THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1106789

Victor G. Benjamin, Employee,.....Appellant,

v.

Rexam Beverage Can Company
d/b/a Rexam Beverages, Employer, and
Hartford Insurance Company of the
Midwest c/o Sedgwick CMS, Carrier,..... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This matter has been the subject of two proceedings before the South Carolina Workers' Compensation Commission based on injuries Claimant Victor G. Benjamin ("Claimant") incurred on June 15, 2011 while working for Rexam, Inc. Respondents Rexam and Sedgwick Claims Management Services, Inc. accepted the claim and began paying compensation benefits and providing medical treatment.

On February 19, 2014, Claimant filed a Form 50 seeking reimbursement for surgery performed by Dr. Steven C. Poletti, who was not his authorized treating physician. Claimant also requested that Dr. Poletti be named his authorized treating physician. Respondents opposed and the parties were heard by Commissioner Susan S. Barden on June 23, 2014. The Single Commissioner issued a decision on September 17, 2014 denying Claimant's request because, at the time he sought treatment (including cervical surgery) from Dr. Poletti, he was still actively treating with the authorized treating physician, Dr. Karl A. Lozanne, who had not released Claimant from his care. The Single Commissioner determined that the surgery provided by Dr. Poletti was not an emergency and Respondents were providing appropriate medical treatment. The Single Commissioner also denied Claimant's request for transfer of treatment to Dr. Poletti. (Single Commissioner Decision and Order, filed September 17, 2014, R. pp. 1-19). Claimant appealed to the Full Commission which affirmed the Single Commissioner Decision in its entirety. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed April 23, 2015, R. pp. 20-47). No appeal was taken.

Claimant initiated the current proceeding by filing a Form 50 alleging injury to his "[b]rain, spine- back and neck, right upper extremity, right shoulder, left shoulder, both lower extremities, has altered gait, and psychological overlay." He sought ongoing medical treatment and also requested "authorization of the motorized scooter, cervical collar and epidural lumbar steroid injection ordered by Dr. George Sandoz." (Cl. Form 50, dated May 3, 2016, R. p. 106).

Respondents admitted that Claimant "sustained a compensable injury to the neck, psyche and right upper extremity but den[ied] that Claimant sustained a compensable injury to the back, brain, left shoulder, right shoulder, left lower extremity and/or right lower extremity." Respondents noted that they were providing "Claimant with authorized causally-related medical treatment." (Form 51, dated June 2, 2016, R. pp. 107-108).

The parties were heard by Single Commissioner Aisha Taylor on August 18, 2016. Claimant and his wife, Letia Benjamin, testified on his behalf.

On July 21, 2017, the Single Commissioner issued a Decision and Order, finding, among other things, that Claimant suffered compensable injuries to his "neck, right arm, brain (for initial closed head injury and resulting headaches and seizures), and psyche" but not to his lower back, bilateral shoulders and left arm. (Single Commissioner Decision and Order, filed July 21, 2017, R. pp. 60-61, 64). The Single Commissioner also found that Claimant failed to meet his burden of proving he was entitled to lifetime benefits either on the basis of "incomplete paraplegia," giving greater weight to the testimony and medical opinions of Claimant's authorized treating neurosurgeon, Dr. Lozanne, or on the basis of permanent and severe physical brain damage, based on a

preponderance of the evidence including both lay and medical evidence. (R. pp. 61-64). However, the Single Commissioner held that, "Claimant's injuries to his neck, right arm, brain (for initial closed head injury and resulting headaches and seizures) and psyche render him permanently and totally disabled," which entitled him to lifetime causally-related medical treatment for those body parts. She denied the request for a mobility scooter because there was insufficient evidence causally-relating the need for the scooter to Claimant's compensable injuries. (R. p. 65-66).

Claimant filed a Form 30, Request for Commission Review, (R. pp. 830-832), raising 10 separate issues which he condensed into three issues on appeal to the Full Commission: whether the Single Commissioner erred in failing to find he was entitled to lifetime benefits either due to his alleged "incomplete quadriplegia" or due to "permanent and severe physical brain damage," and in denying his request for a mobility scooter.

The parties were heard before an Appellate Panel of the Full Commission on October 16, 2017 and the Appellate Panel issued its Decision and Order, affirming the Single Commissioner Decision with amendments. The Commission found that "Claimant sustained compensable injuries to his neck, right arm, brain (for initial closed head injury and resulting headaches and seizures), and psyche" but denied his claim for injury to his lower back, along with resulting radiculopathy to his legs, his bilateral shoulders and left arm. In addition, the Commission found that Claimant "failed to prove he is entitled to lifetime benefits on the basis of 'incomplete paraplegia,'" giving greater weight to the testimony and opinions of Dr. Lozanne who is the authorized treating neurosurgeon in this case. The Commission also found Claimant failed to prove he is

"entitled to lifetime benefits on the basis of having sustained permanent and severe physical brain damage." The Commission based this finding on five factors:

a. Three brain scans performed by treating physicians including Dr. Meiere, Dr. Naso, and Dr. Sandoz (R. pp. 136-137, 715-716, 695-696);
b. Claimant's appearance at and participation in two depositions;
c. Claimant's attendance at most of his medical appointments on his own to which he also drove himself on his own;
d. Claimant's service as treasurer of his union at the time of his injury and continued service as treasurer through 2012 (at the time of the hearing he was still a member of the union);
e. The lack of any medical evidence stated to a reasonable degree of medical certainty that Claimant sustained brain damage that was permanent and severe.

Instead, the Commission found Claimant is permanently and totally disabled due to the "injuries to his neck, right arm, brain (for initial closed head injury and resulting headaches and seizures) and psyche." The Commission denied Claimant's request for a mobility scooter as not supported by a preponderance of the evidence. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed April 24, 2018, R. pp. 74-103).

Claimant timely appealed to this Court.

FACTUAL BACKGROUND

I. Lay Testimony

Claimant was 54 years old at the time of the hearing before the Single Commissioner. He is married and has two sons, one 24 years old and one 16 years old. He graduated from Bishopville High school and also obtained a welding certificate from Kershaw County Welding School. (R. p. 958:8 – p. 959:18).

On June 15, 2011, he was working for Rexam as a cupper operator,[1] when a protective guard fell from overhead and struck him on the head and right shoulder. Claimant lost consciousness for a short period of time. He recalled a co-worker telling him "it was going to be ok," and also "getting in the back of the ambulance." (R. p. 961:3-7) (R. p. 880:12 – p. 884:5) (Supp. R. p. 1086:2 – p. 1087:8).

In a 2012 deposition, Claimant testified that he suffered from depression because he was unable to take care of himself and had become dependent on others and because of financial worries. (Supp. R. p. 1090:25 – p. 1091:18). As to his brain damage, Claimant testified that he sometimes lost his train of thought during conversations. (Supp. R. p. 1092:19 – p. 1093:8). He also admitted he had been diagnosed with a deteriorating disc in his low back in the "'80s or '90s" but that nothing had changed with regard to his lower back since his June 15, 2011 accident. (Supp. R. p. 1094:24 – p. 1095:18). He testified that he did not believe he could return to his job because he lacked the strength to do it and because he was worried he might have a panic attack. (Supp. R. p. 1096:6-17).

At the hearing before the Single Commissioner, Claimant was able to testify cogently about his monthly mortgage payments, car payments, insurance and taxes on his automobiles. He discussed his family towing business and how much that business made on average before he was injured. He discussed repairs he wanted to make to his home for insurance purposes. (R. p. 988:24 – p. 994:20). On cross-examination, he recalled

[1] Rexam makes soda cans and beer cans. (R. p. 960:13-15). Claimant testified at length and in detail about his job as a cupper operator, or front-end maintainer, which involved loading coils onto a coil cot, loading aluminum "bricks" onto a pallet, checking the machine and making sure it was not making bad cups. (Supp. R. p. 1081:24 – p. 1085:15).

testifying at the 2014 proceeding before Commissioner Barden and at his 2012 and 2014 depositions. (R. p. 998:2-16).

In his 2014 deposition, Claimant testified about driving himself to appointments with Dr. Bergman in Columbia, which trip takes him over an hour, without problem. (Supp. R. p. 1097:5-10; p. 1098:4 – p. 1100:8; p. 1101:5-19). At the hearing, Claimant testified again that he often drove himself to appointments with Dr. Bergman in Columbia, which is approximately 60 miles from his home. (R. p. 999:1-10). He agreed that operating his vehicle required him to use his hands, his legs and feet, and to use his eyes, ears and brain to be aware of his surroundings and in order to safely navigate traffic. (R. p. 1000:13 – p. 1001:20). He has renewed his driver's license since his accident. (R. p. 1002:1-7). He testified that he did not have any problem locating Dr. Bergmann's office. (R. p. 1003:18-23). Claimant's wife confirmed that he drove himself to doctor's appointments and acknowledged that there are times, even as recently as a month prior to the hearing, that she rides as a passenger in the vehicle while Claimant drives. (R. p. 1065:2 – p. 1066:22).

Claimant agreed that Dr. Bergmann and Dr. Deal have provided beneficial treatment. He acknowledged that part of the stress in his life involved taking care of his parents, particularly since his father was very ill. (R. p. 1014:21 – 1016:20). He had other stressors with his family relationships. (R. p. 1018:17 – p. 1019:17; R. p. 1021:15-22). Claimant testified that he was not having any more seizures because of the medication. (R. p. 968:12-15).

At the time of his injury, Claimant was a member of the United States Steel Workers of America union. Not only was he a member, but he served as treasurer both

before and after his accident, throughout 2012 and into 2013. He is still a member of the union. (R. p. 1005:18 – p. 1008:13).

Although Claimant sought unauthorized treatment from Dr. Poletti, his health insurance paid for the surgery and treatment. Claimant acknowledged that he was not required to pay premiums for his health insurance. (R. p. 889:16 – p. 890:6) (Supp. R. p. 1102:17 – p. 1103:20).

