

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

T. SCOTT BECK, COMMISSIONER, CHAIR
DERRICK L. WILLIAMS, COMMISSIONER

W.C.C. FILE NO.:0810190

Bobby Baker,Employee/Claimant/Appellant,

vs.

Hilton Hotels Corporation, Employer, and
Ace American Insurance Company,.....Carrier/Defendants, Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

This is an appeal from the finding of the Appellate Panel, upholding the Single Commissioner's ruling that Bobby Baker did not suffer a physical brain damage. **(R. pp.18-24).**

On May 6, 2008, Mr. Baker suffered a compensable work related injury when a ceiling tile fell and struck him on the head, cutting him, and injuring his head, neck and back. Mr. Baker filed for workers compensation benefits for injuries to his head, neck, and back, and physical brain damage. **(R. pp. 25-27).**

A hearing before the single Commissioner was held on December 15, 2010. **(R. pp. 38-137).** The single Commissioner found that the Mr. Baker suffered a work related injury to his back, sustained a greater than 50% loss of use of his back, is permanently and totally disabled as a result thereof, and entitled to disability benefits pursuant to S.C. Code Ann. §42-9-10(B) in the amount of \$623.60 per week from May 5, 2008 for a period not to exceed five hundred (500) weeks. **(R. pp. 4-17; 15).** In addition, the single Commissioner held that Mr. Baker did not suffer physical brain damage as a result of the accident and denied lifetime benefits under S.C. Code Ann. §42-9-10(C). **(Id.) (R. pp. 14-15)**

Mr. Baker appealed from the single Commissioner's finding that he did not suffer physical brain damage as a result of the work related accident to the Appellate Panel of the Workers Compensation Commission. **(R. pp. 34-35)** The Appellate Panel upheld the Decision and Order of the single Commissioner in its entirety by Order dated October 31, 2011. **(R. pp. 18-24).** Mr. Baker timely appeals from this Order. **(R. pp. 36-37).**

STATEMENT OF THE FACTS

On May 6, 2008, Mr. Baker suffered a work related injury when a ceiling tile fell down and hit him on the top of the head. (R. p. 263). Mr. Baker lost consciousness, was knocked to the ground, and received 12 stitches on his scalp. (Id.). Ten days later, on May 16, 2008, Mr. Baker visited Doctor's Care complaining of lower back and neck pain and was diagnosed with a low back strain. (R. pp. 264-265).

Mr. Baker saw Dr. Michael McCaffrey on June 26, 2008, a neurologist at Strand Regional Specialty Associates. (R. pp. 266-267). Dr. McCaffrey's treatment notes reflect that Mr. Baker's chief complaint was "low back pain", but reflects in his review of symptoms that Mr. Baker has "had weakness, fatigue, and difficulty sleeping since the time of the accident. Dr. McCaffrey also notes that Mr. Baker has intermittent ringing in his ears. (R. p. 267).

From June 26, 2008, Mr. Baker continued treatment with Dr. McCaffrey for his chief complaint of "low back pain", through March 11, 2009. (R. pp. 267-322.). Dr. McCaffrey attempted to treat Mr. Baker's headache symptoms pharmacologically, but his treatment notes reflect these efforts were unsuccessful. (R. p. 316.). Throughout Dr. McCaffrey's treatment notes, Dr. McCaffrey makes mention of symptoms consistent with a physical brain damage, including:

Date	Description of Event
6/26/2008	Strand Regional Specialty Associates Consultation Chief Complaint – Low back pain History states "when he stepped back fire proof ceiling from twelve feet above fell on top of the patient and struck him on the left occipital region of his scalp. He suffered a very brief loss of conscious with a laceration to the occipital area requiring 12 stitches at Grand Strand Regional Medical Center." Last line of history states "he is no longer having any occipital pain or neck pain." Review of systems: "He has had weakness, fatigue, and difficulty

