STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM FLORENCE COUNTY

COURT OF COMMON PLEAS
Michael G. Nettles, Circuit Court Judge

CASE NO.: 07-CP-21-2065

S.C. Ct. App. No. 2010-UP-525 – Filed December 13, 2010

Clifton Sparks,

Petitioner,

vs.

Palmetto Hardwood, Inc., and
Palmetto Timber S.I. Fund c/o
Walker, Hunter & Associates,

Respondents.

PETITION FOR 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 January 28, 2011.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS OVERLOOK OR MISAPPREHEND THAT THE APPELLATE PANEL'S FINDING THAT CLAIMANT SUSTAINED A COMPENSABLE INJURY-BY-ACCIDENT TO HIS BRAIN IS THE LAW OF THE CASE, SINCE IT WAS NOT APPEALED?

II. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE APPELLATE PANEL ERRED IN FAILING TO COMLY WITH THE CIRCUIT COURT REMAND ORDER REQUIRING IT TO DEFINE ITS KEY TERMS AND EXPLAIN ITS CONTRADICTIONS, AND IN FAILING TO APPLY THE PROPER DEFINITION OF "PHYSICAL BRAIN DAMAGE?"

III. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE CIRCUIT COURT ERRED IN FAILING TO RULE THAT CLAIMANT SUFFERED PHYSICAL BRAIN DAMAGE AS A MATTER OF LAW, IN LIGHT OF THE UNAPPEALED FINDING THAT CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS BRAIN AND THE UNDISPUTED FACT THAT SUCH INJURY WAS CAUSED BY A TRAUMATIC FORCE OUTSIDE OF CLAIMANT'S BODY?

IV. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLATE PANEL USED THE CORRECT STANDARD OF PROOF REGARDING CLAIMANT'S PHYSICAL BRAIN DAMAGE?

V. DID THE COURT OVERLOOK OR MISAPPREHEND THAT WHEN THE WHOLE RECORD IN THIS CASE IS CONSIDERED, REASONABLE MINDS MUST CONCLUDE THAT CLAIMANT SUFFERED PHYSICAL BRAIN DAMAGE, SIGNIFYING THAT THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLATE PANEL'S IMPLICIT FINDING OF NO PHYSICAL BRAIN DAMAGE?

VI. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE CIRCUIT COURT ERRED IN FAILING TO RULE THAT CO-MORBIDITY IS NO DEFENSE TO LIFETIME COMPENSATION FOR "PHYSICAL BRAIN DAMAGE" UNDER SOUTH CAROLINA CODE §42-9-10?

VII. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE APPELLATE PANEL'S REFERENCE TO CLAIMANT'S ALLEGED LACK OF CREDIBILITY REVEALS A DISTORTED AND CONFUSED CONCEPT OF BRAIN INJURY BY THE APPELLATE PANEL, WITH WHICH REASONABLE MINDS CONSIDERING THE WHOLE RECORD SHOULD NOT AGREE?

VIII. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE CIRCUIT COURT ERRED IN FAILING TO AWARD LIFETIME COMPENSATION, SINCE CLAIMANT IS TOTALLY AND PREMANENTLY DISABLED AND HAS SUFFERED PHYSICAL BRAIN DAMAGE AS A RESULT OF HIS COMPENSABLE INJURY?

STATEMENT OF THE CASE

This appeal involves a worker's compensation claim for lifetime compensation allegedly due because Claimant/Petitioner (hereinafter, "Claimant") is totally and permanently disabled and suffered physical brain damage as a result of his compensable injury. The claim was instituted when Claimant filed his Form 50 dated April 19, 2002 seeking benefits under the S. C. Workers' Compensation Act. (R.p. 136-145) His claim was based upon three separate accidental injuries[1] sustained by Claimant while working as a saw operator for Respondent/Employer Palmetto Hardwoods, Inc. (hereinafter, "Employer[2]"). *Id.*

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[1] The initial injury was in early September 2000 when Claimant injured his lower back while trying to pick up a steel leveling block and felt "pops" in his lower back. Employer denied that injury, but the Hearing Commissioner and the Appellate Panel found a compensable injury did in fact occur, and Employer did not appeal the Appellate Panel decision. The second injury was on March 1, 2001, when Claimant sustained an admitted compensable injury to his lower back (aggravation of pre-existing condition) which Claimant alleged affected both of his legs. Employer denied the legs were affected, but admitted the back injury itself. The Hearing Commissioner and the Appellate Panel found the legs were affected, and Employer did not appeal the Appellate Panel decision. (R. p. 50, l. 10-12; l. 19-21; p. 53, l. 20-22; p. 54, l. 1-3; p. 60, l. 1-3; l. 10-12)

[2] For the sake of brevity "Employer" will henceforth be used to refer to both Palmetto Hardwoods, Inc. and its workers' compensation insurance carrier, unless the context suggests otherwise.

This appeal involves the third accidental injury on May 21, 2001, when Claimant sustained an admitted compensable injury to his head, as he was struck with a three to four inch cube of steel propelled from a pressurized cylinder. Claimant alleged that accident also injured his neck, arms, and brain; and caused bladder incontinence, bowel incontinence, headaches, hearing loss, vision problems, tremors, loss of coordination, gait problems and psychological problems. Employer denied any injuries other than to the head.

All three claims were heard on June 9, 2005 before Commissioner J. Alan Bass. By Order dated October 5, 2005, the Commissioner found, as to the third injury, that Claimant injured not only his head, but also his neck (affecting the arms), bladder, head (headaches), brain and psyche. (R. p. 51, l. 1-4) The Commissioner also found Claimant to have suffered causally related physical brain damage, tremors, loss of coordination and gait problems. (R. p. 52, l. 8-9; l. 11-13) The Commissioner found that Claimant's bowel incontinence, hearing loss and vision problems were not proven to be causally related to his injuries and were thus not compensable. (R. p. 51. l. 3-4) The Commissioner found Claimant to be credible. (R. p. 52, l. 20-22) The Commissioner found Claimant reached maximum medical improvement on February 28, 2005, was permanently and totally disabled, and was entitled to lifetime medical treatment and lifetime disability compensation. (R. p. 52, l. 10; l. 14; p. 53, l. 2-7)

With regard to this appeal, the Hearing Commissioner's key findings are Findings of Facts 8-13, and 15-17, relating to physical brain damage. In those Findings[3] the Commissioner

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3 The precise language used by the Hearing Commissioner in his Finding of Fact 8-13 and 15-17 is set forth verbatim in this footnote:

> 8. The primary point of contention is whether Claimant suffered a physical brain injury. The opinions varied. Drs. Waid and Bumgartener stated no physical injury, but implied there may be a mild brain injury intermingled with other problems including pain and psychiatric disturbances. Drs. Evans, Kolehma and

carefully reviewed all the evidence and determined as a fact that Claimant suffered a compensable injury-by-accident to his brain, which represented a physical brain injury and physical brain damage under South Carolina Code §42-9-10.

