

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

SC Court of Appeals

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

Appellate Case No.: 2016-000325

Pedro A. Moran, Employee/Claimant, Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

Mark R. Calhoun
CALHOUN LAW FIRM
714 East Main Street
Lexington, SC 29072
(803) 957-8401

ATTORNEYS FOR APPELLANT

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ARGUMENT

1. Pedro Moran has suffered physical brain damage and is legally entitled to workers' compensation benefits for life [in reply to Respondents' argument at pages 8-15].
 - A. Application of the test for Physical Brain Damage [in reply to Respondents' argument at pages 9-11].

In their brief, "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." [Brief of Respondents, page 10]. As Respondents acknowledge that a 1% impairment to a finger is a permanent disability by definition (albeit not severe), so too must they acknowledge the severe permanent disability Moran suffered as confirmed by the 73% whole person permanent impairment "due to his 6-22-10 injury causing physical brain damage." [APA page 160].

If indeed the test is viewed on a spectrum, it cannot be gainsaid that a 73% impairment rating is on the opposite (severe) side of the spectrum. Yet, the 73% impairment rating (and Dr. Healy's opinion regarding physical brain damage) is not mentioned by the Appellate Panel. There is no tiptoeing around the elephant in the room – its presence is not even acknowledged. How can it be said that the Appellate Panel applied the Sparks test when it ignored or overlooked the single most critical medical evidence in the record – the unrefuted expert medical opinion of the treating neurologist? See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) ("We find no evidence that challenges the conclusions of Burnette's doctors . . . As a result, the record provides little or no support of the findings of the Commission . . .").

Respondents also claim: "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.'" [Brief of Respondents, page 10]. This characterization of Sparks is not accurate. In Sparks, the Petitioner argued "that the General Assembly's use of the verb phrase 'has suffered'

indicates that the injury need not result in permanent damage, since this form of the verb requires no more than that the action—here ‘suffered’—occur at some (indeterminate) point in the past.” Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (S.C. 2013). The Supreme Court rejected this strained interpretation – emphasizing that the “General Assembly’s use of this tense is consistent with a finding that it intended ‘physical brain damage’ to denote damage that is permanent and therefore necessarily continues to have effect into the present.” Id. at 130-131, 750 S.E.2d 64.

The Sparks court did not deal with a situation – as in the instant case or Pearson – where there was uncontroverted evidence of severe permanent physical brain damage. None of the doctors in Sparks opined Sparks had suffered severe permanent physical brain damage. Indeed, the “Commission found that Petitioner had sustained a compensable injury to his head, including a mild concussion, but that his testimony relating to the extent of his brain injury was not credible and that the evidence failed to show that Petitioner had been dazed and confused after his head injury or suffered nausea, vomiting, cognitive impairments, or post-concussive headaches.” Id. at 127, 750 S.E.2d 62. Faced with the absence of such evidence characteristic of physical brain damage, the Commission went so far as to state “the claim for physical brain injury borders on the frivolous.” Id.

The evidence of brain damage in Moran’s case stands in stark contrast to Sparks. On March 30, 2012, the neuropsychologist, Dr. Waid, reported the very conditions noted to be missing in Sparks:

Records reveal that Mr. Moran experienced **disruptive memory difficulties** post injury as well as complaint of **frequent headache, mood swings, poor sleep,** and low back pain. Affidavits provided by Reina Isabel Quintero, wife, as well as Hiber Donaldo Medina-Romero document the pre to post injury changes in Mr. Moran including **memory loss, dizziness, headache, mood swings/depression,** and the manner in which he is **emotionally reactive** with an ease in which he becomes aggravated with loss of temper. Mr. Moran was also described as being socially withdrawn, preferring “be by himself.” [APA page 39].

In December 8, 2014, Dr. Healy observed: “Patient continues to have **post traumatic headache**. The patient states 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 (emphasis added)].

