

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0717624

Hector G. Fragosa, Employee/Claimant, Appellant,

v.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
STANDARD OF REVIEW	8
ARGUMENT	9
1. Hector Fragosa has suffered physical brain damage and is legally entitled to workers' compensation benefits for life.	9
A. The criteria established under the South Carolina Workers' Compensation Act for physical brain damage.	10
B. The evidence overwhelmingly supports a finding that Fragosa suffered physical brain damage.	13
2. 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	16
3. The Workers' Compensation Commission should have addressed and ordered additional medical treatment	18
CONCLUSION	19
CERTIFICATE OF COUNSEL	20

TABLE OF AUTHORITIES

CASES

<u>Broughton v. South of the Border,</u> 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999)	8
<u>Canteen v. McLeod Regional Medical Center,</u> 735 S.E.2d 246, 400 S.C. 551 (Ct. App. 2012)	10
<u>Carter v. Penny Tire & Recapping Co.,</u> 261 S.C. 341, 200 S.E.2d 64 (1973)	8
<u>Doe v. South Carolina Dept. of Disabilities and Special Needs,</u> 660 S.E.2d 260, 377 S.C. 346 (2008)	16
<u>Grant v. Grant Textiles,</u> 372 S.C. 196, 641 S.E.2d 869 (2007)	8
<u>Hutson v. South Carolina State Ports Authority,</u> 732 S.E.2d 500, 399 S.C. 381 (2012)	10, 13, 17
<u>Kinsey v. Champion American Service Center,</u> 268 S.C. 177, 232 S.E.2d 720 (1977)	8
<u>Krepps by Krepps v. Ausen,</u> 479 S.E.2d 290, 324 S.C. 597 (Ct.App. 1996)	11-12
<u>Massey v. W.R. Grace & Co.,</u> 286 S.C. 434, 334 S.E.2d 122 (1985)	8
<u>Michau v. Georgetown County,</u> 396 S.C. 589. 723 S.E.2d 805 (2012)	18
<u>Pearson v. JPS Converter & Indus. Corp.,</u> 4 89 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997)	9
<u>Reed-Richards v. Clemson University,</u> 638 S.E.2d 77, 371 S.C. 304 (Ct.App. 2006)	10-11
<u>Tiller v. Nat'l Health Care Ctr. of Sumter,</u> 334 S.C. 333, 513 S.E.2d 843 (1999)	8

Wynn v. People's Natural Gas Co. of S.C.,
238 S.C. 1, 118 S.E.2d 812 (1961)

8

STATUTES

S.C. Code Ann. § 42-1-160 (2007)

18

S.C. Code Ann. § 42-9-10 (2007)

10, 12

S.C. Code Ann. § 42-15-60 (2007)

18

S.C. Code Ann. § 43-243.1 (L)(1)(2011)

11

STATEMENT OF ISSUES ON APPEAL

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 Appellant, 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.

Appellant 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. 27]. 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. 29].

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." [R. p. 13-14, Conclusion of Law 3] 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." [R. p. 13, Finding of

Fact 18]. 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. 13, Conclusion of Law 2]

Fragosa timely appealed to the Appellate Panel of the Full Commission on December 5, 2011. [R. p. 25-26]: 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. 16-24].

This appeal followed.

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 fell onto him knocking him off the roof and onto the ground.

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 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. 418].

The specific diagnoses related to his traumatic brain injury are (1) skull fracture; (2) open complex scalp wound with epidural and subdural hematoma; and (3) bilateral frontal contusions. [R. p. 418]. The attending physician at MUSC documented dramatic evidence of physical brain injury, reporting: “This patient incurred a large fracture through the skull, apparently it is open, with subdural and epidural fluid collections.” [Claimant’s APA, page 1].

While in the hospital, Fragosa required a “percutaneous endoscopic gastrostomy tube for continued enteral feeds and nutritional support.” [R. p. 172]. 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. 172].

The Employer accepted Fragosa’s claim and began providing benefits, including treatment from a neurologist, Dr. George Sandoz. Dr. Sandoz made numerous statements throughout his medical records confirming the physical brain injury.

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. 222 (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. 224(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. 227 (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. 229 (emphasis added)].

Six months later on June 2, 2009, Doctor Sandoz continued with the diagnosis of: “**Intracranial injury** of other and unspecified nature.” [R. p. 236]. The next day he wrote a letter confirming the brain injury and assigning a 20% impairment rating per the 6th Edition of the AMA Guide: “seen by MUSC Orthopaedics for cervical and lumbar injury as well for a **traumatic brain injury.** . . . From the traumatic brain injury, the patient’s impairment rating is of 20% as noted on the table 13-8.” [R. p. 237].