Employer timely filed a Form 30, Request of Commission Review, alleging twenty-eight errors. In its brief, Employer organized its arguments into four sections. The only alleged errors that relate to this appeal were Employer's contentions that Claimant did not suffer compensable brain injury or physical brain damage. (R. p. 196-201)

The Appellate Panel held a hearing on April 25, 2006 and filed its Appellate Panel Decision and Order on June 12, 2006, in which it affirmed in part and reversed in part the Order of the Hearing Commissioner dated October 5, 2005. (R. pp. 57-64) Essentially, the Appellate

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Brabham opined that a physical brain injury was sustained by Claimant. Dr. Kang also stated no physical brain injury; however, Dr. Kang is a physiatrist and there is no indication that he has expertise, either through training and/or experience, to speak to that issue. Claimant was referred to Dr. Kang by me for an opinion about his pain management. It is unclear why Dr. Kang chose to venture an opinion about physical brain injury.

9. Dr. Waid did not specifically rule on physical brain injury in his report of 9/7/02, stating "cannot be attributed solely to brain dysfunction as there is no compelling evidence . . . [on radiographic tests] of physical injury to the brain." He found "far more morbidity" than could be explained by mild brain injury alone. Dr. Waid believed that Claimant's "greatest" problem is pain and psychiatric disturbance. Dr. Waid concluded his opinion by stating that, ". . . there is no way to disentangle the contribution of a potential concussion or render an opinion that he has suffered a physical injury to the brain." In his report of 3/26/05, Dr. Waid seems to be more certain about the absence of physical brain injury, although there is no indication as to what caused his opinions to firm up between 9/7/02 and 3/26/05.

10. Dr. Bumgartner opined that the "primary" source of Claimant's impairment is one of psychiatric dysfunction and chronic pain. He opines that mild concussion "alone" would not produce Claimant's clinical picture.

11.The opinions of Drs. Evans, Kolehma and Brabham say physical brain injury without qualification.

12. There is clear and convincing evidence that following the admitted head injury, Claimant was dazed and confused and suffered nausea, vomiting, cognitive impairments and post-concussive headaches.

13. The record as a whole clearly establishes a closed head injury with a concussion. I find that Claimant did suffer physical brain damage.

15. The Claimant did suffer permanent injuries to his low back, (affecting lower extremities) neck (affecting upper extremities), bladder, psyche, and brain. Related symptoms include tremors, loss of coordination and gait problems.

16. The Claimant is permanently and totally disabled under §42-9-10.

17. The Claimant's physical brain damage from the 5/21/01 injury contributes to his disability. (Tr. 5 – p. 52, l. 16)

Panel affirmed all of the relief ordered by the Hearing Commissioner except with regard to physical brain injury/damage. Interestingly, the Appellate Panel confirmed in its Finding of Fact #7 that Claimant sustained a compensable injury to his brain, (R. p. 60, l. 13-15), yet paradoxically found "the claim for physical brain injury borders on the frivolous," and chose not to award benefits for physical brain damage. (R. p. 61, l. 7-8; l. 14-15; p. 64, l. 17-20) In doing so, the Panel did not define "physical," "physical brain injury" or "physical brain damage." The Panel deleted the finding regarding permanency of the brain injury in the Hearing Commissioner's Finding of Fact #15 (its Finding of Fact #14), confirmed Claimant is totally and permanently disabled, but changed the statutory basis from S.C. Code *§42-9-10* to *§42-9-30*; and deleted the Finding of Fact regarding Claimant's physical brain damage contributing to his disability. (R. p. 34, l. 15-16; p.61, l.14-15; l. 17).

Claimant timely appealed the Appellate Panel Order to the Circuit Court by Notice of Intent to Appeal, dated July 12, 2006. By Order dated July 29, 2007, the Honorable James Lockemy remanded the case to the Appellate Panel, requiring the Panel to explain what they meant by "physical brain injury," and "physical brain damage," and to address the contradiction between its findings that Claimant sustained a compensable brain injury, but that his claim for physical brain injury borders on the frivolous. (R. p. 1-3)

On remand, the Appellate Panel issued its Amended Decision and Order filed October 31, 2007. (R. pp. 69-76) The Appellate Panel confirmed in its Finding of Fact #7 that Claimant did in fact suffer a compensable injury-by-accident to his brain. (R. p. 72, l. 4-6) However, the Panel did not define "physical brain injury" or "physical brain damage;" did not clarify whether it views "injury" and "damage" as interchangeable terms; nor did it explain the contradictions between its affirmation of a compensable injury-by-accident to the brain and its assertion that the claim for physical brain injury borders on the frivolous. Rather, it deleted from Finding of Fact #11 its assertion regarding the claim for physical brain injury being borderline frivolous, and substituted a new Finding of Fact #11, as follows:

> Claimant has failed to carry his burden of proof to establish physical brain damage as contemplated by S. C. Code Ann. §*42-9-10*. Although Finding of Fact #7 above notes an injury-by-accident to the brain, this does not constitute damage to the brain. (R. p. 73, l. 1-4)

This contradicting assertion of compensable "injury-by-accident to the brain" but no "physical brain damage" is unexplained, and the key terms are undefined in violation of the July 29, 2007 remand Order of Judge Lockemy. A conclusory statement by the Panel that brain injury does not constitute brain damage does not present definitions of key terms nor provide any real explanation of the apparent inconsistency between compensable brain injury, but no physical brain damage.

