

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 5185 (S.C.Ct.App. filed November 27, 2013)
Op. No. 2016-UP-139 (S.C.Ct.App. filed March 30, 2016)

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S.C. SUPREME COURT

Hector G. Fragosa, (Employee/Claimant), Petitioner,
v.
Kade Construction, LLC (Employer) and
Key Risk Management Services, Inc. (Carrier), Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers Compensation Commission correctly followed the Court of Appeals' instructions on remand to clarify whether Petitioner's work related injuries included an injury to the brain, and in light of Crisp II and Sparks, cite specific evidence to support its determination of whether such injury was of sufficient severity to reach the level of physical brain damage as contemplated in S.C. Code Ann. §42-9-10(C).
2. Whether the Workers' Compensation Commission correctly held that a neuropsychologist was qualified to give an opinion as to whether "functional studies, such as EEGs, CTs, and MRIs, were read as unremarkable 'demonstrating structural resolution of the work related injury'" when a neuropsychologist's expertise does not extend to reading and interpreting EEGs, CTs, and MRIs.

STATEMENT OF THE CASE

This workers' compensation appeal arises following Petitioner's admitted accident on November 1, 2007. As a result of his accident, Petitioner alleged injuries to his "vision, spine, bilateral arms, left shoulder, hips, bilateral legs, right foot, psychological overlay, and physical brain damage set forth in S.C. Code Ann. §42-9-10(C)." (Appendix, p.89) On April 8, 2011, Petitioner filed a Form 50 Request for Hearing, seeking an award of permanent and total disability, and arguing for an exception to the five hundred (500) week cap on benefits as a result of physical brain "damage" as set forth by the Legislature in S.C. Code Ann. §42-9-10(C). Respondents filed responsive pleadings admitting the accident but denying the extent of the injuries as alleged by the Petitioner. (Appendix, pp.89-90).

A hearing was held before the Workers Compensation Commission on June 28, 2011, and on November 21, 2011, the Single Hearing Commissioner ("Single Commissioner") issued a Decision and Order, wherein he set forth Findings of Fact and Conclusions of Law, including but not limited to the following:

Findings of Fact

1. That the Claimant sustained an eleven percent (11%) medical impairment to the whole person on account of his cervical spine injury as stated by Dr. Christopher Merrell in his February 8, 2010 Form 14B. (Appendix, p. 53, Finding of Fact #6)
2. That the Claimant sustained a forty percent (40%) impairment rating to the right lower extremity and a one percent (1%) impairment rating to the left upper extremity, and had a combined impairment rating of seventeen percent (17%) to the whole person on account of the Claimant's right foot and left shoulder injuries as stated by Dr. Shane Wolfe in his April 8, 2010 Form 14B. (Appendix, pp.53-54, Finding of Fact #7)
3. That the Claimant sustained a forty-six percent (46%) impairment to the whole person for a traumatic brain injury as stated by Dr. George M. Sandoz in his August 20, 2009 letter. (Claimant's APA #6, pg. 716). (Appendix, p. 54, Finding of Fact #8)
4. That, **after considering the Claimant's multiple impairment ratings, the Claimant is permanently and totally disabled** and is unable to return to any type of work that he has performed in the past. (emphasis added)(Appendix, p. 54, Finding of Fact #9)
5. That Dr. George M. Sandoz testified that the Claimant suffers from mastoiditis "and that's why he's dizzy." (Deposition of George M. Sandoz, M.D., Claimant's APA Exhibit A, p. 861). (Appendix, p. 54, Finding of Fact #14)
6. That there has been no Guardian *ad Litem* appointed on the Claimant's behalf. (Appendix, p. 55, Finding of Fact #17)
7. That, based on the greater weight of the evidence, I find there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers' Compensation Act. This award is made under § 42-9-30 and § 42-9-10 and physical brain damage does not apply. (Appendix, p. 55, Finding of Fact #18)

Conclusions of Law

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act. (Appendix, p. 55, Conclusion of Law #1)
2. Under § 42-9-30 and Reg. 67-1101, the **Claimant's multiple impairment ratings to his right lower extremity, left upper extremity, head and inner ear render the Claimant permanently and totally disabled.** (emphasis added)(Appendix, p. 55, Conclusion of Law #2)
3. Under § 42-9-30 and § 42-9-10, the Claimant has not suffered a physical brain injury and is not entitled to lifetime compensation benefits under the South Carolina Workers' Compensation Act. (Appendix, pp.55-56, Conclusion of Law #3).

