THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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

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

v.

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

REPLY BRIEF OF PETITIONER

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1. Hector Fragosa has suffered severe and permanent physical brain damage and is legally entitled to workers' compensation benefits for life [In Reply to Brief of Respondents at pages 6-9].

The Court of Appeals committed legal error in both the original appeal and the appeal after remand. The court erred in the original appeal in mistaking the Commission's legal error for an inconsistent finding of fact. On appeal following remand, the court erred in affirming the Commission's replacement of its original findings of fact with wholly new findings. The new findings exceeded the scope of remand and were unsupported by substantial evidence. These errors should be reversed by this Court.

Respondents suggest Petitioner "attempts to confuse the issues 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 damage." [Brief of Respondents, page 7]. Petitioner respectfully disagrees with this characterization.

The "piecemeal reading" presumably arises from various parts of Petitioner's Brief where the two critical findings are written together, i.e., "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled . . .," [R. p. 20, Findings of Fact 8-9]. For the sake of clarity and brevity, the two findings have indeed been condensed to their essential components in later parts of Petitioner's Brief. However, the two findings are stated separately when first discussed on pages 12-13 of Petitioner's Brief.[1]

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[1] The Court may note that the Commission cited to Dr. Sandoz's August 20, 2009 letter in support of Finding of Fact 8. In that letter, Dr. Sandoz wrote: ""Mr. Fragosa is a patient of mine who I have seen since 09/16/2008 secondary to a traumatic brain injury on 11/01/2007. . . . At this moment from the injury that the patient has suffered, he is totally and permanently disabled." [Appendix page 811, R.P. 763].

As to including "inappropriate and unsolicited medical research and opinions involving brain injuries," a lawyer has a duty to the Court to help it understand complex issues, including medical issues. Indeed, the Court has itself referred to medical publications many times to explain unfamiliar medical definitions and concepts.[2] The citations in Petitioner's brief to medical treatises and publications are not themselves evidence nor were they offered as proof of Fragosa's physical brain damage. As stated in the brief: "Petitioner makes this point simply to aid the Court as it reviews the medical evidence in the record. As in Crisp, Sparks and Therrell, the parties and medical providers sometimes use 'inartful phrasing' in describing Fragosa's physical brain damage as a physical brain injury or traumatic brain injury." [Brief of Petitioner, page 15].

Respondents do correctly note that this case was tried before this Court introduced the new "permanent and severe" test for physical brain damage. In its original Decision and Order, the Appellate Panel never explained why "based on the greater weight of the evidence, we find there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers' Compensation Act." [R. P. 21]. From the arguments at trial and before the Appellate Panel, the commissioners appeared to rely on the "I know it when I see it" rationale famously used in 1964 by United States Supreme Court Justice Potter Stewart to define hard core pornography as

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[2] See, e.g., Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("The Code requires the commission to convert injuries to unscheduled members into a percentage of impairment to whole person pursuant to either the American Medical Association's 'Guides to the Evaluation of Permanent Impairment' or 'any other accepted medical treatise or authority.'"); Peoples v. Henry Co., 611 S.E.2d 527, 364 S.C. 123 (2005)(observing "The circuit court noted that the Achilles tendon is defined in Taber's Medical Dictionary as being a part of the leg."); Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596 (1996)(referencing Dorland's Illustrated Medical Dictionary for definition of "intubation"). Cf. Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002)("Reflex Sympathetic Dystrophy ('RSD') is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain.").

obscene. At oral argument before the Appellate Panel, Commissioner Gene McCaskill asked of Respondents' counsel: "as I understand what you're saying if it is a physical brain injury you've got to be able to see it?" [R. p. 111, lines 11-13). Use of such a subjective standard for determining a complex medical technical condition was obviously untenable from the beginning. The test adopted in Crisp and Sparks removes the speculation and requires the Commission to rely on specific criteria established by expert medical evidence.