Claimant timely appealed the Amended Appellate Panel Decision and Order in this case by Notice of Intent to Appeal dated November 14, 2007. By Order dated June 16, 2008, the Honorable Michael Nettles affirmed the Appellate Panel's Amended Decision and Order filed October 31, 2007, such Order being received by Claimant on June 17, 2008.

Claimant thereafter timely appealed that Order to the Court of Appeals by Notice of Appeal dated July 2, 2008, and Amended Notice of Appeal dated July 16, 2008.

Without oral argument, the Court of Appeals issued its Opinion filed December 13, 2010, by which it affirmed the Circuit Court, and held that only the ruling of the Workers' Compensation Commission that Appellant is totally and permanently disabled pursuant to section 42-9-30 of the S.C. Code (Supp. 2000), is the law of the case. In so ruling, the Court's implicitly ruled that it is not the law of the case that Claimant sustained a compensable brain injury. As to the remaining issues on appeal, the Court of Appeals found substantial evidence in the record to support the Appellate Panel's decision.

Claimant timely filed his Petition for Rehearing on December 28, 2010 which was denied by Order of the Court of Appeals dated January 28, 2011.

ARGUMENT

I. THE COURT OF APPEALS OVERLOOKED OR MISAPPREHENDED THAT THE APPELLATE PANEL'S FINDING THAT CLAIMANT SUSTAINED A COMPENSABLE INJURY-BY-ACCIDENT TO HIS BRAIN IS THE LAW OF THE CASE, SINCE THAT FINDING WAS NOT APPEALED.

The finders of fact have consistently determined that Claimant sustained a compensable injury-by-accident to his brain. The Hearing Commissioner's Order, served October 5, 2005, provides in its Finding of Fact #7 as follows: "The accident of 5/21/01 was admitted. Claimant sustained a compensable injury-by-accident not only to his head, but also to his ... brain...." (R. p. 51, lines 1-3) Following an appeal by the Employer, the Appellate Panel issued its Decision and Order filed June 12, 2006, which contains language in its Finding of Fact #7 almost identical to the Hearing Commissioner's Order: "The accident of May 21, 2001 was also admitted.

Claimant sustained a compensable injury-by-accident not only to his head, but also to his ... brain...." (R. p. 60, l. 11-13; p. 61, l. 17) After Claimant's first appeal to the Circuit Court resulted in a remand Order, dated July 29, 2007, the Appellate Panel issued its Amended Decision and Order filed October 31, 2007, which contains in its Finding of Fact #7 the same exact language concerning Claimant's having sustained a compensable injury-by-accident to his brain. (R. p. 72, l. 4-6; p, 73, l. 11). The Employer did not appeal any aspect of the original Appellate Panel Decision and Order nor the Amended Appellate Panel Decision and Order in this case.

Where, as here, a finding of fact has been determined in proceedings below, and there has been no appeal from that finding, the finding of fact becomes the law of the case. *See, e.g. ML-Lee Acquisition Fund, LP vs. Deloitte & Touche,* 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (noting an unappealed ruling is the law of the case); *Resolution Trust Corporation v. Eagle Lake,* 310 S.C. 473, 427 S.E.2d 646 (1993) (law of the case because of no appeal). The Court of Appeals decision recognized that the law of the case is that Claimant is totally and permanently disabled. (R. p. 2, l. 2-6) Yet that Court overlooked or misapprehended that it is just as much the law of the case that Claimant sustained a compensable injury-by-accident to his brain. That is indisputably true, and necessary to a complete understanding of this appeal. For the Court of Appeals to overlook or disregard that fundamental truth is a compelling reason for this Court to grant the Petition for Writ of Certiorari.

II. THE COURT OVERLOOKED OR MISAPPREHENDED THAT THE APPELLATE PANEL ERRED IN FAILING TO COMPLY WITH THE CIRCUIT COURT REMAND ORDER REQUIRING IT TO DEFINE ITS KEY TERMS AND EXPLAIN ITS CONTRADICTIONS, AND IN FAILING TO APPLY THE PROPER DEFINITION OF "PHYSICAL BRAIN DAMAGE".

The injury on May 21, 2001 occurred after Claimant's supervisor asked him to cut a piece of metal out from under the gang saw, requiring a metal cylinder to be filled up with air, building up pressure, to help break loose a piece of steel. When the steel finally broke loose it exploded under the built up pressure, striking Claimant in the head. (R. P. 219, l. 19-22; p. 220, l. 19 - p. 221, l. 1) The piece of steel that struck Claimant in the head was cubic in shape, 3 or 4 inches long, 3 or 4 inches wide, and 3 or 4 inches thick. (R. p. 220, l. 9-18) The steel hit Claimant's head so hard Claimant thought it had killed him. (R. p. 221, l. 2-3) The uncontroverted evidence concerning the facts and circumstances of this injury, combined with the Commission's consistent finding that Claimant suffered an injury-by-accident to his brain on May 21, 2001, demonstrates conclusively that the injury to Claimant's brain resulted from an impact upon his head from a physical force or trauma outside of his body; i.e., from a cube of metal propelled into Claimant's head from the pressurized cylinder. Unquestionably, this injury to Claimant's brain was physical in nature, as opposed to the non-physical development of psychosis or some other mental illness caused by stress or other mental or emotional stimuli.

South Carolina Code *§ 42-9-10* sets forth the basic rules regarding total disability and the customary 500 week cap on total and permanent disability compensation, subject to limited exceptions. The third paragraph of *§ 42-9-10* describes the limited circumstances in which an injured Claimant may receive lifetime compensation, as follows:

> Notwithstanding the 500 week limitation prescribed in this section or elsewhere in this title, a person determined to be totally and permanently disabled who as a result of compensable injury is a paraplegic, quadriplegic or who has suffered physical brain damage is not subject to the 500 week limitation and shall receive the benefits for life. (Emphasis added.)