Petitioner appealed to the Full Commission Appellate Panel ("Full Commission"), and after briefing by the parties, oral arguments were held on March 19, 2012. On May 23, 2012, the Full Commission issued a Decision and Order adopting and affirming the Single Commissioner's decision. (Appendix, pp.58-66). Petitioner served and filed his first notice of appeal in the South

Carolina Court of Appeals on June 18, 2012.

The Workers' Compensation Act provides a value for injuries to specific body parts, including the brain, which is assigned a value of up to 250 weeks under Regulation 67-1101. Further, S.C. Code §42-9-10(C), defines and assigns the amount of compensation for "permanent and total disability." S.C. Code Ann. §42-9-10(C) was included by the Legislature to carve out only three (3) exceptions to the five hundred week cap on benefits under the Act, including paraplegia, quadriplegia, and "physical brain damage." At the time Petitioner first appealed to the Court of Appeals, there was no defined test or directions from the Appellate Courts to guide the Commission in deciding whether an injured workers' injury to the brain constituted "physical brain damage" as set forth in S.C. Code Ann. §42-9-10(C).

While the case was pending at the Court of Appeals, this Court issued two (2) companion opinions setting forth the test the Workers' Compensation Commission was to use as fact finders when deciding whether an injured worker's injuries to the head and/or brain result qualified as physical brain "damage," entitling the injured worker to one of the three (3) limited exceptions to the five-hundred (500) week cap on benefits. (*see Sparks v. Palmetto Hardwood, Inc.* 406, S.C. 124, 750 S.E.2d 61, (2013) *and Crisp v. SouthCo., Inc. II*, 401 S.C. 627, 738 S.E.2nd 835 (2013)). This Court rejected the argument that the mere presence of any physical brain injury or damage, regardless of degree, triggers the operation of §42-9-10(C). In *Crisp II*, this Court stated, "This argument is not persuasive, as it is contrary to the legislative intent and to the manner in which our courts have awarded compensation for injuries to the brain. As we found in *Sparks v. Palmetto Hardwood, Inc.*, 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, separate and apart from other scheduled member injures, resulting in permanent physical brain damage." *Crisp II*, at 842. This

Court went on to state that as noted in Sparks, permanency and physicality are requirements; however, severity is the lynchpin of the analysis. (Id.)

Oral arguments were held before the Court of Appeals on October 10, 2013, and on November 27, 2013, the Court of Appeals issued an opinion remanding the case to the Full Commission. (Appendix, pp.67-74). The Court of Appeals stated:

Here, the Appellate Panel made inconsistent findings with regards to the existence of a physical brain injury. In finding of fact #8, the Appellate Panel found Fragosa sustained 46% impairment to the whole person for a traumatic brain injury. However, in finding of fact #18, the Appellate Panel found Fragosa did not suffer a brain injury. Based on this inconsistency, *we remand to the Appellate Panel for clarification. It is undisputed that Fragosa suffered severe injuries as a result of his work accident, however, it is unclear whether the Appellate Panel found these injuries included an injury to the brain. If the Appellate Panel finds Fragosa did sustain a physical brain injury, it should, in light of Crisp II and Sparks, cite specific evidence to support its determination as to whether such injury was of sufficient severity to reach the level of physical brain damage as contemplated in section 42-9-10(C).* (emphasis added) (Appendix, p. 73)

Petitioner's Petition for Rehearing and Rehearing en Banc was denied on March 31, 2014, and his Petition for Writ of Certiorari was denied by this Court on July 24, 2014. (Appendix, pp. 75-76).

