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.

BRIEF OF PETITIONER

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

Jeff C. Chandler
CHANDLER LAW FIRM
Bank of America Building
2501 North Oak Street
Myrtle Beach, SC 29577
(843) 448-4357
jeffcchandler@aol.com

ATTORNEYS FOR PETITIONER

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A. Issues appealed after remand:

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2. Whether the Workers Compensation Commission erred in failing to comply with the instructions to "remand for clarification regarding the existence of a physical brain injury," when the Commission made new findings without reference to its previous findings, such new findings being inconsistent, unsupported by the evidence in the record, and based on the medical opinions of the Commissioner rather than the doctors.

3. Whether § 42-9-10 requires that total and permanent disability result solely from physical brain damage rather than merely requiring that the claimant suffer physical brain damage as a result of the compensable injury as held in Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 400, 489 S.E.2d 219, 222 (Ct. App.1997).

B. Issues appealed prior to remand raised again to preserve issues under Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013):

1. Whether the Workers Compensation Commission erred as a matter of fact and law in finding: "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."

2. Whether the Workers' Compensation Commission erred as a matter of fact and law in finding 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.

3. Whether the Workers' Compensation Commission erred as a matter of fact and law in arbitrarily disregarding the unrefuted expert medical opinion of Dr. Sandoz that Claimant had suffered a physical brain injury.

4. Whether the Workers' Compensation Commission erred as a matter of fact and law in giving any weight to Dr. Wagner's opinion when the opinion was not stated to a reasonable degree of medical certainty.

5. Whether the Workers' Compensation Commission erred as a matter of law in failing to make specific and detailed findings of fact sufficient for appellate review.

6. Whether the Workers' Compensation Commission erred as a matter of fact and law in failing to award lifetime compensation to Claimant in that he was totally disabled and had suffered physical brain injury.

STATEMENT OF THE CASE

This workers' compensation appeal arises out of an accident suffered by the Petitioner, Hector Fragosa, on November 1, 2007. Fragosa's Employer, Kade Construction, LLC, and its Carrier, Key Risk Management Services, Inc., accepted liability and began providing benefits. Employer and Carrier are the Respondents in this appeal.

On March 25, 2011, Respondents filed a Form 21 (Employer's Request for Hearing) seeking to terminate temporary compensation. [R. p. 44].

Petitioner filed a Form 50 (Request for Hearing) on April 8, 2011, alleging he was entitled to lifetime compensation and medical treatment due to permanent and total disability accompanied by physical brain damage. [R. p. 45]. Respondents timely filed a Form 51 (Employer's Answer to Request for Hearing) on April 19, 2011. Respondents admitted the work injury, but denied Fragosa sustained injuries to the extent alleged in the Form 50. [R. p. 46].

The Workers' Compensation set the hearing on the Forms 21, 50 and 51.

The hearing was held on June 28, 2011, before Commissioner Avery B. Wilkerson. The primary issue in dispute was whether Hector Fragosa was permanently and totally disabled with physical brain damage.

Commissioner Wilkerson issued an Order on November 21, 2011, Fragosa: "has not suffered a physical brain injury and is not entitled to lifetime compensation benefits under the South Carolina Workers' Compensation Act." He found as a fact 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." He further found "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." [R. p. 11].

Fragosa timely appealed to the Appellate Panel of the Full Commission on December 5, 2011. The Oral argument was held before the Appellate Panel on March 19, 2012. The Appellate Panel affirmed the Single Commissioner's Order on May 23, 2012. [R. p. 14 - 22].

Fragosa timely appealed to the South Carolina Court of Appeals on June 18, 2012. The primary issues raised were (1) whether the Commission erred as a matter of law in finding Fragosa had not suffered physical brain damage; and (2) in relying on the opinion of a neuropsychologist, Dr. Mark Wagner, in interpreting imaging studies. Oral arguments were heard on October 10, 2013. On November 27, 2013, the Court issued a published opinion. Fragosa v. Kade Constr., LLC, 407 S.C. 424, 755 S.E.2d 462 (Ct. App. 2013).

In the opinion, the Court affirmed the "Appellate Panel's reliance on the opinion of Dr. Wagner and remand for clarification regarding the existence of a physical brain injury." Id.

Fragosa timely filed a Petition for Rehearing and a Petition for Rehearing en banc on December 12, 2013. Respondents filed a Return to the Petition for Rehearing on December 23, 2013. Fragosa filed a Reply to the Return on December 31, 2013. The Court denied both Petitions on March 31, 2014.

Fragosa timely filed a Petition for Writ of Certiorari on April 30, 2014. The South Carolina Supreme Court denied the Petition on July 24, 2014.

This Court then issued the Remittitur on August 2, 2014, remanding the case to the Workers' Compensation Commission.

On September 30, 2014, the Appellate Panel issued a Decision and Order on Remand. The Appellate Panel entirely disregarded its previous findings, instead making 28 new findings of fact, ultimately concluding "Based upon these findings, the Appellate Panel finds that the ultimate, residual affects of Claimant's head injury are not of sufficient severity to reach the level of physical brain damage as contemplated in Section 42-9-10(C). [R. p. 42, lines 8 - 10]. The Appellate Panel ordered:

> IT IS THEREFORE ORDERED that Claimant is permanently and totally disabled and is entitled to benefits as provided in S.C. Code Ann. § 42-9-10(A) (1976, as amended). Claimant is not entitled to benefits under S.C. Code Ann. § 42-9-10(C).

[R. p. 43].

Petitioner timely appealed to the Court of Appeals. Following oral argument, the Court of Appeals affirmed in an unpublished opinion on March 30, 2016. Fragosa v. Kade Construction, LLC, Op. No. 2016-UP-139 (S.C.Ct.App. filed March 30, 2016). The Court of Appeals denied the Petition for Rehearing on August 19, 2016. [App. P. 38].

Petitioner filed his Petition for Writ of Certiorari on September 19, 2016. This Court issued the Writ on August 22, 2017.

STATEMENT OF THE FACTS

Hector Fragosa is 32 years old and originally from Mexico where he obtained the equivalent of a middle school education. He does not speak English and testified through a Spanish interpreter.

On November 1, 2007, Fragosa was working on a construction project for the Employer in Marion, South Carolina. Fragosa was on the roof of a parking garage. He was hit in the head with part of a construction crane which fractured his skull, and knocked him off the roof onto the ground.

