THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No.: 0717624

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

v.

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

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission correctly determined "[t]hat based on the greater weight of the evidence, I find there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers' Compensation Act. This award is made under § 42-9-30 and § 42-9-10 and physical brain damage does not apply."

2. Whether The Workers' Compensation Commission properly relied on the findings and opinions of Dr. Mark Wagner and Dr. George Sandoz in support of their conclusion that Appellant did not sustain physical brain damage.

3. Whether the Workers' Compensation Commission erred as a matter of fact and law in failing to order additional medical treatment in its Order.

STATEMENT OF THE CASE

Appellant contends he sustained work-related injuries to his brain (including headaches), vision, spine, both arms, left shoulder, hips, both legs, right foot, and psychological overlay on November 1, 2007. Appellant filed a Form 50 Request for Hearing on April 8, 2011, seeking compensation for past medical care, future medical treatment, permanent and total disability, and an award of lifetime benefits due to physical brain damage. (R. p. 27).

On April 19, 2011, Respondents timely filed a Form 51 admitting that Appellant sustained a work injury by accident arising out of and in the course of his employment on November 1, 2007, but denying the extent of the injuries as alleged by the Appellant. (R. p. 28). Respondents also sought credit for temporary total benefits paid in excess of the award and sought to stop payment of the Appellant's temporary benefits pursuant to the Form 21 filed on March 25, 2011. A hearing was held in Conway, South Carolina on June 28, 2011 to determine the issues raised in the Forms 50, 51, and 21.

At the hearing, Appellant alleged he was entitled to (1) additional medical care as a result of his admitted work accident and (2) a finding that he was totally and permanently disabled based on the totality of his injuries. Appellant also sought lifetime benefits, claiming he suffered physical brain damage in accordance with S.C. Code Ann. § 42-9-10(C).

Respondents contended Appellant was not permanently and totally disabled, and they were entitled to stop payment of the Appellant's temporary benefits because the Appellant had reached maximum medical improvement. Respondents further contended the Appellant did not suffer a physical brain damage as set forth in S.C. Code Ann. § 42-9-10(C), and any permanent disability compensation for an alleged injury to Appellant's brain properly fell under Regulation 67-1101

which sets forth the range of 25-250 weeks for either partial or total loss of use of the brain as a result of a work accident. S.C. Code Ann., Regulation 67-1101 (2007).

The Hearing Commissioner issued a Decision and Order on November 21, 2011, finding Appellant permanently and totally disabled on account of his multiple impairment ratings. (R. p. 12, Finding of Fact #9). The Hearing Commissioner further found that Appellant had not suffered a physical brain damage, so he was not entitled to lifetime compensation benefits in accordance with S.C. Code Ann. §42-9-10(C). (R. p. 13, Finding of Fact #18 and Conclusion of Law #3). Appellant timely filed a Form 30 Request for Commission Review on December 5, 2011. (R. p. 25).

The Appellate Panel of the Workers' Compensation Commission heard the matter on March 19, 2012. The Appellate Panel issued a Decision and Order adopting and affirming the Hearing Commissioner's decision on May 23, 2012. (R. p. 24). Appellant served and filed its notice of appeal in this Court on June 18, 2012.

STATEMENT OF THE FACTS/EVIDENCE

Appellant testified at the hearing in this matter, and his testimony allowed the Commissioner to observe the Appellant, to ask questions to the Appellant, and to judge the Appellant's credibility as a witness. It is significant to note that in this claim for alleged physical brain damage, Appellant testified without issue on his own behalf and did not request or require the appointment of a guardian of any kind.

Appellant testified he was twenty-nine (29) years old. (R. p. 71, lines7-8). Appellant testified that he was unmarried, had no children, and his education background consisted of completing middle school in his home country of Mexico. (R. p. 71, lines 9-18). Appellant

testified he came to the United States in the year of 2002 or 2003. (R. p. 71, lines 19-21). Appellant's prior work history included security work, retail sales, and construction. (R. p. 71, lines 22-25; R. p. 72, lines 1-18). At the hearing, Appellant described the occurrence of his work injury and the course of his medical treatment. In addition, Appellant testified regarding his symptoms and the difficulties he still experienced as a result of his injury. Appellant testified he has headaches at least once a week (R. p. 79, lines 16-20), and he has short term memory problems and dizziness. (R. p. 80, lines 21-23; R. p. 81, lines 17-19). Despite these symptoms, Appellant testified he is still able to drive a car. (R. p. 93, lines 19-20).