In accordance with the Court of Appeals' instructions on remand, the Full Commission filed a second Decision and Order on September 13, 2014, wherein it issued twenty eight (28) additional findings on remand. (Appendix, pp. 78-87) The Full Commission's Order starts by accurately citing the Court of Appeals request for "clarification regarding the existence of a physical brain injury," and then goes on to state, "the Appellate Panel has reviewed the record, and concludes that Claimant did not suffer physical brain 'damage.' Based upon the evidence – and Respondents concession – **we find that Claimant suffered a physical brain injury, but not physical brain "damage."** (Appendix, p. 79). As instructed by the Court of Appeals, the Full Commission went on cite evidence in the record it used to support its conclusion that Petitioner's injury to the brain was not of sufficient severity as to qualify as brain "damage" as contemplated

by S.C. Code Ann. §42-9-10(C), and “the combination of Claimant’s injuries (including but not limited to his foot and his dizziness) are what totally disable him.” (Appendix, p.86).

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

STANDARD OF REVIEW

In workers’ compensation cases, the South Carolina Workers’ Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the “substantial evidence” rule as the standard for judicial review of a decision of the Commission:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (d) affected by other error of law; [or]
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers’ compensation appeals, may overturn a conclusion of the Workers’ Compensation Commission if that conclusion is “clearly erroneous in view of the

reliable, probative and substantial evidence on the whole record.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

The test is whether the decision of the Commission is 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 that the administrative agency reached in order to justify its action. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENTS

- I. **The Workers Compensation Commission correctly followed the Court of Appeals’ instructions on remand to clarify whether Petitioner’s work related injuries included an injury to the brain, and in light of Crisp II and Sparks, cited specific evidence to support its determination that Petitioner’s injury to the brain was not of sufficient severity to reach the level of physical brain “damage” as contemplated in S.C. Code Ann. §42-9-10(C).**

Petitioner attempts to confuse the issues before this Court by presenting a piecemeal reading

of the findings of the Workers Compensation Commission and Court of Appeals, along with his own inappropriate and unsolicited medical research and opinions involving brain injuries. Petitioner wants this Court perform a new analysis of the evidence in the record to reach a different conclusion than that of the appropriate fact finder in the case, the Workers' Compensation Commission. These efforts are without merit because this Court has already provided the test that the Commission is to apply when determining whether an injured workers injury to the brain constitutes physical brain "damage," and there are no new legal issues for this Court to address. Respondents argue that this Court, like the Court of Appeals in this case, should affirm the Commission's application of the "permanent and severity" test and its ultimate conclusion that Petitioner's injury to the brain does not rise to a sufficient severity as to constitute physical brain "damage" as contemplated by §42-9-10(C).

When the Court of Appeals heard this case the first time in October 2013, it did so with the benefit of the new "permanent and severity" test for brain "damage" set forth in Crisp II and Sparks. In looking at the facts of this case, the Court of Appeals addressed the inconsistency in the Full Commission's decision likely caused by the "inartful phrasing" referenced by Petitioner in his brief, and the court stated the following:

Here, the Appellate Panel made inconsistent findings with regard to the existence of a physical brain injury. In Finding of Fact #8, the Appellate Panel found Fragosa sustained forty-six percent impairment to the whole person for a traumatic brain injury. However, in Finding of Fact #18, the Appellate Panel found Fragosa did not suffer a brain injury. **Based on this inconsistency, we remand to the Appellate Panel for clarification. It is undisputed that Fragosa suffered severe injuries as a result of a work related accident. However, it is unclear whether the Appellate found these injuries included an injury to the brain. If the Appellate Panel finds Fragosa did sustain a physical brain injury, it should, in light of Crisp II and Sparks, cite specific evidence to support its determination as to whether such injury was of sufficient severity to reach the level of physical brain damage as contemplated in section 42-9-10(C).**

