THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2018-000965

Victor G. Benjamin, Claimant, ... Appellant,

v.

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

REPLY BRIEF OF APPELLANT

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Respondents begin their argument by mischaracterizing Appellant's arguments as "an attempt to use this case as a vehicle to dramatically expand lifetime benefits under S.C. Code Ann. § 42-9-10(C) . . ." Respondents then go on to state their real argument, which is that it is the *combination* of compensable injuries that render Benjamin permanently and totally disabled. [Resp. Br. p. 21].

It is Respondents who seek to dramatically curtail lifetime benefits for disabled workers who are quadriplegic or who suffer physical brain damage. They seek to frustrate the intent of the legislature to award lifetime compensation to those individuals who suffer severe and permanent injuries to their brains and spinal cords. Their strategy is to confuse the issue by attributing total disability to a combination of injuries – notwithstanding the fact that Benjamin is totally disabled due to his physical brain damage and/or his incomplete quadriplegia.

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

It would create an absurd result if Benjamin were barred from lifetime compensation because he suffered b*oth* physical brain damage *and* incomplete quadriplegia. Trauma resulting in physical brain damage and spinal cord damage typically causes damage to other body parts as well. The presence of other injuries which may contribute to the disability does not control whether an injured worker receives lifetime compensation. Lifetime compensation is predicated on the existence of permanent physical brain damage or incomplete quadriplegia "so severe that the person could not subsequently return to suitable gainful employment." Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013).

1. Victor Benjamin has suffered severe and permanent physical brain damage and is legally entitled to workers' compensation benefits for life.

Two essential points show why Benjamin proved his claim for lifetime compensation due to physical brain damage. The first is the Appellate Panel's finding 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." [R. p. 79, lines 18-26 (emphasis added)]. The second is the unchallenged opinion from his treating neurologist, Dr. Sandoz, that the traumatic brain injury resulted in a 54% impairment of the whole body and "physical brain damage the severity of which renders him incapable of returning to any form of gainful employment." [R. p. 652]. The Court should therefore reverse the Appellate Panel and enter an order for lifetime compensation based on physical brain damage.

A. Appellant did not mischaracterize any material facts.

Respondents accuse Appellant of mischaracterizing the facts of the case, culminating in the charge that Appellant "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.'" [Resp. Br. p. 25 (emphasis added by Respondents)]. Appellant has never disputed that the Commission attributed Benjamin's total disability to the various injuries he sustained. This entire argument by Respondents is a red herring. The injuries sufficiently severe to render Benjamin permanently and totally disabled are the spinal cord injury (resulting in incomplete quadriplegia) and the traumatic brain injury (resulting in physical brain damage). The arm injury resulted in no permanent impairment nor restrictions. [R. p. 128]. The numerical impairment ratings were for permanent impairment of the brain, the spinal cord, and the psyche.[1] And the psychological injury is, at least in part, a result of the brain damage (with the other contributing factor being chronic pain).

Respondents do make a valid point about the period of time during which Benjamin was unconscious, as the evidence is not entirely clear on this point. The emergency records state "He was aroused and taken to the ED." [R. p. 115]. Benjamin himself, who is the only testifying witness on this point, did not remember the accident. He testified "The only thing I can remember is getting in the back of the ambulance . . ." [R. p. 883, line 17 - p. 884, line 6]. However, as Respondents point out, Benjamin told Dr. Goldschmidt that a coworker told him he had "lost consciousness for roughly 8 minutes." [R. p. 242]. The material fact here is that Benjamin was rendered unconscious for an extended period – at least 8 minutes. On that point, all parties agree. And, short of an extended coma, the length of time a person is unconscious immediately after the accident is not relevant to the determination of whether the individual suffered *permanent* physical brain damage. That determination cannot be made until the patient reaches MMI. It is the patient's condition when the effects of the injury are permanent and stable that counts; not the condition immediately after the

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[1] The impairment ratings are: (1) Dr. Sandoz: 54% whole body for traumatic brain injury; (2) Dr. Poletti: 67% whole person for spinal cord injury; (3) Dr. Lozanne: 53% whole person for spinal cord injury; (4) Dr. Brabham: 22% whole person for clinical dementia; and (5) Dr. Bergmann: 30% whole person for psyche. [R. pp. 218-9, 472, 606-8, 686, 711-2].

initial injury. See Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013)(the issue of lifetime compensation was not ripe because "the Commission's order manifests a clear intention to delay a permanency finding with respect to Petitioner's brain injury because Petitioner had not yet reached MMI . . ."); Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012) ("Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment.").