At the scene, Fragosa was combative, vomited, and suffered respiratory failure – all symptoms of traumatic brain injury. He was transported to MUSC by helicopter.

Fragosa was hospitalized for one month following his accident – the first two weeks of which he was in a coma. He has no memory of the accident.

Fragosa suffered numerous injuries, to wit (drawn from the discharge summary at MUSC):

1. Subdural and epidural hematomas.
2. Bilateral frontal [lobe] contusions.
3. Respiratory failure.
4. Hypotension that was treated with intravenous fluid.
5. Scalp laceration with large complex, status post repair.
6. CT and T1 spinous process fractures.
7. Right rib fractures which include 7, 8, 9, 10.
8. Bilateral transverse process fractures of L1 and L2, right L3.
9. Right big toe fracture.
10. Right fifth toe fracture.
11. Fracture of skull, midline to sagittal through frontal and parietal.
12. Placement of percutaneous endoscopic gastrostomy.
13. Tracheostomy.
14. Status post amputation of 2nd through 5th toes. [R. p. 465].

The specific diagnoses related to physical brain damage are (1) skull fracture; (2) open complex scalp wound with epidural and subdural hematoma; and (3) bilateral frontal lobe contusions. [R. p. 700]. The attending physician at MUSC documented dramatic evidence of physical brain damage, reporting: "This patient incurred a large fracture through the skull, apparently it is open, with subdural and epidural fluid collections." [R. p. 48].

While in the hospital, Fragosa required a "percutaneous endoscopic gastrostomy tube for continued enteral feeds and nutritional support." [R. p. 353]. The surgeon who implanted the tube, Dr. Stuart Leon, noted: "The patient sustained several injuries, the most significant of which was a

closed-head injury with an epidural hematoma. **This injury has left Mr. Gomez neurologically devastated."** [R. p. 353].

The Employer accepted Fragosa's claim and began providing benefits, including treatment from a Spanish-speaking neurologist, Dr. George Sandoz.[1] Dr. Sandoz made numerous statements throughout his medical records confirming the physical brain damage.

On October 10, 2008 – nearly a year after the accident – Fragosa presented to Dr. Sandoz "with the complaint of dizziness [and] spells that suggest that the patient is having seizures . . . From the evidence of the brain, this was reviewed by me and it suggest that there is a **right temporal lobe injury**." [R. p. 740 (emphasis added)].

Several weeks later on October 24, 2008, Dr. Sandoz reported, "This has been worked up and has shown no evidence of any seizure and nor any evidence of any damage of the brain. **Despite that review of the MRI shows some mild abnormality in the temporal lobe**." [R. p. 743 (emphasis added)].

On November 25, 2008, Dr. Sandoz noted, "The patient is a very complex white male who appears to have **traumatic brain injury**." [R. p. 746 (emphasis added)].

On January 6, 2009, Dr. Sandoz recorded, "The patient presented here status **post work-related injury where he had a traumatic brain injury** with the description that the patient suffer. At this moment, the **headaches appear to be chronic, posttraumatic in nature**." [R. p. 748 (emphasis added)].

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[1] Dr. Sandoz is the only medical provider who was able to speak with Fragosa without an interpreter. Dr. Sandoz is "fluent in Spanish." [R. p. 1079, lines 22-25].

Six months later on June 2, 2009, Doctor Sandoz continued with the diagnosis of: "**Intracranial injury** of other and unspecified nature." [R. p. 757].

On a followup visit on July 7, 2009, Dr. Sandoz noted the specific problems still present 20 months after the the traumatic brain injury: "The patient is a 28-year old male with traumatic brain injury, headache, dizziness, difficulty with complex tasks." [R. p. 760].

On August 20, 2009, Dr. Sandoz wrote a detailed explanation of Fragosa's impairment and total disability as it relates specifically to the brain injury:

> 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. He ____ for a **traumatic brain injury. At this moment from the injury that the patient has suffered, he is totally and permanently disabled.** After evaluation of the AMA Guidelines, he is totally and permanently disabled. After the evaluation of the AMA Guidelines, Guides to Evaluation of the Permanent Impairment Rating, fifth edition as in table 13-5, the patient has 29% of the whole person. Superimposed to this is associated with the headaches that the patient has presented and this correlates to 2% impairment of the whole body. From the standpoint of the dizziness, the patient has 10% impairment of the whole person. Utilizing a combined value chart, this is a 46% impairment of the whole body. This does not attend to the damage that the patient has suffered from his neck and back as well for his foot. [R. p. 763 (emphasis added)].

Table 13-5 is the chart for "Clinical Dementia Rating." [AMA Guides to Permanent Impairment (5th Edition), page 320]. The 29% whole person rating for clinical dementia reflects an "impairment [which] requires direction of some activities of daily living." Id.

Dr. Sandoz was deposed on August 6, 2010. He confirmed, "This is not a concussion, this is an injury suffered to the brain.... That's why traumatic brain injury is the preferred term.... [The difference is the] concussion should resolve." [R. p. 1089, lines 12-19]. He further testified that it is called a traumatic brain injury "Because there's been some damage and injury to the function of the brain." [R. p. 1089, lines 20-24].

On March 10, 2011, Dr. Sandoz removed all doubt regarding his opinions by answering "YES" to the question "to a reasonable degree of medical certainty whether **Mr. Fragosa has suffered *physical brain damage* that has rendered him totally and permanently disabled.**" [R. p. 929 (emphasis added)].

Defense counsel arranged an evaluation with Dr. Mark Wagner, a neuropsychologist. The evaluation took place on October 30, 2008. Dr. Wagner's report is replete with observations of physical brain damage – both the fact of the physical brain damage and the cognitive deficits resulting from that damage. He notes:

> [Mr. Fragosa] had a very serious work-related injury resulting in trauma to his body and skull. He had a skull fracture with acute underlying minor structural change to the brain. . . . **He has persisting cognitive complaints.** While he has had excellent neurologic recovery, it is probably that he is exhibiting symptoms of postconcussive syndrome.[2] The cognitive findings while mostly normal, do contain **abnormal findings largely in the domain of complex attention and concentration.** In addition, he may have some element of **decreased intellectual efficiency**, although this was not measured.[3] [R. p. 954 (emphasis added)].