(emphasis added)(Appendix, p. 73)

The Court of Appeals' instructions were clear. The Full Commission was to make two

(2) findings. First, whether Petitioner suffered a physical brain injury, and second, whether the injury to the brain reached the level sufficient severity as to constitute brain “damage” as defined in Crisp II and Sparks. This remand was the appropriate action because in workers’ compensation cases, the South Carolina Workers’ Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). Petitioner wants this Court to believe that the case presents a novel issue because this Court has not yet heard a case involving the application of the “permanent and severity” test, but again it is not the role of the appellate courts to act as fact finder and apply their previously handed down test on the same legal issue unless the findings of the lower courts are not supported by substantial evidence.

The Full Commission’s September 30, 2014 Order on Remand specifically states at the outset of the opinion that it was responding to the Court of Appeals request for clarification of the existence of a physical brain injury, as well as whether such injury reached sufficient severity as to qualify as physical brain “damage.” The Commission found that Petitioner did sustain an injury to the brain, but it concluded that Petitioner did not suffer physical brain “damage.” (Appendix, p. 79). Specifically, the Commission stated that it recognized the seriousness and significance of the accident; however, “the significance of the mechanics of an accident and initial diagnoses are not dispositive in light of the standard set forth by the Supreme Court as to whether Claimant sustained permanent and serious physical brain damage (thereby entitling him to lifetime benefits),” and it based its finding on the medical evidence in its entirety. (Appendix, p. 79).

The Full Commission was charged with the task of reviewing the entire evidence in the record and applying those facts and evidence to the new “permanent and Severity” test to determine whether Petitioner qualifies as one of the three (3) limited exceptions envisioned by the General Assembly to the 500 week cap on benefits. Respondents would point out that this

evidence included not only the medical evidence, but the hearing testimony of Petitioner himself, who testified on his own behalf and sought a lump sum award of money without the need of any sort of guardian in his behalf. Further, Petitioner's own testimony spoke to his ability to remember details and perform activities of daily living, such as driving, which someone with the most severe injury to the brain would unlikely be able to do.

A. The Court of Appeals correctly applied the appropriate standard of review to workers compensation cases.

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

Petitioner cannot cite any evidence to support his claim that the Full Commission Appellate Panel or the Court of Appeals misapplied the "substantial evidence" standard of review that it applies on a regular basis. Petitioner's argument comes down to the fact that he disagrees with the decision the Full Commission's interpretation of the evidence in the record as a whole.

This point is made clear by Petitioner's attempt to provide this Court with his own research on different forms of injuries to the brain in an unsolicited effort to qualify his brain injury as severe, while at the same time criticizing the Full Commission's finding on severity as speculation based on the unqualified medical opinions of the Commissioners. Petitioner cannot have it both ways. Petitioner cannot call the Commission's interpretation of the evidence as "speculation about a complex medical diagnosis it does not fully understand," and then expect this Court to reach a different conclusion about a medically complex diagnoses based on

Counsel's own research and interpretation of the medical evidence on various forms of brain injuries referenced in his brief.

B. The Full Commission did not exceed its authority on remand from the Court of Appeals by disregarding or substituting previous findings of the Single Commissioner.

Although Petitioner wants this Court to believe the Full Commission Panel abandoned its previous findings and replaced them with new ones, this belief is not accurate. There is nothing in the Appellate Panel's order indicating that it abandoned the previous findings of the Single Commissioner. Instead, the Appellate Panel's order addresses the specific questions posed by the Court of Appeals on the severity of Petitioner's injury to the brain and comes to the same conclusion as the Single Commissioner that Petitioner was permanently and totally disabled as a result of the combination of his injuries to multiple body parts. In addition, the Full Commission goes on to cite specific evidence, as requested by the Court of Appeals, in support of its decision that Petitioner's brain injury did not reach the sufficient level of permanency and severity to result in brain "damage" as set forth in §42-9-10(C) and defined by Crisp and Sparks.