II. Medical evidence

Following his injury, Claimant was transported to McLeod Regional where he was seen in the Emergency Room. Medical notes indicate that he was "awake, alert, conversant, fluent speech. Normal affect .... Both upper and lower extremities have normal bulk and tone with 5/5 strength ..." Claimant was diagnosed with a "[l]eft parietal skull fracture," a "[c]losed head injury with concussion," and a "[r]ight forearm injury, possible tendon and nerve injury." (R. pp. 693-694).[2] The CT scan of his head showed "[c]omminuted minimally depressed left frontal parietal fracture. No intracranial hemorrhage." (R. pp. 695-696). On June 17, 2011, two days later, it was noted that "[n]eurologically [Claimant] is doing well." He was discharged to home. (R. pp. 119, 121).

At a follow-up appointment on June 24, 2011 with Dr. William B. Naso, Claimant complained of "significant headaches," "lightheadedness and dizziness" as well as "some neck discomfort." However, the notes also indicate Claimant was "awake alert and conversant, with fluent speech, normal affect, and fully oriented," with normal "5/5

[2] Claimant's right forearm injury was surgically repaired by Dr. Matthew D. Welsch, who continued to treat him from September 23, 2011 through October 14, 2013. (R. pp. 697-704). At those appointments, Dr. Welsch noted that Claimant was "[a]lert and oriented x 3" and his "[m]ood and affect were appropriate." (R. pp. 697, 699, 701, 704).

strength" in his upper and lower extremities. Given his headaches, Dr. Naso ordered an MRI, which was unremarkable. (R. pp. 123-124, 126, 716).

Claimant was seen by Dr. Eugene Giddens in November 2012. Although Dr. Giddens recommended "a decompression and fusion ... at C3 through C6 and plating," (R. pp. 146-147), Claimant testified that he "didn't get a good feeling" about Dr. Giddens. (R. p. 885:8 – p. 886:21).[3] As a result, Claimant's care was transferred to Dr. Lozanne with whom Claimant said he had a good relationship. (R. p. 887:7-19).

Claimant began seeing Dr. George M. Sandoz of Grand Strand Specialty Associates Neurology in September 2011. Notes from his initial appointment indicate Claimant was experiencing no motor weakness, his balance and gait were intact, his coordination was intact and his fine motor skills were normal. (R. pp. 769-771). Subsequent medical notes from Dr. Sandoz's office repeat these findings. (R. pp. 773, 774, 776, 777-778, 780, 782, 784, 787, 797, 800). In June 2013, Dr. Sandoz noted that Claimant was using a cane but, again, noted normal level of consciousness, alert and oriented, normal intellect, intact memory, no motor weakness and coordination intact. (R. p. 790). Claimant testified that he used the cane for balance, "because I will from time to time stumble." (R. p. 888:5-6).

At the request of Dr. Sandoz, Dr. Leonard Goldschmidt, a licensed clinical psychologist, performed a neuropsychological evaluation of Claimant in October 2011. (R. pp. 241-254). Dr. Goldschmidt noted that Claimant's fellow employees told him he had "lost consciousness for roughly 8 minutes." (R. p. 242). Although the exam

[3] Claimant saw Dr. Poletti on November 5, 2012, which visit was unauthorized. Dr. Poletti recommended a posterior cervical decompression to the C3-4 level. (R. 746-748). However, Claimant's care was transferred from Dr. Giddens to Dr. Lozanne.

"suggested [Claimant] was experiencing several cognitive deficits and behavioral deficits that were consistent with his closed head traumatic brain injury; these deficits were primarily concerning memory, attention, and executive functioning ... Otherwise, he was generally functioning within normal limits of functioning, reaching to as high as in the Above Average range." Claimant tested to be in the Low Average for IQ. (R. p. 253). Claimant treated with Dr. Goldschmidt from December 2011, (R. pp. 255-256), until June 2012, (R. pp. 397-405), approximately six months.

In February of 2012, Claimant was diagnosed as having seizures which were described as "Focal with secondary generalization." (R. pp. 155-158). His seizures were controlled with medication and, in June 2012, his driving privileges were restored because he had gone six months without a seizure. (R pp. 162-163). In January 2014, Dr. Sandoz noted that Claimant's seizures continued to be controlled with medication. (R. pp. 186-187).

In June 2012, treatment of Claimant's psyche was transferred to Dr. Lawrence Bergmann and Dr. Roger Deal with the Post Trauma Resources, in Columbia. Dr. Bergmann's June 6, 2012 note references Dr. Goldschmidt's prior diagnosis, but does not adopt or repeat it. (R. pp. 406-407). Dr. Bergmann's notes over the following years[4] reference reports of irritability, depression and anger focused on family issues and family/interpersonal conflicts, (R. pp. 416, 433, 441-442, 461, 464-467, 470 (noting Claimant's "expectations for others play a big role in his anger"), 726-727, 730-731, 734-737, 739), frustrations with the workers' compensation/legal process and money issues,

[4] Claimant testified at the Hearing before the Single Commissioner that saw Dr. Bergmann and/or Dr. Deal on approximately a weekly basis, with the latest appointment being within a month before the hearing. (R. p. 999:18 – p. 1000:1).

(R. pp. 418, 420-423, 438-441, 446, 450, 454, 458, 461-462, 465-466, 726, 729, 732-733, 737-738, 743-744), and the difficulty of learning how to live with chronic pain and new his physical limitations. (R. pp. 423, 435-436 (noting the "relationship between pain and psychological status"), 437, 448, 450, 456-457, 459, 465-467, 728, 737-739). While Dr. Bergmann did indicate that a head injury can "impact ... feelings especially anger," (R. p. 444), he also linked a myriad of other emotions and frustrations Claimant was experiencing with family/interpersonal issues, stress over the workers' compensation and legal processes, the difficulty of living with pain and his reduced capacity, as noted above.

Dr. Deal noted on August 23, 2012 that he had discussed with Claimant "the fact that with his pain level that he has, it activates a part of his brain that is not under voluntary control and causes a lot of chemical changes in the body ..." (R. p. 476). On September 13, 2012, Dr. Deal noted that Claimant "continues to work regularly with Dr. Bergmann and is learning about the ill effects of chronic pain ..." (R. p. 478). Dr. Deal also noted that Claimant struggled with family issues, dealing with pain and his reduced ability to work and to care for his family, (R. pp. 489-491, 724 ("Mr. Benjamin has an enormous amount of interpersonal stress")), and the workers' compensation process. (R. p. 493).

On February 5, 2015, Drs. Bergmann and Deal assigned Claimant a 30% medical impairment to the whole person based the on injury to his psyche. (R. p. 472).

Claimant began seeing Dr. Lozanne at Columbia Neurosurgical Associates, P.A. in January 2013. Notes from his first visit indicate that Claimant was "[a]wake, alert, and oriented with normal and appropriate speech." Motor strength was 4+/5 for the right

upper extremity while, "[a]ll other muscle groups are 5.5." Claimant denied "any urinary or bowel symptoms." Dr. Lozanne recommended "surgical intervention in the form of an anterior cervical discectomy and plated fusion at C4-5, C5-6 and C6-7. It is my opinion that the C3-4 level does not require any surgical intervention at this time because I am not seeing any significant neural compression despite the fact that it does appear that there is some spinal cord signal change at this level." (R. pp. 705-706). The surgery was performed on February 18, 2013, (R. pp. 631-634), and Claimant was discharged on February 20, 2013. (R. p. 636).[5] Claimant followed up with Dr. Lozanne and, in August 2013, underwent an MRI of his right shoulder that revealed some pathology, which concerned Dr. Lozanne. He recommended Claimant be seen by a shoulder specialist but did not believe new imaging studies of his cervical spine were warranted at that time. (R. pp. 645-646; Supp. R. pp. 1079-1080). Dr. Lozanne saw Claimant again in November 2013, noting that an "MRI of the right shoulder revealed a SLAP tear for which he has been evaluated by orthopaedics." Dr. Lozanne did not believe Claimant had reached MMI for his cervical spine and spinal cord injury and wanted to see Claimant again in February 2014, which would be a year from his cervical fusion surgery. (R. p. 648).

On January 20, 2014, however, Claimant again sought unauthorized treatment from Dr. Poletti at the Southeastern Spine Institute.[6] Physician's Assistant Justin P. Swain indicated that Claimant complained of "neck, shoulder, and right arm pain," but

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[5] During his treatment with Dr. Lozanne, Claimant denied any urinary or bowel symptoms. In addition, Dr. Lozanne noted that Claimant was "alert, and oriented with normal and appropriate speech." (R. pp. 628). Following the surgery, strength in Claimant's muscles, other than his right arm, was "5/5." (R. pp. 638, 640, 643, 648).

[6] Claimant acknowledged at the June 23, 2014 Hearing before Commissioner Barden that his legal counsel had scheduled both of the appointments with Dr. Poletti that led up to Dr. Poletti performing surgery on Claimant at the C3-4 level. (R. p. 889:16-21; R. p. 890:16 – p. 892:9).

denied any bowel or bladder issues. He noted "continued evidence of disc-height collapse, spondylosis, and kyphosis noted at C3-4" and recommended "an immediate cervical MRI scan." (R. pp. 749, 576-577). Dr. Poletti saw Claimant the next day and diagnosed Claimant with "worsening stenosis or progressing cervical stenosis at the C3-4 level where there is noted to be edema changes in the cord, some measure of settling and posterior disc bulging at the C3-4 level with spinal cord compression with high signal cord at the C3-4 level." He stated that Claimant "should consider surgery," which "could prevent him from worsening." (R. p. 479). Dr. Poletti performed surgery on Claimant's C3-4 level on February 13, 2014. (R. pp. 582-583).

When Claimant returned to Dr. Lozanne on March 11, 2014, Dr. Lozanne noted that Claimant had undergone surgery at the C3-4 level by Dr. Poletti and, as a result, it would be more appropriate for him to follow up with Dr. Poletti. Dr. Lozanne released Claimant from his care. (R. p. 649). "[A]t the repetitive request of [Claimant's] attorney," however, Dr. Lozanne saw Claimant again on August 21, 2014 but noted that Dr. Poletti continued to provide care following the February 2014 surgery. Dr. Lozanne again released Claimant from his care. (R. p. 650).