	<p>sleeping since the time of the accident.” Also notes that he wears glasses and has intermittent ringing in his ears.</p> <p>Neurological: “He has had intermittent ringing in his ears. Some muscle weakness and recent closed-head injury.”</p> <p>Impression: “2. Closed-head injury with a left occipital laceration. The patient’s laceration is completely healed, he is having no residual symptoms from this.”</p> <p>Signed by Michael McCaffrey, M.D. (R. pp. 266-269)</p>
6/26/2008	<p>Strand Regional Specialty Associates, LLC Patient Data Base Form Describes problem as “lower back pain” Review of Body Systems Notes – check marks under weakness, fatigue, difficulty sleeping, ringing in the ears, muscle weakness, ringing in the ears, history of head injury (R. pp. 273-276)</p>
8/11/2008	<p>Strand Regional Specialty Associates, LLC Follow Up History – being seen for follow up of left occipital headaches and low back pain secondary to Workmen’s Comp injury. Currently has had increasing problems with his left occipital headaches, which initially resolved. These last for less than five minutes and are sharp in nature and resolve spontaneously. Impression Notes- 2. “Left occipital headaches. These have been worsening over time. He may need to be put on a prophylactic medication for atypical migraine/cluster headaches in the very near future.” (R. pp. 290; 291)</p>
8/11/2008	<p>Strand Regional Specialty Associates, LLC Initial Visit / Follow Up Form Presenting problem – Low back pain Notation on right hand side complaining of pain, left occipital near where hit in the head by tile (R. p. 293)</p>
10/02/2008	<p>Strand Regional Specialty Associates, LLC Chief Complaint – Low Back Pain History – “Since his last visit, he has had intermittent sharp headaches with upper extremity tremor.” Assessment – noted “Intermittent headaches with upper extremity tremor. This appeared to be stable at present. He had a very mild 6 to 8 Hz tremor in the upper extremity, which worsened on finger-nose-finger testing.” (R. pp. 296-297)</p>
11/24/2008	<p>Strand Regional Specialty Associates, LLC Initial Visit Follow Up form Presenting problem is intermittent headaches and lower back pain</p>

	<p>Notation "complaining of pain in occipital scar" (R. p. 299)</p>
01/15/2009	<p>Strand Regional Specialty Associates, LLC Follow Form History of Present Illness: "He continues to have left occipital headaches which radiate into the left shoulder. These do start in a scar where he suffered a laceration in his left high parietal/occipital region of the scalp." Assessment: "Left occipital headaches/neck pain. I will start the patient on Gabapentin 600 mg one-half to one orally three times a day." (R. pp. 310-311)</p>
01/15/2009	<p>Strand Regional Specialty Associates, LLC Initial Visit Follow Up Form Presenting Problem – LBP Right leg radical intermittent headaches near scar, notation regarding medication (R. p. 312)</p>
01/15/2009	<p>Strand Regional Specialty Associates, LLC Work Limitations Form No work until further notice for 2 months until follow up appointment on March 16, 2009 List treatment as "Headaches/Neck Pain/Lumbar Radiculopathy" (R. p. 314)</p>
03/11/2009	<p>Strand Regional Specialty Associates, LLC Follow Examination Notes History of Present Illness: "Since his last visit on January 15, 2009, he continues to have left occipital headaches, which have not improved with Gabapentin." Assessment: "Left occipital headaches/neck pain. This did not improve with Gabapentin. Unfortunately, he has developed an allergic reaction to a previous treatment by Dr. Rosenberg. He may be a candidate for Botox injection in the near future." Notation- "I think the patient is totally/permanently disabled within a reasonable degree of medical certainty in reference to his low back pain, neck pain, and headaches." (R. pp. 315;316)</p>
3/11/2009	<p>Strand Regional Specialty Associates, LLC Initial Visit Follow Up Form Presenting problem listed as headaches and lower back pain Notation "complaining of left occipital headache not improved with gabapentin." (R. p. 318)</p>
3/11/2009	<p>Strand Regional Specialty Associates, LLC Work Limitations Form treatment for Lumbar Radiculopathy / CHIE Left occipital HA No work until further notice for 9 months until follow up appointment on</p>

	12/31/09 (R. p. 322)
10/12/2010	Dr. Michael McCaffrey – Do you concur with the opinion of Dr. Randolph Waid that Bobby Baker has sustained a permanent physical brain injury (See neuropsychological evaluation attached)? Yes. Is your answer based upon a reasonable degree of medical certainty (more likely than not)? Answer Yes. (R. p. 324)

Importantly, on March 11, 2009, Dr. McCaffrey concluded that Mr. Baker “is totally/permanently disabled within a reasonable degree of medical certainty in reference to his....headaches.” **(R. p. 316).**