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[2] Post-concussion syndrome is a set of symptoms that a person may experience for weeks, months, or occasionally up to a year or more after a concussion. The condition can cause a variety of symptoms: physical, such as headache; cognitive, such as difficulty concentrating; and emotional and behavioral, such as irritability. Continuing symptoms confirm the presence of physical brain damage. When asked about post concussive syndrome, Dr. Sandoz testified "This is not a concussion, this is an injury suffered to the brain. . . . That's why traumatic brain injury is the preferred term. . . . The concussion should resolve. . . . [We call it traumatic brain injury] because there's been some damage and injury to the function of the brain." [R. P. 906, lines 5-24].

[3] Despite Dr. Sandoz ordering "a neuropsychological evaluation in Spanish, Dr. Wagner's evaluation was done in English through an interpreter. As Dr. Wagner himself noted, "The caveat to this entire evaluation is the use of an interpreter and the use of tests that were not in Spanish. Both items can reduce the validity of the findings." [R. p. 951].

Included in the above description was the incidental statement that: "Follow-up structural and functional studies (i.e. EEG, CT and MRI) have been read as unremarkable demonstrating structural resolution of the work-related injury." [R. p. 954].

Fragosa was also evaluated by Dr. Robert Brabham, a psychologist and certified brain injury specialist, on October 27, 2010. [R. p. 915]. Dr. Brabham concluded:

> With the passage of time, now more than 2.5 years after his injuries, *behavioral and cognitive changes have persisted, as will be noted, sufficient to conclude that the brain injuries he sustained, described as post-concussion injuries in multiple records, has resulted in continuing and severe symptoms clearly associated with a* ***physical traumatic brain injury****, the result of his on-the-job injuries.* [R. p. 915 (Italics in original; bold added)].

Dr. Brabham further opined: "to a high degree of professional certainty . . . **he has experienced a (Physical) Traumatic Brain Injury and must be expected to permanently remain, unable to engage in full-time gainful, competitive employment** as a result of his medical conditions resulting from his on-the-job injuries in November 2007." [R. p. 926 - 927 (emphasis added)]. Dr. Brabham also observed "His cognitive deficits would also cause difficulty in his ability to pay attention to job tasks and job duites for hours each week, on average. The inability to maintain concentration and persistence interferes with the ability to meed production expectation for even unskilled jobs." [R. P. 927].

As of the June 28, 2011 trial, Fragosa still suffered from daily headaches, dizziness, short and long term memory deficits, cognitive deficits, and buzzing in both ears – all of which resulted from the physical brain damage. [R. p. 1131, line 5 - R. p. 1135, line 16]. He remains physically and mentally incapable of returning to any kind of work that he has ever done. [R. p. 1142, lines 12-15].

STANDARD OF REVIEW

The guiding principle undergirding our workers' compensation system that the Act is to be liberally construed in favor of the claimant. Carter v. Penny Tire & Recapping Co., 261 S.C. 341, 349, 200 S.E.2d 64, 67 (1973). An award may not rest upon surmise, conjecture, or speculation. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). Instead, "[an award] must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S.C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961). A court may reverse or modify the Commission's decision if substantial rights of the Petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634, 637 (Ct. App. 1999).

When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the courts. Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). "While the appellate courts are required to be deferential to the full commission regarding questions of fact, this deference does not prevent the courts from overturning the full commission's decision when it is legally incorrect as it is here." Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007). The Commission's findings will be reversed when the evidence of a compensable injury is overwhelming. Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985).

ARGUMENT

1. Hector Fragosa has suffered physical brain damage and is legally entitled to workers' compensation benefits for life.

Hector Fragosa was hit in the head with a crane which knocked him off a roof onto the ground. He suffered a skull fracture with subdural and epidural hematomas along with frontal lobe contusions – all of which were confirmed with MRI and CT scans. He remained in a coma for 15 days following his accident.[4] Since then, he has suffered from proven cognitive deficits, balance problems, dizziness, seizures, and difficulty with complex tasks – resulting in permanent and total disability. Dr. Sandoz (treating neurologist); Dr. Wagner (Respondent's forensic neuropsychologist) and Dr. Brabham (psychologist and certified brain injury specialist) confirm the permanency of the cognitive deficits. Dr. Sandoz has repeatedly and explicitly stated to a reasonable degree of medical certainty that Fragosa is permanently and totally disabled due to traumatic brain injury resulting in physical brain damage. The evidence of physical brain damage is simply overwhelming. See Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997)(affirming award of lifetime benefits for physical brain damage when "[a]t most, one physician, Dr. Woodward, indicated that he could not determine whether the greater cause of Pearson's disability was his psychological deficits or his organic brain damage [and] [n]ot one physician has stated that Claimant's disability is not due to physical brain damage.").

Fragosa has reached MMI. He suffered severe permanent physical brain damage – sufficiently severe for the Commission to find in its original order "That the Claimant sustained a

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[4] The CDC developed a definition of traumatic injury for the Department of Defense and Veterans Administration. Under the CDC's definition, a loss of consciousness longer than 24 hours is classified as a *severe* traumatic brain injury. See, Department of Defense and Department of Veterans Affairs (2008). "Traumatic Brain Injury Task Force" http://www.cdc.gov/nchs/data/icd9/Sep08TBI.pdf

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, lines 5 -7]. The Commission further found "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, lines 8 - 10]. These twin findings plainly meet the permanent and severe standard set forth in Crisp and Sparks.

The new findings made by the Commission do not comply with this analysis – nor do they comply with the instructions on remand. Instead of resolving the inconsistency found by the Court of Appeals in the Appellate Panel's order, the Commission abandoned the previous findings *in toto* – mining the record for inconsequential nuggets – each less than a scintilla of evidence and which, when compiled into a whole, add up to less than a scintilla. This approach is simply a means of justifying the initial erroneous legal conclusion. It is not meaningfully applying the Crisp and Sparks framework to the established facts of this case. The decision below must be reversed.

A. The criteria established under the South Carolina Workers' Compensation Act for physical brain damage.

In 2013, this Court issued two landmark opinions addressing "physical brain damage" in workers' compensation cases. 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).

Even though the Court has now defined "physical brain damage," our appellate courts have not yet reached a case applying the "permanent and severe" standard. In Crisp, the issue was not ripe because "the Commission's order manifests a clear intention to delay a permanency finding with respect to Petitioner's brain injury because Petitioner had not yet reached MMI . . ." Crisp. And in Sparks, although Sparks had reached maximum medical improvement (MMI), the Supreme Court affirmed the Commission's finding that "Claimant has failed to carry his burden of proof to establish physical brain damage as contemplated by S.C.Code Ann. § 42-9-10." Sparks.