The discharge summary from the Medical University of South Carolina (MUSC) Medical Center shows that the Claimant's injuries included subdural and epidural hematomas, bilateral frontal contusions, respiratory failure, hypotension, a scalp laceration, C7 and T1 spinous process fractures, right rib fractures, bilateral transverse fractures, a right big toe fracture, a right fifth toe fracture, a fracture of the skull, a tracheostomy, an endoscopic gastrostomy, and an amputation of the second through the fifth toes of the right foot. (R. p. 179). A CT scan of the Claimant's head performed on the date of the accident revealed a fracture of the skull with a small extraocciptoparietal hematoma and the possibility of a small epidural hematoma. (R. p. 127).

Dr. Mark Wagner, a Clinical Neuropsychologist, saw Appellant on October 30, 2008 and completed a neuropsychological evaluation. Dr. Wagner noted the Appellant sustained a skull fracture with acute underlying minor structural change to the brain, but he concluded the functional studies, such as EEGs, CTs and MRIs, were read as unremarkable "demonstrating structural resolution of the work-related injury." (R. p. 208).

Dr. Mark Hoy of MUSC Department of Otolaryngology, Head and Neck Surgery, treated Appellant from December 1, 2008 until April 13, 2009 for ear pain associated with closed head

injury. Despite Appellant's continued complaints of ear pain, Dr. Hoy noted most of the Appellant's tests to be normal (R. p. 209). Dr. Hoy opined in a Form 14B prepared March 16, 2010 that Appellant reached maximum medical improvement with regard to his ear pain on April 13, 2009, and Appellant would not need future medical care with regard to his ear pain. (R. p. 210). Dr. Hoy did not assign Appellant any impairment rating on the Form 14B, but he instead placed a question mark ("?") in the space where the impairment rating is to be written. (R. p. 210).

Dr. George M. Sandoz, a neurologist with Strand Regional Specialty Associates, LLC initially treated Appellant for dizziness and headaches from August 29, 2008 to August 12, 2009. Dr. Sandoz noted the Appellant had some damage to his right inner ear which caused some loss of hearing and mastoiditis. (R. p. 313, lines 20-25; R. p. 322, lines 15-20). Dr. Sandoz described mastoiditis as an inflammation of the mastoid, which is a part of the skull, not of the brain. (R. p. 327, lines 3-5 and lines 14-20). On August 20, 2009, Dr. Sandoz drafted a letter stating that Appellant had a forty-six percent (46%) impairment to the whole body for a traumatic brain injury. (R. p. 242). Dr. Sandoz further stated that Appellant was permanently and totally disabled, but interestingly Dr. Sandoz made no mention of physical brain *damage*. (R. p. 242). Dr. Sandoz reaffirmed this position in his August 6, 2010 deposition, stating that Appellant was not able to return to any kind of former employment due to an inability to follow commands and due to the inner ear injury which caused Appellant to be unsteady and dizzy. (R. p. 324, lines 17-23). Dr. Sandoz also stated in his deposition that Appellant suffered some damage and injury to the *function* of the brain. (R. p. 320, lines 23-24).

While Dr. Sandoz opined the Appellant suffered a traumatic brain injury, he also testified "There's no evidence of any damage on the brain that we can go and see." (R. p. 320, lines 3-4). Appellant's medical records are void of any neurological medical treatment from August 12, 2009

through August 6, 2010, the date of Dr. Sandoz's deposition. Dr. Sandoz did not treat Appellant from August 12, 2009 until November 12, 2010. Despite both Appellant's lack of treatment for over a year, and Dr. Sandoz's testimony that there was no physical damage to Appellant's brain, Dr. Sandoz circled "Yes" in response to a questionnaire drafted by Appellant's counsel which asked if Appellant sustained physical brain damage, rendering him permanently and totally disabled. (R. p. 286). It is significant to note that with the exception of the questionnaire drafted by Appellant's attorney, Dr. Sandoz never uses the word "damage" in his notes to describe the injury to the brain.

