THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

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 TO PETITION TO RECALL THE REMITTITUR AND ORDER REHEARING

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 Petitioner Clifton Sparks' ("Petitioner Sparks") Petition to Recall the Remittitur and Order Rehearing ("Petition")[1] of this Court's decision, Sparks v. Palmetto Hardwood, Inc., 2013 S.C. LEXIS 34 (2013).

Sections I and II of the Petition merely purport to adopt and incorporate the Petition for Rehearing filed in Crisp v. SouthCo., Inc., 2013 S.C. LEXIS 32 (2013) ("Crisp Petition"). Petitioner Sparks' attempt to adopt and incorporate the Crisp Petition is improper for several

[1] Petitioner Sparks' request to have the remittitur recalled has been granted and, therefore, Respondents do not address that issue.

reasons. First, these two cases were not and have not ever been consolidated and are not "companion cases" but, instead, are two separate proceedings with completely different facts and procedural postures. Second, although Rule 208(b)(6), SCACR, allows parties to an appeal to adopt by reference part or all of another party's brief, as noted, Mr. Crisp is not a party to this proceeding and Mr. Sparks is not a party to the Crisp matter. Third, although Petitioner Sparks attached the Crisp Petition to his Petition, and although Rule 240(c)(3), SCACR instructs that, "where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions," the Crisp Petition is not a source of "facts." Instead, it is legal argument based on an entirely different case. Fourth, it is procedurally inappropriate and unfair for Petitioner Sparks to simply adopt and incorporate the Crisp Petition, as it forces Respondents to respond to issues and arguments arising out of a separate case. In essence, it unfairly requires Respondents to respond to two separate petitions for rehearing, one of which was filed in an entirely different case by a non-party to this proceeding. If Petitioner Sparks favored the arguments made in the Crisp Petition, he should have drafted them in his own words to fit the facts of this case. For these reasons, the Court should disregard entirely those portions of the Petition that purport to adopt and incorporate by reference the Crisp Petition.

Nonetheless, out of an abundance of caution, Respondents respond to the substantive points raised in the Crisp Petition that are purported to be incorporated into the Petition.

I. This Court understood and applied the proper definition of physical brain damage under section 42-9-10.

Section I of the Crisp Petition argues this Court should adopt the test they allege was "proposed" by the employer and carrier in Sparks. (Crisp Pet. pp. 2-3). First, although Petitioner Sparks is purportedly alleging that the argument presented by Petitioner Crisp was one

of his "alternative arguments with respect to the proper application of the lifetime benefits statute in the context of a brain injury," (Pet. p 2) (Crisp Pet. p. 2), at no point below did Petitioner Sparks presume to adopt or agree with Respondents' definition of physical brain damage. Thus, Petitioner Sparks is both changing his position and making arguments in his Petition that he did not make below. This he cannot do. *See* McLeod v. Starnes, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012) (a party may not take one position below and a different position on appeal); Multi-Cinema, Ltd. v. South Carolina Tax Comm'n, 300 S.C. 514, 518, 389 S.E.2d 153, 154 (1989) (a party cannot raise an argument for the first time on rehearing); *see also* Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, ___, 737 S.E.2d 601, 613 (2013) (arguments cannot be presented for the first time on appeal).

Second, what Petitioner Sparks and Petitioner Crisp misunderstand or misconstrue is that the arguments on page 21 of Respondents' Brief ("Resp. Br.") in Sparks 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 Petitioner Sparks' assertion that, even though his concussion was "mild," he was still entitled to lifetime benefits. (*See*, Pet. 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.