In addition to treatment with Dr. McCaffrey, Mr. Baker also saw Dr. Jason C. Rosenberg, board certified in neurology and pain management on September 21, 2008. **(R. pp. 325-368).** Dr. Rosenberg’s treatment notes reflect that Mr. Baker has low back pain, and that was when the pain was abated, Dr. Rosenberg would consider further treatment for Mr. Baker’s neck. **(R. pp. 327.).** The following month, on October 29, 2008, Dr. Rosenberg’s notes reflect that Mr. Baker reports headaches and ringing in his ears. **(R. p. 333).** Dr. Rosenberg noted a headache again on November 18, 2008. **(R. p. 338).** Thereafter, on December 1, 2008, Dr. Rosenberg noted “fatigue, heartburn, dizziness, headaches, ringing in his ears...” **(R. p. 341).** Again on April 9, 2009, Dr. Rosenberg noted “headaches, ringing in his ears....” **(R. p. 343).** Dr. Rosenberg’s notes did not reflect any course of diagnosis or treatment for Mr. Baker’s reported headaches and/or ringing in the ears. **(R. pp. 325-368).**

Mr. Baker was also treated by Dr. Jeffrey C. Wilkins, certified in physical medicine and rehabilitation, on September 8, 2009 and evaluated for chronic lower back pain. **(R. pp. 423-431).** On the patient intake form, Mr. Baker complains of numbness, tingling, and frequent headaches. **(R. pp. 424,426).** Dr. Wilkin’s notes do not reflect any

course of diagnosis or treatment for Mr. Baker's numbness, tingling, and frequent headaches. **(R. pp. 423-431).**

Thereafter, on November 4, 2009, Mr. Baker obtained a second opinion regarding his back injury from Dr. Gregory Kang, certified in Physical Medicine & Rehabilitation and Physical Medicine & Rehabilitation - Pain Medicine. **(R. pp. 395-422).** Mr. Kang's treatment was specific to Mr. Baker's back pain and his treatment notes reflect no mention of any symptoms of physical brain damage and/or any treatment for any of the symptoms through November 10, 2010. **(Id.).**

In July 2010, Mr. Baker was referred to Dr. Robert E. Brabham, Ph.D, licensed psychologist and certified brain injury specialist, for an independent psychological and vocational evaluation. **(R. pp. 432-450).** Dr. Brabham concluded that Mr. Baker suffered from a cognitive disorder secondary to traumatic brain injury. **(R. pp. 446-448).**

On July 29, 2010, Mr. Baker saw Dr. Randolph Waid, Ph.D., licensed clinical psychologist. **(R. pp. 451-459).** Dr. Waid concluded that Mr. Baker experiences neurocognitive impairments due to a head injury (physical brain injury). **(R. p. 459).**

Thereafter, on October 12, 2010, Dr. McCaffrey, Mr. Baker's treating neurologist, concurred with Dr. Waid's opinion of physical brain damage. **(R. p. 324).** Further on that same date, Dr. Brabham issued an addendum to his July 2010 psychological and vocational evaluation after review of additional records from Dr. McCaffrey and Dr. Waid, which continued to concluded that Mr. Baker suffered a physical brain damage. **(R. p.p. 434-435).**

On December 4, 2010, Mr. Baker was seen for another neuropsychological evaluation by Dr. Robert E. Deysach, Ph.D. **(R. pp. 460-467).** Dr. Deysach's evaluation

reflects that he did not review the files or treatment notes from Dr. McCaffrey, Dr. Wilkins, or Dr. Kang. (**Id.**). In addition, Dr. Deysach's evaluation reflects that he did not review Dr. McCaffrey's or Dr. Brabham's October 12, 2010 opinion and addendum. (**Id.**). Notwithstanding his failure to review the treatment notes and Mr. Baker's persistent symptoms of physical brain damage, Dr. Deysach appears to conclude that Mr. Baker does not suffer from an acquired brain damage, i.e. any damage to the brain following birth. (**R. p. 467**).

