THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Common Pleas Case No. 2012-CP-32-02093
Common Pleas Case No. 2012-CP-32-02111
Appellate Case No. 2014-001258

Ricky Kneece, Petitioner,

v.

Kneece Farms and Legion in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Respondents.

AMENDED PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 22, 2016.

QUESTIONS PRESENTED

I. Did the Petitioner suffer severe and permanent physical brain damage, totally and permanently disabling him with physical brain damage compensable pursuant to S.C. Code Ann. § 42-9-10(C)?

II. Is the application of Regulation 67-1101 to Petitioner's physical brain damage arbitrary and capricious?

III. Has the Petitioner suffered a total loss of earning capacity notwithstanding the financial support offered him by his family farm?

IV. Was the Workers' Compensation Commission order immediately appealable?

STATEMENT OF THE CASE

This matter was commenced by the filing and service of a Form 50 dated November 7. 2001, alleging that the Petitioner, Ricky Kneece, had suffered an injury by accident to his head/brain, face, mouth/teeth, nasal passage, sinus, left eye and left knee on or about November 22, 1999, while employed by Respondent Kneece Farms (the employer was insured by Legion Insurance Company which has been liquidated and the claim is now covered by the Respondent South Carolina Property and Casualty Insurance Guaranty Association).

By order dated April 18, 2005, Commissioner Michelle found that the Petitioner had suffered

compensable injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, and teeth ("2005 Order"). The Hearing Commissioner also found that the Petitioner also sustained compensable injuries to his left shoulder, left elbow and for depression (R. pp. 248-249; 2005 Order at pp. 10-11). The 2005 Order held the Respondents responsible for treatment rendered by Dr. L. Randolph Waid, a licensed clinical psychologist, for Petitioner's brain and head injury. In addition, the 2005 Order found the Petitioner was entitled to future treatment for depression by Dr. Lawrence Bergmann. (R. pp. 248-250; 2005 Order at pp. 10-12); (R. pp. 250-251; 2005 Order at pp. 12-13).

By Order dated April 28, 2011, the Workers Compensation Hearing Commissioner found the Petitioner totally and permanently disabled with physical brain damage and ordered the Respondents to provide the Petitioner with the relief afforded him under the Workers' Compensation Act for life (R. p. 202; 2011 Order). Giving the Respondents all credit for temporary total disability benefits paid to the Petitioner, the Commissioner awarded the Petitioner benefits for life as provided by S. C. Code Ann. § 42-9-10(C) (R. pp. 234-236; 2011 Order at pp. 33-35).

By order dated April 19, 2012, the Full Commission reversed the findings of fact and conclusions of law of the Hearing Commissioner in his 2011 Order that the Petitioner was totally disabled accompanied by physical brain damage pursuant to S. C. Code Ann. § 42-9-10(C) and instead concluded that the Petitioner sustained an injury pursuant to Regulation 67-1101. (2012 Order). In particular, the Full Commission found as follows:

> The Commissioners find a Claimant who can drive a "complicated" computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury. The Claimant sustained an injury pursuant to Regulation 67-1101.
> (R. p. 200; 2012 Order at page 10).

The Full Commission affirmed all other findings of fact and conclusions of law set out in the

Hearing Commissioner's 2011 Order.

Both parties appealed the 2012 order to the Lexington County Circuit Court which reversed the Full Commission by order dated July 18, 2013 holding that the evidence of record was only capable of the inference that the Petitioner was totally and permanently disabled with physical brain damage and awarded the Petitioner benefits to which he was entitled under the Workers Compensation Act. The Circuit Court dismissed the Respondents' appeal. By order dated April 24, 2014, the Circuit Court denied the Respondents' Rule 59(e) motion to alter or amend judgment.

The Respondents appealed the Circuit Court order to the Court of Appeals which, without oral argument, reversed and remanded the Circuit Court order for further proceedings to the Workers Compensation Commission in an opinion dated April 7, 2016. The Court of appeals denied the Petitioner's petition for rehearing by order dated July 22, 2016.

STATEMENT OF FACTS

Accident. The Petitioner was injured November 22, 1999, while in the employ of Respondent Kneece Farms when a tire which he was changing violently exploded while under pressure causing him injury to the head, brain, and face as well as the left side of his body. The explosion was severe enough to cause the Petitioner to lapse into a coma after the explosion and he had to be transported by helicopter to the hospital where he was treated for his many injuries. (R. p. 577, l. 7 – p. 579, ll. 6-11).

Physical Brain Damage. It is undisputed that the Petitioner suffered a permanent and severe head and brain injury.

Dr. Lenwood P. Smith, Jr., the Petitioner's treating neurologist, in his September 30, 2001 report opined as follows:

> "[Petitioner] . . . was very severely injured when he had a compression-type

truck wheel blow apart and strike him in the head. He had injuries to the right frontal pole, diffuse cerebral edema was seen, he had subarachnoid hemorrhage across the tentorium, and a left tentorial subdural hematoma. He had high right posterior frontal epidural and very thin bilateral convexity subdural hematomas. He had a left posterior frontal parasagittal contusion." (R. p. 1205).