In support of his argument, Petitioner attempts to paraphrase the original findings of the Single Commissioner by using two piecemealed sentences out of the Single Commissioner's order, repeatedly stating as fact that "Claimant sustained 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled." Petitioner's paraphrasing of the order entirely ignores the multitude of other injuries and injury produced limitations suffered by the Petitioner, as well as the impairment ratings to Petitioner's cervical spine, right lower extremity, left upper extremity, and dizziness caused by mastoiditis.

(Appendix, pp.53-55) The Single Commissioner's decision actually states that Petitioner was permanently and totally disabled on account of the injuries he suffered to multiple body parts.

(Appendix, p. 54). When read in its totality, the findings of both the Single Commissioner and

subsequent clarification from the Appellate Panel address all pending issues in this matter, and their decision should be affirmed.

C. Petitioner's argument that "even if Fragosa's other physical impairments contribute to this disability, he is still entitled to lifetime compensation because he suffered physical brain damage within the meaning of the Act" is without merit.

Petitioner's argument that the Commission's conclusion that the combination of his injuries (including but not limited to his foot and dizziness) are what totally disable him was made without reference to any particular evidence or without analysis is again unfounded. Counsel for Petitioner attempts to minimize the multitude of injuries he sustained in addition to his brain injury in an effort to maximize the impact Petitioner's injury to the brain had on his disability.

At the hearing before the Single Commissioner, Petitioner himself testified as to the impact his other injuries had on his ability to return to work. With respect to his left shoulder, Petitioner testified "when I move my shoulder hurts. If I try to lift my arm it will hurt. When I go to sleep it bothers me. I don't have the same strength that I used to have. When I try to grab something I couldn't hold it long enough." (Appendix, p. 1188, lines 3-6). Petitioner further testified with regards to his back injury, "if I sit down for a long period of time it starts bothering me, like the lower back, my back. I cannot stay too long of a time sitting down. My neck, I cannot move it freely because it bothers me." (Appendix, p. 1188, lines 21-24). Finally, with respect to his right foot and amputated toes, Petitioner testified "I cannot walk for along period of time because I've got inflammation. I have a lot of balance problems. And, I can't walk like I used to, like, just do some walking." (Appendix, pp. 1190-1191, line 25 and lines 1-3). In addition to his own testimony were the multiple impairments ratings assigned by Petitioner's authorized treating physicians, including his 11% impairment rating to the cervical spine by Dr.

Christopher Merrell, his 40% impairment rating to the right lower extremity due to his amputated toes, and 17% impairment to his whole person on account of his right foot and left shoulder injuries assigned by Dr. Shane Wolfe. (Appendix, pp.53-54)

Petitioner tries to rely on the holding in Pearson v. JPS Converter & Industrial Corp. for the position that an employer cannot attempt to avoid lifetime benefits because other injuries contributed to his disability. The facts in Pearson are different than the instant case. In Pearson, the claimant sustained a head injury, and after reviewing the medical records of multiple providers, the Court of Appeals found that the evidence supported the Commission's finding that Pearson was permanently disabled as a result of physical brain damage he suffered from his work accident. The court rejected the employer's effort to avoid the lifetime provision of §42-9-10(C) by arguing Pearson's psychological problems contributed to his disability, instead holding that entitlement to lifetime benefits under §42-9-10(C) does not require permanent and total disability as a result of the brain injury only, but instead requires that (1) the claimant be permanently and totally disabled, and (2) the claimant suffer brain "damage" as a result of his injury. In the present case, both the Single Commissioner and the Full Commission found that Petitioner's injuries in addition to his brain injury, combined to contribute to his permanent and total disability, but that Petitioner's injury to the brain did not rise to the level of sufficient severity as to constitute brain "damage" as contemplated by §42-9-10(C).