Records from June 22, 2010 (the date of the accident) further confirm Moran “fell from a second story while working on the outside of a house. There he was noted to have loss of consciousness.” [APA page 1].

Dr. Sanchez confirms these conditions, writing:

He became **unconscious** for about 20 minutes until he woke up in the ambulance. . . Her [sic] states that since the accident his **memory has been very poor**. He has realized that at times while talking, he will stop and not remember what he was talking about. . . . He has been having some **headaches** that have lasted for days, are intolerable and do not subside with Tylenol or other OTC medications. At times he has felt **extremely angry** to where he does not feel like talking to anybody despite having been a very social person before this fall. . . . He is also having some **dizziness** and **problems finding words**. . . . He is obviously experiencing some **headaches that seem to be worse with light exposure**. [APA pages 98-99].

The same symptoms appear throughout Dr. Healy’s treatment records. The bottom line is that the evidence in Moran’s case is nothing like Sparks. Sparks had none of the indicia of physical brain damage. Moran suffers from the persistent severe headaches and cognitive deficits missing in Sparks. Moran’s condition meets the test for permanent and severe physical brain damage set forth in Sparks and Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013)

B. Application of Pearson and Burnette to the Appellate Panel’s medical opinions [in reply to Respondents’ brief at pages 11-13].

Dr. Healy is Moran’s treating neurologist. He is the only medical doctor to treat Moran’s brain injury and one of two medical doctors who opined on Moran’s physical brain damage (the second being Dr. Sanchez). Where the Appellate Panel mentions Dr. Healy’s opinions, it purports to quote his opinion – yet the quotation attributed to Dr. Healy does not appear in the cited pages.

The Appellate Panel found as a fact: “Dr. Healy noted Claimant’s issues [sic] is ‘predominately depression.’” [FC Order, page 8, Finding of Fact 8]. Dr. Healy made no such statement. A full reading of the cited records shows the Appellate Panel misquoted, misstated and misunderstood Dr. Healy’s opinion. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(“Because no evidence indicates this opinion originated from a medical provider, yet it appears in the single commissioner’s order, *we are forced to conclude it is the medical opinion of the single commissioner*, adopted by the Commission.”)(emphasis added).

As support for the “predominately depression” finding, the Appellate Panel cited three pages from Dr. Healy’s chart written between June 27, 2012 and August 26, 2013.

On June 27, 2012, Dr. Healy wrote:

Pedro Moran returns today for a follow up. I have had a chance to review Dr. Waid’s note with regards to the neuropsychological assessment. As expected this shows that the patient does have a post-traumatic encephalopathy with consequent cognitive dysfunction¹ as well as associated psychological problems. Predominately the psychological problems are reactive to depression. [APA page 127].

No fair reading of this passage supports a finding that Moran’s issue is “predominately depression.” Dr. Healy’s statement that the “psychological problems are reactive to depression” simply describes the type of psychological problem – depression rather than anxiety or any of the myriad other psychological problems that could potentially affect a disabled person. Dr. Healy plainly states the primary diagnosis is “post-traumatic encephalopathy with cognitive dysfunction . . .” [APA page 127]. In short, physical brain damage.

The second record cited by the Appellate Panel is from July 9, 2012. Here Dr. Healy states:

Pedro Moran has suffered physical brain damage due to his June 22, 2010 industrial

¹Dr. Healy additionally noted “[Moran] would benefit from cognitive educational retraining and this would have to be done at relatively sophisticated rehabilitation unit.” [APA page 127]. No cognitive retraining was provided to Moran.

injury. Testing has confirmed there is structural/organic damage to Mr. Moran's brain due to a traumatic brain injury with consequent cognitive dysfunction. These cognitive deficits are also being exacerbated by disruptive somatic and psychological difficulties. [APA page 129].

Dr. Healy confirms his opinion once again: Moran suffered physical brain damage with cognitive deficits. The fact the cognitive deficits are exacerbated by psychological difficulties is not evidence that Moran's problem is "predominately depression." And it is certainly not evidence that Dr. Healy said any such thing.

