

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)

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S.C. SUPREME COURT

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

v.

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

RESPONDENTS' RETURN TO PETITIONER'S WRIT OF CERTIORARI

J. Gabriel Coggiola, Esquire
Michael W. Burkett, Esquire
Willson, Jones, Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2889
Attorneys for Respondents

OTHER COUNSEL OF RECORD

Jeffrey C. Chandler,
Chandler Law,
Bank of America Building
2501 Oak Street
Myrtle Beach, South Carolina 29578
(843) 448-4357
Attorney for Petitioner

Stephen B. Samuels
Samuels Law Firm, LLC
1320 Richland Street
Columbia, South Carolina 29201
(803) 779-4000
Attorney for Petitioner

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QUESTIONS PRESENTED

1. Whether an inconsistency in the Commission's findings was an error of law requiring reversal rather than remand?
2. Whether the Court of Appeals erred by applying an "any evidence" standard of review rather than the appropriate "substantial evidence" standard of review?
3. Whether the Full Commission Appellate Panel exceeded its authority on a remand by making new inconsistent findings without reference to its previous findings?
4. Whether the evidence at MMI confirmed Petitioner suffered physical brain "damage" under the Crisp, Sparks, and Pearson standard, thus allowing the Court to reverse the Full Commission Appellate Panel?
5. Whether §42-9-10(C) requires that permanent and total disability results 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)?

STATEMENT OF THE CASE

This workers' compensation appeal arises out of an admitted accident that occurred on November 1, 2007. As a result of the accident, Petitioner alleged injuries to his vision, spine, bilateral arms, left shoulder, hips, bilateral legs, right foot, psychological overlay, and physical brain damage set forth in S.C. Code Ann. §42-9-10(C). (Appendix, p.89) On April 8, 2011, Petitioner filed a Form 50 Request for Hearing, seeking compensation for past medical care, future medical treatment, permanent and total disability, and an award of lifetime benefits due to physical brain damage, and Respondents filed responsive pleadings, admitting the November 1, 2007 work accident, but denying the extent of the injuries as alleged by the Petitioner. (Appendix, pp.89-90) Respondents also sought credit for temporary total benefits paid in excess of the award and sought to stop payment of the Petitioner's temporary benefits pursuant to their Form 21 hearing request filed on March 25, 2011. (Appendix, p. 88)

A hearing was held before the Workers Compensation Commission on June 28, 2011 to

determine all issues raised in the Forms 50, 51, and 21. At the hearing, Petitioner alleged he was entitled to (1) additional medical care as a result of his admitted work accident and (2) a finding that he was totally and permanently disabled based on the totality of his injuries, and (3) a finding that he sustained physical brain “damage” in accordance with S.C. Code Ann. § 42-9-10(C), resulting in an award of lifetime indemnity benefits. (Appendix, p.1155, lines 20-25)

On November 21, 2011, the Single Hearing Commissioner (“Single Commissioner”) issued a Decision and Order, wherein he set forth the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers’ Compensation Act, as amended, with Hector G. Fragosa as Employee-Claimant and Kade Construction, LLC as Employer and Key Risk Management Services, Inc. as Carrier, Defendants. (Appendix, p. 53)
2. That the average weekly wage of Employee-Claimant at the time of the above-described accident was \$400.00, with an applicable compensation rate was \$266.68. (Appendix, p. 53)
3. That the Claimant testified that he was twenty-nine (29) years old, was not married, and has no children. The Claimant’s date of birth is October 4, 1980 and his age is thirty (30) years old. (Appendix, p. 53)
4. That this is a closed head injury. (Appendix, p. 53)
5. That the Claimant came from Mexico to the United States in 2002 or 2003. He went to middle school. He speaks very little English. The Claimant has worked in the construction industry his whole life. 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. (Appendix, p. 53)
6. That the Claimant sustained an eleven percent (11%) medical impairment to the whole person on account of his cervical spine injury as stated by Dr. Christopher Merrell in his February 8, 2010 Form 14B. (Appendix, p. 53)
7. That the Claimant sustained a forty percent (40%) impairment rating to the right lower extremity and a one percent (1%) impairment rating to the left upper extremity, and had a combined impairment rating of seventeen percent (17%) to the whole person on account of the Claimant’s right foot and left shoulder injuries as stated by Dr. Shane Wolfe in his April 8, 2010 Form 14B. (Appendix, pp.53-54)
8. That the Claimant sustained a forty-six percent (46%) impairment to the whole person for a traumatic brain injury as stated by Dr. George M. Sandoz in his August 20, 2009 letter. (Claimant’s APA #6, pg. 716). (Appendix, p. 54)