Dr. Poletti continued to see Claimant, and began documenting and treating him for back/lumbar pain in May 2014. (R. pp. 584-593, 595, 605). In August 2014, Dr. Poletti's office noted problems with Claimant's "balance as of late and is using a cane for ambulation" in connection with his lumbar pain. Claimant denied "any bowel or bladder disturbance, any paralysis." (R. pp. 601-602). In a letter to Claimant's Counsel, dated May 27, 2015, Dr. Poletti opined that Claimant "has signs and symptoms of upper and lower extremity weakness. This type of spinal cord edema or compression is what

commonly would be referred to as incomplete quadripareis or as a form of incomplete quadriplegia. He has a disabling problem that will prevent him from walking normally ..." He assigned Claimant a 28% medical impairment to the cervical spine, 39% for the spinal cord injury, and 28% for the cervical fusions, for a total whole person impairment rating of 67%. (R. pp. 606-608).

On May 15, 2015, Dr. Sandoz noted for the first time that Claimant was experiencing lower back pain. (R. pp. 214-216). On May 20, 2015, Dr. Sandoz wrote a letter, copied to Claimant's Counsel in which he stated, "[u]nfortunately, this is secondary to the lack of workmen's comp care of the patient's cervical issues that he has with his neck, we were never been [sic] able to pay attention to his back issues. At this time since we have controlled his symptomatology in his neck, it is necessary to pursue evaluation of his back and we need to go ahead and try to relieve the symptoms with an epidural steroid injection and MRI and nerve conduction study of the leg should be done." (R. p. 217).

On the same date, Claimant began seeing Dr. Barbara Sarb for pain management, particularly with regard to his lower back complaints. She also noted that he was "alert and oriented to person, place, and time. Speech is clear and fluent. Mentation is appropriate for age. Conversation is fluent." She also noted his strength "is 5/5 in the upper and lower extremities with normal muscle bulk and tone." (R. pp. 211-213).

On June 19, 2015, Dr. Sandoz provided impairment ratings based on the "AMA Guidelines Sixth Edition" of 4% impairment of the whole body for Claimant's headache, 29% impairment of the whole body for his traumatic brain injury, and 34% impairment of the whole body for his seizures, for a combined value of 54% of the whole body. Dr.

Sandoz indicated that Claimant's lumbar pain/injury was "secondary" to his workplace injuries that he suffered. (R. p.218). After this date, Dr. Sandoz began noting "Motor – spastic Quadriparesis, Balance & Gait – spastic hemiparesis" and "decrease[d] ambulation sever[e] restriction on ADL's." (R. pp. 219, 226).

In June and October of 2015, Claimant returned to Dr. Poletti's office, which continued to treat him for lower back pain. He consistently denied any "paralysis, or changes in bladder or bowel function." (R. pp. 609-615). In December 2015, Claimant again denied "loss of bowel or bladder function, any focal muscle deficits, or paralysis." (R. pp. 616-617). Claimant returned to Dr. Poletti's office in April 2016 at which time he "denie[d] any significant progression of his symptoms." (R. p. 619).

In July 2015, Robert Brabham, Ph.D., performed a psychological and vocational evaluation in which he stated that Claimant "apparently lost consciousness for approximately 8-10 minutes." He noted that Claimant developed seizures "but apparently they have since resolved." He discussed Claimant's depression and "noted that his father and uncle died last year, which adds to his depression." Dr. Brabham concluded that Claimant "would be unable to effectively perform the essential duties in any gainful work activity," referring to "the unfortunate combination of factors and characteristics he now faces" due to his work injury. (R. pp. 678, 680, 692)

On October 1, 2015, Dr. Sandoz prescribed a scooter for Claimant due to decreased ambulation. (R. p. 227). Dr. Sandoz later responded to a questionnaire from Claimant's Counsel, to which he answered "yes" to the question of whether Claimant "require[s] the use of a motorized scooter to aid him with ambulation due to the injuries he sustained in his 06-15-2011 work accident." (R. p. 662).

In December 2015, Dr. Sandoz opined that Claimant "suffered physical brain damage the severity of which renders him incapable of returning to any form of gainful employment." Dr. Sandoz also opined that Claimant's spinal cord injury "which would be referred to as incomplete quadriparesis or as a form of incomplete quadriplegia" left him "incapable of returning to any form of gainful employment." (R. p. 652).

On June 8, 2016, Dr. Sandoz noted Claimant continued to have lower back problems. He denied "any bowl or bladder dysfunction." Dr. Sandoz noted that, cognitively, Claimant was "awake alert and conversant, with fluent speech, normal affect, and fully oriented." (R. pp. 668-669). On June 9, 2016, Dr. Sarb noted the same when Claimant was seen for a lumbar epidural steroid injection. (R. pp. 672-674).

Dr. William L. Mills performed an IME on Claimant on June 20, 2016. He agreed with Dr. Poletti's and Dr. Sandoz's "diagnosis of incomplete quadriplegia" and with their impairment ratings. (R. pp. 675-677).

Dr. Lozanne performed an evaluation and rating in July 2016. Claimant reported "no incontinence, no difficulty urinating, no hematuria, and no increased frequency." Claimant was "awake, alert, answering questions appropriately." His motor strength in his right upper extremity was 4+/5 and in his left upper and both lower extremities 5/5. Dr. Lozanne agreed that Claimant had reached MMI with respect to his cervical spine and, pursuant to the Guides to the Evaluation of Permanent Impairment, 5th edition, "under the DRE cervical category IV with loss of motion segment due to surgical arthrodesis correlating to a whole person impairment rating of 28%. From a cortical spinal tract perspective, he falls under class I for bilateral upper extremity involvement and class II for effect on station and gait. His condition correlates to a whole person

impairment of 19% and 19%, respectively. No impairment of bladder, anorectal, sexual, or respiratory function is warranted. Of particular note, there is no separate impairment for lower extremity involvement as this is encompassed by impairment to station and gait. Using the combined values chart (p.604), the total whole person impairment rating for Mr. Benjamin equals 53%." (R. pp. 709-712).

Dr. Lozanne, Claimant's authorized treating physician, was deposed twice, in 2014 and again in 2016. Dr. Lozanne was offered as an expert in neurosurgery without objection. (R. p. 865:6-13). In 2014, Dr. Lozanne was asked a series of questions regarding whether Claimant was in need of emergency surgery in February 2014 when Dr. Poletti operated on Claimant at the C3-4 level. Dr. Lozanne explained that, while the surgery may have been reasonable, Claimant was not in need of emergency surgery. (R. p. 866:2 – p. 873:1 (explaining "Emergency in the neurosurgical or even in a medical environment is something that tells me hey, we got to get this patient to the hospital and get this procedure done here within the next couple of days"); R. p. 875:17 – p. 876:1). The fact that Dr. Poletti had performed surgery on Claimant affected Dr. Lozanne's "ability to continue to manage" Claimant's care. (R. p. 873:21 – p. 874:17).

At his 2016 deposition, Dr. Lozanne was asked to "define paraplegia ... from the context of a neurosurgeon." He responded, "[s]o any time we use the plegia as a suffix in neurosurgical speak, that's complete lack of movement. All right? So we use quadriplegia as complete lack of movement in four extremities. Paraplegia is complete inability to move your legs. Hemiplegia is complete inability to move one side of your body." (R. p. 897:18 – p. 898:3). Dr. Lozanne explained that, in order to determine whether someone was paraplegic or quadriplegic, he would perform a physical

examination, which could be supplemented with objective studies such as an MRI or EMG nerve conduction study. (R. p. 898:12-25). Dr. Lozanne further explained that, with a plegia, "what you would experience physically, it's a complete lack of movement of the muscles with potentially what's called atrophy, which is deterioration in muscular bulk as time progresses as the muscles become deinnervated from its signals from the spinal cord or the brain, if the brain is what's creating the hemiplegia. The other findings that you can have – so there's a couple of different types of plegias. One is a flaccid plegia, which there is complete lack of tone. You can also develop a different type of plegia in which the patient actually becomes hypertonic, meaning that their … arm or their leg or whatever is plegic becomes stiff. So those are things that you actually determine during your examination." (R. p. 899:1 – p. 900:2).

Reviewing his notes of his examination of Claimant in 2013, Dr. Lozanne stated that Claimant "is not plegic. Okay. And what I mean by that, it is by definition somebody who has motor strength is not plegic. That's by definition. He had motor strength. He had some weakness in his right upper extremity, but he walked. He could move. He can actually directly be tested in terms of strength. He actually had significant strength to even – he had resistance in strength. So by definition from just my examination – I don't need to look at any imaging study, any EMG or nerve conduction study. I can tell by definition by just examining him that he is not plegic." (R. p. 901:1-22).

Dr. Lozanne also reviewed a number of test reports and medical records from 2015, none of which he felt were indicative of any plegia. (R. p. 902:24 – p. 907:3). Specifically, Dr. Lozanne testified, "[s]o when we're discussing plegia, once again,

plegia is a lack of function in terms of motor strength and potentially even sensation due to a disconnection … from the brain to the affected muscles, whether it's in the spinal cord or the brain, of subsequence. And the first thing you evaluate is the motor strength in the patient. A patient who has strength by definition cannot be plegic." (R. p. 906:14-22). Dr. Lozanne also agreed that plegia typically "manifest[s] itself rather quickly following an acute injury," the exception being where a tumor grows over time, exerting pressure on the spinal cord. (R. p. 908:20 – p. 909:13).

When asked by Claimant's Counsel about "incomplete quadriparesis or incomplete quadriplegia," Dr. Lozanne explained that, "if you talk about that with a neurosurgeon, they'll – it actually sounds like an oxymoron. And what I mean by that is that a quadriplegia by definition in terms of neurosurgical and neurologic training is complete lack of function." (R. p. 910:18 – p. 911:1). When presented with Dr. Poletti's May 27, 2015 letter, Dr. Lozanne testified that the phrase Dr. Poletti used, "incomplete quadriparesis" is "not an appropriate phrase to use … in this condition. Mr. Victor Benjamin … has a cervical myelopathy. So he has spinal cord dysfunction that has led to some symptoms, including some difficulties with … his balance because he had a spinal cord injury. He does not suffer from a quadriplegia. I've never heard a neurosurgeon – incomplete quadriplegia used as a phrase in any of my education …. in neurosurgical training that's not a typical phrase. The diagnosis that Mr. Victor Benjamin suffers from is a cervical myelopathy. He has a spinal cord injury and he has some weakness associated with that and he's not a quadriparetic in the sense that he has normal motor strength in multiple extremities, though he has some decreased strength … in his right upper extremity …. He is not a quadriplegic and it would be inappropriate for … me as a

neurosurgeon to describe him as an incomplete quadriplegic." (R. p. 911:16 – p. 914:21). Dr. Lozanne instead suggested that Dr. Poletti was attempting to describe an incomplete spinal cord injury (as opposed to a complete spinal cord injury), "in which the function below the level of injury is still present, whether it is motor or sensory," which Claimant in fact had suffered. (R. p. 915:11 – p. 916:9). Dr. Lozanne ultimately concluded that "Dr. Poletti is trying to convey that, you know, he is – he has some weakness and I'm in complete agreement with Dr. Poletti in that regard. But I'm in disagreement in labeling Mr. Victor Benjamin as an incomplete or complete quadriplegic in any kind of way." (R. p. 914:22 – p. 915:2).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2011). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a

whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Instead, the Commission's findings are presumed to be correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). It is not within the appellate court's purview to reverse findings of the Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999).