The heart of the controversy in this case is the meaning of the statutory phrase who "has suffered physical brain damage" and how that statutory language applies to the Claimant's circumstances. The South Carolina Workers' Compensation Act defines many of its terms. See, generally, South Carolina Code *§42-1-20* thru *§42-1-175*. Nowhere in the act, however, is there any definition of "physical brain injury," "physical brain damage," "physical" or "brain damage." That omission suggests that "physical brain damage" should be ascribed its ordinary and customary meaning, with any reasonable doubts resolved in favor of coverage. *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1991); *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 416 S. E.2d 639 (1992).

Black's Law Dictionary[4] defines "Injury"as follows:

> Any wrong or damage done to another, either in his person, rights, reputation, or property. [Citations omitted] An act which damages, harms, or hurts. [Citations omitted] The words "damage," "loss" and "injury" are used interchangeably, and within legislative meaning and judicial interpretation, import the same thing. [Citations omitted.]

Black's Law Dictionary defines "Damage" as follows: "Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter person or property. ... [Citations omitted.]

Merriam-Webster's Dictionary of Law online defines "injury" as follows: (1) an act that wrongs or harms another; (2) hurt, damage or loss sustained. The same source defines "damage" as "injury or harm that reduces value or usefulness;" and defines "physical" as "of or pertaining to the body."

4 *Black's Law Dictionary,* Revised Fifth Edition, (1983).

Wikipedia defines "injury" or "bodily injury" as "damage or harm caused to the structure or function of the body, caused by an outside agent or force which may be physical or chemical." *Wikipedia* defines "brain damage" as "the destruction or degeneration of brain cells." It suggests "acquired brain injury" as being synonymous with "brain damage."

These definitions suggest the words "injury" and "damage" are substantially interchangeable. Injury connotes damage; and damage connotes injury. See *In re City of Pittsburgh*, 243 Pa. 392, 90 A. 329, 331 (1914) ("The words "damage," "loss," and "injury" are used interchangeably, and within legislative meaning and judicial interpretation, import the same thing.")

These definitions also suggest that "physical," when used to modify the word "injury" or "damage," refers to a force from outside the body impacting upon the body in a harmful way. Thus, legal dictionaries and more popularly available sources suggest the proper definition of "physical brain injury" and "physical brain damage" is an injurious force from outside the body impacting adversely upon an injured person's head and brain. That definition is in accord with reported cases[5].

The statutory definitions of "[i]njury" and "personal injury" contained in S.C. Code §42-1-160 do not provide a substantive definition as one would expect to find in a dictionary. Rather, the statutory definitions focus on those matters which are not to be considered within the scope of "[i]njury" and "personal injury." Those harms excluded from the statutory definitions of

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5 See, e.g., *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d, 441, 84 A.L.R. 5th, (Tenn. 1999); *Sider v. Borough of Waynesboro*, 933 A.2d 681, (Pa. 2007); *Homes of the Innocents, Inc. v. Beauchamp*, 2003 WL 22974994 (Ken. 2003).

"injury" include stress, unaccompanied by physical injury, and resulting in mental illness or injury (unless special criteria are met.) The said definitions in *§42-1-160* provide insight into the meaning of "physical brain injury" and "physical brain damage," because they make a distinction between physically traumatic injuries and mental illness caused by stress. It is respectfully submitted that "physical brain injury/damage" calls for a similar distinction, i.e., a distinction between brain injury/damage caused by physically traumatic stimuli on the one hand, and psychosis or other mental illness caused by mental or emotional stimuli, on the other. *Ivey, supra; Sider, supra; Homes of the Innocents, Inc., supra.*

Given the customary meaning of the words "physical," "injury" and "damage," Claimant's compensable injury-by-accident to his brain, arising out of a cube of steel under tremendous force striking him in the head, represents physical brain injury and physical brain damage, in that the injurious force to Claimant's brain came from a traumatic force outside of his body impacting upon his head and brain.

Rather than using "injury" and "damage" interchangeably and rather than using the commonly accepted definition of "physical," the Appellate Panel must presumably have used those terms as if they had some special, artful significance in the Workers' Compensation context, without providing any explanation or definition. That is because the Panel's findings simply make no sense, based on the ordinary meanings of the key words. For example, after Finding of Fact #7 affirming that Claimant had sustained a compensable brain injury, the Panel

stated in Finding of Fact #11 that "the claim for physical brain injury borders on the frivolous[6]." (R. p. 60, l. 13-15; p. 61, l. 7-8)

Acting on Claimant's first appeal to the Circuit Court, the presiding Judge recognized the problems associated with reviewing the confusing and undefined words and phrases used by the Appellate Panel. He issued his remand Order directing the Appellate Panel to "explain what it means by the use of the term 'physical brain injury,' whether it is different from 'physical brain damage,' or is intended to be the same as 'physical brain damage.'" (R. p. 2) The judge also noted the inconsistency between Finding of Fact #7, that Claimant had sustained a compensable brain injury, and Finding of Fact # 11, making the assertion that the claim for physical brain injury borders on the frivolous. (*Id.*) The judge ordered the Panel to "clarify its Order" and explain "why these two Findings of Fact appear as they do and resolve this inconsistency." (*Id.*)

In the Amended Decision and Order of the Appellate Panel, filed October 31, 2007, the Appellate Panel disregarded the instructions of the Circuit Court. (R. pp. 69-76) The Panel did not define or explain what it meant by "physical brain injury" nor "physical brain damage." The Panel did implicitly assert in conclusory terms that "brain injury" and "brain damage" have different meanings, (R. p. 73) but it did not define either nor explain the purported difference. The Panel left Finding of Fact #7 intact and deleted the language which formerly appeared in

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[6]Commissioner Barden of the Appellate Panel repeated under her signature her personal belief that "the claim for physical brain injury borders on the frivolous." (R. p. 64) For the Commission to find "compensable" brain injury but find against "physical" brain injury provides two important insights regarding the Panel's use of key words and phrases: First, the Panel must believe "injury" and "damage" are synonymous, interchangeable terms, since the Panel's reference to the claim for physical brain injury bordering on the frivolous had to be a reference to Claimant's alleged entitlement to lifetime compensation for physical brain damage under S.C. Code §42-9-10. Second, the Panel must have believed "physical" means something other than "caused by a traumatic force outside of the body." Yet the Commission chose not to explain or define in either Decision and Order what it believes "physical" means. The proper definitions of "physical" and "physical brain damage" are novel questions of law, which are additional compelling reasons for this Court to grant the Petition for Writ of Certiorari.