B. Confusion resulting from the legislature's use of "physical brain damage" when the equivalent medical term is "traumatic brain injury (TBI)."

An issue confounding the decisional law is the legislature's choice of the term "physical brain damage" in the statute – rather than the medical term "traumatic brain injury."[5] This has led to confusion because medical professionals use the term "traumatic brain injury" to refer to all brain injuries resulting in physical brain damage of varying severity. Consequently, before Crisp, the medical opinions used to prove physical brain damage in workers' compensation cases always used the medical term *traumatic brain injury* - sometimes modified as *physical brain injury.* The Supreme Court noted this "inartful phrasing" in Crisp:

> From this inartful phrasing onward, the circuit court, the court of appeals, and the parties in their arguments to the various tribunals and in their briefs have alternatively referred to Petitioner's brain injuries in terms of "physical brain injury" and "physical brain damage," despite the marked difference in the length of time compensation may be awarded when the injury is "physical brain damage" contemplated under section 42–9–10(C) of the South Carolina Code.

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[5] The term "Traumatic Brain Injury" is used elsewhere in statutory law to describe what is essentially "physical brain damage" in the Workers' Compensation Act. See S.C. Code Ann. Reg. § 43-243.1 (L)(1)(2011)(defining "traumatic brain injury" regulations for "Criteria for Entry into Programs of Special Education for Students with Disabilities.").

A similar problem occurred in Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006). In Therrell, the Supreme Court was faced with reconciling statutory terminology with medical terminology. The court observed: "We believe a factor driving much of the confusion on this issue is that the scheduled member statutes speak in a different language from medical service providers . . ." Id.

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.

C. Fragosa's permanent impairments are consistent with physical brain damage.

According to the Centers for Disease Control, "[Traumatic Brain Injury] is generally categorized as mild, moderate or severe. Most TBIs are mild TBI (MTBI). MTBI refers to those in which the injury to the brain itself is diagnosed as mild at the time the person is initially evaluated."[6] "Injury severity is typically established within the acute to early subacute time frame but the long-term effects of TBI and resultant disability, if any, can only be established months to years post-injury."[7] Thus, while it is sometimes possible to determine the existence of physical brain damage early in the process, the fact some healing takes place – particularly within the first six months – and some damage takes time to manifest itself, means the twin determinations of permanent impairment and inability to work are properly made at MMI (as the Court held in Crisp).

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[6] Faul M, Xu L, Wald MM, Coronado V. Traumatic Brain Injury in the United States: Emergency Department Visits, Hospitalizations and Deaths, 2002-2006. Atlanta, Georgia: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control; 2010.

[7] Muriel Deutsch Lezak et al., *Neuropsychological Assessment* 193 (5th ed. 2012).

Doctors make the initial classification of *brain injury* as mild, moderate or severe on the initial evaluation. Most classification systems "differentiate TBI on the basis of loss of consciousness (LOC), altered consciousness (AOC), post-traumatic amnesia (PTA), or Glasgow Coma Scale (GCS)."[8] For the injury to be classified as severe, most systems require that the patient suffer a gross loss of consciousness for greater than 30 minutes.[9]

Brain damage itself comes in various forms. *Focal brain damage* is damage to an identifiable part of the brain. Patients with focal brain damage suffer specific deficits while retaining normal brain function elsewhere. Such patients may suffer partial paralysis or lose the ability to speak, smell or otherwise function depending on the location of the damage. Focal brain damage occurs most often in strokes, penetrating head injuries, and injuries resulting in bleeding (hematomas). Sometimes the damage can be located on imaging studies; otherwise, neuropsychological testing can pinpoint the specific area of damage. In Fragosa's case, he sustained subdural and epidural hematomas.[10] [R. p. 353, 638].

Cortical contusions (bruising) occur with the rapid acceleration-deceleration seen in falls and car accidents. These brain contusions usually involve the frontal and temporal lobes, as these areas are most susceptible to the damaging effects of the brain bouncing and twisting within the skull. Patients with frontal and temporal lobe lesions develop problems with regulation and control of goal

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[8] Department of Defense and Department of Veterans Affairs (2008). "Traumatic Brain Injury Task Force" http://www.cdc.gov/nchs/data/icd9/Sep08TBI.pdf

[9] Id.

[10] According to the National Institutes for Health, "A subdural hematoma is most often the result of a severe head injury. This type of subdural hematoma is among the deadliest of all head injuries. The bleeding fills the brain area very rapidly, compressing brain tissue. This often results in brain injury and may lead to death." https://medlineplus.gov/ency/article/000713.htm

directed activity, problem solving, and memory and learning. They often suffer personality changes which "are more likely to impede the patient's return to psychosocial independence than cognitive impairment or physical crippling."[11] Patients may also suffer an impaired sense of smell, reduced visual competency, hearing issues, and balance disorders.

Fragosa sustained bilateral frontal lobe contusions to the brain. [R. p. 700]. His symptoms correlate exactly with the sequelae of frontal lobe contusions. Dr. Sandoz specifically noted the imaging studies "suggest that there is a *right temporal lobe injury*." [R. p. 740 (emphasis added)]. The fact Fragosa still suffers impairments in cognition, sense of smell, blurred vision, hearing loss, and balance demonstrate that his brain damage is permanent and severe. [R. p. 1,132, line 21-p. 1,133, line 5; p. 1,133, line 17-p. 1,135, line 16; p. 1,143, line 17-p. 1,144, line 14].].

Diffuse brain damage is a common result of closed head injuries. Although the skull protects the brain from penetration, the brain itself is damaged by the shearing effect. Brain tissue suffers widespread tearing at the cellular level known as *diffuse axonal injury.* "Probably most traumatic axonal pathology occurs as a result of secondary effects damaging the fine cytoarchitecture of the axon, referred to as *secondary axotomy*. These intracellular alterations evolve over time taking days to months for the full pathological effects to develop. They degrade the functionality of the axon and can even lead to cell death."[12]

Diffuse brain damage generally cannot be seen on conventional imaging studies, although some emerging technologies provide hope this may change in the future. Under the current state of the art, the effects of diffuse brain damage can be shown by cognitive behavioral level of functioning

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[11] Muriel Deutsch Lezak et al., *Neuropsychological Assessment* 200-202 (5th ed. 2012).

