injury to the brain itself is diagnosed as mild at the time the person is initially evaluated."[7] "Injury severity is typically established within the acute to early subacute time frame but the long-term effects of TBI and resultant disability, if any, can only be established months to years post-injury."[8] Thus, because some healing takes place – particularly within the first six months – and some damage takes time to manifest itself, the twin determinations of permanent impairment and inability to work are properly made at MMI (as the Supreme Court held in Crisp).

Doctors make the initial classification of brain injury as mild, moderate or severe on the initial evaluation. Most classification systems "differentiate TBI on the basis of loss of consciousness (LOC), altered consciousness (AOC), post-traumatic amnesia (PTA), or Glasgow Coma Scale (GCS)."[9] For the injury to be classified as severe, most systems require that the patient suffer a gross loss of consciousness for greater than 30 minutes.[10] As Moran's period of gross unconsciousness lasted around 30 minutes, his brain *injury* could be classified as mild, moderate or severe. The importance of a mild injury (at the moment of the accident) with severe damage (at MMI) was recognized by Dr. Healy when he opined "Mr. Moran's mild postraumatic

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[7]Faul M, Xu L, Wald MM, Coronado V. Traumatic Brain Injury in the United States: Emergency Department Visits, Hospitalizations and Deaths, 2002-2006. Atlanta, Georgia: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control; 2010.

[8]Muriel Deutsch Lezak et al., *Neuropsychological Assessment* 193 (5th ed. 2012).

[9]Department of Defense and Department of Veterans Affairs (2008). "Traumatic Brain Injury Task Force" http://www.cdc.gov/nchs/data/icd9/Sep08TBI.pdf

[10]Id.

encephalopathy/physical brain damage is both permanent and severe."[11] [APA page 157 (emphasis added)].

D. Moran meets the criteria for lifetime compensation set out in Sparks, Crisp and Pearson.

The analysis by the Single Commissioner erred in two respects: (1) the test for physical brain damage was misapplied; and (2) confusing a "mild" injury with "severe damage."

The Supreme Court held entitlement to lifetime compensation is 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, 843, 401 S.C. 627 (2013). The result is a two part test: to qualify for lifetime compensation under section 42-9-10 (C), the employee must have suffered physical brain damage that is both (1) permanent and (2) "so severe that the person could not subsequently return to suitable gainful employment." Id. at 842-843; Sparks v. Palmetto Hardwood, Inc., 401 S.C. 619, 738 S.E.2d 831, 834 (2013)("we conclude that "physical brain damage" as used in § 42-9-10(C) is physical brain damage that is both permanent and severe.").

In Moran's case, it is undisputed that his physical brain damage is permanent At the time of the trial, nearly five years had passed since the accident. In the latest medical record from December 8, 2014, Dr. Healy diagnosed Moran with "closed head injury and postraumatic encephalopathy."[12] He noted "Patient continues to have postraumatic headache. The patient states

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[11]"Of mild head injuries, 10% are thought to result in permanent disability, as well as 66% of moderate head injuries and 100% of severe head injuries." Lauren C. Frey, Epidemiology of Posttraumatic Epilepsy: A Critical Review, Epilepsia, Vol 44, pages 11-17 (October 2003).

[12]This is the same condition suffered by numerous combat veterans and NFL players. The most famous case involved former NFL player Junior Seau. Seau committed suicide on May 2, 2012. He was 43 years old. Mary Pilon and Ken Belson, Seau Had Brain Disease Found in Other Ex-Players, N.Y. Times, Jan. 11, 2013 at B13.

that he 'now thinks about suicide.' He often feels that he would be better off dead. He has no plan. His headaches are no better. He has episodes of confusion." [APA page 164].