Finally, Petitioner Crisp attempts to create a conflict between the holdings in Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997) and Stephenson v. Rice Servs. Inc., 323 S.C. 113, 473 S.E.2d 699 (1996). Petitioner Crisp's argument provides no grounds for rehearing this Court's Opinion in Sparks. First, Stephenson simply does not imply "that any brain injury, without proof of total and permanent disability, triggers lifetime benefits," as Petitioner Crisp suggests. (Crisp Pet. p. 3). Instead, the dicta Petitioner Crisp focuses on in Stephenson was describing the "combination of two competing models of workers'

compensation, one economic and the other medical." Stephenson, 323 S.C. at 116, 473 S.E.2d at 700. This Court was explaining the two conceptual situations under which a claimant may be found to be totally disabled: 1) the medical model, under parts of Sections 42-9-10 (loss of certain body parts and quadriplegia, paraplegia and physical brain damage) and 42-8-30 (50% or more loss of use of the back), where qualifying claimants are deemed permanently and totally disabled; and 2) the economic model where the claimant must prove inability to earn wages. Under the former, "the medical model of workers' compensation predominates." Stephenson, 323 S.C. at 118, 473 S.E.2d at 701. As this Court found, linking physical brain damage with paraplegia and quadriplegia indicates a legislative intent to grant lifetime benefits to only the most seriously and permanently injured workers.

Second, the verbiage that Petitioner Crisp focuses on in the Court of Appeals' Pearson Opinion was responding directly to an argument made by the employer that, "the record does not sufficiently support that Pearson's total disability was a result of physical brain damage," and that, instead, the claimant's disability was the result of a combination of psychological problems and brain damage. Rejecting the employer's argument, the Court of Appeals explained, "that section 42-9-10 does not require the total and permanent disability to be solely the result of physical brain damage – **the statute only requires that a claimant be totally and permanent[ly] disabled and suffer physical brain damage as a result of the injury**." Pearson, 327 S.C. at 400, 489 S.E.2d at 222 (emphasis added). While it may be implicit in Pearson that physical brain damage should contribute to the claimant's total and permanent disability, in reality, any injury that satisfies this Court's definition of physical brain damage will necessarily contribute to a claimant's inability to earn wages.

Finally, as Petitioner Crisp points out, neither this Court's Crisp nor Sparks Opinions cite Stephenson.[2] Petitioner Sparks did not cite it in either of his briefs below. This Court should reject attempts to fabricate conflicts and new issues at this point. *See* Multi-Cinema, 300 S.C. at 518, 389 S.E.2d at 154.

II. This Court did not unintentionally use medical terms that inject new ambiguity into the definition of physical brain damage as used in Section 42-9-10.

First, Petitioner Crisp acknowledges that an employee is not entitled to lifetime benefits when "the brain injury is not permanent." (Crisp Pet. p. 6). However, Petitioner Sparks vociferously argued below that the brain injury did not need to be permanent in order for him to be entitled to lifetime benefits. (*See* Reply Brief of Petitioner Sparks, pp. 4-6). As noted above, Petitioner Sparks cannot make inconsistent or new arguments on rehearing. *See* McLeod, 396 S.C. at 657, 723 S.E.2d at 204; Multi-Cinema, 300 S.C. at 518, 389 S.E.2d at 154.

Second, although Petitioner Crisp (and by adoption Petitioner Sparks) spends over two full pages opining and instructing this Court on the use of the term "severe" in the medical field, he points to no evidence in the Record in this case to support his arguments. Unsupported arguments should be disregarded. *See* Cole v. South Carolina Elec. & Gas, Inc., 355 S.C. 183, 196, 584 S.E.2d 405, 412 (Ct. App. 2003) (declining to consider argument in part because it was not supported by authority); *see also* Goodwin v. Kennedy, 347 S.C. 39 n.4, 552 S.E.2d 319, 3245 n.4 (2001) (refusing to consider argument where the party cited no authority for its proposition). Clearly, unsupported statements by counsel do not constitute facts. *See* Reed-Richards v. Clemson Univ., 371 S.C. 304, 309 n.7, 638 S.E.2d 77, 80 n.7 (Ct. App. 2006) (noting that "[i]t is well established that counsel's statements regarding the facts of a case and counsel's

