

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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

Ricky Kneece,

Petitioner,

v.

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

Respondents.

AMENDED APPENDIX – VOLUME I

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The South Carolina Court of Appeals

Ricky Kneece, Respondent,

v.

Kneece Farms, Employer, and Legion in Liquidation and
the South Carolina Property and Casualty Insurance
Guaranty Association, Appellants.

Appellate Case No. 2014-001258

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

J.

H. B. W.

J.

Paul A. Roman

J.

Columbia, South Carolina

cc:

Mark Davis Cauthen, Esquire
Peter P. Leventis, IV, Esquire
Scott A. Elliott, Esquire

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July 22, 2016

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Beth Carrigg
The Honorable R. Knox McMahon

The South Carolina Court of Appeals

Ricky Kneece, Respondent,

v.

Kneece Farms, Employer, and Legion in Liquidation and
the South Carolina Property and Casualty Insurance
Guaranty Association, Appellants.

Appellate Case No. 2014-001258

ORDER

In this worker's compensation action, Kneece Farms and Legion in Liquidation and the South Carolina Property and Casualty Guaranty Association (Appellants) appeal the circuit court's order reversing the Appellate Panel of the South Carolina Workers' Compensation Commission's determination and finding claimant Ricky Kneece was totally disabled accompanied by physical brain injury pursuant to section 42-9-10(C) of the South Carolina Code (2015). Appellants also assert the circuit court erred in affirming the Commission's rulings that Kneece was entitled to reimbursement of past medical expenses and lifetime medical expenses and that he had sustained compensable injuries by accident to his zygomatic arch, thyroid, and finger and scarring.

The Appellate Panel reversed the single commissioner's determination Kneece was entitled to lifetime benefits pursuant to section 42-9-10(C) and held Kneece had sustained an injury pursuant to South Carolina Regulation 67-1101 (2012), which sets out the compensation rates for the total and partial loss of parts of the body. The Appellate Panel remanded the claim to the single commissioner for a decision with regard to permanency. It affirmed the single commissioner's other findings. Both parties immediately appealed to the circuit court, which affirmed in part and reversed in part the Appellate Panel's order.

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We find the Appellate Panel's order was not immediately appealable to the circuit court. "An appellate court may determine the question of appealability of a decision from a lower court as a matter of law. Even if not raised by the parties, this court may address the issue of appealability *ex mero motu*." *Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 379, 762 S.E.2d 44, 47 (Ct. App. 2014) (internal quotation marks and citations omitted).

The Administrative Procedures Act provides, "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." S.C. Code Section 1-23-380 (Supp. 2015). "An agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review." *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013) (quoting *S.C. Baptist Hosp. v. S.C. Dep't of Health & Envtl. Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987) (ellipses omitted)). "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Id.* at 75, 744 S.E.2d at 557 (quoting *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010)).

In *Price v. Peachtree Electrical Services, Inc.*, 405 S.C. 455, 456-57, 748 S.E.2d 229, 230 (2013), our supreme court found an order of the appellate panel remanding the case to the single commissioner for further determination of benefits was not immediately appealable.

Here, as in *Price*, the Appellate Panel remanded the case to the single commissioner for a determination of benefits. Therefore, the Appellate Panel's order was not a final decision. The parties would be able to receive an adequate remedy after a final decision is made. Thus, this order was not immediately appealable to the circuit court.

The order of the circuit court, therefore, is VACATED and the matter REMANDED for proceedings consistent with this order.

Thomas C. Hoff

A.C.J.

H. Bruce Williams J.

Paul D. Thomas J.

Columbia, South Carolina

cc:

Mark Davis Cauthen, Esquire

Peter P. Leventis, IV, Esquire

Scott A. Elliott, Esquire

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April 7, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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SC Court of Appeals

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

Ricky Kneece,

Respondent

v.

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

Appellants

PETITION FOR REHEARING

The Respondent requests rehearing of the decision in this appeal on the following grounds.

The Workers' Compensation Commission order was immediately appealable.

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

The instant appeal is governed by the South Carolina Administrative Procedures Act ("APA"). Bone v. U.S Food Serv., 404 S.C. 67, 73, 744 S.E.2d 552(2013); Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't'l Control, 387 S.C. 265, 267, 692

S.E.2d 894, 895 (2010). S.C. Code Ann. Section 1-23-380 provides for an appeal of a final agency decision. The Supreme Court has defined a final decision as follows: “[a] final judgement disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.” Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health & Env’tl Control.

However, the APA also provides that a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. S.C. Code Ann. Section 1-23-380.

The decision of the Appellate Panel was immediately appealable to the Circuit Court by either standard.

Citing Bone v. U.S. Food Serv., 404 S.C. 67, 73, 744 S.E.2d 552(2013), the Court of Appeals held that “[a]n agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review.” In Bone v. U.S Food Serv., the Supreme Court concluded that an order of the Circuit Court remanding a claim to the Workers’ Compensation Commission for further proceedings was not immediately appealable.

The Circuit Court order in this action is a final order. The Court below concluded:

THEREFORE, based on the foregoing, the Workers’ Compensation Commission erred in finding and concluding that the Claimant did not suffer physical brain damage. Accordingly, the Commission Order of April 19, 2012 is reversed. The Claimant is totally and permanently disabled with physical brain damage and entitled to benefits provided for in Section 42-9-10. The Defendants’ appeal is without merit and is dismissed. The order of the Hearing Commissioner dated April 28, 2011 is reinstated. The matter is remanded to the Workers’ Compensation Commission to enter its order awarding benefits under S.C. Code Section 42-9-10(C) from the date of the 1999 accident and continuing for life together with all other benefits ordered by the Hearing Commissioner in his order dated April 28, 2011. (R. pp. 42-43).

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

The Court of Appeals in the instant action concluded that the order of the Workers' Compensation Commission Appellate Panel was not appealable because it was not a final decision. The Appellate Panel overturned the Hearing Commissioner concluding that the Respondent did not suffer permanent brain damage and remanded the matter for a determination of permanency, a decision all parties considered to be a final decision and a decision all parties appealed to the Circuit Court.

Under the terms of the APA, the order of the Workers' Compensation Commission was immediately appealable. The Court of Appeals in Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) held that the Appellate Panel's decision overturning the Hearing Commissioner's finding that the Claimant suffered a brain injury and remanding the claim to the Hearing Commissioner for a determination of permanency was immediately appealable. Construing S.C. Code Ann. Section 1-23-380 of the APA, the Court of Appeals concluded that the Claimant had exhausted all of her administrative remedies and that the order of the Appellate Panel was a final agency decision. In so doing, the Court of Appeals expressly stated that the Appellate Panel order appealed from was not interlocutory. The Court of Appeals concluded that because the disposition of the brain injury issue effectively disposed of the claim and because the decision of the Appellate Panel deprived the Claimant for treatment of

her brain injury, the Appellate Panel order was a final agency decision on the merits. Canteen v. McLeod Regional Medical Center.¹

The Appellate Panel below similarly held that the Respondent did not suffer a physical brain damage and remanded the claim back to the Hearing Commissioner for a determination as to permanency. Consequently, the decision of the Appellate Panel constituted a final agency decision and was immediately appealable. Canteen v. McLeod Regional Medical Center. All parties considered the Appellate Panel decision to be immediately appealable. The Circuit Court order below disposed of the whole subject matter of the workers' compensation claim and constitutes a final order which was immediately appealable. All parties considered the Circuit Court order to be immediately appealable. The order of the Circuit Court below should be affirmed and the matter remanded to the Workers' Compensation Commission for enforcement of the provisions of the order.

Moreover, the APA is not so rigid as to prohibit parties in the proper circumstance from appealing intermediate orders. S.C. Code Ann. Section 1-23-380 which permits an appeal of a preliminary, procedural, or intermediate agency action or ruling, also serves as authority for the appeal in the instant action. Our appellate courts have not fully defined those circumstances where a final agency decision would not provide an adequate remedy. The Court of Appeals has held that a delay in payment of money between carriers does not necessarily suffice to demonstrate the inadequacy of the remedy of a final agency decision. Rose v. JJS Trucking, LLC, 411 S.C. 366, 768 S.E.2d 412 (Ct. App. 2015).

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

However, the sole issue in the instant appeal is the Respondent's recovery of benefits for physical brain damage pursuant to S.C. Code Ann. Section 42-9-10(C). To recover under S.C. Code Ann. Section 42-9-10(C), the physical brain damage must be severe. Crisp v. SouthCo, Inc., 401 S.C. 627, 738 S.E.2d (2013). Under S.C. Code Ann. Section 42-9-10(C), the Claimant suffering permanent and severe physical brain damage is entitled not only to monetary payments for life, but also medical treatment for his physical brain damage for life. Under the statutes governing appeals from the Workers' Compensation Commission, a Claimant who has been denied treatment and who must prosecute an appeal to win his right to medical treatment for his physical brain damage would not be entitled to medical treatment during the pendency of his appeal. Left untreated, physical brain damage may result in deterioration of the Claimant's health which belated treatment will not repair. An award of treatment at the end of a lengthy appeals process may be too little too late for the Claimant with permanent and severe physical brain damage depriving him of the benefits to which he would be entitled pursuant to S.C. Code Ann. Section 42-9-10(C). A final agency decision delayed by additional litigation would not adequately compensate the permanently and severely brain damaged Claimant and under the authority of S.C. Code Ann. Section 1-23-380, the decision of the Appellate Panel below, even if intermediate, would be immediately reviewable by the Circuit Court.²

The procedural record in the case before the Court best demonstrates the compelling interest in an early resolution of the sole legal issue in this appeal. The order of the Hearing Commissioner was issued April 28, 2011. The appeals to the full Commission, Circuit Court and the Court of Appeals have taken five years to this point in the litigation. Vacating the Circuit Court order has the effect of terminating benefits for Respondent's permanent and severe

² Both parties tend to benefit from an early decision on the issue of physical brain damage. A Claimant with severe permanent brain damage receives necessary treatment more timely and to the extent a Claimant's treatment for his brain damage is successful or beneficial, the Carrier's cost of treatment would tend to be reduced.

physical brain damage and a remand to the Commission will require the Respondent to linger as long as five more years for his appeal to work its way through the appellate process before asking this Court to award him benefits under S.C. Code Ann. 42-9-10(C). The General Assembly intended S.C. Code Ann. Section 1-23-380 to further the ends of justice and in so doing authorized the immediate review of certain intermediate agency decisions.

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

While the provisions of S.C. Code Ann. Section 14-3-330 are not directly applicable to the instant appeal, the provisions which address the appealability of an intermediate order or decree provide some insight into the intent of the General Assembly in enacting the provisions of S.C. Code Ann. Section 1-23-380 which provide for an immediate review of an intermediate agency decision. In enacting S.C. Code Ann. Section 14-3-330, the General Assembly recognized that delay associated with the lengthy appeals process may prove unduly prejudicial to one or both parties and provided for appellate review of intermediate orders where the merits were implicated. A body of law has developed defining those instances where appeal of an intermediate Circuit Court order was appropriate under S.C. Code Ann. Section 14-3-330. As noted above, the appellate courts have yet to develop a body of law defining an appeal will lie from an intermediate agency decision under S.C. Code Ann. Section 1-23-380. Having

determined that the interests of justice require early appellate review of some lower tribunal decisions, it seems clear that the General Assembly intended the appellate courts to have jurisdiction over intermediate agency decisions under the same circumstances that appellate courts have jurisdiction to review intermediate orders issued by the circuit courts. Thus, the decisions construing S.C. Code Ann. Section 14-3-330 serve as authority for this Court's review of the decision of the Appellate Panel below. The decision of the Appellate Panel concerning the singular issue of physical brain damage implicates the merits and as argued above, a review of a future decision of the Workers' Compensation Commission may come too late to protect the Claimant's health. The decision of the Court of Appeals in Canteen v. McLeod Regional Medical Center compels the conclusion that the order of the Appellate Panel below was an immediately reviewable intermediate agency decision pursuant to S.C. Code Ann. Section 1-23-380.³

Further, the Respondent would respectfully submit that the Court of Appeals failed to give the parties adequate notice and an opportunity to be heard on the jurisdictional issue on which it vacated the Circuit Court order. While by letter dated December 10, 2015, the Court of Appeals requested the Appellants to brief the issue of whether the order of the Appellate Panel was appealable to the Circuit Court, the letter failed to expressly state the issue of concern to the Court of Appeals.⁴

Understanding the Court of Appeals to be requesting authority for the Circuit Court's jurisdiction over the instant appeal as opposed to that of the Court of Appeals, the Appellants

³ While the Respondent submits that Canteen v. McLeod Regional Medical Center has precedential value, to the extent that the Court deems the decision to have been overruled, the Respondent herewith moves the Court pursuant to S.C.A.C.R. 17 to argue against precedent.

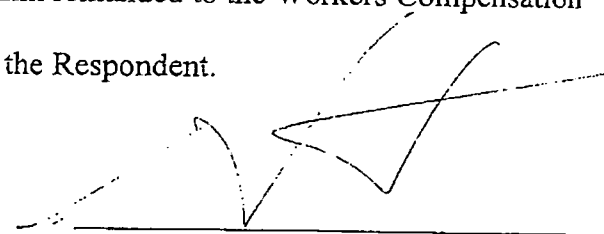
⁴ The text of the Court of Appeals request is as follows:

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

submitted their memo which correctly set forth the decision in Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007) in support of the Circuit Court's jurisdiction. In hindsight, the Court of Appeals must have been requesting that the Appellants submit authority for the appealability of the Appellate Panel decision under Bone v. U.S Food Serv.⁵ However, the nature of the Court of Appeals request was unclear, and the Respondent would respectfully submit that he is entitled to more fully brief and argue the issue of the appealability of the decision of the Appellate Panel.

CONCLUSION

The Respondent, therefore, respectfully requests rehearing in this case on the grounds raised above. In particular, the Respondent requests an opportunity to fully brief the issue of appealability of the decision of the Appellate Panel and the opportunity for oral argument on all issues before the Court of Appeals. In the alternative, the Respondent submits that the order of the Circuit Court below be affirmed and the claim remanded to the Workers Compensation Commission to execute the judgment awarded the Respondent.



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Columbia, South Carolina
April 22, 2016

⁵ In other appeals, the Court of Appeals has acted to have parties address the issue of appealability of final agency orders under Bone but the requests appear to have been more specific. See South Carolina Property and Casualty Insurance Guaranty Association v. Quality HR Services, Inc., 411 S.C. 501, 768 S.E.2d 670 (Ct. App. 2015).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

APR 22 2016

SC Court of Appeals

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2014-001258

Ricky Kneece,

Respondent

v.

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

Appellants

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the below-named parties, at the addresses given, by depositing a copy of it in the United States Mail, postage prepaid, on April 22, 2016.

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803-771-0555

April 22, 2016



The South Carolina Court of Appeals

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December 10, 2015

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Re: Ricky Kneece v. Kneece Farms
Appellate Case No. 2014-001258

Dear Counsel:

Our review of the order of the Appellate Panel of the Workers' Compensation Commission indicates it might not have been appealable to the circuit court.

Accordingly, it is requested that you serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter.

Very truly yours,


CLERK

cc: Scott A. Elliott, Esquire

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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

Ricky Kneece,.....Respondent.

v.

Kneece Farms, Employer, and Legion Insurance Co. in liquidation through the S.C.
Property and Casualty Insurance Guaranty Association.....Appellants.

MEMORANDUM

Pursuant to the Court's request dated December 10, 2015, the Appellants in the above-referenced workers compensation case hereby submit the following MEMORANDUM addressing appealability of the Worker's Compensation Commission Appellate Panel ("Commission") decision. The Appeal currently pending before this Court is an appeal from the Circuit Court Order REVERSING the Commission's decision and entering its own findings. Specifically, this Court inquires whether this case was appealable to the Circuit Court in the first instance, the implication being that perhaps the Court of Appeals may not have jurisdiction over the matter now. For the foregoing reasons, Appellants respectfully submit that appeal from the Commission was properly made to the Circuit Court.

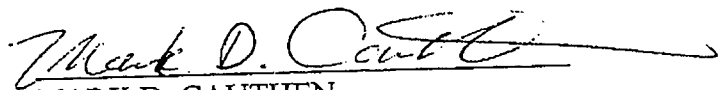
The issue raised by the Court's current inquiry was addressed by the Supreme Court in the case of Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007). Via Order dated August 24, 2007 the Supreme Court held that workers compensation matters with dates of accident before July 1, 2007 are appealable to the Court of Common Pleas for the county in which the underlying accident occurred or in which the Employer resides or has his principal office. Conversely, decisions of the Commission with dates of accident occurring after July 1, 2007 are appealable to the Court of Appeals. See 2007 Act No. 111 amending §42-17-60 (Except as otherwise provided for in this Act, this act takes effect July 1, 2007, or if ratified after July 1, 2007, and except as otherwise stated, upon approval of the Governor and applies to injuries that occur on or after this date" *emphasis added*). As Appellants submit that Pee Dee Regional Transportation, *supra*, is dispositive of the issue presented, a copy of the case is attached for the Court's reference.

In this case, the underlying date of accident that is the subject of this Appeal occurred on November 22, 1999, prior to the 2007 amendments to §42-17-60 shifting jurisdiction of workers compensation appeals from the Circuit Court to the Court of Appeals, as well as the effective date of that statutory amendment- July 1, 2007. Pee Dee Regional Transportation *supra* is the authority upon which the Appellants in this case, and the Bar in general, specifically relies when assessing the proper forum for appeal for workers compensation matters with dates of accident before and after July 1, 2007. As such, Appellants filed their appeal of the Commission's decision with the Court of Common Pleas for Lexington County in 2012, as that is the venue where the accident occurred and the Employer is located.

It should also be noted that both parties filed appeals to the Circuit Court. Neither party raised any objections as to jurisdiction or venue of the cross-appeals. Likewise, no questions were raised by the presiding Circuit Court Judge.

For the aforementioned reasons, Appellants respectfully submit that initial appeal of the Commission's Order was properly made to the Circuit Court by both parties. Thereafter, Appellants properly appealed the Circuit Court Order to this Court. Hopefully, this MEMORANDUM satisfies the Court's inquiry, but if Appellants have misapprehended the issue then they will gladly provide further elucidation.

Respectfully Submitted,



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December 18, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
COURT OF COMMON PLEAS
The Honorable R. Knox McMahon

Appellate Case No. 2014-001258

Ricky Kneece,

Respondent,

v.

Kneece Farms and Legion in Liquidation
And the South Carolina Property and Casualty
Insurance Guaranty Association,

Appellants.

PROOF OF SERVICE

I certify that I have served the Memorandum upon counsel for the Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on December 18, 2015 addressed to Scott Elliott, Esquire, Elliot & Elliott, 1508 Lady Street, Columbia, SC 29201.

December 18, 2015



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Pee Dee Reg'l Transp. v. S.C. Second Injury Fund

Supreme Court of South Carolina

August 24, 2007, Decided

No Number in Original

Reporter

375 S.C. 60; 650 S.E.2d 464; 2007 S.C. LEXIS 315

Pee Dee Regional Transportation, Employer, and State Accident Fund, Appellants, v. S.C. Second Injury Fund, Respondent, In re: Clinton Gaskins, Jr., Employee/Claimant, v. Pee Dee Regional Transportation, Employer, and State Accident Fund, Carrier.

Subsequent History: As Corrected August 30, 2007.

Core Terms

Appeals, extension of time, injuries, applies, notice

Counsel:

Judges: [***1] Jean H. Toal, C.J., James E. Moore, J., John H. Waller, J., E. C. Burnett, III, J., Costa M. Pleicones, J.

Opinion

[*61] [**465] ORDER

On July 13, 2007, appellants served and filed a notice of appeal in the Court of Appeals and with the Florence County Clerk of Court from an order of the South Carolina Workers' Compensation Commission dated June 20, 2007. The appeal pending before the Court of Appeals was certified to this Court pursuant to Rule 204(b), SCACR, by order dated August 3, 2007. Appellants have now filed a Motion to Determine Jurisdiction and Alternatively for an Extension of Time to File Appellants' Initial Brief. Therein, appellants ask this Court to make a determination as to the proper jurisdiction for this appeal.

S.C. Code Ann. § 42-17-60 (Supp. 2006) previously provided that an appeal from a decision of the Workers' Compensation Commission shall be to the Court of Common Pleas in the county in which the alleged accident occurred or in which the employer resides or has his principal office. On June 25, 2007, the statute was amended by 2007 Act No. 111 to require such appeals be made to the Court of Appeals.

However, Part IV, Section 2 of Act 111 states the following: "Except as otherwise [***2] provided for in this act, this act takes effect July 1, 2007, [*62] or, if ratified after July 1, 2007, and except otherwise stated, upon approval by the Governor and *applies to injuries that occur on or after this date.*" (Emphasis added).

The cardinal rule in interpreting Act 111 is to ascertain and effectuate the intent of the Legislature. Davis v. School Dist. of Greenville County, 374 S.C. 39, 374 S.C. 39, 647 S.E.2d 219 (2007). Where the language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. State v. Pittman, 373 S.C. 527, 373 S.C. 527, 647 S.E.2d 144 (2007).

The language of Act 111 is not ambiguous and clearly states that it applies only to injuries that occur on or after July 1, 2007. Therefore, the change regarding the appeal procedure, like all other provisions of the Act, is only applicable to Workers' Compensation cases in which the injury occurred on or after July 1, 2007.

The injury at issue in the case at hand occurred on January 30, 2002, clearly prior to July 1, 2007. Accordingly, the amendments set forth in Act 111 do not apply and, applying the former version of section 42-17-60, [***3] jurisdiction over this appeal lies in the Court of Common Pleas. We therefore dismiss the notice of appeal filed in the Court of Appeals and certified to this Court, and the appeal shall instead proceed as filed in the Court of Common Pleas. Appellants' request to hold the timelines for this appeal in abeyance or, in the alternative, to grant them an extension of time to file their initial brief, is denied as moot.

IT IS SO ORDERED.

s/Jean H. Toal, C.J.

s/James E. Moore, J.

s/John H. Waller, Jr., J.

375 S.C. 60, *62; 650 S.E.2d 464, **465; 2007 S.C. LEXIS 315, ***3

s/E. C. Burnett, III, J.

