

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

SEP 17 2018

S.C. SUPREME COURT

Op. No. 2018-MO-29 (S.C. filed August 29, 2018)

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

v.

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

PETITION FOR REHEARING

This is an appeal involving a workers' compensation case. Respondents, by and through their undersigned counsel, hereby file this petition for rehearing pursuant to Rule 221, SCACR. On August 29, 2018, this Court filed an opinion reversing the South Carolina Court of Appeals' March 30, 2016 decision, wherein the Court of Appeals affirmed the Workers' Compensation Commission's denial of lifetime benefits to Petitioner as a result of physical brain "damage" pursuant to S.C. Code Ann. §42-9-10(C). Fragosa v. Kade Construction, LLC, Opinion No. 2018-MO-29 (S.C. filed August 29, 2018). As grounds for their Petition, Respondents would respectfully argue that this Court may have overlooked or misapprehended the evidence, law, or arguments involving (1) the Commission's ability to make or alter findings of impairment ratings, (2) whether the Commission complied with the Court of Appeals' instructions on remand

and whether its decision was supported by substantial evidence, and (3) if a finding of 46% impairment alone is outcome determinative, whether the Commission in fact assigned 46% impairment to the brain, and not the whole person.

STATEMENT OF THE CASE

On June 28, 2011, the Single Commissioner found Petitioner to be permanently and totally disabled as a result of the combination of his injuries; however, the Single Commissioner found Petitioner did not suffer physical brain damage entitling him to lifetime benefits under §42-9-10(C). [R. pp.54-55, Finding of Fact #9 and Conclusions of Law #2 and #3]. The Full Commission (“Commission”) affirmed on May 23, 2012. [R. p.66]. On March 6, 2013, while the parties were awaiting oral arguments before the Court of Appeals, this Court handed down two (2) decisions setting forth the “permanency and severity” test to be utilized by the Workers’ Compensation Commission when deciding whether or not an injured worker suffered physical brain “damage” under §42-9-10(C). (*see Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 131, 750 S.E.2nd 61, 64 (S.C. 2013)(holding physical brain damage must be “both permanent and severe.”); *Crisp v. SouthCo, Inc.* 401 S.C. 627, 642, 738 S.E.2nd 835, 842 (S.C. 2013)(“[T]he severity of the [brain] injury is the lynch pin of the analysis.”)).

On November 27, 2013, the South Carolina Court of Appeals issued its decision affirming the Commission’s May 23, 2012 decision in part and remanding the case to the Commission for clarification. *Fragosa v. Kade Construction, LLC*, 407 S.C. 424, 755 S.E.2nd 462 (S.C.Ct. App. 2013)[R. pp.67-74]. Specifically, the Court of Appeals concluded that the Commission’s Finding of Fact #8, which found the Petitioner sustained a 46% impairment to the whole person for a traumatic brain injury, was inconsistent with Finding of Fact #18, which

found the Petitioner did not suffer a brain injury. [R. p.73]. To this end, the Court of Appeals instructed the Commission to (1) clarify whether Petitioner sustained a physical brain injury as a result of his accident, and (2) in light of the new test handed down in Crisp and Sparks, cite specific evidence to support the Commission's determination as to whether such injury to the brain was of sufficient severity to reach the level of physical brain "damage" as contemplated in §42-9-10(C). [R. p.73].

On September 30, 2014, the Commission issued its Decision and Order on Remand from the Court of Appeals, wherein it concluded that the ultimate residual effects of Petitioner's head injury were not of sufficient severity to reach the level of physical brain "damage" as contemplated in §42-9-10(C), and the combination of Petitioner's injuries, including but not limited to his foot and his dizziness, are what totally disabled him. [R. p.86, Findings #27 and #28]. On March 30, 2016, the South Carolina Court of Appeals affirmed the decision of the Commission. Fragosa v. Kade Construction, LLC, Op. No. 2016-UP-139 (S.C.Ct.App. filed March 30, 2016)[R. pp.1-2].

This Court now reverses the judgment of the Court of Appeals. As the basis for its reversal, this Court stated, "because the Commission originally found a 46% impairment rating for a traumatic brain injury and did not alter that finding in its subsequent order, the finding on remand of no physical brain damage cannot be upheld." This Court went on to state that remaining faithful to Crisp and Sparks, "we find an impairment rating of 46% for a traumatic brain injury sufficiently severe to implicate lifetime benefits for physical brain damage pursuant to section 42-9-10(C)."