On a followup visit on July 7, 2009, Dr. Sandoz noted the specific problems resulting from the brain injury: “The patient is a 28-year old male with traumatic brain injury, headache, dizziness, difficulty with complex tasks.” [R. p. 239].

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. 242 (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 the brain injury 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. 320, 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. 320, 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. 286].

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 injury – both the fact of the physical brain injury and the cognitive deficits resulting from that injury. 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.¹ 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. 299].

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. 299].

Fragosa was also evaluated by Dr. Robert Brabham, a psychologist and certified brain injury specialist, on October 27, 2010. [R. p. 272-285]. 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. 272 (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. 283-284].

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 injury. [R. p. 79, line 5-page 83, line 16]. He remains physically and mentally incapable of returning to any kind of work that he has ever done. [R. p. 90, lines 12-15].

¹Post-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—a mild form of traumatic brain injury. 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.

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 appellant 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.² Since then, he has suffered from proven cognitive deficits, balance problems, dizziness, seizures, and difficulty with complex tasks. Both his treating neurologist and the Defendants' neuropsychological IME confirm the permanency of the cognitive deficits. The authorized treating neurologist has repeatedly and explicitly stated to a reasonable degree of medical certainty that Fragosa is permanently and totally disabled due to physical brain injury. The evidence of physical brain injury 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 injury 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.”). The decision below must be reversed.

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

The Appellate Panel made the legal conclusion “there has not been a physical brain injury as

²The 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>

it does not meet the criteria established under the South Carolina Workers' Compensation Act.” [R. p. 23, Finding of Fact 18]. The Appellate Panel never specified what these criteria might have been or what particular criterion was not met. As such, the Decision and Order is facially inadequate and must be reversed on that basis alone. See Canteen v. McLeod Regional Medical Center, 735 S.E.2d 246, 400 S.C. 551 (Ct. App. 2012)(reversing and remanding to the Appellate Panel with instructions “to cite evidence supporting its position on remand.”). However, because the evidence of physical brain injury is overwhelming, this is a case where the Court can reverse the decision below as a matter of law. 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).

The statute provides that an injured worker “*who has suffered physical brain damage . . . shall receive the benefits for life.*” S.C. Code Ann. § 42-9-10 (C) (2007)(emphasis added). The term *physical brain damage* is not further defined in the statute. The Commission apparently added its own criterion that the brain damage must be visible on a CT scan.³ This additional criterion is drawn from whole cloth. It has no support in medicine or the law; it violates the tenet to liberally construe the Act in favor of the injured worker. See Reed-Richards v. Clemson University, 638 S.E.2d 77, 371 S.C. 304 (Ct.App. 2006)(adopting expansive definition of paraplegia to include “incomplete paraplegia” as “consistent with the legislative purpose of construing workers' compensation laws in

³At oral argument before the Appellate Panel, counsel for Respondents stated: “So traumatic brain injury is the same as physical brain injury; I admit I might have a problem. But I think physical brain injury, in fact, the General Assembly and Legislature has put a burden on us with something we can physically see, something that requires more here.” [R. p. 108, lines 20-25). At another point in that same argument, 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).

favor of claimants”).

Although the term “traumatic brain injury” is not defined in the Act, it is defined elsewhere in the South Carolina Code of Laws at the regulations for “Criteria for Entry into Programs of Special Education for Students with Disabilities.” The definition states:

Traumatic Brain Injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a student’s educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. S.C. Code Ann. § 43-243.1 (L)(1)(2011).

Fragosa’s condition plainly meets this definition. He suffered an acquired injury to the brain resulting in most of the listed impairments. While there is no requirement that the Commission follow this definition, it is far better than arbitrarily making up a rule that for it to be “a physical brain injury you’ve got to be able to see it.” [R. p. 111, lines 11-13]. Cf. Reed-Richards v. Clemson University, 638 S.E.2d 77, 371 S.C. 304 (Ct.App. 2006)(rejecting counsel’s lay definition of paraplegia as a “commonly held stereotype”).

The most common brain injuries are not visible on imaging scans – even acutely. In Krepps, this Court recounted expert testimony from a neuropsychologist about physical brain injuries which are not visible on CT scan:

Dr. Lesser testified it was possible for the brain to be injured without any damage to the skull or any bleeding inside the skull. He stated that closed head injuries often result in postconcussive syndrome, which is evidenced by physical symptoms such as personality change, drop in school performance, headache, fatigue, sleep disturbance, mood alteration, irritability, and memory loss. Dr. Lesser further indicated it was possible for a person to sustain a closed head injury, or postconcussive syndrome, and have little pain, very few complaints, a normal

neurologic exam, a normal MRI, and a normal CAT scan. He was “ninety-nine percent” certain that Shohn sustained a closed head injury. Krepps by Krepps v. Ausen, 479 S.E.2d 290, 324 S.C. 597 (Ct.App. 1996).