Respondents also charge Petitioner with mischaracterizing the psychological treatment records.[2] With all due respect to Respondents, Appellant did not claim that Drs. Deal and Bergmann treated Benjamin "solely 'for psychological issues arising out of his brain injury.'" [Resp. Br. p. 23]. The addition of the word *solely* by Respondents is an attempt to put Appellants' argument in a false light and mislead the Court as to the issues before it. The point being made by Petitioner is that Drs. Deal and Bergmann treated Petitioner for "irritability and anger, cognitive symptoms, sleep difficulties with nightmares, and depressed mood related to pain and physical limitations . . . His cognitive symptoms include headaches, lack of balance, and ringing in his ears." [R. pp. 406-7]. Dr. Bergmann notes in one report that "We discussed the impact of head injury on feelings especially anger. I reminded him that after a head injury, being more irritable is to be expected and it is important that he work to be aware of and control his anger." [R. p. 444]. While some of the depression likely resulted from pain and physical limitations due to the brain and spinal cord injuries, the cognitive symptoms arose specifically from physical brain damage. This is why discussion over Drs. Deal and Bergmann appears in the argument over physical brain damage.

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[2] The author of this brief agrees he "mistakenly states that Claimant saw Dr. Goldschmidt for a year and a half." [Resp. Br. p. 22]. Dr. Goldschmidt treated Benjamin for 6-7 months before Respondents' trial counsel transferred treatment to Drs. Deal and Bergmann. [R. p. 406].

Respondents criticize Petitioner for referencing the July 15, 2014 note from Dr. Sandoz in which he records a head injury where "The symptoms are severe." [R. p. 193]. Respondents objection is the implication that this record *provided a snapshot* of Benjamin's condition at the time of trial (Respondents' characterization), when the trial occurred on August 18, 2016. [Resp. Br. p. 24]. In fact, this report is a fair and accurate description of Benjamin's condition at trial.

The report from July 15, 2014 was written just over three years after the accident – at a time when Benjamin's brain damage had stabilized. There are two more recent treatment reports from Dr. Sandoz addressing brain damage. The next treatment report for "Head Injury" is dated January 13, 2015. Dr. Sandoz reports "The severity of the symptoms is incapacitating. The symptoms have not changed."[3] This rather strongly indicates that the July 15, 2014 report is still an accurate snapshot. The last treatment note dated February 25, 2016 reports similar symptoms with the plan stating "Late effect of traumatic Injury brain . . . from all this injury suffered patient is totally and permanently disabled and will require medication and therapy for life." For symptoms, Dr. Sandoz documented "nausea/vomiting; balance problems; sensitivity to light; sensitivity to noise; feeling like in a fog; don't feel right; difficulty concentrating" along with "blind spots; tearing/watery eyes; confusion; slurred speech; loss of feeling or sensation." [R. p. 659]. Dr. Sandoz again documents severe functional impairments due to the brain damage.

Other later reports from Dr. Sandoz are not treatment records. Dr. Sandoz wrote a statement dated June 19, 2015 providing the impairment rating of 54% whole person for the brain damage. [R. p. 218]. This statement is followed by Dr. Sandoz's December 14, 2015 statement that "I hold the opinion he has suffered *physical brain damage* the severity of which renders him incapable of

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[3] A statement by the treating neurologist that the *severity* of the brain injury is *incapacitating* should alone be enough to satisfy the permanent and severe requirement.

returning to any form of gainful employment." [R. p. 652 (emphasis added)]. These reports accurately describe Benjamin's condition at the time of trial, as he had reached MMI on or before June 15, 2015.

