

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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

1. As Hector Fragosa has suffered permanent physical brain damage so severe that he is unable to return to suitable gainful employment, he is legally entitled to workers' compensation benefits for life (in Reply to Respondents' Argument at pages 10-12).

In their Brief, "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)." [Brief of Respondents, page 11 (emphasis in original)].

The Supreme Court recently clarified the definition of physical brain damage in two recent cases. In Sparks, the Court held "we conclude that 'physical brain damage' as used in § 42-9-10(C) is physical brain damage that is both permanent and severe." Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 19). In Crisp, the Court further explained that entitlement to lifetime compensation was predicated on "a brain injury so severe that the person could not subsequently return to suitable gainful employment."¹ Crisp v.

¹ Regulation 67-1101 was promulgated under the authority of § 42-9-30(22). The purpose is to expand the list of scheduled members to ensure that injured workers who do not suffer actual loss of earnings capacity are compensated for permanent physical injury. "A claimant may obtain disability for a scheduled physical injury included in S.C. Code Ann. § 42-9-30 (1976). The claimant is not required to show lost earning capacity because the compensation is based on the character of the injury and lost earning capacity is conclusively presumed." Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 354 S.C. 100 (2003). The legislature merely expanded the list of scheduled members to encompass a myriad of diverse body parts from the teeth to the gall bladder to the heart to the brain. 25A S.C Code Ann. Reg. 67-1101 (2007).

The inclusion of the brain in the regulation is to compensate people who suffer permanent physical brain damage, *i.e.* loss of use, but are not permanently and totally disabled. By including the brain in the list of scheduled members, people with such brain injuries are not left without a remedy. Some people with brain damage are properly compensated under the regulation. However, because Fragosa's brain damage was severe enough to render him totally disabled, he is properly compensated under S.C. Code § 42-9-10(C).

SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21).

In so doing, the Court simply restated the requirement which, to practitioners, has always been part of the statute: proof that the injured worker (1) is “totally and permanently disabled . . . as a result of a compensable injury” and (2) “has suffered physical brain damage . . .” S.C. Code Ann. § 42-9-10 (C)(2007). The total and permanent disability need not be solely the result of the brain damage; “the statute only requires that a claimant be totally and permanent disabled and suffer physical brain damage as a result of the injury.” Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998).²

By their own admission, Respondents effectively concede both of these elements: “Respondents are not arguing that Appellant did not suffer an injury to the brain, or even one that caused permanent loss of use” and “Respondents admit the Appellant is entitled to lifetime causally-related medical benefits pursuant to the Hearing Commissioner’s finding of permanent and total disability . . .” [Brief of Respondents, pages 12, 17].³ “The General Assembly . . . intended ‘physical brain damage’ to denote damage that is permanent and therefore necessarily continues to have effect into the present.” Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed

²In Sparks, the Supreme Court cited Pearson favorably for the proposition 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 at page 19. This confirms that the Court merely clarified existing law.

³To be clear, Respondents qualify their admission on permanent and total disability by referring to S.C. Code Ann. § 42-9-10(B)(2007). [Brief of Respondents, page 18]. However, the combination of physical brain damage and permanent total disability resulting therefrom meets the required proof for lifetime benefits under S.C. Code Ann. § 42-9-10(C)(2007). See Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219, 327 S.C. 393 (Ct. App. 1997), *cert. denied*, (February 5, 1998)(“the statute only requires that a claimant be totally and permanent disabled and suffer physical brain damage as a result of the injury.”).

March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 19).

Respondents remaining argument essentially boils down to this: “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*.” [Brief of Respondents, page 9 (emphasis added)]. As to the first part, the requirement of permanent physical brain damage has never been disputed and, indeed, was affirmed in Sparks and Crisp. However, the Supreme Court explicitly rejected the second argument stating: “We thus decline to impose a requirement that the injury be proved through an ‘objective diagnostic medium,’ since some indisputably physical injuries may not be revealed by diagnostic instruments that can detect only relatively gross physical abnormalities.” Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 18-19).

In Crisp, the Supreme Court went further, explicitly rejecting the same argument made here, to wit: “Respondents contend that the determination of whether Petitioner sustained ‘physical brain damage’ in the instant case hinges on the fact that no objective measure, *i.e.* a CT or MRI scan, confirmed such damage.” Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 35). The Court first cited expert testimony from a neurologist who opined, “there are essentially three ways to determine whether a person has sustained physical brain damage: (1) CT or MRI scanning; (2) cognitive behavioral level of functioning; and (3) neuropsychological testing.” Id. It then concluded, “In light of this testimony, we are reluctant to require use of a specific diagnostic tool in proving these medically-technical brain injury cases.” Id.

The Appellate Panel erred in adopting a requirement that “if it is a physical brain injury

you've got to be able to see it." [Tr. Page 16, lines 11-13; March 19, 2012). In the instant case, the fact Fragosa sustained severe, permanent physical brain damage was proven by all three methods. The Appellate Panel's error requires reversal.