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. *Hunter v. Patrick Construction Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the "substantial evidence" rule as the standard for judicial review of a decision of the Commission:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> (d) affected by other error of law; [or]
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers' compensation appeals, may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the

reliable, probative and substantial evidence on the whole record." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

> The test is whether the decision of the Commission is supported by substantial evidence. 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 conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Edwards v. Pettit Constr. Co.*, 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT

I. APPELLANT IS NOT ENTITLED TO LIFETIME WORKERS COMPENSATION BENEFITS AS A RESULT OF PHYSICAL BRAIN DAMAGE, PURSUANT TO S.C. CODE ANN. § 42-9-10(C).

The South Carolina Workers' Compensation Act sets forth three (3) separate forms of permanent disability benefits: (1) permanent and total disability under §42-9-10; (2) permanent and total disability benefits which compensate for decreased wage earning capacity under §42-9-

20; and (3) permanent partial disability benefits under §42-9-30 and Regulation 67-1101 which compensate for injuries to specified "scheduled members."

Looking closer at permanent and total disability under §42-9-10, such disability exists "[w]hen the incapacity to work resulting from an injury is total." S.C. Code Ann. §42-9-10(A). Pursuant to S.C. Code Ann. §42-9-10(A), "[i]n no case may the period covered by the compensation exceed five hundred (500) weeks, except as provided in subsection (C)." Subsection (C) then specifically sets forth the only three (3) exceptions in the entire Act in which the 500 week cap does not apply: (1) an injury resulting in paraplegia; (2) an injury resulting in quadriplegia; and (3) an injury resulting in *physical brain damage*.

When drafting this section of the Act, the Legislature was forced to contemplate every possible work injury that could arise in the workers' compensation arena and then narrowly limit the exceptions to the five hundred (500) week cap into only the three categories listed above. Each limited exception presupposes a level of more serious and permanent disability that triggers the heightened criteria required to justify a claimant's entitlement to lifetime benefits. When examining the language of S.C. Code Ann. §42-9-10(C), it is imperative to note the use of specific language in the statute. The statute does not allow an exception for a claimant that has suffered an "injury" to the brain. Instead, the statute specifically adds the qualifier of physical brain "*damage*." S.C. Code Ann. Regulation 67-1101 identifies a list of specific body parts, including the brain, and sets forth a range of weeks for each body part to award for total loss, partial loss, or loss of use for each specific body part. Specifically, S.C. Code Ann. Regulation 67-1101 allows for between twenty five (25) and two-hundred and fifty (250) weeks for partial or total loss of use of the brain.

Respondents respectfully direct this Court to the nexus of the issue at the core of this argument: the distinction between a physical brain *injury*, which is properly compensated pursuant to S.C. Code Ann. Regulation 67-1101, and the exponentially more serious condition of physical brain *damage*, pursuant to S.C. Code Ann. §42-9-10(C). Clearly, the fact that the Workers' Compensation Act specifically designates a range of weeks for disability caused by the partial or total loss of use of the brain leads to the only logical conclusion that the Act contemplated different levels of injuries to the brain. Some brain injuries have residual effects that result in a varying level of loss of use to the brain which is compensated under Regulation 67-1101. Lifetime benefits for physical brain damage presuppose a more serious condition in which there is permanent physical damage to the brain, damage that can be physically seen.

A. Appellant Improperly Argues That The Hearing Commissioner's Decision And Order Is Facially Inadequate And Must Reversed On That Basis Alone.

Appellant argues that while the Workers' Compensation Commission made a legal conclusion that "there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers Compensation Act," the Workers Compensation Commission never specified what the criteria must have been or what particular criterion was not met. As a result, Appellant argues that the Decision and Order is facially inadequate and must be reversed on that basis alone. Appellant raises this argument for the first time in his Initial Brief to the Court of Appeals, and Appellant failed to raise this ground for appeal in his Form 30 Pleadings or his argument to the Appellate Panel of the Workers' Compensation Commission.