The August 26, 2013 record from Dr. Healy continues the focus on differentiating whether Moran's continuing deterioration is psychological or from underlying posttraumatic encephalopathy (i.e. physical brain damage). On the page cited by the Appellate Panel, Dr. Healy reports:

Patient returns for followup of his posttraumatic syndrome. This is a very pleasant 39-year-old Hispanic male who is the unfortunate victim of closed head injury in a work-related accident. Since then he's complained of dizziness poor memory, headache and fatigue. . . . Patient seems to feel that he is deteriorating and getting worse. This late day after his accident my impression is that this would be more of a psychological basis unless there is an underlying posttraumatic encephalopathy. [APA page 140].

Here we can see Dr. Healy analyzing why Moran continues to deteriorate. Many TBI patients tend to improve for six months to a year and then stabilize. Moran continued to worsen – leading Dr. Healy to consider a differential diagnosis of psychological factors versus posttraumatic encephalopathy. He did not make a definitive diagnosis that Moran's problem is primarily depression. We see this on the next page where Dr. Healy states "I believe that at this point he is having demise from psychological standpoint or there is a posttraumatic encephalopathy which has caused his deterioration." [APA page 141].

Inexplicably, the Appellate Panel ended its analysis with the August 26, 2013 record. Ironically, this also coincides with a decision by Respondents to stop Moran's treatment with Dr. Healy and deny him his medications. Dr. Healy complained that "the carrier has continued to refuse

to provide Mr. Moran with the treatment I have ordered . . .” [APA page 150]. Treatment resumed in February 2014. [APA pages 152-153]. Dr. Healy continued to diagnose and treat Moran up to and through the hearing before the single commissioner – with the last treatment note dated December 8, 2014. [APA page 164].

The determination of whether a traumatic brain injury results in physical brain damage is made when the patient reaches MMI. Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013). Dr. Healy placed Moran at MMI on July 28, 2014 – a full 11 months after the last treatment record cited by the Appellate Panel. He opined Moran was permanently and totally disabled with a 73% whole person impairment rating “due to his 6-22-10 injury causing physical brain damage.” [APA page 160].

By that time, Dr. Healy had made his final diagnosis: “Mr. Moran’s mild posttraumatic **encephalopathy/physical brain damage is both permanent and severe.**” [APA page 157 (emphasis added)]. Dr. Healy 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)]. See Crisp (recognizing “cognitive behavior level of functioning” as an accepted method for proving “these medical-technical brain injury cases.”).

As to separating the psychological effects from the cognitive deficits, dizziness and headaches, this is a distinction without a difference. The psychological problems are a direct result of the brain damage – as is typical of TBI patients. Dr. Healy made this point when he wrote “Question at this point is whether he has posttraumatic encephalopathy with poor cognitive impairment secondary to emotional disorder (**related to his head injury**).” [APA page 152 (emphasis added)]. He answered his own question on the next visit where on May 19, 2014, he

wrote: “He has post traumatic encephalopathy. There is *secondary* depression which is worsening.” [APA page 155 (emphasis added)]. The psychiatrist, Dr. Sanchez, agreed “completely” with Dr. Healy. He wrote Moran “is suffering the symptoms of Post Concussion Syndrome which includes the encephalopathy.” [APA page 95].

A full reading of Dr. Healy’s records shows the Appellate Panel’s finding was erroneous and unsupported by the evidence in the record. Moran’s primary problem is post traumatic encephalopathy with “secondary depression” – all of which result from the work-related traumatic brain injury. 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.”).

As such, the record shows that the Appellate Panel’s finding that Moran’s problems are “primarily depression” is not supported by substantial evidence. A disabling psychological condition – particularly one caused by brain damage – cannot bar a claim for lifetime compensation in the presence of physical brain damage. As the Supreme Court characterized Pearson, “§ 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., 406 S.C. 124, 750 S.E.2d 61 (2013). By the same token, the fact that Moran suffered other injuries does not take away the essential truth that he suffered physical brain damage as a result of the compensable injury.²

²Moran’s other injuries do not support permanent and total disability. Dr. Bethea opined “he should be able to work full duty.” [APA page 35]. Dr. McIntosh assigned work restrictions of no ladder climbing or excessive stair climbing more than 5 steps. [APA page 27].