In Sparks, the Court held "we conclude that 'physical brain damage' as used in § 42-9-10(C) is physical brain damage that is both permanent and severe." Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 130, 750 S.E.2d 61, 64 (2013). In Crisp, the Court further explained that entitlement to lifetime compensation was predicated on "brain damage so severe that the person could not subsequently return to suitable gainful employment." Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013). The Court endorsed "three ways to determine whether a person has sustained physical brain damage: (1) CT or MRI scanning; (2) cognitive behavioral level of functioning; and (3) neuropsychological testing." Id. at 844.

The criteria for physical brain damage was met when the Appellate Panel found Fragosa "sustained a 46% permanent impairment to the whole person for a traumatic brain injury [and] is permanently and totally disabled . . .," [R. p. 20, Findings of Fact 8-9]. Yet, even with Crisp and Sparks in hand, the Court of Appeals held "it is unclear whether the Appellate Panel found these injuries included an injury to the brain." [Appendix page 73; R. p. 29]. This was error. No remand for "clarification" was necessary, as the Appellate Panel itself had already made the findings necessary for lifetime compensation due to physical brain damage. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion

because "rank speculation" cannot outweigh competent evidence of disability).

On remand, the Commission only compounded the error – perhaps understandably confused given how perfectly the two findings matched up with the permanent and severe test. Nonetheless, the Commission made matters worse by making new findings wholly inconsistent with its original findings. The Commission on remand cannot ignore what it has already established as fact merely to find different grounds to support an already erroneous decision. Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011)("A court may not . . . exceed its authority and assume the role of a second jury. Rather, the appellate court's instructions circumscribe the trial court's authority on remand.").

Respondents argue 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." [Brief of Respondents, page 8]. That may be what the Full Commission did, but that was not what it was instructed to do. The case was remanded for clarification of an inconsistency (an unnecessary clarification given the appellate courts' authority to correct errors of law); not to disregard its previous findings of fact.

In their discussion of the evidence, Respondents note the "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." [Brief of Respondents, page 9]. This is simply untrue. Fragosa did *not* request a lump sum disability award. His trial counsel explicitly stated "I'm here on behalf of Mr. Fragoso here today arguing for

lifetime benefits under 42-9-10."[3] [Appendix page 1155, lines 20-25; R.p. 1103].

Fragosa testified he used "some of [his] weekly check to pay for things like groceries, and the electric bill, and the rent." [Appendix page 1192, lines 6-11; R.p. 1140]. As with virtually all his testimony, Fragosa was responding to leading questions "for a lot of it just to get us through it." [Appendix page 1174, lines 16-19; R.p. 1122].

Respondents argue Fragosa'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." [Brief of Respondents, page 9]. As this is a medically complex case driven more by the expert testimony and medical evidence, Fragosa's testimony has not drawn much attention. Yet the testimony is equally compelling – showing an individual who struggles every day to function with constant headaches, buzzing in his ears, constant dizziness, choking on his own saliva, irritability, mood changes, frustration, inability to sleep, blurry vision, social isolation, memory problems and cognitive deficits. [Appendix pages 1175-1198; R.p. 1123-1146].

On an exceptionally brief cross-examination, Respondents elicited testimony that Fragosa does "sometimes" drive on occasion; on other occasions his roommates drive him. [Appendix page 1197, lines 16-20; R.p. 1140]. However, Fragosa also testified to the difficulty he has following directions and remembering what he came to a store to get. Trying to follow directions worsens his headaches. He testified, "About the headaches that I have, I have more severe headaches when I'm trying to concentrate." [Appendix page 1186, lines 1-24; R.p. 1134]. Along with occasional driving, Fragosa is able to conduct some activities of daily living. He can fix meals, make his bed, listen to

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[3] The Act provides "Notwithstanding the provisions of Section 42-9-301, no total lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits." S.C. Code Ann. § 42-9-10(D)(2007).

music and try to dust up his room.[4] [Appendix page 1194, lines12-21; R.p. 1142].