[12] Muriel Deutsch Lezak et al., *Neuropsychological Assessment* 187 (5th ed. 2012).

and neuropsychological testing. Although the brain may appear to be superficially intact on conventional CT and MRI scans, patients suffer a constellation of impairments from degradation in the microstructure and integrity of axons and their connections. This type of damage compromises mental processing speed, attention, cognitive efficiency, high-level concept formation, complex reasoning abilities, and executive functions. Patients perform poorly on tasks requiring concentration and mental tracking, and on reasoning problems that must be performed mentally. The result is confusion, perplexity, irritability, fatigue, and inability to do things as well as before the accident.

Fragosa shows the signs of diffuse physical brain damage. Dr. Wagner's neuropsychological testing showed:

> He has **persisting cognitive complaints**. While he has had excellent neurologic recovery, it is probably that he is exhibiting symptoms of postconcussive syndrome. The cognitive findings while mostly normal, do contain **abnormal findings largely in the domain of complex attention and concentration**. In addition, he may have some element of **decreased intellectual efficiency**, although this was not measured. [R. p. 954 (emphasis added)].

Dr. Brabham had a similar opinion regarding persistent behavioral and cognitive deficits resulting from brain damage. He concluded:

> With the passage of time, now more than 2.5 years after his injuries, *behavioral and cognitive changes have persisted, as will be noted, sufficient to conclude that the brain injuries he sustained, described as post-concussion injuries in multiple records, has resulted in continuing and severe symptoms clearly associated with a* ***physical traumatic brain injury****, the result of his on-the-job injuries.* [R. p. 915 (Italics in original; bold added)].

Dr. Sandoz observed cognitive deficiencies at a very basic level. When asked about Fragosa's cognitive deficits, he testified:

> When I ask him, I mean, I'm asking simple stuff, like can you – how many bricks are – can you lay in a day, and how many are in a foot, so stuff that he's able to relate, how many feets are there to this, and he's not able to figure that stuff out. . . . He's a construction worker. I expected him to know, you know, that stuff. [R. p. 1096, line 21 - R. p. 1097, line 12].

At the time of the trial, more than three years had passed since the accident. Fragosa still suffered from daily headaches, dizziness, short and long term memory deficits, cognitive deficits, and buzzing in both ears – all of which resulted from the physical brain damage. [R. p. 1,131, line 5 - p. ,1135, line 16]. He remains physically and mentally incapable of returning to any kind of work that he has ever done – a point conceded by Respondents and the Commission in its Order on Remand.[13] [R. p. 1142, lines 12 - 15; R. p. 35, lines 14 - 18].

D. The findings in the Commission's original Decision and Order show Fragosa meets the criteria for physical brain damage.

In its original Order, the Commission found "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, lines 5 - 10]. Despite these findings – and the evidence supporting them – the Commission inexplicably concluded "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, lines 11 - 14 (emphasis added)]. Unlike the other two findings, this is not a finding of fact – it is a conclusion

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[13] Respondents conceded this point in their brief to the Appellate Panel:

> Defendants have never denied the existence of residual deficits from the Claimant's condition, but these alleged deficits must surely be classified as *loss of use* of the Claimant's brain, not *physical injury* to the Claimant's brain. Otherwise, there is no need for the Act to draw a distinction between loss of use of the brain and a physical brain injury.

of law. More specifically, it is the application of Findings of Fact 8 and 9 to the law – as the law was understood prior to Crisp and Sparks.

The remand resulted from the Court of Appeals' "confusion as to what constitutes a 'finding of fact' and what constitutes a 'conclusion of law'." Black v. Barnwell County, 134 S.E.2d 753, 243 S.C. 531 (1964)(Bussey, J., dissenting). The Commission's findings regarding the 46% permanent impairment for a traumatic brain injury and total disability are unquestionably findings of fact. These findings meet the classic definition as "a specific setting forth of the ultimate facts established by the evidence and which are determinative of the judgment which must be given." Black's Law Dictionary 632 (6th Ed. 1990); cf. Aristizabal v. Woodside-Division of Dan River, 268 S.C. 366, 234 S.E.2d 21 (1977)(where material facts are in dispute the administrative body must make specific, express findings of fact.\). These findings are sufficiently specific to meet the permanent and severe standard.

The error lies in Finding of Fact 18, to wit: "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, lines 11 - 14 (emphasis added)]. Unlike the other two findings, this is not a finding of fact – it is a conclusion of law. The mere happenstance it is labeled as a finding of fact does not make it so.

The distinction was ably explained a half-century ago in a dissent by Justice Bussey:

> The general rule seems to be that where an ultimate conclusion can be arrived at only by applying a rule of law, the result so reached embodies a 'conclusion of law' and is not a finding of fact and not binding upon the reviewing court. Courts from other jurisdictions have held so-called finding of facts almost identical in wording to the so-called findings of fact here, to be mere conclusions of law. Black v. Barnwell County, 134 S.E.2d 753, 243 S.C. 531 (1964)(Bussey, J., dissenting).

In this case, the Commission was applying the facts – as it found them – to a legal definition of *physical brain damage,* thus making a conclusion of law.

The original findings must remain in place. The Commission on remand did not have authority to dispense with them. It may add to them to explain its reasoning – it 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.").

The Court of Appeals should have reversed the Appellate Panel in Fragosa I. No remand was necessary as no additional factual findings were necessary. An award for lifetime compensation was mandated by Findings of Fact 8 and 9 in the Appellate Panel's original order.

E. The Commission's new findings that Fragosa did not suffer physical brain damage as defined in Crisp and Sparks are unsupported by substantial evidence as they are based on speculation and the unqualified medical opinions of the Commissioners.

In the Order on Remand, the Appellate Panel made 28 new "FINDINGS OF FACT AND RULINGS OF LAW." [R. p. 35-42]. Significantly, the Appellate Panel did not differentiate between the two, nor did it reconcile (or even reference) any of its previous findings. The most glaring omission is *any* reference to the opinions of the treating neurologist, Dr. Sandoz.[14] Indeed, the single

[14] The Appellate Panel virtually ignores Dr. Sandoz's opinions on physical brain damage altogether. The primary reference to Dr. Sandoz is the statement beginning: "We find it more than coincidental that Claimant did not return to Dr. Sandoz for one year to receive any treatment." [R. p. 41, lines 20 - 27]. The unstated implication apparently meant to be conveyed here is that Fragosa only returned to Dr. Sandoz to bolster his brain damage claim.

