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)
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.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Respondents contend there are no novel or important issues raised in the Petition. There are three novel issues here: (1) *actual* application of the Sparks and Crisp standard in the first case in which the issue is ripe for decision; (2) the Appellate Panel discarded its pre-remand findings of fact in contravention of the instructions on remand; and (3) application of Pearson to a brain damage case arising under Sparks and Crisp. While perhaps less novel, there is the additional important issue of how the appellate courts should review the Commission's selection of irrelevant and trivial evidence to bolster a flawed decision while inexplicably disregarding the neurologist's opinion that Fragosa has suffered a 46% impairment due to his traumatic brain injury (a finding previously adopted by the Appellate Panel) and has suffered severe, permanent physical brain damage.

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 reply to Respondents' argument at pages 6-8].

Respondents argue this case presents no novel issues because the Court defined the test for physical brain damage in Sparks v. Palmetto Hardwood, 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). Petitioner observes that neither Sparks nor Crisp presented a case where there was actual proof of physical brain damage.

In Sparks, the employee did not meet his burden of proving physical brain damage. His case was so tenuous that the Commission found: "the claim for physical brain injury borders on the frivolous." Sparks at 127, 750 S.E.2d 62.

In Crisp, the employee had not reached MMI. This fact spurred Chief Justice Pleicones to write a concurring opinion stating: "I write separately because I would not reach the question what constitutes severe brain damage for purposes of § 42–9–10. Rather, I would wait until a case is

before us for review of a Commission decision addressing it." Crisp at ___, 738 S.E.2d 844.

The instant case presents a posture markedly different from Sparks and Crisp. Fragosa has been placed at MMI with a 46% impairment rating defined by his neurologist as "***physical brain damage* that has rendered him totally and permanently disabled**." [R. p. 929 (emphasis added)]. The case is ripe for a decision on the merits. And there can be no suggestion that a claim for physical brain damage is frivolous.

Respondents's statement that it is not the role of the appellate courts to "tak[e] it upon themselves to take the fact finding role" is correct insofar as it goes. The appellate courts cannot make findings of fact. Yet by the same token, appellate review must be meaningful. The courts cannot simply rubber stamp the Commission's findings – not when those decision are based on speculation or controlled by an error of law.

A remand was not needed here because the Court of Appeals misinterpreted a conclusion of law as a finding of fact. However, now that the remand has happened and the case is percolating its way back through the appellate courts, the Court should grant certiorari to address whether a conclusion of law couched as a finding of fact can and should be subject to review and correction. Respectfully, the Court should take this opportunity to correct the fundamental error of law in this case, to wit: a Finding of Fact "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled . . ." compels the conclusion that the individual in question has sustained physical brain damage. [R. p. 20, lines 5 - 10].

2. The Court of Appeals applied an incorrect and improperly deferential Standard of Review to workers' compensation cases [in reply to Respondents' argument at pages 8-9]..

Respondents contend Petitioner questions the standard of review applied by the Court of Appeals simply because "he disagrees with the decision the Full Commission Appellate Panel made after it reviewed the complete evidence in the record as a whole." [Return, page 9]. Petitioner admits he disagrees with the Appellate Panel's decision.

The import of the issue raised in the Petition is apparent on a reading of the Commission's Order on Remand. The order is virtually stuffed with new findings of fact – none of which were in the original order and all of which are completely different in tone and substance from the original order. A close reading shows that these new factual findings are downright bizarre. They universally focus on trivial entries in the medical records – to the exclusion of the critical expert opinions on the ultimate issue by the one physician who treated Fragosa throughout this entire ordeal. Viewed dispassionately, the new findings seem deliberately written to bolster the previous decision – without regard to how illusory or insubstantial each individual finding might be.

The acceptance of this exercise in "unusual finesse of reasoning" is a misapplication of the standard of review. Substantial evidence is manifestly not a mere scintilla; and certainly not a scintilla rendered possible only by seeking out trivia and ignoring positive proof.

3. The Court of Appeals overlooked the Commission's previous Findings of Fact confirming physical brain damage when it limited review to the Order on Remand [in reply to Respondents' argument at pages 9-10]..

Respondents contend both Commission orders when read together "address all pending issues in this matter." [Return, page 10]. This is simply not correct. The Order on Remand is inconsistent with the original Decision and Order.