The Commission is the ultimate fact finder in workers' compensation cases. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Brunson v. American Koyo Bearings, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). Furthermore, "[e]xpert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony." Id., 334 S.C. at 340, 513 S.E.2d at 846.

ARGUMENTS

At their core, Claimant's arguments on appeal are an attempt to use this case as a vehicle to dramatically expand lifetime benefits under S.C. Code Ann. § 42-9-10(C), which provides that, "[n]otwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life." Claimant has a panoply of symptoms from his compensable injuries that, in combination, have resulted in his permanent and total disability. He has been awarded accordingly. However, Claimant's Counsel takes that disability and attempts to weld onto it either, or both, physical brain damage or quadriplegia as those terms are employed in Section 42-9-10(C). His arguments on both fronts are meritless and should be denied.

I. The Commission correctly held that Claimant failed to meet his burden of proving he was entitled to lifetime benefits on the basis of having sustained permanent and severe physical brain damage.

Claimant's Counsel's arguments with regard to physical brain damage, as that phrase is used in S.C. Code Ann. § 42-9-10(C), fall into several categories. First, he mischaracterizes some of the evidence and parts of the Commission's findings in an attempt to build a case that Claimant suffered severe and permanent physical brain damage. Second, he conflates a diagnosis of a traumatic brain injury with physical brain damage, as that phrase is used in Section 42-9-10(C), in an attempt to modify the test for lifetime benefits into one that is easier for Claimant to meet. Third, he pontificates on the nature of traumatic brain injury, citing treatises not presented to the Commission, some of

which are not readily available via normal research search engines. Fourth, and finally, he argues that the Commission "disregarded dispositive evidence," when, in fact, the Commission considered the voluminous medical evidence and concluded that, while Claimant was permanently and totally disabled from the combination of his multiple work-related injuries, there was substantial evidence demonstrating he had not suffered permanent, severe physical brain damage.

A. Claimant's mischaracterization of the facts.

Claimant's mischaracterization of the facts begins in his Statement of the Facts, where he states he lost consciousness until he was "aroused in the ambulance," and later suggesting that he was unconsciousness for approximately 30 minutes. (App. Br. pp. 4, 16). As noted above, Claimant was unconscious for a short period of time, regaining consciousness when a co-worker told him "it was going to be ok." He also later recalled "getting in the back of the ambulance." (R. p. 883:15 – p. 884:5) (Supp. R. p. 1086:2 – p. 1087:8). Dr. Goldschmidt noted that Claimant's fellow employees told him he had "lost consciousness for roughly 8 minutes," (R. p. 242), a finding with which Dr. Brabham agreed. (R. p. 678).

Claimant's Counsel mistakenly states that Claimant saw Dr. Goldschmidt, for a year and a half. (App. Br. p. 5). In fact, Claimant saw him for approximately six months (from December 2011 to June 2012, (R. pp. 255-256, 397-405)), at which point treatment was transferred to Drs. Bergmann and Deal. (R. pp. 406-407). Although Claimant suggests Drs. Bergmann and Deal saw Claimant solely "for psychological issues arising out of his brain injury," their treatment notes clearly show they were treating him for all his conditions, not just the brain injury. (R. pp. 406-496, 724-744). Dr. Bergmann's note

on Claimant's initial visit merely repeated the diagnosis provided by Dr. Goldschmidt but in no way adopted it as his own. (R. p. 406). And, while Dr. Bergmann occasionally linked Claimant's anger issues to his head injury, (R. p. 444), more often he linked Claimant's problems with irritability, depression and anger to Claimant's focus on family issues and family/interpersonal conflicts, (R. pp. 416, 433, 441-442, 461, 464-467, 470 (noting Claimant's "expectations for others play a big role in his anger"), 726-727, 730-731, 734-737, 739), frustrations with the workers' compensation/legal process and money issues, (R. pp. 418, 420-423, 438-441, 446, 450, 454, 458, 461-462, 465-466, 726, 729, 732-733, 737-738, 743-744), and the difficulty of learning how to live with chronic pain and new his physical limitations. (R. pp. 423, 435, 436 (noting the "relationship between pain and psychological status"), 437, 448, 450, 456, 459, 465-467, 728, 737-739).

Dr. Deal recorded on August 23, 2012 that he had discussed with Claimant "the fact that with his pain level that he has, it activates a part of his brain that is not under voluntary control and causes a lot of chemical changes in the body ..." (R. p. 476). On September 13, 2012, Dr. Deal noted that Claimant "continues to work regularly with Dr. Bergmann and is learning about the ill effects of chronic pain ..." (R. p. 478). Dr. Deal also indicated that Claimant struggled with family issues, dealing with pain and his reduced ability to work and care for his family, (R. pp. 489-491, 724 ("Mr. Benjamin has an enormous amount of interpersonal stress")), and the workers' compensation process. (R. pp. 493).

Claimant cites Dr. Sandoz's treatment notes as "the clearest evidence of physical brain damage" including, specifically, notes from a July 15, 2014 appointment. While Claimant correctly points out that Dr. Sandoz noted "[a]ssociated symptoms" that

included "clumsiness, confusion, gait disturbance, hearing loss, incoordination, irritability, loss of consciousness, lucid intervals, memory difficulty, personality changes, restlessness, seizures, speech difficulty, stiff neck, unusual behavior and weakness," he fails to acknowledge that Dr. Sandoz recorded the location of the injury being "in the **bilateral cervical region**," as well as the "bilateral frontal region and bilateral parietal region," and that the location of pain was "facial, head and **neck**." (R. p. 193). Thus, these symptoms were stated to be coming from **both** the head injury and the neck injury. Furthermore, notes from that very same appointment also indicate that Claimant was "negative" for "loss of sensation and paralysis," that his level of consciousness, orientation, memory, coordination and fine motor skills all were normal. Dr. Sandoz attributed Claimant's dizziness to "inner ear damage," not brain damage. (R. p. 194).

Claimant's Counsel also suggests that the July 15, 2014 evaluation by Dr. Sandoz cited above, (R. p. 193), provided a current snapshot of Claimant's condition at "the time of the trial." (App. Br. p. 7). However, the hearing before the Single Commission in this proceeding occurred on August 18, 2016, nearly two years later.

Several places in his Brief, Claimant argues that the Commission Decision is inconsistent in both finding that the brain injury with resulting headaches and seizures resulted in total disability," (*see* App. Br. pp. 13, 18, 21), but failing to find that he proved he was entitled to lifetime benefits for physical brain damage under Section 42-9-10(C). In so arguing, he glaringly omits the fact that the Commission consistently found that it is the **combination** of Claimant's permanent "**injuries to his neck, right arm**, brain (for initial closed head injury and resulting headaches and seizures) **and psyche**"

that "render him permanently and totally disabled." (Commission Decision, R. pp. 91, 95, 97, 100, 102-103) (emphasis added).

B. Claimant's attempts to lower the standard for proving physical brain damage should be rejected.

In many ways, Claimant's arguments on physical brain damage are a blatant attempt to "water down" the test for physical brain damage as that phrase is used in Section 42-9-10(C), even going so far as to suggest that a diagnosis of a traumatic brain injury should suffice. (App. Br. pp. 14-18). His arguments are logically and legally unsound and must be rejected.

The Supreme Court has set out the test for physical brain damage. In Crisp v. SouthCo., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013), the claimant was injured when a 600-pound solid steel Bobcat bucket fell on him, injuring his right hand and head. The claimant was treated and later underwent a neuropsychological evaluation by a clinical psychologist, who noted "clear indications of deficits in verbal memory, attention, problem solving, and inhibition tied to his work injury ... he has likely experienced personality changes ... [and an] exacerbation of obsessive-compulsive tendencies." He was diagnosed with "Cognitive Disorder [not otherwise specified], probable personality change due to head injury, obsessive compulsive disorder, traumatic brain injury." 401 S.C. at 633, 738 S.E.2d at 838. A second IME performed by a neurologist concluded that the claimant had sustained "a traumatic brain injury/closed head injury." 401 S.C. at 633-634, 738 S.E.2d at 838.

Noting that the Commission had not determined permanency, the Supreme Court nonetheless rejected the claimant's argument that "the mere presence of any physical brain injury or damage, regardless of degree, triggers the operation of *section 42-9-*

10(C)," and explained that the General Assembly's intent in Section 42-9-10(C) was "to compensate an employee-claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent physical brain damage." Crisp, 401 S.C. at 641-642, 738 S.E.2d at 842. As the Supreme Court explained in Crisp, "the inclusion of 'physical brain damage' among the most serious injuries within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment." 401 S.C. at 643, 738 S.E.2d at 844. Accordingly, the Supreme Court held that "permanency and physicality are requirements. However, the severity of the injury is the lynchpin of the analysis," 401 S.C. at 642, 738 S.E.2d at 842, which is the claimant's burden to prove. 401 S.C. at 645, 738 S.E.2d at 844.

In Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013), the claimant was hit by a three- to four-inch piece of metal that flew out of a gang saw and hit him in the head. The claimant testified to his "substantial head pain, loss of cognitive ability, and other brain-function-related symptoms, including inability to read without severe headache, loss of his mathematical abilities, inability to balance while standing or to walk without a cane, hand tremors, anxiety, and more." 406 S.C. at 126, 750 S.E.2d at 62. Conflicting medical evidence included opinions that ranged from the claimant suffered a mild injury to his brain, to opinions that he suffered a physical brain injury. The Commission determined that, while the claimant had suffered an "injury-by-accident to the brain, this does not constitute damage to the brain," and held that he was not entitled to lifetime benefits under Section 42-9-10(C). 406 S.C. at 127, 750 S.E.2d at 62-

63. The Supreme Court confirmed the Commission's "interpretation of 'physical brain damage' [as] clearly consonant with the intent of the General Assembly," 406 S.C. at 128, 750 S.E.2d at 63, concluding and holding that "'physical brain damage' as used in § 42-90-10(C) is physical brain damage that is both permanent and severe."[7]

Claimant's Counsel even goes so far as to suggest that a State Board of Education regulation, which defines the various "Criteria for Entry into Programs of Special Education for Students with Disabilities" that allow children with disabilities to enroll in special education programs, essentially "describe[s]" "'physical brain damage' in the Workers' Compensation Act." (App. Br. p. 14 n.5). First, the purpose of S.C. Code Ann. Reg. §§ 43-243 & 43-243.1 is to set forth the "state's requirements of educational programs for students with disabilities." S.C. Code Ann. Reg. § 43-243(I). It patently is not intended to determine lifetime benefits of any type whatsoever. Furthermore, in addition to listing traumatic brain injury as a qualifying condition, other qualifying conditions include being "Deaf/Hard of Hearing," S.C. Code Ann. Reg. § 43-243.1(D), having an "Emotional Disability," S.C. Code Ann. Reg. § 43-243.1(F), "Other Health Impairment," S.C. Code Ann. Reg. § 43-243.1(I) (which includes acute asthma, ADD,

[7] Despite Claimant's suggestion otherwise, the General Assembly's use of the phrase physical brain damage is **not** equivalent or even similar to the issue addressed in Therrell v. Jerry's Inc., 370 S.C. 22, 633 S.E.2d 893 (2006), which considered whether, under the scheduled member section of the Act, Section 42-9-30, "recovery for a torn rotator cuff [is] limited to the scheduled recovery for the loss of an arm," as opposed to the loss of a shoulder. 370 S.C. at 25, 633 S.E.2d at 895. Noting that there is some "confusion" caused by the difference in the language incorporated into the scheduled member provisions, which use terms such as "leg" and "arm," and the language in the AMA Guides, which uses "upper or lower extremities," the Supreme Court merely emphasized "the need for the commission to examine the particular injury at issue in every case to determine how a physician's or medical service provider's impairment rating is properly applied ..." 370 S.C. at 31, 633 S.E.2d at 897-898. Neither Therrell, nor Crisp or Sparks suggest, as does Claimant's Counsel, or support the argument that physical brain damage is equivalent to traumatic brain injury.

ADHD, diabetes, etc.), "Orthopedic Impairment," § 43-243.1(J) (which includes congenital anomalies such as clubfoot, and amputations or fractures), "Speech-Language Impairment," S.C. Code Ann. Reg. § 43-243.1(L), and "Visual Impairment, S.C. Code Ann. Reg. § 43-243.1(N), among others. The purpose of and evaluation under this regulation has no connection whatsoever to Workers' Compensation benefits or to the determination of whether Claimant has suffered physical brain damage pursuant to Section 42-9-10(C). What Claimant's Counsel's reference to and reliance on S.C. Code Ann. Reg. § 43-243.1 does demonstrate, however, is that his current arguments are little more than an attempt to water down the standard for proving entitlement to lifetime benefits for physical brain damage under the Act. They must be rejected.

Claimant's Counsel's citation to an unreported opinion, Fragosa v. Kade Constr. LLC, Op. No. 2018-MO-29 (S.C. Sup. Ct. filed Aug. 29, 2018), a case that he appealed to the South Carolina Supreme Court, is both improper and unwarranted. First, pursuant to Rule 268(d)(2), "[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR. Second, at the writing of this Brief, that opinion is under rehearing before the South Carolina Supreme Court and, therefore, is not final.[8]

C. Claimant's Counsel erroneously relies on extra-record material and attempts to provide his own medical evidence/testimony.

Claimant's Counsel pontificates on medical terms and concepts for which, as far as the undersigned is aware, he has no specialized training or knowledge. Indisputably,

[8] In addition, the facts in Fragosa are significantly different from the facts in this case – there, the Commission found that the claimant had a 46% impairment from brain injury, which was not reversed or modified on remand; here, the Commission has made no such finding.

argument of counsel is not evidence, *see, e.g.*, Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991), either factual or medical.

Furthermore, in violation of Rules 208(b)(4) and 210(c), SCACR, he cites to articles and authority for factual assertions that are not designated for inclusion, nor properly includable, in the Record on Appeal, for the simple reason that they were never presented to the Commission or relied on by any of the medical experts in this case.[9] As such, his discussions of and assertions about medical articles and treatises on the pages of his Brief, identified below, should be stricken. While, on one hand, Claimant's Counsel criticizes the Commission for what he alleges is engaging in reaching its own medical conclusions, (App. Br. p. 11), on the other hand, Counsel feels no compunction about rendering his own medical opinions, advice and conclusions. (App. Br. pp. 14-15 (regarding TBIs),[10] 24-25, 28-29 (regarding quadriplegia)). This matter should be stricken and/or discredited.[11]

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[9] In Reed-Richards v. Clemson Univ., this Court acknowledged that it was appropriate for the Commission to consider a medical authority on which the claimant's treating physician relied. 371 S.C. 304, 308-309, 638 S.E.2d 77, 79 (Ct. App. 2006). Here, none of Claimant's treating physicians relied on the sources discussed in this paragraph. As this Court observed in Reed-Richards, "counsel's statement regarding the facts of a case and counsel's arguments are not admissible evidence." 371 S.C. at 309 n.7, 638 S.E.2d at 80 n.7.

[10] Interestingly, the quote regarding TBIs being "generally categorized as mild, moderate or severe..." which Claimant attributes to, "Faul M., Xu L., Wald M.M., 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," does not appear anywhere in the version of that article that Respondents were able to locate on-line. *See* https://www.cdc.gov/traumaticbraininjury/tbi_ed.html.

[11] This includes, specifically, 1) the first two paragraphs of Subsection C on p. 15 and continuing onto p. 16 (starting with, "According to the Centers for Disease Control ..." and ending with "...most systems require that the patient suffer a gross loss of consciousness for greater than 30 minutes[,]" and including footnote nos. 6, 7, 8 & 9); the last full paragraph on p. 16 through the end of the run-over paragraph on p. 18 (starting

Furthermore, even based on the medical texts quoted by Claimant's Counsel, which, as noted above, are not in evidence and were never presented to the Commission, a severe brain damage case involves a loss of consciousness of 30 minutes or greater. While Claimant's Counsel invites this Court to speculate that it was at least 30 minutes, there is no evidence whatsoever in the record to substantiate anything more than a brief loss of consciousness. Claimant testified that he recalled a co-worker telling him "it was going to be ok," and also that he recalled "getting in the back of the ambulance." (R. p. 880:12 – p. 884:5) (Supp. R. p. 1086:2 – p. 1087:8). Dr. Goldschmidt's evaluation, performed in the fall of 2011, indicates that Claimant was told "by fellow employee witnesses that he had lost consciousness for roughly 8 minutes." (R. p. 242). The only other evidence regarding how long Claimant was unconscious came from Dr. Brabham, who stated that Claimant "apparently lost consciousness for approximately 8-10 minutes." (R. p. 678). Thus, Claimant's arguments are based on non-record material and medical conclusions drawn by Counsel based on a mischaracterization of the evidence. As such, they should be rejected.

D. Substantial evidence supports the Commission Decision.

Claimant argues that the Commission disregarded dispositive evidence, erred in its analysis and misapplied the test for physical brain damage, at the same time truncating the Commission's factual finding regarding the combination of compensable injuries that rendered him permanently and totally disabled. Claimant's arguments fail for a number of reasons.

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with, "Brain damage itself comes in various forms ..." and ending with "... and inability to do things as well as before the accident[,]" and including footnote nos. 10 & 11). Footnote 12 at the bottom of p. 18, however, does not suffer from the same malady.

Claimant suggests that the Commission "simply ignored" certain evidence that he claims proves his case. First, the Commission based its findings of fact and conclusions of law "on a preponderance of the evidence including the medical records of the Claimant, the testimony of Dr. Lozanne, the Claimant's testimony and the testimony of the Claimant's wife ..." (Commission Decision, R. pp. 93-94, 99, 100 ("based on the preponderance of the evidence as a whole ...")). Furthermore, the Commission clearly reviewed Dr. Sandoz's opinion as to Claimant's employability, as noted in Finding of Fact No. 17. (Commission Decision, R. p. 95). Thus, there is no basis for Claimant's current allegation that the Commission ignored certain evidence, just because Claimant believes it is more persuasive and should have been considered conclusive. *See, e.g.*, Tiller, 334 S.C. at 340, 513 S.E.2d at 846 ("[e]xpert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony"); Lyles v. Quantum Chem. Co., 315 S.C. 440, 443-445, 434 S.E.2d 292, 294-295 (Ct. App. 1993) ("[t]he commission may find a degree of disability different from that suggested by expert testimony").

Claimant argues that the Commission arbitrarily substituted its own "hunch or intuition" for "the diagnoses of a medical professional,"[12] suggesting that there is no

[12] This language is taken from a concurring opinion in an Eleventh Circuit case, Marbury v. Sullivan, 957 F.2d 837 (11th Cir. 1992) (Johnson, J., concurring), which considered an award of Social Security disability benefits. At the time Marbury was decided, the Secretary's regulations required that "the opinions of treating physicians must be accorded substantial or considerable weight by the Secretary." 957 F.2d at 840, *quoting* Lamb v. Bowen, 847 F.2d 698, 703 (11th Cir. 1988). In contrast, in South Carolina workers' compensation cases, the Commission decides what weight to assign to the evidence, both expert and lay, before it. *E.g.*, Brunson, 395 S.C. at 455, 718 S.E.2d at 758 (determining the "weight to be accorded evidence is reserved to the Full

medical evidence to support the Commission's conclusion that Claimant did not sustain physical brain damage as contemplated by the Act. He is incorrect. When Claimant presented to McLeod Regional Medical Center on June 15, 2011 with a head injury, the medical report indicates that Claimant was **awake/alert/conversant/fluent speech**, had normal affect, and had intact extraocular movement. (R. p. 693). The records of Dr. Welsch, the physician who performed Claimant's right hand tendon repair, indicate that Claimant presented with no acute distress and was **alert and oriented**. (R. pp. 697-704). Upon completion of the June 27, 2011 brain scan, Dr. Naso opined that "Claimant seems to be some better" and, although Claimant had "trouble" with headaches and "short-term memory issues," Dr. Naso advised Claimant to continue with "conservative management" and follow up in "two to 3 months." (R. p. 127). Nothing in this August 3, 2011 medical report describes a "permanent and severe" brain condition.