Generally, claims or defenses not presented in the pleadings will not be considered on appeal. *See McNeely v. South Carolina Farm Bureau Mut. Ins. Co.,* 259 S.C. 39, 190 S.E.2d 499 (1972). This rule is consistent with the general restriction that one cannot present and try a case

on one theory and then attack the result below by presenting another theory on appeal. *Butler v. Town of Edgfield*, 328 S.C. 238, 493 S.E.2d 838 (1997); *Gurganious v. City of Beaufort,* 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995). In this case, Appellant previously presented arguments that the Workers Compensation Commission erred in concluding that Appellant never met the criteria for physical brain damage, but he never raised the argument that failure to define the criteria rendered the Decision and Order facially inadequate, requiring immediate reversal. As such, Appellant failed to preserve this theory of the case, and it is not properly before this Court.

Notwithstanding Appellant's failure to raise the argument that the Decision and Order is facially inadequate and requires immediate reversal, the specific finding of fact referenced by Appellant does state that "[t]his award was made under §42-9-30 and §42-9-10 and physical brain damage does not apply." (R. p. 13, Finding of Fact #18). Appellant is correct that no specific criteria for physical brain "damage" is set forth in §42-9-10(C); however, the Act's use of the word "damage" as opposed to "injury", or "total/partial loss of use" clearly suggests a heightened criteria that is necessary in order to contemplate lifetime benefits as opposed to the 25-250 week range set forth in Regulation 67-1101. In no other section of the Act is the word "damage" used to describe the extent of disability.

B. Appellant Has Set Forth Evidence Of A Physical Brain Injury; However, Appellant Has Failed To Demonstrate Evidence Of Physical Brain *Damage* As A Result Of The November 1, 2007 Work Related Accident.

In support of his argument for physical brain *damage*, Appellant cites several examples of proving a physical brain *injury*. First, Appellant directs this Court to the initial skull fracture, hematomas, and frontal lobe contusions confirmed by diagnostic testing at the time of the accident. Appellant then directs this Court to the ongoing cognitive difficulties caused by the

injury to the brain which he states are confirmed by the opinions of Dr. Sandoz and Dr. Wagner. Relying on *Pearson v. JPS Converter & Indus. Corp*, 327, S.C. 393, 489 S.E.2d 219 (Ct. App. 1997), Appellant argues these facts serve as "overwhelming" evidence of physical brain injury. It is significant to note the sentence Appellant pulled from the *Pearson* case refers to "organic brain damage" and disability due to "physical brain damage." Again, Respondent's do not deny that Appellant suffered an injury to the brain, but Appellant's brain injury is properly compensated for loss of use under Regulation 67-1101 and not physical brain *damage* under S.C. code §42-9-10(C).

Appellant looks to other sections of the S.C. Code of Laws in an effort to define "traumatic brain injury." Appellant references the S.C. Code of Laws regulations for criteria for entry into programs of special education for students with disabilities. The statute states:

> Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a student's education performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. S.C. Code Ann. §43-234.1(L)(1)(2011).

The symptoms of a traumatic brain injury described in the definition above still do not make any references the specific qualifier of physical brain *damage*. Even if an injured worker suffers from the symptoms described, the Workers Compensation Act properly compensates for this partial or total loss of use of the brain in Regulation 67-1101.

Appellant seems to be of the opinion that the Workers' Compensation Commission arbitrarily created a rule that one must be able to actually see the damage to the brain to qualify for lifetime benefits, but he does not provide any insight into why then the Workers

Compensation Act adds the additional requirement of brain *damage*. Although the Act does not set forth a definition for "damage" in S.C. Code Ann. §42-9-10(C), the Act clearly contemplated two (2) scenarios in which a claimant has an injury to the brain; one resulting in partial or total loss of use and the other physical brain damage. In the absence of these two options, there would be no reason to include the brain in Regulation 67-1101 since every injury to the brain would result in lifetime benefits. Clearly, the inclusion of the brain in Regulation 67-1101 demonstrates that the Legislature did not intend to award every physical brain injury with lifetime benefits. It created the limited exception only for those with physical brain *damage*.