Dr. Healy opined "Mr. Moran has a whole person rating of 73% due to his 6-22-10 injury causing physical brain damage." [APA page 160]. As to the test for physical brain damage, he opined "Mr. Moran's mild postraumatic **encephalopathy/physical brain damage is both permanent and severe.**" [APA page 157 (emphasis added)]. See Sparks v. Palmetto Hardwood, Inc., 401 S.C. 619, 738 S.E.2d 831, 834 (2013)("we conclude that "physical brain damage" as used in § 42-9-10(C) is physical brain damage that is both permanent and severe."). As "[a] permanent impairment by definition, lasts for a lifetime," Moran easily meets the first part of the test. James v. Anne's Inc., 390 S.C. 188, 199, 701 S.E.2d 730, 736 (2010).

In concluding Moran did not meet the criteria for physical brain damage, the Appellate Panel states "Claimant's head injury is described as *mild* throughout the records." [Order, Page 9, Finding of Fact 9]. This is a misapplication of the test. The determination of whether the injury is *severe* has to be made at MMI; not at the time of injury. See Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013)(determination of whether claimant suffered physical brain damage was premature where the "Commission explicitly left the determination of permanency to a later date."). A person can suffer a severe traumatic brain injury – as measured at the time of the accident – yet make a full recovery. Conversely, as in this case, the initial injury may have been viewed as mild – consistent with accepted TBI classification criteria – yet ultimately result in permanent, severe loss of brain function rendering the injured worker permanently and totally disabled (as determined at MMI).

Here, with the treating neurologist opining as to a 73% whole person rating from "physical brain damage that is permanent and severe," the evidence shows that the closed head injury resulted in permanent and severe physical brain damage. See 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).

Regarding the second part of the test, Dr. Healy opined:

> Mr. Moran is considered unable to return to employment capacities. Considering Mr. Moran's permanent neurocognitive, emotional and somatic impairments in conjunction with his educational deficits and impairment to his pelvis/back/legs, I do not believe he could successfully meet the demands of any job in the competitive marketplace. He is assessed as totally disabled.

[APA page 158].

Dr. Healy's opinion regarding total disability was confirmed by the vocational expert, Joel Leonard. [APA page 117]. And of course, the Commission found Moran totally disabled.

Another problem with the decision is the finding that "Claimant is permanently and total disabled due to the combination of his pelvis, head/brain, and psychological overlay, and therefore entitled to receive lifetime causally-related medical and psychological benefits for these injuries/conditions." [Order, page 10-11, Finding of Fact 14]. The specific finding is not problematic itself. It is the legal analysis that *this* finding of permanent and total disability does not meet the criteria for physical brain damage.

The difficulty arises because most people who suffer traumatic brain injuries also suffer other disabling injuries in the same accident. Should someone with physical brain damage who also suffers disabling permanent impairments to other parts of the body be barred because he might have been disabled anyway – regardless of the severity of the brain damage? This very question was answered in Pearson. See Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 400, 489 S.E.2d 219, 222 (Ct. App.1997)(holding "Employer's argument to avoid the lifetime benefit provision of section 42-9-10 because of Pearson's psychological problems is meritless."). The test elucidated in Sparks and Crisp did not change the rule. Sparks quoted Pearson for the rule that "§ 42-9-10 *does not require that total and permanent disability result solely from physical brain damage* but does require

that the claimant suffer physical brain damage as a result of the compensable injury." Sparks v. Palmetto Hardwood, Inc., 738 S.E.2d 831, 835, 401 S.C. 619 (2013)(emphasis added).

Indeed, the brain damage itself *is* the disabling condition. Had there not been a brain injury, Moran's other injuries would not by themselves result in permanent and total disability. Moran was examined by Dr. James Bethea on December 7 and 15, 2011 for low pack pain. Dr. Bethea assigned a 2% impairment rating to the pelvis and opined "he should be able to work full duty." [APA page 35]. Dr. McIntosh released Moran at MMI on March 26, 2012 for his pelvis fracture. He assigned a 10% lower extremity rating with permanent work restrictions of no ladder climbing or excessive stair climbing more than 5 steps. [APA page 27]. Dr. McIntosh specifically opined that Moran had no weight restrictions. [APA page 31]. *These are the only physical restrictions assigned by an authorized treating physician.* The evidence supporting permanent and total disability comes entirely from Dr. Healey (neurologist) and Joel Leonard (vocational expert).

