

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-000325

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SC Court of Appeals

Pedro Moran, (Employee/Claimant),.....Appellant,
v.
JMR Siding, LLC (Employer) and
Hartford Underwriters Insurance Company (Carrier), Respondents.

RESPONDENTS' INITIAL BRIEF

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Statement of Issues on Appeal

1. WHETHER THE WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT APPELLANT WAS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF THE COMBINATION OF HIS INJURIES TO HIS PELVIS, HEAD, AND PSYCHOLOGICAL, BUT APPELLANT DID NOT SUFFER FROM BRAIN "DAMAGE" AS CONTEMPLATED BY S.C. CODE ANN. §42-9-10(C).
2. WHETHER THE WORKERS' COMPENSATION COMMISSION PROPERLY WEIGHED THE CREDIBILITY OF THE APPELLANT'S HEARING TESTIMONY, IN ADDITION TO A REVIEW OF THE COMPLETE MEDICAL EVIDENCE IN THE RECORD, IN REACHING ITS FINAL DECISIONS.

STATEMENT OF THE CASE

Appellant was involved in an admitted work accident on June, 22, 2010, when he fell from a second story. As a result of his accident, Appellant alleges injuries to the head, pelvis, psychological overlay, back, right leg, right arm, and physical brain damage pursuant to S.C. Code Ann. §42-9-10(C). Respondents provided Appellant with authorized causally related treatment with multiple medical providers, including but not limited to, Lexington Orthopaedics and Columbia Orthopaedic Specialists for his physical injuries, and Dr. Joseph Healy for his head injury. Appellant was placed at maximum medical improvement (“MMI”) for his pelvis on December 15, 2011 and MMI for his head on July 28, 2014.

On March 20, 2014, Appellant filed a form 50 request for hearing, wherein he sought a finding a permanent total disability and ongoing future medical treatment. Notably, Appellant did not allege physical brain “damage” on his Form 50. Respondents timely filed a Form 51 admitting Appellant’s accident, but denying the extent of injuries as alleged by the Appellant and denying that Appellant was permanently and totally disabled. Respondents simultaneously filed a Form 21 request for hearing to stop payment of temporary compensation, pay permanency, and request for credit for overpayment of temporary compensation benefits paid after MMI. By way of Appellant’s Form 58 pre-hearing brief, Appellant amended his Form 50 and for the first time to allege “physical brain damage” pursuant to S.C. code Ann. §42-9-10(C), and Appellant’s entitlement to lifetime benefits pursuant to the same, which Respondents categorically deny. At the hearing, attorney for appellant argued that if appellant was not found to have “physical brain damage” so as to entitle him to lifetime benefits, in the alternative appellant sought an award of permanent and total disability to be paid in a lump sum.

A hearing was held before the single Commissioner on March 2, 2015. On July 24, 2015, the Single Commissioner issued a decision in order, wherein she ruled that (1) Appellant reached MMI for his pelvis on December 15, 2011; (2) Appellant reached maximum medical improvement for his head/brain and psychological overlay on July 28, 2014; (3) Appellant is permanently and totally disabled due to a combination of his pelvis, head/brain, and psychological overlay injuries; and (4) Appellant failed to meet his burden of proving “physical brain damage” within the confines of S.C. Code Ann. §42-9-10(C) of the and “permanency an severity test” set forth by the South Carolina Supreme Court.

Within the allowable fourteen (14) day time frame, Appellant filed a Form 30 request for commission review, and oral arguments were held before the Full Commission Appellate Panel (“Full Commission”) on October 9, 2015. On January 21, 2016, the Full Commission issued a decision in order affirming the order of the single Commissioner in full. On February 19, 2016, Appellant filed his Notice of Intent to Appeal with this court. This appeal now follows.