[Petitioner's] problems **are severe and will be permanent**. I agree that their concerns are well founded. These concerns can be summarized by saying that Mr. Kneece may no longer be able to be the same competitive businessman that he would have been in the past and our society and culture has provided for these people to be compensated. [Emphasis added] (R. p. 1206).

In its 2005 order, the Commissioner found that the Petitioner suffered a closed head injury as a result of his extensive injuries to his face and head. (R. p. 249; 2005 Order at p. 11).

The Commissioner ordered as follows:

4. That the Defendants are responsible for treatment for the Petitioner's closed head injury and depression including all past treatment by Dr. Waid and for all future treatment including that from Dr. Waid and his referral to Dr. Larry Bergmann. (R. p. 251; 2005 Order at p. 13).

Thereafter, Dr. Carl A. White confirmed the Petitioner's physical brain damage. From an MRI taken in 2007, Dr. White, found a 32 x 43 mm area in the Petitioner's right frontal lobe which Dr. White found compatible with encephalomalacia (or softening of the brain) related to the Petitioner's 1999 head injury and skull fracture. In essence, Dr. White found a dead zone in the Petitioner's brain. Dr. White opined in 2007 that the Petitioner's hypothyroidism was related to his head trauma. Further, Dr. White opined that Petitioner's hypothyroidism was related to pituitary insufficiency and results in lethargy, weight gain, and general lack of energy and desire. Moreover, Dr. White confirmed that the Petitioner's emotional changes and memory loss were related to his

head trauma and frontal lobe damage. (R. p. 1186).

In 2010, Dr. Charles Shissias, a neurologist, began treating the Petitioner for chronic daily headaches, memory loss and depression arising from Petitioner's 1999 accident. Dr. Shissias concluded that the Petitioner was suffering from Organic Brain Syndrome secondary to traumatic brain injury which Petitioner suffered when he was hit with the locking ring tire and experienced an injury to his right frontal lobe and a right supra orbital fracture and found that the Petitioner was unable to make major decisions without input from his wife (R. p. 1007).

Dr. L. Randolph Waid, a licensed psychologist, performed neuropsychological evaluations in 2002 and 2007. Dr. Waid determined that radiographic studies conducted at the time of the Petitioner's injury revealed disruptive physical injury to the brain. As a result of his evaluation, Dr. Waid assessed the Petitioner to have suffered,

> Axis 1
>
> Cognitive Disorder NOS (294.90) secondary to the sustainment of a traumatic brain injury
>
> Axis III
> Status post traumatic brain injury; headaches; residual pain and discomfort affecting the left knee and left shoulder

Dr. Waid assigned a 22% impairment as a result of his neurocognitive deficits (R. p. 1020).

Dr. Lawrence H. Bergmann, PhD and Dr. Roger W. Deal, MD treated the Petitioner and corroborate the opinion of Dr. Waid. Dr. Bergmann, a psychotherapist, found that Petitioner continued to have symptoms of dysphoria, difficulties adjusting to his cognitive disability, irritability and withdrawal and symptoms consistent with the head injury (R. p. 1030 and p. 1071). Both Dr. Bergmann and Dr. Deal opined that the Petitioner experienced an 11% whole person, permanent impairment (R. p.1369).

The Respondents' clinical psychologist Tora Brawley, PhD, concluded that as late as 2011, the Petitioner was not at maximum medical improvement with regard to his vegetative symptoms such as fatigue, weight gain, decreased energy level, loss of interest in recreational activities, feelings of depression, feelings of anxiety, increased irritability, and decreased frustration tolerance. Dr. Brawley concluded that the Petitioner would benefit from continued treatment for his personality and psychological symptoms for which he is being treated by his physicians. (R. p. 1396).

Left Arm and Leg Injuries. Complicating his permanent and severe physical brain damage, the Petitioner's left side was severely injured in the tire explosion as well. The Petitioner sustained an injury to his left knee requiring two surgeries. As a result of Petitioner's injuries, Dr. James O'Leary assigned a 10% impairment rating to the Petitioner's lower left extremity (R. p. 1150). The Petitioner also suffered a causally-related injury to his left shoulder and elbow requiring two surgeries. As a result of these injuries, Dr. Michael Green assigned a 17% impairment to the Petitioner's upper left extremity (R. p. 1098).

Loss of Earning Capacity. Dr. William W. Stewart, a Board-Certified vocational rehabilitation counselor, recognized that the Petitioner enjoyed a "benevolent and sheltered employment situation" and opined that, "In an open, competitive labor market [the Petitioner] would find himself vocationally disabled and unable to work gainfully." (R. p. 995, 998).

Dr. Stewart opined as follows:

> .....based on Mr. Kneece's original and update (sic) vocational and rehabilitation evaluations it is concluded that to a reasonable degree of vocational and rehabilitation certainty he is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable sustained basis. (R. p. 998).

Dr. Stewart recommended that the Petitioner continue with "medical care, medical pain management care, neurological care, psychiatric care and professional/trauma counseling care, continue prescribed medications, and medical case management services to coordinate his care/needs." (R. p. 998).