August 24, 2007

s/Costa M. Pleicones, J.

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
COURT OF COMMON PLEAS
The Honorable R. Knox McMahon

Appellate Case No. 2014-001258

Ricky Kneece,

Respondent,

v.

Kneece Farms and Legion in Liquidation
And the South Carolina Property and Casualty
Insurance Guaranty Association,

Appellants.

FINAL BRIEF OF THE APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

- I. THE CIRCUIT COURT MISSAPPLIED THE SUBSTANTIAL EVIDENCE STANDARD IN REVERSING THE FULL COMMISSION'S ORDER.
- II. THE CIRCUIT COURT INAPPROPRIATELY REVERSED THE FULL COMMISSION'S ORDER WHICH HAD FOUND THE CLAIMANT WAS NOT PERMANENTLY AND TOTALLY DISABLED PURSUANT TO S.C. CODE ANN. § 42-9-10(C)
 - A. THE RESPONDENT DID NOT SUSTAIN A LOSS OF EARNING CAPACITY AND, THEREFORE, RESPONDENT IS NOT PERMANENTLY AND TOTALLY DISABLED PURSUANT TO S.C. CODE ANN. § 42-9-10 OR § 42-9-20
 - B. THE RESPONDENT IS NOT ENTITLED TO A PRESUMPTION OF PERMANENT AND TOTAL DISABILITY
- III. THE "BENEVOLENT EMPLOYMENT" DOCTRINE DOES NOT APPLY TO THIS CASE AND SHOULD NOT HAVE BEEN UTILIZED AS A BASIS FOR FINDING PERMANENT AND TOTAL DISABILITY
 - A. RESPONDENT'S WORK INJURY OCCURRED WHILE WORKING FOR KNEECE FARMS, A SEPARATE ENTITY FROM DELANO KNEECE & SON AND, THE BENEVOLENT EMPLOYMENT DOCTRINE HAS NO APPLICATION TO THIS CLAIM
 - B. RESPONDENT'S ARGUMENT THAT HIS BRAIN INJURY PREVENTS HIM FROM HANDLING THE FINANCES OF KNEECE & SON IS WITHOUT MERIT AND DOES NOT DEMONSTRATE THAT HIS EMPLOYMENT WITH KNEECE & SON IS BENEVOLENT
 - C. IF RESPONDENT WAS PROPERLY DEEMED PERMANENTLY AND TOTALLY DISABLED, THE CIRCUIT COURT ERRED IN AWARDED TEMPORARY TOTAL DISABILITY BENEFITS FOR PERIODS PRIOR TO THE DATE OF MAXIMUM MEDICAL IMPROVEMENT
- IV.. THE CIRCUIT COURT ERRED IN AFFIRMING THAT THE CLAIMANT IS ENTITLED TO REIMBURSEMENT OF PAST MEDICAL EXPENSES FROM UNAUTHORIZED TREATMENT PROVIDERS AS WELL AS LIFETIME MEDICAL EXPENSES
- V. THE CIRCUIT COURT ERRED IN AFFIRMING THE FULL COMMISSION AND HEARING COMMISSIONER'S FINDING AND CONCLUSION THAT RESPONDENT SUSTAINED COMPENSABLE INJURIES BY ACCIDENT TO HIS ZYGOMATIC ARCH, THYROID, SCARRING, AND FINGER

STATEMENT OF THE CASE

This matter comes before the Court of Appeals from an appeal of the decision of the Honorable R. Knox McMahon, which reversed the decision of the Full Commission of the South Carolina Workers' Compensation Commission. Appellants assert that, among other errors, that the Circuit Court incorrectly applied the substantial evidence standard in his review of the Full Commission Order.

The prior matter before the Court of Common Pleas addressed Petitions for Judicial Review submitted by both parties in response to the Order of the South Carolina Workers' Compensation Appellate Panel dated April 19, 2012. The Defendants subsequently moved to alter or amend judgment on August 5, 2013. This motion was denied by Judge Knox McMahon on April 24, 2014. (R. p. 4).

Previously, this matter came before the Full Commission on September 20, 2011, on appeal from the Decision and Order of Commissioner Derrick L. Williams filed on April 28, 2011, by Kneece Farms, Legion Insurance Company in Liquidation, and The South Carolina Property and Casualty Insurance Guaranty Association (hereinafter "Defendants").

The Claimant/Respondent, Ricky D. Kneece (hereinafter "Claimant"), sustained compensable injuries on November 22, 1999, while working for Kneece Farms, which was owned by the Claimant's uncle, including injuries to his head/brain, left lower extremity and left upper extremity. The Defendants provided medical as well as indemnity benefits for the Claimant's work injuries.

At the time of the accident at Kneece Farms, the Claimant was also employed with Delano R. Kneece & Son Farms, Inc. (hereinafter "Delano Kneece & Son"), which is a family

farm that is owned and operated by Claimant and his father. The Claimant and his father farmed their own land while also working as sharecroppers on land owned by Kneece Farms. The Claimant never returned to employment with the Defendant Employer in this claim – Kneece Farms. However, he did return to full time employment with the family farming operation, Delano Kneece & Son Farms.

The Claimant returned to limited work duties with Delano R. Kneece & Son Farms within months of his accident and admitted, per a signed Form 17, that he was able to return to full time work with Delano Kneece & Son during 2005. (R. p. 1241).

The Claimant, per testimony during the hearing, has never been without his salary or wages as a result of his injuries. During the hearing, the Claimant's Wife, who is also the bookkeeper for Delano R. Kneece & Son Farms, Inc., testified that the Claimant's wages from the family farm for 2007 and 2009 were \$76,600.00 and \$77,600.00 respectively. (R. p. 482 lines 22-24). She also testified that these yearly amounts were over two times the amount of the Claimant's yearly salary at the time of the accident. (R. p. 483 lines 1-4).

On April 16, 2004, Claimant's treating physician for his left lower extremity, Dr. James O'Leary, released Claimant at maximum medical improvement (MMI) with a 10% impairment rating to his left lower extremity. (R. p. 998). The Claimant treated with Dr. Michael Green for his left upper extremity injury. Dr. Green released the claimant at MMI with a 17% impairment rating to his left upper extremity on September 23, 2004. (R. p. 946).

Accordingly, the Defendants filed a Form 21 Request to stop payment of temporary total disability (TTD) benefits. The hearing on Defendants' Form 21 was held on January 11, 2005, before Commissioner Childs. On April 18, 2005, Commissioner Childs issued her Decision and Order finding and concluding, in pertinent part, that: (1) Claimant sustained compensable

injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, left shoulder, left elbow and depression; and (2) Claimant had not yet reached MMI all of those injuries. As a result, the hearing Commissioner ordered Defendants to provide additional medical treatment for injuries to the Claimant's left knee and shoulder, as well as treatment for Claimant's closed head injury, and depression with Dr. Randy Waid and Dr. Larry Bergmann. (R. pp. 104-107).

In addition, the Hearing Commissioner found that although the Claimant was earning wages from Kneece & Son during the same time period he was receiving TTD benefits from the Carrier, the Defendants were not allowed to receive an off-set or credit for those TTD benefits because the Claimant's wages were paid by a "collateral source." This "collateral source" was the salary Claimant earned at Kneece & Son. (R. p. 106).

The Defendants timely appealed this 2005 Decision and Order of Commissioner Childs. However, prior to the Full Commission Hearing on the matter the Claimant agreed to execute a Form 17 acknowledging that he was able to return to work at full duty as of October 4, 2005. (R. p. 1241). Accordingly, TTD payments were terminated as of October 4, 2005; Defendants provided Claimant with additional medical treatment for his closed head/brain injury, as well as the injuries to Claimant's left lower extremity (knee) and left upper extremity (shoulder) pursuant to the 2005 Order and the Agreement between the parties.

The Claimant was re-evaluated by Dr. Green on March 20, 2006. During this evaluation, the Claimant informed Dr. Green that he drove his tractor for long periods of time on his farm (Kneece & Son). (R. p. 1195). The Claimant's physical examination at this appointment was normal except for a "little bit of discomfort." Dr. Green opined at that time that the claimant was able to *work full duty* as of March 20, 2006. (R. p. 1195).

The Claimant was also evaluated by Dr. Randy Waid for his closed head injury. In his report of February 8, 2007, Dr. Waid indicated that the Claimant continued to "demonstrate mild executive dysfunction both with regard to cognitive and emotional/psychological functioning." He also noted that the Claimant continued to be employed on his family farm. On February 8, 2007, Dr. Waid released the Claimant at MMI with a 22% impairment rating to the whole person for this injury. The Claimant had previously been released at MMI with regard to his left upper and left lower extremity in 2004, as stated above. (R. pp. 862-868).

On May 14, 2008, the Claimant underwent a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. Dr. Adams diagnosed Claimant with a "mild to moderate head injury with a contusion to his right frontal lobe" and he found the Claimant's examination to be "absolutely normal." (R. p. 1219). Dr. Adams subsequently ordered an electroencephalogram (EEG) test to measure brain electrical activity which was also normal. (R. p. 1222). Consequently, no further treatment was recommended by Dr. Adams.

Following that 2008 evaluation with Dr. Adams, neither Claimant nor his attorney ever made any demand or request for any additional medical treatment other than a request that Claimant be allowed to continue his psychological treatment with Dr. Bergmann and Dr. Deal, which the Defendants authorized. However, in March of 2010, the Claimant decided to seek additional medical treatment on his own without any notice to Defendants with Dr. Charles Shissias of Lowcountry Medical Group in Beaufort.

Following the commencement of unauthorized treatment with Dr. Shissias, Claimant filed a Form 50 on July 9, 2010, requesting additional medical treatment, as well as an award of

permanent and total disability based upon a general disability/loss of earning capacity pursuant to S.C. Code Ann. § 42-9-10. (R. p. 386).

This Form 50 hearing request was Claimant's first such request since before the hearing in front Commissioner Childs in 2005. This was also the first notice to Defendants that: (1) The Claimant was alleging he was permanently and totally disabled as a result of a loss of earning capacity under S.C. Code Ann. § 42-9-10; (2) That the Claimant had been receiving treatment from Dr. Shissias; and (3) That the Claimant intended to rely upon the opinions of the unauthorized physician, Dr. Shissias, as well as Claimant's own vocational expert, William Stewart, to establish his claim for permanent and total disability. The Defendants answered Claimant's Form 50, denying he was entitled to an award of permanent and total disability under S.C. Code Ann. § 42-9-10, or any other provision of the Workers' Compensation Act. (R. p. 384).

A hearing on the Forms 50 and 51, which ultimately give rise to this appeal, was originally scheduled before Commissioner Williams on October 4, 2010; however, the parties agreed to mediate this claim. Mediation was held on November 29, 2010, but was unsuccessful. Following mediation, Defendants sought to obtain evaluations with a neuropsychologist, a neurologist, and a vocational specialist to address the new and updated opinions of Claimant's experts, specifically with regard to any ongoing neurological issues or deficits.

On December 7, 2010, counsel for the Defendants notified Claimant's counsel of a neuropsychological evaluation appointment set for January 4, 2011, with Dr. Tora Brawley of the University of South Carolina Specialty Clinics, Department of Neuropsychiatry and Behavioral Science (R. p. 1349). Subsequently, Defendants received correspondence from Claimant's attorney to Dr. Brawley indicating that he was refusing to allow Claimant to attend

the scheduled appointment with Dr. Brawley. (R. p. 1351). The Defendants kept the appointment scheduled; however, the Claimant failed to participate or attend this evaluation.

On December 14, 2010, Counsel for the Defendants requested, via written correspondence to Claimant's attorney, dates that Claimant was available to meet with Defendants' vocational expert, Cynthia P. Grimley. (R. p. 1354). In addition, Ms. Grimley separately phoned and wrote to Claimant's counsel requesting available dates for the interview for the vocational evaluation. Although Claimant's counsel indicated he spoke with Ms. Grimley in December and was "checking her references," he subsequently advised that he would not agree to make the Claimant available for a vocational evaluation with the Defendants' expert.

Finally, on January 21, 2011, counsel for the Defendants notified the Claimant's counsel of a neurological examination scheduled for the Claimant with Dr. Ben Bashinski of Neurological Associates of Augusta, Georgia, for February 4, 2011 (R. p. 1359). The Defendants offered to provide transportation for the Claimant to this appointment if needed. However, Claimant's counsel responded by letter dated January 24, 2011, that the Claimant would not submit to the neurological evaluation with Dr. Bashinski. (R. p. 1360).

On January 26, 2011, the Defendants moved for an Order compelling the Claimant to attend and cooperate with the examinations to be conducted by the Defendants' neurologist, neuropsychologist and vocational rehabilitation expert as set forth above. (R. p. 361, Motion to Compel dated January 26, 2011). The Defendants also requested an Order suspending Claimant's right to further benefits and cancelling the hearing that had been scheduled for February 14, 2011, due to the Claimant's noncompliance with S.C. Code Ann. § 42-15-80 permitting an independent medical evaluation by the Defendants. On February 2, 2011, the Defendants' Motion to Compel the medical and vocational evaluations and to postpone the

hearing was denied by a Form Order of the Commission without explanation. (R. p. 93). However, prior to the hearing, the Claimant complied with the neuropsychological evaluation with Dr. Brawley and this was performed on January 28, 2011. In her report, Dr. Brawley was essentially in agreement with Dr. Waid that the Claimant had experienced a "mild residual brain dysfunction as a result of his accident." (R. pp. 1237 - 1239, Dr. Brawley report, dated February 11, 2011).

At the Hearing on February 14, 2011, Defendants renewed their Motion to compel discovery and the medical evaluation, and also to postpone the hearing. At that time the Defendants also objected to the introduction of various records reflecting certain expenditures submitted by Claimant through his APA submissions. (R. pp. 1093 and 1094). The Defendants' objection to the introduction of this evidence as well as their 'Motion to Compel and Postpone the Hearing' were each denied by the hearing Commissioner. Specifically, the Hearing Commissioner stated that these evaluations could have been performed prior to the Hearing; however, no finding or disposition was made with regard to the Motion to Compel in the hearing Commissioner's Order.

At the Hearing on February 14, 2011, the Claimant asserted that he was entitled to permanent and total disability benefits as a result of a physical brain injury pursuant to S.C. Code Ann. § 42-9-10. It was the position of the Defendants that the Claimant had not sustained a loss of earning capacity and that Claimant was not permanently and totally disabled. However, both parties agreed the Claimant was at MMI for all injuries.

On April 28, 2011, Commissioner Derrick L. Williams issued his Decision and Order, finding and concluding in pertinent part, that:

1. The job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc., is sheltered employment and benevolent in nature and the accommodations made by

Claimant's family that enabled Claimant to perform certain limited services for Delano R. Kneece & Son, Inc., is not evidence that a reasonably stable market exists for the services Claimant provides for the family farm.

2. The amounts paid the Claimant by Delano R. Kneece & Son, Inc. are not intended to represent wages earned and the amount is not calculated on the basis of services performed by Claimant. Instead, those amounts paid to the Claimant are in the nature of a gift and do not constitute wages. Additionally, that Claimant was entitled to weekly compensation for all previously unpaid weeks (despite earning significantly more yearly income from his employer than he received at the time of his accident).
3. The Claimant is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable, sustained basis in accordance with the opinion of Dr. Stewart and, therefore, the Claimant is unable to perform services other than those that are so limited in quality, dependability, and quantity that a reasonable stable market for them does not exist.
4. That the Claimant sustained injuries to the brain/head, nasal passage, sinus, left eye, left knee, left shoulder, left elbow (left upper and lower extremities), finger, zygomatic arch, thyroid, scarring, teeth, and psychological.
5. The Claimant is permanently and totally disabled, with a physical brain injury, pursuant to §42-9-10, and is entitled to lifetime benefits in terms of weekly compensation and medical treatment.
6. The Defendants have failed to pay for all medications prescribed by Claimant's physicians, to include Drs. Deal, Wicker, Shissias, and Ugino.
7. The Claimant will benefit from future treatment and Defendants are ordered to pay for those medications for all causally related injuries.
8. The Claimant has accumulated mileage of 3,658 for which he is entitled to reimbursement, (despite failing to submit any prior requests for over ten years of treatment).
9. The Claimant has accumulated charges of \$14,010.77 in prescriptive medications for which he is entitled to reimbursement.

(R. pp. 84-91).

Based upon the Hearing Commissioner's Findings of Fact and Conclusions of Law, the Defendants were ordered to pay Claimant weekly compensation in the amount of \$461.67 from

November 22, 1999, to the present and continuing for Claimant's lifetime, with a credit for 157 $\frac{1}{7}$ weeks of weekly compensation already paid to Claimant.

In addition, the Defendants were ordered to provide Claimant lifetime medical treatment for his compensable injuries to be directed by Drs. Bergmann, Deal, Shissias, Wicker and Ugino, as well as reimbursement for all causally related medical expenses incurred up to that date, including reimbursement for all prescription medication and mileage listed by Claimant in his Exhibits.

From this Decision and Order issued by Commissioner Williams, the Defendants timely filed a Form 30 Request for Review to the Appellate Panel of the South Carolina Workers' Compensation Commission, raising 39 Grounds for Review. (R. p. 349). The Defendants' appeal was heard by the Full Commission on September 20, 2011.

Pursuant to S.C. Code Ann. § 42-17-50 (1985), the Appellate Panel reviewed the Award and weighed the evidence as presented at the initial hearing, finding good grounds to reverse and remand the prior Order on grounds that Claimant was not permanently and totally disabled with accompanying physical brain damage. (R. p. 47, SCWCC Appellate Panel Order dated April 19, 2012). Puzzlingly, the Full Commission signed a proposed Order submitted by Claimant's Counsel without removing or amending the multitude of Findings of Fact and Conclusions of Law that conflicted with the Panel's primary holding, which reversed the single Commissioner's original finding of permanent total disability.

Subsequently, both parties timely appealed the Order of the Full Commission for the reasons outlined below and in their respective Petitions for Review to the Circuit Court of Lexington County. (R. pp. 214; 225, Notice of Intent to Appeal dated May 18, 2012; Petition for Judicial Review dated May 21, 2012). Judge Knox McMahon reversed the holdings and

conclusions of the Appellate Panel of the full Commission, reinstating the holdings of the single Commissioner, and finding that the Claimant was permanently totally disabled with a physical brain injury, and therefore entitled to life time medical and indemnity benefits associated with this claim. (R. pp. 21-46). These Defendants filed a Rule 59(e) motion for rehearing, which was denied on April 24, 2014. This appeal by the Defendants to the Court of Appeals follows.

STANDARD OF REVIEW

The question of whether there is a sufficiency of evidence is strictly a matter of fact, and the findings of the Commission thereabout are final. *Phillips v. Dixie Stores, Inc.*, 186 S.C. 374, 195 S.E. 646 (1938) [additional citations omitted]. It is well settled that findings of fact by the Industrial Commission are conclusive and binding upon both the court of common pleas and the Supreme Court, if there is any competent evidence reasonably tending to support them, even though there is evidence that would have supported a finding to the contrary. *Willard v. Commissioners of Public Works of City of Spartanburg*, 219 S.C. 477, 65 S.E.2d 874 (1951). In reviewing the finding of an administrative agency, neither the Court of Appeals nor the Circuit Court may substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995). Furthermore, a reviewing court will not disturb findings of the Workers' Compensation Commission if its findings are supported by substantial evidence on the record as a whole. *Pearson v. JPS Converter & Indus. Corp.*, 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). Where there is a conflict in evidence, either by different witnesses or in testimony of the same witness, findings of fact of the South Carolina Workers' Compensation Commission are conclusive. *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 513 S.E.2d 843 (1999). If evidence is susceptible to more than one reasonable inference, the full Commission's

finding must be sustained. Wilson v. City of Darlington, 229 S.C. 62, 91 S.E.2d 714 (1956). The courts may not weigh the evidence in their review of a factual finding by the Commission. Walker v. City of Columbia, 247 S.C. 241, 146 S.E.2d 856 (1966).

Based on the foregoing, the Circuit Court should have been by the findings of the Commission if they were supported by substantial evidence. The Full Commission's Order thoroughly explains its analysis of the issues and the reasonable evidence it relied on in reversing the lower Order. The Circuit Court, in its appellate capacity, is not permitted to substitute its own judgment for that of the Appellate Panel of the Workers' Compensation Commission with regards to the weight of the evidence. It is not the court's duty, when sitting in an appellate capacity, to weigh the testimony but only to determine whether the record contain[ed] competent evidence to support the findings of the Workers' Compensation Commission. Kay v. South Carolina Public Service Authority, 246 S.C. 168, 143 S.E.2d 130 (1965), or determine if the Order of the Appellate Panel was affected by some other error of law.

"The statute empowers the full Commission to make its own findings of fact and to reach its own conclusions of law consistent with or inconsistent with those of the hearing commissioner. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967).

If the evidence is all one way, or if the findings of the Commission are based on surmise, speculation, or conjecture, the issue becomes one of law for the court and not of fact for the Commission. Herndon v. Morgan Mills, Inc., 246 SC 201, 143 SE2d 376 (1965).

Upon admitted or established facts the question of whether an accident is compensable is a question of law, and review thereof is not an invasion of the fact-finding field of the Commission on the part of the Court. Jordan v. Dixie Chevrolet, Inc., 218 SC 73, 61 SE2d 654 (1950). A Court may reverse or modify the Workers' Compensation Commission's decision if

substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law. Etheredge v. Monsanto Co., 349 SC 451, 562 SE2d 679 (2002).

ARGUMENT

I. THE CIRCUIT COURT MISSAPPLIED THE SUBSTANTIAL EVIDENCE STANDARD IN REVERSING THE FULL COMMISSION'S ORDER

The Employer/Carrier assert that the Circuit Court, in reversing the findings of the Appellate Panel as to the Claimant's degree of permanency, by finding that the Claimant was not permanently totally disabled, has misapprehended either the appropriate standard of review for a factual finding of disability, or failed to address how the Claimant's injury has rendered him permanently totally disabled as a matter of law. The Order of the Circuit Court overturned the findings of the Appellate Panel which had ruled, under the facts of this case, the Claimant was not permanently totally disabled.