It is well-established that neuropsychological evaluation is a scientifically legitimate method for proving the existence of a traumatic brain injury - even in the absence of visual evidence. Id. Indeed, Dr. Wagner made the same diagnosis in this case as Dr. Lesser made in Krepps. [R. p. 299].

In the instant case, there was never any doubt that Fragosa suffered a serious physical brain injury – nor is there any doubt that he suffers from multiple permanent impairments as a result of that physical brain injury.⁴ Moreover, unlike the injury in Krepps, Fragosa’s brain injury was visible on CT scan. The neurological and neuropsychological testing merely confirmed the impairments which resulted from the brain injury.

The statute merely states that a person “who has suffered physical brain damage . . . shall receive the benefits for life.” S.C. Code Ann. § 42-9-10 (C) (2007). Fragosa has suffered physical brain damage. The physical brain damage resulted in serious permanent impairments. As such, he meets all the legislative criteria for lifetime benefits. The decision below must be reversed.

⁴Respondents 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. [Brief of Respondents to the Appellate Panel, page 6 (emphasis in original)].

B. The evidence overwhelmingly supports a finding that Fragosa suffered physical brain damage.

Despite the overwhelming evidence, the Appellate Panel found as a fact that “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. 23, Finding of Fact 18]. The only finding of fact which could even remotely support such a conclusion is Finding of Fact 12: “That Dr. Mark Wagner noted that the Claimant sustained a skull fracture with acute underlying minor structural change to the brain, but Dr. Wagner concluded that functional studies, such as EEGs, CTs and MRIs, were read as unremarkable ‘demonstrating structural resolution of the work-related injury.’” [R. p. 22, Finding of Fact 12].

This isolated statement in Dr. Wagner’s report is *not* evidence that Fragosa did not suffer physical brain damage. Dr. Wagner himself confirms the presence and effect of the physical brain damage in the very same paragraph of his report, noting:

[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. 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. 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. 299].

Throughout his report, Dr. Wagner consistently notes the “persisting cognitive complaints” and “abnormal findings” shown by neuropsychological testing.

Dr. Wagner is a neuropsychologist. Neuropsychologists are qualified to testify as experts on physical brain damage *as shown* by neuropsychological testing. In this case, Dr. Wagner’s testing

confirmed the existence of cognitive deficits due to “structural change to the brain.” The comment about the imaging studies “demonstrating structural resolution of the work-related injury” is not an opinion about physical brain damage, nor could it be as Dr. Wagner is not qualified to interpret or opine on imaging studies. Dr. Wagner never explicitly opined on physical brain damage one way or the other (nor did he ever state his opinions to a reasonable degree of medical or neuropsychological certainty). 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”). The only inference which can be drawn from his report is that Fragosa suffers persistent cognitive deficits due to the brain injury, thus supporting Fragosa’s claim of physical brain injury.

The doctor who is qualified to interpret and opine on imaging studies is Dr. Sandoz, the authorized treating neurologist. Throughout his reports, Dr. Sandoz opined Fragosa had suffered physical brain damage. He based his opinions on the entire course of his treatment of Fragosa – including the patient history, imaging studies, physical examination and response to treatment. He assigned a 46% whole person impairment rating under the 5th Edition of the AMA Guides and a 20% whole person impairment under the 6th Edition. These ratings were strictly for the damage to the brain.⁵ [R. p. 237-242].

Respondents’ argument is that the brain hematomas shown on the CT scans have resolved. Respondents’ counsel used the analogy of “Well, I hit my arm at my house the other day and I have a hematoma on my arm and it is going to resolve.” [R. p. 65, lines 10-15]. This is an interesting analogy – and it would have some superficial appeal if Fragosa’s brain (like counsel’s arm) had fully

⁵Fragosa’s other doctors assigned impairment ratings of 11% to the spine (Dr. Merrell), 1% to the left shoulder (Dr. Wolfe), and 40% to the right foot (Dr. Wolfe). [R. p. 295, 305].

healed with no residual deficits. Tragically, it did not. Counsel retains full use of his arm; Hector Fragosa lost as much as 46% of the use of his brain.