The Petitioner. Prior to his accident, the Petitioner was a general decision-maker for Delano R. Kneece & Son, Inc., a 2,000 acre Lexington County farm o owned by the Petitioner, his father, Delano R. Kneece, and other family members (Depos. of Roxanne Kneece at p. 13; R. p. 662). The Petitioner is unable to remember the nature of his treatment and the instructions given him by his physicians. (R. p. 585, ll. 1-7).

The Petitioner is unable to stay focused on a task. His time spent on the farm is not productive for the farm. (R. p. 589, l. 16 – p. 590, l. 9). Prior to Petitioner's accident, he was able to perform very physical farm chores which required climbing, stooping, lifting and bending, without limitation. His chores included climbing 200 foot tall elevator legs, climbing grain bin legs, performing irrigation duties, and doing roof work. The Petitioner's physical injuries no longer permit him to perform these farm chores. (R. p. 548, l. 7 – p. 549, l. 9).

The Petitioner is no longer able to manage the farm's finances or his own. Dr. Shissias affirms the fact that the Petitioner can no longer manage his finances. (R. p. 587, l.14 – p. 589, l. 2).

The Petitioner cannot effectively calculate or broadcast chemicals, seeds or fertilizer which if not applied correctly would cause crop damage. (R. p. 585, l. 19 – p. 587, l. 8).

The Petitioner can no longer safely operate most farm equipment. There are certain farm implements which the Petitioner's family refuses to allow him to operate. However, to permit the Petitioner to participate on his farm, the family farm has purchased a fully-automated tractor

complete with a GPS device, programmed planting devices and alarm systems which the Petitioner is permitted to drive. The tractor is completely mechanized and requires no physical exertion to drive. The GPS and other sophisticated equipment make the tractor is simple to operate. However, other farm hands must program the GPS equipment and follow behind the Petitioner to correct his mistakes. While, the Petitioner may be permitted by his family to drive a tractor for up to 5 to 7 hours at a time during unusual planting or harvesting, the Petitioner's family has accommodated him by going to what would otherwise be unnecessary expense to permit him to attempt some farming chores thus allowing dignity and self-worth. (R. p. 591, l. 6 – p. 596, l. 1); (R. p. 665, l. 14 – p. 667, l. 13). The Farm has purchased other "foolproof" equipment that the Petitioner can assist by operating. (R. p. 596, l. 5 – p. 597, l. 13).

In addition to equipment purchases made to accommodate the Petitioner's mental and physical infirmities, additional farm hands have been employed to do the work that the Petitioner was able to do prior to his accident but can no longer perform. The Petitioner's son performs 95% of the Petitioner's former duties. The Petitioner's father, Delano Kneece, continued to work on the family farm. Since the Petitioner's accident, the family farm has been forced to employ farm hands on temporary part time and full time bases to make up for the Petitioner's inability to perform as a farmer. (R. p. 598, l. 7 – p. 599, l. 15); (R. p. 604, l. 21 – p. 608, l. 9; R. p. 1277); (R. p. 606, l. 8 – p. 608, l. 9); (R. p. 608, ll. 1-20).

The Petitioner's ill temper has alienated family and people around him. The Petitioner was almost arrested for an outburst against the County Fire Marshal. (R. p. 582, l. 1 – p. 583, l. 15).

The Petitioner no longer sleeps well. The Petitioner yells in his sleep, has nightmares, he jumps, jerks twitches and falls off the bed. (R. p. 583, l. 25 – p. 584, l. 17). The Petitioner has

become lifeless and depressed since his accident. (R. p. 590, l. 10 – p. 591, l. 2).

Sheltered Employment

The Petitioner is paid $4,175 per month by the family farm. The Petitioner has no idea what he is paid or how his check is calculated. The Petitioner's check is not calculated based on performance. The Petitioner's father directs Mrs. Kneece, the bookkeeper for the family farm, to write the Petitioner's check and in what amount. (R. p. 602, ll. 2-25); (R. p. 636, l. 20 – p. 638, l. 12). To afford to make these payments, the Petitioner's parents retired after the Petitioner's accident in 1999, freeing up the revenue needed to make payments to the Petitioner. In addition, the Petitioner's father stopped planting less productive crops such as soybeans and wheat and to grow peanuts which are more productive to increase farm revenues. The Petitioner's father's justification for these monthly payments is because "we love him that much". (R. p. 600, l. 4 – p. 604, l. 18); (R. p. 612, ll. 13-17); (R. p. 659, l. 14 – p. 660, l. 22); (R. p. 601, l. 8 – p. 602, l. 5).

The job market in farming is very competitive. With the availability of migrant farm workers, the Petitioner cannot compete for farm jobs. No employer would tolerate the lack of productivity, errors, and costs such as those caused on the family farm by the Petitioner and the family farm would never hire a stranger with the Petitioner's disabilities (R. p. 609, l. 25 – p. 612, l. 4); (R. p. 612, l. 25 – p. 613, l. 21).

ARGUMENT I

THE PETITIONER SUFFERED SEVERE AND PERMANENT PHYSICAL BRAIN DAMAGE AND IS TOTALLY AND PERMANENTLY DISABLED WITH PHYSICAL BRAIN DAMAGE COMPENSABLE PURSUANT TO S. C. CODE ANN. § 42-9-10(C).