STATEMENT OF THE FACTS/EVIDENCE

Witness Hearing Testimony:

Appellant was the only witness to testify at the hearing. Appellant is 40 years old and is from Nicaragua. (Hr. Tr. pg. 14). Appellant testified that he only attended the first few years of grade school in Nicaragua. (Id. at 14). Appellant testified through an interpreter that did not speak or understand the English language. (Id. at 14), Appellant has a wife and seven children, and he currently lives with his wife and two of his children. (Id. at 15). Appellant testified his work history consisted of construction work. (Id. at 15).

Appellant testified that on the day of the accident, he only remembered performing siding and roofing work, and he had no recollection of the accident itself. (Id. at 15-16). Despite being provided with treatment from multiple medical providers, Appellant testified he only remembers seeing one doctor for his injuries, Dr. Joseph Healy. (Id. at 16).

With respect to his physical complaints, Appellant testified, "what hurts is my right hand, my back, my pelvis and my right leg." (Hr. Tr. p.19, lines 19-20). Appellant further testified regarding his arm, stating, "the pain that I feel in my right shoulder is I feel like it's coming off my body, and it shoots down all the way to my hand. I feel an itchy sensation in my hand. Frequently, it gets numb. I don't have strength, and I can't have it raised for too long. (Id. at p.22, lines 8-13). With respect to his back, Appellant testified, "the pain that I have in my back shoots down my leg. Sometimes I feel he gets so swollen that the muscles in my spine are swollen. There have been instances where I had to go to the ER, and pain is so strong that it even keeps me from sitting, walking." (Id. at pp. 22-23, lines 22-25, 1-3). With respect with respect to his pelvis and right leg, Appellant testified, "the pain that I do have, I have a lot, and I feel it's a tickling -- or a tingling sensation, and it shoots down from my -- back here (witness indicates) down to the bottom part of my leg all the way to my heel. I feel like my tendons tense up, and that's when it's been stronger. When it stronger, I feel like it weekends or -- direct translation is trip. I want to trip, because he gets so weak. That's my problem." (Id. at pp.23-24, lines 18-25, lines 1-4). Finally, Appellant testified regarding daily headaches. (Id. at 19, lines 24-25).

Although Appellant testified on direct examination testimony at the hearing that he only attended a few years of grade school, Appellant testified on cross examination that did not recall or misunderstood his October 6, 2010 deposition testimony wherein he testified to attending as much as ten (10) years of schooling in Nicaragua. (Hr. Tr., pp.33-34, lines 11-25, 1-23; Moran 10/01/10

Depo Tr., pg. 6, lines 10-12). When asked by the Single Commissioner whether he could have gone to the tenth grade of school, Appellant responded that he did not remember. (Id. at 34-35, lines 25, 1-10). Furthermore, when Appellant was asked why he told several of his doctors that he had ten years of education in Nicaragua, and again Appellant responded that he did not remember. (Id. at 35, lines 14-24).

Appellant testified that since the accident, he has received his own weekly workers' compensation checks made payable to Appellant. (Id. at 37, lines 18-21). Appellant has never had a guardian appointed to protect or care for his interests. (Id. at 37-38, lines 22-25, 1-6). Appellant testified that he is able to drive himself out of necessity or emergency. (Id. at p. 38, lines 11-14). Appellant further testified he knows how to and has used jumper cables. (Id. at p.40, lines 1-3).

Medical Evidence:

- **Dr. James McInstosh (Authorized Medical Provider):**
 - Appellant presented to Dr. James McIntosh on June 22, 2015 as a consultation for a pelvic fracture. Appellant further reported numbness down the leg with difficulty moving his extremity, and complaints of right elbow and right wrist pain. (APA 1, p.1)
 - Appellant continued to treat with Dr. McIntosh, to include medication management, physical examinations, and updated radiographs of his pelvic fracture. On March 26, 2012, Dr. McIntosh's medical note states that the Appellant reported with continued pain in the trunk and trochanteric region of the right hip, which prevented him from walking long distances climbing, climbing steps or ladders, or having relationships with his wife. With regards to his pelvis, Dr. McIntosh explained that appellant had a non-antalgic gate that he felt was leading to the discomfort in the pelvic ring, and Dr. McIntosh assigned 15% impairment to the right lower extremity, with permanent work restrictions of no ladder climbing or excessive stairclimbing more than six steps. (APA 1., p. 27). Dr. McIntosh subsequently submitted an addendum to his report, wherein he assigned 10% to the right lower extremity. (APA 1., p. 27).