ARGUMENT

This Court's August 29, 2018 opinion states, "[S]ince the Commission originally found a 46% impairment rating for a traumatic brain injury and did not alter that finding in its subsequent order, the finding on remand of no physical brain damage cannot be upheld." Respondents respectfully argue that this Court misapprehended the evidence, law, or arguments involving (1) the Commission's ability to make or alter findings of impairment ratings assigned by physicians, and (2) whether the Commission's decision of no physical brain "damage" complied with the Court of Appeals' instructions on remand and can be upheld based on the substantial evidence. In the alternative, Petitioner respectfully submits that this Court misapprehended the evidence, law, or arguments involving whether the Commission made a specific finding of impairment to the brain as opposed to the whole person.

I. This Court overlooked or misapprehended the evidence, law, or arguments involving the Commission's ability to make or alter findings of "impairment."

The Single Commissioner's June 28, 2011 Order included the finding that "Petitioner sustained a 46% impairment of the whole person for a traumatic brain injury **as stated by Dr. George M. Sandoz in his August 20, 2009 letter.**" [R. p.54, Finding of Fact #8](emphasis added). In fact, the Single Commissioner issued findings with regard to the impairment ratings assigned by all of Petitioner's medical providers, including the 11% impairment of the whole person on account of his cervical injury **as stated by Dr. Christopher Merrill** in his February 8, 2010 Form 14B, and 40% impairment rating to the right lower extremity and 1% impairment rating to the left upper extremity, and combined impairment rating of 17% of the whole person on account of Petitioner's right foot and left shoulder injuries **as stated by Dr. Shane Wolf** in his April 8, 2010 Form 14B. [R. pp. 9-10, Findings of Fact #6 and #7](emphasis added).

Petitioners respectfully submit that this Court overlooked or misapprehended the

evidence, arguments, or law involving the Commission's ability to make or alter a finding that Petitioner sustained 46% impairment rating for a traumatic brain injury **as stated by Dr. Sandoz**. The Commission cannot itself find or alter the August 20, 2009 opinion of Dr. Sandoz, and this Court misapprehended the law involving a finding of "impairment" versus a finding of "disability."

The physician determines the extent of "impairment," if any, as opposed to "disability." "Impairment" is the loss of, loss of use of, or derangement of any body part, system, or function. "Disability" is a distinct concept and is defined as "the limiting loss or absence of the capacity of an individual to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements."¹

The Workers' Compensation Commission lacks the capacity to find a medical impairment. Instead, the Commission's authority lies in the determination of "disability" based on an analysis of the complete of the evidence of the case. In determining the extent of "disability," the Commission has the responsibility to review the entire evidence in the record, including, but not limited to, impairment ratings provided by doctors. In other words, the Commission's recitation of one medical opinion should not be confused with its analysis of the evidence as a whole to make disability findings.

In this case, the Single Commissioner's Finding of Fact #8 that Petitioner sustained 46% impairment to the whole person for a traumatic brain injury was nothing more than a recitation Dr. Sandoz' August 20, 2009 medical opinion and no different than the recitation of medical evidence in Findings of Fact #6 and #7 that preceded it. [R. pp.53-54]. These findings of fact are not legal conclusions of the Commission, only restatements of the impairment ratings provided by the doctors.

¹ Beard, Poteat, Lamar, Sumwalt, Bluestein, Sullivan, The Law of Workers Compensation Insurance in South Carolina: Sixth Edition, 2012 §I(B)(2)(b) at page 329 (citing American Medical Association, Guides to the Evaluation of Permanent Impairment (5th Ed.), at p.2).

Accordingly, since the Single Commissioner could not issue his own opinion on impairment, the Commission lacked the authority to alter any finding of a medical impairment assigned by a doctor in its original May 23, 2012 full affirmation or subsequent remand Order on September 30, 2014. To do so would require the Commission to alter the August 20, 2009 opinion of Dr. Sandoz.

As discussed more fully below, the Commission on remand did not address the finding of 46% impairment to the whole person for physical brain damage because it was not instructed by the Court of Appeals to restate its previous findings. Instead the Court of Appeals directed the Commission to address the inconsistency between Findings of Fact #8 and #18, and to cite specific evidence in support of its determination of whether Petitioner's brain injury was of sufficient severity to qualify as physical brain "damage," using the new test set forth in Crisp and Sparks which was unavailable prior to the remand. [R. p.73].