However, Dr. Deysach's report agrees that Mr. Baker suffers from cognitive deficits which developed following the work related accident. (**R. pp. 466-467**). Dr. Deysach's report also seems to contradict his conclusion, and agree that Mr. Baker suffered physical brain damage ("the data do not appear to support the presence of ...restrictions in productivity or quality of life as a result of *the physical brain damage*"). (**R. p. 467**). Further, Dr. Deysach also seems to agree that the physical brain damage Mr. Baker suffered may be one cause, but not the critical cause of Mr. Baker's cognitive deficits ("Although the findings of Dr. Waid and this examiner are **sensitive** to the cognitive deficits the patient is exhibiting, they do not **specifically** point to physical brain damage as a critical cause."). (**Id.**). Rather, Dr. Deysach points to four other potential causes of Mr. Baker's cognitive deficits, including:

- Developmental difficulties in learning
- Increase in distraction from chronic pain
- Cognitive difficulties as a side effect of pain medication (although evaluation notes that Mr. Baker did not take any pain medication the day of the evaluation).
- Increased sensitization to his own areas of learning difficulties

Importantly, of the four causes Dr. Deysach points to, other than physical brain damage, three are post-injury. (**Id.**).

Mr. Baker's wife, testified that prior to the accident Mr. Baker was able to work 80 hours a week, financially take care of their home, and pay the bills. **(R. pp. 62-63)**. However, after the accident, Mrs. Baker stated that Mr. Baker began forgetting things all the time and was getting confused. **(Id.)** Mrs. Baker testified that her husband was not the same person, mentally, as he was before the accident. **(R. p. 63)**. Mrs. Baker even suggested that the doctors needed to examine his head because he seemed to have a progressive problem with his memory and confusion. **(R. pp. 63-64)**. However, according to Mrs. Baker, the doctor's were not authorized to discuss brain injury related treatment. **(R. pp. 63-64; 86-87)**. In addition to confusion and memory problems, Mrs. Baker testified that her husband's personality changed after the accident and that he was more moody and withdrawn and further elaborated and testified to other classic symptoms of brain injury. **(R. pp. 65-74; 79-81)**. Mr. Baker similarly testified regarding his bad headaches and to his mental and personality changes following the accident, consistent with classic symptoms of brain injury. **(R. pp. 93-94; 96-98; 100; 102-103; 110)**. In addition, Mr. Baker also testified that his doctor's were not authorized to discuss brain injury related treatment with him. **(R. pp. 99-100)**.

The Commissioner and the Appellate Panel erroneously relied on Dr. Deysach's report for their fact finding, and as a result both Dr. Deysach's report and the ruling of the Appellate Panel are without evidentiary support.

SCOPE OF REVIEW

The question of whether a claimant asserts a "physical brain damage" within the meaning of the Act is a question of law. Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct. App. 1995). This Court may review the Commission's legal conclusion to

determine if it is affected by an error of law. S.C.Code Ann. §1-23-380(A)(6) (Supp.1999).

Notwithstanding the scope of review on this legal question, this Court must affirm the Commission's factual findings if they are supported by substantial evidence and not controlled by legal error. v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999). "An appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record." Id., at 339, 513 S.E.2d at 845. "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." Id., at 338, 513 S.E.2d at 845 (citing Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995)).

DISCUSSION

I. The Single Commissioner and Appellate Panel erred as a matter of law in failing to find that Mr. Baker suffered physical brain damage?

The Single Commission and Appellate Panel erred in failing to find that Mr. Baker suffered a physical brain damage. South Carolina Code Section 42-9-10(C) provides as follows:

Notwithstanding the five hundred week limitation...any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic or who suffered physical brain damage is not subject to the five hundred week limitation and shall receive such benefits for life.

A. What is a physical brain damage?

The South Carolina Worker's Compensation statutes offer no definition of "physical brain damage". See S.C. Code Ann. §42-1-10 et seq. Further, South Carolina case law providing any definition of "physical brain damage" is notably absent. Only three South Carolina cases address with substance "physical brain damage", but any discussion of the meaning of the term is incidental: Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219 (Ct. App. 1997); Crisp v. SouthCo., Inc., 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010); Potter v. Spartanburg School District 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011).

In Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219 (Ct. App. 1997), the Court of Appeals reviewed the Commission's finding that the claimant was totally and permanently disabled as a result of physical brain damage he suffered from a work related injury. While the Pearson court does not specifically define "physical brain damage", it discusses the term with reference to the claimant's primary treating neurologist's finding of "organic brain damage". 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). Notwithstanding, neither "physical brain damage" nor "organic brain damage" are defined in the text of the Pearson opinion. However, the Pearson court expressly held that:

[S]ection 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 [sic] disabled *and* suffer physical brain damage as a result of the injury.