In further addressing whether there exists a requirement that the physical brain damage be seen on imaging scans, Appellant cites *Krepps by Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996) to argue that most common brain injuries are not visible on imaging scans. Again, Respondents are not arguing that Appellant did not suffer an injury to the brain, or even one that caused permanent loss of use, but Appellant still fails to address the heightened requirement of physical brain damage. When asked in his deposition whether there was physical brain damage that could be seen on a "scan, CT, MRI, *or anything else*," Appellant's authorized treating neurologist, Dr. Sandoz, testified that they were not going to see anything, "not in this case." (R. p. 321, lines 8-13).

C. The Preponderance Of The Evidence Shows That Claimant Did Not Suffer Physical Brain Damage As A Result Of His November 2, 2007 Work Related Accident

In evaluating whether the evidence in this case supported a finding of physical brain damage, the Workers Compensation Commission focused primarily on the reports and opinions of Dr. Mark Wagner, a neuropsychologist, and Dr. George Sandoz, a neurologist.

Dr. Wagner saw Appellant for a neuropsychological evaluation on October 30, 2008. (R. pp. 296-301). At his evaluation, Dr. Wagner noted the Appellant's admitting diagnosis from MUSC on the date of accident to be skull fracture, open complex scalp wound with epidural and subdural hematoma, and bilateral frontal contusions. The report further reflects a CT of the head on November 1, 2007 (date of accident) showed comminuted fracture with small extra occipitoparietal hematoma at the midline at the vertex, worrisome for small epidural hematoma. (R. p. 297). Dr. Wagner goes on in his report and references several additional scans and tests which showed a resolution of his previous findings, and Dr. Wagner gave his opinion as follows:

> He had a skull fracture with acute underlying minor structural change to the brain. Follow-up structural and functional studies (i.e. EEG, CT, and MRI) have been read as unremarkable demonstrating structural resolution of the work related injury. He has persisting cognitive complaints. While he has had an excellent neurologic recovery, it is probably that he is exhibiting symptoms of post concussive syndrome. The cognitive findings, while mostly normal, do contain abnormal findings largely in the domain of complex attention and concentration. I do not think the severity of his cognitive deficits represents a major barrier for return to work, especially manual labor. Additionally, he does have findings positive for situational depression and pain are also contributing to his functional ability. (R. p. 299).

Appellant incorrectly interprets Dr. Wagner's statement as confirmation of the presence and effect of physical brain damage by noting the persisting cognitive complaints and abnormal findings. Again, Appellant fails to acknowledge that the cognitive complaints and abnormal findings he refers to can and should be properly compensated for loss of use to the brain under Regulation 67-1101. They are not, however, evidence of physical brain *damage*. The testing performed to measure the presence of physical brain damage instead showed the structural resolution of his work related injuries.

Citing the tests referenced by Dr. Wagner, it is clear that there is no objective evidence of any ongoing or permanent "damage" to the brain. The radiologist performing and evaluating Appellant's January 16, 2008 CT of the brain found (1) no evidence of acute intracranial process

and (2) healing skull fractures. (R. p. 303) The radiologist who conducted Appellant's September 16, 2008 MRI of the brain found (1) right mastoiditis and (2) otherwise, unremarkable MRI of the brain. (R. p. 215). Finally, Appellant's October 2, 2008 EEG was read by Dr. Sandoz to be within a wide range of normal limits, with no focal or seizure discharges noted. (R. p. 302).

Appellant argues that Dr. Sandoz, the authorized treating neurologist, was the appropriate doctor to interpret and opine on imaging studies in order to comment on whether Appellant suffered physical brain damage. Appellant relies heavily on the "unrefuted" questionnaire of Dr. Sandoz, dated March 10, 2011, in which he opined the Claimant suffers from physical brain damage, rendering him permanently and totally disabled. (R. p. 286). On the contrary, Dr. Sandoz's circling "YES" on the bottom of this medical questionnaire hand crafted by opposing counsel is far from "unrefuted." The questionnaire is in direct contravention of the records and previous statements of Dr. Sandoz himself. Further, counsel's insertion of the word "damage" in the questionnaire is the first time Dr. Sandoz' reports make reference to brain "damage." Dr. Sandoz notes consistently refer to the Appellant's brain "injury" which is properly compensated under S.C. Code Ann. Regulation 67-1101 for loss of use.