Claimant began treating with Dr. Sandoz on September 16, 2011. Notes from this initial appointment indicate Claimant was experiencing no motor weakness, his balance and gait were intact, his coordination was intact and his final motor skills were normal. Further, Dr. Sandoz indicates that Claimant was "**alert and oriented x3. Grossly normal intellect**," with "**Memory: intact**." (R. pp. 769-771). Subsequent medical notes from Dr. Sandoz's office repeat these findings. (R. pp. 773, 774, 776, 777, 779, 781, 784, 787, 790, 793, 797, 800). Upon completion of the October 10, 2011 brain scan, Dr. Sandoz opined that Claimant's head injury symptoms were "mild" and assessed Claimant with "intracranial injury of other and unspecified [nature]." (R. pp. 138-139).

Commission"); Therrell, 370 S.C. at 25, 633 S.E.2d at 894 (a reviewing court "will not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact").

Throughout his treatment with Dr. Sandoz, Claimant's head symptoms ranged from "mild," (R. p. 138), to "moderate," (*e.g.*, R. pp. 157, 164, 186, 190, 741, 775, 777, 781), to no reference to the head injury at all. (*E.g.*, R. pp. 148, 171, 196, 202, 207, 214, 219, 223, 783, 786, 792, 799, 808, 815). In his treatment notes, Dr. Sandoz did not indicate any physical brain damage rising to the level of both "permanent and severe."

Dr. Sandoz last examined Claimant on October 1, 2015 and made absolutely no mention of any physical brain damage in his treatment report. (R. p. 819). The first (and only) mention of the phrase "physical brain damage" appeared in Dr. Sandoz's December 2015 letter, written at the request of Claimant's Counsel, wherein Dr. Sandoz opined that Claimant "has suffered physical brain damage the severity of which renders him incapable of returning to any form of gainful employment." (R. p. 652). However, the medical evidence as a whole (as noted above and below), and not isolated to one letter written at the request of Claimant's Counsel, supports the Commission's finding. While Claimant is permanently and totally disabled, it is as a result of the combined "injuries to his neck, right arm, brain (for initial closed head injury and resulting headaches and seizures) and psyche." (Commission Decision, R. pp. 95, 100-101).

Claimant alleges that Dr. Goldschmidt "diagnosed the Claimant with Dementia and closed head traumatic brain injury." (App. Br. pp. 5, 22). However, Claimant neglects to discuss more fully the results of Dr. Goldschmidt's October 2011 neuropsychological evaluation, which found:

> "Test data suggested that [Claimant] was experiencing several cognitive deficits and behavioral deficits that were consistent with his closed head traumatic brain injury; these deficits were primarily concerning memory, attention, and executive functioning. **Otherwise, he was generally**

> **functioning within normal limits of functioning, reaching to as high as in the Above Average range.** Other than in the previously mentioned areas of functioning, Mr. Benjamin's **functional status was largely commensurate with his intellectual ability.**"

(R. p. 253) (emphasis added).

At the November 5, 2012 unauthorized visit with Dr. Poletti, the physical examination revealed that Claimant was "alert and orient x3 in no acute distress." (R. p. 747). Dr. Lozanne's initial treatment notes indicate that Claimant was "alert, and oriented with normal and appropriate speech." (R. p. 705). Dr. Sarb's notes from June 2016 indicate Claimant was "awake alert and conversant, with fluent speech, normal affect, and fully oriented." (R. pp. 669-673).

Furthermore, Claimant's Brief conveniently downplays how his **own** actions and testimony contradict the claim that he suffers from "permanent and severe" physical brain damage. In the March 2012 deposition, Claimant testified that he experiences dizziness and headaches. (Supp. R. p. 1088:10 – p. 1089:23). Claimant also stated that he gets "lost in thought" and "lost in conversation" resulting in his inability to participate in a conversation because he can no longer remember what he was talking about. (Supp. R. p. 1092:19 – p. 1093:10). When asked if he felt capable of returning to work, however, Claimant testified that he did not believe he could return to work due to strength concerns and panic attacks but Claimant **did not mention any cognitive difficulties, dizziness, headaches, etc.,** as an impediment to returning to work. (Supp. R. p. 1096:6-17).

Although Claimant alleges that he suffers from "permanent and severe" physical brain damage in his Brief, he fails to mention that he is still able to, per his own

testimony, operate a motor vehicle, **by himself**, to drive from his home in Lee County to his doctor appointments in Columbia, South Carolina without any major issues:

- "I said, 'Doc, there was nothing triggered it, **I was just doing my normal routine, just driving**.' Because my wife, she has to work, and right there to Columbia, you know, **I make that trip myself**, unless she's off from work." (Supp. R. p. 1097:5-10) (emphasis added).
- Q: "Does it normally take you an hour or less than an hour or how long [to get from Claimant's home to Dr. Bergman's and Dr. Deal's office in Columbia]?" A: "It take, **it take over an hour**." (Supp. R. p. 1099:4-6; *see* R. p. 999:11-15) (emphasis added).
- Q: "When you drive from Sumter to see Dr. Bergman and Dr. Deal, do you have any difficulty finding their office or driving from your home to there?" A: "**Not yet, I haven't**." (Supp. R. p. 1099:15-19).
- "I know where I'm going, pretty much, now that I don't need a map." (Supp. R. p. 1099:23-24; *see* R. p. 1003:21 – p. 1004:1) (emphasis added).
- Q: "As far as driving is concerned, do you feel as though you can safely drive from Sumter/Bishopville, your home, to you visits in Columbia to see Dr. Bergman?" A: "**Evidently, I guess so**. I hadn't had a accident, yet, so I've **been doing, doing pretty good, yes, sir**." Q: "Do you have any difficulty at all operating the car, driving?" A: "**No.**" Q: "Any problems from a, not only just a physical standpoint, but **mentally as far as being aware of what's going on** the road and reacting to other drivers and doing those sorts of things, any issue with that?" A: "**I react to what's going on, because I take my time**..." (Supp. R. p. 1101:10 – p. 1102:2; *see* R. p. 1002:15 – p. 1004:1) (emphasis added).
- Q: "When you go and see Dr. Bergmann...you oftentimes will drive yourself to an appointment to see him, correct?" A: "**Sometime I do. Yes, I do.**" Q: "And that is approximately **60 miles or so from home**?" A: "Somewhere in that neighborhood." R. p. 999:3-10) (emphasis added).

Furthermore, Claimant testified that he served as a treasurer of his union, at the time of his work-related accident, and continued service as treasurer through 2012 and possibly into 2013. (R. pp. 1005-1008).

- Q: "Did you serve as the treasurer of [the local union hall] after your work accident occurred?" A: "**Yes. I did.**" Q: "Did you serve as the treasurer of that organization in 2011?" A: "**Yes, I was currently a treasurer. Yes.**" (R. p. 1006:21–p. 1007:1) (emphasis added).
- Q "Did you serve as the treasurer of your union hall in 2012?" A: "**Yes**, I was, but here was the secretary of treasurer that was taking care of all the business. He was taking care of all the business. The only thing he did was came by and **got me to sign checks. So you were signing checks on behalf of the union hall in 2012? Yes, I was.**" (R. p. 1007:9-17) (emphasis added).
- Q: "Are you still a member of your union hall?" A: "**Yes, I am.**" (R. p. 1008:12-13) (emphasis added).

Claimant not only appeared and participated in two depositions and two Commission hearings, he was able to recall over 30 years of employment, names **and** duties, and provide a detailed account of his arrest history and medical treatment although he claimed that, "I get loss of thought sometimes on conversation." (Supp. R. p. 1092:25 – p. 1093:1). Not one time, during Claimant's two depositions (2012 or 2014) or during the two Hearings (2014 or 2016), did Claimant "lose train of thought" or "forget" what he was testifying about. Respondents do not contend that Claimant needs to be completely incapacitated in order to show he has suffered permanent and severe physical brain damage; however, it seems that a claim for "permanent and severe" physical brain damage would manifest some type of hindrance or difficulty during the course of litigation, and during Claimant's daily activities, such as driving and signing checks, that

would support Claimant's position. As the Supreme Court noted, "'physical brain damage' as used in § 42-9-10(C) is physical brain damage that is both permanent and severe," Sparks, 406 S.C. at 131, 750 S.E.2d at 64, and "the severity of the injury is the lynchpin of the analysis." Crisp, 401 S.C. at 642, 738 S.E.2d at 842.

After reviewing and analyzing the Claimant's testimony, both at hearings and in depositions, and reviewing the medical records in their entirety, the Commission properly found, as a matter of fact and concluded as a matter of law, that Claimant failed to prove that he sustained physical brain damage, such that would entitle him to lifetime benefits. As this case involves conflicting medical and other evidence, and because the Commission correctly applied the law as set out in Section 42-9-10(C) and as explained in Crisp and Sparks, this Court should uphold the Commission Decision.

II. The Commission correctly held that Claimant failed to meet his burden of proving he was entitled to lifetime benefits on the basis of "incomplete paraplegia" or "incomplete quadriplegia."

Claimant's argument that he is entitled to lifetime benefits based on his claim of "incomplete quadriplegia" is based on an overly-expansive reading of this Court's decision in Reed-Richards v. Clemson Univ., 371 S.C. 304, 638 S.E.2d 77 (Ct. App. 2006), and an attempt to mischaracterize his authorized treating neurosurgeon's testimony. Claimant's arguments are a barely disguised attempt to characterize almost any cervical spine injury that results in cervical myelopathy as an "incomplete quadriplegia." In fact, Claimant's arguments are an attempt to make any "incomplete spine injury" a lifetime benefits case, regardless of the severity or symptoms.

