THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 2016-UP-139 (S.C.Ct.App. filed March 30, 2016)

Hector G. Fragosa, Employee/Claimant, ... Petitioner,

v.

Kade Construction, LLC, Employer, and
Key Risk Management Services, Inc., Carrier, ... Respondents.

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 August 19, 2016. [App. P. 38].

QUESTIONS PRESENTED

This is a workers' compensation case with an extensive procedural history. Hector Fragosa was a construction worker. On November 1, 2007, he suffered serious injuries when a crane hit him in the head, fracturing his skull and knocking him off a parking garage onto the ground. The Workers' Compensation Commission found that he had sustained a "46% permanent impairment to the whole person for a traumatic brain injury" and "is permanently and totally disabled." However, despite these twin findings, the Commission found he did not meet the statutory requirements for lifetime compensation for physical brain damage under S.C. Code § 42-9-10 (C)(2007). The Commission's conclusion was apparently based on testimony from Fragosa's neurologist (who opined Fragosa was permanently and totally disabled due to serious permanent brain damage) that the brain damage could not longer be seen on a CT scan or MRI.

Fragosa appealed to the Court of Appeals. In the interim, this Court clarified the applicable standard for physical brain damage in Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013) and Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013).

The Court of Appeals remanded the case to the Commission to resolve the inconsistency between a 46% permanent impairment and total disability findings with a conclusion that Fragosa did not meet the statutory criteria for lifetime compensation. The specific purpose for remand was "for clarification regarding the existence of a physical brain injury." Fragosa v. Kade Constr., LLC, 407 S.C. 424, 755 S.E.2d 462 (Ct. App. 2013).

On remand, the Commission disregarded its original findings, instead making new (and inconsistent) findings to support its original legal conclusion that Fragosa had not sustained "physical brain damage that is both permanent and severe." Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 130, 750 S.E.2d 61, 64 (2013). In a summary unpublished opinion, the Court of Appeals affirmed the decision on remand as supported by substantial evidence. Fragosa v. Kade Construction, LLC, Op. No. 2016-UP-139 (S.C.Ct.App. filed March 30, 2016)

The specific questions presented for certiorari are:

1. Whether the determination that a person who suffered a "46% permanent impairment to the whole person for a traumatic brain injury" and "is permanently and totally disabled" does not meet the meet the statutory requirements for lifetime compensation is a conclusion of law subject to review and reversal by the appellate courts?[1]

2. Whether the Court of Appeals applied the any evidence standard of review rather than the substantial evidence standard of review?

3. Whether the Workers Compensation Commission exceeded its authority on a "remand for clarification regarding the existence of a physical brain injury," when the Commission made new inconsistent findings without reference to its previous findings?

4. Whether the evidence at MMI confirms Fragosa suffered physical brain damage under the Crisp, Sparks and Pearson standard, thus allowing this Court to reverse the Appellate Panel?

5. Whether § 42-9-10 requires that total and permanent disability result solely from physical brain damage rather than merely requiring that the claimant suffer physical brain damage as a result of the compensable injury as held in Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 400, 489 S.E.2d 219, 222 (Ct. App.1997)?

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[1]This issue applies equally to the order on remand as well as the original order of the Commission which ultimately was remanded by the Court of Appeals. Petitioner recognizes that this Court denied his original Petition for Writ of Certiorari. As the Order denying the writ does not specify the grounds, Petitioner raises these issues again in the event the original denial was based on procedural reasons under Bone, rather than on the merits.

STATEMENT OF THE CASE

On November 1, 2007, Hector Fragosa was working on a construction project for Kade Construction in Marion, South Carolina. Fragosa was on the roof of a parking garage. He was hit in the head with part of a construction crane which knocked him off the roof and onto the ground.

He was transported to MUSC by helicopter, where he remained hospitalized for one month following his accident – the first two weeks of which he was in a coma. He has no memory of the accident.

Fragosa suffered numerous injuries, the most serious being a skull fracture and traumatic brain injury. [R. p. 418]. The specific diagnoses related to physical brain damage are (1) skull fracture; (2) open complex scalp wound with epidural and subdural hematoma; and (3) bilateral frontal contusions. [R. p. 418]. The attending physician at MUSC documented dramatic evidence of physical brain damage, reporting: "This patient incurred a large fracture through the skull, apparently it is open, with subdural and epidural fluid collections." [Claimant's APA, page 1].