At his deposition, Dr. Sandoz testified the Appellant suffered a traumatic brain injury, since "there's been some damage and injury to the *function* of the brain." (R. p. 320, lines 23-24, emphasis added). Dr. Sandoz further testified "there's no evidence of any damage on the brain that we can go and see." (R. p. 320, lines 3-4). When Dr. Sandoz's statements are examined in detail, it is evident he has only opined the Appellant has some residual damage to the *function* of the brain, but there is actually no *physical damage*.

Even if this Court finds the Dr. Sandoz questionnaire response and deposition testimony to be inconsistent with each other, this Court recently held that when both parties presented conflicting medical evidence, "[t]he Single Commissioner, and ultimately the Appellate Panel, had the discretion to weigh the conflicting evidence in rendering its decision. Thus, we defer to its findings in its decision." *Cranford v. Hutchison Construction*, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012); *See Mullinax v. Winn-Dixie Stores, Inc.*318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995)("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

The Single Commissioner had ample support in the record for the finding that Appellant did not sustain a physical brain injury under S.C. Code Ann. § 42-9-10(C). Dr. Sandoz testified the Appellant suffers from mastoiditis, a condition of the skull, "and that's why he's dizzy." (R. p. 322, lines 15-20). Dr. Wagner noted that the Appellant suffered from mild post-concussive syndrome. The Single Commissioner noted the Appellant underwent no neurological medical treatment from August of 2009 to November of 2010, indicating Appellant did not suffer from a debilitating physical brain injury. (R. p. 8). Dr. Wagner noted the Appellant sustained a skull fracture with acute underlying minor structural change to the brain, but he concluded functional studies, such as EEGs, CTs and MRIs, were read as unremarkable "demonstrating structural resolution of the work-related injury." (R. p. 299). Even the testimony of Dr. Sandoz qualified the Claimant's injury as one to the *function* of the brain, and Dr. Sandoz admitted there was no physical damage. (R. p. 321, lines 8-13). Aside from a single and conflicting pre-written medical questionnaire on which Dr. Sandoz circled the word "YES," every piece of evidence available makes it clear that Appellant did not suffer physical brain damage. At the most, Appellant suffers

from residual deficits and cognitive symptoms – all of which are compensable under Regulation 67-1101.

II. THE WORKERS' COMPENSATION CORRECTLY RELIED ON THE FINDINGS AND OPINONS OF DR. MARK WAGNER AND DR. GEORGE SANDOZ IN REACHING THE CONCLUSION THAT APPELLANT DID NOT SUFFER PHYSICAL BRAIN DAMAGE IN ACORADNCE WITH S.C. CODE ANN. §42-9-10(C).

Appellant argues that a neuropsychologist's expertise does not extend to reading and interpreting EEGs, CTs and MRIs. Specifically, Appellant argues Dr. Wagner, "is not a medical doctor, nor a radiologist; he cannot interpret imaging studies. He merely parrots the reports themselves – and parrots them inaccurately." Appellant is correct that Dr. Wagner is not a radiologist, and he did not attempt to interpret the studies himself. However, Appellant's statement that Dr. Wagner "parroted them inaccurately" is unfounded. Dr. Wagner simply restated the findings made by the doctors who did interpret the studies.

The radiologist performing and evaluating Appellant's January 16, 2008 CT of the brain found (1) no evidence of acute intracranial process and (2) healing skull fractures. (R. p. 303). The radiologist who conducted Appellant's September 16, 2008 MRI of the brain found (1) right mastoiditis and (2) otherwise, unremarkable MRI of the brain. (R. p. 215). Finally, Appellant's October 2, 2008 EEG was read by Dr. Sandoz to be within a wide range of normal limits, with no focal or seizure discharges noted. (R. p. 302). Dr. Wagner's reliance on the interpretations of other professionals was proper since all of the doctors who treated the Appellant relied on the diagnostic testing to determine the proper course of treatment despite the fact that they were not radiologists specifically trained to interpret the films themselves.