- **Dr. Randolph Waid (Neuropsychological Evaluation):**
 - Appellant was seen for a neuropsychological evaluation with Dr. Randolph Waid on March 30, 2012, and again on October 22, 2012. At his March 30, 2012 evaluation, Dr. Wade opined that, "overall, neuropsychological evaluation revealed compromises and brain behavior functioning that are commonly obtained on individuals who experience mild traumatic brain injuries with associated frontal

attentional/executive difficulties.” Dr. Waid goes on to state, “review of records as well as the current evaluation are consistent with Mr. Moran having sustained physical brain injury due to a mild traumatic brain injury as well as deficits being exacerbated to a more disruptive level by disruptive somatic and psychological difficulties. (APA 3, p.95). Finally, Dr. Waid stated that the appropriate diagnosis for appellant was “cognitive disorder due to the residuals of a mild traumatic brain injury as well as the interfering effects of pain/somatic symptoms; psychological disruption, and sleep disturbance/fatigue.” (APA. 7, p.46).

- Appellant returned to Dr. Waid for a follow-up evaluation on October 22, 2013 at the request of Dr. Healy, for repeat testing to compare to the previous evaluation and clarify the Eddie yellow logical factors for appellant’s continuing difficulties. Following a repeat evaluation, Dr. Waid stated that appellant was more compromised in his functional/psychological disruption, but neuropsychological testing was generally consistent with that obtained at the previous evaluation as would be expected considering the length of time since Mr. Moran sustained a physical injury to the brain.” Dr. Waid goes on to state that in his opinion, the evidence for more disruptive compromise affecting attention and concentration was slower processing speed were attributed to his deteriorating psychological/emotional state. Dr. Waid concludes that appellant has attained a reasonably good recovery from a mild traumatic brain injuries and that his current level of impairments are due to an exacerbation caused by his disruptive levels of somatic and emotional difficulties.” (APA 7, pp. 53-54).

- **Dr. Joseph Healy:**

- Dr. Healy provided extensive treatment for Appellant as it relates to his head injury. Following the completion of treatment, Dr. Healy issued several statements regarding the claimant’s ability to return to work, permanent impairment, and permanent work restrictions.
 - (04/08/14): “Mr. Moran is considered unable to return to employment capacities. Considering 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 is totally disabled.” (APA. 10, p. 158).
 - (07/29/14): “Mr. Moran has a whole person rating of 73% due to his June 22, 2010 injury causing physical brain damage. (APA. 10, p. 160).

- **Dr. John Taylor (Respondents’ IME):**

- (01/18/14, 03/21/14) “Current level of neuropsychological functioning is indicating mild cognitive impairment. There are no focal or lateralized neurobehavioral findings. His testing does indicate some improvement over that noted by Dr. Wade in his neuropsychological valuation. I am not finding evidence of significant diffuse axonal injury or hypoxic/ischemic injury. Regarding ideology, there is a variability is prescribed previously described. This is most likely preferable to the effects of pain as well as his psychiatric functioning on his performance.” (APA, 7, p.105).

- **Columbia Rehabilitation Clinic (IME obtained by Appellant)**
 - (06/02/12): At the request of his attorney, Appellant was scheduled for a functional capacity evaluation at Columbia rehabilitation clinic on June 4, 2012. Following completion of the testing and evaluation, it was the opinion of Elizabeth Wagner, DPT, that appellant was limited to light to light medium physical demand category, with restrictions of lifting 19 pounds Florida waste, 19 pounds 12 inch to waste, 19 pounds waist to shoulder, 19 pounds shoulder to overhead, 23 pounds two-handed Carrie, 15 pounds right hand carry 15 pounds left hand carry, and 40 pounds push and pull. (APA. 4, pp.67-68).