While in the hospital, Fragosa required a "percutaneous endoscopic gastrostomy tube for continued enteral feeds and nutritional support." [R. p. 353]. The surgeon who implanted the tube, Dr. Stuart Leon, noted: "The patient sustained several injuries, the most significant of which was a closed-head injury with an epidural hematoma. **This injury has left Mr. Gomez neurologically devastated."** [R. p. 353].

The Employer accepted Fragosa's claim and began providing benefits, including treatment from a Spanish-speaking neurologist, Dr. George Sandoz.[2] Dr. Sandoz made numerous statements

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[2]Dr. Sandoz is the only medical provider who was able to speak with Fragosa without an interpreter. Dr. Sandoz is "fluent in Spanish." [R. p. 1079, lines 22-25].

throughout his medical records confirming the physical brain damage.

On October 10, 2008 – nearly a year after the accident – Fragosa presented to Dr. Sandoz "with the complaint of dizziness [and] spells that suggest that the patient is having seizures . . . From the evidence of the brain, this was reviewed by me and it suggest that there is a **right temporal lobe injury**." [R. p. 740 (emphasis added)].

On July 7, 2009, Dr. Sandoz summarized the specific problems resulting from the brain injury: "The patient is a 28-year old male with traumatic brain injury, headache, dizziness, difficulty with complex tasks." [R. p. 760].

On August 20, 2009, Dr. Sandoz wrote a detailed explanation of Fragosa's impairment and total disability as it relates specifically to the brain injury:

> Mr. Fragosa is a patient of mine who I have seen since 09/16/2008 secondary to a **traumatic brain injury** on 11/01/2007. He ____ for a **traumatic brain injury. At this moment from the injury that the patient has suffered, he is totally and permanently disabled.** After evaluation of the AMA Guidelines, he is totally and permanently disabled. After the evaluation of the AMA Guidelines, Guides to Evaluation of the Permanent Impairment Rating, fifth edition as in table 13-5, the patient has 29% of the whole person. Superimposed to this is associated with the headaches that the patient has presented and this correlates to 2% impairment of the whole body. From the standpoint of the dizziness, the patient has 10% impairment of the whole person. Utilizing a combined value chart, this is a 46% impairment of the whole body. This does not attend to the damage that the patient has suffered from his neck and back as well for his foot. [R. p. 763 (emphasis added)]

Table 13-5 is the chart for "Clinical Dementia Rating." [AMA Guides to Permanent Impairment (5th Edition), page 320]. The 29% whole person rating for the brain injury reflects an "impairment [which] requires direction of some activities of daily living." Id. On March 10, 2011, Dr. Sandoz removed all doubt regarding his opinions by answering "YES" to the question "to a reasonable degree of medical certainty whether **Mr. Fragosa has suffered *physical brain damage* that has**

rendered him totally and permanently disabled." [R. p. 929 (emphasis added)].

The Commission relied on these opinions from Dr. Sandoz in finding as facts "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled . . ." [R. p. 20, lines 5 - 10].

Respondents arranged a forensic evaluation with Dr. Mark Wagner, a non-Spanish speaking neuropsychologist. The evaluation took place on October 30, 2008. Dr. Wagner's report is replete with observations of physical brain damage – both the fact of the physical brain damage and the cognitive deficits resulting from that damage. He notes:

> [Mr. Fragosa] had a very serious work-related injury resulting in trauma to his body and skull. He had a skull fracture with acute underlying minor structural change to the brain. . . . **He has persisting cognitive complaints**. While he has had excellent neurologic recovery, it is probably that he is exhibiting symptoms of postconcussive syndrome.[3] The cognitive findings while mostly normal, do contain **abnormal findings largely in the domain of complex attention and concentration**. In addition, he may have some element of **decreased intellectual efficiency**, although this was not measured.[4] [R. p. 954 (emphasis added)].

Included in the above description was the incidental statement that: "Follow-up structural and functional studies (i.e. EEG, CT and MRI) have been read as unremarkable demonstrating structural resolution of the work-related injury." [R. p. 954].

Fragosa was also evaluated by Dr. Robert Brabham, a psychologist and certified brain injury

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[3]Post-concussion syndrome is a set of symptoms that a person may experience for weeks, months, or occasionally up to a year or more after a concussion–a mild form of traumatic brain injury. The condition can cause a variety of symptoms: physical, such as headache; cognitive, such as difficulty concentrating; and emotional and behavioral, such as irritability. Continuing symptoms confirm the presence of physical brain damage.