The holding in Pearson was available to this Court in 2013 when deciding Crisp II and Sparks, and nothing in the Pearson opinion changes the fact that questions of whether an injured workers' injury to the head or brain result in permanent "damage" are to be evaluated and using the "permanent and severity" test. The holding in Pearson excludes a finding that the mere addition of a second body part excludes a finding of physical brain damage, but in this case it is clear that Petitioner's ultimate disability was the result of not only his injury to the brain, but also

by his multitude of other physical injuries and injury produced limitations. The question of whether Petitioner suffered physical brain “damage” still requires an analysis of whether the injury to the brain was of sufficient “permanency and severity,” and in this case, the Commission found that it was not.

II. The Workers’ Compensation Commission correctly held that a neuropsychologist was qualified to give an opinion as to whether “functional studies, such as EEGs, CTs, and MRIs, were read as unremarkable ‘demonstrating structural resolution of the work related injury’ when a neuropsychologist’s expertise does not extend to reading and interpreting EEGs, CTs, and MRIs.

Petitioner’s argument that that the neuropsychologist in this case was unqualified to give an opinion because his expertise do not extend to reading and interpreting EEGs, CTs and MRIs is without merit. The authorized neurologist in this case, Dr. Mark Wagner is admittedly not a radiologist, and nor he did not attempt to interpret the studies himself. Dr. Wagner simply restated the findings made by the doctors who did interpret the studies and applied those findings to his own his medical opinion.

The radiologist performing and evaluating Petitioner’s January 16, 2008 CT of the brain found (1) no evidence of acute intracranial process and (2) healing skull fractures. (Appendix, p. 1028). The radiologist who conducted Appellant’s September 16, 2008 MRI of the brain found (1) right mastoiditis and (2) otherwise, unremarkable MRI of the brain. (Appendix, p.771). Finally, Petitioner’s October 2, 2008 EEG was read by Dr. Sandoz to be within a wide range of normal limits, with no focal or seizure discharges noted. (R. p. 1005). Dr. Wagner’s reliance on the interpretations of other professionals was proper since all of the doctors who treated Petitioner relied on the diagnostic testing to determine the proper course of treatment, despite the fact that they were not radiologists specifically trained to interpret the studies themselves.

It would be illogical to hold that only doctors with a specialization in radiology are qualified to give an opinion on the findings of objective diagnostic testing mediums such as

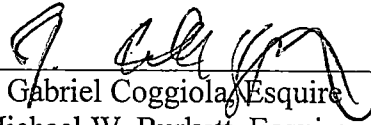
EEGs, MRIs, and CTs. Such a finding would mean that virtually every orthopedist, neurologist, or other specialized medical provider, is not qualified to make decisions regarding the prognosis and treatment plan for their patients, unless they also specialize in radiology and the actual performance of the testing. This sort of finding would eliminate the vast majority of doctors who treat patients, especially in some form of specialized care, because a new heightened criteria of qualification has been decided, requiring them to also specialize in the practice of radiology, and minimizes the importance of medical providers who do specialize in the intricacies of radiology and the interpretation of studies. Petitioner fails to cite any authority suggesting that it was improper for Dr. Wagner to rely on the conclusions of the radiologists who are specialize in the performance of diagnostic testing.

CONCLUSION

Based upon the foregoing arguments, Respondents respectfully request that this Court affirming the decision of the Workers Compensation Commission that Petitioner is permanently and totally disabled as result of his combined injures to multiple body parts, but that his injury to the brain did not rise to a sufficient level of severity as to qualify as physical brain “damage” as contemplated by S.C. Code Ann. §42-9-10(C).

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November 20, 2017

THE STATE OF SOUTH CAROLINA
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Workers' Compensation Commission

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

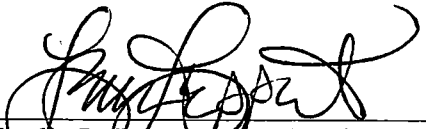
Hector G. Fragosa, (Employee/Claimant),Petitioner,
v.
Kade Construction, LLC (Employer) and
Key Risk Management Services, Inc. (Carrier),..... Respondents.

PROOF OF SERVICE

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

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