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the "substantial evidence" rule as the standard for judicial review of a decision of the Commission:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (d) affected by other error of law; [or]
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers' compensation appeals, may only overturn a conclusion of the Workers' Compensation Commission only if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the

case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2010). “[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record.” Tiller v. Nat’l Health Care Center, 334 S.C. 333, 340 (1999).

ARGUMENT

I. The Workers’ Compensation Full Commission Correctly Affirmed The Single Commissioner’s Decision That Appellant Was Permanently And Totally Disabled As A Result Of The Combination Of His Injuries To His Pelvis, Head, And Psychological, But Appellant’s Injuries Did Not Meet The Level Of Brain “Damage” As Contemplated By S.C. Code Ann. §42-9-10(C).

The South Carolina Workers’ Compensation Act sets forth three (3) separate forms of permanent disability benefits: (1) permanent and total disability under §42-9-10; (2) permanent and total disability benefits which compensate for decreased wage earning capacity under §42-9-

20; and (3) permanent partial disability benefits for “scheduled member injuries” set forth in §42-9-30 and Regulation 67-1101. Under §42-9-10(A), such disability exists “[w]hen the incapacity to work resulting from an injury is total.” Pursuant to S.C. Code Ann. §42-9-10(A), “[i]n no case may the period covered by the compensation exceed five hundred (500) weeks, except as provided in subsection (C).”

A. “Physical Brain Damage” as defined by S.C. Code Ann. §42-9-10(C).

S. C. Code Ann. §42-9-10(C) specifically sets forth the only three (3) exceptions in the entire Act to the 500 week cap on benefits, including: (1) an injury resulting in paraplegia; (2) an injury resulting in quadriplegia; and (3) an injury resulting in “physical brain damage.”

When drafting this section of the Act, the Legislature was forced to contemplate every possible injury that could arise in the workers’ compensation arena and then narrowly limit the five hundred (500) week cap exceptions the three most serious categories listed above. Each limited exception presupposes a heightened criteria required to justify a claimant’s entitlement to lifetime benefits. When examining the language of S.C. Code Ann. §42-9-10(C), it is imperative to note the use of specific language in the statute. The statute does not allow an exception for a claimant who has suffered an “injury” to the brain, but instead it specifically adds the qualifier of physical brain “*damage.*” An “injury” to the brain is properly compensated under Regulation 67-1101, which allows for between twenty five (25) and two-hundred and fifty (250) weeks of compensation for partial or total loss of use of the brain.

B. “Permanency and Severity Test” for “Physical Brain Damage”

On March 6, 2013, the South Carolina Supreme Court issued two (2) companion opinions setting forth the test the Workers Compensation Commission and lower courts are to use in

adjudicating whether an injury to the brain constitutes “physical brain damage” so as to trigger an to the 500 week cap on benefits and a claimant’s entitlement to lifetime benefits.¹

In Crisp II, the Supreme Court rejected the argument that any physical brain injury, regardless of degree, triggers the operation of section 42-9-10(C), since it is “contrary to legislative intent and to the manner in which our courts have awarded compensation to the brain.” (Crisp II, at 842). The Court in Crisp states:

As we found in Sparks, we view the inclusion of “physical brain damage,” along with quadriplegia and paraplegia, in section 42-9-10(C) as indicative of the General Assembly’s intent to compensate an employee-claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in physical brain damage. As noted in Sparks, *permanency and physicality are requirements. However, the severity of the injury is the lynchpin of the analysis.*” (Emphasis added)

Id at 843.

Appellant first inaccurately states that this is the first time the Appellate Courts have had an opportunity to address the applicator of the “permanency and severity” handed down by the Supreme Court. In fact, this Court recently addressed the exact issue in an unpublished opinion filed March 20, 2016.² Further, the Court itself applied the test in Sparks themselves when they affirmed the Commission’s decision that the claimant failed to meet the burden of “physical brain damage.” Sparks, (opinion No. 27229: 2013).