[4]Despite Dr. Sandoz ordering "a neuropsychological evaluation in Spanish," Dr. Wagner's evaluation was done in English through an interpreter. As Dr. Wagner himself noted, "The caveat to this entire evaluation is the use of an interpreter and the use of tests that were not in Spanish. Both items can reduce the validity of the findings." [R. p. 951].

specialist, on October 27, 2010. [R. p. 915]. Dr. Brabham concluded:

> With the passage of time, now more than 2.5 years after his injuries, *behavioral and cognitive changes have persisted, as will be noted, sufficient to conclude that the brain injuries he sustained, described as post-concussion injuries in multiple records, has resulted in* ***continuing and severe symptoms clearly associated with a physical traumatic brain injury****, the result of his on-the-job injuries.* [R. p. 915 (Italics in original; bold added)].

Dr. Brabham further opined: "to a high degree of professional certainty . . . **he has experienced a (Physical) Traumatic Brain Injury and must be expected to permanently remain, unable to engage in full-time gainful, competitive employment** as a result of his medical conditions resulting from his on-the-job injuries in November 2007. [R. p. 926 - 927 (emphasis added)].

As of the June 28, 2011 trial, Fragosa still suffered from daily headaches, dizziness, short and long term memory deficits, cognitive deficits, and buzzing in both ears – all of which resulted from the physical brain damage. [R. p. 1131, line 5 - R. p. 1135, line 16]. He remains physically and mentally incapable of returning to any kind of work that he has ever done. [R. p. 1142, lines 12-15].

The case was tried on June 28, 2011, before Commissioner Avery B. Wilkerson. The primary issue in dispute was whether Hector Fragosa was permanently and totally disabled with physical brain damage, thus entitled to lifetime compensation.

Commissioner Wilkerson issued an Order on November 21, 2011, finding Fragosa: "has not suffered a physical brain injury and is not entitled to lifetime compensation benefits under the South Carolina Workers' Compensation Act." He found "based on the greater weight of the evidence, I find there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers' Compensation Act. This award is made under 42-9-30 and 42-9-10 and physical brain damage does not apply." He further found "Under 42-9-30 and Reg. 67-1101, the

Claimant's multiple impairment ratings to his right lower extremity, left upper extremity, head and inner ear render the Claimant permanently and totally disabled." [R. p. 11].

The Appellate Panel affirmed the Single Commissioner's Order on May 23, 2012. [R. p. 14 - 22].

Fragosa timely appealed to the South Carolina Court of Appeals on June 18, 2012. The primary issues raised were (1) whether the Commission erred as a matter of law in finding Fragosa had not suffered physical brain damage; and (2) in relying on the opinion of a neuropsychologist, Dr. Mark Wagner, in interpreting imaging studies. Oral arguments were heard on October 10, 2013. On November 27, 2013, the court issued a published opinion. Fragosa v. Kade Constr., LLC, 407 S.C. 424, 755 S.E.2d 462 (Ct. App. 2013).

In the opinion, the court remanded to the Commission "for clarification regarding the existence of a physical brain injury." Id.

Fragosa's Petitions for rehearing and a Writ of Certiorari were denied. The case was remitted to the Commission.

On September 30, 2014, the Appellate Panel issued a Decision and Order on Remand. The Appellate Panel entirely disregarded its previous findings, instead making 28 new findings of fact, ultimately concluding "Based upon these findings, the Appellate Panel finds that the ultimate, residual affects of Claimant's head injury are not of sufficient severity to reach the level of physical brain damage as contemplated in Section 42-9-10(C). [R. p. 42, lines 8 - 10]. The Appellate Panel ordered:

> IT IS THEREFORE ORDERED that Claimant is permanently and totally disabled and is entitled to benefits as provided in S.C. Code Ann. § 42-9-10(A) (1976, as amended). Claimant is not entitled to benefits under S.C. Code Ann. § 42-9-10(C).

[R. p. 43].

Fragosa appealed to the Court of Appeals. The court affirmed the Appellate Panel in an unpublished decision issued on March 30, 2016. Fragosa v. Kade Construction, LLC, Op. No. 2016-UP-139 (S.C.Ct.App. filed March 30, 2016). After denial of the Petition for Rehearing, Fragosa filed this Petition for Writ of Certiorari.

ARGUMENT

1. The Petition should be granted because the inconsistency in the Commission's findings is an error of law requiring reversal rather than remand.

In 2013, the South Carolina Supreme Court issued two landmark opinions addressing "physical brain damage" in workers' compensation cases. In Sparks, the Court held "we conclude that 'physical brain damage' as used in § 42-9-10(C) is physical brain damage that is both permanent and severe." Sparks v. Palmetto Hardwood,Op. No. 27229 (S.C. Sup. Ct. filed May 22, 2013) (Shearouse Ad. Sh. No. 23 at 40). In Crisp, the Court further explained that entitlement to lifetime compensation was predicated on "brain damage so severe that the person could not subsequently return to suitable gainful employment." Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013).