There are only two ways in which a claimant can be found permanently totally disabled as a matter of law. First is by the loss of two hands, feet, eyes, shoulders, hips, arms or legs, or any combination thereof. (S.C. Code Ann. §42-9-10(B)). None of those circumstances exist in the present case as the Claimant did not suffer a loss of any body part, or parts. Secondly, to be declared permanently totally disabled as a matter of law, a claimant may suffer a disability of over 50% to the back. (See S.C. Code Ann. §42-9-30). The Claimant in the instant case did not suffer an injury to the back, nor receive a disability rating thereto. Therefore, the Claimant is not permanently disabled as a matter of law under either theory.

Under a factual determination by the Commission, a Claimant may also be determined to be permanently totally disabled under S.C. Code Ann. §42-9-10(A) if it is determined he has suffered an injury to a "non-scheduled" body part, or to two or more scheduled member body

parts (See S.C. Code Ann. §42-9-30 and S.C. Code of Regs. §67-1101), which has resulted in a total loss of earning capacity. Similarly, if a claimant has suffered a permanent physical brain injury which has rendered him or her to have lost all earning capacity, he or she can be determined permanently totally disabled and entitled to life time benefits under S.C. Code Ann. §42-9-10(C).

Nevertheless, neither of these two types of permanent total disability (wage loss under §42-9-10(A) or (C)) are findings that can be made as a matter of law. Rather, such a determination of disability under this model is adjudicated as a factual question; therefore the ultimate determination of disability in such circumstances *must* be determined by the Workers' Compensation Commission as the trier of fact. The Supreme Court recently clarified in two opinions, 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.2d 835 (2013) that a physical brain injury in and of itself was not enough to make a finding that a Claimant was therefore permanently totally disabled under S.C. Code Ann. §42-9-10(C).

The petitioner in Crisp, similarly to the Claimant/Respondent Kneece in the case *sub judice*, argued that the mere presence of a permanent physical brain injury or damage, triggers the operation of section 42-9-10(C) entitling an injured worker to life time indemnity benefits – which Crisp had essentially argued required a finding as a matter of law of permanent total disability. The Sparks and Crisp courts summarily rejected this argument, finding that such an interpretation would be contrary to legislative intent, and to the manner in which our courts have awarded compensation for injuries to the brain. Further support for the proposition that §42-9-10(C) does not implicate a finding of permanent total disability for brain injuries as a matter of law, is that S.C. Code of Regs. §67-1101 provides scheduled compensation up to 250 weeks for

injuries to the brain. That is, §67-1101 is for permanent *partial* disability cases where a brain injury had occurred, but where the injured worker has not been rendered permanently totally disabled by the injury.

The Order of the Circuit Court in this claim made a finding that that Respondent was indeed permanently totally disabled, countermanding the Appellate Panel of the Commission's findings that he is not permanently totally disabled, and was only entitled to benefits under S.C. Code of Regs. §67-1101. Such a finding by the Circuit Court cannot have been as a matter of law, as both §42-9-10(B)(amputation and member loss) and §42-9-30(21)(back injuries) are not even at issue in the instant case, yet as outlined by the Crisp and Sparks Courts, a finding of permanent total disability in brain injury cases is not as a matter of law. Therefore, the finding of permanent total disability by the Court must have been a determination of fact as to the degree and severity of the injury to the Claimant's brain. However, this would have required additional findings that the Appellate Panel's factual findings as to disability were unsupported by substantial evidence.

Finally, on this point, the Circuit Court Order on page 11, in weighing the evidence of the record held that: "[t]he evidence of the record, when viewed as a whole, compels the finding that the Claimant suffered physical brain damage with a severe and permanent impairment of his normal brain function." (R. p. 31). However, this newly instituted finding by the Circuit Court, in contradiction to the Appellate Panels' findings on this point, is also contradictory to the 'substantial evidence rule.' First, a finding of the degree of severity of an injury is a question of fact for the Commission. The Commission's failure to find a, "severe and permanent brain injury," is most certainly supported by the evidence in the record, even if the Circuit Court were

to conclude it was not by the greater weight of the evidence. Nonetheless, the Appellate Panel's ruling should stand under the applicable standard of review.

Appellants assert there is competent and substantial evidence in the record to support the Commission's failure to find a "severe permanent brain injury," with "severely impaired" function of the Respondent's brain. For example, On May 14, 2008, the Respondent underwent a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. Dr. Adams diagnosed Claimant with a "mild to moderate head injury with a contusion to his right frontal lobe" and he found the Respondent's examination to be "absolutely normal." (R. p. 1219). Dr. Adams subsequently ordered an electroencephalogram (EEG) test to measure brain electrical activity which was also normal. (R. p. 1222, Dr. Julian Adams – SC Neurological Clinic). No further treatment was recommended by Dr. Adams. See also report of Dr. Tora Brawley who was in agreement with Dr. Waid (Claimant's expert) that the Respondent had experienced a "mild residual brain dysfunction as a result of his accident." (R p. 1237, Dr. Tora Brawley dated February 11, 2011).

However, if the finding was made as a factual determination, Appellants contend that such a finding by the Circuit Court is improper, in that the Appellate Panel of three Commissioners in weighing the evidence as to disability, unanimously found that the Respondent was not totally disabled. Moreover, the Appellate Panel's finding was supported by substantial evidence in that the Respondent continued to work 50 hours plus per week, and is now making significantly higher wages than he did at the time of the accident, filing tax returns on such money as wages, and previously signing a Form 17 to be filed with the SCWCC representing that he had returned to work making the same wages (or higher, than) he earned at

the time of his injury as of October 2005. (R. p. 1241). Therefore, under the applicable standard of review this finding of the Appellate Panel is binding on appeal and should have been affirmed.

Whether the Circuit Court upon its review finds that the greater weight of the evidence may have supported a finding of permanent total disability or not, such weighing of the evidence is not permitted at this point in the appeal. The only question upon appellate review of this issue is indeed whether or not the finding of the Appellate Panel (that the Respondent's injuries had not resulted in permanent total disability) was supported by substantial evidence in the record. Appellants assert that such findings were so supported, and to find otherwise was in error. Similarly on page 12 of the Order, the Circuit Court improperly engaged in weighing the evidence by finding, "[t]here is no evidence that he can operate a complicated computer operated tractor." (R p. 32). To the contrary, there is substantial evidence in the record, to include the Respondent's own testimony at the hearing and his sworn deposition testimony. Therefore, this finding should not have been disturbed on appeal by the Circuit Court.

In addition, the Circuit Court improperly reinstated the trial Commissioner's Order of April 28, 2011, thereby making findings of fact contrary to, and in conflict with, the Appellate Panel's April 19, 2012 determination(s) that the Respondent was capable of operating a complicated computer operated tractor up to 50 hours per week and therefore was not permanently totally disabled. Also, the Circuit Court improperly relies on the "sheltered employment" doctrine to find the Respondent was permanently totally disabled through a total loss of earning capacity, when such a finding by the single Commissioner had been inherently overturned by the Appellate Panel. (R. p. 56).

That is, the Appellate Panel abandoned this finding of "sheltered employment" in the instant case, by making its finding that the Respondent was in fact gainfully employed by virtue

of his work driving a tractor up to 50 hours per week, and contemporaneously ruling that he was indeed not permanently totally disabled. (R. p. 56). For the Circuit Court to have found otherwise was an impermissible weighing of the evidence as to this factual determination made by the Appellate Panel on this point. Furthermore, the “sheltered employment” doctrine has not been formally adopted in South Carolina. Nevertheless, even in states where “sheltered employment” has been adopted, the facts of this case are materially different. For example, the Respondent Kneece is essentially self-employed. He is no longer employed by the Appellant employer in this claim. He has continually received raises over the past ten years since the accident, and he actually works, in almost the same capacity – driving tractors for up to three quarters of the week, for close to 50 hours or more per week, as he did prior to the date of accident and confirmed in his deposition testimony. (R. p. 544 line 21 to p. 545 line 19).

No authority was cited by the Circuit Court for the premise that sheltered employment may be provided by a non-party employer, as was the case here. In fact, sheltered employment should not extend to a non-party employer. This standard is a safeguard to protect an employee from a risk of continuing employment simply for an employer to avoid a finding against that employer of permanent and total disability, even though an injured worker may be unable to work post injury. By juxtaposition, in the instant case, Respondent’s employment with Appellant employer ended and he has subsequently worked at a much greater salary with a non-party employer that has provided years of stable employment. (R. p. 1395). Moreover, Ricky Kneece’s current employer, Delano Kneece & Son Farms, has no financial interest in minimizing Mr. Kneece’s own financial recovery from his prior employer, Kneece Farms.

The Appellants further argue, that any rights flowing from such a finding of permanent total disability, are in error in that life time medical benefits under S.C. Code Ann. §42-9-10 and

§42-15-60 would be improper to the degree that the Respondent was incorrectly adjudicated to be permanently totally disabled. Similarly, to the degree that the Respondent was incorrectly determined to be found permanently totally disabled, lifetime/ongoing permanent disability benefits under S.C. Code Ann. §42-9-10(C) would not be available.

II. THE CIRCUIT COURT INAPPROPRIATELY REVERSED THE FULL COMMISSION'S ORDER WHICH HAD FOUND THE CLAIMANT WAS NOT PERMANENTLY AND TOTALLY DISABLED PURSUANT TO S.C. CODE ANN. § 42-9-10(C)

The Full Commission properly determined that Respondent was not permanently and totally disabled due to the combination of the injury to the brain and other injuries. Specifically, based upon the greater weight of evidence in the record as outlined below:

1. Claimant made no allegation of permanent and total disability based upon a specific disability;
2. Claimant failed to establish any presumption of permanent and total disability under S.C. Code Ann. § 42-9-10 or 42-9-30;
3. Claimant experienced no loss of earning capacity;
4. Claimant returned to work full time with a different employer making the same or greater earnings as prior to the work accident; and
5. Claimant executed a Form 17 on April 18, 2005, affirming and attesting to his ability to return to work.
6. Without evidence that Claimant's brain injury has rendered him unable to work, the presence of a brain injury alone is not sufficient to qualify for lifetime benefits under the Act.

As stated above, the full commission based its finding that Respondent was not permanently and totally disabled with a physical brain injury, (but rather was limited to benefits for a scheduled member injury to the brain under S.C. Code of Regs. § 67-1101), on reasonable, cogent and competent evidence of Respondent's continuing abilities to maintain gainful employment, which does satisfy the substantial evidence standard.

As stated above, a claimant may establish his entitlement to an award of permanent and total disability under S.C. Code Ann. § 42-9-10, in limited ways:

First, a claimant may be presumptively totally disabled. As such, a claimant must show a physical injury enumerated in § 42-9-10. However, because the Legislature has categorized certain types of injuries as *per se* totally disabling, the claimant need not show a loss of earning capacity....

Second, a claimant may establish total disability under § 42-9-10 by showing an injury, which is not a § 42-9-30 scheduled injury, caused sufficient loss of earning capacity to render him totally disabled....

Third, a claimant may establish total disability through multiple physical injuries. Under this scenario a claimant who has a § 42-9-30 scheduled injury must show an additional injury....

Wigfall, 580 S.E.2d at 105.

Respondent's Form 50 expressly alleges that he is permanently and totally disability due to a general disability only. (R. p. 386, Form 50 dated July 9, 2010). The Respondent makes no allegation of permanent and total disability based upon a specific disability pursuant to S.C. Code Ann. § 42-9-30. As enunciated in the recent case of Hutson v. South Carolina State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct. App 2010), "[u]nder the South Carolina Workers' Compensation Act, a claimant may proceed under § 42-9-10 or § 42-9-20 to prove a general disability; alternatively, he or she may proceed under § 42-9-30 to prove a loss, or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute." Hutson, 700 S.E.2d at 465.

Therefore, because the Respondent alleges that he is permanently and totally disabled as a result of a general disability, the Respondent has the burden of proving that he is either presumptively permanently and totally disabled or that his non-scheduled injury caused a

complete loss of earning capacity, rendering him permanently and totally disabled. The Respondent failed to meet his burden of proving he is entitled to an award of permanent and total disability under either theory.

A. THE RESPONDENT DID NOT SUSTAIN A LOSS OF EARNING CAPACITY AND, THEREFORE, RESPONDENT IS NOT PERMANENTLY AND TOTALLY DISABLED PURSUANT TO S.C. CODE ANN. § 42-9-10 OR § 42-9-20:

The evidence in the record clearly shows that since the time of the Respondent's work injury, he has earned the same and/or a *greater income* than when he was originally injured in the same capacity as an employee and part owner of Delano Kneece & Son Farms (which is a separate business entity from Kneece Farms). (R. at pp. 1243 -1348, 1362-1395, Tax Returns of the Claimant 1999-2009).

Specifically, a review of Respondent's tax records introduced into evidence demonstrates that the Respondent's earnings have consistently increased since the injury in 1999, and that Respondent currently earns approximately twice as much as he did prior to the accident. There was no evidence presented at the hearing to indicate that this trend of increasing earnings will change. (R. at *id.*).

In addition, the Respondent's wife, Bookkeeper for the Claimant's farm, testified that he received a raise in 2007, which resulted in an increase in Claimant's compensation from \$3,500.00 per month to \$4,170.00 per month. (R. p. 507 line 21 to p. 508 line 7, 2010 Deposition of Roxanne Kneece). Moreover, the Respondent himself testified that he had a substantial work life following his injury despite his limitations. (R. p. 725 at line 23 to p. 730 line 3).

As outlined below, the Respondent's testimony and other evidence in the record demonstrates that since Respondent returned to full time work with Kneece & Son almost nine years ago, he has:

(1) Regularly worked approximately fifty (50) hours per week; (R. p. 544 line 21 to p. 545 line 19).

(2) Performed the same kind of work with similar or the same responsibilities he had when he was injured in 1999. In fact, the Respondent testified both in his deposition on September 23, 2010, and at the Hearing on November 11, 2005, that he works at Kneece & Son approximately six (6) days a week, eight (8) to twelve (12) hours per day, and spends 75% of his working time driving a tractor. (R. p. 729 line 16 – p. 730 line 2).

(3) Earned the same income, or much greater income, than when he was originally injured in the same capacity as a full time employee and part owner of Delano Kneece & Son. (R. at pp. 1243 -1348, 1362-1395, Tax Records of Respondent); and

(4) Signed a Form 17 indicating that he was able to return to work without restrictions as of October 4, 2005. (R. p. 1241; Form 17 dated June 16, 2006).

The Respondent also testified that after the accident, his job duties at Kneece & Son were essentially the same job duties he was performing prior to the accident. Specifically, the Respondent testified that the majority of his work day following the accident involves driving a complicated computer operated tractor, which is the same job duties Respondent primarily performed prior to his injury. The Respondent's wife confirmed this fact as she testified that the Respondent currently drives a tractor for five to seven hours per day, six days a week, and rarely misses a day of work. (R. p. 514 lines 19-23, R. 516, lines 3-17).

In addition to demonstrating no loss of earning capacity, the evidence in the record further demonstrated that if the Respondent did not perform the job duties at Delano Kneece & Son that he has been performing since at least 2005; then someone else would have had to perform them in order to maintain the business. Therefore, the evidence clearly shows the existence of a need for the farming functions the Respondent has been performing since his work accident, and that it is financially beneficial service he provides to the farm through his labor from which he is being paid.

Accordingly, the fact that the Respondent has been working for many years since his work accident operating a computer operated tractor system which he admitted under oath he drives for over fifty (50) hours per week, and earning a greater income than before his injury, countermands any argument that the Respondent is permanently totally disabled under a wage loss theory. “[A]s the claimant is now earning wages in an amount equal to those received by him prior to his injury, he has failed to show any compensable injury or incapacity.” See *Parrott v. Barfield Used Parts, et. al.*, 206 SC 381, 34 SE 2d 802 (1945).

As a result, the Respondent failed to meet his burden of proving a sufficient loss of earning capacity necessary to render him permanently and totally disabled as required by S.C. Code Ann. § 42-9-10, nor for a partial wage loss under S.C. Code Ann. § 42-9-20.

B. THE RESPONDENT IS NOT ENTITLED TO A PRESUMPTION OF PERMANENT AND TOTAL DISABILITY:

While certain provisions contained in S.C. Code Ann. §42-9-10 and §42-9-30 provide a presumption of permanent and total disability, none of these provisions are applicable in this case. Specifically, under S.C. Code Ann. §42-9-10, there is a presumption of permanent and total disability when the injured worker suffers “[t]he loss of both hands, arms, shoulders, feet, hips, or vision in both eyes, or any two thereof....” (Note, the loss of shoulders and hips were

added after the 2007 amendments to this statute). As no amputation or loss of a bodily appendage is applicable to this case, none of the Claimant's injuries from this injury implicate this provision, therefore, the permanent and total disability presumption provision in S.C. Code Ann. §42-9-10 does not apply.

The second presumption of permanent and total disability arises under S.C. Code Ann. §42-9-30, when an injured worker is found to have sustained 50% or more loss of use of his back. The Respondent has not alleged a back injury in this claim, and, therefore, the presumption under S.C. Code Ann. §42-9-30 is also not applicable to this case.

However, Respondent's counsel previously argued that pursuant to S.C. Code Ann. §42-9-10, a physical brain injury in and of itself constitutes a statutory presumption of permanent and total disability. Yet a review of the Workers' Compensation Act and its accompanying Regulations demonstrates that such a presumption does not exist. Therefore, to the extent the Hearing Commissioner's Order may be read as finding or concluding that the Respondent is entitled to a presumption of permanent and total disability by virtue of the existence of a physical brain injury, such determination constitutes reversible error.

Specifically, S.C. Code Ann. §42-9-10(C), states that:

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

S.C. Code Ann. §42-9-10(C)(Emphasis added).

In addition, Regulation 67-1101 of the South Carolina Workers' Compensation Act specifically lists the scheduled value of the brain at 25 to 250 weeks, thereby demonstrating that a physical brain injury in and of itself does not create a presumption of permanent and total

disability. Instead, only when the Claimant is permanently and totally disabled and has sustained an accompanying physical brain injury may he be entitled to lifetime benefits under S.C. Code Ann. §42-9-10.

As noted previously, in Crisp v. SouthCo., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013), the petitioner argued that the mere presence of any physical brain injury or damage, regardless of degree, triggers the operation of § 42-9-10(C). The Court found this argument was not persuasive, as it was contrary to legislative intent and to the manner in which our courts have awarded compensation for injuries to the brain.

Similarly, the South Carolina Supreme Court clarified, “we view the inclusion of ‘physical brain damage,’ along with quadriplegia and paraplegia, in § 42-9-10(C) as indicative of the General Assembly’s intent to compensate an employee-claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent brain damage.” Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013). Furthermore, “Thus, we conclude that ‘physical brain damage’ as used in § 42-9-10(C) is physical brain damage that is both permanent and severe.” Id.

The Court in Crisp, relied on the Sparks decision in noting that, “permanency and physicality are requirements. However, the severity of the injury is the lynchpin of the analysis. Cf. James v. Anne's Inc., 390 S.C. 188, 199, 701 S.E.2d 730, 736 (2010) (“The 500 weeks limitation, however, represents the limit of the monetary amount of compensation that may be recovered. It has no relation to the duration or the extent of the injury. A permanent impairment, by definition, lasts for a lifetime. (emphasis in original)).” Furthermore, “[i]nherent in the requirement that the injury to the brain be severe is the requirement that the worker is

unable to return to suitable gainful employment. See Floyd v. C.B. Askins & Co., 382 S.C. 84, 90, 675 S.E.2d 450, 453 (Ct. App. 2009)"

The Court in Crisp interpreted "the inclusion of "physical brain damage" among the most serious injuries within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment. See Adams v. Texfi Indus., 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) ("In construing a statute, the Court looks to its language as a whole in light of its manifest purpose." (citing Simmons v. City of Columbia, 280 S.C. 163, 311 S.E.2d 732 (1984))); Cokeley v. Robert Lee, Inc., 197 S.C. 157, 169, 14 S.E.2d 889, 894 (1941) ("While it is an elementary rule of construction that words used in a statute should be given their plain and ordinary meaning this, as all other rules, is subject to the prime object of ascertaining and giving effect to the legislative intention. In doing this, we are not to be governed by the apparent meaning of words found in one clause, sentence, or part of the act, but by a consideration of the whole act, read in the light of the conditions and circumstances as we may judicially know they appeared to the Legislature, and the purpose sought to be accomplished." (quoting State ex rel. Walker v. Sawyer, 104 S.C. 342, 346, 88 S.E. 894, 895 (1916))).

This interpretation is in harmony with the entire purpose of our workers' compensation regime and recognizes the other avenues of compensation available under the scheme for brain injuries that do not render the worker unemployable. See Shealy v. Algernon Blair, Inc., 250 S.C. 106, 112, 156 S.E.2d 646, 649 (1967) ("The object of the act is to relieve an injured workman from the loss or impairment of his Capacity to earn wages."). Thus, only in cases of physical brain damage that are both permanent and severe would an employee-claimant be entitled to benefits for life."

Based on the above, the Full Commission correctly determined that Claimant did not meet the accepted standard to prove entitlement to lifetime permanent and total disability for physical brain damage; therefore the decision of the Circuit Court should be reversed.

III. THE "BENEVOLENT EMPLOYMENT" DOCTRINE DOES NOT APPLY TO THIS CASE AND SHOULD NOT HAVE BEEN UTILIZED AS A BASIS FOR FINDING PERMANENT AND TOTAL DISABILITY

In addition to arguing he is permanently and totally disabled under S.C. Code Ann. § 42-9-10, the Respondent argues that he is permanently and totally disabled because his employment with Delano Kneece & Son constitutes "benevolent employment." The Hearing Commissioner agreed and found and concluded that the job offered by Delano Kneece & Son is "sheltered employment" and "benevolent in nature," and that the accommodations made by Kneece & Son that enabled Claimant to perform certain "limited services" for Kneece & Son further supports a Finding and Conclusion that the "benevolent employment" doctrine applies in this case.