B. Appellant seeks a determination of physical brain damage under criteria established by the Supreme Court under the South Carolina Workers' Compensation Act.

In their second argument, Respondents' state: "In many ways, Claimant's argument 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." [Resp. Br. p. 25]. After making this accusation, Respondents make their counter argument in a footnote. [Resp. Br. p. 27 n.7].

Part of Respondents' argument is to note that the treatment records themselves do not use the term *physical brain damage*. The inference they want the Court to draw is, that if the doctors did not use the term *physical brain damage* until they were asked to address the issue by Benjamin's lawyers, then this must be "merely" a *brain injury*. Appellant addressed this issue in his brief to preempt this kind of word smithing.

The term *physical brain damage* is entirely a legal construct, created by the legislature when it enacted Section 42-9-10. It is used nowhere else in medicine or the law. See Crisp v. SouthCo., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013)("While other states have also adopted by legislative enactment an exception to the general compensation rule for permanent total disability, none of these states appear to utilize the "physical brain damage" terminology."). Indeed, the use of "inartful phrasing" by doctors, lawyers, commissioners and judges is exactly what compelled the supreme court to define the term. See Fragosa v. Kade Constr., LLC, 407 S.C. 424, 755 S.E.2d 462 (Ct. App. 2014)(noting "'Physical brain damage' is not statutorily defined.").

All physical brain damage cases necessarily involve a brain injury – usually a *traumatic brain injury*, although in some instances there may be an *anoxic brain injury.* In the instant case, it is undisputed that Benjamin suffered a traumatic brain injury (TBI) when the metal object hit him in the head, fractured his skull and knocked him unconscious. His medical records are replete with references to TBI – although the doctors use varying terminology.[4] [R. pp. 406-7, 687]. The use by doctors of various terms to describe TBI is not going to change. Doctors use medical terminology. *Physical brain damage* is a *legal* term of art; not a medical one. A neutral trier of fact should not get bogged down in a pointless debate over medical terminology versus legal terminology. The argument becomes a *reductio ad absurdum* akin to debating how many angels can dance on the head of a pin.

Appellant is not seeking to water down the test for physical brain damage. Appellant simply seeks a correct application of the facts to the law – as the law has been expressed by the South Carolina Supreme Court. In Sparks, the court held "we conclude that 'physical brain damage' as used in § 42-9-10(C) is physical brain damage that is both permanent and severe." Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 130, 750 S.E.2d 61, 64 (2013). In Crisp, the supreme court further explained lifetime compensation was predicated on "brain damage so severe that the person could not subsequently return to suitable gainful employment." Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013). Appellant met his burden of proof with medical evidence using the exact language proposed by the court.

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[4] Dr. Goldschmidt used the term "Closed Head Traumatic Brain Injury." [R. p. 253]. Dr. Brabham used the term "Traumatic Brain Injury/Damage." [R. p. 687]. Dr. Bergmann used "Closed TBI." [R. p. 406]. Dr. Naso describes "Closed head injury with concussion." [R. p. 111]. Dr. Sandoz uses multiple terms, including "intracranial injury", "head injury", "traumatic brain injury" and "physical brain damage." [R. pp. 133, 193, 218, 652].

C. The Commission erred in finding Benjamin failed to meet his burden of proving severe and permanent physical brain damage.

In this case, Benjamin met his burden of proof. His authorized treating neurologist – a doctor chosen by Respondents – opined to a reasonable degree of medical certainty: "I hold the opinion he has suffered **physical brain damage** the severity of which renders him incapable of returning to any form of gainful employment." [R. p. 652 (emphasis added)]. This opinion combined with the 54% whole person impairment rating for traumatic brain injury meets the test set forth in Sparks and Crisp. This evidence of permanent and severe physical brain damage at MMI shows that Benjamin meets the legal test for *physical brain damage*. This is the evidence that supports the Commission's finding that "Claimant's injuries to his . . . **brain (for initial closed head injury and resulting headaches and seizures)** . . . render him permanently and totally disabled." [R. p. 79, lines 18-26 (emphasis added)].