Even though the Court has now defined "physical brain damage," the Court has not yet reached a case applying the "permanent and severe" standard. In Crisp, the issue was not ripe because "the Commission's order manifests a clear intention to delay a permanency finding with respect to Petitioner's brain injury because Petitioner had not yet reached MMI . . ." Crisp. And in Sparks, although Sparks had reached maximum medical improvement (MMI), the Court affirmed the Commission's finding that "Claimant has failed to carry his burden of proof to establish physical brain damage as contemplated by S.C.Code Ann. § 42-9-10." Sparks.

This case squarely presents the issues left unanswered by Sparks and Crisp. As such, it is ripe for analyzing how the test for physical brain damage is applied in real life.

Fragosa has reached MMI. He suffered severe permanent physical brain damage – sufficiently severe for the Commission to find "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury as stated by Dr. George M. Sandoz in his August 20, 2009 letter." [R. page 22, Finding of Fact 8]. The Commission further found "that the Claimant is permanently and totally disabled and is unable to return to any type of work that he has performed in the past." [R. page 22, Finding of Fact 9]. These twin findings plainly meet the permanent and severe standard.

Despite these findings – and the evidence supporting them – the Commission inexplicably concluded "there has not been a physical brain injury *as it does not meet the criteria* established under the South Carolina Workers' Compensation Act." [R. page 23, Finding of Fact 18 (emphasis added)]. Unlike the other two findings, this is not a finding of fact – it is a conclusion of law. More specifically, it is the *mis*application of Finding of Facts 8 and 9 to the law. This is a critical distinction as it fundamentally controls the standard of review. "The general rule seems to be that where an ultimate conclusion can be arrived at only by applying a rule of law, the result so reached embodies a 'conclusion of law' and is not a finding of fact and not binding upon the reviewing court." Black v. Barnwell County, 243 S.C. 531, 134 S.E.2d 753 (1964)(Bussey, J., dissenting)

The criteria relied on by the Commission was the supposed, albeit erroneous, requirement that *physical brain damage* must be visible on MRI or CT scans – as had been argued below by

Respondents. The Commissioners plainly believed this was the dispositive criterion.[5] At the time, their belief was not wholly unreasonable as the Supreme Court had not yet addressed the issue. Now that Crisp and Sparks have rejected "use of a specific diagnostic tool in proving these medically-technical brain injury cases," the Commission's conclusion is affected by an error of law and must be reversed. Cf. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding).

The issues were confounded further when the Court of Appeals declined to reverse, instead remanding the case back to the Commission because "it is unclear whether the Appellate Panel found these injuries included an injury to the brain." Fragosa v. Kade Construction, LLC, Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)(Shearouse Adv.Sh. No. 50 at 82). The court perceived a conflict that did not exist when it paraphrased the Commission's order: "However, in finding of fact #18, the Appellate Panel found Fragosa did not suffer a brain injury." Id.

The Commission found as a fact "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury as stated by Dr. George M. Sandoz in his August 20, 2009 letter." [R. page 22, Finding of Fact 8]. This is plainly a finding that Fragosa sustained permanent damage to the brain. There is nothing at all ambiguous about it. "A permanent impairment, by definition, lasts for a lifetime." James v. Anne's Inc., 701 S.E.2d 730, 736, 390 S.C. 188 (2010). There is also no doubt that 46% to the whole person is a significant permanent

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[5]At oral argument before the Appellate Panel, Commissioner McCaskill asked Respondents' counsel, "As I understand what you're saying if it is a physical brain injury you've got to be able to see it." Counsel responded affirmatively, stating "That is our position there would be some physical change that something would pick up on a Scan . . ." [R. Page 16, lines 11-17].

impairment.[6] This finding satisfies the requirement that the brain damage be permanent and severe.

The Commission went on to find "That, after considering the Claimant's multiple impairment ratings, we find that the Claimant is permanently and totally disabled and is unable to return to any type of work that he has performed in the past." [R. page 22, Finding of Fact 9]. This finding meets the second part of the test – "brain damage so severe that the person could not subsequently return to suitable gainful employment." Id. at 843. There is nothing ambiguous in this finding either. Indeed, Respondents concede Fragosa is permanently and totally disabled. The reference to "multiple impairment ratings" – of which the 46% for traumatic brain injury is by far the most significant – confirm that the brain damage rendered Fragosa unemployable. See Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998)("the statute only requires that a claimant be totally and permanent disabled and suffer physical brain damage as a result of the injury.").