However, the Hearing Commissioner, and later the Circuit Court, went against established South Carolina law as well as the clear and unequivocal evidence in this case to find that Respondent was permanently and totally disabled because Respondent's post injury employment at his family farm, Delano Kneece & Son, was "benevolent employment."

South Carolina has not adopted the Doctrine of "Benevolent Employment" and, therefore, the Hearing Commissioner relied upon decisions from other jurisdictions to support his Findings and Conclusions that Respondent was permanently and totally disabled under this doctrine.

The Respondent is a part owner of his family farm from which all of his post injury wages have been paid. He is for all purposes self-employed. The Respondent's tax return lists him as "sole proprietor" of the farm operation. (R. at pp. 1243 -1348, 1362-1395). The Finding

of the Hearing Commissioner that the Respondent's employment is benevolent belies the very meaning of the word benevolent. Specifically, the Merriam-Webster dictionary defines the adjective benevolent as: "having or marked by sympathy and consideration for *others*." (*Heilker v. Zoning Bd. Of Appeals for City of Beaufort*, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct.App.2001) (holding dictionaries can be helpful tools for the purpose of defining terms) (emphasis added)).

The Hearing Commissioner relied upon the Respondent's argument that his employment with Kneece & Son is "benevolent employment" because his work there after the accident was so limited and valueless to *the farm* that the increasing wages he received from Kneece & Son were merely "a gift." In addition, the Respondent alleges that he essentially "costs" the farm money as a result of the installation of upgrades and the hiring of other full and part time employees to do work he previously did. However, the business model of the farm, profitable or otherwise, is not a basis for finding a wage loss of or loss of earning capacity *to the Respondent himself*. In any event, the evidence in the record demonstrates that since the Respondent's work injury, Kneece and Son has continued to remain profitable.

Furthermore, the contention that Respondent's earnings were a "gift" is not supported by Respondent's tax treatment of the earnings. The Federal Tax Code allows for gifts to be excluded up to a certain value per year from one or more people. For tax years 1999 to 2001 individuals could exclude \$10,000 per source from any income or gift tax (i.e. he could receive up to \$20,000 total tax free from a father and a mother, depending on the number of family members connected to the business, Respondent could have presumably receive several multiples of the \$10,000 limit on an entirely tax free basis). For tax years 2002-2005 the annual exclusion amount increased to \$11,000 per source per year. For years 2006-2008, the exclusion

amount increased to \$12,000 per source per year. For 2009, the exclusion amount increased to \$13,000 per source per year. At a bare minimum, if Respondent's earnings were truly a "gift" his tax return should have excluded between \$10,000-\$13,000 per year between 1999-2009. Instead, all earnings were treated alike for tax purposes and Social Security contributions.

A thorough review of the evidence submitted in this clearly displays that the Respondent's arguments and the Hearing Commissioner's Findings and Conclusions on this issue are untenable. Specific evidence which rejects these arguments is outlined as follows:

1. Respondent is part owner and the majority shareholder of Kneece & Son;
2. Since the accident in 1999, Respondent has regularly worked 50 hours per week, or more, performing the same or similar job duties he performed prior to the accident; namely, operating the complicated computer operator tractors for the majority of every work day;
3. Respondent testified that he has had a substantial work life following his injury despite his limitations. (R. p. 725 line 1 – p. 730 line 3);
4. Following the accident in 1999, Respondent continued to earn the same wages / income at Delano Kneece & Son and since 1999, his income has consistently increased. In fact, Respondent and his wife both testified that Respondent currently earns a much greater income than when he was originally injured; (R. at pp. 1243 -1348, 1362-1395)
5. Respondent's wife testified via deposition that the Respondent received a raise in 2007, which resulted in an increase in Respondent's compensation from \$3,500.00 per month to \$4,175.00 per month. (R. p. 507, line 21 to p.509 line 5);
6. Despite the fact that the Respondent characterizes the payments made to him on a monthly basis as a "gift," he clearly treats it differently by virtue of the fact that he reports these payments to the IRS and the South Carolina Department of Revenue as taxable income and does not take any tax-free exclusions for gifts from one or more sources within the family business. Therefore, as a result of the earnings Respondent has made since his accident, Respondent is eligible to file for social security insurance benefits, unemployment benefits or other benefits based on the fact that he and Delano Kneece & Son pay/file/withhold and otherwise treat this money as taxable earnings;
7. Respondent testified both in his deposition on September 23, 2010, and at the Hearing on November 11, 2005, that he works at Delano Kneece & Son

approximately six (6) days a week, eight (8) to twelve (12) hours per day, and spends 75% of his working time driving a "complicated" tractor;

8. Respondent voluntarily executed a Form 17 indicating that he was able to return to work without restrictions as of *October 4, 2005*; (R. p. 1241)
9. A review of the Federal and State Income taxes filed by Respondent individually as well as the taxes filed by Kneece & Son, clearly demonstrate that since the work accident in 1999, the Respondent is listed as the "sole proprietor" of Kneece Farms on "Schedule F – Profit or Loss from Farming" of the IRS tax returns;
10. "Section E" of Respondent's applicable 1040 tax returns from 2000-2006, specifically asks: "*Did you 'materially participate' in the operation of this business during the year of the filing.*" (Emphasis added) On every tax return filed following the work accident, the Respondent answered this question posed by the IRS *in the affirmative*; (R. at pp. 1243 -1348, 1362-1395)
11. While the parties concede that the Respondent's work duties were modified to some extent as a result of Respondent's injuries, there is substantial evidence in the record demonstrates that these modifications have not and do not render the Respondent's employment at Delano Kneece & Son "benevolent" nor do they render his increasing wages from Delano Kneece & Son a "gift."

Based on the facts above, the Respondent's job duties do not fit the definition of benevolent employment where an employee continues to receive wages despite an inability to contribute to his employer. On the contrary, Respondent remained a productive and integral part of Delano Kneece & Son. In fact, if Respondent were truly unable to contribute then the Employer would have to bear the expense of paying for another employee to work the tractor up to 50 hours per week.

A. RESPONDENT'S WORK INJURY OCCURRED WHILE WORKING FOR KNEECE FARMS, A SEPARATE ENTITY FROM DELANO KNEECE & SON AND, THE BENEVOLENT EMPLOYMENT DOCTRINE HAS NO APPLICATION TO THIS CLAIM

The testimony and evidence presented on behalf of the Respondent and relied upon by the Hearing Commissioner to support his Findings and Conclusions that Respondent's current employment with Kneece & Son is benevolent employment, is logically inconsistent.

As outlined above, the Respondent is part owner and the largest stake holder in Kneece & Son, and he has continued working full duty and is currently earning more money now than he did prior to his 1999 accident. Following his 1999 work accident at Defendant/Employer Kneece Farms, the Respondent never returned to perform any work for Kneece Farms and the Respondent has never alleged that Defendant/Employer Kneece Farms was the employer that provided him with Benevolent Employment.

Instead, since his work accident at Kneece Farms, Respondent has worked solely for Delano Kneece & Son Farms. Yet it was Found and Concluded by the Hearing Commissioner that the Respondent's self-employment with Delano Kneece & Son, *who is not a party to this claim*, was "benevolent employment." The Appellate Panel was correct in overturning the single Commissioner on these points, and their ruling should have been affirmed by the Circuit Court.

This point distinguishes this claim from the North Carolina cases relied upon by the Respondent and the Hearing Commissioner in support of the adoption of the "Benevolent Employment" Doctrine. Specifically, not one of the injured workers in the cases cited by the Respondent and relied upon by the Hearing Commissioner and Circuit Court, accepted or were

able to accept the offers of benevolent employment and, as a result, they did not receive wages in addition to their compensation benefits.

A review of the cases from North Carolina cited by the Respondent and relied upon by the Hearing Commissioner in issuing his Decision and Order, indicates that the "Benevolent Employment" Doctrine only applies when the employer with whom the injured worker was employed at the time of the accident, provides "benevolent employment" in one of two ways: (A) An employee who is otherwise unable to work is paid a gratuitous wage by the employer who wishes to keep the claimant as his employee for the purpose of defending and defeating an allegation of permanent total disability (PTD) (based upon his continued employment with that employer); or (B) By a truly benevolent employer who, out of guilt/kindness/good will or otherwise, chooses to keep and pay a totally disabled worker who was injured in their employ, but has been rendered unable to earn wages from his work place injury. In each of the North Carolina cases cited in the Single Commissioner's Order, the employment found to be benevolent was post injury employment with or offered by a claimant's employer at the time of the accident. By contrast in this case, Respondent's post injury return to work, with similar job duties, at increased earnings, for an entity that he owns, *is not the same employer as he worked for at the time of the accident*. Thus, the Benevolent Employment Doctrine has no application to the facts of the present case.

Moreover, with regard to any modifications made for Respondent, a review of case law from other States that utilize the "Benevolent Employment" Doctrine such as Florida, indicate that reasonable job modifications for the purpose of accommodating an injured or partially disabled employee will not place the job outside of the definition of gainful employment. See Cooper v. Escambia County School Bd., 734 So. 2d 1072, 1073 (Fla. 1st DCA 1999)("The

modifications the employer made in the claimant's job to accommodate her disability do not, as a matter of law, render it sheltered employment so as to place this job outside of 'gainful employment'...." See also, Goodwill Indus. v. Heard, 863 So. 2d 389, 390-391 (Fla. Dist. Ct. App. 1st Dist. 2003).

To the extent that such accommodations have been made, allowing the Respondent to work full time, if any, above and beyond such technological upgrades that would have been made over time on a farm regardless to realize increased production and profits generally, these are indeed reasonable accommodations. Such accommodations therefore, do not render Respondent's employment sheltered or "benevolent" employment. Moreover, as noted and testified to by employees of Kneece & Son Farms, the business is and has remained profitable since the Respondent's return to full time work in 2005, and the Respondent himself has continued to receive raises in salary throughout that time period.

Therefore, this case is not analogous to the cases from other states cited by the Respondent and relied upon by the Hearing Commissioner in applying the "benevolent employment" doctrine to this case. Furthermore, the law in South Carolina is clear that "an employee who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury." Wynn v. Peoples Natural Gas, 238 S.C. 1, 118 S.E.2d 812 (S.C. 1961).

Moreover, as demonstrated by the tax returns filed by the Respondent for the years following his 1999 work injury, it is uncontroverted that the Respondent is self-employed as the majority stakeholder in Kneece & Son and that he has earned wages performing his daily job

would only be payable from the date of maximum medical improvement as adjudicated by the Workers' Compensation Commission, and not from the date of injury. Indemnity benefits from the date of accident up through the date of maximum medical improvement are only awardable to a claimant as temporary indemnity benefits under S.C. Code Ann. §§42-9-200 et seq. No such finding of additional temporary total disability benefits was made by the single Commissioner, the Appellate Panel or the Circuit Court in the instant case. Therefore, no further temporary benefits should be provided in the instant case between the date of accident and the date the Respondent was adjudicated to have reached maximum medical improvement; as the Respondent previously voluntarily terminated his right to further temporary indemnity benefits back in 2006 prefaced upon his 2005 return to full time employment at the same or greater earnings. (R. p. 1241). Also, see Curiel v. Environmental Management Services 376 S.C. 23, 655 S.E.2d 482 (2007) which states in part:

Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct.App.2006). Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits.

Additionally, even if the Respondent were entitled to lifetime benefits, the Circuit Court erred in failing address appellate ground No. 10 raised by the Employer/Carrier in their request for appellate review to both to the Appellate Panel of the Commission and the Circuit Court. Namely, that the Appellate Panel and the Circuit Court erred in affirming an award for weekly compensation benefits to the Respondent while failing to address credit for wages/earnings of the Respondent from his date of return to full time employment in 2005 to present, the error being that such issue was raised by Appellants in their appeal but not ruled upon.

Circuit Court relied upon the opinions/reports of the unauthorized physicians. However, in contradiction to S.C. Code Ann. § 42-15-60, the Respondent did not have the right to seek his own treating physicians with no notice to the Appellants.

The only treating physicians in this case since approximately 2005, have been Drs. Deal and Bergmann. However, the Respondent never made any request of the Appellants to authorize treatment by any other providers since 2005, with the exception Dr. Adams in 2008. Therefore, pursuant to S.C. Code Ann. § 42-15-60, Appellants would respectfully assert that they have no responsibility for any past or future treatment, expense, or mileage, arising from or related to treatment provided by the unauthorized physicians; specifically, Drs. Shissias, White, Ugino, or Wicker.

Additionally, the Appellants should not be responsible for payment of certain expenses related to medications as sought by the Respondent. Specifically, Respondent's counsel submitted as an Exhibit, a list of prescriptions dating back to 1999 that he requested be reimbursed. (R. p. 1093). Appellants should not be responsible for payment of these prescriptions as submitted by Respondent for several reasons:

First, it is impossible to tell from the list provided by the Respondent what these prescriptions are for, who they were prescribed by (authorized or unauthorized physician), and/or whether the prescriptions were needed as treatment for a causally related injury ordered compensable by Commissioner Childs and/or agreed to by the parties.

Secondly, the Respondent's wife testified at the hearing in 2011, that all of these prescriptions were paid for by their personal health insurance plan. (R. p. 489 lines 8-21). She further testified that neither she nor the Respondent ever sought authorization for payment of these prescriptions by the workers' compensation carrier although she obviously believed that her

(4) left eye¹; (5) left lower extremity; (6) left upper extremity; and (7) depression. Following Commissioner Childs' issuance of her Decision and Order in 2005, the parties resolved several of the appealed items from Commissioner Childs' Order and the appeal was withdrawn. Specifically, the Appellants agreed to accept the injuries to Respondent's brain, left knee, and left shoulder, and to provide medical treatment for same.

In exchange for the Appellants to accept these three (3) injuries and to provide medical treatment for same, as well as withdraw their Form 30, the Respondent executed a Form 17, acknowledging that he returned to work as of October 4, 2005. (R. p. 1241). Therefore, Appellants were able to stop TTD payments as of October 4, 2005. Accordingly, the 2005 Decision and Order of Commissioner Childs has been and remains the law of the case. Moreover, the Respondent has reached MMI for all admitted injuries based upon the opinions of the authorized treating physicians.

Therefore, pursuant to the doctrines of *laches* and *res judicata*, the Circuit Court erred in failing to find and conclude the Respondent is now barred from asserting he is entitled to compensation for these injuries. The doctrine of *res judicata* is based upon the principles that public interest requires an end to litigation and that no one should be sued twice for the same cause of action. Hayes v. Hayes, 312 S.C. 141, 439 S.E.2d 305 (Ct. App. 1993). In order for a claim to be barred pursuant to the doctrine of *res judicata*, three elements must be shown:

- (1) the prior judgment/order must be final, valid and on the merits;
- (2) the parties in the subsequent action must be identical to those in the first action; and
- (3) the second action must involve matters properly included in the first action.

See, Owenby v. Owens Corning Fiberglass, 313 S.C. 181, 437 S.E.2d 130 (Ct.App.1993).

¹ The eye is not a part of this claim as Claimant conceded on p. 47 of his 12/17/2004 deposition, that the alleged eye problems do not specifically adversely affect his vision. (See S. C. Code of Regs. § 67-1105 impairment ratings for the eye based on loss of vision) (R. p. 923).

1. Zygomatic Arch: This term refers to the part of the temporal bone of the skull that forms the prominence of the cheek (the cheekbone). Immediately following the work accident, the Respondent was seen at Palmetto Richland Health. On November 22, 1999, the date of the work accident, Respondent underwent a neurology consult which specifically found that based upon the CT scan of Respondent's head, he sustained a right frontal and *zygomatic/orbital* fracture, but that no surgery was necessary. (R. p. 1154).

Accordingly, as of the date of the accident on November 22, 1999, the Respondent had been diagnosed with a zygomatic arch fracture. While Respondent may not have been informed of the diagnosis on the date of the accident, the Respondent was made aware of this diagnosis prior to the January 2005 hearing, as Respondent submitted the records from Palmetto Richland Health from the date of the accident as part of his APA's for the Hearing on January 11, 2005. (See R. p. 96, Claimant's APA No. 8). Therefore, this claim should be barred by *res judicata*.

2. Thyroid/Hypothyroidism: At the Hearing before Commissioner Williams on February 6, 2011, the Respondent alleged for the very first time in this case that his hypothyroidism is causally related to his 1999 head injury. Hypothyroidism is a condition characterized by abnormally low thyroid hormone production. Thyroid hormones are produced by the thyroid gland which is located below the 'Adams Apple,' of the throat.

As evidenced by the medical documentation in the record, there was never any mention of Respondent injuring his thyroid in the 1999 accident. Instead, when Respondent started seeing family practitioners Drs. White and Wicker prior to 2005, for what Respondent described as "staggers," he was incidentally diagnosed with hypothyroidism and given medication for same beginning in at least 2005. However, on June 17, 2009, Dr. Wicker states that he wanted to test Respondent's T4 levels regarding the cause of his fatigue. (R. pp. 1014 – 15, Narrative Reports

from Dr. Ugino submitted into the record were submitted by Defendants as APA page #'s 293-296, which all reference Respondent's prior dislocations to his left shoulder. (R. p. 1189 -1193).

Furthermore, with regard to the statement by Respondent and his wife at the Hearing that claimant's "stagger" (which Respondent described as a feeling of dizziness upon standing up from a seated position) caused the Respondent to fall and injure his right hand, a review of the medical reports from HealthSouth indicate that other than Respondent's headaches and knee pain, "most of his other bothersome symptoms have improved." (R. p. 1040). Finally, the evidence in the record demonstrates that shortly before this alleged fall, Respondent's "staggers" had improved "in that when he changes posture and gets up, he feels steady and stable from the get-go." (R. p. 1040). In addition, in June of 1999, Respondent informed Dr. Wicker that he has not had any lightheadedness or dizziness since he began treatment for his unrelated hypertension. (R. p. 1014).

Accordingly, based upon evidence of record, the Appellants would respectfully show that the Circuit Court erred in affirming the finding that Respondent sustained a compensable injury to his index finger.

4. Hypothyroidism and Weight Gain:

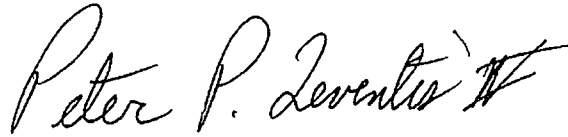
At the Hearing before Commissioner Williams on February 14, 2011, the Respondent alleged for the very first time in this case that his hypothyroidism is causally related to his 1999 head injury. The Finding relating to hypothyroidism is addressed in the prior section.

However, based upon the medical evidence in the record, the record also shows there has been no significant weight gain by Respondent and even if Respondent had gained significant weight, the evidence in the record does not support a finding that such weight gain was related to the 1999 work accident.

CONCLUSION

BASED ON THE FOREGOING, the Appellants respectfully request the Court of Appeals reverse the ruling of the Circuit Court as to finding that the Respondent is permanently totaled disabled under S.C. Code Ann. §42-9-10(C), and that the claim should be remanded as ordered to a single Commissioner for a determination of permanency pursuant to S.C. Code Ann. §42-9-30 and Reg. § 67-1101 for the schedule member injuries including Claimant's brain, and with further modifications as outlined herein above.

Respectfully Submitted,



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March 16, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case Nos.: 2012-CP-32-02093 & 2012-CP-32-02111

Ricky Kneece,

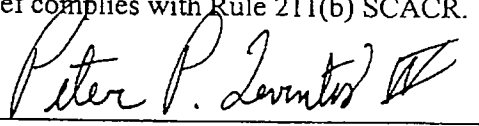
Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b) SCACR.



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Ricky Kneece,

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v.

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

Appellants

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE RESPONDENT SUFFER SEVERE AND PERMANENT PHYSICAL BRAIN DAMAGE TOTALLY AND PERMANENTLY DISABLING HIM WITH PHYSICAL BRAIN DAMAGE THAT IS COMPENSABLE PURSUANT TO S. C. CODE ANN. § 42-9-10(C)?
- II. DID THE RESPONDENT SUFFER A TOTAL LOSS OF EARNING CAPACITY NOTWITHSTANDING THE FINANCIAL SUPPORT OFFERED HIM BY HIS FAMILY FARM?
- III. DID THE CIRCUIT COURT CORRECTLY HOLD THAT THE RESPONDENT IS ENTITLED TO PAYMENT OF WEEKLY COMPENSATION FROM THE DATE OF THE 1999 ACCIDENT CONTINUING FOR LIFE AND THAT APPELLANTS HAD BEEN GIVEN ALL CREDITS TO WHICH THEY WERE ENTITLED?
- IV. DID THE CIRCUIT COURT CORRECTLY HOLD THAT THE APPELLANTS WERE RESPONSIBLE FOR PAYMENT OF RESPONDENT'S MEDICAL TREATMENT, MILEAGE AND PRESCRIPTION MEDICINE?
- V. DID THE CIRCUIT COURT CORRECTLY HOLD THAT THE RESPONDENT SUFFERED CAUSALLY RELATED AND COMPENSABLE INJURIES RELATED TO HIS BRAIN, HEAD, FACE AND FINGER?

STATEMENT OF THE CASE

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

After a hearing held January 11, 2005, the Hearing Commissioner Michelle Childs issued her order dated April 18, 2005, finding that the Respondent had suffered compensable injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, and teeth ("2005 Order"). The Hearing Commissioner also found that the Respondent also sustained compensable injuries to his left shoulder, left elbow and for depression (R. pp. 104-105; 2005 Order at pp. 10-11). The 2005 Order also found that as a result of his injury, the Respondent was diagnosed with conditions which include a closed head injury, chronic olecranon bursitis of his left elbow, intra articular left biceps tendon rupture, patello femoral syndrome of symptomatic plica, interior instability of the shoulder, diffuse cerebral edema with subarachnoid hemorrhage, neurocognitive deficits, left femoral condyle fracture, and a fracture of the nasal bridge and left nasal bone. The 2005 Order found that the Respondent was not at MMI (R. pp. 104-106; 2005 Order at pp. 10-12).

The 2005 Order held the Appellants responsible for treatment rendered by Dr. L. Randolph Waid, a licensed clinical psychologist, for Respondent's brain and head injury. In addition, the 2005 Order found the Respondent was entitled to future treatment for depression by Dr. Lawrence Bergmann as recommended by Dr. Waid and follow-up treatment with Dr. Waid

for Respondent's closed head injury. (R. pp. 106-107; 2005 Order at pp. 12-13).