9. That, **after considering the Claimant's multiple impairment ratings, the Claimant is permanently and totally disabled** and is unable to return to any type of work that he has performed in the past. (Appendix, p. 54)
10. That the ratings themselves would exceed the five hundred (500) weeks after applying all the factors, age, education and work restrictions as well as the disfigurements noted in the record. (Appendix, p. 54)
11. That Dr. George M. Sandoz testified in his deposition on August 6, 2010 that the Claimant was disabled on account of a traumatic brain injury. (Deposition of George M. Sandoz, M.D., Claimant's APA Exhibit A, p. 858). There is no neurological medical treatment from August of 2009 to November of 2010 indicating that this is the case. (Appendix, p. 54)
12. That Dr. Mark Wagner noted that the Claimant sustained a skull fracture with acute underlying minor structural change to the brain, but Dr. Wagner concluded that functional studies, such as EEGs, CTs and MRIs, were read as unremarkable "demonstrating structural resolution of the work-related injury." (Claimant's APA #4, pg. 655). (Appendix, p. 54).
13. That Dr. Mark Wagner noted on October 30, 2008 that the Claimant suffers from mild post-concussive syndrome. (Claimant's APA Exhibit B, p. 874). (Appendix, p. 54.)
14. That Dr. George M. Sandoz testified that the **Claimant suffers from mastoiditis "and that's why he's dizzy."** (Deposition of George M. Sandoz, M.D., Claimant's APA Exhibit A, p. 861). (Appendix, p. 54)
15. That Dr. Shane Wolfe prescribed a special foot insert for the Claimant on March 16, 2009 in order to lower the dorsal impact at the site of the Claimant's toe amputation. (Claimant's APA #3, pg. 629). (Appendix, pp.54-55)
16. That Dr. Christopher Merrell performed a nerve root block on the Claimant's left cervical spine at the C5 region on August 26, 2009 after an MRI revealed neuroforaminal narrowing on the left side. (Claimant's APA #3, pg. 641). (Appendix, p. 55)
17. That there has been no Guardian *ad Litem* appointed on the Claimant's behalf. (Appendix, p. 55)
18. That, **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.** (Appendix, p. 55)

Conclusions of Law

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act. (Appendix, p. 55)
2. 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.** (Appendix, p. 55)
3. Under § 42-9-30 and § 42-9-10, the **Claimant has not suffered a physical brain injury and is not entitled to lifetime compensation benefits under the South Carolina Workers' Compensation Act.** (Appendix, pp.55-56)

Petitioner appealed to the Full Commission Appellate Panel (“Appellate Panel”), and oral arguments were held on March 19, 2012. On May 23, 2012, the Appellate Panel issued a Decision and Order adopting and affirming the Single Commissioner’s decision. (Appendix, pp.58-66)

Petitioner served and filed his first notice of appeal in the South Carolina Court of Appeals on June 18, 2012. During the time period in which final briefs were being filed with the Court of Appeals, this Court issued two (2) opinions handing down the “permanent and severity” test to be used by fact finders when determining whether an injured worker’s injuries to the head and/or brain result in the injured qualifying for one of only three exceptions to the five-hundred (500) week cap on benefits, due to their injuries resulting in permanent brain “damage” under §42-9-10(C).(*see Sparks v. Palmetto Hardwood, Inc.* 406, S.C. 124, 750 S.E.2d 61, (2013) *and Crisp v. SouthCo., Inc.*, 401 S.C. 627, 738 S.E.2nd 835 (2013)).