In Crisp v. SouthCo., Inc., 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010), *cert. granted* Jan. 12, 2012, the Commission determined that the claimant sustained a head injury resulting in cognitive disorders to his brain but not physical brain damage. On

appeal, the Circuit Court reversed and found that the claimant suffered physical brain damage. Thereafter, the Court of Appeals held that substantial evidence supported the Commissions finding that claimant did not sustain physical brain damage and reversed the Circuit Court. The Court of Appeals noted the findings of brain injury related symptoms and conditions, “including chronic headaches, mild verbal memory problems, attention and concentration problems, problem solving and inhibition problems, probable personality change due to head injury, exacerbation of obsessive-compulsive tendencies, decrease in sense of smell, frontal lobe brain injury, traumatic closed head injury, and Cognitive Disorder [not otherwise specified]”, but nonetheless reversed. In reversing, the Court of Appeals relied upon the lack of any brain imaging scans, treatment notations that claimant was neurologically intact, and a lack of evidence of severe headaches and/or loss of consciousness in the treatment notes, and held that substantial evidence supported the Commission’s finding of no physical brain damage. However, other than discussing symptoms of brain injury, nowhere in the opinion does the Court of Appeals define “physical brain damage”. The Supreme Court granted certiorari on January 12, 2012.

In Potter v. Spartanburg School District 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011), the claimant suffered a head injury, which was illustrated with a “small amount of supratentorial blood” on a CT scan of his head. The claimant’s neuropsychological evaluation set forth the claimant’s injuries to include “cognitive disorder residuals of traumatic brain injury”; however, the claimant’s treating physician specifically reported the claimant’s symptom “were probably not related to his fall”, and opined that he did “not feel that [claimant] has any significant ongoing neurologic difficulty from the fall on 12/18/03.” In upholding the decision of the Commission that claimant did not suffer

physical brain damage, the Court of Appeals held that the Appellate Panel could disregard the medical testimony presented in the neuropsychological evaluation, if other competent evidence is presented, such as the that by claimant's treating physician. However, the court in Potter did not discuss the symptoms and/or the definition of "physical brain damage" in reaching this conclusion. Rather, the Potter opinion turned on the weight expert medical evidence could be afforded by the Appellate Panel.

As a result, no statutory or case law definition of "physical brain damage" has been set forth in South Carolina. Therefore, the general rules of statutory construction require the Court to ascertain and effectuate the intent of the legislature. Lester v. South Carolina Workers' Compensation Comm'n, 334 S.C. 557, 514 S.E.2d 751 (1999). When faced with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). Courts should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997).

While Appellant recognizes that a decision of an administrative agency is not binding of this Court, the Workers Compensation Commission and Order in the case of Whitman v. Standard Corp., W.C.C. File No. 0015768 (Nov. 5, 2005), 2005 WL 4684253 (S.C. Work.Comp. Comm. 2005), provides some insight on the treatment of the term "physical brain damage" at the administrative level. In Whitman, Commissioner Bass found that "the definition and thus the legal standard for showing 'physical brain damage' is a novel question in South Carolina" 2005 WL 4684253 at 13. The

commissioner noted that “[c]learly, the legislature intended to elevate [‘physical brain injuries’] to the highest level of benefits, in order to properly provide for the expanded needs of workers suffering these injuries.” Id. Commissioner Bass then undertook a thorough analysis of South Carolina and other states’ case law and workers’ compensation statutes addressing similar terms, and concluded that the term “physical brain damage” included:

- a) damage to the functioning of the brain itself, stemming from damage to either the structure or the substance of the brain; or, in the alternative,
- b) damage to the brain caused by trauma by physical means, as opposed to psychological means.

2005 WL 4684253 at 20-21.

Further, Commissioner Bass concluded that physical brain damage does not, by definition, require proof by objective MRIs, CTs, or other scans. “[B]ecause of the differing nature of brain injuries, many factors go into [a determination of physical brain damage], with the existence or absence of objective scans being only one such fact.”

2005 WL 4684253 at 25. The other pertinent factors Commissioner Bass listed included, but were not limited to, the following:

- a) mechanism of injury (primarily a blow to the head);
- b) presence of loss of consciousness and concussion;
- c) timing of the appearance of the symptoms;
- d) medical history of the claimant;
- e) the nature, extent and continuity of the symptoms and documentations thereof;
- f) the nature and credibility of the expert testimony and the area of expertise, and
- g) the nature and credibility of the lay testimony.