Perhaps, had there been contrary medical evidence, the Commission could have found otherwise. There is not. The medical evidence on physical brain damage is all one way. There are no other medical opinions from other neurologists, neuropsychologists or any other profession that could render an expert opinion. Respondents produced no other opinions nor did they even cross-examine Dr. Sandoz at a deposition. His opinion remains unrefuted, unchallenged and unimpeached. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when "The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]").

Nonetheless, the Commission completely disregarded Dr. Sandoz's opinions. The Commission does not even mention Dr. Sandoz's opinion on physical brain damage. Indeed, the Commission found his opinion did not exist, inexplicably denying the claim due to "the lack of any

medical evidence stated to a reasonable degree of medical certainty that Claimant sustained brain damage that was permanent and severe as required by case law and the Act." [R. p. 99, lines 1-17].

The existence of physical brain damage is a medically complex issue. See Crisp v. SouthCo Inc., 738 S.E.2d 835, 844, 401 S.C. 627 (2013)(discussing the proof needed in these "medically-technical brain injury cases."). The Act requires that "In medically complex cases, an employee shall establish by medical evidence that the injury arose in the course of employment."[5] S.C. Code Ann. § 42-1-160(E)(2007). For the Commission to disregard, ignore or overlook the medical evidence from Dr. Sandoz is an error of law. This is essentially the same error the Commission made in Burnette, where the Court reversed the Commission because "We find no evidence that challenges the conclusions of Burnette's doctors concerning her herniated disk at L5-S1, lower back pain, or development of radiculopathy." Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). Ignoring competent medical evidence is an impermissible resort to rank speculation. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability.)

Despite this dispositive medical evidence in this medically-technical brain injury case, Respondents refer to various other records and testimony which might have been relied on by the Commission. Much of this is a reference to various levels of function shown in the medical records,

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[5] Respondents cite to Tiller for the proposition that "Expert 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." Tiller v. National Health Care Center, 334 S.C. 333, 513 S.E.2d 843 (1999). The general rule in Tiller is correct, except in medically complex cases like this one, where the statute requires proof by medical evidence. The Act defines the term *medical evidence* as "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician." S.C. Code Ann. § 42-1-172 (2007).

along with references to Benjamin's ability to drive and talk, as well as sign (not write) checks.[6] This is a clarion call for the Court to repeat the Commission's error and substitute hunch and intuition over competent medical evidence.

To begin with, the ability to function at some level does not preclude an award of lifetime compensation for physical brain damage. "Under Workers' Compensation Law 'total disability' does not require complete, abject helplessness." McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 474 (Ct.App.1989). When the supreme court defined *physical brain damage*, it keyed the definition to the inability to "return to suitable gainful employment." Crisp v. SouthCo Inc., 738 S.E.2d 835, 401 S.C. 627 (2013). While the court could have defined severe and permanent physical brain damage as complete, abject helplessness, it chose not to do so. In this case, there is extensive evidence that Benjamin's "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" rendered him unable to work and unable to perform many activities of daily living. [R. p. 193]. And, of course the Commission ultimately determined that Benjamin is unable to return to suitable gainful employment.

Given the opinion from Dr. Sandoz, the only explanation for the Commission's decision is that it must have simply found Benjamin did not look like he fit the lay person's image of brain damage. He has lucid intervals, his speech is slurred but understandable, his long-term memory is

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[6] Benjamin testified: "Yes, I was [the treasurer of the union hall], but there was the secretary of treasurer that was taking care of all the business. The only thing he did was came by and got me to sign the checks." [R. p. 1007, lines 11-14]. This testimony reveals that Benjamin simply signed his name to checks already written by the secretary. The fact the union hall could not rely on him to write checks shows that his cognitive deficits effectively disabled him from performing as a treasurer.

largely intact, and his personality changes and unusual behavior did not manifest themselves in the tightly controlled courtroom environment. In short, the Commission engaged in a fact finding exercise known as "sit and squirm" jurisprudence.