Oral arguments were held on October 10, 2013, and on November 27, 2013, the Court of Appeals issued an opinion remanding the case back to the Full Commission Appellate Panel. (Appendix, pp.67-74). Specifically, the Court instructed the Full Commission Appellate Panel as follows:

Here, the Appellate Panel made inconsistent findings with regards to the existence of a physical brain injury. In finding of fact #8, the Appellate Panel found Fragosa sustained 46% 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 his work 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). (emphasis added) (Appendix, p. 73)

Petitioner filed a Petition for Rehearing and Rehearing en Banc, which was denied on March 31, 2014. (Appendix, p. 75) On April 29, 2014, Petitioner filed a Petition for Writ of

Certiorari with this Court, which was denied on July 24, 2014. (Appendix, p. 76)

Pursuant to the Court of Appeals' instructions on remand, on September 13, 2014, the Full Commission Appellate Panel filed a second Decision and Order, wherein they issued twenty eight (28) findings on remand. (Appendix, pp. 78-87) The Appellate Panel's Order starts by specifically noting the Court of Appeals request for "clarification regarding the existence of a physical brain injury," and the goes on to state, "Therefore, the Appellate Panel has reviewed the record, and concludes that Claimant did not suffer physical brain 'damage'. Based upon the evidence – and Respondents concession – **we find that Claimant suffered a physical brain injury, but not physical brain "damage."** (Appendix, p. 79) The Appellate Panel then goes on to cite a list of evidence it relied on in coming to its ultimate conclusion that "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 is compensable pursuant to Regulation 67-1101, he is subject to the 500 week statutory limitation." (Appendix, p. 86).

On October 27, 2014, Petitioner filed his second notice of appeal with the South Carolina Court of Appeals. Briefs were prepared by both parties and submitted to the Court for review prior to oral arguments on March 9, 2016. On March 30, 2016, the Court of Appeals issued an unpublished opinion affirming the September 13, 2014 Order of the Full Commission Appellate Panel. (Appendix, pp.1-2) Petition filed for re-hearing, which was denied on August 19, 2016. (Appendix, p. 38) This Petition for Writ of Certiorari of Certiorari follows.

ARGUMENTS

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, "a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242 provides a list of the general character of reasons the

Court will consider, including the following:

1. Where there are novel questions of law.
2. Where there is a dissent in the decision of the Court of Appeals.
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
4. Where substantial constitutional issues are directly involved.
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Respondents first assert that Appellant's Petition for Writ of Certiorari clearly fails to qualify under reasons #2-#5, since there was no dissent in the opinion, the decision of the Court of Appeals does not conflict with any prior Supreme Court decision, and there are no constitutional issues or Federal questions involved.

Petitioner contends this case presents issues sufficiently novel and important to our State's public policy to warrant a full analysis by this Court, but the issues set forth by Petitioner are not novel at all. This Court has already provided a detailed analysis of the issue of what constitutes brain "damage" as set forth in S.C. Code Ann. §42-9-10(C) in the holdings in Crisp and Sparks. This Court handed down the test for the Commission to use when deciding whether an injured worker's injury to the head or brain reached a sufficient level of "permanency and severity" so as to qualify for lifetime benefits, and it held that "the severity of the injury is the lynchpin of the analysis."

Petitioner has not raised any novel issues or questions that require this Court's review and is instead simply displeased with the decisions of the lower courts. Therefore, Respondents respectfully request that the Petition be denied.

- I. **The Petition should be denied because the Court of Appeals appropriately remanded the case to the Commission for clarification of inconsistencies in the Commission's previous findings *and* application of the new legal test for brain "damage" as set forth in Crisp and Sparks.**

After hearing both parties at oral arguments, and with the benefit of the new "permanent

and severity” test for brain “damage” under §42-9-10(C), the Court of Appeals made the sound and appropriate decision to remand the case to the Full Commission Appellate Panel to clarify an inconsistency in the wording of the Single Commissioner’s order and apply the new legal test for brain “damage.” The Court of Appeals stated the following:

Here, 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 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 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).** (Appendix, p. 73)

The Court of Appeals’ instructions were clear. The Full Commission Appellate Panel was to make two (2) findings. First, whether Petitioner suffered a physical brain injury, and second, whether the injury to the brain reached the level of “damage” as defined in Crisp and Sparks. This remand was the appropriate action because in workers’ compensation cases, the South Carolina Workers’ Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986).

