

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 25 2013

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

S.C. Supreme Court

THE HONORABLE MICHAEL G. NETTLES, CIRCUIT COURT JUDGE

CASE No. 2007-CP-21-2065

CLIFTON SPARKS, PETITIONER,

v.

PALMETTO HARDWOOD, INC., AND
PALMETTO TIMBER S.I. FUND C/O WALKER,
HUNTER & ASSOCIATES, RESPONDENTS.

**RESPONDENTS' RETURN
IN OPPOSITION TO MOTION OF AMICUS CURIAE
BRAIN INJURY ASSOCIATION OF SOUTH CAROLINA
FOR LEAVE TO FILE AMICUS BRIEF**

Pursuant to Rule 240(e), SCACR, Respondents Palmetto Hardwood, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates hereby respond in opposition to Brain Injury Association of South Carolina's ("BIA") Motion for leave to file an amicus brief ("Motion"). The Motion is objectionable on several grounds and should be denied.

First, to the extent BIA intends its Motion and its proffered Brief of Amicus Curiae Brain Injury Association of South Carolina ("BIA's Brief") to be filed in the above-captioned matter, it has failed to properly caption both pleadings. Instead, both the Motion and BIA's Brief contain the caption for the Crisp v. SouthCo. case. As such, BIA's Brief fails to comply with the South

Carolina Appellate Court Rules. Rule 213 specifies that amicus briefs “shall comply with the requirements of Rules 208(b) and 211.” Rule 213, SCACR. Rule 208(b)(8), in turn, states that briefs must comply with Rule 267, which requires that the caption contain the names of the parties to the proceeding below. Rules 208(b)(8) & 267, SCACR. Motions must also comply with Rule 267. Rule 240(c), SCACR. Neither BIA’s Motion nor BIA’s Brief comply with the requirement that pleadings be properly captioned.

This is more than a procedural formality. By not filing separate briefs in each pending case, BIA not only offends the Appellate Court Rules, but also creates confusion. For example, BIA’s Brief indicates that it “relies on the Statements of the Case and Statements of the Facts as set forth in the Briefs of the parties” in both Sparks and Crisp. It is inappropriate and confusing to rely on the facts and case history in one case in a procedurally unrelated case. Furthermore, to the extent BIA is relying on the Statements of the Case and Statements of the Facts of the “parties,” it is, in fact relying on the Statement of Facts contained in Respondents’ Brief to this Court, which support this Court’s Opinion entirely. Another example of the confusion BIA’s Brief creates in this case is the fact that BIA states, “[t]his Court frames the issue as a ‘question of whether an employee has sustained either a physical injury to the brain or physical brain damage,’” and cites the Crisp Opinion. (BIA’s Brief p. 9). In this case, this Court stated clearly and in a straightforward manner that, “[a]t issue in this case is the term ‘physical brain damage,’” and made it clear that it was applying a statutory interpretation of that term. Footnote 11 in BIA’s Brief suffers from a similar infirmity, in that it refers to and relies on the respondents’ brief in Crisp.

Second, BIA’s purported Brief is little more than a petition for rehearing, which it readily admits. (See BIA’s Brief, p. 1, Statement of Issue on Appeal, acknowledging that is seeking

rehearing; *see also* p; p. 3, 11, 16, 17, admitting BIA is filing its “Amicus Brief in support of the Petitions for Rehearing in both cases,” and asking this Court to grant the petitions for rehearing). Other than Rule 13’s requirement that an amicus party file a motion seeking permission to file a brief, there is no provision in this Court’s appellate rules for an amicus party to file motions or petitions for rehearing. Rules 13 and 267¹ are the only rules addressing amicus filings. Both Rules address only amicus briefs. In the event this Court should grant rehearing, and only then, it would be appropriate for BIA to move to file an amicus brief addressing the substantive issues to be considered on rehearing.

Third, this Court should deny BIA’s Motion because its Brief purports to analogize the phrase “physical brain damage” to the phrase “traumatic brain injury,” (BIA’s Brief pp. 9-11, 15-16), a term and issue not raised in this case below. Rule 213, SCACR, limits the brief of an amicus curiae “to argument of the issues on appeal as presented by the parties.” In this case, the parties did not argue that the phrase “physical brain damage” was synonymous with or should be interpreted as though it was the same as the phrase “traumatic brain injury.” In addition, pages 12-14, purport to describe various forms of brain damage (focal brain damage, cortical contusions (bruising), diffuse brain damage, *etc.*), none of which was argued by the parties in this case. Finally, much of BIA’s argument implies a denial of treatment. *See* (BIA’s Brief pp. 12, 14). Here, there was no denial of treatment. In fact, the opposite occurred² and denial of treatment was not an issue considered on appeal. Therefore, at a very minimum, even if this Court were to allow BIA to file an amicus brief in this case, pages 9-16 of ABI’s Brief not should be allowed.

¹ Rule 267, SCACR, merely requires the cover of an amicus brief to be green.