Regardless, Respondents would propose to this Court that the most practical way to view the “permanent and severity” test handed down by the Supreme Court is to view both factors on a spectrum. For “permanency”, any minor finger injury resulting in 1% permanent partial disability is by definition, “permanent.” Obviously, this is not what the Court envisioned when they set forth requirement of a “permanent” prong of the test, and they envisioned something on

¹ See Crisp II v. Southco, Inc., 401 S.C. 627; 738 S.E.2nd 835 (2013)p; and Sparks v. Palmetto Hardwood Inc., 406 S.C. 124, 750 S.E.2nd 61 (2013).

² Fragosa v. Kade Construction, et al, Unpublished Opinion 2016-UP-189 (Ct. App. 2016)

the opposite end of the spectrum. Similarly, while slightly more subjective, the “severity” of an injury is one that can be placed on a scale from the most minor injuries all the way to the worst injuries contemplated by the Legislature. Therefore, it stands to reason that Supreme Court has given future instructions to the Commission to review level of permanency and severity as a factual determination, made after a detailed analysis of the facts of the case, the evidence in the record, and in comparison with all other injuries contemplated under the Act.

C. Inapplicability of Pearson v. JPS Converter & Industrial Corp.³

Appellant attempts to argue that Pearson was part of the group of 2014 Supreme Court companion cases defining brain “damage” (*see Crisp II* and *Sparks*), and that Pearson stands for the principle that on the “permanency and severity” spectrum described above, permanent and total disability is the threshold point for satisfying “severity.” This is quite simply not the case.

Pearson was a 1997 Court of Appeals decision, decided approximately 20 years before *Crisp II* and *Sparks*. In Pearson, the Court of Appeals found that the defendants in the case’s effort to avoid a lifetime benefits claim by arguing that Pearson’s disability was a combination of his psychological overlay and some brain damage was without merit, since “the record overwhelmingly supports that Pearson is totally and permanently and totally disabled as a result of the physical brain injury he suffered from a work related accident.” (Pearson at p.399) The court goes on to state, “We agree with the Circuit Court’s interpretation that §42-9-10 does not require the total and permanent disability to be *solely* the result of physical brain damage – the statute only requires that a claimant be permanently and totally disabled *and* suffer physical brain damage as a result of the injury.” (*Id.*) The Court’s statement does not stand for the principle that satisfaction of those two elements automatically equals a lifetime award for “physical brain damage,” but instead the Court explained that both of those requirements must be involved *at a*

³ See 327 S.C 393, 489 S.E.2nd 219

minimum, and the addition of only psychological overlay was not enough to show that permanent and total disability had to *solely* be the result of the brain injury. CITE

Nothing in Pearson says that the “severity” prong of the test is satisfied by an injured workers inability to return to gain employment. If the Supreme Court intended that to be the threshold, they would have expressed that type of clear line rule in Crisp II and Sparks. This is especially true, since the Pearson was a case at their disposal and even cited in their opinions. Further, the Court in Crisp II performed an in depth research of other surrounding states who have adopted by legislative enactment an exception to the general rule for permanent and total disability, including Virginia, who permits lifetime benefits for “an injury to the brain which is so severe as to render the employee-claimant permanently unemployable in gainful employment.” (Crisp II citing Va. Code Ann. §65.2-503(C)). The Supreme Court rejected this type of bright-line test in favor of the “permanency and severity” test they instructed the lower courts to apply. (Id).

While Appellant attempts to cherry-pick quotations of Crisp II in an effort to compile a single favorable statement that “lifetime compensation was predicated upon brain damage so severe that the person could not subsequently return to suitable gainful employment,” (App. Br. P. 9) this is not what the Court said in Crisp II. In Crisp II, the Court clearly states “*Inherent in the requirement that the injury to the brain be severe is the requirement that the worker is unable to return o suitable gainful employment.*” Crisp II (emphasis added). While Appellant tries to discredit this as a minute and indistinguishable difference, Respondents would argue that the court is clearly demonstrating that on the scale referenced above, severity must be demonstrated by *at least* an inability to return to work. Nothing in the case law suggests that inability to return to work is the end of the spectrum though. Again, this is evidenced by the Supreme Court’s

analysis and rejection of a straight line “permanent and total” test for severity such as the one adopted by Virginia.