The Workers' Compensation Commission found that: "a Claimant who can drive a 'complicated' computer-operated tractor for fifty hours per week has not sustained a physical brain injury. The Petitioner sustained an injury pursuant to Regulation 67-1101." (R. p. 200; 2012 Order page 10). There is no evidence in the record to support the Commission's arbitrary finding. Instead, the reliable, probative and substantial evidence of record compels the conclusion that the Petitioner is totally and permanently disabled with physical brain damage compensable pursuant to S. C. Code Ann. § 42-9-10(C) and the Circuit Court so concluded. The Court of Appeals erred in failing to affirm the Order of the Circuit Court.

The Supreme Court has held that "physical brain damage" as contemplated by S. C. Code Ann. § 42-9-10(C) requires severe and permanent physical brain damage as a result of a compensable accident. S. C. Code Ann. § 42-9-10(C) provides as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and **shall** receive the benefits for life. (Emphasis added)

The statute makes no exceptions.

Construing S. C. Code Ann. § 42-9-10(C), the Supreme Court explained that in order for an injured worker to be deemed physically brain damaged under S. C. Code Ann. § 42-9-10(C), a

claimant must have suffered severe, permanent impairment of normal brain function. Sparks v. Palmetto Hardwood, Inc. and Palmetto Timber S.I Fund, 406 S.C. 124, 129; 750 S.E.2d 61 (2013). In Crisp v. SouthCo. Inc., 401 S.C. 627, 738 S.E.2d 835 (2013), the Court concluded that to be compensable pursuant to S.C. Code Ann. § 42-9-10(C), a worker with severe physical brain damage must be unable to return to suitable gainful employment.

The holding in Crisp v. Southco, Inc., is consistent with existing case law which provides that total disability does not require complete abject helplessness; rather total disability is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable job market exists for them. McCollum v. Singer, Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989); Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). The mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996) [recognizing that wages earned by Petitioner totally and permanently disabled by virtue of paraplegia is not necessarily evidence of earning capacity; see footnote (2) at 473 S.E.2d 703]. A Claimant was totally and permanently disabled as a result of an injury to his back may continue to work notwithstanding a finding of total and permanent disability. Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993). Nor does S.C. Code Ann. § 42-9-10(C) require total and permanent disability to be solely the result of the physical brain damage. Pearson v. JPS Converter and Indus. Corp., 327 S.C.393, 489 S.E.2d 219 (Ct. App. 1996).

The Supreme Court in Crisp v. Southco, Inc., recognized that there are essentially three ways to determine whether a person has sustained physical brain damage: CT or MRI scanning; cognitive behavioral level of functioning; and neuropsychological testing. The medical evidence viewed from

the record as a whole compels the finding that the Petitioner suffered physical brain damage resulting in severe and permanent impairment of his normal brain function. Dr. Smith, the treating neurologist, found that the impact to the Petitioner from his physical brain damage **was severe and permanent**. From an MRI taken in 2007, Dr. White found a 32 x 43 mm area in the Petitioner's right frontal lobe compatible with encephalomomalacia or a softening of the brain tissue. Having performed his neuropsychological evaluations, Dr. Waid, having reviewed the radiographic studies conducted at the time of the Petitioner's injury, found the Petitioner to have suffered from a physical injury to the brain and diagnosed the Petitioner as suffering from cognitive disorder, personality change and headaches resulting from severe traumatic brain injury assessing a 22% impairment to the whole person as a result of the Petitioner's traumatic brain injury. Similarly, Dr. Larry Bergmann and Dr. Roger Deal treated the Petitioner for headaches, sleep loss, dizziness, fatigue, irritability, memory impairment, anger and depression. Dr. Bergmann assigned an 11% whole person impairment to the Petitioner. Dr. Shissias. Dr. Shissias found the Petitioner to be suffering from Organic Brain Syndrome secondary to traumatic brain injury treating him for chronic daily headaches, memory loss and depression arising from Petitioner's 1999 accident.

Consistent with the medical evidence in this record, Commissioner Childs, relying on the evidence of the treating neurologist Dr. Smith that the Petitioner's brain injury was both permanent and severe, found in her 2005 order that the Petitioner suffered a closed head injury.

Dr. Adams, who reported no evidence of physical brain damage, saw the Petitioner on only two occasions and unlike Dr. White, conducted no MRI or CT SCAN. Dr. Adams concedes that, unlike Dr. Waid, he "did not perform extensive psychological testing" to ascertain the existence of physical brain damage. Moreover, Dr. Brawley's neuropsychological examination revealed that the

Petitioner continued to suffer from several vegetative symptoms, chronic pain and stressors and that he was not at MMI with respect to his vegetative symptoms recommending reassessment of his medication. Dr. Adams' opinion is contrary to the findings in the 2005 order and the evidence of record and is not credible, reliable or probative on the issue of the Petitioner's physical brain damage. The Commission may not view the evidence blindly from the Defendants' side of the case. Not only is Dr. Adams' opinion not supported by reliable, probative and substantial evidence of record, his opinion is not supported by the Respondents' evidence.