[2] Thus, Petitioner Crisp's assertion that this Court's Opinions in both cases were "trying to reconcile *Pearson* with *Stephenson*," (Crisp Pet. pp. 3, 6), is baseless and should be rejected.

arguments are not admissible evidence"); Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (argument of counsel is not evidence). Furthermore, despite the fact that Respondents clearly argued that severity was a necessary element of physical brain damage as defined in Section 42-9-10, *see* Section I above, Petitioner Sparks did not provide any of the medical definitions he now attempts to advance through the Crisp Petition in the Record on Appeal. Under Rule 210(h), "the appellate court will not consider any fact which does not appear in the Record on Appeal." 210(h), SCACR; *see also* Johnson v. South Carolina Dept. of Probation, 372 S.C. 279, 283, 641 S.E.2d 895, 897 (2007) ("[o]rdinarily, no point will be considered which does not appear in the record on appeal"); McCall v. IKON, 380 S.C. 649, 663, 670 S.E.2d 695, 703 (Ct. App. 2008) (noting that the appellant bears the burden of preparing the Record on Appeal and refusing to consider argument dependent on facts not in the record). Finally, despite Petitioners' assertion that severe is a "medical term of art," there is no need to employ anything other than the common understanding of the term severe.

In addition, Petitioner Crisp reverts to the use of the term brain injury, as opposed to physical brain damage, and attempts to craft a definition that he might more easily meet. His proposed definition (that all a claimant need prove is that he or she is totally and permanently disabled and that he or she suffered a brain injury that contributes in some way, regardless of however small, to the disability) does not make sense in the context of the statute providing for lifetime benefits for only the most severe and permanent injuries – paraplegia, quadriplegia and physical brain damage. The grouping of physical brain damage with paraplegia and quadriplegia is a clear and conclusive indication that the legislature intended to award lifetime benefits only to those employees who have suffered the most severe and life-altering injuries and, conversely, to preclude lifetime benefits for claimants who do not meet this test.

Finally, this Court was well aware of the words and terms it was using in Sparks (as well as in Crisp, as there is no reason to believe otherwise). As the case cited by Petitioner Crisp reveals, Reed-Richards v. Clemson Univ., 371 S.C. 304, 638 S.E.2d 77 (Ct. App. 2006), even the term paraplegia has some medical ambiguity, but the Commission and Courts are sufficiently able to understand and apply the term. The same is true of the requirement that physical brain damage be severe and permanent in order for a claimant to be entitled to lifetime benefits.

Although Petitioner Crisp argues that physical brain damage is often combined with other injuries and that, "the degree to which brain damage contributes to the claimant's total disability cannot be precisely determined," (Crisp Pet. p. 6), this is a non-issue. Neither this Court's Opinion in Sparks nor in Crisp required that the claimant prove to what degree his physical brain damage contributed to the claimant's total disability.

III. This Court properly affirmed the Commission's determination that Petitioner Sparks did not suffer physical brain damage as contemplated by Section 42-9-10 and there is no need to remand.

This Court properly held that, "'physical brain damage' as contemplated in S.C. Code Ann. § 42-9-10 requires severe and permanent physical brain damage as a result of a compensable injury and the Workers' Compensation Commission's finding that Petitioner did not suffer such brain damage is supported by substantial evidence in the record ..." Sparks, 2013 S.C. LEXIS 34 *11.[3] Petitioner Sparks' arguments that this Court should remand rather than affirm the denial of lifetime benefits repeats the same arguments he has pressed below unsuccessfully. They are equally unpersuasive here.

[3] Because this Court correctly determined that the Commission's application of the phrase physical brain damage is consonant with the legislature's intent, the Commission's findings of fact should be upheld so long as they are supported by substantial evidence, Whitworth v. Window World, Inc., 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008), which this Court has determined is the case.