B. The Appellate Panel erred in applying the wrong standard and definition of “physical brain damage”.

In the present case, the only definition of physical brain injury offered into evidence was that by Dr. Waid, whose reports found Baker to suffer from “neurocognitive impairments due to a head injury (physical brain injury)”. (R. p. 459) Dr. Brabham elaborated on this definition and set forth the symptoms of physical brain damage to include, “short term memory loss; trouble concentrating; slowed ability to process information; organizational problems; headaches; major balance problems; depression or mood swings; increased anxiety; easily agitated; changes in vision; appetite, hearing, in balance or muscle coordination; sensitivity to sound and temperature.” (R. p. 447)

Given the legislature’s apparent desire to afford persons affected by physical brain injuries the highest level of benefits, the Appellate Panel in the present case erred as a matter of law in applying an erroneous definition and standard of proof for physical brain damage. Specifically, the Appellate Panel’s finding of facts and conclusions of law do not take into account direct and circumstantial evidence of physical brain injury, including but not limited to, testimony from Bobby Baker, testimony from his wife, Peggy Baker, treatment notes of Dr. McCaffery, the neuropsychological evaluation of Dr. Brabham, the neuropsychological evaluation Dr. Waid, and even the neuropsychological evaluation of Dr. Deysach, all of which acknowledge a work related head injury, a loss of consciousness following the work related head injury, post-concussive symptoms, as well as a variety of other symptoms of physical brain damage. The Appellate Panel simply failed to take into account any of the circumstantial factors that go into a determination of

physical brain damage as set forth by Commissioner Bass in Whitman and placed too much weight on the lack of direct evidence and/or imaging studies. As a result, the decision of the Appellate Panel should be reversed.

C. The decision of the Appellate Panel that Mr. Baker was unlikely to return to gainful employment due to his orthopedic injury, and not due to physical brain damage, is controlled by an error of law.

In Pearson v. JPS Converter & Indus. Corp., 489 S.E.2d 219 (Ct. App. 1997), the Court of Appeals expressly held that:

[S]ection 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 [sic] disabled *and* suffer physical brain damage as a result of the injury.

The Appellate Panel’s conclusions in paragraphs 12 and 13 of the Decision and Order dated October 31, 2011, that “the reason Claimant is unlikely to return to gainful employment is due to his orthopedic injuries and not cognitive limitations,” (**R. p. 21**); and that while Mr. Baker “may have sustained an injury to the head with brief and mild-post concussive symptoms, the data does not support a finding of physical brain damage,” (**Id.**) fails to recognize the principle set forth in Pearson. Specifically, the Appellate Panel and the report of Dr. Deysach, relied upon by the Appellate Panel, recognize that Mr. Baker suffered a work related head injury with mild post-concussive symptoms. (**R. pp. 21, ¶13; 467**). By definition, “post-concussive symptoms,” as identified by the Appellate Panel and Dr. Deysach, are symptoms of physical brain injury, i.e. an “injury to the... brain, resulting from a blow or violent shaking.” Stedmans Medical Dictionary, concussion (27th Ed.); see also Blakiston’s Gould Medical Dictionary, brain concussion (3rd Ed.) (“A condition produced by the sudden application

of violent physical force to the head, marked by varying disturbances of consciousness, autonomic disturbances, reflect changes, lethargy, vomiting, and headache...); see also Dorland's Illustrated Medical Dictionary, concussion of the brain (27th Ed.) ("loss of consciousness as a result of a blow to the head. In mild concussion there is transient loss of consciousness with possible impairment of the higher mental functions, such as retrograde amnesia and emotional lability); Whitman v. Standard Corp., W.C.C. File No. 0015768 (Nov. 5, 2005), 2005 WL 4684253 at 20-21 (S.C. Work.Comp. Comm. 2005)(defining physical brain damage as damage to the brain caused by trauma by physical means, as opposed to psychological means).

As a result, the Appellate Panel and Dr. Deysach both found, a finding which is unappealed from, that Mr. Baker suffered physical brain damage in the form of a concussion and as evidenced by the recognized mild-post concussive symptoms. This physical brain damage, under Pearson, need not result in Mr. Baker's permanent disability for Mr. Baker to qualify for lifetime benefits under South Carolina Code Section 42-9-10(C). Rather, the physical brain damage recognized by the Appellate Panel and Dr. Deysach, i.e. Mr. Baker's post-concussive symptoms, need only to have been found to be a result of Mr. Baker's on the job injury. In other words, the Appellate Panel need only to have found that Mr. Baker suffered physical brain damage and claimant be totally and permanently disabled, not that the post-concussive symptoms caused the permanent disability. See Pearson, 489 S.E.2d 219.