C. There is no conflicting medical evidence for the Appellate Panel to weigh [in reply to Respondents' argument at pages 13-15].

Respondents contend "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)." [Brief of Respondents at page 13.]

Respondents focus on Dr. McIntosh's work restrictions from his orthopaedic injuries. As previously noted, work restrictions of no ladder climbing or excessive stair climbing would not support a total disability award – particularly when Dr. Bethea's return to full duty is factored in.

Respondents also mention Dr. Taylor's opinion. Dr. Taylor had no opinion on either brain damage or disability. He stated he was "unable to provide an opinion regarding the presence or absence of postconcussive syndrome at this time." He "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]. Dr. Taylor's report has no probative value on the ultimate issues in this case. 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.").

Respondents then go to Dr. Healy's opinion. As discussed *supra* at pages 3-7, Dr. Healy ultimately concluded that Moran's work injury resulted in "**physical brain damage [that] is both permanent and severe.**" [APA page 157 (emphasis added)]. Dr. Sanchez agreed "completely." [APA page 95]. There is simply no conflict in the opinions of the doctors.

Lastly, Respondents speculate that Dr. Healy's 73% impairment rating includes Moran's "physical injuries" as "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." [Brief of Respondents, page 14]. This is a decidedly strained reading of Dr. Healy's impairment rating.

Dr. Healy states "Mr. Moran has a whole person rating of 73% due to his 6-22-10 injury causing physical brain damage." [APA page 160]. Dr. Healy specifically ties the impairment rating to "physical brain damage." He makes no mention of including other injuries. It would make no sense for him to do so, as his treatment for Moran was entirely for the brain damage. Drs. Bethea and McIntosh did not rate the brain. They rated only the injuries they treated. [APA pages 27, 31].

As to a whole person rating, the AMA Guides requires all *Cerebral Impairments* to be expressed as whole person impairments. Unlike the extremities, the Guides does not break out the impairment for brain damage to the brain itself. AMA Guides to Permanent Impairment (5th Edition), pages 309-327. Dr. Healy simply followed the methodology expressed in the AMA Guides. In the absence of any reference to conditions other than physical brain damage, suggesting otherwise is entirely speculative. Cf. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012).

The medical evidence does not support a finding that Moran's brain injury did not rise to the level of permanency and severity proving physical brain damage. Moran's brain damage is *the* disabling condition. Drs. Healy and Sanchez unequivocally state Moran suffered "**physical brain damage [that] is both permanent and severe.**" [APA pages 95, 157 (emphasis added)]. The Appellate Panel should be reversed and Moran should be awarded lifetime compensation.

2. A credibility finding is unnecessary, unsupported by the evidence, and cannot outweigh the medical evidence [in reply to Respondents' Brief at pages 15-17].

Appellant does not dispute Respondents' assertion that "a claimant may testify to his own disability." [Brief of Respondents at page 15]. The error here lies in the Commission making patently arbitrary credibility findings as a proxy for rejecting the medical evidence of physical brain damage. 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); Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App.2011)(permitting the Commission to disregard medical evidence only when other competent evidence exists in the record). Respondents do not address this point nor the issue of "sit and squirm" jurisprudence. See Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring)(hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional.").

Respondents instead suggest Moran must not be brain damaged if his attorneys believe he does not need a guardian appointed and is entitled to a lump sum award. [Brief of Respondents at page 16]. The reality is that a guardian is not necessary for a represented claimant at this stage of the proceedings. See S.C. Code Ann. § 62-5-303(b)(2012)("unless the allegedly incapacitated person has counsel of his own choice, [the court] shall appoint an attorney to represent him in the proceedings and that attorney shall have the powers and duties of a guardian ad litem.").