Once the Commission made findings meeting the physical brain damage definition set out in Crisp and Sparks, it was an error of law to conclude Fragosa did not meet the criteria for lifetime compensation. The Court of Appeals erred in remanding the case. A remand was unneeded. The proper ruling was to hold that under the established facts, Fragosa had proven physical brain damage as a matter of law. "[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally

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[6]The finding itself is amply supported by substantial evidence. Much of the impairment is based on a "Clinical Dementia Rating" correlating to an "impairment [which] requires direction of some activities of daily living." [AMA Guides to Permanent Impairment (5th Edition), page 320]. In the description of the rating, Dr. Sandoz specified it was "for a traumatic brain injury. At this moment from the injury that the patient has suffered, he is totally and permanently disabled." [R. Page 242].

compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012).

The issues presented in this case are sufficiently novel and important to our State's public policy that they warrant a full analysis by our highest court. As such, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari and reverse the decisions below.

2. The Writ of Certiorari should be granted because the Court of Appeals applied an incorrect and improperly deferential Standard of Review to workers' compensation cases.

In its decision, the Court of Appeals cited the correct standard of review: "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 the administrative agency reached in order to justify its action." Fragosa II, *quoting* Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005). However, the Court actually applied the outdated "any evidence" standard used before the passage of the Administrative Procedures Act (APA) in 1977. S.C. Code Ann. § 1-23-310, et seq. (1977 and as amended).

Prior to passage of the APA, "an award of the [Workers' Compensation Commission was] conclusive and binding on judicial review as to all questions of fact, if such factual findings are supported by *any competent evidence*." Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981)(emphasis added). In Lark, the Supreme Court held the "substantial evidence" standard of review supplanted the "any evidence standard." Id. The Lark definition was recently reaffirmed in Hartzell v. Palmetto Collision, LLC, Op. No. 27260 (S.C.Sup.Ct. filed April 13, 2016)(Shearouse Adv.Sh. No. 15 at 14). "'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 or must have reached in order to justify its action." Id.

In the instant case, no substantial evidence supports the Commission's finding that Fragosa's "brain injury" did not rise to the level of physical brain damage. The Commission, on remand, disregarded its original findings – findings which would have conclusively supported an award of lifetime compensation for permanent physical brain damage. Instead the Commission pored over 800 pages of medical records to find any possible notation of somewhat normal brain function – ignoring competent evidence and resorting to speculation. It then cobbled together these random nuggets to bolster its already erroneous conclusion that Fragosa did not meet the criteria for physical brain damage.[7]

The Court of Appeals overlooked the two key findings in the original Decision and Order which *require* a finding of physical brain damage under the Crisp and Sparks framework. In its original Order, the Commission found "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled . . . " [R. p. 20, lines 5 - 10]. These two findings do not appear in the Order on Remand. Appellant believes the court repeated the same error made by the Commission in removing these most critical findings from the analysis, instead endorsing the Commission's "unusual finesse of reasoning" to identify any scintilla that might support the original ruling.

Appellant respectfully requests the Court grant the Petition. The new findings by the

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[7]For a full discussion of the new findings, see Brief of Appellant at pages 21-28 (App. Pages 1246-1253].

Commission may have some support in the record. The possibility that they may individually be supported by the record does not mean they add up to "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Hartzell. The Commission's conclusion of no physical brain damage cannot. survive the true substantial evidence standard of review. Substantial evidence is a relatively deferential standard of review; it is not a rubber stamp. The Petition should be granted for this Court to review the totality of the findings in light of the entire record.

3. The Commission's disregard of its previous findings and substitution of inconsistent new findings exceeded its authority on remand is an important issue deserving review by this Court.

In its original Order, the Commission found "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled . . .." [R. p. 20, lines 5 - 10]. Despite these findings – and the evidence supporting them – the Commission inexplicably concluded "there has not been a physical brain injury *as it does not meet the criteria* established under the South Carolina Workers' Compensation Act." [R. p. 21, lines 11 - 14 (emphasis added)]. As argued elsewhere in this Petition, this conclusion was actually a conclusion of law; not a finding of fact.