While the Appellants appealed the 2005 Order, the parties reached a settlement of the issues on appeal whereby the Appellants commitment agreed to provide medical treatment authorized by the 2005 Order, and the Respondent agreed to try to return to work and to permit the Appellants to stop making temporary total disability payments holding all issues of temporary total disability and permanent disability in abeyance. (R. p. 1109; Elliott correspondence to Stubley dated September 27, 2005).

On or about July 9, 2010, the Respondent filed a Form 50 requesting a hearing seeking an Order of this Commission finding him to be permanently and totally disabled with physical brain damage compensable pursuant to S.C. Code Ann. § 42-9-10; Respondent sought all benefits to which he was entitled under the act. After a full hearing on all matters raised by the parties, by Order dated April 28, 2011, the Hearing Commissioner found the Respondent totally and permanently disabled with physical brain damage and ordered the Appellants to provide the Respondent with the relief afforded him under the Workers' Compensation Act for life (R. p. 58; 2011 Order).

In particular, the Hearing Commissioner found in his 2011 Order:

- (1) That the Respondent was permanently and totally disabled with physical brain damage pursuant to S. C. Code Ann. § 42-9-10 (C) (R. p. 85; 2011 Order at p. 28);
- (2) That the Respondent has not returned to work for the Appellant Kneece Farms and that the Respondent's employment on his family farm is sheltered employment, benevolent in nature (R. p. 86; 2011 Order at p. 29);
- (3) That the Respondent was permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation or any other kind of job or gainful employment on a reliable, sustained basis and that Respondent was unable to perform services other than those that are so limited in quality, dependability, and quantity as a reasonable, stable market for them does not exist (; R. p. 86; 2011 Order at p. 29);

- (4) That Respondent sustained causally related injuries to his left knee (10% impairment) (R. p. 87; Order 2011 at p. 30) and his left shoulder and elbow (17% impairment) (R. p. 87; 2011 Order at p. 30);
- (5) That the Respondent has benefited from the treatment of his physicians Drs. Bergmann, Deal, White, Wicker, Shissias and Ugino and that the Respondent will benefit from future treatment by these physicians (R. pp. 85-86; 2011 Order at pp. 28-29);
- (6) That the Appellants failed to pay for all medications in the amount of \$14,010.77 prescribed by Respondent's physicians as required by Commission Order; (R. p. 87; 2011 Order at p. 30);
- (7) That the Respondent had accumulated mileage to which he was entitled reimbursement. (R. p. 87; 2011 Order at p. 30).

The Hearing Commissioner concluded that the Respondent was totally and permanently disabled with physical brain damage and entitled to treatment for his injuries by Drs. Bergmann, Deal, White, Wicker, Shissias, and Ugino, together with payment of and reimbursement for related medical treatment, prescriptions and mileage. The Commissioner concluded that the Respondent suffered a loss of earning capacity. Giving the Appellants all credit for temporary total disability benefits paid to the Respondent, the Commissioner awarded the Respondent benefits for life as provided by S. C. Code Ann. § 42-9-10(C) (R. pp. 90-92; 2011 Order at pp. 33-35).

The Appellants appealed the Hearing Commissioner's 2011 Order to the Full Commission. By order dated April 19, 2012, the Full Commission reversed the Hearing Commissioner's finding that the Respondent had suffered a physical brain damage (2012 Order). In particular, the Full Commission found as follows:

The Commissioners find a Claimant who can drive a "complicated" computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury. The Claimant sustained an injury pursuant to Regulation 67-1101. (R. p. 56; 2012 Order at page 10).

Based on its finding, the Full Commission reversed the findings of fact and conclusions of law of the Hearing Commissioner in his 2011 Order that the Respondent was totally disabled accompanied by physical brain damage pursuant to S. C. Code Ann. § 42-9-10(C). The Commission concluded that the Respondent sustained an injury pursuant to Regulation 67-1101. The Full Commission affirmed all other findings of fact and conclusions of law set out in the Hearing Commissioner's 2011 Order.

The Respondent filed and served his notice of intent to appeal the 2012 Order of the Full Commission to the Clerk of Court for Lexington County May 18, 2012. On May 21, 2012, the Appellants filed and served their petition for judicial review of the 2012 Order. After a hearing held March 20, 2013, the Honorable R. Knox McMahon reversed the Full Commission by order dated July 18, 2013 holding that the evidence of record was only capable of the inference that the Respondent was totally and permanently disabled with physical brain damage and awarded the Respondent benefits to which he was entitled under the Workers Compensation Act. The Circuit Court dismissed the Appellants' appeal. By order dated April 24, 2014, the Circuit Court denied the Appellants' Rule 59(e) motion to alter or amend judgment.

By notice of appeal dated June 2, 2014, the Appellants appealed the Circuit Court's April 24, 2014, order to the South Carolina Court of Appeals.

STATEMENT OF FACTS

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

(R. p. 433, l. 7 – p. 435, ll. 6-11; 2011 Hearing Tr. p. 44, l. 7 – p. 46, ll. 6-11).

Physical Brain Damage. It is undisputed that the Respondent suffered a permanent and severe head and brain injury. As characterized by the Hearing Commissioner, the 2005 Order sets forth the evidence of the Respondent's admitted physical brain damage as follows:

Both Dr. Lenwood Smith, a neurologist, and Dr. Randolph Waid, a clinical psychologist opined that the Respondent suffered injuries to his head and brain creating mental and emotional deficits which would cause Respondent difficulties in coping with everyday life. Dr. Smith noted in his report dated September 30, 2001....

that the Respondent's injuries, both permanent and severe, interfere with his abilities to operate equipment safely or enjoy farming or recreation. (R. p. 102; 2005 Order at p. 8).

The Commissioner found:

9. That as a result of his injury, the Respondent was diagnosed with conditions, including a closed head injury, chronic olecranon bursitis of his left elbow, intraarticular left biceps tendon rupture, patellofemoral syndrome of symptomatic plica, anterior instability of the shoulder, diffuse cerebral edema with subarachnoid hemorrhage, neurocognitive deficits, left femoral condyle fracture and a fracture of the nasal bridge and left nasal bone. (R. p. 105; 2005 Order at p. 11).

The Commissioner ordered as follows:

4. That the Defendants are responsible for treatment for the Respondent's closed head injury and depression including all past treatment by Dr. Waid and for all future treatment including that from Dr. Waid and his referral to Dr. Larry Bergmann. (R. p. 107; 2005 Order at p. 13).

The 2005 Order constitutes the law of the case and is binding on the parties.

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

"[Respondent] . . . was very severely injured when he had a compression-type truck wheel blow apart and strike him in the head. He had injuries to the right frontal pole, diffuse cerebral edema was seen, he had

subarachnoid hemorrhage across the tentorium, and a left tentorial subdural hematoma. He had high right posterior frontal epidural and very thin bilateral convexity subdural hematomas. He had a left posterior frontal parasagittal contusion." (R. p. 1046; Claimant's APA 11 at p. 202).

Dr. Smith further opined that:

[Respondent's] problems **are severe and will be permanent**. I agree that their concerns are well founded. These concerns can be summarized by saying that Mr. Kneece may no longer be able to be the same competitive businessman that he would have been in the past and our society and culture has provided for these people to be compensated. [Emphasis added] (R. p. 1047; Claimant's APA 11 at p. 203).

Dr. Carl A. White confirmed the Respondent's physical brain damage. From an MRI taken in 2007, Dr. White, found a 32 x 43 mm area in the Respondent's right frontal lobe which Dr. White found compatible with encephalomalacia (or softening of the brain) related to the Respondent's 1999 head injury and skull fracture. In essence, Dr. White found a dead zone in the Respondent's brain. Dr. White opined in 2007 that the Respondent's hypothyroidism was related to his head trauma. Further, Dr. White opined that Respondent's hypothyroidism was related to pituitary insufficiency and results in lethargy, weight gain, and general lack of energy and desire. Moreover, Dr. White confirmed that the Respondent's emotional changes and memory loss were related to his head trauma and frontal lobe damage. After his diagnosis, Dr. White began treating Respondent for his hypothyroidism and headaches with medication (R. p. 1027; Claimant's APA 9). Dr. Christopher Wicker has now succeeded Dr. White as Respondent's family physician (R. p. 1014; Claimant's APA 8). Dr. Wicker continues to treat the Respondent for his injuries.

In 2010, Dr. Charles Shissias, a neurologist, began treating the Respondent for chronic daily headaches, memory loss and depression arising from Respondent's 1999 accident. Dr. Shissias concluded that the Respondent was suffering from Organic Brain Syndrome secondary

to traumatic brain injury which Respondent suffered when he was hit with the locking ring tire and experienced an injury to his right frontal lobe and a right supra orbital fracture. Dr. Shissias also found that the Respondent has fragmented sleep, chronic daily headaches, and chronic mood disturbance. In fact, Dr. Shissias found that the Respondent was unable to make major decisions without input from his wife and that without her, the Respondent would require a legal guardian or payee to manage his affairs. Dr. Shissias is treating the Respondent with medication (R. p. 855; Claimant's APA 2).

The Respondent has benefited from the treatment by Dr. Shissias and further treatment was warranted. Dr. Shissias states that the Respondent is responding to treatment (R. p. 855; Claimant's APA 2). Mrs. Kneece testified that Dr. Shissias' treatment for the Respondent's headaches and depression was of benefit to the Respondent. (R. p. 472, l. 17 – p. 473, l. 14; 2011 Hearing Tr. p. 83, l. 17 – p. 84, l. 14).

Dr. L. Randolph Waid, a licensed psychologist, performed neuropsychological evaluations in 2007 and 2002. Dr. Waid determined that radiographic studies conducted at the time of the Respondent's injury revealed disruptive physical injury to the brain. Dr. Waid further concluded that the Respondent had a full scale IQ of 76 and continued as a result to experience difficulties with sustaining attention, concentration, and suffered from slowed mental processing speed. In particular, Dr. Waid described the impact of the Respondent's brain and head injury as follows:

Mr. Kneece's intellectual functioning is in the low average range. Neurocognitive evaluation revealed Mr. Kneece to continue to experience difficulties with the effective sustainment of attention/concentration and slowed mental processing speed. Assessment of anterograde memory continued to reveal a lateralized pattern of impairment as Mr. Kneece continues with difficulties with immediate visual learning/memory capacities. There is also continuing impairment of visual spatial skills compared to estimates of his premorbid level of functioning. Mr. Kneece

continues to demonstrate mild executive dysfunction both with regard to cognitive and emotional/psychological functioning.

Assessment of emotional/psychological functioning revealed Mr. Kneece to continue with social executive changes to his personality that are common after a traumatic brain injury, particularly when there is injury to the anterior portion of the brain. He is assessed as experiencing disruptive difficulties associated with apathy, executive dysfunction, and disinhibition/emotional dysregulation. Overall, he is more irritable, with lower frustration tolerance and remains quite withdrawn with regard to social and recreational pursuits. (R. p. 867; Claimant's APA 3).

As a result of his evaluation, Dr. Waid made the following assessment of the Respondent:

Axis I

Cognitive Disorder NOS (294.90) secondary to the sustainment of a traumatic brain injury

Personality change labile/apathetic type (DSM-IV 310.10) due to sustainment of a traumatic brain injury

Axis III

Status post traumatic brain injury; headaches; residual pain and discomfort affecting the left knee and left shoulder

Based on his evaluation, Dr. Waid opined that as a result of his neurocognitive impairments resulting from a severe traumatic brain injury, the Respondent was assessed as having a Class 2 impairment to the whole person with a 22% impairment as a result of his neurocognitive deficits (R. p. 868; Claimant's APA 3).

Dr. Lawrence H. Bergmann, PhD and Dr. Roger W. Deal, MD have treated the Respondent since March of 2005 and corroborate the opinion of Dr. Waid. Dr. Bergmann, a psychotherapist, treats the Respondent for headaches, sleep loss, dizziness, fatigue, irritability, memory impairment, anger and depression. Dr. Deal similarly treats the Respondent for sleep disturbance, headaches, poor concentration, memory loss, loss of interest, irritability, fatigue and depression. In addition, Dr. Deal treats the Respondent with various medications for his symptoms and illness. Dr. Bergmann found the Respondent at maximum medical improvement in January of 2007. Dr. Bergmann found that Respondent continued to have symptoms of

dysphoria, difficulties adjusting to his cognitive disability, irritability and withdrawal and symptoms consistent with the head injury (R. p. 878 and p. 919; Claimant's APA 4 and 5). Both Dr. Bergmann and Dr. Deal opined that the Respondent experienced an 11% whole person, permanent impairment (R. p. 1210; Bergmann corres. dated January 11, 2007). However, Drs. Bergmann and Deal opined in 2007, and again as recently as September of 2010, that the Respondent will require the use of psychotropic medication and medication management as long as he is experiencing chronic pain and cognitive difficulties. Dr. Bergmann further opined in September of 2010 that the Respondent will require the use of psychotropic medication for the foreseeable future (R. p. 878; Claimant's APA 4).

Both the Respondent and his wife testified that the Respondent has benefited from the treatment of Drs. Deal and Bergmann but that the Respondent was in need of additional medical treatment by Drs. Deal and Bergmann. (R. p. 470, ll. 14-18; 2011 Hearing Tr. page 81, lines 14-18). Mrs. Kneece explained that the Respondent sought to be reimbursed for all prescriptions purchased in treating the Respondent's injuries. In particular, Mrs. Kneece testified that the Carrier has not reimbursed the Respondent for prescriptions purchased since 2005. (R. pp. 1094 - 1102; Claimant's Exhibit E-2; R. p. 470, l. 19 – p. 472, l. 5; 2011 Hearing Tr. page 81, lines 19 - page 83, line 5).

Importantly, the Appellants' clinical psychologist Tora Brawley, PhD, after performing a neuropsychological evaluation of the Respondent in January of 2011, concluded that the Respondent suffered from several vegetative symptoms, chronic pain, and stressors. In fact, Dr. Brawley concluded that the Respondent was not at maximum medical improvement with regard to his vegetative symptoms such as fatigue, weight gain, decreased energy level, loss of interest in recreational activities, feelings of depression, feelings of anxiety, increased irritability, and

decreased frustration tolerance. Dr. Brawley's findings corroborate those of Dr. Waid, Dr. Bergmann, Dr. Deal, Dr. White, and Dr. Shissias, all of whom have treated or continue to treat the Respondent for his physical brain damage. Moreover, Dr. Brawley accepted Dr. Waid's test results reflecting that the Respondent had a full-scale IQ of 76. Last, Dr. Brawley concluded that the Respondent would benefit from continued treatment for his personality and psychological symptoms for which he is being treated by his physicians. (R. p. 1237; Defendants' APA 13).

Left Arm and Leg Injuries. Complicating his permanent and severe physical brain damage, the Respondent's left side was severely injured in the tire explosion as well. The Respondent sustained an injury to his left knee; his injuries to his left knee were so severe as to require two (2) surgeries and as a result of Respondent's injuries, Dr. James O'Leary assigned a 10% impairment rating to the Respondent's lower left extremity (R. p. 998; Claimant's APA 7). The Respondent also suffered a causally-related injury to his left shoulder and elbow. These injuries were so severe as to require two (2) surgeries as well. As a result of these injuries, Dr. Michael Green assigned a 17% impairment to the Respondent's upper left extremity (R. p. 946; Claimant's APA 6).

Further, the Respondent's unsteadiness or staggers have led to further injury. In November of 2010, the Respondent became dizzy and suffered a fall requiring treatment from Dr. Michael R. Ugino for a left hand injury. (R. p. 412, l. 12 – p. 413, l. 6; 2011 Hearing Tr. page 23, line 12 - page 24, line 6). Mrs. Kneece testified that Dr. Ugino treated the Respondent for his left hand injury in November of 2010. (R. p. 473, l. 25 – p. 474, l. 9; 2011 Hearing Tr. page 84, line 25 - page 85, line 9). Both the Commission and Circuit Court ordered the Appellants to provide the Respondent with treatment by Dr. Ugino.

Mrs. Kneece explained that the Respondent had not been reimbursed for mileage and that

the Respondent is seeking reimbursement of the mileage found on Respondent's Exhibit 1. Mrs. Kneece testified that she had calculated the amount of mileage due to date and requested reimbursement for any mileage from the date of the hearing forward. (R. p. 1093; Claimant's Exhibit-1; R. p. 472, ll. 6-16; 2011 Hearing Tr. page 83, lines 6-16).

Loss of Earning Capacity. Dr. William W. Stewart, a Board-Certified vocational rehabilitation counselor, recognized that the Respondent enjoyed a "benevolent and sheltered employment situation" and opined that, "In an open, competitive labor market [the Respondent] would find himself vocationally disabled and unable to work gainfully." (R. p. 843, 846; Claimant's APA 1).

Dr. Stewart opined as follows:

.....based on Mr. Kneece's original and update (sic) vocational and rehabilitation evaluations it is concluded that to a reasonable degree of vocational and rehabilitation certainty he is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable sustained basis. (R. p. 846; Claimant's APA 1).

Dr. Stewart, who evaluated the Respondent in 2004 and again in September of 2010, explained his opinion as follows:

This vocational opinion is consistent with the mental, emotional and physical problems and limitations and the combination of those mental/cognitive, emotional and physical conditions and the findings and opinions contained in the medical/neurological/psychiatric/professional/trauma counseling records, the number of years/length of time his problems and limitations have continued, the multiple prescribed medication he continues to have to take, the deterioration in his overall ability to work and be productive and need for help from others, and Dr. Shissias' statement concerning "...He is unable to make major decisions without input from wife, his primary caregiver. Believe that without her, he would require legal guardian or payee to manage his affairs..." (R. p. 846; Claimant's APA 1).

Dr. Stewart recommended that the Respondent continue with "medical care, medical pain management care, neurological care, psychiatric care and professional/trauma counseling care, continue prescribed medications, and medical case management services to coordinate his care/needs." (R. p. 846; Claimant's APA 1).

The Family Farm. The Respondent was injured while working for the Appellant Kneece Farms. Kneece Farms was owned by the Respondent's uncle Everett Kneece. In addition to his work for the Appellant, the Respondent also worked on his family farm, Delano R. Kneece and Son, Inc. The Respondent has not worked for the Appellant Kneece Farms since the accident (R. pp. 98-99; 2005 Order at pp. 4-5).

Delano R. Kneece & Son, Inc. operates a farm on approximately 2,000 acres in Lexington County. Delano R. Kneece & Son, Inc. is a corporation owned by the Respondent, his father, Delano R. Kneece, and other family members (Depos. of Roxanne Kneece at p. 13; R. p. 510). The Respondent's wife, Roxanne Kneece, is the corporate treasurer and bookkeeper and works on the family farm (R. p. 433, l. 17 – p. 434, l. 24; 2011 Hearing Tr. p. 44, l. 17 – p. 45, l. 24). Prior to his accident, the Respondent was a general decision-maker for Delano R. Kneece & Son, Inc. The Respondent lives on the Delano R. Kneece & Son, Inc. farm (the family farm). His home is steps away from the farm, fields and shops (R. p. 445, ll. 3-15; 2011 Hearing Tr. p. 56, ll. 3-15). After his accident, the Respondent was no longer able to perform the chores required by the family farm.

The Respondent. The Respondent's 1999 injuries affected his physical strength, his memory and his temperament. The Respondent's forgetfulness interfered with his ability to seek and obtain medical treatment. The Respondent is unable to remember the nature of his treatment and the instructions given him by his physicians. (R. p. 441, ll. 1-7; 2011 Hearing Tr. page 52, lines 1-7).

The Respondent's memory loss has affected his ability to farm effectively. A farmer must be able to manage the farm's finances. A farmer must be able to determine the appropriate crops to be planted, the appropriate pesticides and fertilizer to be applied. A farmer must be able

to calculate the amount of seed to be planted and pesticide and fertilizer to be broadcast. A farmer must be able to calibrate and repair the equipment. He must be able to drive a farm tractor and other equipment to plant the seed or broadcast the fertilizer or pesticide. A farmer must be able to operate irrigation equipment. The Respondent's memory does not permit him to perform these tasks. (R. p. 441, l. 8 – p. 443, l. 2; 2011 Hearing Tr. p. 52, l. 8 – p. 54, l. 2). The Respondent can no longer program or adjust the irrigation equipment so as to avoid repetition or excess watering. (R. p. 406, ll. 13-23; 2011 Hearing Tr. page 17, lines 13-23).

Prior to Respondent's accident, he was able to perform very physical farm chores which required climbing, stooping, lifting and bending. He had no limitations in this regard. His chores would include climbing grain bin legs, performing irrigation duties, and doing roof work. The Respondent was able to climb sheds in need of repair. He was able to climb elevator legs which are 200 feet tall. The Respondent was able to stoop and bend. A farmer or farm hand must be able to crawl under farm implements and behind tractors to repair or adjust them. A farmer must be able to stoop to get around grain facilities and unloading facilities. The Respondent was able to stoop so as to get under farm implements or behind the tractor and make repairs or to get around grain facilities and unloading facilities. The Respondent had no restrictions on the use of farm equipment. The Respondent's physical injuries no longer permit him to perform these farm chores. (R. p. 404, l. 7 – p. 405, l. 9; 2011 Hearing Tr. page 15, line 7 - page 16, line 9).

The Respondent is unable to stay focused on a task. He will spend hours on the cell phone talking with others or visiting with a stranger that may come by the farm. His time spent on the farm is not productive for the farm. (R. p. 445, l. 16 – p. 446, l. 9; 2011 Hearing Tr. page 56, line 16 - page 57, line 9).

The Respondent is no longer able to manage the farm's finances or his own. Prior to the

accident, the Respondent understood the family farm's revenue and expenses, deliveries and inventory and the family farm's financial position. He is no longer able to do so. Often, Delano R. Kneece & Son, Inc. will order farm supplies for smaller neighboring farms and advance payment for these supplies. The neighbors will reimburse the farm for these supplies. As a result of his injury, the Respondent will forget to bill his neighbors for these supplies, and it is only by virtue of the honesty of these neighbors to volunteer repayment that the farm gets reimbursed. The Respondent's forgetfulness has almost certainly caused loss to the farm. Dr. Shissias affirms the fact that the Respondent can no longer manage his finances. (R. p. 443, l.14 - p. 445, l. 2; 2011 Hearing Tr. page 54, line 14 - page 56, line 2).