As to the lump sum, entitlement to a lump sum is a substantial right for a disabled worker as it protects their social security benefits. James v. Anne's Inc., 701 S.E.2d 730, 736, 390 S.C. 188 (2010). In lifetime compensation cases, the injured worker is limited to a partial lump sum awarded at the discretion of the Commission. See S.C. Code Ann. § 42-9-301 (2007). This is done in

recognition that the lifelong income stream is in the best interests of such severely injured workers. Should Moran receive a lump sum, it would be managed by a trustee, thus obviating the need for a GAL. The argument about a guardian and lump sum request is, respectfully, a deflection.


The Appellate Panel erred in using unwarranted credibility findings as a basis for rejecting the medical evidence of physical brain damage. The credibility findings are unnecessary, unwarranted, arbitrary and capricious. The Commission found Moran not credible because the single commissioner found imagined inconsistencies in Moran's testimony regarding non-material collateral issues (his education and use of jumper cables).

Appellant requests the Court reverse the Commission on the ground that no substantial evidence exists to refute the medical opinions of Drs. Healy and Sanchez that Moran is permanently and totally disabled due to severe permanent physical brain damage. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(no need to reach credibility issue because underlying findings were reversed based on the single commissioner's own medical opinion rather than expert opinion of the doctors). Should the Court reach the credibility findings, they should be reversed because credibility findings based on "sit and squirm" jurisprudence are inherently unreliable. Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984); 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).

CONCLUSION

For the foregoing reasons and the reasons stated in the Brief of Appellant, 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,



Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

Mark R. Calhoun
CALHOUN LAW FIRM
714 East Main Street
Lexington, SC 29072
(803) 957-8401

Attorneys for Appellant

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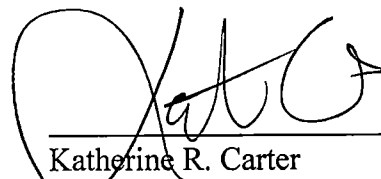
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PROOF OF SERVICE

I certify that I, Katherine R. Carter, paralegal to Stephen B. Samuels, have served the **Appellant's Initial Reply Brief** upon counsel for the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on August 15, 2016, addressed as follows:

Sarah S. Alphin, Esquire
Willson, Jones, Carter & Baxley, PA
4500 Fort Jackson Blvd.
Columbia, SC 29209

August 15, 2016



Katherine R. Carter
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000



STEPHEN B. SAMUELS
ANDREW J. BROWN
ATTORNEYS AT LAW

August 15, 2016

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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RE: Pedro A. Moran v. JMR Siding, LLC, et. al.
Appellate Care No.: 2016-000325

Dear Ms. Kitchings:

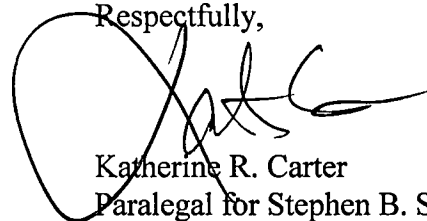
Please find enclosed the original and one copy of **Initial Reply Brief of Appellant** for filing in the above-referenced matter. Please file the original and return the clocked copy in our enclosed self-addressed stamped envelope.

By copy of this letter and enclosure to Sarah Alphin, we are serving opposing counsel with a copy of our **Initial Reply Brief of Appellant** as indicated by the attached Proof of Service.

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

With kindest regards, I am

Respectfully,



Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc

Enclosure(s) as stated

cc: Mark Calhoun, Esquire
Sarah S. Alphin, Esquire

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1320 RICHLAND STREET, COLUMBIA, SC 29201 | P: (803) 779.4000 | F: (803) 779.4004 | WWW.SAMUELSLAWFIRM.NET



1320 RICHLAND STREET
COLUMBIA, SC 29201

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The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211