The suggestion that this case should be remanded to the Commission because the Commission may have misunderstood and misapplied the word "physical" and/or the phrase "physical brain damage," is specious. First, as noted in Respondents' Brief, the Commission did not "disobey" a directive form the Circuit Court to define the terms "physical" and/or "physical brain damage." (Pet. p. 3).[4]

Second, the Commission's application of the term physical brain damage in this case is entirely consistent with this Court's Opinion. The Commission noted the conflicting medical evidence in the case and found that, "[m]edical records consistently describe Claimant's condition as a mild concussion, with no loss of consciousness, and all radiographic studies of Claimant's head and brain were normal." (R. 72). In addition, the Commission found Petitioner Sparks' testimony relating to his brain injury not credible. (Id.). Following his initial injury, none of the hallmarks of a serious head injury were present. "There is no clear and convincing evidence that following the admitted head injury, Claimant was dazed and confused and suffered nausea, vomiting, cognitive impairments and post-concussive headaches." (R. 73).[5] Dr. Suggs noted in June that Petitioner Sparks "comes in with a history of having had a concussion." (R. 415). The use of past tense here clearly indicates Dr. Suggs considered the concussion resolved. On his next visit, Petitioner Sparks reported that his headaches were much better. (R. 416). After extensive examination, Drs. Baumgartner and Waid concluded that, although Petitioner Sparks had suffered a mild concussion, his "primary problem is one of psychiatric dysfunction

[4] The 2007 Circuit Court Order did not require the Commission to provide a textbook definition of these terms but, instead, instructed it to "explain what it means by the use of the term 'physical brain injury', whether it is different from 'physical brain damage', or is intended to be the same as 'physical brain damage.'" (R. 2); *see also* (Resp. Br. p. 24).

[5] As Dr. Waid explained, although Petitioner Sparks "may have experienced a mild concussion as the result of the 3rd work related accident in May of 2001, review failed to suggest an extended period of loss of consciousness or highly disruptive acute neurological sequelae that would provide compelling evidence that he sustained physical injury to the brain." (R. 629). Dr. Kang explained that "[t]he hallmark of a serious head injury is loss of consciousness." (R. 729).

and chronic pain." (R. 724) (*see also* R. 629). Dr. Kang concurred. (R. 729). This is substantial evidence that the injury to Petitioner Sparks' brain was neither severe nor permanent. Despite Petitioner Sparks' allegations, the Commission did not find that his tremors, loss of coordination, gait problems or injury to his psyche were caused by his brain injury. (Pet. p. 7). Instead, the Commission found that he suffered "permanent injury to his back (affecting lower extremities), neck (affecting upper extremities), bladder, and psyche. Related symptoms include tremors, loss of coordination and gait problems." (R. 73). Furthermore, the Commission did not focus solely on the initial injury. Instead, the Commission reviewed all of the evidence in this case – not just the initial diagnosis – and made its decision on the basis of the entire record.

As this Court found, the Commission's, "interpretation of 'physical brain damage' is clearly consonant with the intent of the General Assembly as more fully discussed below." Sparks, 2013 S.C. LEXIS 34 *5.[6] The Commission's 2007 Decision, (R. 69-76), clearly stated that, while Petitioner Sparks had suffered a work-related injury to his brain, he "failed to carry his burden of proof to establish physical brain damage as contemplated by S.C. Code Ann. § 42-9-10." (R. 72-73). While Respondents understand Petitioner Sparks' desire to avoid the conclusion of his claim, there simply is no need to remand to the Commission in order for it to state yet again that he failed to prove he suffered physical brain damage, where this Court has already determined that the Commission's "interpretation of 'physical brain damage' is clearly consonant with the intent of the General Assembly ...". Sparks, 2013 S.C. LEXIS 34, *5.