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

This approach "will not only result in unreliable conclusions when observing claimants with honest intentions, but may encourage claimants to manufacture convincing observable manifestations of pain or, worse yet, discourage them from exercising their right to appear before [the commission] for fear that they may not appear to the unexpert eye to be as bad as they feel." Tyler v. Weinberger, 409 F.Supp. 776 (E.D. Va. 1976)(finding claimant disabled as a matter of law where factual finding that claimant "over-exaggerated his complaint about sitting for extended periods" was "unreasonable under the law and this Court does not accept them."). For these reasons, a hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional." Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992)(Johnson, J., concurring).

Respondents contend there is nothing wrong with "sit and squirm" jurisprudence, stating the "Commission decides what weight to assign to evidence, both expert and lay, before it." [Resp. Br. p. 32 n.12]. While this is a correct statement of black letter law, there is more to the Commission's fact finding role than choosing the evidence it likes and disregarding the remainder. While the Commission can weigh conflicting evidence, it cannot ignore evidence nor can it resort to

speculation. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability). By the same token, the Commission cannot substitute its own medical opinion for the opinion of a qualified medical professions – certainly not in a complex medical-technical case such as this one. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(a finding of fact based on a commissioner's own lay medical opinion is not substantial evidence and must be reversed).

The Commission's finding that Benjamin failed to meet his burden of proof for physical brain damage is not supported by substantial evidence and controlled by an error of law. Therefore, the Decision and Order of the Appellate Panel should be reversed. The Court should hold Benjamin is entitled to lifetime compensation for physical brain damage.

2. Victor Benjamin was rendered an incomplete quadriplegic and is legally entitled to workers' compensation benefits for life.

Respondents argue that Benjamin's claim for *"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)." Respondents suggest that this is "a barely disguised attempt to characterize almost any cervical spine injury that results in cervical myelopathy as an 'incomplete quadriplegia.'" [Resp. Br. pp. 37-38]. To the contrary, Appellant simply believes the Workers' Compensation Commission should follow the law as stated by our appellate courts. Here, two treating physicians and an independent medical examiner opined Benjamin's spinal cord injuries left him an *incomplete quadriplegic*. These experts based their opinions on the definition promulgated by the American Spinal Injury Association and adopted by this Court in Reed-Richards. Following the law does not expand it. Circumventing binding precedent not only violates the law; it contracts the remedy and frustrates the expressed intent of the Legislature. "Common sense indicates that a

compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." Pierre v. Seaside Farms, Inc., 689 S.E.2d 615, 386 S.C. 534 (2010).

Respondents seek to make an end run around Reed-Richards by suggesting that if only the employer in Reed-Richards had presented a different definition of paraplegia from another doctor, then the outcome would have been different. They want to retry Reed-Richards. This they cannot do, for Reed-Richards is the law of the land. Cf. Shea by Reynolds v. State Dep't of Mental Retardation, 279 S.C. 604, 608, 310 S.E.2d 819, 821 (Ct. App. 1983)("The maintenance of a harmonious body of decisional law is essential to the efficient administration of justice. Therefore, if the judicial system is to operate efficiently, this court must be bound by decisions of the Supreme Court."), *overruled on other grounds by* McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

Respondents misconstrue Reed-Richards as merely a failure of proof by the employer; a simple substantial evidence case. A careful reading of the opinion show this is not the case. In Reed-Richards, the Court did the same thing the Supreme Court did in Sparks and Crisp: define a specific term in a statute. In Sparks and Crisp, the court was asked to define "physical brain damage." In Reed-Richards, the Court was asked to define "paraplegic." See S.C. Code Ann. § 42-9-10(C)(2007(setting compensation for "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.").

The issue in Reed-Richards was whether the Legislature intended the term *paraplegic* to encompass *incomplete paraplegia*, or, as urged by the employer in Reed-Richards and Respondents in the instant case, whether *paraplegia* meant "total and full and complete loss of use of your lower

extremities." After engaging in thorough analysis, the Court held the ASIA definition of incomplete paraplegia was consistent with the legislative purpose underlying the Act. The Legislature agreed, as it did not modify the terms *paraplegic* and *quadriplegic* when it amended section 42-9-10 the year after Reed-Richards was published.[7] See Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003)(as the Legislature is presumed to be aware of the appellate court's interpretation of its statutes, Legislative "inaction is evidence the Legislature agrees with this Court's interpretation.").