² Respondents provided appropriate medical care following Claimant’s injury. Furthermore, the Commission awarded future medical and psychological care for Claimant’s work-related injuries. (R. 74-76). Thus, entitlement to medical care was not an issue in this case.

Fourth, BIA shares in Petitioner Sparks' and Petitioner Crisp's misunderstanding (or misconstruction) of the Respondents' arguments in Sparks. (BIA's Brief, p. 7 and n.2). On page 21 of Respondents' Brief ("Resp. Br.") to this Court in Sparks, Respondents were addressing Petitioner Sparks' specific argument that his brain injury did not need to be permanent in order for him to recover lifetime benefits under Section 42-9-10, and pointing out the fact that the Commission specifically omitted his brain injury from the list of injuries that caused permanent disability. (See Pet. Br. pp. 18-21). While facially clever, attempting to pigeonhole Respondents into a position as advocating a definition of "physical brain damage" that is less robust than that adopted by this Court ultimately fails. As did this Court, Respondents emphasized the traumatic and debilitating nature of an injury that gives rise to lifetime benefits. See Resp. Br. p. 20 (noting that "[t]he third paragraph of S.C. Code Ann. § 42-9-10 provides an additional measure of financial security to workers suffering from certain specific **injuries that are particularly devastating** to quality of life, and require a greater degree of support than other injuries. Inarguably, the purpose of S.C. Code Ann. § 42-9-10 is to provide lifetime support for **workers who sustain traumatic, lifelong injuries** that permanently affect their ability to support themselves," and that "the legislative intent behind S.C. Code Ann. § 42-9-10 is to provide long-term financial security for those who are permanently and totally disabled as a result of **particularly devastating physical conditions** (paraplegia, quadriplegia and brain damage)"); see also Resp. Br. p. 26 (stating that, "[b]y linking entitlement to lifetime compensation for paraplegics, quadriplegics and workers who have suffered physical brain damage, the Legislature carved out an exception from the 500-week limitation for **only those workers who have experienced the most severe, life-changing and permanent physical damage**") (emphasis added). Respondents specifically rejected Claimant's assertion that, even though his concussion

was “mild,” he was still entitled to lifetime benefits. (*See*, Resp. Br. pp. 19-20, 26 (arguing that “[i]t would be incongruous and contradict the purpose and structure of the Act to award a claimant lifetime benefits for a mild concussion...”). To suggest that Respondents “proposed” or “embraced” a definition that discounted the element of severity out of the definition of physical brain damage is to take isolated portions of Respondents’ Brief entirely out of context and to ascribe to Respondents a position they did not take, either in their Brief or at oral argument.

Fifth, this Court should deny BIA’s Motion because BIA’s Brief relies extensively on material that is not in the Record in this case. (*See* BIA’s Brief pp. iv, 2, 10, 11, 12, 13, 14, and 15) (relying on no fewer than six “Secondary Sources” not contained in the Record). One of the items (*see* BIA’s Brief, pp. 2, 11 n.9), was produced by BIA itself – which is hardly an authoritative source on the interpretation of statutory terms under the Workers’ Compensation Act. The authoritative weight of the remaining items has not been evaluated by the Commission, is not readily available to the parties, and should not be considered.

Finally, this Court should deny BIA’s request to participate in oral argument. Although BIA asserts that it represents the interests of “persons with brain injury,” and that “[m]any suffered traumatic brain injuries in the workplace,” (BIA’s Brief, pp. 2-3), there is no indication that a significant or meaningful portion of the individuals BIA represents ever file workers’ compensation claims, who would be the only people directly affected by this Court’s Opinion in Sparks.

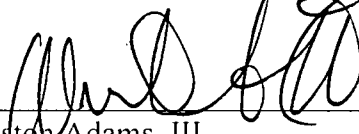
CONCLUSION

For all of the reasons stated herein, this Court should deny ABI’s Motion to file its Brief, deny rehearing in this case, and deny ABI’s request to participate in oral argument, if any, in this

case. At a minimum, and in the event this Court grants rehearing and/or allows ABI to file an amicus brief, this Court should instruct ABI that its brief must comply in all respects with Rule 13, SCACR, and the offending portions of its proffered Brief be either revised or stricken. Finally, should this Court allow BIA to file an amicus brief, Respondents request the opportunity to respond fully to the substance of any such brief.

Respectfully submitted,

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April 25, 2013

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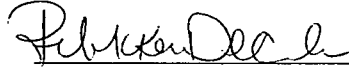
PROOF OF SERVICE

I certify that I have served the **Respondents' Return in Opposition to Motion of Amicus Curiae Brain Injury Association of South Carolina For Leave to File Amicus Brief** on the Brain Injury Association of South Carolina and on Clifton Sparks by depositing a copy of it in the United States Mail, postage prepaid, on April 25, 2013, addressed to their attorneys of record as follows:

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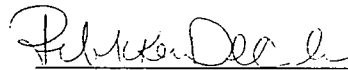
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