The Respondent cannot effectively calculate or broadcast chemicals, seeds or fertilizer. An appropriate amount of seed must be planted and were the fertilizer to be misapplied, the crops could be damaged or killed. These chemicals are expensive and in the event the Respondent misjudges what to plant or how to fertilize, he would not only waste the costly chemicals but also damage the crop. The Respondent is no longer able to perform these functions, and they are carried out by another. (R. p. 441, l. 19 - p. 443, l. 8; 2011 Hearing Tr. page 52, line 19 - page 54, line 8).

The Respondent can no longer safely operate most farm equipment. There are certain farm implements which the Respondent's family refuses to allow him to operate. However, to permit the Respondent to participate on his farm, the family farm has purchased a fully-automated tractor complete with a GPS device, programmed planting devices and alarm systems which the Respondent is permitted to drive. However, another farm hand must follow the Respondent to the field he is to work. A farm hand must program the GPS equipment and computer. Once at the field on the pre-programmed tractor, the Respondent "mashes" a button

and the tractor plows the fields using the GPS coordinates. The equipment prompts the Respondent turn the steering wheel to turn the tractor when necessary. The Respondent need not perform any other functions while driving the tractor. Even then, the Respondent makes costly mistakes. Farm hands must often go back to the field and re-plow where the Respondent has misused the computerized equipment. If the tractor loses the GPS satellite signal, the Respondent is unable to reestablish contact with the satellite, and a farm hand must recalibrate the GPS equipment. The tractor is completely mechanized and requires no physical exertion to drive. While, the Respondent may be permitted by his family to drive a tractor for up to 5 to 7 hours at a time during unusual planting or harvesting, the Respondent's family has accommodated him by going to what would otherwise be unnecessary expense to permit him to attempt some farming chores thus allowing some dignity and self-worth. (R. p. 447, l. 6 – p. 452, l. 1; 2011 Hearing Tr. page 58, line 6 - page 63, line 1; R. p. 513, l. 14 – p. 515, l. 13; Roxanne Kneece depositions p. 16, l. 14- p. 18, l. 13).

The family farm has taken additional measures to accommodate the Respondent's inability to farm. The farm has bought a corn dryer which is operated by the push of a button which the Respondent is capable of operating. However, the corn dryer is also equipped with an alarm which shuts off the dryer and notifies others on the farm when the Respondent has experienced a problem operating the corn dryer. These devices are as foolproof as humanly possible. (R. p. 452, l. 5 – p. 453, l. 13; 2011 Hearing Tr. page 63, line 5 - page 64, line 13).

In addition to equipment purchases made to accommodate the Respondent's mental and physical infirmities, additional farm hands have been employed to do the work that the Respondent was able to do prior to his accident but can no longer perform. After the accident, the Respondent's son, Kain Kneece, was employed to work full time on the farm. Kain Kneece

performs 95% of the duties that the Respondent performed prior to his accident. (R. p. 454, l. 7 – p. 455, l. 15; 2011 Hearing Tr. page 65, line 7 - page 66, line 15). Although he retired, the Respondent's father, Delano Kneece, continues to work on the family farm. Since the Respondent's accident, the family farm has been forced to employ farm hands on temporary part time and full time bases to make up for the Respondent's inability to perform as a farmer. (R. p. 460, l. 21 – p. 464, l. 9; 2011 Hearing Tr. page 71, line 21 - page 75, line 9; R. p. 1118; Respondent's Ex. 4). These farm hands have been hired to help with fencing, electrical work, weed pulling, truck driving, shop work on equipment, cattle vaccination and records, and making sure everything runs smoothly when Respondent is in the field. (R. p. 462, l. 8 – p. 464, l. 9; 2011 Hearing Tr. page 73, line 8 - page 75, line 9). In particular, the farm employed Willie Dobbs to take over many of the Respondent's responsibilities. For instance, Mr. Dobbs drives tractors, spreads chicken manure, spreads fertilizer, sprays, feeds cows, helps dry corn, helps harvest and dry peanuts, and helps harvest cotton. In other words, Mr. Dobbs performs farm chores that the Respondent could perform without help prior to the accident. (R. p. 487, ll. 8-19; 2011 Hearing Tr. page 98, lines 8-19).

The Respondent attempts to help with the cattle. Whereas before the accident, the Respondent could give the cattle shots and vaccinations by himself, after the accident other farm hands must help perform these chores. The Respondent cannot remember how much medicine is required for the shots or which cows he has vaccinated. At times, four or five farm hands might help the Respondent give the shots to the cattle; a chore Respondent could perform by himself before the accident. In fact, there are occasions when the farm hires farm hands simply to watch the Respondent in the field. (R. p. 464, ll. 1-20; 2011 Hearing Tr. page 74, lines 1-20).

Respondent's physical brain damage has affected his temper. Before the accident, the

Respondent was mild-mannered. Since the accident, Respondent has developed a "very short fuse." The Respondent's temper was so bad that he alienated his oldest son, other family members, and people around him. Indeed, the Respondent was almost arrested for an outburst against the County Fire Marshal. Treatment by Drs. Bergmann and Deal has helped the Respondent control his anger. (R. p. 438, l. 1 – p. 439, l. 15; 2011 Hearing Tr. page 49, line 1 - page 50, line 15).

Since his accident, the Respondent has been unable to get a good night's sleep. The Respondent yells in his sleep, has nightmares, he jumps, jerks twitches and falls off the bed; he never has a restful night. Drs. Deal and Shissias are trying to treat this Respondent for the causes of his fitful sleep, and their treatment has been somewhat helpful. (R. p. 439, l. 25 – p. 440, l. 17; 2011 Hearing Tr. page 50, line 25 - page 51, line 17).

Prior to the accident, the Respondent was energetic and active. However, he has become lifeless since his accident. He is also depressed. Drs. Deal, Bergmann, and Shissias are working with the Respondent to address his depression. (R. p. 446, l. 10 – p. 447, l. 2; 2011 Hearing Tr. page 57, line 10 - page 58, line 2).

Sheltered Employment. Farming is very strenuous; however, the Respondent is no longer able to farm. The Respondent's wife, who the Hearing Commissioner found to be a very credible witness, described the Respondent to be a completely different man after his accident than he was prior to his accident. It was only with great difficulty that the Respondent's wife was able to describe the Respondent and his weaknesses which resulted from the accident. The Respondent's wife testified, "I was married to one man for 17 years. I'm married to a totally different man now. Same body. There's a shell there but there's not a person. And it's hard. Excuse me. And it really hurts to have to talk about him in front of him. His dignity is worth

something." (R. p. 438, ll. 9-11; 2011 Hearing Tr. page 49, lines 9-11).

The Respondent is paid \$4,175 per month by the family farm. The Respondent has no idea what he is paid or how his check is calculated. The Respondent's check is not calculated based on performance. The Respondent's father directs Mrs. Kneece, the bookkeeper for the family farm, to write the Respondent's check and in what amount. (R. p. 458, ll. 2-25; 2011 Hearing Tr. p. 69, ll. 2-25; R. p. 492, l. 20 – p. 494, l. 12; p. 103, l. 20 – p. 105, l. 12). In addition, the Respondent's father directs Mrs. Kneece to write a check to the Respondent for a dividend or bonus for the purpose of providing the Respondent with the ability to make payments on additional land purchased by the farm. (R. p. 460, ll. 7-16; 2011 Hearing Tr. p. 71, ll. 7-16). In order to afford to make these payments, the Respondent's father, Delano Kneece, who retired after the Respondent's accident in 1999, reduced his pay by approximately half so the Respondent might be paid that amount notwithstanding his inability to farm. In addition, the Respondent's mother retired from her employment on the family farm and her salary was put back into the farm budget. The Respondent's father's justification for these monthly payments is because "we love him that much". In fact, the Respondent's wife writes the check and deposits it; the Respondent never sees it. These payments are made out of love and affection for the Respondent by his family. (R. p. 456, l. 4 – p. 460, l. 18; 2011 Hearing Tr. page 67, line 4 - page 71, line 18; R. p. 468, ll. 13-17; 2011 Hearing Tr. p. 79, lines 13-17). Mrs. Kneece describes these payments as a "love offering." (R. p. 507, l. 14 – p. 508, l. 22; Roxanne Kneece depos. p. 10, l. 14 - p. 11, l. 22).

To increase farm revenues so as to have the financial resources to accommodate the Respondent's loss of productivity resulting from his injuries, the family farm determined to stop planting less productive crops such as soybeans and wheat and to grow peanuts which are more

productive. Whereas prior to his accident the Respondent was able to make all such production decisions, after the accident and because of the Respondent's incapacity, the family farm hired a grain broker to assist in making marketing decisions. (R. p. 457, l. 8 – p. 458, l. 5; 2011 Hearing Tr. page 68, line 8 - page 69, line 5).

The job market in farming is very competitive. With the availability of migrant farm workers and others, the Respondent cannot compete for these farm jobs or any farm jobs in today's market. Moreover, no employer would tolerate the lack of productivity, errors, and costs such as those caused on the family farm by the Respondent. (R. p. 465, l. 25 – p. 468, l. 4; 2011 Hearing Tr. page 76, line 25 - page 79, line 4). It is clear that the Respondent could never compete in the job market for farm positions and that the family farm would never hire a stranger with the Respondent's disabilities. (R. p. 468, l. 25 – p. 469, l. 21; 2011 Hearing Tr. page 79, line 25 - page 80, line 21).

When asked to explain why the Respondent's family has incurred the additional cost and expense of farm equipment and farm help, the Respondent's wife explained that the Respondent's family had gone to great cost so that "Ricky's dignity can be saved. The work has to get done. He can't do it. So, we hire people to help us get it done. And he sort of hangs out with them." (R. p. 468, ll. 13-17; 2011 Hearing Tr. page 79, lines 13-17).

ARGUMENT

STANDARD OF REVIEW

The Administrative Procedures Act (the APA) “governs appellate review of a final decision from an administrative agency.” Hill v. Eagle Motor Lines, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007) *see* S.C. Code Ann. §§1-23-310, et. Seq. Under the APA, this Court “may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.” S.C. Code Ann. § 1-23-380 (A)(5); Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 442 (2000). It is not within the appellate court’s province to reverse the Full Commission’s factual findings if they are supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. The Full Commission’s factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Houston v. Deloach & Deloach, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008). Moreover, the court may reverse the Commission decision if the substantial rights of the Respondent have been prejudiced because the Commission’s findings, inferences, conclusions or decisions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Beckman v. Sysco Columbia, LLC., et al., 408 S.C. 501, 759 S.E.2d 750 (Ct. App. 2014). See also Crisp v. SouthCo. Inc. and Pennsylvania National Mutual Casualty Insurance Co., 401 S.C. 627, 738 S.E.2d 835 (2013). Where the evidence of record is susceptible of but one

reasonable inference, the question is one of law for the court, rather than one of fact for the Commission. Moreover, if the Commission's finding of facts are based on surmise, speculation or conjecture, the issue becomes one of law for the court. Sharpe v. Case Produce Company, 329 S.C. 534, 495 S.E.2d 790 (Ct. App. 1998); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995);

ARGUMENT I

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

The Workers' Compensation Commission found that: "a Claimant who can drive a 'complicated' computer-operated tractor for fifty hours per week has not sustained a physical brain injury. The Respondent sustained an injury pursuant to Regulation 67-1101." (R. p. 56; 2012 Order page 10). There is no evidence in the record to support the Commission's finding. Instead, the reliable, probative and substantial evidence of record compels the conclusion that the Respondent is totally and permanently disabled with physical brain damage compensable pursuant to S. C. Code Ann. § 42-9-10(C) and the Circuit Court so concluded. For the reasons set out, the Order of the Circuit Court should be affirmed.

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

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

The statute makes no exceptions.

Construing S. C. Code Ann. § 42-9-10(C), the Supreme Court explained:

S. C. Code Ann. § 42-9-10(C) awards lifetime benefits for totally disabled Respondents suffering “physical brain damage” as an exception to the normal five-hundred-week limitation along with only two other conditions: paraplegia and quadriplegia. Thus, the context implies the General Assembly meant to require severe, permanent impairment of normal brain function in order for an injured worker to be deemed physically brain damaged under S. C. Code Ann. § 42-9-10(C).

Sparks v. Palmetto Hardwood, Inc. and Palmetto Timber S.I Fund, 406 S.C. 124, 129; 750 S.E.2d 61 (2013).

In explicating upon its decision in Sparks v. Palmetto Hardwood, Inc., the Supreme Court in Crisp v. SouthCo. Inc., *supra*, relying on S.C. Code Ann. §42-9-400(d) which addresses brain damage as a permanent physical impairment, concluded that to be compensable pursuant to S.C. Code Ann. § 42-9-10(C), the physical brain damage must be “severe.” The Court held that a worker with severe physical brain damage must be unable to return to suitable gainful employment. S.C. Code Ann. § 42-9-400(d) defines “permanent physical impairment” as follows:

As used in this section, ‘permanent physical impairment’ means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a **hindrance or obstacle to obtaining employment or to obtaining reemployment** if the employee should become unemployed. S.C. Code Ann. § 42-9-400(d) [Emphasis added]

Crisp v. SouthCo. Inc. and Pennsylvania National Mutual Casualty Insurance Co., 738 S.E.2d at 642.

The statute does not require total and permanent disability to be solely the result of the physical brain damage. Pearson v. JPS Converter and Indus. Corp., 327 S.C.393, 489 S.E.2d 219 (Ct. App. 1996). If the Respondent's physical brain damage combines with the Respondent's other injuries and characteristics to totally and permanently disable him under the Workers' Compensation Act ("the Act"), he is entitled to lifetime benefits under S.C. Code Ann. § 42-9-10(C).

The holding in Crisp v. Southco. Inc., is consistent with existing case law which provides that total disability does not require complete abject helplessness; rather total disability is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable job market exists for them. McCollum v. Singer, Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989); Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). The mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996) [recognizing that wages earned by Respondent totally and permanently disabled by virtue of paraplegia is not necessarily evidence of earning capacity; see footnote (2) at 473 S.E.2d 703]. In Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993), the Court recognized that a Respondent who was totally and permanently disabled as a result of an injury to his back may continue to work notwithstanding a finding of total and permanent disability.

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

The medical evidence, when viewed from the record as a whole, compels the finding that the Respondent suffered physical brain damage resulting in severe and permanent impairment of his normal brain function. Dr. Smith, the treating neurologist, found that the impact to the Respondent from his physical brain damage **was severe and permanent**. Dr. Smith concluded that the Respondent would no longer be the "same competitive businessman" that he would have been prior to his accident. Moreover, Dr. Smith opined that the Respondent's social skills and ability to interact with others would be adversely affected by the Respondent's injuries. Dr. Carl White, the Respondent's internist, diagnosed the Respondent to have suffered from a mass of soft tissue or dead zone in his brain. In particular, from an MRI taken in 2007, Dr. White found a 32 x 43 mm area in the Respondent's right frontal lobe compatible with encephalomalacia or a softening of the brain tissue. In addition, Dr. White opined that the Respondent's hypothyroidism was related to his head trauma resulting in lethargy, weight gain and general lack of energy and desire. Moreover, Dr. White confirmed that the Respondent's emotional changes and memory loss were related to his head trauma and frontal lobe damage.

Having performed his neuropsychological evaluations, Dr. Waid found the Respondent to have suffered from a physical injury to the brain and diagnosed the Respondent as suffering from cognitive disorder, personality change and headaches resulting from severe traumatic brain injury. Dr. Waid, who conducted a battery of tests on the Respondent, concluded that the Respondent who functioned in the low average IQ range would have difficulties concentrating, memory impairment, and dysfunction in regard to both cognitive and emotional/psychological function. Dr. Waid assessed a 22% impairment to the whole person as a result of the Respondent's traumatic brain injury. Similarly, Dr. Larry Bergmann and Dr. Roger Deal treated the Respondent for headaches, sleep loss, dizziness, fatigue, irritability, memory impairment,

anger and depression from 2005 to the date of the hearing below and recommended ongoing treatment for the Respondent. Dr. Bergmann assigned an 11% whole person impairment to the Respondent. In 2010, Dr. Shissias, a neurologist, began treating the Respondent for chronic daily headaches, memory loss and depression arising from Respondent's 1999 accident. Dr. Shissias, who is of the opinion that the Respondent is suffering Organic Brain Syndrome secondary to traumatic brain injury, finds that the Respondent is unable to make major decisions without input from his wife and that without her, the Respondent would require a legal guardian to handle his financial affairs.

The Appellants point to the opinion of Dr. Julian Adams who reported no evidence of physical brain damage. Dr. Adams saw the Respondent on only two occasions. Dr. Adams concedes that he "did not perform extensive psychological testing" to ascertain the existence of physical brain damage, whereas Dr. Waid conducted two neuropsychological examinations finding neurocognitive impairments as well as psychiatric impairment resulting from severe traumatic brain injury. Moreover, Dr. Brawley's neuropsychological examination revealed that the Respondent continued to suffer from several vegetative symptoms, chronic pain and stressors and that he was not at MMI with respect to his vegetative symptoms recommending reassessment of his medication. Dr. Adams did not employ any of the diagnostic tools recognized in Crisp v. SouthCo. Inc. to determine whether the Respondent suffered physical brain damage, whereas Dr. White's MRI reflected a mass of soft brain tissue or dead zone in Respondent's brain. Dr. Adams' opinion is not credible, reliable or probative on the issue of the Respondent's physical brain damage. More important, Dr. Adams articulated no nexus between the Respondent's driving a tractor and the existence of physical brain damage and the

Appellants' reliance on Dr. Adams' opinion in support of the Full Commission's finding is misplaced.

Furthermore, Dr. Adams' conclusions are not credible when viewed against the record as a whole. Instead of corroborating Dr. Adams' opinion, Dr. Brawley's findings corroborate those of Drs. Smith, White, Shissias, Waid, Bergmann and Deal. Moreover, Dr. Brawley also recommends continued treatment for his psychological symptoms as did Dr. Smith, Dr. Bergmann, Dr. Deal, Dr. White, Dr. Wicker, and Dr. Shissias. While the Defendants point to Dr. Adams' report to support their contention that the Respondent's physical brain damage was mild to moderate, the Court may not view the evidence blindly from the Defendants' side of the case. Not only is Dr. Adams' opinion not supported by reliable, probative and substantial evidence, his opinion is not supported by the Appellants' evidence.

In her 2005 Order in this matter, Commissioner Childs, relying on the evidence of Dr. Smith that the Respondent's brain injury was both permanent and severe, found that the Respondent suffered a closed head injury giving rise to neurocognitive deficits. She ordered the Defendants to treat the Respondent for his closed head injury.

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

Moreover, the Circuit Court correctly held that the full Commission finding that "a Claimant who can drive a 'complicated' computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury," is wholly unsupported by the facts and evidence of record.

First, there is no credible, probative medical evidence to support the Commission finding that a Claimant who can drive a 'complicated' computer-operated tractor for fifty hours per week has not sustained a physical brain damage. Neither the Respondent's medical providers nor the Appellants' medical providers render an opinion with respect to the Respondent's driving a tractor and his physical brain damage. There is no medical evidence that addresses the matter of the Respondent's driving at all. While there is evidence that the Respondent can and does drive a farm tractor, there is no evidence that the Respondent can operate the tractor's very technical equipment purchased and installed to accommodate the Respondent's limitations resulting from his physical brain damage. The Respondent's family bought a tractor equipped with GPS and computer-operated equipment which accommodates the Respondent's limitations by automatically operating the tractor and its equipment, allowing him to plow, plant and fertilize. It is undisputed that the Respondent drives the tractor, but it is undisputed that the Respondent cannot program or operate the equipment. The Respondent is only required to "mash" a button to start the equipment. A family member must program the equipment and accompany him to the field to assist the Respondent in the event the equipment fails. Moreover, the Respondent's family accommodates the Respondent's mistakes. This evidence has not been refuted by the Appellants.

The medical evidence supports the finding that the Respondent suffered physical brain damage. The record, when read as a whole, simply does not support the Commission's finding that the Respondent's ability to drive a tractor is evidence that the Respondent did not suffer physical brain damage. The Commission cherry picked evidence from only one side of the case in making its finding, and as a consequence, the finding appealed from does not withstand scrutiny when viewed in context of the record as a whole. The full Commission's finding is

based on surmise, conjecture and speculation. Houston v. Deloach & Deloach; Sharpe v. Case Products Co., supra.

In addition, severe and permanent physical brain damage is not compensable under Regulation 67-1101. Regulation 67-1101 addresses brain injury. The application of Regulation 67-1101 to Respondent's claim is arbitrary and capricious. The Regulation purports to address total loss, partial loss or loss of use of the brain and would assign a period of compensation of 25 to 250 weeks. A claimant who has suffered the total loss of use of the brain would be in a vegetative state. Yet, in that condition, he would not be deemed totally disabled under Regulation 67-1101 but would be eligible for benefits of up to 250 weeks. Further, the Regulation 67-1101 assigns a higher value to the total loss of the scrotum and testicles, tongue, biliary tract, small intestine, and skin to that of a total loss to the brain which is far more debilitating. The regulatory scheme of Regulation 67-1101 defies logic, and its application here is arbitrary, capricious and violates due process.

Under the Court's decision in Crisp v. SouthCo. Inc., to be compensable under S.C. Code Ann. § 42-9-10(C), the physical brain damage must be severe so as to pose a hindrance or obstacle to obtaining employment or obtaining reemployment should the employee become unemployed. The Respondent's permanent and severe physical brain damage interferes with his abilities to operate farm equipment safely and reliably operate the family farm. The Respondent now functions in the low average IQ range and has no formal education beyond high school. Farming is all the Respondent knows. The Respondent's family has purchased farming equipment which accommodates the Respondent's disabilities. The Respondent's family has hired farm hands to assist the Respondent with his chores and to perform the Respondent's chores. The Respondent's father has eliminated his income from the farm to free up funds with

which to pay the Respondent. The Respondent's son now works on the farm and performs much of the Respondent's former responsibilities. The family has managed its farming practices to maximize the farm's income while permitting the Respondent the opportunity to work around the farm. The Respondent can no longer manage the farm's financial affairs and without his wife, Respondent would need a legal guardian to manage his affairs.