The Commission was charged with explaining the inconsistency between finding a 46% permanent impairment for traumatic brain injury and total disability, yet not meeting the criteria for physical brain damage ("serious" and permanent"). To be sure, this was an impossible task. Once the Commission made those findings in the original Order, there was no way not to conclude that Fragosa had suffered physical brain damage as defined in Crisp and Sparks.\

The impossibility of supporting the original conclusion led to the strained reasoning in the Order on Remand. The Commission appears to have believe that it was required to justify its previous conclusion; such that it was not permitted to reach the oppositive conclusion even if compelled by the law and previous findings of fact. The Commission's misapprehension of the remand instructions was compounded by the Court of Appeals when that body failed to address the lack of an explanation, instead merely accepting the new findings of fact without considering the inherent contradiction created by discarding the previous findings. Such an error is worthy of correction and explication by the Supreme Court.

4. The evidence at MMI confirms physical brain damage [in reply to Respondents' argument at pages 10-11].

Petitioner relies on the Petition and Briefs previously filed with the Court.

5. The Court did not address the argument 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 reply to Respondents' argument at pages 11-13]

Respondents seek to distinguish Pearson from the instant case. In Pearson, this Court rejected the proposition reached by the Appellate Panel: lifetime benefits should not be awarded because the employee suffers from additional ailments which contribute to his disability. See

Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 400, 489 S.E.2d 219, 222 (Ct. App.1997)(holding "Employer's argument to avoid the lifetime benefit provision of section 42-9-10 because of Pearson's psychological problems is meritless."). Sparks cited Pearson specifically for the opposite proposition, to wit: "§ 42-9-10 *does not require that total and permanent disability result solely from physical brain damage* but does require that the claimant suffer physical brain damage as a result of the compensable injury." Sparks v. Palmetto Hardwood, Inc., 738 S.E.2d 831, 835, 401 S.C. 619 (2013)(emphasis added).

Respondents point out that an injured worker could still be permanently and totally disabled and not receive lifetime benefit, even with a brain injury. Indeed, this is exactly what happened in Sparks. The instant case is different in two aspects.

First, in Sparks, the evidence of brain injury was equivocal. Six doctors rendered opinions ranging from "no physical brain injury" to "might have suffered a mild brain injury as a result of the work accident but that any difficulties resulting from it were intermingled with other problems, including pain and psychiatric disturbances" to simply stating "had suffered a physical brain injury." Id. Conversely, in the instant case, there is a single expert medical opinion from a treating neurologist in Dr. Sandoz. No physician disagrees. Not only does Dr. Sandoz's opinion meet the Sparks and Crisp requirements, but his opinion was adopted as a finding of fact by the Commission in the original Decision and Order.

Second, the brain damage suffered by Fragosa is a substantial contributor to his disability. Respondents suggestion (and the Commission's finding on Remand) that the other impairment ratings are the sole cause of Fragosa's disability is untenable. The 46% whole person impairment for brain damage is by far the most serious of Fragosa's impairment ratings. The spine rating is 11%

whole person. 40% to the right lower extremity is equivalent to 16% of the whole person. 1% to the left lower extremity is a 0% whole person impairment. Table 17-3, AMA Guides to Permanent Impairment (5th Edition), page 527. Adding all the other listed impairments together (16% + 0% + 11% = 27%) is still less than 46% to the whole person.

The other impairment ratings merely confirm that Fragosa suffered other injuries in the accident. It would create an absurd result if he were barred from lifetime compensation for his brain damage because he also suffered other serious injuries. Trauma resulting in physical brain damage typically causes damage to other body parts as well – being knocked off a building by a crane undoubtedly does.

The writ should be granted to show that Pearson retains its vitality. Sparks and Crisp were issued to make the point that only serious permanent brain damage qualifies for lifetime compensation. The cases clarified the law. They were not designed to bar all lifetime benefit claims. A meritorious claim for lifetime benefits such as Fragosa's should not be blithely disregarded on flimsy grounds and faulty reasoning.

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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October 31, 2016

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PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Reply to Return to Petition for a Writ of Certiorari** 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 October 31, 2016, addressed as follows:

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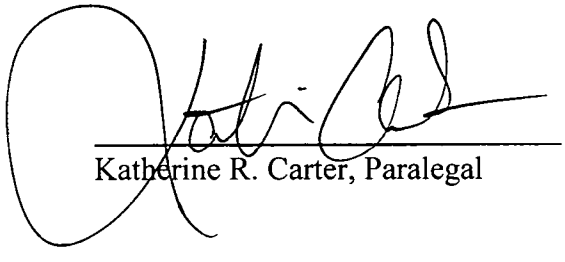

Katherine R. Carter, Paralegal

October 31, 2016
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