This *de minimus* level of activity does not bar Fragosa from being disabled under the Workers' Compensation Act. It is well established that "Total disability does not require complete helplessness." Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 628, 142 S.E.2d 43, 44 (1965). The generally accepted test of total disability is an inability "to perform services other than those that were so limited in quality, dependability, or quantity that a reasonably stable market for them did not exist." Id. The standard for total disability is no different in brain damage cases. It is now and always has been based on inability to obtain and maintain gainful employment. In Crisp, the Court confirmed entitlement to lifetime compensation is predicated on "brain damage so severe that the person could not subsequently return to *suitable gainful employment*." Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013)(emphasis added). The disability resulting from Fragosa's brain damage meets this test.

A. The Court of Appeals applied the "any evidence" standard of review rather than the correct "substantial evidence" standard. [In Reply to Brief of Respondents, pages 9-10].

Respondents argue "Petitioner cannot city any evidence to support his claim that the Full Commission Appellate Panel[5] or the Court of Appeals misapplied the 'substantial evidence' standard of review that it applies on a regular basis." [Brief of Respondents, page 9]. Admittedly, it is difficult to identify the specific reasons the Court of Appeals erred in Fragosa II, given that the

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[4] Dr. Sandoz recognized Fragosa's residual ability to perform some ADL's. The 29% whole person impairment rating he assigned for clinical dementia reflects an "impairment [which] requires direction of some activities of daily living." " [AMA Guides to Permanent Impairment (5th Edition), page 320, Table 13-5].

[5] As the ultimate trier of fact, the Appellate Panel applies a de novo review standard, meaning it makes its own findings of fact based on a preponderance of the evidence.

opinion is an unpublished memorandum opinion with no analysis. However, in this case, the findings made by the Appellate Panel on remand are so egregious that they virtually speak for themselves. The findings are extensively analyzed at pages 21-30 of Petitioner's Brief.

Petitioner rejects Respondents' suggestion that he "did his own research on different forms of injuries to the brain in an unsolicited effort to qualify his brain injury as severe" merely because he "disagrees with the Full Commission's interpretation of the evidence in the record as a whole." [Brief of Respondents, page 9]. Any person charged with the heavy responsibility of hearing and deciding workers' compensation cases *must* understand the medicine. It is the responsibility of the lawyers who represent disabled workers before the Commission and the Courts to study the medicine, so they can impart that understanding to commissioners and judges. To do anything less would be an abdication of responsibility.

Workers' compensation may not outwardly seem to have the drama and pathos of criminal law. Yet, to the people involved – who have lost their health and their livelihoods – there is more than enough. It is perhaps not necessary that those who try these cases sympathize or empathize with disabled workers. It is necessary that they be heard.

Here, the key evidence is the opinion of Fragosa's neurologist, Dr. Sandoz. His opinion is the evidence that allowed the Commission to find "That the Claimant sustained a 46% permanent impairment to the whole person for a traumatic brain injury as stated by Dr. George M. Sandoz in his August 20, 2009 letter." [R. p. 20, Finding of Fact 8]. And it is the opinions of Dr. Sandoz and Dr. Brabham which allowed the Commission to find "That, after considering the Claimant's multiple impairment ratings, we find that the Claimant is permanently and totally disabled and is unable to return to any type of work that he has performed in the past." [R. p. 20, Finding of Fact 9].

With those findings – from detailed reports and medical records – it is inexplicable how the Commission on remand could virtually ignore the evidence from Dr. Sandoz and Dr. Brabham (and Dr. Wagner) and instead reach a decision made of the shabbiest cloth woven from the thinnest threads. No such decision should stand, nor should such a flawed decision making process continue.

There are only two plausible explanations for how this came to be. Perhaps the medical evidence was misapprehended, thus the rationale for Petitioner to provid context to the medical evidence in his brief. Or, more likely, perhaps the commissioners misapprehended the instructions on remand, believing they were to search the record for evidence to support the original decision, rather than to resolve the apparent inconsistency in whichever direction the facts and the law took them.