First, it is important to distinguish the posture of Reed-Richards from the posture of this case. In Reed-Richards, this Court upheld the Commission Decision because it

was supported by substantial evidence in the record. 371 S.C. at 307, 638 at 79. Here, Claimant is seeking to overturn the Commission Decision, despite the fact that it is supported by substantial evidence. There, the only physician to render an opinion as to whether the claimant was a paraplegic based his opinion regarding incomplete paraplegia on a definition contained in "the International Standards of Neurologic Classification of Spinal Cord Injuries, Revised Sixth Edition, dated 2000 ..." Id., 638 at 78. Here, none of Claimant's treating neurosurgeon's cited the International Standards of Neurologic Classification of Spinal Cord Inures, Revised Sixth Edition, dated 2000, despite his Counsel's attempt to rely on it on appeal. In Reed-Richards, there was only one expert opinion as to what constituted paraplegia/incomplete paraplegia; here, there are conflicting expert opinions. Finally, in Reed-Richards, the claimant's treating physician "expressly stated, albeit parenthetically, that Reed-Richards '**is a paraplegic**.'" 371 S.C. at 308, 638 S.E.2d at 79 (emphasis added). Here, there is no expert evidence or testimony that Claimant is a quadriplegic but only that he suffers from an incomplete quadriplegia or incomplete paraesis. (*See* R. pp. 606-607, 652, 675-677).

Claimant argues that the Commission committed error because it held "an incomplete quadriplegic is not a quadriplegic." (App. Br. p. 23). Note that he does not cite to the Commission Decision – because that is not what the Commission held. Furthermore, Claimant attempts to read Reed-Richards as a blanket statement that the term "paraplegic" (or, in this case, "quadriplegic") **always** and under any set of facts means **anyone** diagnosed with "incomplete paraplegia" (or, in this case, "incomplete quadriplegia"), such that that person is entitled to lifetime benefits under Section 42-9-

10(C). That is not the holding of Reed-Richards, the outcome of which was based on the facts and evidence presented to the Commission in that case.

Clearly, while the inclusion of employees and employers is a basic purpose of the Act and justifies a broad construction of its coverage, Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945), the same does not apply to determining whether a claimant has met his or her burden of proving facts sufficient to entitle him or her to benefits under the Act, particularly lifetime benefits.[13] *See, e.g.*, Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998) ("[t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation"). In other words, although the Act must be construed liberally in favor of coverage, it "must not be construed so as to work a hardship on the employer and/or the carrier by the interpolation of words or conditions not found in the act .... The act must be construed in justice to both parties and must not impose a burden on either." Hill v. Skinner, 194 S.C. 330, 11 S.E.2d 386 (1940); *see also* Wigfall, 354 S.C. at 117, 580 S.E.2d at 109 (courts "are not at liberty to extend by construction the meaning implicit in the language found in the *Workmen's [sic] Compensation Act* in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt") (citation omitted). Furthermore, although 'compensation *law* will be construed liberally in order to effect its beneficent purpose .... the rule of liberal construction has been held not to apply to the

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[13] The fact that the General Assembly did not make any changes to the definition of "paraplegia" and "quadriplegia" when they undertook major revisions to the Act in 2007 is of no import, since Reed-Richards was not a Supreme Court decision. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (noting the General Assembly's inactivity over forty years and that it "is presumed to be aware of **this** Court's interpretation of its statutes") (emphasis added).

evidence offered, or required, to establish the claim, or to the function of the commission in hearing evidence or in resolving conflicts in the testimony, and does not operate to distort the proofs or to make the facts other than as they are." Cross v. Concrete Materials, 236 S.C. 440, 446, 114 S.E.2d 828, 831-32 (1960). In other words, "our rule which is applicable to the finding of facts is that a claimant must establish by the preponderance of the evidence the facts which will entitle him to an award; the burden of proof is upon him. He cannot prevail by the resolution of doubts." 236 S.C. at 446, 114 S.E.2d at 832.

As the Supreme Court noted in Sparks, standard statutory construction dictates that "the Court may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." 406 S.C. at 129, 750 S.E.2d at 63. Furthermore, in discussing the context of Section 42-9-10(C), the Supreme Court advised that, "[t]he immediate context of the term 'physical brain damage' suggests that the general Assembly intended a more restrictive meaning," and that "the context implies the General Assembly meant to require severe, permanent impairment[]." Id. This admonition applies equally to "plegias" as it does to physical brain damage.

It is highly significant that the **only** medical evidence addressing the issue in Reed-Richards was from her treating physician who equated her incomplete paraplegia, which included being restricted to using a walker, and a complete loss of control over her bowels such that they emptied "at random times, forcing her to wear adult diapers and restricting her from going out in public because of odor problems." 371 S.C. at 306, 638

at 78.[14] The absurdity of adopting Claimant's definition of quadriplegia, based on a medical text that was not mentioned or relied on by any expert or the Commission in this case, was never presented to the Commission and is not in the Record, is that, according to Claimant, any "impairment of function in the arms as well as in the truck, legs and pelvic organs" resulting from a cervical injury qualifies as incomplete quadriplegia." (App. Br. p. 25). This clearly does not comport with the Sparks interpretation of lifetime benefits under Section 429-10(C) for only permanent and severe physical impairment.

In contrast, here, there is conflicting medical evidence, despite Claimant's Counsel's attempts to twist Dr. Lozanne's testimony into saying the opposite of what he actually and repeatedly stated. As such, the Commission's resolution of the conflict in evidence must be upheld on appeal. *E.g.*, Tiller, 334 S.C. at 338, 513 S.E.2d at 845. Furthermore, while Claimant has some pain and numbness in his right arm, the arm that required surgery, and some imbalance such that he uses a cane, he is not confined to a walker and still has control over his bowels. Clearly, he still leaves the house and, as noted above, drives himself regularly to and from medical appointments that are over an hour from his home. (*See, e.g.*, Supp. R. p. 1099:4-19; R. p. 999:3-15; R. p. 1000:13 – p. 1001:20).

Claimant suggests that Dr. Poletti's opinions deserve greater weight because he continued to treat/follow up with Claimant after the unauthorized February 2014 surgery. However, Dr. Lozanne continued to be Claimant's authorized neurosurgeon. The April

[14] Note that these symptoms were present shortly after Reed-Richards' accident, Reed-Richards, 371 S.C. at 306, 638 S.E. 2d at 78, which comports with Dr. Lozanne's opinion that plegia typically "manifest[s] itself rather quickly following an acute injury," the exception being where a tumor grows over time, exerting pressure on the spinal cord. (R. p. 908:20 – p. 909:13).

23, 2015 Commission Decision found that "Claimant's request for transfer of treatment to Dr. Poletti is denied." (2015 Commission Decision, R. p. 42). This ruling was not appealed.[15] Furthermore, Dr. Lozanne saw Claimant again in 2016 for a final evaluation. (R. pp. 709-712).

Claimant attempts to discredit and dismiss Dr. Lozanne's medical opinion by equating it to a "lay person's definition," or a "semantical definition." (App. Br. pp. 24-25, 28). In Reed-Richards, this Court properly rejected the employer's attorney's "lay person's definition" of paraplegia. 371 S.C. at 308-309, 638 S.E.2d at 79. However, Dr. Lozanne, who was accepted as an expert in neurosurgery without objection, (R. p. 865:6-13), clearly is not providing a lay person's definition. That this Court did not have the benefit of expert testimony with regard to the appropriateness of using the term "incomplete paraplegia" in Reed-Richards does not somehow denigrate Dr. Lozanne to the status of an attorney attempting to provide medical testimony.[16] Furthermore, the Commission was fully entitled to rely on Dr. Lozanne's expert testimony.

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[15] Claimant cannot challenge that ruling now. Issues and arguments may not be raised for the first time in a Reply Brief. *See, e.g.*, Emerson Elec. Co. v. South Carolina Dept. of Rev., 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief); Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 153, 494 S.E2d 449, 460 (Ct. App. 1997) ("an appellant may not use the reply brief to argue issues not argued in the appellant's initial brief").

[16] It is noteworthy that, in Reed-Richards, this Court addressed only the issue of whether, under the facts and evidence presented to it, the claimant's diagnosis of incomplete **paraplegia** qualified for lifetime benefits under Section 42-9-10(C). The instant case does not involve an allegation of incomplete paraplegia, but of incomplete **quadriplegia**. Claimant's Counsel might "opine" that the only difference is that "quadriplegia involves spinal cord damage in the cervical spine rather than the lumbar spine ..." (App. Br. p. 25), however, as noted above, testimony and argument of counsel is not evidence, and certainly not expert evidence. Bowers, 304 S.C. at 68, 403 S.E.2d at 129; Reed-Richards, 371 S.C. at 309 n.7, 638 S.E.2d at 80 n.7.

Contrary to Claimant's Counsel's attempts to misconstrue/re-write Dr. Lozanne's testimony, Dr. Lozanne did **not** "agree[] with Benjamin's other doctors in everything but the terminology," and his testimony is **not** "tantamount to an opinion that Benjamin is an incomplete quadriplegic." (App. Br. pp. 26, 29). While Dr. Lozanne agreed that Claimant has an incomplete spinal cord injury, he never equated that to a diagnosis of incomplete quadriplegia, which he repeatedly and consistently denied was an appropriate term or diagnosis in this case:

- Dr. Lozanne stated that Claimant "**is not plegic**. Okay. And what I mean by that, it is by definition somebody who has motor strength is not plegic. That's by definition. He had motor strength. He had some weakness in his right upper extremity, but he walked. He could move … He actually had significant strength to even – he had resistance in strength … I can tell by definition by just examining him that **he is not plegic**." (R. p. 901:1-22) (emphasis added).
- Concluding, after reviewing a number of test reports and medical records from 2015, that none of them indicated Claimant had any plegia. (R. p. 902:24 – p. 907:3).
- Dr. Lozanne testified, "[s]o when we're discussing plegia, once again, plegia is a lack of function in terms of motor strength and potentially even sensation due to a disconnection … from the brain to the affected muscles, whether it's in the spinal cord or the brain, of subsequence. And the first thing you evaluate is the motor strength in the patient. A patient who has strength by definition cannot be plegic." R. p. 906:14-22).
- Dr. Lozanne agreed that plegia typically "manifest[s] itself rather quickly following an acute injury," the exception being where a tumor grows over time, exerting pressure on the spinal cord. (R. p. 908:20 – p. 909:13).
- With regard to "incomplete quadriparesis or incomplete quadriplegia," Dr. Lozanne explained that, "if you talk about that with a neurosurgeon, they'll – it actually sounds like an oxymoron. And what I mean by that is that a quadriplegia

by definition in terms of neurosurgical and neurologic training is complete lack of function." (R. p. 910:18 – p. 911:1).