Dr. Sandoz explained the distinction in his deposition testimony:

- Q. Now, we've arrived at this because of what you called traumatic brain injury, correct?
- A. That's correct.
- Q. As far as physical findings on his brain, if you were to look at scans, is it fair to say there is no physical damage to the brain *that we can see*; is that right?
- A. There's no evidence of any damage on the brain *that we can go and see*, that's correct.
- Q. Okay. So what we're dealing with here are these – the traumatic brain injury, and sometimes I like to call it because I don't know what else to call it, but I see it often, is the post concussive syndrome –
- A. Got it.
- Q. Injury suffered to the brain.
- A. That's why traumatic brain injury is the preferred term.
- Q. What's the difference between the jar that a brain takes in a concussion and what he may have had?
- A. The concussion should resolve.
- Q. Okay. So we're looking at – so we call it traumatic brain injury because it's a longer period of time?
- A. Because *there's been some damage and injury to the function of the brain*.

[R. p. 262, line 21-page 263, line 24 (emphasis added)].

Hematomas are like tsunamis. The blood is absorbed back into the body, just as the tidal wave retreats back to the ocean. But just like a tsunami, the hematoma leaves destruction in its wake. The tidal wave is gone – you can no longer see it – the damage remains.

It is not at all unusual for a physical brain injury not to be visible on conventional CT and MRI scans - even once the initial bleed reabsorbs. Most brain injuries involve widespread microscopic damage to neurons and axons within the cerebrum. To actually see the residual damage, more sophisticated imaging is required – such as PET scans and 3.0 Tesla MRI scans – and even then, the injury may be so diffuse and microscopic as to be unseen by current technology. Otherwise,

the evidence of physical brain injury is shown by evidence of continuing symptoms and functional deficits – all of which were confirmed here by Drs. Wagner, Sandoz and Brabham.

Respondents' point to testimony by Dr. Sandoz which, they contend, shows no evidence of physical brain damage. Respondents take Dr. Sandoz's testimony out of context. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 660 S.E.2d 260, 377 S.C. 346 (2008) ("A review of the record, however, indicates that the testimony relied upon is taken completely out of context and does not support the Court of Appeals' conclusion."). The question and answer relied on by Respondents had a qualifier. Counsel did not ask Dr. Sandoz *whether* Fragosa had suffered physical damage to his brain; counsel asked *if you could see* any evidence of physical damage to the brain on the later MRI and CT scans. [R. p. 262, line 24-page 263, line 4]. When Dr. Sandoz was asked the ultimate question, he confirmed his opinion to a reasonable degree of medical certainty that Fragosa is permanently and totally disabled due to physical brain injury. [R. p. 286]. The opinion of Dr. Sandoz is the sole statement on physical brain damage tendered by an expert qualified to give such an opinion.

As the evidence of physical brain damage is overwhelming, the Court should reverse the Appellate Panel and find as a fact that Fragosa suffered physical brain damage. As such, he is entitled to lifetime compensation and medical treatment.

2. 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.

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 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.

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

A further concern over Dr. Wagner’s opinion is that it is not stated to a reasonable degree of medical certainty (or even neuropsychological certainty). A traumatic brain injury is a medically complex case – defined as “sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment excluding MRIs, CAT scans, x-rays, or other similar diagnostic

techniques.” S.C. Code Ann. § 42-1-160 (2007). The testimony from Dr. Sandoz that the brain injury exists, but cannot be visualized on a CT scan, shows how this case plainly meets the definition.

Such cases must be proven by medical evidence. The term *medical evidence* is defined as “expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician.” *Id.* An IME by definition must be explicitly stated to a reasonable degree of medical certainty. Michau v. Georgetown County, 396 S.C. 589. 723 S.E.2d 805 (2012). As Dr. Wagner’s report is not so stated, his opinions are incompetent (as they would be on interpreting imaging studies in any case) and were improperly relied on as evidence against physical brain injury.

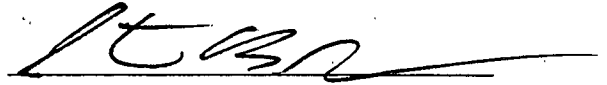
3. The Workers’ Compensation Commission should have addressed and ordered additional medical treatment.

Respondents admit Fragosa requires additional medical treatment to lessen his period of disability. This specific issue was not addressed by the Workers’ Compensation Commission in its Order one way or the other. Appellant requests that the Appellate Panel be ordered to modify the Order to provide for lifetime medical treatment as required under S.C. Code Ann. § 42-15-60 (2007).

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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Columbia, South Carolina
March 25, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0717624

Hector G. Fragosa, Employee/Claimant, Appellant,

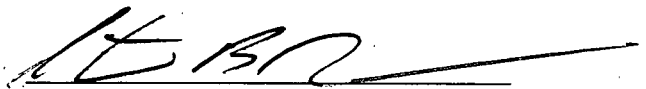
v.

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

CERTIFICATE OF COUNSEL

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

Respectfully Submitted



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