Finding of Fact #11 that "the claim for physical brain injury borders on the frivolous." In its place, the Panel substituted a new Finding of Fact #11 as follows:

> "Claimant has failed to carry his burden of proof to establish physical brain damage as contemplated by South Carolina Code Ann. *§42-9-10.* Although Finding of Fact #7 above notes an injury-by-accident to the brain, this does not constitute damage to the brain."

Id. A conclusory statement that a brain injury does not constitute brain damage does not represent our explanation, nor does it define its key terms nor resolve its inconsistency.

The first Appellate Panel Order apparently used "injury" and "damage" interchangeably. *See footnote 6, supra.* In removing the language regarding the claim for physical brain injury bordering on the frivolous, the Amended Appellate Panel Decision and Order fails to acknowledge the fact that the Panel originally used the words "injury" and "damage" terms interchangeably; yet it now asserts the words have different meanings, without defining the words nor explaining the alleged differences. Further, in its revised and undefined Finding of Fact #11, continues its confusing and undefined use of the word "physical" persisting in its apparent belief that brain injury from being hit in the head by a pressurized steel cube represents compensable brain injury but does not entail physical brain damage.

If "physical," "injury" and "damage" are given their ordinary meanings; compensable brain injury from a blow to the head represents physical brain injury and physical brain damage. Asserting in conclusory terms that compensable brain injury from being hit in the head by pressurized ejection of a steel cube does not constitute brain damage does not presnet any

explanation[7] of how the Appellate Panel defines "injury," "damage," or "physical." The Panel's failure to explain itself and its failure to define "physical," "injury," "damage," "physical brain injury" and "physical brain damage" represents blatant failure to obey Judge Lockemy's Order; and the Circuit Court erred in failing to enforce the prior Circuit Court Order. The Appellate Panel's failure to comply with the Circuit Court remand order, and the failure by the second Circuit Court and Court of Appeals to enforce that Order, represent further compelling reasons for this Court to grant the Petition. The Panel's failure to use the proper definition of "physical brain damage" i.e., injury caused to the brain by a traumatic force outside the body, also justifies the grant of certiorari.

III. THE COURT OVERLOOKED OR MISAPPREHENDED THAT THE CIRCUIT COURT ERRED IN FAILING TO RULE THAT CLAIMANT SUFFERED PHYSICAL BRAIN DAMAGE AS A MATTER OF LAW, IN LIGHT OF THE UNAPPEALED FINDING THAT CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS BRAIN AND THE UNDISPUTED FACT THAT SUCH INJURY WAS CAUSED BY A TRAUMATIC FORCE OUTSIDE OF CLAIMANT'S BODY.

If this Court agrees that "injury" by definition includes some degree of "damage," and if "physical brain damage" means brain damage caused by an outward force or trauma impacting adversely on the body, then the unappealed finding that Claimant sustained a compensable injury-by-accident to his brain by being struck in the head by a pressurized cube of steel signifies that he has suffered physical brain damage as a matter of law. The Circuit Court erred in failing to so rule, and the Court of Appeals overlooked or misapprehended that error. At the very least, the proper definitions of "physical" and "physical brain damage" are novel questions for this

[7] As noted in the text to footnote 6, *supra*, the Appellate Panel initially used "brain injury" interchangeably with "brain damage." Thus one may infer that the unexplained semantical distinction being applied by this Appellate Panel may relate more to "physical" than to "damage." Yet no party, commissioner or judge has proffered a definition of "physical" damage other than that submitted by the Claimant; i.e., traumatic damage caused by a traumatic force from outside of a claimant's body.

Court justifying certiorari; and Claimant is entitled to have proper definitions used for adjudicating his claim.

IV. THE COURT OVERLOOKED OR MISAPPREHENDED THAT THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLATE PANEL USED THE CORRECT STANDARD OF PROOF REGARDING CLAIMANT'S PHYSICAL BRAIN DAMAGE.

The statutory and regulatory law regarding workers' compensation hearings and the Administrative Procedures Act do not set forth expressly what the standard for fact finding at the single commissioner level and the Appellate Panel are to be. However, in practice most practitioners recognize the "preponderance of evidence" standard as applicable to workers' compensation cases; and Employer's counsel in this case agrees. (R. p. 333, l. 19-23) That no higher standard is required is inferable from considering the well established "substantial evidence" standard by which such factual findings are to be reviewed on appeal. By requiring a "substantial evidence" standard on appellate review of factual findings by the Workers' Compensation Commission, it is evident that the Workers' Compensation Commission is not subject to any enhanced legal standard for determining findings of fact, such as "clear and convincing" evidence, but are to use an ordinary "preponderance of the evidence" standard.

The Hearing Commissioner used the correct legal standard in determining that Claimant had sustained physical brain damage. It is clear from the context of his Order that when he made reference to there being "clear and convincing evidence" that following the admitted head injury, Claimant was dazed and confused and suffered nausea, vomiting, cognitive impairments, and post-concussive headaches, he was acknowledging that the proof of record was far beyond that which is required to make a finding that Claimant exhibited signs and symptoms of brain damage. (R. p. 52) That finding was based on the medical evidence from Dr. Suggs, Marion County Medical Center Emergency Room, Dr. Abinsay, Dr. Hopla, Dr. Healy, Dr. Evans, Dr.

Waid, MUSC Rehabilitation Services, Dr. Polen, Dr. Roberts, Dr. Brabham, Dr. Kolehma, McLeod Emergency Room and the Claimant.

In attempting to provide an explanation for its reversal of the Hearing Commissioner's finding of "physical brain damage," the Appellate Panel made a Finding of Fact #12 that there was "no clear and convincing evidence that following the admitted head injury, Claimant was dazed and confused and suffered nausea, vomiting, cognitive impairments, and post-concussive headaches." To the contrary, evidence of those symptoms was in fact overwhelming and uncontradicted. More importantly, however, a finding of no "clear and convincing" evidence of brain damage symptoms, even if correct, which it is plainly not, is not a valid reason to find that there was no physical brain damage. The Appellate Panel erred by evaluating the adequacy of proof of brain damage on a "clear and convincing evidence" basis rather than "preponderance of the evidence" standard. Since a primary asserted justification for the finding of no brain damage (i.e., no clear and convincing evidence of brain damage symptoms) used an improper legal standard, the finding of no physical brain damage must be reversed for legal error. The Court of Appeals overlooked or misapprehended that error.

