THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court Of Common Pleas

Roger L. Couch, Circuit Court Judge

Opinion No. 4746 (S.C. Ct. App. filed September 29, 2010)

Michael D. Crisp, Jr., Employee.....Petitioner,

v.

SouthCo., Employer, and Pennsylvania National
Mutual Casualty Ins. Co., Carrier.....Respondents.

RESPONDENTS' RETURN IN OPPOSITION TO PETITIONER'S PETITION FOR REHEARING

I. INTRODUCTION

This Court reversed the ruling of the court of appeals and remanded this case to the Commission in its decision filed March 6, 2013. (Op. No. 2012-UP-542) (S.C.Sup.Ct. filed March 6, 2013) (Shearouse Adv.Sh. No. 11 at 21) In its Order, the Court remanded to the Commission for a determination with regard to the permanency of Petitioner's injuries and clarified the meaning of "physical brain damage" as that term is used in S.C. Code Ann. § 42-9-10(C). Petitioner filed his Petition for Rehearing in this Court on April 2, 2013. For the reasons stated herein Respondents submits Petitioner's Petition for Rehearing should be denied.

II. ARGUMENT

Rule 221 of the South Carolina Rules of Appellate Procedure contemplates the filing of a petition for rehearing where issues of law or fact have been "overlooked or misapprehended" by the Court. Here, no such omission or misapprehension occurred. Rather, Petitioner seeks to re-argue his case in favor of a less stringent test for the award of lifetime compensation benefits relying upon arguments and authority not heretofore presented to the Commission, the court of appeals, or to this Court. In response, Respondents submit this Court fully considered and rejected the Petitioner's actual arguments on appeal and that it set forth the correct definition of "physical brain damage" for this and future cases. As such, the Petition for Rehearing should be denied.

A. Rehearing Is Unwarranted In Light Of The Court's Order Remanding The Case To The Commission For A Determination Of Maximum Medical Improvement And Permanency.

As aptly noted by the majority, "the Commission did not resolve the permanent status of Petitioner's brain injuries. Rather, 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 . . . .". even though it also determined he had not sustained a "physical brain injury." (Slip Op. at *10; Shearouse Adv. Sh. at 31) Thus, while all parties asserted merits-based arguments regarding lifetime benefits awarded pursuant to Section 42-9-10(C), the Court concluded that "[t]hese arguments were prematurely before the circuit court, court of appeals, and now this Court." (Slip. Op. at *11, Shearouse Adv. Sh. at 32) Petitioner does not challenge this aspect of the Court's

ruling, nor do Respondents in response to the petition for rehearing. Instead, and for the reasons set forth below, Respondents submit the Court reached the correct result and that this case should be remanded to the Commission for further proceedings with the benefit of this Court's analysis of the physical brain damage standard.

B. The Court Did Not Misconstrue Petitioner's Argument With Respect To The Proper Application Of Lifetime Benefits In The Context Of Alleged Physical Brain Damage.

The Court did not misconstrue Petitioner's argument regarding "the proper test for a lifetime benefits [sic] in a brain injury case" because he never made that argument below. (Pet. for Reh'g at 2) Instead, and for the first time on appeal, Petitioner now urges the Court to rule that a claimant is entitled to lifetime benefits pursuant to § 42-9-10(C) where (1) he has sustained physical brain damage from the work-related accident; (2) he is totally and permanently disabled, and (3) the physical brain damage contributes to the disability. (*Id.*) Inasmuch as it is axiomatic that a party may not raise an issue for the first time on appeal, the Court should deny rehearing on the basis that it employed the wrong analysis to determine Petitioner's eligibility for lifetime benefits pursuant to S.C. Code Ann. § 42-9-10. *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2012) (*quoting Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.")).

Petitioner's primary argument to the South Carolina Court of Appeals frames the issue as whether the circuit court "correctly reversed the Commission on the issue of physical brain damage[,] finding that the Commission's findings are contradictory and not supported by substantial evidence and determining as a matter of law that the only conclusion that can be reached . . . is that [Petitioner] has sustained physical brain damage." (App. at 49) Indeed, Petitioner (1) consistently argued that substantial evidence, including "all the probative expert evidence . . . indicates brain injury and physical brain damage. . . ." and (2) urged the appellate courts to view his expert's finding of "traumatic brain injury" as the type of compelling evidence of "physical brain damage" that would entitle him to lifetime benefits as contemplated in Section 42-9-10. (*Id.* at 23, 29) Not once did Petitioner urge the court of appeals or this Court to adopt the rule of law he now advances in his Petition for Rehearing; to wit, "that lifetime benefits are appropriate in the case of a brain injury that is a contributing cause, but not necessarily the sole cause, of a claimant's permanent and total disability." (Pet. for Reh'g at 3)

Petitioner advanced similar "substantial evidence" arguments in his brief and oral argument to this Court without ever advocating a specific test for or definition of "physical brain damage" beyond the mere presence of brain injury as a prerequisite to lifetime compensation benefits. For example, Petitioner's statement of issues on appeal all frame the issue as whether or not substantial evidence supports a finding of physical brain damage. (Pet'r's Br. at 1) Nowhere in his Brief (or during the course of his oral argument) did Petitioner advance a specific test for determining the existence of physical

brain damage, let alone the specific test he urges the Court to adopt in his Petition for Rehearing[1]. Instead, he merely cut and pasted his extensive catalogue of record evidence and repeated his argument that "[t]he statue merely states that the physical brain damage must exist. Whether a worker has sustained minor physical brain damage or severe physical brain damage, the existence of physical brain damage satisfies the statute." (Pet'r's Br. at 24) Going further, Petitioner again urged this Court to conclude that "all the probative evidence . . . proves that [Petitioner] sustained brain injury and physical brain damage within the meaning of the statute. . . ." (*Id.*)