- When presented with Dr. Poletti's May 27, 2015 letter, Dr. Lozanne testified that the phrase Dr. Poletti used, "incomplete quadriparesis" is "**not an appropriate phrase to use ... in this condition**. Mr. Victor Benjamin ... **does not suffer from a quadriplegia**. I've never heard a neurosurgeon – incomplete quadriplegia used as a phrase in any of my education ... in neurosurgical training that's not a typical phrase. The diagnosis that Mr. Victor Benjamin suffers from is a cervical myelopathy. He has a spinal cord injury and he has some weakness associated with that and **he's not a quadriparetic .... He is not a quadriplegic and it would be inappropriate for ... me as a neurosurgeon to describe him as an incomplete quadriplegic**." (R. p. 911:16 – p. 914:21) (emphasis added).

In fact, instead of agreeing with Dr. Poletti that Claimant suffered from incomplete quadriplegia, Dr. Lozanne suggested that Dr. Poletti was attempting to describe an incomplete spinal cord injury (as opposed to a complete spinal cord injury), "in which the function below the level of injury is still present, whether it is motor or sensory," which Claimant in fact had suffered. (R. p. 915:11 – p. 916:9).[17] And, while he would agree with Dr. Poletti that Claimant had suffered an incomplete spinal cord injury and had some weakness, he stated uncategorically that "**I'm in disagreement in labeling Mr. Victor Benjamin as an incomplete or complete quadriplegic in any kind of way**." (R. p. 914:22 – p. 915:2) (emphasis added).

In the emergency room immediately following his accident, Claimant had normal bulk and tone with 5/5 strength in both upper and lower extremities. (R. pp. 693-694). At a follow-up appointment on June 24, 2011 with Dr. William B. Naso, Claimant had

[17] Dr. Lozanne's statement that "[t]his is literally semantics," was in the context of his explanation that he believed Dr. Poletti really meant to diagnose Claimant with an incomplete spinal cord injury, as opposed to the oxymoronic incomplete quadriplegia. (R. p. 910:18-23; R. p. 914:17 – p. 915:19).

normal "5/5 strength" in his upper and lower extremities. (R. p. 123). At his first unauthorized visit to Dr. Poletti, Claimant's "[s]trength in the lower extremity is 5/5 and symmetric." (R. p. 747). At his initial appointment with Dr. Lozanne in January 2013, Claimant's motor strength was 4+/5 for the right upper extremity while, "[a]ll other muscle groups are 5.5." (R. p. 705). At his May 2015 appointment with Dr. Sarb, she noted Claimant's strength "is 5/5 in the upper and lower extremities with normal muscle bulk and tone." (R. p. 212). When Dr. Lozanne examined Claimant in July 2016, his motor strength in his right upper extremity was 4+/5 and in his left upper and both lower extremities 5/5. (R. p. 711).

In fact, Claimant began to be diagnosed with lower extremity weakness and "a slightly antalgic gait" after he began treating for his lower back problems, which, as noted above, are not compensable. (R. pp. 590, 597, 601 (even though he denied "any paralysis")). Furthermore, throughout Claimant's treatment with Dr. Sandoz, his balance and gait were intact, his coordination was intact and his fine motor skills were normal, (R. pp. 769-771), until June 2015, when Dr. Sandoz opined that Claimant's lumbar pain/injury was "secondary" to his workplace injuries at which point Dr. Sandoz began noting "Motor – spastic Quadriparesis, Balance & Gait – spastic hemiparesis" and "decrease[d] ambulation sever[e] restriction on ADL's." (R. pp. 218-221, 224).

This is a case of conflicting medical and other evidence and, as such, the Commission Decision should be upheld under proper application of the substantial evidence standard of review. *E.g.*, Tiller, 334 S.C. at 338, 513 S.E.2d at 845; *see also* Sharpe, 336 S.C. at 160, 519 S.E.2d at 105 ("[w]here there is a conflict in the evidence, the Commission's findings of fact are conclusive"). This Court should affirm the

Commission finding that Claimant failed to prove he was entitled to lifetime benefits under Section 42-9-10(C) due to "incomplete paraplegia" and/or "incomplete quadriplegia."

III. The Commission properly found Claimant was not entitled to a mobility scooter as it was not causally related to his compensable injuries.

Claimant argues that the "evidence uniformly relates the need for the mobility scooter to Benjamin's work-related spinal cord injury," pointing to Dr. Sandoz's February 12, 2016 attorney letter at R. p. 662, that the scooter was necessary "due to the injuries he sustained in his 06-15-2011 work accident[.]" (App. Br. p. 29, 32). However, what Claimant fails to account for, going so far as to characterize references to a lower back injury as a "red herring,"[18] is the fact that, starting in May 2015, Dr. Sandoz began treating Claimant's lower back symptoms which he believed were work-related. (R. pp. 214-215-217 (suggesting that, due to the "cervical issues that [Claimant] has with his neck, we were never ... able to pay attention to his back issues," and that it was now "necessary to pursue evaluation of his back ..."), R. p. 218 (Dr. Sandoz providing medical impairment ratings for headache, brain injury and seizures, and noting "[t]his does not include the injury that he has suffered from the lumbar standpoint secondary to the injury that he has suffered and has not been addressed here as per Workmen's Comp"), R. p. 219 (Dr. Sandoz chronicling lower back pain radiating to "the dermatome anteriorly")).

[18] Claimant inexplicably asserts that he never alleged or pled "a lower injury." (App. Br. pp. 30-31). His Form 50 clearly alleged compensable injury to his "[b]rain, spine- **back** and neck, right upper extremity, right shoulder, left shoulder, both lower extremities, has altered gait, and psychological overlay." (Cl. Form 50, dated May 3, 2016, R. p. 106) (emphasis added). In his Form 58, Pre-Hearing Brief, Claimant stated "[c]ompensability of lumbar spine is at issue. Causation provided by authorized treating physician, Dr. George Sandoz." (Form 58, Pre-Hearing Brief, dated Aug. 2, 2016, R. pp. 109-110).

The Commission determined that Claimant's lower back/lumbar injury was not causally related to his June 15, 2011 accident. Claimant did not appeal that issue or raise it in his opening brief and cannot do so now. Emerson Elec., 395 S.C. at 489 n.6, 719 S.E.2d at 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief); Lister, 329 S.C. at 153, 494 S.E2d at 460 ("an appellant may not use the reply brief to argue issues not argued in the appellant's initial brief").

Dr. Sandoz prescribed the scooter in October 2015. Oddly, Claimant argues that, because Dr. Sandoz noted problems with his dizziness, balance, gait and/or ambulation beginning in September 2011, (R. pp. 130, 148, 151, 160, 172, 176, 179, 184, 191, 193, 194, 197, 199, 200, 209, 215, 219, 220),[19] his prescription in 2015 was to address those symptoms. If the scooter was intended to address the symptoms described above, present and documented since 2011, the obvious question arises: Why did Dr. Sandoz wait until October 2015 to prescribe a mobility scooter for Claimant? Regardless of whether or not Claimant himself alleged that the need for the mobility scooter arose out of his lower back injury, (App. Br. pp. 30-31), the fact remains that Dr. Sandoz did not prescribe the scooter until after he began diagnosing and treating Claimant for lower back pain and radiculopathy, despite the fact that the symptoms Claimant now alleges justify the prescription were present, to some degree, for years.

[19] Although Claimant's counsel includes in his list R. pp. 130, 159-160, 172, 176, 184, 191, 193-194, 200, those records indicate that, while Claimant reported "some difficulty with ambulation" or decreased mobility, he also demonstrated normal balance & gait, normal coordination and normal fine motor skills. It was after Dr. Sandoz opined that Claimant's lumbar pain was related to his workplace injuries that he began noting, "Motor – spastic Quadriparesis, Balance & Gait – spastic hemiparesis" and "decrease[d] ambulation sever[e] restriction on ADL's." (R. pp. 215, 219-220).

Despite the fact that they did not prescribe the mobility scooter, Claimant relies on isolated statements from Dr. Poletti, Dr. Mills and Dr. Lozanne in an attempt to justify the need for the scooter. As demonstrated above, however, Dr. Sandoz, the prescribing physician, noted that Claimant demonstrated normal balance & gait, normal coordination and normal fine motor skills, up until he began treating for lower back pain and symptoms. (*Compare* R. pp. 130, 159-160, 172, 176, 184, 191, *with* R. pp. 193-194, 215, 219-220). This is not a case of the Commission providing its own medical opinion; instead, it is the Commission carefully reviewing, weighing and analyzing all of the medical information before it, some of it conflicting, and making a finding of fact based on the preponderance of the evidence. Tiller, 334 S.C. at 340, 513 S.E.2d at 846 ("the Commission determines the weight and credit to be given to the expert testimony"); Brunson, 395 S.C. at 455, 718 S.E.2d at 758 (where "the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive"). As such, the Commission Decision should be upheld.

CONCLUSION

For all the reasons stated herein, or based on any other ground appearing in the record pursuant to Rule 220(c), SCACR, this Court should affirm the Commission Decision in its entirety.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1106789

Victor G. Benjamin, Employee,.....Appellant,

v.

Rexam Beverage Can Company
d/b/a Rexam Beverages, Employer, and
Hartford Insurance Company of the
Midwest c/o Sedgwick CMS, Carrier,. ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents Rexam Beverage CA Company d/b/a Rexam Beverages and Hartford Insurance Company of the Midwest c/o Sedgwick CMS complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondents complies with the South Carolina Supreme Court's April 15, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

April 9, 2018

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