Petitioner argues this case involves a novel issue because this Court has not yet heard a case applying the “permanent and severity” test it already handed down in Crisp and Sparks, but again that is not the appellate court’s role to play. This Court has already answered the question of what test the Workers’ Compensation Commission is supposed to use when deciding whether an injured worker suffered brain “damage.” It is not the role of the appellate courts to then have to come back and act as fact finder in ongoing cases involving the same legal questions unless the findings of the lower courts are not supported by substantial evidence.

The situation described above is exactly what happened when the Court of Appeals remanded the case to the Full Commission Appellate Panel after obtaining guidance from the holdings in Crisp and Sparks. Petitioner wants this Court to find it was an error on the Court of Appeals part to remand the decision to the Workers Compensation Appellate Panel instead of taking it upon themselves to take the fact finding role and reversing the decision of Commission. The Court of Appeals remand to the Full Commission Appellate Panel was absolutely appropriate, and the only real questions become (1) whether the Appellate Panel applied the test set forth in Crisp and Sparks, and (2) whether their application of the facts to the test was supported by substantial evidence. If so, there is no need for further appellate review.

Respondents argue that the Commission accurately followed the instructions from the Court of Appeals on remand, and after finding that Petitioner did suffer an injury to the brain, it applied the test set forth in Crisp and Sparks. Based in its review of the evidence as a whole, the Appellate Panel concluded that Petitioner's injury to the brain did not reach the sufficient level of severity as to qualify as brain "damage" under §42-9-10(C). For the reasons set forth above, Respondents respectfully request that the current Petition be denied.

II. The Petition should be denied the Court of Appeals correctly applied the appropriate standard of review to workers compensation cases.

Petitioner argues that the Court of Appeals cited the correct "substantial evidence" standard of review, but instead incorrectly applied the outdated "any evidence" standard used before the passage of the Administrative Proceedings Act in 1977. Petitioner argues there is no evidence to support the Appellate Panel's decision that Petitioner's brain injury did not rise to the level of "damage" as set forth in §42-9-10(C), and then goes on to provide his own speculative impression of how the decision making process was exercised by the Full Commission Appellate Panel.

Petitioner cannot cite any evidence to support his claim that the Full Commission Appellate Panel or the Court of Appeals misapplied the “substantial evidence” standard of review that it is familiar with and applies on a regular basis. Petitioner’s argument comes down to the fact that he disagrees with the decision the Full Commission Appellate Panel made after it reviewed the complete evidence in the record as a whole. As a result, there are no grounds in Petitioner’s argument that warrant a Writ of Certiorari to this Court.

III. The Petition should be denied because the Full Commission did not exceed its authority on remand from the Court of Appeals by disregarding or substituting previous findings of the Single Commissioner.

Although Petitioner wants this Court to believe the Full Commission Panel abandoned its previous findings and replaced them with new ones, this belief is not accurate. The Court of Appeals was clear in their instructions on remand. The Commission was not instructed to review or make new findings regarding all issues litigated in the claim. The Court of Appeals instructions to the Commission were two-fold: (1) clarify whether Petitioner suffered a physical brain injury as a result of his accident, and (2) if they did find Petitioner suffered a physical brain injury, make a determination of whether the brain injury was of sufficient severity to reach the level of “damage” under the new test in Crisp and Sparks.

There is nothing in the Appellate Panel’s order stating that it abandoned the previous findings of the Single Commissioner. Instead, the Appellate Panel’s order comes to the same conclusion as the Single Commissioner that Petitioner was permanently and totally disabled as a result of the combination of his injuries to multiple body parts, but the Appellate Panel goes on further to set forth specific evidence requested by the Court of Appeals in support of its decision that Petitioner’s brain injury did not reach the sufficient level of permanency and severity to result in brain “damage” as set forth in §42-9-10(C) and defined by Crisp and Sparks.