Petitioner Sparks again insists that the Commission may have erroneously believed that physical brain damage must be proved radiographically. As noted in Respondents' Brief, not

[6] The fact that the Commission's 2006 Decision found that his claim for physical brain injury bordered on the frivolous is irrelevant, as that Decision is not on appeal here.

only was this argument not accepted for review,[7] but it is fabricated out of nothing more than Petitioner Sparks' speculation that the Commission "believed the absence of positive brain imaging signified no 'physical' brain damage." (Pet. p. 5). As Respondents pointed out previously, medical evidence such as MRIs, CTs and the like are designed to aid the Commission in its decision-making, along with other evidence such as expert testimony and lay testimony. Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 106 (1999). The Commission gave no indication that the presence of objective medical evidence is an absolute requirement for finding physical brain damage. Instead, the Commission weighed all the evidence, including Petitioner Sparks' testimony, medical reports and the test results, and found that Petitioner Sparks had failed to "carry his burden of proof to establish physical brain damage." (R. 73). Specifically, the Commission reviewed the reports of a neuropsychologist (Dr. Waid), a neurologist (Dr. Bumgartner), and a physiatrist (Dr. Kang) who concluded after extensive examinations that Petitioner Sparks may have suffered a mild concussion but that his primary problem was his psychiatric difficulty and chronic pain. *See* (R. 629) (R. 723) (R. 729). In short, Petitioner Sparks did not prove either that his current condition, regardless of the severity, was attributable to his head injury, or that he had suffered physical brain damage as that phrase is used in Section 42-9-10. Thus, the Commission's finding of no physical brain damage is supported by substantial evidence in the record that did not depend on the presence or absence of radiographic brain imaging. This Court should reject Petitioner Sparks' attempt to fabricate issues out of nothing more than his own speculation.

[7] *See* Petitioner Sparks' Petition for Writ of Certiorari, p. 17 n.9, including this footnote as part of argument No. IV, which this Court did not accept for review (Order of the Supreme Court, filed June 8, 2012 (granting review of Petitioner Sparks' questions II, III, V, VII and VIII, but denying review of Petitioner Sparks' questions I, IV and VI)).

As to Petitioner Sparks' allegation that the Commission may have failed to attribute appropriate weight to "the vocational significance of the residual permanent damage," (Pet. p. 3), that language does not appear in this Court's Opinion. As there is no discussion of the "vocational significance of the residual permanent damage," in this Court's Opinion, there is no reason to remand to the Commission for it to consider the same.

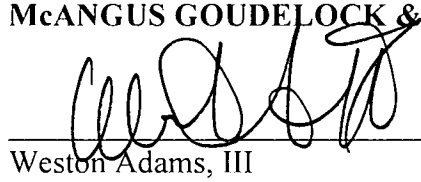
Finally, Petitioner Sparks' reliance on Burnette v. City of Greenville, 737 S.C. 200, 2012 S.C. App. LEXIS 362 (Ct. App. 2012) is misplaced. First, the facts in Burnette are distinctly different from the facts of this case. At issue in Burnette was whether substantial evidence in the record supported the Commission's finding that the claimant did not injure her lower back in a particular incident, and whether the Commission formed its own, independent medical opinion. 2012 S.C. App. LEXIS 362 **16-17. In contrast, here there was no issue raised below that the Commission was forming its own medical conclusions. Furthermore, substantial evidence in this Record supports the Commission's conclusion that Petitioner Sparks did not suffer physical brain damage. As noted above, there is substantial evidence that Petitioner Sparks' brain injury was neither severe nor permanent. Second, the Court of Appeals' Opinion in Burnette is not persuasive authority in that it has been appealed to this Court and may well be overturned.

CONCLUSION

For all the reasons stated herein, this Court should deny the Petition and affirm its March 6, 2013 Opinion in this case.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC



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April 25, 2013

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PROOF OF SERVICE

I certify that I have served the **Respondents' Return to Petition to Recall the Remittitur and Order Rehearing** on Clifton Sparks by depositing a copy of it in the United States Mail, postage prepaid, on April 25, 2013, addressed to his attorney of record:

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