In Fragosa I, The Court of Appeals opined:

> the Appellate Panel made inconsistent findings with regard to the existence of a physical brain injury. In finding of fact # 8, the Appellate Panel found Fragosa sustained a forty-six percent impairment to the whole person for a traumatic brain injury. However, in finding of fact # 18, the Appellate Panel found Fragosa did not suffer a brain injury. Based on this inconsistency, we remand to the Appellate Panel for clarification. . It is undisputed that Fragosa suffered severe injuries as a result of a work related accident. However, it is unclear whether the Appellate Panel found these injuries included an injury to the brain. If the Appellate Panel finds Fragosa did sustain a physical brain injury, it should, in light of Crisp II and Sparks, cite specific

> evidence to support its determination as to whether such injury was of sufficient severity to reach the level of physical brain damage as contemplated in section 42–9–10(C).

Fragosa v. Kade Constr., LLC, 407 S.C. 424, 755 S.E.2d 462, 466 (Ct. App. 2014).

The new findings made by the Commission on remand violated the instructions on remand. The original findings must remain in place. The Commission on remand does not have authority to dispense with them. It may add to them to explain its reasoning – it cannot ignore what it has already established as fact merely to find different grounds to support an already erroneous decision. Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011)("A [trial] court may not . . . exceed its authority and assume the role of a second jury. Rather, the appellate court's instructions circumscribe the trial court's authority on remand.").

Here, the Commission made entirely new findings without referencing its previous findings. The "46% permanent impairment to the whole person for a traumatic brain injury" is never even acknowledged. The Commission does not resolve an inconsistency – it makes no analysis, no explanation, no reasoning. The Commission simply lays out a list of new factual findings – only to summarily repeat its original erroneous conclusion. The instruction was to resolve an inconsistency; not to bolster an improper conclusion. Cf. Parker v. South Carolina Public Service Com'n, 342 S.E.2d 403, 288 S.C. 304 (1986)(error of administrative agency to exceed scope of remand instructions and give party a second bite at the apple)

To be sure, the Commission was given an impossible task. The twin findings of severe permanent impairment and total disability from the brain injury compel an award of lifetime compensation. Nevertheless, the Commission must analyze the issue with sufficient thoroughness for a reviewing court to understand how it resolved the apparent inconsistency. And if the analysis

forces the Commission to reverse its original conclusion, then the exercise has been worth the remand.

As the Court of Appeals issued a memorandum decision in this case, no analysis was made of the Commission's error of law in discarding its original findings. The Commission did not comply with the remand instructions. Petitioner respectfully requests the Court grant the writ to analyze the Commission's decision and hold the Commission erred in *replacing* its previous findings of fact rather than *explaining* the inconsistency in its original decision. Given the high number of remands in workers' compensation cases, this is an important issue which should be addressed by this Court so as to provide guidance to the Commission and the workers' compensation bar.

4. Under the *Crisp*, *Sparks* and *Pearson* standard, the evidence at MMI confirms Fragosa suffered physical brain damage.

Hector Fragosa was hit in the head with a crane which knocked him off a roof onto the ground. He suffered a skull fracture with subdural and epidural hematomas along with frontal lobe contusions – all of which were confirmed with MRI and CT scans. He remained in a coma for 15 days following his accident.[8] Since then, he has suffered from proven cognitive deficits, balance problems, dizziness, seizures, and difficulty with complex tasks – resulting in permanent and total disability. Dr. Sandoz (treating neurologist); Dr. Wagner (Respondent's forensic neuropsychologist) and Dr. Brabham (psychologist and certified brain injury specialist) confirm the permanency of the cognitive deficits. Dr. Sandoz has repeatedly and explicitly stated to a reasonable degree of medical

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[8]The CDC developed a definition of traumatic injury for the Department of Defense and Veterans Administration. Under the CDC's definition, a loss of consciousness longer than 24 hours is classified as a *severe* traumatic brain injury. See Department of Defense and Department of Veterans Affairs (2008). "Traumatic Brain Injury Task Force" http://www.cdc.gov/nchs/data/icd9/Sep08TBI.pdf

certainty that Fragosa is permanently and totally disabled due to traumatic brain injury resulting in physical brain damage. **He made this determination at the point Fragosa reached MMI.** The evidence of physical brain damage is simply overwhelming. See Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997)(affirming award of lifetime benefits for physical brain damage when "[a]t most, one physician, Dr. Woodward, indicated that he could not determine whether the greater cause of Pearson's disability was his psychological deficits or his organic brain damage [and] [n]ot one physician has stated that Claimant's disability is not due to physical brain damage.").