The gravamen of Respondents' argument is that because they elicited testimony from Dr. Lozanne that "we use quadriplegia as a complete lack of movement in four extremities," then neither they nor the Commission are bound by Reed-Richards. [R. p. 897, lines 22-25]. And indeed, this is exactly how the Commission ruled.

It is not that simple. Could a workers' compensation claimant get around Crisp and Sparks by eliciting testimony from a neurologist that "physical brain damage" does not have to be permanent and severe? Could the Commission rely on such testimony to distinguish Crisp and Sparks in the same manner it distinguished Reed-Richards? For that matter, if an expert testified he does not use impairment ratings in his practice, could the Commission refuse to make an award for loss of use?

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[7] Respondents argue "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." [Resp. Br. p. 39 n.13]. This is simply wrong. The Legislature is presumed to know how its statutes have been interpreted in the past – regardless of whether the decisions come from the Supreme Court or the Court of Appeals. See, e.g. State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197–98 (1997) ("The General Assembly is presumed to be aware of the common law, . . . and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense."); Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) ("Congress presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind"); State v. McKnight, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.").

The answer is a resounding *NO*. Once the appellate courts define a term in a statute, no expert opinion can alter that definition. The entire purpose behind defining a statutory term is so that all litigants receive consistent treatment from courts and commissions. Adherence to binding precedent is essential to due process. It is the very foundation of the common law.

There is no conflict in the evidence because Dr. Lozanne's opinion does not follow the legal definition and is therefore incompetent. Cf. Michau v. Georgetown Cnty., 396 S.C. 589, 723 S.E.2d 805 (2012)(excluding medical opinion as not competent because it did not comply with statutory requirement for medical evidence). Respondents' attempt to create a conflict by eliciting testimony which contradicts Reed-Richards should be rejected. The Commission's reliance on the incompetent testimony should similarly be stricken and reversed as legal error.

The other tack pursued by Respondents is to minimize Benjamin's condition relative to the employee in Reed-Richards. Ms. Reed-Richards required a walker for ambulation and lost the ability to control her bowels. Although Benjamin may be marginally better off, he still has been left with significant deficits due to his incomplete quadriplegia. Benjamin requires a four prong cane and "the use of a motorized scooter to aid him with ambulation . . ." [R. pp. 227, 652, 662]. He has spasticity. [R. p. 572]. Dr. Poletti described a "serious or catastrophic neurological injury . . . that will prevent him from walking normally or using his hands normally for fine motor skills." [R. p. 607]. He also has intermittent bowel and bladder problems. His impairment ratings range from 53% (Lozanne) to 67% (Poletti) to the whole person for spinal cord damage. These ratings include significant impairment for gait derangement.

This is a picture of a gravely disabled individual. Benjamin is far worse off than the employee in Clemmons – who suffered from cervical myelopathy but whose injury was not severe enough to be an incomplete quadriplegia. Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268

(S.C. 2017). Benjamin's "catastrophic neurological injury" to his spinal cord rendered him an incomplete quadriplegic and resulted in his total disability. Although not specifically required for quadriplegia, Benjamin suffered severe and permanent neurological damage to his spinal cord. Finding Benjamin to be an incomplete quadriplegic does not expand the class of people who receive lifetime compensation. It simply ensures that all workers who receive severe and permanent spinal cord injuries which leave them quadriplegic will receive equal treatment from the Commission.

Benjamin proved he is an incomplete quadriplegic by expert medical testimony. The Commission based its ruling on incompetent testimony. The Commission further erred by effectively "overruling" Reed-Richards and holding *incomplete quadriplegia* is not *quadriplegia* within the meaning of Section 42-9-10(C). This is legal error and must be reversed.

3. The Commission erred in denying the mobility scooter prescribed by the authorized treating physician for the cervical spinal cord injury.

Respondents' argument on the denial of the mobility scooter follows the Commission's reasoning, wherein it denied the prescription for the scooter under the theory that Benjamin's gait derangement and mobility problems must have been due to a non-work-related lumbar spine injury.