In reviewing a finding of fact of the Workers' Compensation Commission, this Court is not required to suspend disbelief. The evidence of record, when viewed as a whole, compels the finding that the Petitioner suffered physical brain damage with a severe and permanent impairment of his normal brain function.

Moreover, there is no medical evidence to support the Commission finding that "a Claimant who can drive a 'complicated' computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury," Neither Dr. Adams nor Ms. Brawley support any relationship between the Petitioner's driving a tractor and the existence of physical brain damage. The full Commission's finding is based on surmise, conjecture and speculation and is arbitrary. Houston v. Deloach & Deloach; Sharpe v. Case Products Co., *supra.*

As required by the Court's decision in Crisp v. SouthCo. Inc., the Petitioners physical brain damage was so severe as to prevent his obtaining employment or obtaining reemployment should the employee become unemployed. Dr. Stewart, a Board Certified Rehabilitation Counselor and Board Certified Vocational Evaluator, concluded that the Petitioner has suffered a complete loss of earning capacity because of his injuries. Dr. Stewart recognized that the Petitioner enjoyed a "benevolent

and sheltered employment situation," and opined that, "[i]n an open, competitive labor market [the Petitioner] would find himself vocationally disabled and unable to work gainfully." (R. p. 998)

Based on the foregoing, the substantial evidence of record reflects that the Petitioner suffered a complete loss of earning capacity and the Full Commission so held. As a consequence of the Petitioner's loss of earning capacity, his permanent and severe physical brain damage in and of itself is totally disabling and he is entitled to lifetime benefits under S.C. Code Ann. § 42-9-10(C) in addition to all other benefits under the Act. Crisp v. Southco, Inc.; Wigfall v. Tidelands Utilities, Inc., *supra.*

The Petitioner's schedule injuries in combination with each other, the Petitioner's non-schedule injuries and Petitioner's severe and permanent brain damage are likewise totally disabling. Wigfall v. Tideland Utilities, Inc., *supra.* It is undisputed that the Petitioner's physical brain damage was disabling. Moreover, the Petitioner's injuries to his left upper extremity (17% impairment rating) and his left lower extremity (10% impairment rating) are S.C. Code Ann. § 42-9-30 schedule injuries. Because the Petitioner's severe and permanent physical brain damage combines with the Petitioner's other injuries and characteristics to totally and permanently disable him under the Act, he is entitled to lifetime benefits under S.C. Code Ann. § 42-9-10(C) in addition to all other benefits under the Act.

For the foregoing reasons, it is clear that based on the reliable, probative and substantial evidence of record, the Petitioner is totally and permanently disabled with physical brain damage and

entitled to benefits provided for in S. C. Code Ann. § 42-9-10. Crisp v. SouthCo., Inc.; Wigfall v. Tideland Utilities, Inc., *supra*.[1] [2] The Circuit Court was correct in reversing the Full Commission.

ARGUMENT II

THE APPLICATION OF REGULATION 67-1101 TO PETITIONER'S PHYSICAL BRAIN DAMAGE IS ARBITRARY AND CAPRICIOUS.

The Full Commission acted arbitrarily in holding that the Petitioner's physical brain damage was compensable under Regulation 67-1101. S.C. Code Ann. § 42-9-10(C) governs the remedy available to a claimant with physical brain damage. Regulation 67-1101 addresses brain injury, not physical brain damage suffered by the Petitioner. The Regulation purports to address total loss, partial loss or loss of use of the brain and would assign a period of compensation of 25 to 250 weeks. A claimant who has suffered the total loss of use of the brain would be unable to function, and yet would not be deemed totally disabled under Regulation 67-1101, eligible only for benefits of up to 250 weeks. Further, the Regulation 67-1101 assigns a higher value to the total loss of the scrotum and testicles, tongue, biliary tract, small intestine, and skin to that of a total loss to the brain which is far more debilitating. Neither the Respondents nor the Full Commission set out any rationale for

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1 The Circuit Court concluded that the Commission correctly found that the Petitioner has benefited from the treatment of his personal physicians and ordered the Respondents to provide for treatment by Dr. White, Dr. Wicker, Dr. Shissias and Dr. Ugino. Moreover, the Commission found that the Respondents were responsible for all mileage associated with treatment and for prescriptive medicine prescribed by Petitioner's physicians. The Commission's findings are clearly supported by the record and should be sustained.

2 The Circuit Court correctly affirmed the Commission's Order requiring the Respondents to treat the Petitioner for his injuries to his zygomatic arch, thyroid, scarring and/or finger. The issues litigated and finally determined in the 2005 Order are unassailable. All remaining issues arising after the entry of the 2005 Order are the proper subject of this claim. The Commission found and concluded correctly that the zygomatic arch, hypothyroidism, and damage to Petitioner's left metacarpal were compensable. Accordingly, the Circuit Court Order affirming the Commission on this point should be affirmed.

applying the provisions of Regulation 67-1101 to the Petitioner's permanent and severe brain damage.