Fragosa has reached MMI. He suffered severe permanent physical brain damage – sufficiently severe for the Commission to find in its original order "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury as stated by Dr. George M. Sandoz in his August 20, 2009 letter." [R. p. 20, lines 5 -7]. The Commission further found "that the Claimant is permanently and totally disabled and is unable to return to any type of work that he has performed in the past." [R. p. 20, lines 8 - 10]. These twin findings meet the permanent and severe standard set forth in Crisp and Sparks.

The new findings made by the Commission do not comply with this analysis – nor the instructions on remand. Instead, the Commission abandoned the previous findings *in toto* – mining the record for inconsequential nuggets – each less than a scintilla of evidence and which, when compiled into a whole, still add up to less than a scintilla. This approach is simply a means of justifying the initial erroneous legal conclusion. It is not meaningfully applying the Crisp and Sparks framework to the established facts of this case.

The vast majority of new findings made by the Commission address Fragosa's condition

during his slow progress towards MMI – not his condition *at* MMI when the determination must be made. For example, at oral argument, the Court of Appeals inquired about the Commission putting "great weight" on records from Dr. Norcross and Dr. Takacs. The Commission found "Dr. Norcross of MUSC terms Claimant's neurological recovery as "actually remarkable.' Dr. Takacs (also of MUSC) states that Claimant has 'no neurological sequela.'" [R. P. 38 (Finding of Fact 20).

The full statement by Dr. Norcross reads: "His injuries included . . . a closed head injury with a skull fracture and epidural hematoma. He underwent a trach and a PEG-tube while in the Intensive Care Unit, but made a remarkable neurologic recovery." [R. P. 640]. Dr. Norcross made this statement on December 17, 2007 – a mere 48 days after Fragosa's accident. Moreover, in the same record, Dr. Norcross states "Given the severity of his injuries, I think [an appointment with Neurosurgery] should be appropriate, and a consultation was filled out with Dr. Takacs, who saw the patient in-house." [R. P. 640]. Considering that Fragosa nearly died and spent a full month in the ICU with a traumatic brain injury, the fact he could now breath and eat on his own (48 days later) would indeed constitute a remarkable neurological recovery – even though Dr. Norcross noted "ongoing headaches and some dizziness" on the same day. [R. P. 644]. This non-specific characterization by Dr. Norcross has no probative value as to Fragosa's brain damage at MMI.

Dr. Takacs is a neurosurgeon. His Assessment and Plan states: "27-year-old Hispanic male status post closed head. No neurological sequela. His fingertip numbness could possibly be from a whiplash injury for which I do not have a surgical solution. Patient is not in need of neurosurgical at this time." [R. P. 661]. Dr. Takacs saw Fragosa one time on January 31, 2008 – three months after the accident – for surgical evaluation of a possible whiplash injury to his neck. This was a condition entirely unrelated to Fragosa's brain damage. The only fair reading of his report is to take it in the

context of a neurosurgeon evaluating whether a patient required surgery for a tertiary condition. Finding no surgical option, Dr. Takacs never saw Fragosa again. His report has no probative value regarding physical brain damage.

In its original Order, the Commission found "The Claimant did not have problems with his brain prior to the 2007 accident. He has headaches at least once a week and has short term memory problems. The Claimant is constantly dizzy." [R.P. 9 (Finding of Fact 5)]. Headaches, dizziness and short term memory are all neurological sequelae – still present at MMI. The Commission cannot take back its original finding of neurological sequelae still present four years after the accident. The remand did not allow the Commission a second bite of the apple. They cannot change their minds, contradict their previous findings, and give "great weight" to records which they previously (and correctly) found to be inconsequential. Cf. Parker v. South Carolina Public Service Com'n, 342 S.E.2d 403, 288 S.C. 304 (1986)(error of administrative agency to exceed scope of remand instructions).

The opinion by Dr. Sandoz – made at MMI – confirms that Fragosa has suffered permanent damage to his brain of sufficient severity to render him permanently and totally disabled. It is in reliance on this opinion that the Commission found Fragosa had suffered a 46% permanent impairment because of traumatic brain injury, as well as finding him permanently and totally disabled. Indeed, Respondents concede both points. There is no evidence contradicting these findings. Nor, for that matter, are they any findings in the original order which contradict these findings.

Fragosa met his burden. He respectfully requests the Court grant the Petition, allow full briefing and argument on the issues, and ultimately reverse the decision below.

5. The Court should address the issue overlooked by the Court of Appeals that "Even if Fragosa's other physical impairments contribute to his disability, he is still entitled to lifetime compensation because he suffered physical brain damage within the meaning of the Act."