Respondents first state "Claimant inexplicably asserts that he never alleged or pled a "lower [back] injury." They then note the Form 50 includes the *back* in the list of injuries. [Resp. Br. pp. 46-7 n.18; R. p. 106]. This is simply another deflection, as listing of the back as a body part is correct given the undisputed fact that the spinal cord injury affects the entire back from the level of the injury down through the legs.

At trial, Appellant argued "that the mobility scooter is because of the cervical cord injury." [R. p. 951, line 23 - p. 952, line 5]. It is also significant Respondents never argued that the need for the scooter was due to a separate lumbar injury. Respondents sole objection to it was "I don't see that Dr. Lozanne has ever recommended it." [R. p. 956, lines18-25]. At no point did either party

suggest the scooter was needed for anything other than the gait difficulties caused by the spinal cord injury.

The Commission *sua sponte* denied the mobility scooter under its own theory that the gait derangement and mobility problems did not arise until Dr. Sandoz began treating the lumbar spine. There was no call for the Commission to make this logical leap nor is there substantial evidence to support their conclusion.

Benjamin's clumsiness, gait derangement and need for a cane is extensively documented throughout the treatment records from Drs. Sandoz, Poletti, Lozanne and Mills. Dr. Lozanne attributed the unsteadiness and need for a cane to "the spinal cord abnormality." [R. p. 707]. Dr. Mills and Dr. Poletti attribute the gait impairment to the spinal cord injury. [R. pp. 606-8, 676]. The impairment ratings for the spinal cord injury uniformly include specific ratings "for effect on station and gait" from a cortical spinal tract perspective. [R. pp. 711-2].

The Appellate Panel substituted its own medical opinion for that of Dr. Sandoz. Dr. Sandoz wrote the prescription for the scooter on January 11, 2016. [R. p. 656]. In the treatment note for that date, he wrote: "Cervical spondylosis – causing pain syndrome difficulties with ambulation needing a scooter and causing ED." [R. p. 654]. He repeated this recommendation twice more. [R. pp. 659, 666]. Dr. Sandoz never attributed the need for the scooter to a lumbar injury.

The Appellate Panel seems to have misinterpreted a questionnaire from Dr. Sandoz. The questionnaire is dated March 2, 2016 – after Dr. Sandoz had already prescribed the scooter for the cervical cord injury. He answered "Yes" as to "Does Mr. Benjamin require the use of a motorized scooter to aid him with ambulation due to the injuries he sustained in his 06-15-11 work accident?" He was also asked whether "the need for a [lumbar epidural] injection [is] causally related to his work injury which occurred on 06-15-11." He responded "Directly related." [R. p. 662].

These are two separate questions. The lumbar injection and the scooter are not intertwined. The Commission employed an "unusual finesse of reasoning"[8] to deny the mobility scooter on grounds so tenuous and spurious that even Respondents did not raise them.

The evidence overwhelmingly shows the scooter was necessary to treat the spinal cord injury and resulting incomplete quadriplegia. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when "The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]"). As Dr. Sandoz prescribed the scooter as needed for ambulation, Respondents were required to provide it as a matter of law. See S.C. Code Ann. § 42-15-60 (2007) (employer must furnish or cause to be furnished "an attending physician and any medical care or treatment that is considered necessary by the attending physician . . ."). Therefore, the Decision and Order denying the mobility scooter should be reversed.

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[8] See, National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 174 S.E. 581, 173 S.C. 1 (1934)("If it be conceded that there may be deduced by a process of unusual finesse of reasoning that there is a scintilla of evidence . . . nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.")

CONCLUSION

For the foregoing reasons, the Court should reverse the Appellate Panel and hold Victor Benjamin suffered total disability due to physical brain damage and incomplete quadriplegia. As such, he is not subject to the five hundred week limitation, and shall receive disability and medical benefits for life. The Court should also reverse the Appellate Panel on the denial of the mobility scooter prescribed by the attending neurologist.

Respectfully Submitted

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2018-000965

Victor G. Benjamin, Claimant, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

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

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