The term arbitrary means "without adequate determining principle, nonrational; not governed by any fixed rules or standard." Hatcher v. South Carolina District Council of the Assemblies of God, Inc., 267 S.C. 107, 117, 226 S.E.2d 253 (1976). Regulation 67-1101 is not governed by any adequate determining principle or fixed rules or standards. The application Regulation 67-1101 to a severe and permanent brain injury is arbitrary. There is no credible evidence, medical or otherwise, in this record to suggest that a claimant who can drive a complicated tractor which accommodates his limitations does not have physical brain damage compensable under S.C. Code Ann. § 42-9-10(C). The Commission's application of Regulation 67-1101 to the Petitioner's severe and permanent brain damage was arbitrary, capricious and violates due process.

ARGUMENT III

THE PETITIONER HAS SUFFERED A TOTAL LOSS OF EARNING CAPACITY NOTWITHSTANDING THE FINANCIAL SUPPORT OFFERED HIM BY HIS FAMILY FARM.

The Commission held that the Petitioner suffered a loss of earning capacity, notwithstanding the financial support offered him by his family farm. The Circuit Court affirmed the Commission on this point and denied the Respondents' appeal. The Court of Appeals should have affirmed the Circuit Court order in this regard.

The Commission correctly found the Petitioner to be permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation

or of any other kind of job or gainful employment on a reliable sustained basis. In addition, the Commission also correctly concluded the Petitioner is unable to perform the services other than those that are so limited in quality, dependability, and quantity that a reasonable stable market for them does not exist. Last, the Commission correctly found that the services that the Petitioner performs for his family farm, given the accommodations his family has made to enable him to perform certain limited services, are not evidence that a reasonably stable market exists for the services the Petitioner provides for the family farm. In so finding, the Commission found and concluded that the work offered by Petitioner's family farm is sheltered employment and benevolent in nature. The Commission's finding is supported by a long line of South Carolina legal precedent.

To be totally disabled, the Petitioner must be unable to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E. 2d 390 (Ct. App. 2003). Total disability under the Workers' Compensation Act does not require complete, abject helplessness. McCollum v. Singer Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989). The mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996). Evidence that a Petitioner has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability. McCollum v. Singer Co.; Stephenson v. Rice Services, Inc., *supra*. The Supreme Court pointed out in Stephenson v. Rice Services, Inc. [a paraplegic may recover for permanent and total disability under S. C. Code Ann. § 42-9-10 yet continue to work].

In recognizing a benevolent employment rule, North Carolina courts have reached the same conclusion, holding that an injured employee's earning capacity must be measured not by the largesse of a particular employer, but by the employee's own ability to compete in the labor market. Employment with accommodations to meet the injured employees' limitation not ordinarily found in the competitive job market evidence of earning capacity. A worker who does not have the ability to earn wages competitively, will be left with no income should his job be terminated. Peoples v. Cone Mills Corp., *supra*. See also Baker v. Sam's Club, 589 S.E. 2d 387 (N.C. App. 2003); Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E. 2d 110 (2002); Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E. 2d 798 (1986); Saums v. Raleigh Community Hospital, 346 N.C. 760, 487 S.E. 2d 746 (1997).

The services that the Petitioner performs for his family farm, given the accommodations his family has made to enable him perform certain limited tasks, are not evidence that a reasonably stable market exists for the services Petitioner provides for the family farm. Dr. Stewart concluded that the Petitioner suffered a total loss of earning capacity. The undisputed testimony of record is that those amounts paid the Petitioner by the family farm are not intended to represent wages earned and are not calculated on the basis of services performed by the Petitioner on behalf of the family farm. Rather the amounts paid the Petitioner are in the nature of a gift and do not constitute wages for work expended on behalf of the farm or wages calculated on the basis of productivity.

The Petitioner's attempt to return to work having executed a Form 17 does not temporarily disqualify him from receiving benefits until the date of the 2011 Order. The Form 17 does not operate as an adjudication of the Petitioner's ability to work or lack of earning capacity and does not terminate the Petitioner's claim nor affect his right to apply for additional

benefits. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E. 2d 599 (Ct. App. 1999). See also Lyles v. Quantum Chemical Co., *supra.*

Nor are the Respondents entitled to a credit for the amount the Petitioner receives from his employment from the family farm. The payments from the Delano R. Kneece and Son, Inc. family farm are a collateral source. This issue was decided in the 2005 Order and is the law of the case. See also McLeod v. South Carolina Insurance Company, 272 S.C. 254, 251 S.E.2d 193 (1979).

The Circuit Court was correct in affirming the Commission's findings of fact and conclusions of law with respect to the Petitioner's total loss of earning capacity and should be affirmed.

ARGUMENT IV

THE WORKERS' COMPENSATION COMMISSION ORDER WAS IMMEDIATELY APPEALABLE.

The Court of Appeals, erred in vacating the order of the Circuit Court and remanding the claim to the South Carolina Workers' Compensation Commission for further action.

The instant appeal is governed by the South Carolina Administrative Procedures Act ("APA"). Bone v. U.S Food Serv., 404 S.C. 67, 73, 744 S.E.2d 552(2013); Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010). S.C. Code Ann. Section 1-23-380 provides for an appeal of a final agency decision. The Supreme Court has defined a final decision as follows: "[a] final judgement disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control.