In support of his argument, Petitioner continues to attempt to paraphrase the original findings

of the Single Commissioner by using two piecemealed sentences out of the Single Commissioner's order, repeatedly stating as fact that "Claimant sustained 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled." Petitioner's paraphrasing of the order entirely ignores the multitude of other injuries and injury produced limitations suffered by the Petitioner, as well as the impairment ratings to Petitioner's cervical spine, right lower extremity, left upper extremity, and dizziness caused by mastoiditis. (Appendix, pp.53-55) The Single Commissioner's decision actually states that Petitioner was permanently and totally disabled on account of the injuries he suffered to multiple body parts. (Appendix, p. 54). When read in its totality, the findings of both the Single Commissioner and subsequent clarification from the Appellate Panel address all pending issues in this matter, and therefore the current Petition should be denied.

IV. The Petition should be denied because under the Crisp and Sparks standard, the evidence confirms that Petitioner suffered multiple injuries, including a head injury, but his head injury was not of sufficient severity to reach the level of damage set forth in §42-9-10(C).

In his Petition, Argument IV, Petitioner attempts to recite the same medical evidence that was available to the Commission and Court of Appeals, and present his own conclusion that the evidence in the record as a whole supports a finding of brain "damage" pursuant to §42-9-10(C), contrary to the opinion of the Commission and the Court of Appeals. Petitioner inaccurately states that the Commission Appellate Panel abandoned the Single Commissioner's findings *in toto* and made new findings to support an erroneous conclusion.

Respondents would again point to the specific instructions of the Court of Appeals on remand to the Appellate Panel to clarify the existence of a physical brain injury and determine whether said injury reached the level of sufficient severity so as to qualify as brain "damage." The Appellate Panel did exactly that, and it supported its decision with an extensive list of medical evidence in their decision. (Appendix, pp. 79-86) In addition to its findings supporting

their conclusion on the Petitioner's brain injury, the Appellate Panel also addressed the severity of the Appellant's other multiple injuries, and reached the same ultimate conclusion as the Single Commissioner that the Claimant was permanently and totally disabled a result of his injuries to multiple body parts, including a physical brain injury, but Petitioner's brain injury was not of sufficient severity as to qualify as "damage" under §42-9-10(C). (Appendix, p. 86) As there or no new issues for appellate review, Respondents argue the current Petition should be denied.

V. The Petition should be denied because the Court of Appeals did not overlook Petitioner's argument that "even if Fragosa's other physical impairments contribute to this disability, he is still entitled to lifetime compensation because he suffered physical brain damage under the Act."

Throughout the course of this appeal, Petitioner continues to argue the decision of the Commission should be reversed pursuant to the 1997 Court of Appeals decision in Pearson v. JPS Converter & Indus. Corp., which stands for the principle that §42-9-10(C) only requires "that a claimant be totally and permanently disabled and suffer physical brain damage as a result of his injury." 327 S.C. 393, 489 S.E.2nd 219 (Ct. App. 1997)(*cert. denied* February 5, 1998). Petitioner continues to attempt to use Pearson in support of his repeated argument that Petitioner is entitled to lifetime benefits for brain "damage" even if Petitioner's other physical impairments contributed to his disability. In his current Petition, Petitioner even goes as far as to make the unsupported statement that "in the absence of brain damage, Petitioner's other injuries would not totally disable him."

The facts in Pearson are different than the instant case. In Pearson, the claimant sustained a head injury, and after reviewing the medical records of multiple providers, the Court of Appeals found that the evidence supported the Commission's finding that Pearson was permanently disabled as a result of physical brain damage he suffered from his work accident. The court rejected the employer's effort to avoid the lifetime provision of §42-9-10(C) by

arguing Pearson's psychological problems contributed to his disability. The Court of Appeals held that entitlement to lifetime benefits under §42-9-10(C) does not require permanent and total disability as a result of the brain injury only, but instead requires that (1) the claimant be permanently and totally disabled, and (2) the claimant suffer brain "damage" as a result of his injury. The holding in Pearson was available to this Court in 2013 when deciding Crisp and Sparks, and nothing in the Pearson opinion changes the fact that questions of whether an injured workers' injury to the head or brain result in permanent "damage" are to be evaluated and using the "permanent and severity" test. Further, there are an endless list of possible scenarios in which an injured worker can be deemed permanently and totally disabled as a result of injuries to multiple body parts, including an injury to the head or brain, and the head or brain injury does reach a sufficient level of permanency and severity to qualify as brain "damage" as contemplated by §42-9-10(C).