The severity analysis focuses on inability to return to suitable gainful employment. The Crisp court looked to section 42-9-400(d) for the Legislature's definition of "permanent physical impairment" as "any permanent condition . . . of such seriousness as to constitute a hindrance or obstacle to obtaining employment . . ." Crisp v. SouthCo Inc., 738 S.E.2d 835, 843, 401 S.C. 627 (2013), *quoting*, S.C. Code Ann. § 42-9-400(d)(2007).

Dr. Healy's opinions were virtually ignored. The Order *never mentions* the unrefuted 73% impairment rating nor that the "encephalopathy/physical brain damage is both permanent and severe." [APA page 157, 160]. See McCruter v. Bowen, 791 F.2d 1544 (11th Cir. 1986)(holding that an administrative decision is not supported by substantial evidence where the ALJ acknowledges only the evidence favorable to the decision and disregards contrary evidence). No one questioned

Dr. Healy regarding his opinions. There was no medical evidence contradicting his opinion.[13] Indeed, the psychiatrist, Dr. Sanchez, wrote wrote to Dr. Healy, stating ". . . I agree completely with all that you have written. . . [APA page 95].

There is no evidence which would allow the Commission to find that Moran's traumatic brain injury and resulting brain damage was not – at a minimum – a significant contributing factor to his inability to return to gainful employment. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability). Cf. McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 474 (Ct.App.1989) ("Under Workers' Compensation Law 'total disability' does not require complete, abject helplessness. Rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them."). Moran proved he suffered permanent physical brain damage sufficiently severe to prevent him from returning to suitable gainful employment. As such, he is entitled to a finding that he suffered permanent physical brain damage.

2. A credibility finding is unnecessary, unsupported by the evidence, and cannot outweigh the medical evidence.

In its Order, the Appellate Panel states "Claimant is not credible" and his testimony was "evasive." The Panel notes "Claimant repeatedly asked for more time when answering questions – as if he was stalling for more time rather than struggling to find answers." [Findings of Fact 11-14, FC Order pages 8-9]. In a medically complex case, such speculative credibility findings cannot replace the consistent medical evidence proving Moran is permanently and totally disabled due to

[13]Dr. Healy noted Moran's "EEG showed a non-specific encephalopathy." [APA page 123]. As such, not only was the physical brain damage shown by neuropsychological testing and "cognitive behavioral level of functioning," it was also shown by objective testing.

physical brain damage and the resulting sequelae (including the psychological problems inherent in brain damaged individuals). See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability). If anything, it seems to be an unfortunately gratuitous finding included to imply Moran is not a proper person to receive benefits.

Moran testified through an interpreter. He does not speak English nor does the Commissioner speak Spanish. To assign credibility findings to the manner in which a brain-damaged emotionally-compromised non-English speaker answers questions posed through an interpreter is, respectfully, inherently arbitrary and capricious.

Although not addressed by our state courts in the workers' compensation context, rulings of this type have been roundly condemned by the Federal Courts as inherently unreliable. "In 'sit and squirm' jurisprudence, [a commissioner] who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied." Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984). This approach "will not only result in unreliable conclusions when observing claimants with honest intentions, but may encourage claimants to manufacture convincing observable manifestations of pain or, worse yet, discourage them from exercising their right to appear before [the commission] for fear that they may not appear to the unexpert eye to be as bad as they feel." Tyler v. Weinberger, 409 F.Supp. 776 (E.D. Va. 1976)(finding claimant disabled as a matter of law where factual finding that claimant "over-exaggerated his complaint about sitting for extended periods" was "unreasonable under the law and this Court does not accept them."). A hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional." Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring). Cf., Burnette v. City of Greenville, 737 S.E.2d

200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed).