D. Full Commission appropriately found that Appellant failed to meet the “permanency and severity” burden required to establish “physical brain damage” in accordance with §42-9-10(C).

In this case, there was more than sufficient medical evidence to support the Full Commission’s finding that Appellant was permanently and totally disabled as a result of the combination of his multiple injuries, but his brain injury did not rise to the level of “damage” as contemplated by §42-9-10(C). Respondents first cite Dr. McIntosh’s March 26, 2012 note, stating Appellant reported with continued pain in the trunk and trochanteric region of the right hip and a non-antalgic gate that Dr. McIntosh felt was leading to the discomfort in the pelvic ring. His injuries were severe enough that Dr. McIntosh assigned 15% impairment to the right lower extremity, with permanent work restrictions of no ladder climbing or excessive stairclimbing more than six steps. (APA 1., p. 27).

Further, Respondents rely Dr. John Taylor’s opinion that Appellants’ level of neuropsychological functioning indicated mild cognitive impairment, and there were no focal or lateralized neurobehavioral findings. Dr. Taylor opined that Appellant’s testing does indicate improvement over that noted by Dr. Waid in his neuropsychological valuation, and Dr. Taylor could not find evidence of significant diffuse axonal injury or hypoxic/ischemic injury. Regarding ideology, Dr. Taylor concluded that his function problems had a variability as previously described, and his problems were likely related to the effects of his pain as well as his psychiatric functioning. (APA. 7, p.105).

Finally, Respondents would cite the medical opinion of Dr. Healy, who stated that “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 impairments to his pelvis/back/legs, I do not believe he could successfully meet the demands of any job in the competitive marketplace.” (APA. 10, p.158). Dr. Healy’s inclusion of the appellant’s physical injuries is further evidenced by the fact that he assigned 73% impairment to the whole person, as opposed to assigning 73% to the head, which is a separate scheduled member under SC code annotated regulation 67 – 1107. (APA. 10, p. 59).

In addition to the medical evidence in the record, the Single Commissioner also had the benefits of observing the Appellant in person and taking live testimony. Appellant testified at length with regards to the physical injuries that would prevent him from returning to work, exclusive of his headaches and alleged cognitive difficulties.⁴

This Court recently held that when both parties presented conflicting medical evidence, “[t]he Single Commissioner, and ultimately the Appellate Panel, had the discretion to weigh the conflicting evidence in rendering its decision. Thus, we defer to its findings in its decision.” Cranford v. Hutchison Construction, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012); *See Mullinax v. Winn-Dixie Stores, Inc.* 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995)(“Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.”).

⁴ **Claimant’s Deposition Testimony:**

- “What hurts is my right hand, my back, my pelvis and my right leg.” (Hr. Tr. p.19, lines 19-20).
- “The pain that I feel in my right shoulder is I feel like it’s coming off my body, and it shoots down all the way to my hand. I feel an itchy sensation in my hand. Frequently, it gets numb. I don’t have strength, and I can’t have it raised for too long. (Id. at p.22, lines 8-13).
- “The pain that I have in my back shoots down my leg. Sometimes I feel he gets so swollen that the muscles in my spine are swollen. There have been instances where I had to go to the ER, and pain is so strong that it even keeps me from sitting, walking.” (Id. at pp. 22-23, lines 22-25, 1-3).
- “The pain that I do have, I have a lot, and I feel it’s a tickling -- or a tingling sensation, and it shoots down from my -- back here (witness indicates) down to the bottom part of my leg all the way to my heel. I feel like my tendons tense up, and that’s when it’s been stronger. When it stronger, I feel like it weekends or -- direct translation is trip. I want to trip, because he gets so weak. That’s my problem.” (Id. at pp.23-24, lines 18-25, lines 1-4).