- II. This Court overlooked or misapprehended the evidence, law, or arguments involving) whether the Commission's decision of no physical brain "damage" complied with the Court of Appeals' instructions on remand and can be upheld based on the substantial evidence.**
 - a. The Court overlooked or misapprehended the evidence, law, or arguments involving the Commission's compliance with the Court of Appeals instructions on remand.**

As stated above, neither the Commission's May 23, 2012 order affirming the Single Commissioner nor its subsequent September 30, 2014 remand order altered the Single Commissioner's November 21, 2011 finding of 46% impairment to the whole person for a traumatic brain injury as stated by Dr. Sandoz on August 20, 2009, because "impairment" is a determination reserved for medical providers, and the Commission lacked the authority to alter a recitation of Dr. Sandoz's August 20, 2009 medical opinion. The Commission's September 30,

2014 Order on remand did not include an identical finding that Petitioner sustained 46% impairment to the whole person as stated by Dr. Sandoz, nor did it include any findings involving the impairments ratings assigned by Petitioner's other medical providers. The reason for these omissions is clear in light of the instructions from the Court of Appeals. The Court of Appeals only instructed the Commission to address the inconsistency in its May 23, 2012 Order and cite evidence in support of its application of the new permanent and severity test set forth by Crisp and Sparks. Until that time, the Commission did not have an opportunity to make a decision of whether Petitioner suffered physical brain "damage" in light of the "permanent and severe" test handed down in Crisp and Sparks.

The Commission's September 30, 2014 Order on remand first addressed the inconsistency in its prior order and held that Petitioner suffered a physical brain injury, but not physical brain damage. [R. p.79, Finding #2]. The Commission then went on to set forth its conclusion that in light of the "permanent and severe" test handed down in Crisp and Sparks, Petitioner's injury to the brain did not reach the sufficient level of severity as to constitute brain "damage." [R. p. 86, Finding #27]. As instructed by the Court of Appeals, the Commission supported this conclusion by citing extensive evidence it relied upon to reach its decision.

In a workers' compensation action, the existence of any conflicting opinions between the doctors is a matter left to the Worker's Compensation Commission. Harbin v. Owens-Corning Fiberglass, 316 S.C. 423, 450 S.E.2nd 112 (S.C.App. 1994). In this case, the Commission states at the outset of the September 20, 2014 order on remand that its finding is based on medical evidence in its entirety. [R. p.79, Finding #3]. In compliance with its instructions from the Court of Appeals, the Commission cited an extensive list of medical evidence supporting its ultimate conclusion that the residual effects of petitioner's head injury were not of sufficient severity to

reach the level of physical brain damage as contemplated in §42-9-10(C). For example, the Commission cited the opinions of Dr. Norcross of MUSC, who termed the Petitioner's neurological recovery as "actually remarkable" and the opinion Dr. Takas of MUSC, who stated the Petitioner had "no neurological segue." [R. p. 82, Finding #20]. The Commission stated that it gave great weight to the records of these two physicians as they were supported by sequential hospital records. [Id.]. Further, the Commission cited the opinion of Dr. Wagner that Petitioner's cognitive deficits were "relatively mild" and his Glasgow Coma Scale 15/15. [R. p. 82, Finding #21]. The Commission concluded that an assessment of "relatively mild" does not rise to the level of most serious cases of injury to the brain as set forth by the Supreme Court. [Id.].

In addition to its reliance on competing medical evidence, the Commission stated in the September 30, 2014 Order on remand that it based its conclusion that Petitioner's injury to the brain did not constitute physical brain "damage" on the lay testimony of Petitioner himself. The Commission stated that although not dispositive to their decision, statements and testimony from Petitioner himself showed his ability to drive, an activity which requires more than physical skill. [R. pp.82-83, Finding #23].

For the reasons set forth above, Petitioners respectfully submit that this Court overlooked or misapprehended the evidence, law, or arguments involving the Commission's compliance with the Court of Appeals instructions on remand, and whether its ultimate conclusion that Petitioner's brain injury was not of sufficient severity to reach the level of physical brain "damage" is supported the substantial evidence in the record.

- b. This Court overlooked or misapprehended the evidence, law, or arguments involving whether an impairment rating alone can be outcome determinative when deciding whether an injured worker sustained physical brain "damage."**

Respondents respectfully submit that this Court overlooked or misapprehended the evidence, law, or arguments involving whether a single impairment rating alone can be outcome determinative in deciding whether an injured worker sustained a brain injury. As this Court held in Sparks, "physical brain damage" as used in § 42-9-10(C) is physical brain damage that is both permanent and severe. 406 S.C. 124, 131, 750 S.E.2nd 61, 64 (S.C. 2013). In Crisp, this Court stated, "[T]he severity of the [brain] injury is the lynchpin of the **analysis**." 401 S.C. 627, 642, 738 S.E.2nd 835, 842 (S.C. 2013) (emphasis added). As this Court's dictates in Crisp, the determination of whether an injury to the brain represents physical brain damage is **an analysis** to be conducted by the Commission, and there are no bright line rules that qualify an injury to the brain as sufficiently severe enough to arise to the level of physical brain "damage."

In Smith v. Michelin Tire Co., this Court held that while medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record. Stated concisely, "medical testimony should not be held conclusive irrespective of other evidence." See Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2nd 281 (S.C. 1946); Hargrove v. Carolina Orthopaedic Surgery Associates, P.A., 389 S.C. 119, 697 S.E.2nd 641 (S.C.Ct. App 2010).