Similarly, The Appellate Panel and Employer oddly rely on Dr. Waid's assertion that there is no "compelling" evidence of physical brain injury[8]. That reliance is odd for two reasons: (1) Workers' Compensation laws do not require proof of brain damage by compelling evidence; and (2) the Appellate Panel affirmed the finding that Claimant sustained a compensable injury-by-accident to his brain. It was legal error for the Appellate Panel to apply the wrong standard,

[8] Dr. Waid does not define "physical," but it is reasonably clear from his report that he believes it means proved radiographically. See R. p. 519, l. 5-12. There is absolutely no basis in the law to support that theory. If Dr. Waid recognized that the proper definition of "physical" in this context is "caused by an outside force or trauma acting on the body," the facts of the injury prove it was "physical."

whether "clear and convincing" or "compelling;" and the Circuit Court erred in failing to so rule. The Court of Appeals overlooked or misapprehended that error. Use of an improper standard for fact-finding is yet another compelling reason for granting certiorari.

V. THE COURT OVERLOOKED OR MISAPPREHENDED THAT WHEN THE WHOLE RECORD IN THIS CASE IS CONSIDERED, REASONABLE MINDS MUST CONCLUDE THAT CLAIMANT SUFFERED PHYSICAL BRAIN DAMAGE, SIGNIFYING THAT THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLATE PANEL'S IMPLICIT FINDING OF NO PHYSICAL BRAIN DAMAGE.

Claimant asserts that the appealed Order is fatally flawed with legal errors noted above. However, even if factual findings are to be addressed on their merits, the Order must still be reversed because of a lack of substantial evidence to support the Panel's implicit finding[9] of no physical brain damage.

It is well settled that appellate review of factual findings by the South Carolina Workers' Compensation Commission is governed by the substantial evidence standard. *Smith vs. Squires Timber Co.*, 311 S.C. 321, 428 S.E.2d 878 (1993). This Court has held that "substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion" that the South Carolina Workers' Compensation Commission reached. (Emphasis added.) *Shealy vs. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000).

[9]The Panel never expressly found an absence of physical brain damage; instead finding that Claimant's proof was insufficient. (R. p. 73) Such an assertion represents further legal error in light of the fact that the Panel's only references to standard of proof are erroneous references to an absence of "clear and convincing" and "compelling" evidence. See Argument IV, *supra.*

In this case there was no substantial evidence to support the erroneous findings and conclusions of the Commission regarding no physical brain damage, especially given the law of the case that Claimant sustained a compensable injury-by-accident to his brain. Consideration of the whole record leads reasonable minds indisputably to the conclusion that Claimant did suffer "physical brain damage" from his accidental and physically traumatic brain injury. If there had been no damage, there would have been no injury. There is no logical or reasonable basis to conclude an injury does involve damage. There is no logical or reasonable basis to conclude Claimant's brain injury and brain damage were anything other than "physical."

Many observers believe that the S.C. Workers' Compensation Commission disfavors physical brain damage claims, and this case exemplifies that reality. The Commission's role as fact-finder deserves respect, yet its authority is not absolute.

Cherry-picking unreliable fragments of testimony in a concerted effort to avoid a finding of physical brain damage does not represent substantial evidence, because it reflects a slanted view of only a portion of the record. Cf. *Doe v. South Carolina Dept. of Special Needs*, 377 S.C. 346, 660 S.E.2d 260, (S.C. 2008) "Substantial evidence" in support of a factual finding is evidence from the "whole record," not self-serving fragments thereof. "Substantial evidence" is evidence that would lead "reasonable" minds to the conclusion reached by the Commission. Where there is "substantial evidence," there is no need for the strained, unexplained and unreasonable mental gymnastics employed by those with a strong-willed desire to deny lifetime compensation. The conclusion reached by the Appellate Panel in this case to deny benefits for physical brain damage under S.C. Code Ann. § 42-9-10 must be reversed, because when the whole record is considered, reasonable minds can reach but one conclusion, i.e., that Claimant

suffered physical brain damage. The Court of Appeals overlooked or misapprehended that error below; which is yet another reason for this Court to grant certiorari.

VI. THE COURT OVERLOOKED OR MISAPPREHENDED THAT THE CIRCUIT COURT ERRED IN FAILING TO RULE THAT CO-MORBIDITY IS NO DEFENSE TO LIFETIME COMPENSATION FOR "PHYSICAL BRAIN DAMAGE" UNDER SOUTH CAROLINA CODE §42-9-10.

The only medical evidence of record which provides even an indirect, flimsy, scintilla of support for Respondents' argument that Claimant did not sustain physical brain damage are the second (3/26/05 consultation) report from Dr. Waid (R. pp. 712-716), the report of Dr. Bumgartner (R. pp. 725-726) and the report of Dr. Kang (R. pp. 727-729). None say there was no brain damage, none say no physical brain damage, and all in fact admit at least mild brain injury.

The first two state that psychiatric comorbidity is a key problem for Claimant, and state or imply that brain damage alone does not explain all Claimant's cognitive problems. That they assume Claimant has at least mild brain damage is clear from their phrase, "psychiatric comorbidity." No other injury or damage is relevant to Claimant's cognitive impairments other than brain injury/damage and psychiatric conditions associated with his injuries. If not brain damage, to what comorbidity do Dr. Waid and Dr. Bumgartner refer? These reports do not contain substantial evidence of no physical brain damage, because they do not even assert an absence of brain damage. The core of those opinions is that brain damage alone does not explain all of Claimant's cognitive impairments, and there is psychiatric comorbidity present as well.[10]

10 Dr. Waid administered his tests originally in September 2002, then readministered a number of neuropsychological tests in March, 2005, again concluding that Claimant suffers severe impairment of learning and memory skills, poor attention capacity, and numerous confusional errors. (R. pp. 712-716) In both reports, Dr. Waid acknowledged that Claimant may well have experienced a concussion, but contends that his very low test results are not consistent with a mild concussion alone. In his second report Dr. Waid asserted that "[t]here is no