Despite the sufficient evidence in the medical records and hearing testimony, In addition, Appellant still unnecessarily attempts to educate this court on the varying forms of brain injuries, including focal brain damage, cortical contusions, frontal lobe contusions, and diffuse brain damage. Appellant argues that he has symptoms consistent with the various conditions he lists for the first time in his brief, but Appellant cites no reference to these conditions in the medical records. Nor does Appellant cite whether any of these conditions were discussed as prerequisites to brain “damage” as contemplated by the Supreme Court. Instead, they are an exercise in counsel’s effort to set forth his own medical opinion, which is exactly what he criticizes the commission for doing under the instructions of the Supreme Court.

Based on the arguments set forth above, it is clear that the Workers’ Compensation Commission appropriately heard the witness testimony and reviewed the evidence in the record, and after applying the facts of the case to the test set forth by the Supreme Court in Crisp II and Sparks, the Commission properly found that Appellant did not sustain a head injury rising to the level of permanent brain damage as set forth in §42-10(C). Therefore, Respondents ask this Court to affirm the January 21, 2016 Decision and Order of the Workers Compensation Commission.

II. The Workers' Compensation Commission Full Appellate Panel properly weighed the credibility of the Appellant’s hearing testimony and a review of the complete medical evidence in the record, in reaching its final decision that Appellant did suffer brain “damage” as set forth in S.C. Code Ann. §42-9-10(C).

Appellant next attempts to argue that the Full Commission erred by including a finding about the Appellant’s credibility as a witness, and the Commission’s decision should be overruled. Respondents respectfully disagree and would submit that a claimant may testify as to his own disability and the Commission may rely on that testimony to support its findings of disability.

Brundrick v. Powell's Garage & Wrecker Service, 248 S.C. 496, 151 S.E.2nd 437 (1966); Linen v. Ruscon Construction Co., 286 S.C. 67, 332 S.E.2nd 211 (1985).

Since the Appellant's brief wants to turn this Court's attention to the Federal Court and their handling of witness testimony, Respondents would show Federal Rules of Evidence provide that if a witness is not testifying as an expert, his opinion is limited to those opinions which are (rationally based on his perception and (b) helpful to a clear understanding of the testimony or determination of fact in the case. (Fed.R.Evid: 410). In this case, appellant's attorney put him up as a witness in order to provide testimony in support of his allegation for physical brain damage. Regardless, appellant now seeks to argue that "to a sign credibility findings to the manner in which a brain-damaged emotionally compromise non-English speaker answers questions posed through an interpreter is, respectfully, inherently arbitrary and capricious." (App. Br. P. 17).

In response, respondents would first show that hearing testimony through an interpreter is a common practice in Worker's Compensation, since a significant percentage of work-related injuries are sustained by non-English-speaking workers. Further, despite counsel's description of appellant as brain-damaged and emotionally compromised, no effort or request was ever made to assign a guardian to protect his interests. In addition, counsel for appellant sought a lump-sum award of permanent and total disability, suggesting the claimant's ability to manage and maintain his own finances. Respondents would argue that if there was anything arbitrary or capricious about the testimony of the appellant, it would be that his attorneys allowed him to testify on his own behalf.

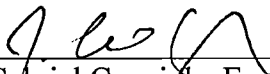
There is nothing in the South Carolina Worker's Compensation Act or accompanying case law stating that a claimant who requests his own hearing is allowed to testify, but the Commissioner is prevented from weighing his testimony credibility after an unsuccessful result.

Based on the arguments set forth above, Respondents would respectfully request that this Court affirm the decision of the Full Commission.

CONCLUSION

The substantial evidence in the record confirms the conclusion of the Full Commission that Appellant is permanently and totally disabled as the result the combination of his injuries to his pelvis, head/brain, and psychological overlay, but Appellants brain injury does not rise to the level of “physical brain damage” as contemplated by S.C. Code Ann. §42-9-10(C). Accordingly, Respondents request that this Court affirm the Workers’ Compensation Commission Full Appellate Panel’s January 21, 2016 Decision and Order.

Respectfully Submitted,



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