This Court's decision that the presence of one of Petitioner's medical provider's assignment of impairment rating of 46% to the whole person for a traumatic brain injury alone is sufficiently severe to trigger lifetime benefits for physical brain "damage" eliminates the Commission's analysis and role as the factfinder in the case. If this Court's decision that an impairment rating from one of Petitioner's medical providers alone satisfies the severity prong of the test for physical brain damage is upheld, then this Court has removed the Commission's essential function to weigh the complete evidence in the record, including competing medical

evidence and lay testimony, and make case by case determinations as to the “permanency and severity” of an injury to the brain as instructed by Crisp and Sparks.

Respondents respectfully submit that this Court’s decision that the Commission’s recitation of Dr. Sandoz’s medical opinion of 46% impairment to the whole person is outcome determinative is a misapprehension of the evidence, law, or arguments involving application of the “permanent and severe” test for physical brain “damage.” The Commission properly relied on the entire evidence in the record, and the substantial evidence supports its conclusion that the residual effects of Petitioner’s head injury are not of sufficient severity to reach the level of physical brain damage as contemplated in §42-9-10(C).

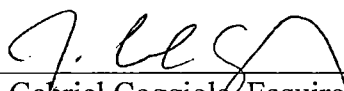
III. This Court overlooked or misapprehended the evidence, law, or arguments involving whether the commission made a specific finding of impairment to the brain.

Notwithstanding the arguments set forth above, this Court’s decision to reverse hinged on its conclusion that the “Commission originally found a 46% impairment rating for a traumatic brain injury.” However, the finding of fact upon which this Court relied noted a “46% impairment to the **whole person** for a traumatic brain injury.” [R. p. 54](emphasis added). Pursuant to Regulation 67-1101, the brain is a scheduled member, and the issue in a scheduled member case “is not impairment to the whole body, but rather it is loss of use of a specific body part.” Clemmons v. Lowe’s Home Centers, Inc. – Harbinson, 420 S.C. 282, 803 S.E.2d 268, 272 (2017). In this case, there is no finding of impairment or disability to the brain by the Commission, yet this Court noted “we find an impairment rating of 46% for a traumatic brain injury sufficiently severe to implicate lifetime benefits.” This Court reversed this case on the misapprehension that the Commission found a 46% impairment to the brain, and as a result of

this misapprehension, the basis for reversal cannot stand. This Court should affirm the decision of the Court of Appeals. In the alternative, this Court should remand the case to the Commission for a specific finding to the brain as opposed to the whole person if this Court believes a specific finding to the brain is outcome determinative under the Crisp and Sparks analysis and despite the overwhelming evidence cited by the Commission in its September 30, 2014 remand Order.

CONCLUSION:

Respondents respectfully submit that this Court's decision may have overlooked or misapprehended the evidence, law, or arguments involving the Commission's ability to make or alter findings related to impairment ratings and to weigh the complete evidence in the record and render an ultimate conclusion on whether an injury to the brain constitutes physical brain "damage." For the foregoing reasons, Respondents request this Court grant the petition for rehearing, reconsider the original opinion, and affirm the judgment of the South Carolina Court of Appeals that Petitioner's injury to the brain did not constitute physical brain "damage" as contemplated by §42-9-10(C). In the alternative, this Court should remand the case to the Commission for a specific finding of disability to the brain if this Court believes one impairment or disability rating alone is outcome determinative.



J. Gabriel Coggiola, Esquire
Michael W. Burkett, Esquire
Willson, Jones, Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204
(803) 227-2889
jgcoggiola@wjlaw.net
Attorneys for Respondents

September 12, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 17 2018

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

S.C. SUPREME COURT

Op. No. 2018-MO-29 (S.C. filed August 29, 2018)

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

v.

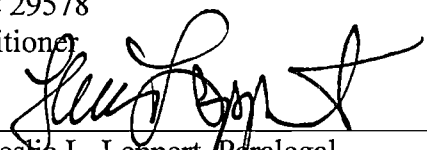
Kade Construction, LLC (Employer) and
Key Risk Management Services, Inc. (Carrier), Respondents.

PROOF OF SERVICE

The undersigned certifies that on the date indicated below, she served counsel for Petitioner with a copy of **Respondents' Petition for Rehearing** by mailing copies of the same by United States Mail postage prepaid on September 17, 2018 to the following addresses:

Stephen B. Samuels
Samuels Law Firm, LLC
1320 Richland Street
Columbia, SC 29201
Attorney for the Petitioner

Jeff. C. Chandler
Chandler Law
Bank of America Building
2501 Oak Street
Myrtle Beach, SC 29578
Attorney for Petitioner



Leslie L. Leppert, Paralegal
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204
(803)227-2890

September 17, 2018
Columbia, South Carolina