In any case, the order on remand is fundamentally flawed and should be reversed. It is controlled by multiple errors of law and is unsupported by substantial evidence.

B. The Full Commission exceeded its authority on remand by disregarding critical findings in its original order. [In Reply to Brief of Respondents, pages 10-11].

Respondents contend "there is nothing in the Appellate Panel's order [on remand] indicating that it abandoned the previous findings of the Single Commissioner." [Brief of Respondents, page 10]. Actually, there is a great deal to indicate the previous findings were abandoned – specifically the Order itself and what it leaves out.

If the Commission was truly providing "clarification regarding the existence of a physical brain injury," then it must clarify the inconsistency in its previous order. The Commission was required to reconcile how "a 46% permanent impairment to the whole person for a traumatic brain injury" was "not a physical brain injury as it does not meet the criteria established under the South

Carolina Workers' Compensation Act." [Appendix page 54-55, Findings of Fact 8 and 18; R. p. 10-11]. The truth is there is no way to reconcile these findings – not under Crisp and Sparks. The original rationale – brain damage you can see on a CT scan or MRI – was rejected in Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013)("we are reluctant to require use of a specific diagnostic tool in proving these medically-technical brain injury cases."). With the foundation for the "not a physical brain injury" finding no longer good law (if it ever was), the Commission was left with a logical contradiction akin to the *Liar's Paradox* which it could not resolve. The solution was to simply ignore the inconvenient fact and start anew. The result was a new order which omitted the inconvenient facts.

In reality, it's not that easy. "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, Argument in Defense of the Soldiers in the Boston Massacre Trials, December 1770. The Commission committed legal error and exceeded the remand instructions by disregarding its previous factual findings.

2. Even if Fragosa's other physical impairments contribute to his disability, he is still entitled to lifetime compensation because he suffered physical brain damage within the meaning of the Act [In Reply to Brief of Respondents, pages 11-13].

Petitioner does not deny he has other physical impairments caused by his fall from the parking garage. He does not, as suggested by Respondents, "minimize the multitude of injuries he sustained in addition to his brain injury . . ." [Brief of Respondents, page 11]. Hector Fragosa knows more than anyone how serious his injuries are.

Taken to its logical conclusion, Respondents propose an analytical scheme where a brain

damaged person is barred from lifetime compensation if he also suffers other disabling injuries. Such an approach "would turn the Act on its head and violate the stated policy behind it." Hutson v. S.C. Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (2012) (rejecting analytical approach which "would punish an employee for merely exploring the chance of overcoming an unanticipated injury by exploring other possible career options."). There is no rational reason to treat injured workers who suffer physical brain damage alone (such as from a gunshot, blow to the head, or fall from standing height) differently than those who suffer physical brain damage along with multiple other injuries(such as a fall from height as in the instant case). This is exactly the holding of Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998)("the statute only requires that a claimant be totally and permanent disabled and suffer physical brain damage as a result of the injury.").

Ironically, at trial, Respondents' counsel cogently explained why central nervous system injuries (brain damage, quadriplegia, and paraplegia) are treated differently under the Workers' Compensation Act. Mr. Burkett explained:

> I think that the best way to look at this is you have the question of physical brain [damage], which is what the Statute requires, versus just an injury to the brain, which is covered under Regulations 67-1101. The law covers both of them.
>
> And I think the best example is if we take an injured worker who has his legs amputated, he's confined to a wheelchair for the rest of his life. Well, assume he can't go back to work. The most he's going to get is five hundred (500) weeks. He's got his two (2) body parts, he has no legs; he cannot walk.
>
> Now take someone who is a paraplegic. No functional use of the legs, can't walk anymore, confined to a wheelchair, but their outcomes are different. The law gives one (1) of them lifetime benefits and gives the other five hundred (500) weeks because the law presupposes additional more complicated problems when you're a paraplegic as opposed to having your legs amputated. The law presupposes additional problems, significant problems, when you have a physical [damage] to

your brain . . . [6] [Appendix page 1162, line 2-page 1163, line 3; R. P. 1110-1111].