In reality, Fragosa could not return to Dr. Sandoz because Respondents cut off his treatment once he was placed at MMI. Dr. Sandoz testified: "The last contact I had, you know, with any of them is the nurse case manager in [August 24, 2009]" [R. p. 1091, lines 6-7]. Other references in

reference to Dr. Sandoz occurs at finding 24 – buried in a litany of "other inconsistencies in the record which call into question the alleged severity of Claimant's residual condition." [R. pp. 39-41]. From reading the Order on Remand, one would never know the Commission had previously found: "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]. Nor would one know that Dr. Sandoz had explicitly opined: "to a reasonable degree of medical certainty . . . **Mr. Fragosa has suffered *physical brain damage* that has rendered him totally and permanently disabled.**" [R. p. 929 (emphasis added)].

On the dispositive issue, "Based on these findings, the Appellate Panel finds that the ultimate, residual effects of Claimant's head injury are not of sufficient severity to reach the level of physical brain damage as contemplated in Section 42-9-10(C)." [Finding 27, R. p. 42]. There is no real analysis here – simply this vague conclusion.

Instead of considering the entire record in light of its previous findings, the Appellate Panel "threw the baby out with the bath water."[15] The Appellate Panel combed the 882 pages of medical

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the record confirm Fragosa's difficulty obtaining treatment through the workers' compensation carrier. On October 24, 2008, Dr. Sandoz wrote: "At this moment, the patient is only taking over-the-counter medication. Apparently he is unable to obtain any payment for the medications from workman comp standpoint." [R. p. 744]. In workers' compensation, injured workers must rely on the insurance carrier to provide medical treatment. S.C. Code Ann. § 42-15-60 (2007). In serious cases, the carriers employ nurse case managers to coordinate the treatment, particularly when the injured worker has the double difficulty of cognitive issues and a language barrier.

Dr. Sandoz had placed Fragosa at MMI on August 7, 2009. The MMI date coincides with the interruption of treatment. Dr. Sandoz was deposed on August 6, 2010. With the aid of counsel, Fragosa was able to resume treatment on November 12, 2010 – where Dr. Sandoz noted "The problem is unchanged." [R. p. 764]. Medical records from that date forward confirm that Fragosa's condition has not improved despite the resumption of treatment.

[15] The idiomatic expression "throw the baby out with the bath water" means to "reject the essential with the inessential." Jewell, Elizabeth, ed. (2006). The Pocket Oxford Dictionary and Thesaurus

records to cobble together numerous incidental – often trivial – findings to justify its ultimate conclusion. Respectfully, any conclusions reached by the exercise of this *unusual finesse of reasoning* cannot survive meaningful appellate review.[16] 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). Cf. Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air."). This method of analysis – focusing on trivial minutiae to the exclusion of qualified expert opinions on the ultimate issue – is merely the Commission's lay speculation about a complex medical diagnosis it does not fully understand. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding).

(2nd edition), p. 53. It is used here to illustrate a point, to wit: the Appellate Panel ignored its own previously made finding that Fragosa "sustained a 46% permanent impairment to the whole person for a traumatic brain injury . . ." [R. page 20, Finding of Fact 8]. This one finding could not be more essential for it confirms that Fragosa's TBI resulted in severe and permanent physical brain damage. By disregarding this essential finding in the Order on Remand, the Appellate Panel failed to comply with the Court's instructions on remand. The remand instructions were to make additional findings to explain its apparent inconsistency – not to rewrite the entire order to reach the same erroneous result.

[16] The phrase is drawn from an older Supreme Court case illustrating that stretching evidence to find a mere scintilla of evidence defies common sense and reason. "Whilst adhering to the scintilla rule, this court has recognized a rule supplemental to the scintilla rule, which is thus propounded in the case of National Bank v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 174 S.E. 581, 582 (1934); 'If it be conceded that there may be deduced by a process of *unusual finesse of reasoning* that there is a scintilla of evidence * * * nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.'" Radcliffe v. Southern Aviation Sch., 209 S.C. 411, 40 S.E.2d. 626 (1946)

The Appellate Panel devotes much of its analysis to highlighting notations of improving function as Fragosa recovered through his month-long hospital stay. There is virtually no analysis of Fragosa's cognitive level of function at MMI, nor any mention of his seizure disorder and balance problems. The detailed opinions of Drs. Sandoz, Brabham and Wagner are given short shrift over the medical opinions of the commissioners themselves.

Findings 6 through 16 document Fragosa's gradually increasing level of consciousness as he came out of the coma. The Panel gave "great weight" to incidental chart notations where "Claimant's memory is medically documented as 'intact' and within normal limits."[17] [Finding 13, R. pp. 36-37]. Page 481 is an occupational therapy note. It documents that Fragosa was able to walk, eat and converse with his therapist - as well as being "more conversive. More aware/alert." [R. p. 481]. No one disputes that Fragosa came out of his coma – gradually regaining some of his mental functioning.

The next record "given great weight" is an electronic chart with the printed notation under the psychological category of "Memory intact" followed by the notation "WNL" (within normal limits). The document itself is part of a multi-page electronically generated checklist which covers

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[17] The fallacy behind giving great weight to these chart notations was made by Professor Lezak in the leading treatise on the subject:

> When the patient has sustained other injuries . . . the cognitive problems may not become disruptive or even evident for days or – in some cases – weeks after the accident. Patients who take a few days away from their normal responsibilities after an accident may not notice mental impairments until returning to work or preparing meals, shopping, and planning for a family. Thus it is not uncommon to find no notes reporting altered mental status in the emergency room record or hospital chart, even when the patient is later observed to suffer from fairly debilitating mental dysfunction.

Muriel Deutsch Lezak et al., *Neuropsychological Assessment* 204 (5th ed. 2012).

virtually every condition. The same entry is repeated for the rest of Fragosa's hospital stay. Each entry is "given great weight" by the Appellate Panel. [R. p. 37, findings 13-16].

It simply makes no sense why a boilerplate checklist would be given "great weight." There is no way to determine whether any memory testing was done nor by whom it was done. The notation "WNL" is the default setting for the computer-generated form. The other notations under the psychological category of the checklist note affect, behavior and verbalization are appropriate to the situation – meaning not normal, but appropriate for someone still in the hospital after suffering a very serious industrial accident a month earlier.