However, the APA also provides that a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. S.C. Code Ann. Section 1-23-380. The decision of the Appellate Panel was immediately appealable to the Circuit Court by either standard.[3]

Citing Bone v. U.S. Food Serv., the Court of Appeals held that "[a]n agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review." The Appellate Panel overturned the Hearing Commissioner concluding that the Petitioner did not suffer permanent brain damage and remanded the matter for a determination of permanency, a decision all parties considered to be a final decision and a decision all parties appealed to the Circuit Court.

Under the terms of the APA, the order of the Workers' Compensation Commission was immediately appealable. The Court of Appeals in Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) held that the Appellate Panel's decision overturning the Hearing Commissioner's finding that the Claimant suffered a brain injury and remanding the claim to the Hearing Commissioner for a determination of permanency was immediately appealable. The Court of Appeals concluded that because the disposition of the brain injury issue effectively disposed of the claim and because the decision of the Appellate

3 This Court in Bone v. U.S. Food Serv. construed the finality of a circuit court order. The Circuit Court order below reinstated the decision of the Hearing Commissioner disposing of the whole subject matter of the action leaving nothing to be done but to enforce by execution what the Circuit Court had determined (R. pp. 42-43). The Circuit Court order was final and immediately appealable pursuant to Bone v. U.S. Food Serv.; Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control; and Montjoy v Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994). All parties considered the Circuit Court order to be immediately appealable.

Panel deprived the Claimant for treatment of her brain injury, the Appellate Panel order was a final agency decision on the merits. Canteen v. McLeod Regional Medical Center, *supra.*[4]

The Appellate Panel below similarly held that the Petitioner did not suffer a physical brain damage and remanded the claim back to the Hearing Commissioner for a determination as to permanency. Consequently, the decision of the Appellate Panel constituted a final agency decision and was immediately appealable. Canteen v. McLeod Regional Medical Center, *supra*[5] Accordingly, the order of the Circuit Court should be affirmed.

Moreover, the APA is not so rigid as to prohibit parties in the proper circumstance from appealing intermediate orders. S.C. Code Ann. Section 1-23-380 which permits an appeal of a preliminary, procedural, or intermediate agency action or ruling, also serves as authority for the appeal in the instant action. Our appellate courts have not fully defined those circumstances where a final agency decision would not provide an adequate remedy.[6]

To recover full benefits under S.C. Code Ann. Section 42-9-10(C), the physical brain damage must be severe. Crisp v. SouthCo, Inc., *supra* Under S.C. Code Ann. Section 42-9-10(C), the Claimant suffering permanent and severe physical brain damage is entitled not only to

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4 In dictum, Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control purported to overrule Canteen v. McLeod Regional Medical Center to the extent the decision relied upon S.C. Code Ann. Section 14-3-330 to permit the appeal of interlocutory orders of the Workers' Compensation Commission. However, since the holding for which Canteen v. McLeod Regional Medical Center is cited, was based upon the authority in S.C. Code Ann. Section 1-23-380, the decision has precedential value here.

5 While the provisions of S.C. Code Ann. Section 14-3-330 are not directly applicable to the instant appeal, the provisions which address the appealability of an intermediate order or decree provide insight into the intent of the General Assembly in enacting the provisions of S.C. Code Ann. Section 1-23-380 which provide for an immediate review of an intermediate agency decision.

6 The Court of Appeals has held that a delay in payment of money between carriers does not necessarily suffice to demonstrate the inadequacy of the remedy of a final agency decision. Rose v. JJS Trucking, LLC, 411 S.C. 366, 768 S.E.2d 412 (Ct. App. 2015).

monetary payments for life, but also medical treatment for his physical brain damage for life. Left untreated, physical brain damage may result in deterioration of the Claimant's health which belated treatment will not repair. An award of treatment at the end of a lengthy appeals process may be too little too late for the Claimant with permanent and severe physical brain damage depriving him of the benefits to which he would be entitled pursuant to S.C. Code Ann. Section 42-9-10(C)

The procedural record in the case before the Court best demonstrates the compelling interest in an early resolution of the sole legal issue in this appeal. The order of the Hearing Commissioner was issued April 28, 2011. The appeals to the full Commission, Circuit Court and the Court of Appeals have taken five years thus far. Vacating the Circuit Court order has the effect of terminating benefits for Petitioner's permanent and severe physical brain damage and a remand to the Commission will require the Petitioner to linger as long as five additional years for the opportunity to present his case for benefits under S.C. Code Ann. 42-9-10(C) to this Court.

The risk of additional, unnecessary brain damage which would result from the unjustified failure to treat for serious permanent and severe physical brain damage provides a compelling reason to justify an immediate appeal under S.C. Code Ann. Section 1-23-380. Certainly, the General Assembly did not intend for the APA to be construed so rigidly as to threaten the health and well-being of this State's workers who the South Carolina Workers Compensation Act was enacted to protect.