Mr. Burkett's analysis of the policy underlying the various levels of disability compensation is spot on. The Workers' Compensation Act provides three methods to obtain compensation for permanent disability: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C.Code Ann. § 42-9-20; and 3) scheduled disability under S.C. Code Ann. § 42-9-30. The first two methods are premised on the economic model. Under the economic model, the injured worker must prove an actual loss of earnings capacity. The third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).

A person with a permanent injury limited to a single scheduled body part is compensated under the medical model set out in S.C. Code Ann. § 42-9-30 (2007). Under the "two-body part rule," the injured worker may proceed under the economic model *if* he can prove two or more body parts are injured or affected by the injury. Thus, rather than being limited to (in Mr. Burkett's example) 195 weeks for each leg, he can recover 500 weeks for permanent and total disability under § 42-9-10. The rationale for the greater potential recovery is "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 106-7, 354 S.C. 100, 103 (2003).

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[6] Counsel went on to argue "The law presupposes additional problems, significant problems when you have a physical injury to your brain, something we can see, a physical damage to the brain as opposed to what the law covers in the regulations, which says he can gert an award between twenty-five (25) and two hundred and fifty (250) weeks." [Appendix page 1162, line 2-page 1163, line 3; R. P. 1110-1111]. It is at this point that Petitioner must part company with opposing Counsel, for the rest of the argument takes us into the "I know it when I see it" analysis adopted by the Commission in its original order and rejected by this Court in Crisp.

The same rationale applies to lifetime compensation for physical brain damage, quadriplegia and paraplegia. All are serious injuries to the central nervous system (brain and spinal cord). The brain and spinal cord control every bodily function. Serious injuries to the central nervous system create additional more complicated problems for myriad organ systems within the body. The Legislature understood that paraplegia is quantitatively much more serious than amputation of both legs. By the same token, the Legislature understood that a mild traumatic brain injury with minimal sequelae allowing a person to remain gainfully employed is a far cry from serious and permanent physical brain damage.

In Mr. Fragosa's case, it is the multiple deficits caused by the brain damage that qualify him for lifetime compensation. His problems would not arise from a simple single episode concussion. As noted previously, he suffers from cognitive issues, emotional issues, headaches, dizziness, vision and hearing problems – all as a result of the physical brain damage. Dr. Sandoz recognized these deficits when he assigned the 46% impairment of the whole body. Dr. Sandoz wrote that this impairment "does not attend to the damage that the patient has suffered from his neck and back as well for his foot," thus indicating Fragosa would be totally disabled from his brain injury even without the other injuries. [Appendix page 811, R.P. 763]. To resolve all doubt about meeting the legal requirements for proof of physical brain damage, Dr. Sandoz opined "to a reasonable degree of medical certainty [that] Mr. Fragoso has suffered physical brain damage that has rendered him totally and permanently disabled." [Appendix page 977, R.P. 929].

To what extent Fragosa's other impairments contribute to his disability is not at issue. He suffered an exceptionally serious accident with injuries to multiple parts of his body. The other injuries do not necessarily disable him, as the work restrictions assigned by his doctors would not

in and of themselves render him incapable of gainful employment. This issue is controlled by Pearson, wherein the employer also conceded total disability, yet argued "that Pearson's disability was a result of a combination of psychological problems and some brain damage." Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 400, 489 S.E.2d 219, 222 (Ct. App.1997), *cert. denied* (1998). The Court of Appeals rejected this assertion, holding "Employer's argument to avoid the lifetime benefit provision of section 42-9-10 because of Pearson's psychological problems is meritless." Id. In Sparks, this Court reconfirmed this analysis, citing Pearson for the rule that: "§ 42-9-10 *does not require that total and permanent disability result solely from physical brain damage* but does require that the claimant suffer physical brain damage as a result of the compensable injury." Sparks v. Palmetto Hardwood, Inc., 738 S.E.2d 831, 835, 401 S.C. 619 (2013)(emphasis added).