Regardless, Appellants seems to be of the position that since Dr. Wagner is a neuropsychologist, he is not able to consider the diagnostic studies and findings of other doctors

in the formation of his opinion. Appellant readily criticizes Dr. Wagner, yet he does not cite any authority suggesting that it was improper for Dr. Wagner to rely on the conclusions of the doctors who performed the diagnostic testing. It is also important to note the Appellant's criticism of Dr. Wagner's statement is new to his appeal efforts only. In his medical summary submitted to the Hearing Commissioner, Appellant was happy to rely on his own redacted version of Dr. Wagner's opinion to demonstrate that Appellant "had skull fracture with acute underlying minor structural change to the brain." (R. p. 32). Appellant had no problem with Dr. Wagner's use of other doctor's findings to support his argument that he sustained a skull fracture with underlying minor structural change to the brain, but he conveniently omitted, and now tries to argue as improper, the rest of Dr. Wagner's statement regarding structural resolution of the injury.

The Appellant also contended the Hearing Commissioner erred in improperly relying on Dr. Wagner's opinions "against physical brain injury" because they must be explicitly stated to a reasonable degree of medical certainty. Appellant is correct that a physical brain damage is a medically complex case which must be *proven* by medical evidence. This rule, however, is not a double-edged sword; Respondents are not required to *disprove* a medically complex case by medical evidence. Indeed, Respondents are not required to prove anything in this case. The burden is on Appellant, and the Hearing Commissioner correctly found the Appellant failed to meet this burden. The Commissioner reviewed the entirety of the evidence and found that the greater weight supported a finding that the Appellant did not sustain physical brain damage under § 42-9-10(C).

Regardless of Appellant's issues with Dr. Wagner's use of the diagnostic test results in forming his medical opinions, Appellant argues that Dr. Sandoz is the appropriate doctor to

interpret and opine on these results. As discussed in the arguments above, when asked in his deposition whether there was physical brain damage that could be seen on a "scan, CT, MRI, *or anything else*," Dr. Sandoz testified that they were not going to see anything, "not in this case." (R. p. 321, lines 8-13).

III. THE DEFENDANTS ADMIT THE CLAIMANT IS ENTITLED TO LIFETIME CAUSALLY-RELATED MEDICAL BENEFITS BECAUSE THE CLAIMANT WAS FOUND TO BE PERMANENTLY AND TOTALLY DISABLED BY THE SINGLE COMMISSIONER.

Respondents contend that this issue does not need to be addressed or held in abeyance. Respondents admit the Appellant is entitled to lifetime causally-related medical benefits pursuant to the Hearing Commissioner's finding of permanent and total disability, in accordance with S.C. Code Ann. § 42-9-10(B) and §42-15-60(C).

CONCLUSION

The substantial evidence in the record leads to the conclusion that Appellant is not entitled to an award of lifetime benefits as a result physical brain damage, in accordance with S.C. Code Ann. §42-9-10(C). The Workers Compensation Commission's Decision that Appellant is permanently and totally disabled, but he has not suffered physical brain damage, is clearly not erroneous in light of the substantial evidence in the record. Accordingly, this Court should affirm the Workers' Compensation Commission's decision.

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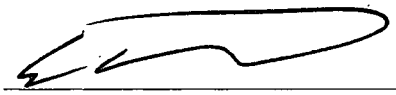
Respectfully Submitted,



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April 15, 2013
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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No.: 0717624

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

v.

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

PROOF OF SERVICE

The undersigned certifies that on the date indicated below he served counsel for Appellant with a copy of the Final Brief of Respondent by mailing copies of the same by United States Mail postage prepaid to the following addresses:

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CERTIFICATE OF COUNSEL

Respondents, by and through their undersigned counsel, certify that the Respondents' Final Brief complies with Rule 211(b), SCACR.

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