Ironically, the observations made in the Order were also made by Dr. Sanchez, albeit with a much different conclusion. Dr. Sanchez wrote:

> He is obviously experiencing some headaches that seem to be worse with light exposure. . . . **During our interviews he will pause as if he had just forgotten what word he was about to use although he remembers the intentions of it.** He admits to having quite a lot of anxiety. He relates also that he has been having a hard time remembering conversations that he had the day before. . . . He is also frustrated still because he feels that he is not remembering "anything."
>
> Interview is somewhat difficult to follow. Although he and I speak Spanish fluently, he would maintain his voice quite low to where I had somewhat of a hard time understanding his words. His answers were also quite short and he appeared to avoid giving out information other than the one that he was asked for. Mood is said to be sad and anxious.
>
> **Some word loss is present** and he has many questions, doubts and uncertainties that after explanation has helped quite a lot. . . . **He makes quite a lot of effort to maintain concentration and becomes frustrated when he is unable to find the words or at times asks me to repeat my questions or statements.**

[APA page 99].

As a Spanish speaking psychiatrist, Dr. Sanchez was able to speak directly with Moran. He made the same observations made by the Single Commissioner, yet attributed them to postconcussion syndrome, depressive disorder and anxiety; not "duplicity." The evidence shows that Moran has difficulty remembering and impaired word finding due to brain damage. See Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)("How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court."). The Commission erred by substituting its own lay opinion of a medical condition for the diagnosis made by a qualified medical professional.

The Order also takes issue with Moran's testimony regarding jumper cables (which he is shown using on surveillance video). Moran testified he had used them. He was then asked "do you have any recollection of using jumper cables on your Ford vehicle a little over a year ago?" After the interpreter asked if he could rephrase rather than repeat the obviously confusing question, Moran responded: "I don't remember. It's hard to remember something that happened last week, hard to remember something that happened last year." [Tr. Page39, line 21-page 40, line 20]. There is no reasonable way to turn this testimony *by a brain-damaged individual* speaking through an interpreter (who was struggling to translate the question) into duplicity. The man did not remember if he used jumper cables in the year before the hearing – but he acknowledged he had used them in the past.

Similarly, the testimony about Moran's education cannot fairly be interpreted as duplicitous. The transcript states his testimony about how far his education went in Nicaragua was "The first few years of grade school." [Tr. Page 14, lines16-18]. This was a confusing question because there is no such thing as "grade school" in Nicaragua.[14] Moran testified in his deposition that he had received "four years of secondary school" and a total of ten years of formal education. Nicaragua's educational system includes 6 years of primary school followed by secondary school. [Tr. Page 33, line 21-page 35, line 10]. The testimony was obviously confusing – specifically to Moran – but also to the interpreter, lawyers and commissioner. To characterize such obvious confusion on a tangential issue as "dishonest testimony" is simply unwarranted piling on.

The injection of credibility findings into this medically driven case is unnecessary, arbitrary

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[14]Moran was born on March 24, 1974. At the time he entered school, Nicaragua had one of the poorest educational systems in Latin America. The socialist Sandinista government came to power in 1979 with a mandate to reform the educational system. At that time, only 65% of primary school age children were enrolled in school; only 22% completed the full six years of primary school. Education funding improved in the 1980's when Moran would have been in school, yet Nicaragua retained a high rate of illiteracy (more than 23% – down from 50% in 1979). Secondary schools were mostly private and too expensive for the average family.

and capricious. To the extend such credibility findings have any bearing on physical brain damage, Appellant requests those findings be vacated. The Order below should be reversed, in favor of a finding that Moran has proven physical brain damage of sufficient severity to render him incapable of gainful employment.

CONCLUSION

For the foregoing reasons, the Appellate Panel should be reversed. Moran should be provided lifetime medical treatment and disability compensation for physical brain damage under § 42-9-10.

Respectfully Submitted,

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