2. As there is no substantial evidence to support the Appellate Panel's finding 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 decision below must be reversed (in Reply to Respondents' Argument at pages 13-16).

The Appellate Panel found "there has not been a physical brain injury as it does not meet the criteria established under the South Carolina Workers' Compensation Act." [FC Order]. This finding was based on the erroneous requirement that "if it is a physical brain injury you've got to be able to see it." [Tr. Page 16, lines 11-13; March 19, 2012). See Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 18-19)(rejecting "requirement that the injury be proved through an 'objective diagnostic medium'"). As this is not the correct criteria, the decision below must be reversed as it is based on an error of law and not supported by substantial evidence in the record.

Physical brain damage can be proven by "(1) CT or MRI scanning; (2) cognitive behavioral level of functioning; and (3) neuropsychological testing." Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 35). All three of these measures showed significant physical brain damage – of sufficient severity to require lifetime compensation.

Respondents primary argument is to point to imaging studies which they contend are "clear that there is no objective evidence of any ongoing or permanent "damage" to the brain. [Brief of Respondents, page 14]. They specifically point to the radiologist's report of the September 16, 2008, MRI of the brain as unremarkable. [Brief of Respondents, page 14]. They overlook the fact that

Dr. Sandoz also reviewed the same MRI. In his office note of October 24, 2008, Dr. Sandoz reported:

The patient reported here secondary to the complaint of having symptom status post work related injury with neck pain with episodes of dizziness, episode of syncope in the past. This has been worked up and has shown no evidence of any seizure and nor any evidence of any damage of the brain. **Despite that review of the MRI shows some mild abnormality in the temporal lobe.** [R. p. 696 (emphasis added)].

Thus, while the clinical evidence of physical brain damage at that stage was apparently somewhat equivocal (before neuropsychological testing), the MRI showed visible evidence of abnormality in the temporal lobe.⁴ This finding and the earlier proof of bleeding on the brain is consistent with the residual cognitive deficits, balance problems and headaches shown by other medical evidence. More importantly, the MRI is only part of the equation – as “some indisputably physical injuries may not be revealed by diagnostic instruments that can detect only relatively gross physical abnormalities.” Sparks v. Palmetto Hardwood, Op. No. 27229 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 14, 18-19). The argument that “the cognitive complaints and abnormal findings” referred to by Dr. Wagner “are not . . . evidence of physical brain *damage*” fails in light of Sparks and Crisp.

One the “you have to see it” argument is dispensed with, Respondents remaining argument is to argue that both parties presented conflicting medical evidence, such that they win by default under the substantial evidence standard. This is simply not correct. All three experts gave opinions which support a finding of physical brain damage.

Dr. Brabham opined: “to a high degree of professional certainty . . . he has experienced a (Physical) Traumatic Brain Injury and must be expected to permanently remain, unable to engage

⁴The MRI was ordered because Fragosa had been “Complaining of headaches, memory loss, slurred speech since injury at work November 2007.” [R. p. 215].

in full-time gainful, competitive employment as a result of his medical conditions resulting from his on-the-job injuries in November 2007. [R. p. 283-284].

Dr. Wagner opined:

He has persisting cognitive complaints. While he has had excellent neurologic recovery, it is probably that he is exhibiting symptoms of postconcussive syndrome. The cognitive findings while mostly normal, do contain abnormal findings largely in the domain of complex attention and concentration. In addition, he may have some element of decreased intellectual efficiency, although this was not measured. [R. p. 299].

Persistent cognitive deficits on neuropsychological testing done one year after the accident are strong indicators for permanent physical brain damage. See Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 35)(physical brain damage can be proven by cognitive level of functioning and neuropsychological testing).

Dr. Sandoz opined “to a reasonable degree of medical certainty [that] Mr. Fragoso has suffered physical brain damage that has rendered him totally and permanently disabled.” [R. p. 286]. His opinion is prescient – as it virtually mirrors the standard explicated in Crisp. Furthermore, it is consistent with his other opinions expressed in his records and deposition.

Respondents contend Dr. Sandoz has rendered inconsistent opinions regarding physical brain damage, such that this Court must defer to the Appellate Panel. First off, as previously noted, the Appellate Panel used an incorrect standard for determining physical brain injury. Secondly, Dr. Sandoz has not rendered inconsistent opinions; indeed, he has consistently and repeatedly diagnosed Fragosa “with traumatic brain injury, headache, dizziness, difficulty with complex tasks.” [R. p. 239].