Furthermore, these remarks appear in the "psychological" category of the checklist; not the neurological. The neurological section notes "Orientation" as "unable to assess" on November 26, 27, and 28th. [R. pp. 602-619]. The last notation on November 28, 2007, notes the patient is unable to speak English. The last notes on November 30th and December 1st (the day of discharge) note the patient is oriented to person, but not to place and time. [R. p. 620]. In other words, at his actual discharge, Fragosa knew his name but did not know where he was nor what day it was.

The Appellate Panel noted the discharge instructions documented "ambulating without any difficulties" and "alert and oriented x3." The full record actually states:

> Neurology: Patient was managed by neurosurgery for his subdural and epidural hematomas. Patient was also managed for multiple spinous process fractures. Patient has subsequently recovered function. He was ambulating without any difficulties, moving all extremities. Patient alert and oriented x3.[18]

[R.p. 465].

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[18] "The term "alert and oriented x 3" means oriented to "person, place and time." Dr. Sandoz explained "I ask him, what's your name, what's your date of birth, what – sorry. What day is today, and what's the place we are." [R. p. 1084, line 12 - p. 1085, line 2].

The problem again is the Commission taking isolated records out of context and making its own medical opinions. Fragosa was with his family. Anyone knows that a person leaving the hospital after a month-long stay receives comfort and assistance from his family – who help him with orientation to person, place and time.

As to whether he was "ambulating without any difficulties," Fragosa was taken out of the hospital to his family's car in a wheelchair. He was deemed "safe for [discharge] home [with Front Wheel Walker] and family support." [R. p. 491]. Fragosa was able to bear weight after his toe amputations – for the Commission to conclude he could walk without difficulty is incorrect.

Another curious area the Commission focused on was the intake sheet filled out by Fragosa's interpreter at Dr. Sandoz's office on August 29, 2008. [R. pp. 715-718]. The Commission cited the intake sheet for "other inconsistencies in the record which call into question the alleged severity of Claimant's residual condition." [R. p. 39, Finding 24]. Specifically, the Commission stated that the intake sheet did not mention hearing loss, "a 'clog' in his ears", or blurred vision. [R. pp. 39-40, Finding 24]. The Commission blithely ignores the complaints relevant to physical brain damage, specifically migraine headaches, dizziness, memory loss and history of head injury – all of which were listed on the intake form. [R. p. 718]. And in point of fact, on the first page there is a handwritten notation "dizzy/blurred" – showing that the Commission's selective reading of the intake form was incomplete and erroneous. [R. p. 715]

The Commission *never* mentions Dr. Sandoz's actual report from his evaluation of Fragosa that same day. [R. pp. 719-722]. Under Review of Systems, Dr. Sandoz wrote: "There is headaches, dizziness that are present, and visual disturbances when the headaches happen." [R. p. 720].

Although hearing loss is not mentioned in the initial report, Dr. Sandoz wrote about it *in the past tense* three months later: "He *continues* to have difficulty hearing on the right ear." [R. p. 745].

The vast majority of new findings made by the Commission address Fragosa's condition during his slow progress towards MMI – not his condition *at* MMI when the determination must be made. For example, at oral argument, the Court of Appeals inquired about the Commission putting "great weight" on records from Dr. Norcross and Dr. Takacs. The Commission found "Dr. Norcross of MUSC terms Claimant's neurological recovery as "actually remarkable.' Dr. Takacs (also of MUSC) states that Claimant has 'no neurological sequela.'" [R. p. 38, Finding of Fact 20].

The full statement by Dr. Norcross reads: "His injuries included . . . a closed head injury with a skull fracture and epidural hematoma. He underwent a trach and a PEG-tube while in the Intensive Care Unit, but made a remarkable neurologic recovery." [R. p. 640]. Dr. Norcross made this statement on December 17, 2007 – a mere 48 days after Fragosa's accident. Moreover, in the same record, Dr. Norcross states "Given the severity of his injuries, I think [an appointment with Neurosurgery] should be appropriate, and a consultation was filled out with Dr. Takacs, who saw the patient in-house." [R. p. 640]. Considering that Fragosa nearly died and spent a full month in the ICU with a traumatic brain injury, the fact he could now breath and eat on his own (48 days later) would indeed constitute a remarkable neurological recovery – even with "ongoing headaches and some dizziness" on the same day. [R. p. 644]. This non-specific characterization by Dr. Norcross has no probative value as to Fragosa's brain damage at MMI.

Dr. Takacs is a neurosurgeon. His Assessment and Plan states: "27-year-old Hispanic male status post closed head. No neurological sequela. His fingertip numbness could possibly be from a whiplash injury for which I do not have a surgical solution. Patient is not in need of neurosurgical

at this time." [R. p. 661]. Dr. Takacs saw Fragosa one time on January 31, 2008 – three months after the accident – for surgical evaluation of a possible whiplash injury to his neck. This was a condition entirely unrelated to Fragosa's brain damage. The only fair reading of his report is in the context of a neurosurgeon evaluating whether a patient required surgery for a tertiary condition. Finding no surgical option, Dr. Takacs never saw Fragosa again. His report has no probative value regarding physical brain damage.

In its original Order, the Appellate Panel found "The Claimant did not have problems with his brain prior to the 2007 accident. He has headaches at least once a week and has short term memory problems. The Claimant is constantly dizzy." [R.p. 9, Finding of Fact 5]. Headaches, dizziness and short term memory are all neurological sequelae – still present at MMI. The Commission cannot take back its original finding of neurological sequelae still present four years after the accident. The remand did not allow the Commission a second bite of the apple. The commissioners cannot change their minds, contradict their previous findings, and give "great weight" to records which they previously (and correctly) found to be inconsequential. Cf. Parker v. South Carolina Public Service Com'n, 342 S.E.2d 403, 288 S.C. 304 (1986)(error of administrative agency to exceed scope of remand instructions).

The opinion by Dr. Sandoz – made at MMI – confirms that Fragosa has suffered permanent damage to his brain of sufficient severity to render him permanently and totally disabled. It is in reliance on this opinion that the Commission found Fragosa had suffered a 46% permanent impairment because of traumatic brain injury, as well as finding him permanently and totally disabled. Indeed, Respondents concede both points. There is no evidence contradicting these

findings. Nor, for that matter, are there any findings in the original order which contradict these findings.