It is axiomatic that where, as here, an issue or argument is not preserved for appellate review when it is raised for the first time on appeal. *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 n. 2 (2010) (internal citation omitted); *Kennedy*, 349 S.C. at 533, 564 S.E.2d at 323 ("The appellants have the responsibility to identify errors on appeal, not the Court."). It is clear Petitioner consistently argued that substantial record evidence supports his contention that he sustained a traumatic brain injury and that he never advocated the approach he now urges in his Petition for Rehearing. It is equally clear that Petitioner urged the court of appeals and this Court to take the view that brain injury and "physical brain damage" are synonymous and, as such, to conclude that he is entitled to lifetime benefits pursuant to Section 42-9-10(C). His argument for rehearing

[1] Petitioner's briefs are devoid of reference to *Pearson v. JPS Converter & Indus. Corp.*, 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997), or *Stephenson v. Rice Services*, 323 S.C. 113, 473 473 S.E.2d 699 (1996). Further, Petitioner misstates *dicta* in *Stephenson* for the proposition that "any brain injury, without proof of total and permanent disability, triggers lifetime benefits . . . ." (Pet. for Reh'g at 3) As the Court has made clear, however, "it is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits." (Slip. Op. at * 15; Shearouse Adv. Sh. at 35) (citation omitted).

on a different basis that would impose a less stringent standard for lifetime benefits comes too late and should be rejected.

C. The Court Correctly Defined "Physical Brain Damage" As that Phrase is Used in section 42-0-10(C).

In its opinion, the majority adhered to the long-standing tenants of statutory construction in order to define "physical brain damage" in a manner that harmonizes with "the entire purpose of our workers' compensation regime and recognizes the other avenues of compensation available under the scheme for brain injuries that do not render the worker unemployable. (Slip Op. at * 14; Shearouse Adv. Sheet at 34-35) (*quoting Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 112, 156 S.E.2d 646, 649 (1967) ("The object of the act is to relieve an injured workman from the loss or impairment of his Capacity to earn wages.")). Respondents respectfully submit this is the correct result and that the Court should adhere to the view that "only in cases of physical brain damage that are both permanent and severe would an employee-claimant be entitled to benefits for life." (*Id.*; Shearouse Adv. Sh. at 35) Petitioner's argument to the contrary is not preserved for review, is incorrect, and should be rejected.

In his Section II of his Petition for Rehearing, Petitioner asserts the Court has muddled the analysis by using terms with "specific medical definitions", thereby resulting in what he believes is the "unintended effect of making the lifetime benefits statue narrower than its intended scope." (Pet. for Reh'g at 4) As with the argument in favor of rehearing addressed in the preceding section, however, Petition never presented this argument prior to the rehearing phase and has therefore waived it. *Herron, supra*, 395 S.C. at 469, 719 S.E.2d at 644 (a party may not raise an issue for the first time on

appeal). Even assuming the argument is preserved, which it is not, it must fail as inconsistent with the clear legislative intent that lifetime awards pursuant to section 42-9-10(C) are reserved to those cases of physical brain damage that is permanent and severe.

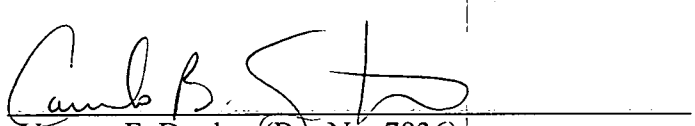
As this Court has now recognized, inclusion by the legislature of "physical brain damage" in section 42-9-10(C) makes clear that the underlying injury should be among the most serious injuries possible, the existence of which should not be left to speculation or conjecture. (Slip Op. at * 12; Shearouse Adv. Sh. at 33) (*citing Floyd v. C.B. Askins & Co.*, 382 S.C. 84, 90, 675 S.E.2d 450, 453 (Ct. App. 2009)). The Court's guidance in defining "physical brain damage" also places South Carolina in harmony with the analysis employed by its sister states of North Carolina and Virginia, which require proof of "severe" injury that permanently impairs the claimant's ability to return to gainful employment. (*Id.*; Adv. Sh. at 33-34) (internal citations and quotations omitted). Respondents respectfully submit this is the correct test, as it recognizes the clear intention of the legislature and conforms to the approach taken by other states on this issue. Most importantly, the Court's opinion provides meaningful guidance to the Commission and the courts in analyzing whether a claimant has sustained his burden of proving physical brain damage so severe that it will prevent his return to gainful employment, thereby entitling him to lifetime benefits under the act.

III. CONCLUSION

The Court's opinion fully addresses the issues actually presented on appeal, and it correctly decided those issues. Petitioner's Petition for Rehearing does not demonstrate otherwise, and there is no reason for the Court to revisit its decision. For these reasons,

Petitioner's Petition for Rehearing should be denied.

TURNER PADGET GRAHAM & LANEY P.A.

April 22, 2013 By: 

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PROOF OF SERVICE

I certify this 22nd day of April 2013 that I served a copy of RESPONDENTS' RETURN IN OPPOSITION TO PETITIONER'S PETITION FOR REHEARING upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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(Signature page to follow.)

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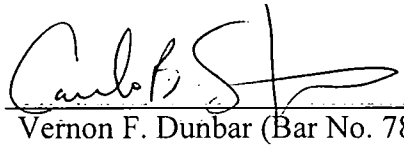
April 22, 2013

By: 

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