3. The IME Report from Dr. Wagner cannot be used to support a finding of no physical brain damage as a neuropsychologist is not qualified to give an opinion based on imaging studies [In Reply to Brief of Respondent at pages 13-14].

In Fragosa I, Petitioner appealed the issue of whether a neuropsychologist is qualified to give an opinion based on imaging studies. This issue was raised in the statement of issues, but was not raised to the Court of Appeals in Fragosa I nor in Petitioner's Brief to this Court. Petitioner is replying to this issue because it was raised by Respondents in their brief.

Respondents' argument contains one significant typographical error. On page 13, Dr. Wagner is referred to as "the authorized neurologist in this case." [Brief of Respondents, page 13]. Dr. Wagner is a neuropsychologist. He is a Ph.D.; not an M.D. He is qualified to give opinions on brain damage based on neuropsychological testing. He is not qualified to interpret studies, interpret

the opinions of medical doctors reading imaging studies, nor is he qualified to give a medical opinion. The actual authorized treating neurologist, Dr. Sandoz, is qualified to do all those things.

The Appellate Panel's reliance on Dr. Wagner's statement regarding imaging studies having been read as unremarkable is legal error. Dr. Wagner never rendered an opinion – or "concluded" as the original Order puts it – that Fragosa had not suffered physical brain damage or even that the brain damage had somehow been cured with no deficits. At most, he merely commented that the later imaging studies were read as unremarkable.

As a neuropsychologist, Dr. Wagner is qualified to give an opinion as to the existence, extent and severity of a traumatic brain injury – subject to the limitation that his opinion be based on the neuropsychological testing he is qualified to administer and interpret. He is not a medical doctor nor a radiologist; he cannot interpret imaging studies. He merely parrots the reports themselves – and parrots them inaccurately. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion as based on "rank speculation").

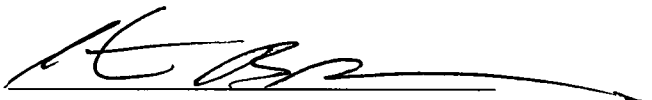
Furthermore, his unqualified interpretation that the imaging studies "have been read as unremarkable demonstrating structural resolution of the work-related injury" is wrong on its face. The last CT scan was completed on January 16, 2008. The report states: "There has been interval resolution of previously visualized left parietal and right temporoparietal soft tissue swelling." [R. p. 303]. The mere fact the acute swelling has gone down does not equate to "structural resolution" of the brain injury – not when Fragosa is left with permanent cognitive, balance and memory deficits.

Dr. Wagner's opinion *supports* the conclusion that Fragosa suffered physical brain damage. His testing revealed cognitive deficits. He attributed the deficits to the brain damage; not to medication, not to psychological issues, not to any other cause – only the brain damage.

CONCLUSION

For the foregoing reasons, the Court should reverse the Appellate Panel and hold Hector Fragosa suffered physical brain damage, is not subject to the five hundred week limitation, and shall receive disability and medical benefits for life.

Respectfully Submitted



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PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Reply Brief of Petitioner** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on December 13, 2017, addressed as follows:

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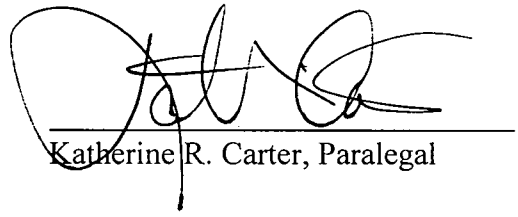

Katherine R. Carter, Paralegal

December 13, 2017
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