Dr. Stewart, a Board Certified Rehabilitation Counselor and Board Certified Vocational Evaluator, concluded that the Respondent has suffered a complete loss of earning capacity because of his injuries. Dr. Stewart recognized that the Respondent enjoyed a "benevolent and sheltered employment situation," and opined that, "[i]n an open, competitive labor market [the Respondent] would find himself vocationally disabled and unable to work gainfully." (R. p. 846; Claimant's APA 1). The impact of the Respondent's injuries is best described by Dr. Stewart who stated that the Respondent's:

...mental, emotional and physical problems and limitations and the combination of those mental/cognitive, emotional and physical conditions and the findings and opinions contained in the medical/neurological/psychiatric/professional/trauma counseling records, the number of years/length of time his problems and limitations have continued, the multiple prescribed medication he continues to have to take, the deterioration in his overall ability to work and be productive and need for help from others, and Dr. Shissias' statement concerning '...He is unable to make major decisions without input from wife, his primary caregiver. Believe that without her, he would require legal guardian or payee to manage his affairs....' (R. p. 846; Claimant's APA 1)

The Respondent's wife who also performs chores on the farm, including that of the farm bookkeeper, testified that because of Respondent's disabilities he would be unable to compete in an open job market. In fact the family farm would not hire a farm hand with Respondent's disabilities. No farming operation would go to the cost and expense of providing work accommodations for a farm hand such as the Respondent. Her testimony is consistent with that of Dr. Stewart.

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

Based on the evidence of record as a whole, the only inference to be drawn from the evidence of record supports the finding that the Respondent suffered permanent and severe physical brain damage as concluded by the Circuit Court.

Under Wigfall v. Tideland Utilities, Inc., the Respondent may demonstrate total disability through multiple physical injuries. Under this scenario, a Respondent who has a S. C. Code Ann. § 42-9-30 scheduled injury must show an additional injury. Singleton v. Young Lumber Company and Granite State Fire Insurance Company, 236 S. C. 454, 114 S.E.2d 837 (Ct. App. 1960); see also McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989) [Court found Respondent totally disabled due to combined partial impairments to the back, stomach and leg].

In addition to permanent and severe physical brain damage, the Respondent suffered extensive injuries to his left upper and lower extremities, head and face. After two surgeries to his left arm and elbow, Dr. Michael Green assigned a 17% impairment to the Respondent's upper left extremity. After two surgeries to Respondent's left knee, Dr. James O'Leary assigned a 10% impairment rating to the Respondent's lower left extremity. It is undisputed that the Respondent's physical brain damage was disabling. The Respondent's permanent and severe physical brain damage has caused him memory loss, depression, irritability, chronic daily

headaches, mood swings, loss of sleep and dizziness. The Respondent's mental and emotional deficits cause him difficulties in coping with everyday life. After his psychological testing, Dr. Waid assigned a 22% whole person impairment to the Respondent for his injuries and Dr. Bergmann assigned an 11% impairment to the Respondent for the injuries for which he and Dr. Deal treated the Respondent.

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

For the foregoing reasons, it is clear that based on the reliable, probative and substantial evidence of record, the Respondent is totally and permanently disabled with physical brain damage and entitled to benefits provided for in S. C. Code Ann. § 42-9-10. Crisp v. SouthCo., Inc.; Wigfall v. Tideland Utilities, Inc., supra. The Circuit Court was correct in reversing the Full Commission.

ARGUMENT II

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

The Full Commission affirmed the holding of the Hearing Commissioner that the Respondent has suffered a loss of earning capacity, notwithstanding the financial support offered

him by his family farm. The Circuit Court affirmed the Commission on this point and denied the Appellants' appeal. The Circuit Court order holding that the Respondent suffered a complete loss of earning capacity should be affirmed.

The Commission correctly found the Respondent to be permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation or of any other kind of job or gainful employment on a reliable sustained basis. In addition, the Commission also correctly concluded the Respondent is unable to perform the services other than those that are so limited in quality, dependability, and quantity that a reasonable stable market for them does not exist. Last, the Commission correctly found that the services that the Respondent performs for his family farm, given the accommodations his family has made to enable him to perform certain limited services, are not evidence that a reasonably stable market exists for the services the Respondent provides for the family farm. In so finding, the Commission found and concluded that the work offered by Respondent's family farm is sheltered employment and benevolent in nature.

The Appellants argue South Carolina law does not recognize the doctrine of sheltered or benevolent employment. The Appellants misapprehend the nature of the sheltered or benevolent employment doctrine. In applying the benevolent employer doctrine to the facts of this claim, the Commission was applying or extending longstanding South Carolina case law to the facts below.

To be totally disabled under the Act, the Respondent must be unable to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E. 2d 390 (Ct. App. 2003). Total disability under the Workers' Compensation Act does not require

complete, abject helplessness. McCollum v. Singer Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989). South Carolina courts have held that the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996).

Evidence that a Respondent has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability. McCollum v. Singer Co.; Stephenson v. Rice Services, Inc., *supra*. The Supreme Court pointed out in Stephenson v. Rice Services, Inc. that a person who becomes a paraplegic, as a result of a work-related accident, may recover for permanent and total disability under S. C. Code Ann. § 42-9-10 yet continue to work. The Respondent, who has suffered physical brain damage as a result of a work-related accident, may likewise recover for permanent and total disability under S. C. Code Ann. § 42-9-10 yet continue to work.

Because the South Carolina Workers' Compensation Act was based on the North Carolina Act, the Commission and Circuit Court appropriately turned to North Carolina case law for guidance. See Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E. 2d 110 (2002). Citing Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E. 2d 798 (1986) the North Carolina Commission held "an injured employee's earning capacity must be measured not by the largesse of a particular employer, but by the employee's own ability to compete in the labor market. The fact that an employee is capable of performing employment tendered by employer is not, as a matter of law an indication of plaintiff's ability to earn wages." Saums v. Raleigh Community Hospital, 346 N.C. 760, 487 S.E. 2d 746 (1997).

The rationale behind the benevolent employment rule is simple: that the proffered employment would not accurately reflect earning capacity if other employers would not hire the

employee with the employee's limitation at a comparable wage level. The same is true if the accommodations or modification of the job to meet the employee's limitations are not ordinarily found in the competitive job market. Simply put, if the Respondent does not have the ability to earn wages competitively, he will be left with no income should his job be terminated. Peoples v. Cone Mills Corp., *supra*. See also Baker v. Sam's Club, 589 S.E. 2d 387 (N.C. App. 2003).

The Appellants argue that the North Carolina cases are distinguishable because the injured claimants in the cases cited returned to work with the employer/defendant, whereas here, the Respondent never returned to work with the Appellant Kneece Farms. However, the issue is whether the Respondent's employment on his family farm subsequent to his injury is evidence of earning capacity. Although the Respondent regularly worked for Kneece Farms prior to his accident, he has not worked for the Appellant Kneece Farms since his injury, evidence in and of itself of the loss of earning capacity. The evidence of record below is that the Respondent is not employable outside the family farm and that the family would never hire a stranger with the Respondent's physical and mental impairments. The reliable, probative and substantial evidence below is capable of only the inference that the Respondent has suffered a total loss of earning capacity.

The benevolent employment doctrine as articulated by the Commission below is application of long-standing South Carolina law to the evidence of record. See McCollum v. Singer Co., *supra*; Stephenson v. Rice Services, Inc., *supra*. See also Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993); Wigfall v. Tideland Utilities, Inc., *supra*.

The Appellants object to the Commission's application of the benevolent employment doctrine to the facts of this case because the family farm makes regular payment to the

Respondent. The Appellants argue that because the amounts paid the Respondent meet or exceed the Respondent's wages prior to his workers' compensation injury, he has earning capacity and therefore Appellants argue that the benevolent employment doctrine is not applicable to the facts of this case.

The Appellants' argument overlooks the evidence of record that the services that the Respondent performs for his family farm, given the accommodations his family has made so as to enable the Respondent to perform certain limited tasks, are not evidence that a reasonably stable market exists for the services Respondent provides for the family farm. Dr. Stewart concluded that the Respondent suffered a total loss of earning capacity. Respondent's wife testified that the Respondent was not employable and that the Delano R. Kneece & Son, Inc. would not employ a stranger with the Respondent's disabilities. The Appellants also overlook the undisputed testimony of record that those amounts paid the Respondent by the family farm are not intended to represent wages earned and are not calculated on the basis of services performed by the Respondent on behalf of the family farm. Rather the amounts paid the Respondent are in the nature of a gift and do not constitute wages for work expended on behalf of the farm or wages calculated on the basis of productivity. The testimony of Respondent's wife, the family farm bookkeeper and treasurer, is undisputed on this point. Indeed, the Hearing Commissioner found the Respondent's wife to be a very credible witness who testified truthfully and accurately to the Respondent's physical and psychological limitations--testimony corroborated by the undisputed medical evidence of record. The Respondent's wife testified about the nature of the work the Respondent is able to perform and the fact that the family has essentially kept him working because he is family. The Respondent's wife described the Respondent as a "shell" of his former self. The fact that the Respondent's family, through

personal sacrifice and careful business practices, is able to afford to pay the Respondent any amount whatever is not evidence of the Respondent's earning capacity.

The Appellants argue that the payments made by the family farm to the Respondent must be in the nature of wages as opposed to a gift because he reports him on his income tax. The payments to the Respondent are taxable. However, this issue is not whether the payments made to the Respondent are wages. The issue is whether the Respondent has retained earning capacity. The undisputed evidence of record is that the Respondent's family is paying him out of love and affection and that the Respondent with his physical and mental limitations is not otherwise employable.

Last, the Appellants argue that in the event that the Commission's Order is allowed to stand, the Appellants should be entitled to a credit for the amount the Respondent receives from his employment from the family farm. The Appellants are entitled to no credit. The payments from the Delano R. Kneece and Son, Inc. family farm are a collateral source. This issue was decided in the 2005 Order and is the law of the case. See also McLeod v. South Carolina Insurance Company, 272 S.C. 254, 251 S.E.2d 193 (1979).

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

ARGUMENT III

THE CIRCUIT COURT CORRECTLY HELD THAT THE RESPONDENT IS ENTITLED TO PAYMENT OF WEEKLY COMPENSATION FROM THE DATE OF THE 1999 ACCIDENT CONTINUING FOR LIFE AND THAT APPELLANTS HAD BEEN GIVEN ALL CREDITS TO WHICH THEY WERE ENTITLED.

The Circuit Court correctly held that the Respondent was entitled to benefits under the Workers' Compensation Act for life. The Appellants misapprehend the nature of the award authorized by statute in this matter. In particular, the Respondent was entitled to an award of weekly permanent disability payments and all necessary medical treatment from the date of his accident for life.

S.C. Code Ann. § 42-9-10(C) applies to the issue of lifetime benefits and provides as follows:

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

S.C. Code Ann. § 42-9-10(C) provides that a Claimant who is totally and permanently disabled with a physical brain damage is entitled to weekly compensation from the date of the accident for life. The statute makes no exceptions. Crisp v. Southco, Inc., *supra*. The record reflects that the Appellants were given all credit for temporary total disability payments to the Respondent since his 1999 accident to which they are due.

The Appellants erroneously argue that because the Respondent attempted to return to work having executed a Form 17, he is barred from receiving weekly compensation from that date until the 2011 Order.

In 2005, in exchange for the Appellants' agreement to provide him with the medical treatment for his injuries as ordered in the 2005 Order, the Respondent agreed to stop payment of his temporary total disability benefits and attempt to go back to work on the family farm. (R. p. 1109; Respondent's Exhibit No. 3). As required, the Respondent executed a Form 17 authorizing the Appellants to stop payment of temporary total disability payments at that time. (R. p. 1241; Defendants' Exhibit 4). The Respondent's effort to return to work does not act as a waiver of his rights under the Act.

The Form 17 executed by the Respondent authorizing the Appellants to stop his temporary total disability benefits provides as follows:

I UNDERSTAND THAT MY WEEKLY TEMPORARY COMPENSATION CHECKS WILL STOP; HOWEVER, I GIVE UP NO RIGHTS TO COMPENSATION FOR FUTURE DISABILITY, FOR PERMANENT DISABILITY, DISFIGUREMENT, OR MEDICAL CARE. (Bold and upper case on Form 17)

The parties' agreement on its face provides that the Respondent's efforts to return to work do not prejudice him from any future benefits. Further, the Form 17 does not operate as an adjudication of the Respondent's ability to work or lack of earning capacity. A signed Form 17 does not terminate the Respondent's claim nor affect his right to apply for additional benefits. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E. 2d 599 (Ct. App. 1999). See also Lyles v. Quantum Chemical Co., *supra*.

Moreover, the Appellants' argument conflicts with important public policy considerations advanced by the Act in general and S.C. Code Ann. § 42-9-10(C) in particular. First, the Act encourages injured workers to return to work. The Respondent attempted to return to work in 2005. The Appellant's argument would discourage injured workers from attempting to return to work by penalizing them from recovery of benefits in the event the injured worker finds himself

unable to remain at work. The Form 17 protects the Respondent from the loss of benefits for having tried to return to work and failed. Second, The General Assembly has afforded injured workers such as the Respondent with benefits commensurate with the serious nature of their physical brain damage. Crisp v. SouthCo, Inc., Sparks v. Palmetto Hardwood, Inc., *supra*. The Appellants would penalize the Respondent for attempting in good faith to return to work by depriving him of the benefits afforded him by §§ 42-9-10(C). Contrary to Appellants' argument, distinctions between temporary and permanent disability benefits are not relevant to application of S. C. Code Ann. § 42-9-10(C) which provides for lifetime benefits for injured workers with permanent and severe physical brain damage.

The Respondent agreed to return to work in exchange for the Appellants' agreement to provide all medical treatment required by the 2005 Order. The Appellants failed to fully honor their obligation under the parties' agreement to provide authorized treatment. While the Appellants did provide counseling by Dr. Deal, the Appellants refused to pay for Respondent's prescription medicine as prescribed by Dr. Deal (R. p. 1103; Respondent's Exhibit No. 3). The Act encourages injured employees to attempt to return to work and encourages employers to provide prompt medical treatment so as to enable employees to return to work. Here only the Respondent complied with the letter and spirit of the Act and the Appellants should not be permitted to profit from their failure to comply with the parties' settlement. Hamilton v. Bob Bennett Ford, *supra*.

The Appellants argue that the 2005 Order bars Respondent's right to benefits after the date of that Order. The opposite is true. The 2005 Order requires the Appellants to provide the Respondent not only with weekly temporary total disability payments but also with medical treatment. By failing to provide the Respondent authorized prescriptive medicine, the Appellants

failed to abide by the terms of the 2005 Order and are estopped from raising any objection to the Commission granting Respondent all benefits he is entitled to under the Act.

The Appellants next argue that the Respondent's claims to weekly benefits are barred by the doctrine of *laches*. The Doctrine of *laches* does not apply. Here the Respondent timely filed his Form 50. There was no unreasonable delay. Throughout the pendency of the claim, the Respondent sought and the Appellants provided certain benefits under the Act. The Appellants can claim no prejudice arising from the length of time the claim. The Appellants' partial compliance with the Act disproves any such prejudice as is required by the Doctrine of *laches*. Muir v. C. R. Baird, Inc., 336 S.C. 266, 519 S.E. 2d 583 (Ct. App. 1999); Hopkins v. Floyd's Wholesale, 299 S.C. 127; 382 S.E.2d 907 (1989). In Muir v. C. R. Baird, Inc., the Respondent delayed filing his claim and the Court of Appeals recognized that the Doctrine of *laches* might apply to a late-filed claim. However, the Court found that the Respondent's tardiness in filing his claim was not barred by the Doctrine of *laches*. The Court in Muir held that delay in the ascertaining of a right does not in of itself constitute *laches*; rather the employer must be prejudiced by the delay. Here, the Appellants well knew that the Respondent suffered permanent and severe physical brain damage and was undergoing treatment for his injuries from Drs. Bergmann and Deal. The Appellants were paying for part of the Respondent's medical treatment for his injuries. Clearly, there was no delay in prosecuting the claim nor were the Appellants prejudiced. The Doctrine of *laches* does not apply.

The Circuit Court correctly applied the provisions of S. C. Code Ann. § 42-9-10(C) in the award of weekly compensation to the Respondent from the date of his accident and for life. The Appellants were granted the full credit for payments to which they were entitled.

ARGUMENT IV

THE CIRCUIT COURT CORRECTLY HELD THAT THE APPELLANTS WERE RESPONSIBLE FOR PAYMENT OF RESPONDENT'S MEDICAL TREATMENT, MILEAGE AND PRESCRIPTION MEDICINE.

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

Citing S.C. Code Ann. § 42-15-60, the Appellants argue that Drs. White, Wicker, Shissias, and Ugino were not authorized by the Appellants prior to treatment, and therefore, the Appellants were under no obligation to pay for past treatment or to provide future treatment by these physicians. The Appellants argue that S.C. Code Ann. § 42-15-60, provides that the employer and only the employer may determine an authorized medical treatment. The Appellants misread S.C. Code Ann. § 42-15-60.

S.C. Code Ann. § 42-15-60, vests the Commission with authority to direct an employer to provide medical treatment which in the judgment of the Commission will tend to lessen the period of disability. The Commission found that the Respondent suffered from hyperthyroidism as a consequence of his head trauma suffered in his 1999 accident and that the Respondent had benefited from the treatment by Drs. White and Wicker and that the Respondent will continue to benefit from the treatment of his hypothyroidism by Dr. Wicker. The Commission found that

Dr. Shissias treated the Respondent for his chronic daily headaches, memory loss and depression, causally-related injuries, and that the Respondent would continue to benefit from Dr. Shissias' treatment. The Respondent received treatment from Dr. Ugino on an emergency basis. The Commission found that Dr. Ugino's treatment of the Respondent's injury caused when his dizziness, which was causally related to Respondent's accident, lead to his falling and fracturing a bone in his left hand, was a benefit to the Respondent. The Commission was justified in ordering the treatment by these physicians based on the expert medical evidence of record.

Moreover, S.C. Code Ann. § 42-15-60, authorizes the Hearing Commissioner to order a change in medical treatment if circumstances justify it. When Respondent sought treatment of a neurologist, the Appellants sent the Respondent to Dr. Adams who declined to treat the Respondent. The Respondent then sought out the services of Dr. Shissias. In addition, the Appellants refused to pay for the prescription medications authorized by Dr. Deal, Respondent's treating physician. The Appellants have demonstrated their indifference to the Respondent's treatment needs, and the Respondent was certainly justified on these facts in seeking medical treatment on his own. The Appellants do not dispute the qualifications of the physicians in question. The reliable, probative, substantial evidence of record supports the opinions of these physicians. The Respondent was justified in seeking out his own treatment and under the circumstances, the Commission was justified in ordering the Appellants to provide treatment by Drs. White, Wicker, Shissias and Ugino.

The Appellants do not contend that the Respondent did not benefit from the treatment of these providers. Rather they complain about having to pay for the treatment. The Commission is afforded considerable discretion under S.C. Code Ann. § 42-15-60. The Commission may override the employer's choice of medical providers and order a change in the treatment services

provided and require payment of those services. Clark v. Aiken County Government, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005). S.C. Code Ann. § 42-15-60 does not require the Commission to limit its choice of medical care to the providers approved by the Appellants.

The Act should be liberally construed in furtherance of the purposes to which it was designed and any reasonable doubts as to its construction should be resolved in favor of the Respondent. The Appellants argue that they are the exclusive arbiter of the Respondent's medical treatment. Accepting the Appellants' argument would lead to the absurd result of depriving the Commission of any authority over a Respondent's treatment and violates the spirit and letter of the Act. Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100, 576 S.E. 2d 191 (Ct. App. 2003).

Accordingly, the Circuit Court correctly affirmed the Commission's conclusion that treatment by Drs. White, Wicker, Shissias, and Ugino was justified and in authorizing the Appellants to pay for all past and future medical care including treatment, prescription medication, and mileage.

ARGUMENT V

THE CIRCUIT COURT CORRECTLY HELD THAT THE RESPONDENT SUFFERED CAUSALLY RELATED AND COMPENSABLE INJURIES RELATED TO HIS BRAIN, HEAD, FACE AND FINGER.

The Circuit Court correctly affirmed the Commission's Order requiring the Appellants to treat the Respondent for his injuries to his zygomatic arch, thyroid, scarring and/or finger.

In essence, the Appellants argue that although evidence of the injuries are undisputed in the evidence record, these injuries were not found in the 2005 Order to be compensable.

Therefore, the Commission below erred in finding injuries to be causally related to the Respondent's 1999 accident. While the 2005 Order is conclusive as to the injuries established therein, the findings of the Commission below are consistent with and related to the injuries to Respondent's brain/head/face.

As conceded by the Appellants, the Respondent's zygomatic arch or the temporal bone of the skull below the eye was injured in the Respondent's accident. The explosion causing his brain/head/face injury was so traumatic that it damaged his skull. The Appellants have no defense to the causal relationship between the accident and this particular injury.

The Appellants complain that the Commission erred in finding and concluding that the Respondent's hypothyroidism is related to the Respondent's accident. Dr. White did not diagnose this causal-related injury until after the 2005 order below. There is no medical record of evidence to dispute Dr. White's diagnosis of this causally-related injury. The Appellants' definition of hypothyroidism in their brief is not found anywhere in the record. The record does reflect that Dr. White's concern was for the mass of softened brain tissue located near the pituitary gland which is found tucked under the damaged portion of the Respondent's brain. Dr. White's concern was the impact of the physical brain damage on the function of the pituitary gland which ultimately gave rise to hypothyroidism. The reliable, probative, substantial evidence of record supports the Commission's finding and conclusion that the hypothyroidism is related to the Respondent's accident, and that the Respondent is entitled to treatment for his injuries. Beckman v. Sysco Columbia, LLC, supra.