In the Order on Remand, the Commission added another conclusion, to wit: "The combination of Claimant's injuries (including but not limited to his foot and his dizziness) are what totally disable him. As Claimant's brain injury[9] is compensable pursuant to Regulation 67-1101, he is subject to the 500 week statutory limitation." [R. p. 42, Finding 28]. The Appellate Panel makes this conclusion without reference to any particular evidence nor with any analysis. It is simply a conclusion without a foundation. This finding should be reversed, both as unsupported by the evidence and contrary to the law.

The same situation occurred in Pearson. This Court held "Employer's argument to avoid the lifetime benefit provision of section 42-9-10 because of Pearson's psychological problems is meritless." Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998). In Sparks, the South Carolina Supreme Court confirmed Pearson is still good law, rejecting the concept that lifetime benefits should not be awarded merely because the employee suffers from additional ailments which contribute to his disability. The Court held: "§ 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

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[9]In the order on remand, the Appellate Panel notes "Respondents do not deny that Claimant suffered a physical brain injury." The Panel goes on to state "Based upon the evidence – and Respondents' concession – we find that Claimant suffered a physical brain injury, but not physical brain damage." [App. P. 35, Finding of Fact 1]. It is odd that the Appellate Panel would be so reluctant to find even a brain injury, let alone physical brain damage. Fragosa suffered an extraordinarily serious accident with a fracturee skull and bleeding in the brain, in which one doctor described him as "neurologically devastated." This case is vastly different than Sparks where the Commission found "the claim for physical brain injury borders on the frivolous."

compensable injury." Sparks v. Palmetto Hardwood, Inc., 738 S.E.2d 831, 835, 401 S.C. 619 (2013)(emphasis added).

In the absence of brain damage, Fragosa's other injuries would not disable him. Fragosa's neurologist, Dr. Sandoz explicitly opined: "At this moment from the injury that the patient has suffered, he is totally and permanently disabled. After evaluation of the AMA Guidelines, he is totally and permanently disabled." [R. p. 763 (emphasis added)]. Dr. Sandoz tied his opinion on disability directly to the brain damage – as did Dr. Brabham. [R. pp. 915, 926-927].

Conversely, the other three doctors who gave impairment ratings and restrictions for other injuries all opined Fragosa was able to return to work – either without restrictions or with minimal restrictions. The ENT, Dr. Hoy, found no impairment and no work restrictions. [R. P. 713]. The orthopaedic surgeon, Dr. Wolfe, assigned restrictions of "No climbing > 6 steps & use safety equipment." [R. Pp. 984-986]. Dr. Merrell gave no specific restrictions, only noting "Pain may limit overhead activities with the left arm. He may perform overhead activities unless symptoms preclude." [R. P. 950].

The legal test for total disability is the inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." See, e.g. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961). The opinions of Dr. Hoy, Dr. Wolfe and Dr. Merrell would not support a finding of permanent and total disability. As such, there is no substantial evidence that Fragosa's total disability resulted from his other injuries. The only evidence supporting permanent and total disability comes from Dr. Sandoz and Dr. Brabham – both of whom opined Fragosa was totally disabled because of physical brain damage. Indeed, Dr. Sandoz rendered his opinion specifically in the language adopted by Crisp and Sparks.

The Court of Appeals did not address this issue in its decision. Appellant respectfully requests this Court grant the writ to address this issue, apply Pearson, and reverse the decision below. The case should be remanded for an award of lifetime compensation based on physical brain damage.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and permit further briefing of the issues.

Respectfully Submitted

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Columbia, South Carolina
September 19, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

RECEIVED
SEP 19 2016
S.C. SUPREME COURT

Op. No. 2016-UP-139 (S.C.Ct.App. filed March 30, 2016)

Hector G. Fragosa, Employee/Claimant, ... Petitioner,

v.

Kade Construction, LLC, Employer, and
Key Risk Management Services, Inc., Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Petition for a Writ of Certiorari** and **Appendix** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on September 19, 2016, addressed as follows:

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Honorable Jenny Abbott Kitchings
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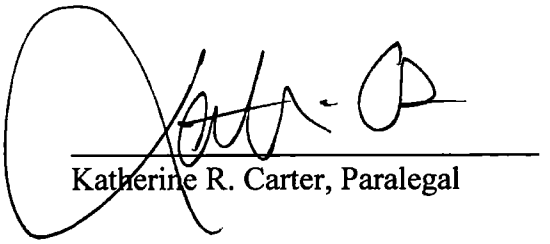
(Petition for a Writ of Certiorari only)



Katherine R. Carter, Paralegal

September 19, 2016
Columbia, South Carolina