Pearson v. JPS Converter and Industrial Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1998) held that physical brain damage need not be the sole cause of total and permanent disability for a claimant to obtain lifetime compensation under *§42-9-10,* and that a claimant need prove only that he is totally and permanently disabled and suffered physical brain damage as result of the

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compelling evidence that [c]laimant has sustained physical injury to the brain or that this is the primary mechanism mediating his current difficulties." (*Id.*) (Emphasis added.) Dr. Waid, like the Appellate Panel, did not define "physical brain damage," but his apparent working definition is unsupported in law. See footnote 8, *supra.* Moreover, workers' compensation law does not require "compelling" evidence. See Argument IV, *supra.* Nor does it require that physical brain damage be the sole or primary problem. *Pearson, supra.* For the Appellate Panel to require either represents an error of law. The second report from Dr. Waid also does not explain why in his 3/26/05 report he seems much more certain about the lesser significance of brain damage, and why his opinions firmed up so dramatically against undefined "physical" brain injury between 9/27/02 and 3/26/05. However, he does acknowledge continuing contact with the defense. (R. p. 712) Dr. Waid's records prove that although a nurse case manager working through the office of Claimant's counsel made the original referral to Dr. Waid, Dr. Waid was subsequently contacted and consulted by a rehabilitation nurse case manager working for the Defendant insurance carrier, who authorized his evaluation after their discussion. (R. p. 514; p. 712) Such contact was improper under *Brown v. Bi-Lo Inc.*, 341 S.C. 611, 535 S.E.2d 445 (2000). Further, Dr. Waid's opinions regarding "physical brain injury" are essentially irrelevant in light of the law of the case that Claimant sustained a compensable brain injury. Whether the brain injury/damage was "physical" or not is a question of law.

Dr. Bumgartner asserted that Claimant's "primary problem is one of psychiatric dysfunction and chronic pain." (R. p. 726) (Emphasis added.) He also asserted that a "mild concussion alone would not produce this clinical picture," and concurred with Dr. Waid's assessment of "significant psychiatric comorbidity." (*Id.*, R. P. 723) (Emphasis added.) To what other morbidity does Dr. Bumgartner refer if not brain damage? Psychiatric comorbidity is no defense to a claim of "physical brain damage" under *§42-9-10. Pearson, supra.* If Dr. Bumgartner's opinions are construed as evidence of no physical brain injury (he did not say that) they are essentially irrelevant in light of the law of the case that Claimant sustained a compensable brain injury. Whether the brain injury/damage was "physical" or not is a question of law.

Dr. Kang opined that Claimant did not suffer a serious head injury, and had only a mild concussion. Dr. Kang is a physiatrist, and there is no indication in the record that he has any expertise by training or experience to address brain injury issues. Claimant was referred to Dr. Kang by Commissioner Bass for an opinion about pain management, and it was unclear to Commissioner Bass why Dr. Kang chose to mention an opinion about severity of head or brain injury. (R. p. 51, l. 9-12) Employer argues that Dr. Kohlema's opinions should also be discounted, because she is also a physiatrist. However, she was not contacted solely to address pain management. Moreover, her observations are corroborated by those of many other physicians, and her involvement was not in violation of *Brown v. Bi-Lo, supra*. Dr. Kang's report is distinguishable from every other medical record in evidence, in that he accuses Claimant of inconsistencies and symptom magnification. No other health care provider agreed with Dr. Kang on that point. It is unclear what Dr. Kang's motivation was for the way he interacted with Claimant and issued his report on a subject not requested by the Hearing Commissioner; but it may be inferred there was improper contact between the Defendant(s) and Dr. Kang in violation of *Brown v. Bi-Lo, Inc. supra*. How else could Dr. Kang possibly have determined to address head or brain injury issues, when the Commissioner authorized and directed the original defense counsel to contact Dr. Kang only for pain management opinions? (R. p. 18) Claimant testified that Dr. Kang treated him disrespectfully, shoved him in his back, and made him try to walk without his cane and bend over, causing him to fall. (R. p. 223, l. 1-14) Dr. Kang's opinion cannot possibly be construed as substantial evidence of no physical brain damage, for although he opined the Claimant's head injury was not severe, based on no immediate complete loss of consciousness, he did not assert an absence of brain injury or damage. Moreover, his opinions are essentially irrelevant, in light of the law of the case that Claimant sustained a compensable brain injury. The Court of Appeals overlooked or misapprehended these errors.

compensable injury. Thus, co-morbidity is no defense. The Appellate Panel's failure to follow the *Pearson* case is itself sufficient to justify this Court's grant of certiorari.

VII. THE COURT OVERLOOKED OR MISAPPREHENDED THAT THE APPELLATE PANEL'S REFERENCE TO CLAIMANT'S ALLEGED LACK OF CREDIBILITY REVEALS A DISTORTED AND CONFUSED CONCEPT OF BRAIN INJURY BY THE APPELLATE PANEL, WITH WHICH REASONABLE MINDS CONSIDERING THE WHOLE RECORD SHOULD NOT AGREE.

In its Finding of Fact #10, the Appellate Panel asserts that Claimant lacks credibility. For the Appellate panel to make such an assertion, in the face of its finding of compensable brain injury and overwhelming evidence of cognitive impairments, shows how bizarre and distorted the reasoning of certain member(s) of the Commission has become.

If one is cherry-picking the record looking for alleged evidence of lack of credibility in a brain injury case, it will be there every time, because brain injury presents a Catch-22 as far as credibility is concerned. If a Claimant is poised, articulate, with consistent intelligent speech, one may consider him too smart and polished to be brain damaged. If he shows signs and symptoms of brain damage and cognitive impairment by memory failures, forgetfulness, confusion and odd expressions, then one motivated to find a lack of credibility may conclude he lacks sufficient credibility to be believed about brain damage.