Last, the Appellants complain about the finding and conclusion by the Commission that the Respondent's injury to his finger suffered when he became dizzy at work and fell breaking the metacarpal bone in his left hand was compensable under the Act. The evidence of record is

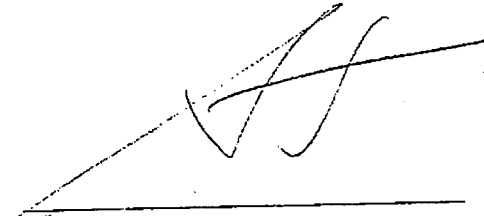
undisputed that a result of the damage to the Respondent's brain/head/face gave rise to dizziness or what the Respondent called "the staggers". The Respondent's unsteadiness caused by his physical brain damage caused him to fall causing the injury to Respondent's finger. It is axiomatic that all injuries flowing from the Respondent's admitted accident are compensable. The Commission correctly found and concluded that the injury to Respondent's finger arising after the 2005 Order was compensable. Whitfeld v. Daniel Construction Co., 226 S.C. 37; 83 S.E.2d 460 (1954); Mullinax v. Winn-Dixie Stores, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995); Hamilton v. Bob Bennett Ford, *supra*.

The issues litigated and finally determined in the 2005 Order are unassailable. All remaining issues arising after the entry of the 2005 Order are the proper subject of this claim. The Commission found and concluded correctly that the zygomatic arch, hypothyroidism, and damage to Respondent's left metacarpal were compensable. Accordingly, the Circuit Court Order affirming the Commission on this point should be affirmed.

CONCLUSION

Based on the foregoing, it is respectfully submitted that Circuit Court correctly applied the standard of review and the applicable substantive law to the issues on appeal from the full Commission. Having done so, the Circuit Court correctly held that based on the evidence of record, viewed as a whole, the Respondent is totally and permanently disabled with physical brain damage and entitled to an award of benefits under S.C. Code Ann. § 42-9-10(C). The Circuit Court's reversal of the Full Commission on this issue was in all respects proper. In addition, the Circuit Court properly affirmed the Full Commission order on all issues raised by the Appellants' appeal therefrom and the Circuit Court's order denying the Appellants' appeal from the Full

Commission should be affirmed. For these reasons, the Respondent respectfully submits that the Circuit Court order below be affirmed.

A handwritten signature in black ink, appearing to be 'SE', is written over a horizontal line.

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March 16, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
COURT OF COMMON PLEAS
The Honorable R. Knox McMahon

Appellate Case No. 2014-001258

Ricky Kneece,

Respondent,

v.

Kneece Farms and Legion in Liquidation
And the South Carolina Property and Casualty
Insurance Guaranty Association,

Appellants.

FINAL REPLY BRIEF OF THE APPELLANTS

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ARGUMENT

I. THE CIRCUIT COURT IGNORED SUBSTANTIAL EVIDENCE IN THE RECORD IN REVERSING THE FULL COMMISSION'S ORDER

The Order of the Circuit Court overturned the findings of the Appellate Panel which had ruled, under the facts of this case, the Claimant was not permanently totally disabled. In Workers' Compensation cases, the Full Commission is the ultimate arbiter of factual issues related to a claim. Their findings will not be disturbed where there is substantial evidence to support their findings and may only be reversed if the findings are based on surmise, speculation, or conjecture. *Sharpe v. Case Produce Company*, 329 S.C. 534, 495 S.E.2d 790 (Ct. App. 1998). The Circuit Court made its decision to reverse despite the existence of reasonable and reliable evidence that Claimant was not permanently and totally disabled from work. It is well settled that findings of fact by the Industrial Commission are conclusive and binding upon both the Court of Common Pleas and the Supreme Court, if there is any competent evidence reasonably tending to support them, even though there is evidence that would have supported a finding to the contrary. *Willard v. Commissioners of Public Works of City of Spartanburg*, 219 S.C. 477, 65 S.E.2d 874 (1951).

"The statute empowers the full Commission to make its own findings of fact and to reach its own conclusions of law consistent with or inconsistent with those of the hearing commissioner." *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967). The statute does not allow the Circuit Court or other appellate bodies to do the same. The standard shifts from "greater weight of the evidence" to whether any substantial evidence exists to support the findings of the Full Commission. If evidence is susceptible to more than one reasonable inference, the full Commission's finding must be sustained. *Wilson v. City of Darlington*, 229 S.C. 62, 91 S.E.2d 714 (1956). The courts may not weigh the evidence in their review of a

factual finding by the Commission. *Walker v. City of Columbia*, 247 S.C. 241, 146 S.E.2d 856 (1966).

The Circuit Court, in its appellate capacity, is not permitted to substitute its own judgment for that of the Appellate Panel of the Workers' Compensation Commission with regards to the weight of the evidence. It is not the court's duty, when sitting in an appellate capacity, to weigh the testimony but only to determine whether the record contained competent evidence to support the findings of the Workers' Compensation Commission. *Kay v. South Carolina Public Service Authority*, 246 S.C. 168, 143 S.E.2d 130 (1965),

II. SUBSTANTIAL EVIDENCE SHOWS THE CLAIMANT/RESPONDENT DID NOT SUSTAIN A "PERMANENT AND SEVERE" BRAIN INJURY SUFFICIENT TO QUALIFY FOR PERMANENT AND TOTAL OR LIFETIME COMPENSATION

Such a finding of permanent and total disability is not a finding that can be made as a matter of law. The ultimate determination of disability in such circumstances *must* be determined by the Workers' Compensation Commission as the trier of fact. The Supreme Court recently clarified in two opinions, *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.2d 835 (2013) that a physical brain injury in and of itself was not enough to make a finding that a Claimant was therefore permanently totally disabled under S.C. Code Ann. §42-9-10(C).

In the Respondent's Brief, the Respondent repeatedly uses the terms "permanent and severe" to describe Claimant's injury. This appears to be repeatedly used as it is part of the standard handed down by the Court in *Sparks*; however, it mischaracterizes even Claimant's own evidence of the case and the reliable evidence that Claimant is capable of continued gainful employment (which he returned to just months after the injury and has worked full time since 2005).

The Claimant was evaluated by Dr. Green on March 20, 2006. During this evaluation, the Claimant informed Dr. Green that he drove his tractor for long periods of time for his employer (Kneece & Son). The Claimant's physical examination at this appointment was normal except for a "little bit of discomfort." Dr. Green opined at that time that the claimant was able to *work full duty* as of March 20, 2006. (R. at p. 1195). Shortly thereafter, on June 16, 2006, Claimant signed a Form 17 agreeing that he had returned to full duty work and was capable of continued full duty work as of October 4, 2005. (R. at p. 1241). Ricky Kneece's income tax filings reflect that as of 2009, his annual salary was over \$77,000 per year, more than double his salary in 1998, the year prior to this injury. (R. at p. 1395).

The Claimant received a neuropsychological evaluation by Dr. Randy Waid for his closed head injury. In his report of February 8, 2007, Dr. Waid indicated that the Claimant continued to "demonstrate **mild** executive dysfunction both with regard to cognitive and emotional/psychological functioning." (R. at pp. 862-877). Dr. Waid also noted that Ricky Kneece continued to be employed on his family farm. On February 8, 2007, Dr. Waid released the Claimant at MMI with a 22% impairment rating to the whole person for this injury. (R. at *id.*).

On May 14, 2008, the Claimant underwent a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. Dr. Adams diagnosed Claimant with previously having had a "mild to moderate head injury with a contusion to his right frontal lobe," and he found the Claimant's examination to be "absolutely normal." (R. at pp. 1219-1224). Dr. Adams subsequently ordered an electroencephalogram (EEG) test to measure brain electrical activity which was also normal. (R. at p. 1222). Consequently, no further treatment was recommended by Dr. Adams. These items alone would constitute substantial evidence upon

which the Commission could have relied to make their prior finding that Claimant Kneece is not permanently totally disabled.

Appellants obtained their own neuropsychological evaluation with Dr. Tora Brawley on January 29, 2011. In her report, Dr. Brawley was essentially in agreement with Dr. Waid that the Claimant had experienced a “mild residual brain dysfunction as a result of his accident.” (R. at p. 1239).

Contrary to Respondent’s repeated assertion of severe brain damage, the evidence supports only a mild residual dysfunction as a result of the accident. Likewise, the Appellate Panel of the Commission found that Claimant Kneece was not permanently totally disabled, which is further supported by the Claimant’s own admission of full duty employment on his signed Form 17, Claimant’s continued work of greater than 50 hours per week, to include operation of heavy equipment, and Claimant’s ongoing and current wages with a third-party employer which are over twice his income at the time of his accident.

The South Carolina Supreme Court clarified, “we view the inclusion of ‘physical brain damage,’ along with quadriplegia and paraplegia, in § 42-9-10(C) as indicative of the General Assembly’s intent to compensate an employee-claimant for life *only in the most serious cases of injury to the brain*, separate and apart from other scheduled injuries, resulting in permanent brain damage.” *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 750 S.E.2d 61 (2013) (emphasis added). Furthermore, “[t]hus, we conclude that ‘physical brain damage’ as used in § 42-9-10(C) is physical brain damage that is both permanent and severe.” *Id.*

The Court in *Crisp*, relied on the *Sparks* decision in noting that, “permanency and physicality are requirements. However, the severity of the injury is the lynchpin of the analysis. Cf. *James v. Anne's Inc.*, 390 S.C. 188, 199, 701 S.E.2d 730, 736 (2010) (“The 500 weeks

limitation, however, represents the limit of the monetary amount of compensation that may be recovered. It has no relation to the duration or the extent of the injury. A permanent impairment, by definition, lasts for a lifetime. (emphasis in original)).” Furthermore, “[i]nherent in the requirement that the injury to the brain be severe is the requirement that the worker is unable to return to suitable gainful employment. See *Floyd v. C.B. Askins & Co.*, 382 S.C. 84, 90, 675 S.E.2d 450, 453 (Ct. App. 2009)”

The Court in *Crisp* interpreted “the inclusion of “physical brain damage” among the most serious injuries within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment. See *Adams v. Texfi Indus.*, 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) (“In construing a statute, the Court looks to its language as a whole in light of its manifest purpose.” (citing *Simmons v. City of Columbia*, 280 S.C. 163, 311 S.E.2d 732 (1984))); *Cokeley v. Robert Lee, Inc.*, 197 S.C. 157, 169, 14 S.E.2d 889, 894 (1941) (“While it is an elementary rule of construction that words used in a statute should be given their plain and ordinary meaning this, as all other rules, is subject to the prime object of ascertaining and giving effect to the legislative intention. In doing this, we are not to be governed by the apparent meaning of words found in one clause, sentence, or part of the act, but by a consideration of the whole act, read in the light of the conditions and circumstances as we may judicially know they appeared to the Legislature, and the purpose sought to be accomplished.” (quoting *State ex rel. Walker v. Sawyer*, 104 S.C. 342, 346, 88 S.E. 894, 895 (1916))).

This interpretation is in harmony with the entire purpose of our workers' compensation regime and recognizes the other avenues of compensation available under the scheme for brain injuries that do not render the worker unemployable (for example, compensation for non-total

disability to the brain is available under Regulation 67-1101). *See Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 112, 156 S.E.2d 646, 649 (1967) ("The object of the act is to relieve an injured workman from the loss or impairment of his Capacity to earn wages."). Thus, only in cases of physical brain damage that are both permanent and severe would an employee-claimant be entitled to benefits for life."

The Order of the Circuit Court in this claim unilaterally made a finding that that Respondent was indeed permanently totally disabled, reversing the Appellate Panel of the Commission's findings that he is not permanently totally disabled, and – under the Commission's ruling – was only entitled to benefits under S.C. Code of Regs. §67-1101 and S.C. Code Ann. §42-9-30. (R. at pp. 21-46). The finding of permanent total disability by the Circuit Court in this matter represented an improper determination of fact as to the degree and severity of the injury to the Claimant's brain, which the Circuit Court was not entitled to determine. Rather, the Circuit Court should have made a determination of the sufficiency of the evidence supporting the factual findings of the Appellate Panel of the Commission. Even assuming, *arguendo*, that the findings of the Full Commission were not supported by substantial evidence, the Circuit Court should have then remanded the claim to the Full Commission for further findings rather than unilaterally issuing its own.

Finally, on this point, the Circuit Court Order on page 11, in weighing the evidence of the record held that: "[t]he evidence of the record, when viewed as a whole, compels the finding that the Claimant suffered physical brain damage with a severe and permanent impairment of his normal brain function." (R. at p. 31). However, this newly instituted finding by the Circuit Court, in contradiction to the Appellate Panels' findings on this point, is also contradictory to the 'substantial evidence rule,' and seems to indicate a weighing of the evidence anew by the Circuit

Court to find the greater weight of the evidence in favor of a finding of permanent total disability. The Appellant submits this was in error, and not the proper standard.

First, a finding of the degree of severity of an injury is a question of fact for the Commission. The Commission's failure to find a, "severe and permanent brain injury," is most certainly supported by the evidence in the record, even if the Circuit Court were to conclude it was not by the greater weight of the evidence. Nonetheless, the Appellate Panel's ruling should stand under the applicable standard of review.

Whether the Circuit Court upon its review finds that the greater weight of the evidence may have supported a finding of permanent total disability or not, such weighing of the evidence was not permitted at that point in the appellate process. The only question upon appellate review of this issue is indeed whether or not the finding of the Appellate Panel (that the Respondent's injuries had not resulted in permanent total disability) was supported by substantial evidence in the record. Appellants assert that such findings were so supported, and to find otherwise was in error. Similarly on page 12 of the Order, the Circuit Court improperly engaged in fact finding stating, "[t]here is no evidence that he can operate a complicated computer operated tractor." To the contrary, there is substantial evidence in the record, to include the Respondent's own testimony at the hearing and his sworn deposition testimony on this point. (R. at p. 32); (R. p. 544 line 21 to p. 545 line 19). Therefore, this finding should not have been disturbed on appeal by the Circuit Court. Moreover, even if the Circuit Court review did not find that the computer devices involved in operating the tractor (that the Claimant admitted he drives in excess of 50 hours per week for his current employer) were or were not "complicated" in nature, this is not the only item of substantial evidence upon which the Appellate Panel could have considered to support its factual determination that Ricky Kneece was indeed not permanently totally disabled.

up to three quarters of the week, for close to 50 hours or more per week, as he did prior to the date of accident and confirmed in his deposition testimony. (R. at *id.*); (R. at pp. 1243-1348; 1362-1395).

No authority was cited by the Circuit Court for the premise that sheltered employment may be provided by a non-party employer, as was the case here. Respondent's employment with Appellant employer ended and he has subsequently worked at a much greater salary with a non-party employer that has provided years of stable employment. Moreover, Ricky Kneece's current employer, Delano Kneece & Son Farms, has no financial interest in minimizing Mr. Kneece's own financial recovery from his prior employer. Mr. Ricky Kneece is one of the primary owners of this company, and for all intents and purposes is largely self employed. (R. at p. 516 line 18 – p. 517 line 6).

On its most basic level, the Claimant/Respondent must show an inability to obtain wages. Here, Ricky Kneece admittedly returned to work for a non-party employer months after the injury and admitted via signing a Form 17 that he could and did return to fulltime employment as of October 4, 2005. Claimant has been in the same position since that time. (R. at p. 1241).

The Respondent argued that the income received from Kneece & Son was no more than a "gift" and does not constitute wages (Respondent's Brief page 35). However, Respondent then concedes that the income was treated as wages for income tax purposes, but while still denying that he has retained any earning capacity. Respondent attempts to characterize these payments as a way to preserve his dignity (Respondent's Brief page 19); however, contrary to this assertion, Respondent's wife asserted that she writes and deposits the checks and Respondent never sees it. (Respondents' Brief page 18). Additionally, the Respondent, himself, testified that he had a

performed prior to his injury. The Respondent's wife confirmed this fact as she testified that the Respondent currently drives a tractor for five to seven hours per day, six days a week, and rarely misses a day of work. (R. at p. 513 line 23 – p. 514 line 3).

Accordingly, the fact that the Respondent has been working for many years since his work accident operating a computer operated tractor system which he admitted under oath he drives for over fifty (50) hours per week, and earning a greater income than before his injury, countermands any argument that the Respondent is permanently totally disabled under a wage loss theory. (R. at p. 415 lines 14-25); (R. at p. 419 lines 3-17). “[A]s the claimant is now earning wages in an amount equal to those received by him prior to his injury, he has failed to show any compensable injury or incapacity.” See *Parrott v. Barfield Used Parts, et. al.*, 206 SC 381, 34 SE 2d 802 (1945).

The totality of the evidence displays that the Appellate Panel's finding that Claimant was not permanently this was supported by substantial evidence:

Based on the facts above, the Respondent's job duties do not fit the definition of benevolent employment where an employee continues to receive wages despite an inability to contribute to his employer. On the contrary, Respondent remained a productive and integral part of Delano Kneece & Son. In fact, if Respondent were truly unable to contribute then the Employer would have to bear the expense of paying for another employee to work the tractor up to 50 hours per week.

IV. **EVEN IF RESPONDENT WAS PROPERLY DEEMED PERMANENTLY AND TOTALLY DISABLED, THE CIRCUIT COURT ERRED IN AWARDING TEMPORARY TOTAL DISABILITY BENEFITS FOR PERIODS PRIOR TO THE DATE OF MAXIMUM MEDICAL IMPROVEMENT**

The Respondent previously voluntarily terminated his right to further temporary indemnity benefits back in 2006 prefaced upon his 2005 return to full time employment at the same or greater earnings. (R. at p. 1241). Also, see *Curiel v. Environmental Management Services* 376 S.C. 23, 655 S.E.2d 482 (2007) which states in part:

Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. *Smith v. NCCI, Inc.*, 369 S.C. 236, 631 S.E.2d 268 (Ct.App.2006). Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits.

Respondent's assertion of return to full time employment at greater wages is confirmed by the evidence contained in his tax records. (R. at pp. 1243 -1348, 1362-1395). Furthermore, Respondent's admission of a return to gainful employment in 2005 was undisturbed and unchallenged until following MMI. Therefore, Respondent should, after asserting to the Commission that he was receiving wages for full-time employment, be estopped from arguing in hindsight that those wages were not actually payment for services rendered working over 50 hours per week conducting farm labor.

Additionally, the Respondent's argument that Commissioner Childs' Order finding pre-2005 wages to be a "collateral source" should apply to all wages after the Order falls flat. The Order does not apply to payments made subsequent to the Order and certainly did not prohibit Claimant from later agreeing that he had returned to gainful employment and signing a Form 17. Claimant agreed that he was able to return to full time employment after the Childs Order and by

signing the Form 17 voluntarily agreed that the income represented earned wages and allowed the Employer to suspend benefits. (R. at p. 1241).

Finally, Respondent repeatedly mischaracterizes his return to work as an "attempt" which is not supported by his deposition testimony or the fact that he unquestionably returned to work for over a decade earning more money than he did before, operating heavy machinery, and working in excess of 50 hours per week. Therefore, even if the Respondent be found entitled to lifetime benefits, Appellants should be entitled to a credit for all weeks between October 4, 2005 and the date of MMI.

V. THE CIRCUIT COURT ERRED IN AFFIRMING THAT THE RESPONDENT IS ENTITLED TO REIMBURSEMENT OF PAST MEDICAL EXPENSES FROM UNAUTHORIZED TREATMENT PROVIDERS AS WELL AS LIFETIME MEDICAL EXPENSES

The Circuit Court erred in affirming the Full Commission and Single Commissioner's findings and conclusions that Appellants are responsible for treatment with Claimant's unauthorized physicians.

While this statute ultimately gives great deference to the Commission, the statute "does not give a unilateral right to claimants to seek their own treating physician, and such an unencumbered right undermines the authority of the Commission, as prescribed by the legislature." *Turner v. S.C. Dept of Health and Environmental Control*, 377 S.C. 540, 661 S.E.118 (Ct. App. 2008).

Following the 2005 Order of Commissioner Childs, the Respondent requested and the Appellants authorized a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. This evaluation was performed on May 14, 2008, at which time Dr. Adams found the Claimant's examination to be "absolutely normal" and he diagnosed Claimant with a "mild to moderate head injury with a contusion to his right frontal lobe." (R. at pp. 1219-12213).

Following his release by Dr. Adams, the Respondent never requested authorization from Appellants for another neurological evaluation or any other type of medical treatment (aside from ongoing psychological counseling). Instead, the Respondent sought unauthorized medical treatment with providers of his own choice. (R. at p. 428, line 17 – p. 430, line 10). The Appellants were never notified of this unauthorized treatment until Respondent filed his Form 50 hearing request in 2010. (R. at p. 386). Pursuant to S.C. Code Ann. § 42-15-60, the Respondent did not have the right to seek his own treating physicians with no notice to the Appellants as no emergency situations coincided with the need for treatment or the Respondent's decision to unilaterally seek medical providers without advice or consent of the Appellants.

The only treating physicians in this case since approximately 2005, have been Drs. Deal and Bergmann. However, the Respondent never made any request of the Appellants to authorize treatment by any other providers since 2005, with the exception Dr. Adams in 2008. Therefore, pursuant to S.C. Code Ann. § 42-15-60, Appellants would respectfully show that they have no responsibility for any past or future treatment, expense, or mileage, arising from or related to treatment provided by the unauthorized physicians; specifically, Drs. Shissias, White, Ugino, or Wicker.

CONCLUSION

BASED ON THE FOREGOING, the Appellants respectfully request the Court of Appeals reverse the ruling of the Circuit Court as to finding that the Respondent Ricky Kneece is permanently totally disabled under S.C. Code Ann. §42-9-10(C), and that the claim should be remanded as ordered to a single Commissioner for a determination of permanency pursuant to S.C. Code Ann. §42-9-30 and Reg. § 67-1101 for the scheduled member injuries including but not limited to the Claimant's brain, and with further modification as outlined herein above.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case Nos.: 2012-CP-32-02093 & 2012-CP-32-02111

Ricky Kneece,

Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b) SCACR.



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