Further, the Petitioner would respectfully submit that the Court of Appeals failed to give the parties adequate notice and an opportunity to be heard on the jurisdictional issue on which it vacated the Circuit Court order. While by letter dated December 10, 2015, the Court of Appeals

requested the Respondents to brief the issue of whether the order of the Appellate Panel was appealable to the Circuit Court, the letter failed to expressly state the issue of concern to the Court of Appeals.[7] Understanding the Court of Appeals to be requesting authority for the Circuit Court's jurisdiction over the instant appeal as opposed to that of the Court of Appeals, the Respondents submitted their memo which correctly set forth the decision in Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007) in support of the Circuit Court's jurisdiction. In hindsight, the Court of Appeals must have been requesting that the Respondents submit authority for the appealability of the Appellate Panel decision under Bone v. U.S Food Serv., *supra.* [8] However, the nature of the Court of Appeals request was unclear, and the Petitioner was entitled to notice of the issue of concern to the Court of Appeals and a meaningful opportunity to be heard on that matter.

The appellate courts have yet to provide guidance on what preliminary, procedural and intermediate agency orders are appealable, In deciding this novel question, the Court of Appeals held, *sua sponte*, that the order of the Full Commission was not immediately appealable. However, the Petitioner was entitled to notice and the opportunity to be heard to demonstrate that the Commission order was final or that review of a final order would not provide him an adequate remedy and the Court of Appeals erred in vacating the Circuit Court order. Moreover,

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7 The text of the Court of Appeals request is as follows:

> "Our review of the Order of the Appellate of the Workers' Compensation Commission indicates it might not have been appealable to the circuit court. Accordingly, it is requested that you serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter."

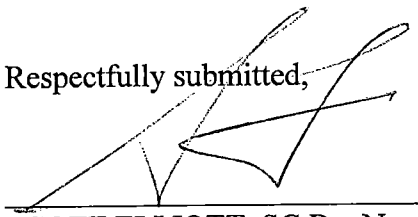
8 In other appeals, the Court of Appeals has acted to have parties address the issue of appealability of final agency orders under Bone but the requests appear to have been more specific. See South Carolina Property and Casualty Insurance Guaranty Association v. Quality HR Services, Inc., 411 S.C. 501, 768 S.E.2d 670 (Ct. App. 2015).

because the appellate courts have yet to provide guidance on what preliminary, procedural and intermediate agency orders are appealable, the Court of Appeals erred in reaching its decision on this novel question of law without a full briefing and argument.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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Attorney for Petitioner

Columbia, South Carolina
September 1, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Common Pleas Case No. 2012-CP-32-02093
Common Pleas Case No. 2012-CP-32-02111
Appellate Case No. 2014-001258

Ricky Kneece, Petitioner,

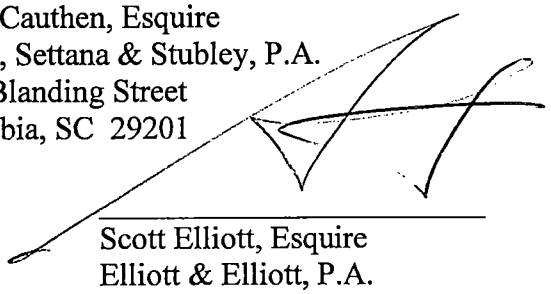
v.

Kneece Farms and Legion in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the Amended Petition For a Writ of Certiorari and Amended Appendix on the below-named parties, at the address given, via hand delivery, on September 1, 2016.

Peter P. Leventis, IV, Esquire
Mark D. Cauthen, Esquire
McKay, Cauthen, Settana & Stubley, P.A.
1303 Blanding Street
Columbia, SC 29201



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September 1, 2016

Via Hand Delivery
The Honorable Daniel E. Shearouse
Clerk, SC Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Ricky Kneece v. Kneece Farms and SCPCIGA
Appellate Case No. 2014-001258

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Amended Petition for a Writ of Certiorari and two (2) copies of the Amended Appendix of Petitioner Ricky Kneece, which I do hereby submit for filing in reference to the above-captioned matter. The Appendix was amended to insert the index and to number the pages sequentially. The Petition was amended to reflect reference to these page numbers. I have also enclosed an extra copy of this document, which I would ask you to date stamp and return to me via my courier. By copy of this letter, I am serving all other parties of record with the above-referenced documents. If you have questions or require any further information, please do not hesitate to contact me.

Thank you for your time and assistance.

Sincerely,

Elliott & Elliott, P.A.

Scott Elliott
S.C. Bar No.1872

SE/lbk
Enclosures
cc & enc.: Jenny Abbott Kitchings, Clerk of Court of Appeals
Peter P. Leventis, IV, Esquire
Mark D. Cauthen, Esquire

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September 1, 2016

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Ricky Kneece v. Kneece Farms and SCPCIGA
WCC File No.: 5920867
Appellate Case No. 2014-001258

Dear Ms. Kitchings:

Enclosed please find a copy of the Amended Petition for a Writ of Certiorari of Petitioner Ricky Kneece, which I do hereby submit for filing in reference to the above-captioned matter. I have also enclosed an extra copy of this document, which I would ask you to date stamp and return to me via my courier. By copy of this letter, I am serving all other parties of record with the above-referenced documents. If you have questions or require any further information, please do not hesitate to contact me.

Thank you for your time and assistance.

Sincerely,

Elliott & Elliott, P.A.

Scott Elliott
S.C. Bar No.1872

SE/lbk
Enclosures

cc: Peter P. Leventis, IV, Esquire (w/encl.)
Mark D. Cauthen, Esquire (w/encl.)