As lawyers, we are taught to reach factual conclusions based on consideration of the evidence – not to form a hypothesis only to disregard the evidence that doesn't support the initial hypothesis. The Appellate Panel simply cannot overlook Dr. Sandoz (or Dr. Wagner or Dr. Brabham). Even though the Commission has the authority to weigh conflicting evidence, the methodology here goes well beyond weight into the realm of pure speculation. A hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional."[19] Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring). See, also 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); Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding); McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 474 (Ct.App.1989) ("Under Workers' Compensation Law 'total disability' does not require complete, abject helplessness. Rather

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[19] Rulings of this type have been roundly condemned by the Federal Courts as inherently unreliable. "In 'sit and squirm' jurisprudence, [a commissioner] who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied." Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984).

This approach "will not only result in unreliable conclusions when observing claimants with honest intentions, but may encourage claimants to manufacture convincing observable manifestations of pain or, worse yet, discourage them from exercising their right to appear before [the commission] for fear that they may not appear to the unexpert eye to be as bad as they feel." Tyler v. Weinberger, 409 F.Supp. 776 (E.D. Va. 1976)(finding claimant disabled as a matter of law where factual finding that claimant "over-exaggerated his complaint about sitting for extended periods" was "unreasonable under the law and this Court does not accept them.").

it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them.").

Not to further belabor the point, but the Order on Remand reads as if Dr. Sandoz had never seen Fragosa, let alone been his treating neurologist from the beginning.

In Fragosa I, the Commission previously found as a fact "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]. This is a finding that Fragosa sustained permanent damage to the brain. There is nothing at all ambiguous about it. "A permanent impairment, by definition, lasts for a lifetime." James v. Anne's Inc., 701 S.E.2d 730, 736, 390 S.C. 188 (2010). Impairment ratings are not made until the injured person reaches maximum medical improvement. "Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). It cannot be gainsaid that 46% to the whole person is a serious permanent impairment. [R. p. 763]. Along with the finding of total disability, this impairment satisfies the requirement that the brain damage be permanent and severe. As such, the Decision and Order below should be reversed.

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 the Order on Remand, the Commission added another conclusion, to wit: "The combination of Claimant's injuries (including but not limited to his foot and his dizziness) are what totally disable him. As Claimant's brain injury is compensable pursuant to Regulation 67-1101, he is subject to the 500 week statutory limitation." [R. p. 42, Finding 28]. The Appellate Panel makes this conclusion without reference to any particular evidence nor with any analysis. It is simply a conclusion without a foundation. This finding should be reversed, both as unsupported by the evidence and contrary to the law. See 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.").

Dr. Hoy is the ENT who treated Fragosa for the ear injury. On March 16, 2010, He opined Fragosa could return to work without restriction. [R. p. 666]. If the dizziness were related to the ear injury, then there is no evidence it caused any disability. Conversely, on November 12, 2011, Dr. Sandoz diagnosed: "Dizziness and giddiness . . . due to tbi doing fair with therappy [sic]." [R. p. 765]. Dr. Sandoz related the continuing dizziness and giddiness to the brain damage.

As to the foot, the only restrictions from Dr. Wolfe were "No climbing > 6 steps & use safety equipment." [R. p. 986]. For the left shoulder and neck, Dr. Merrell assigned no true restrictions, only noting "Pain may limit overhead activities with the left arm. He may perform overhead activities unless symptoms preclude." [R. pp. 950, 985].

The doctors who treated Fragosa for his inner ear, right foot, shoulder and neck all opined that Fragosa could return to work despite those injuries. Any conclusion that his total disability is unrelated to physical brain damage is not supported by substantial evidence.

In its original Order, the Appellate Panel made a similar finding, albeit more specific: "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]. This finding meets the second part of the test – "brain damage so severe that the person could not subsequently return to suitable gainful employment." Id. at 843. Indeed, Respondents concede Fragosa is permanently and totally disabled. The reference to "multiple impairment ratings" – of which the 46% whole person rating for traumatic brain injury is by far the most significant – confirm that the brain damage rendered Fragosa unemployable.

The same scenario came up in 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). The Appellate Panel erred as a matter of law by holding lifetime

benefits should not be awarded where the employee suffers from additional ailments which contribute to his disability.

As in Pearson, the evidence from the treating neurologist overwhelmingly supports the finding that the disability was the result of physical brain damage. Fragosa's neurologist, Dr. Sandoz explicitly opined: "At this moment from the injury that the patient has suffered, he is *totally and permanently disabled.* After evaluation of the AMA Guidelines, he is *totally and permanently disabled.*" [R. p. 763 (emphasis added)]. Dr. Sandoz tied his opinion on disability directly to the brain damage – as did Dr. Brabham. [R. pp. 915, 926-927]. Morever, Dr. Sandoz' opinion was made in the same paragraph the Commission relied on for the 46% whole person impairment rating. Brain damage resulting in a 46% whole person impairment rating is serious enough to render the patient permanently and totally disabled.

Although not necessary under Sparks and Pearson, it should be pointed out that the 46% whole person impairment for the brain injury is by far the most serious of Fragosa's impairment ratings. The spine rating is 11% whole person. 40% to the right lower extremity is equivalent to 16% of the whole person. 1% to the left lower extremity is a 0% whole person impairment. Table 17-3, AMA Guides to Permanent Impairment (5th Edition), page 527. Adding all the other listed impairments together (16% + 0% + 11% = 27%) is still less than 46% to the whole person.

The other impairment ratings merely confirm that Fragosa suffered other injuries in the accident. It would create an absurd result if he were barred from lifetime compensation for his brain damage because he also suffered other serious injuries. Trauma resulting in physical brain damage typically causes damage to other body parts as well – being knocked off a building by a crane undoubtedly does.

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

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000

Jeff C. Chandler
CHANDLER LAW
Bank of America Building
2501 Oak Street
Myrtle Beach, SC 29578
(843) 448-4357

Attorneys for Petitioner

Columbia, South Carolina
September 27, 2017

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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

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

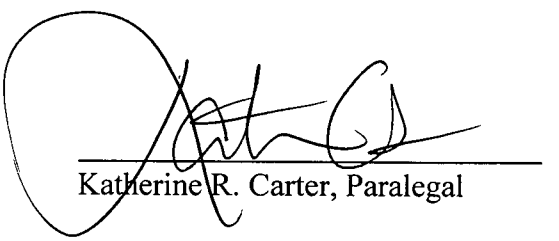
v.

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

PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **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 September 28, 2017, addressed as follows:

Michael W. Burkett, Esquire
J. Gabriel Coggiola, Esquire
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204



Katherine R. Carter, Paralegal

September 28, 2017
Columbia, South Carolina