It is thus a no-win proposition for a brain-damaged claimant whose credibility is being evaluated by those who aggressively cherry-pick the record looking for evidence of a lack of credibility. The less cognitive impairment is present, the less brain damaged a Claimant appears. The more cognitive impairment is present, the more memory lapses, forgetfulness, confusion and

odd expressions will be present to be construed adversely against his credibility, by any fact-finders so motivated.[11]

For the Appellate Panel to judge so harshly the credibility or lack thereof of a brain damaged worker is astonishing. Well-established law indicates that the Workers' Compensation Act is to be construed liberally in favor of the employee, not for aggressive negative inferences to be raised, adverse to the injured worker, to avoid an obligation for the Employer to pay benefits.

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11 The finding of lack of credibility in this case was based in part on Claimant's testimony that his traumatic head injury created a "hole," that "white milky looking stuff" as well as blood came out of his head and that he went to see Dr. Suggs the same day of his injury. The Panel's reference to a "hole" as evidence of poor credibility is ridiculous. Claimant's IQ is in the low 60's after his brain injury. (R. p. 41, l. 6-7) By referring to a "hole," Claimant's obvious intent was to describe an indentation in his skull at the site of the traumatic injury. Such an indentation was present. For the Appellate Panel to believe reference to a "hole" rather than an "indentation" shows a lack of credibility defies logic and reason.

The finding of a lack of credibility is also based in part on Claimant's testimony that he went to see Dr. Suggs on Monday, the day of his brain injury. The first record available in the APA's of a visit with Dr Suggs shows that Dr. Suggs saw Claimant 2 days after his injury. Although Claimant had testified that he believed he went to Dr. Suggs office the very day of his injury, he also testified that he did not truly recall hardly "anything about that week except for Friday." (R. p. 242, l. 5-6) In addition, Dr. Suggs' own records indicate that Claimant has been seen by two other health care providers in his office. (R. p. 413) While records for Dr. Abinsay were provided to Claimant and included in the APA's, there was no record made available from the other health care providers to be provided into the APA's. It is entirely reasonable to infer that Claimant may in fact have gone to Dr. Suggs' office the very day of the injury, and been seen not by Dr. Suggs, but by one of his professional colleagues, either another physician, a nurse practitioner or physician's assistant. Nevertheless, even if Claimant did not see Dr. Suggs or any other provider in Dr. Sugg's office until Wednesday, it is understandable that Claimant may not have had precise recall about details such as dates and order of providers in light of his traumatic brain injury and the fact that he "did not recall hardly anything about that week except for Friday." (R. p. 242, l. 5-6) Given Claimant suffered a compensable brain injury according to all the fact-finders, should he be deemed lacking in credibility for vague or erroneous ability to recall specific dates and order of events after his traumatic brain injury?

Claimant's reference to "white milky looking stuff" coming out of his head after the injury, through difficult to comprehend, is also a very flimsy basis upon which to assert that Claimant lacks credibility. There was a complete absence of medical testimony about the significance, if any, of "white milky looking stuff" coming out of a head injury along with blood. For the Appellate Panel to conclude that the testimony proves a lack of credibility, in the absence of medical evidence to evaluate the reference to "white milky looking stuff," represents speculation of the worse sort. Such a conclusion is unreasonably harsh in the context of a traumatically brain-injured Claimant. That Dr. Suggs' records from a visit two days later do not refer to the white milky looking stuff is of no surprise, since any exudate of blood or other material was surely wiped away well within the first two days after the injury. Moreover, to the extent Claimant may have in fact appeared at Dr. Suggs office for treatment by a nurse practitioner or other colleague of Dr. Suggs the very day of injury, those records were not made available to be included in the APA's.

Most telling about Claimant's credibility is the fact that the Hearing Commissioner who saw Claimant's testimony and judged his demeanor throughout the hearing found Claimant to be credible. Claimant's credibility can obviously be judged better by one who actually has an opportunity to meet him, see him and listen to him, rather than an Appellate Panel member cherry-picking fragments from the written record in an attempt to build a case of no credibility. The Panel has the right under the law to judge credibility, despite no opportunity t observe the key witnesses demeanor and appearance while testifying, but to withstand scrutiny on appeal its credibility findings, like any findings of fact, must be based on substantial evidence, i.e., it must be such that reasonable minds, looking to the whole record, could reach the same conclusion. The credibility findings of the Appellate Panel are not supported by substantial evidence. Substantial evidence suggests instead that the Panel's asserted basis for Claimant's alleged lack of credibility was in fact signs and symptoms of brain damage displayed during Claimant's testimony. The Court of Appeals overlooked or misapprehended those errors below, justifying the grant of certiorari by this Court.

VIII. THE COURT OVERLOOKED OR MISAPPREHENDED THAT THE CIRCUIT COURT ERRED IN FAILING TO AWARD LIFETIME COMPENSATION, SINCE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED AND HAS SUFFERED PHYSICAL BRAIN DAMAGE AS A RESULT OF HIS COMPENSABLE INJURY.

Under S.C. Code §42-9-10, Claimant is entitled to lifetime compensation if he is totally and permanently disabled and if he suffered physical brain damage as a result of his compensable injury. Since the Court of Appeals confirmed it is the law of the case that Claimant is totally and permanently disabled; and since that Court overlooked that it is also the law of the case that Claimant sustained a compensable injury-by-accident to his brain when the steel cube forcibly struck him in the head; it is respectfully submitted that Claimant suffered "physical brain

damage" entitling him to lifetime compensation as a matter of law. The Court of Appeals overlooked or misapprehended that Claimant suffered "physical brain damage" either as a matter of law or based on the only reasonable factual conclusions to be reached from the whole record. It therefore follows that Claimant is entitled to lifetime compensation under S.C. Code Ann. *§ 42-9-10.*

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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March 28, 2011

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAR 29 2011

S.C. Supreme Court

APPEAL FROM FLORENCE COUNTY
Circuit Court

The Honorable Michael Nettles

Case No.: 2006-CP-21-1188

Clifton Sparks, ... Petitioner,

vs.

Palmetto Hardwood, Inc. and Palmetto Timber S.I. Fund
c/o Walker, Hunter& Associates, Inc., ... Respondents.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 28th day of March, 2011 served copies of a Petition for Writ of Certiorari upon counsel for the Respondents by depositing them in the United States mail, first-class postage prepaid, addressed to:

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
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