Respondents arbitrarily reject Dr. Sandoz’s explicit opinion on physical brain damage and

then take his testimony completely out of context in stating: “it is evident he only opined the Appellant has some residual damage to the *function* of the brain, but there is actually no *physical damage*.” [Brief of Respondents, page 15 (emphasis in original)]. This argument is not only wrong; it’s illogical. Dr. Sandoz gave a positive answer to a leading question which did not ask whether there was physical brain damage, but whether there was physical brain damage which could be seen “if you were to look at scans.” [R. page 319, line 21-page 320, line 24]. No objective person reading the entire passage could reasonably conclude Dr. Sandoz was opining “there is actually no *physical damage*.” Furthermore, Dr. Sandoz dispensed with any such suggestion a few moments later when he testified, “[we call it traumatic brain injury] [b]ecause *there’s been some damage and injury to the function of the brain*.” [R. page 320, lines 20-24(emphasis added)].

There is no distinction between permanent “damage and injury to the function of the brain” and permanent “physical brain damage.” They are the same thing. This was shown by the explicit adoption in Crisp of “cognitive behavioral level of *functioning*” as a valid test to determine whether a person has sustained physical brain damage. See Crisp v. SouthCo Inc., Op. No. 27230 (S.C.Sup.Ct. filed March 6, 2013)(Shearouse Adv.Sh. No. 11 at 21, 35)(emphasis added). Most physical brain injuries are confirmed by later testing of brain function. Brain function is impaired because of the physical brain damage. When the impairment is sufficiently severe to render the worker unemployable, it meets the definition of physical brain damage set out in S.C. Code Ann. § 42-9-10(C)(2007).

There is no conflict in the evidence. The medical evidence overwhelmingly supports the conclusion that Hector Fragosa has suffered “a brain injury so severe that [he] could not subsequently return to suitable gainful employment.” Id. The decision below must be reversed.

3. The Appellate Panel erred to the extent it relied on the statement in Dr. Wagner's report that "Follow-up structural and functional studies (i.e. EEG, CT and MRI) have been read as unremarkable demonstrating structural resolution of the work-related injury." (in Reply to Respondents' Argument at pages 116-18).

As argued in Appellant's Brief at pages 16-18, it was error for the Appellate Panel to rely on Dr. Wagner's statement that "Follow-up structural and functional studies (i.e. EEG, CT and MRI) have been read as unremarkable demonstrating structural resolution of the work-related injury." [R. p. 299]. This statement is not Dr. Wagner's opinion; it is merely an isolated comment on other medical reports – reports which Dr. Wagner, as a neuropsychologist, is not qualified to interpret. The Appellate Panel must consider expert reports in their entirety. They cannot cherry pick an isolated passage from a report to support a pre-ordained opinion with a scintilla of evidence. "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

A neuropsychologist is unquestionably qualified to diagnose physical brain injury. However, his expertise is limited to evaluating cognitive behavioral level of functioning and neuropsychological testing; not EEG, CT and MRI. On the ultimate question – whether Fragosa had sustained permanent physical brain injury - Dr. Wagner never gives an opinion one way or the other. However, the fact his testing revealed permanent cognitive deficits supports the inference of permanent physical brain damage.⁵

Respondents also argue that Dr. Wagner's opinions need not be stated to a reasonable degree

⁵The cognitive deficits are permanent because Dr. Wagner also stated Fragosa had reached "maximum medical improvement in terms of his neurological/brain status. [R. p. 299].

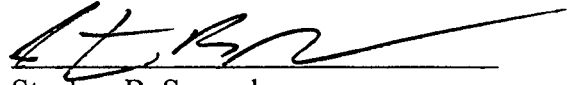
of medical certainty because “Respondents are not required to *disprove* a medically complex case by medical evidence.” [Brief of Respondents, page 17 (emphasis in original)]. See S.C. Code Ann. § 42-1-160(2007)(requiring expert opinion or testimony to be stated to a reasonable degree of medical certainty in complex cases). This suggestion was categorically rejected by the Supreme Court in Michau v. Georgetown County, 723 S.E.2d 805, 396 S.C. 589 (2012). In Michau, the employer obtained an expert opinion from a non-treating physician specifically to *disprove* the opinion of the employee’s doctor. The opinion was not stated to a reasonable degree of medical certainty as required in medically complex cases. The court excluded the IME report as it was not competent evidence due to this defect. The court also rejected the employer’s argument that the statutory requirement “applies only to claimants and not defendants.” Id.

Dr. Wagner’s report is explicitly denoted as an “Independent Medical Evaluation.” [R. p. 296]. It is not competent evidence and cannot be relied on as substantial evidence to outweigh the opinions of Dr. Brabham and Dr. Sandoz.

CONCLUSION

For the foregoing reasons, the Court should reverse the Appellate Panel and hold Hector Fragosa suffered physical brain damage, is not subject to the five hundred week limitation, and shall receive disability and medical benefits for life.

Respectfully Submitted



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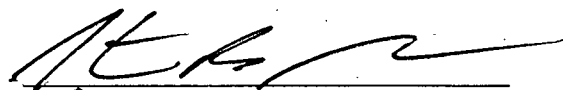
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CERTIFICATE OF COUNSEL

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

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