In this case, Petitioner's argument diminishes the extensive injuries Petitioner suffered to body parts other than his head, and the impact they had on his resulting disability. In addition, it diminishes the Petitioner's own hearing testimony regarding the physical difficulties and limitations he suffers as a result of his physical injuries other than his head injury. Perhaps the most convincing evidence in support of the fact that Claimant's multiple injuries rendered him permanently and totally disabled include his 11% impairment rating to the cervical spine by Dr. Christopher Merrell, and his 40% impairment rating to the right lower extremity (of which he had a tow amputated), and 17% impairment to his whole person on account of his right foot and left shoulder injuries assigned by Dr. Shane Wolfe. (Appendix, pp.53-54)

Since the first hearing in the matter, the Single Commissioner found that "after considering the Claimant's multiple impairment ratings, the Claimant is permanently and totally disabled and is unable to return to any type of work he has performed in the past." (Appendix, p. 54). After

receiving specific instructions on remand from the Appellate Panel to clarify the existence of a physical brain injury, and whether the brain injury rose to the level of “damage” as set forth in §42-9-10(C), the Appellate Panel concluded that Petitioner suffered a physical brain injury, his brain injury did not rise to the level of “damage” under the test set forth in Crisp and Sparks, and the combination of Petitioner’s injuries (including but not limited to his foot and dizziness) are what rendered him permanently and totally disabled. (Appendix, p. 86)

Unlike Pearson, this case does not involve an employer trying to use an affected body part in an effort to avoid the lifetime provision of §42-9-10(C). This case involves an injured worker who suffered serious injuries to multiple body parts, which left him with restrictions and limitations that in combination with his age, education, work history, and work restrictions, rendered him unable to return to any of his previous types of employment. After applying the “permanent and severity” test, the Appellate Panel acknowledged that Petitioner sustained an injury to his head, but it specifically found that the residual effects that it produced are not of sufficient severity as to reach the level of “damage” under §42-9-10(C). (Appendix, p. 86)

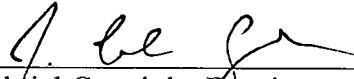
Based on the arguments set forth above, Respondents respectfully request that this Court deny the current Petition for Writ of Certiorari.

CONCLUSION

Based upon the foregoing arguments, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari, thereby affirming the August 19, 2016 decision of the South Carolina Court of Appeals.

Signature Block on Following Page

RESPECTFULLY SUBMITTED,



J. Gabriel Coggiola, Esquire
Michael W. Burkett, Esquire
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Blvd.
Columbia, SC 29209
(803) 227-2888
(803) 782-2527 facsimile
Attorneys for Respondents

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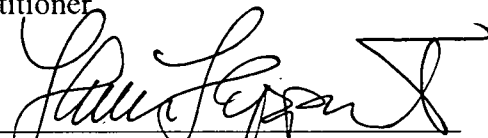
Kade Construction, LLC (Employer) and
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PROOF OF SERVICE

The undersigned certifies that on the date indicated below, he served counsel for Appellant with a copy of **Respondents' Return to Petition for Writ of Certiorari** by mailing copies of the same by United States Mail postage prepaid on October 21, 2016 to the following addresses:

Stephen B. Samuels
Samuels Law Firm, LLC
1320 Richland Street
Columbia, SC 29201
Attorney for the Petitioner

Jeff. C. Chandler
Chandler Law
Bank of America Building
2501 Oak Street
Myrtle Beach, SC 29578
Attorney for Petitioner



Leslie L. Leppert, Paralegal
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209

October 21, 2016
Columbia, South Carolina