The Appellate Panel erred in making contradictory findings of fact that Mr. Baker suffered post-concussive symptoms, which is by definition, a physical injury to the brain, i.e. physical brain damage, and yet finding that Mr. Baker did not meet his burden-of

proof of physical brain damage. Moreover, the Appellate Panel erred in failing to apply Pearson, which requires only a finding of physical brain damage and total and permanent disability. South Carolina does not require that Mr. Baker's physical brain injury, i.e. his post concussive symptoms recognized by the Appellate Panel and Dr. Deysach, no matter how mild or severe, be the cause of his physical disability. Id.

As a result, the decision of the Appellate Panel should be reversed.

II. The Single Commissioner and Appellate Panel erred in failing to find that Mr. Baker suffered physical brain damage because the findings of fact are without evidentiary support?

The Appellate Panel committed reversible error by finding of facts without any evidentiary support in the record.

First, the Appellate Panel found that "Claimant was treated for over two years after the accident and there was no mention of or treatment for brain damage or any other head injury." (R. p. 21, ¶5). Quite contrary to the Appellate Panel's findings of fact, the record is replete with mentions of brain injury symptoms and head injury, including Mr. Baker's initial visit on May 6, 2008 to the emergency room for treatment for his work related head injury and scalp laceration. (R. p. 263) The emergency room notes reflect that Mr. Baker reported: "I got hit in the head with a ceiling tile." (Id.) Further, the emergency history reflects: "Ceiling tile fell down and hit him on top of the head and he suffered a scalp laceration....He did lose consciousness. (Id.) He stated it did knock him to the ground, but he was not injured anywhere else." (Id.) Thereafter, Mr. Baker reported head injury and brain damage symptoms on no fewer than seven (7) separate occasions to his treating physician, Dr. McCaffrey, on no fewer than three (3) separate occasions to Dr. Jason C. Rosenberg, board certified in neurology and pain management,

and on least one (1) occasion to Dr. Jeffrey C. Wilkins, certified in physical medicine and rehabilitation – all within the first two years of treatment and prior to any neuropsychological evaluation by Dr. Brabham, Dr. Waid, and/or Dr. Deysach. (See R. pp. 264-265; 266-269; 273-276; 290-291; 293; 296-297; 299; 312; 314; 315-316; 318; 322; 324; 325-368; 423-431; 395-422; 432-450; 451-459; 434-435). Even Dr. Deysach concurs that Mr. Baker “did suffer an injury to the head with brief and mild post-concussive symptoms.” (R. p. 467).

As a result, the Appellate Panel committed reversible error and erred in finding that Mr. Baker did not suffer physical brain damage.

Second, the Appellate Panel found that: “No medical tests or imaging studies were conducted as a result of complaints of a physical brain injury or physical brain damage.” (R. p. 20, ¶6). Although it is agreed that no imaging studies were conducted, contrary to the Appellate Panel’s finding, several medical tests were conducted as a result of Mr. Baker’s complaints of symptoms of physical brain damage. In addition to Dr. McCaffery’s treatment of Mr. Baker’s symptoms of physical brain damage, including unsuccessful treatment for cluster headaches, Mr. Baker was tested on three occasions by neuropsychological evaluation by Dr. Brabham, Dr. Waid, and/or Dr. Deysach. Moreover, imaging studies are not and should not be dispositive as to proof of physical brain damage. Whitman v. Standard Corp., W.C.C. File No. 0015768 (Nov. 5, 2005), 2005 WL 4684253 at 23 (S.C. Work.Comp. Comm. 2005) (finding “it is abundantly clear from the review of case law that lack of a structural finding on a scan is not at all dispositive as to brain damage.”).

As a result, the Appellate Panel committed reversible error and erred in finding that Mr. Baker did not suffer physical brain damage.

Third, the Appellate Panel found that “Medical reports throughout the course of Claimant’s medical treatment consistently stated Claimant was well oriented to time and place and referred to the Claimant’s mental status as normal.” (R. p. 21, ¶7). Contrary to the Appellate Panel’s finding of fact, the medical reports throughout the course of Mr. Baker’s medical treatment, including the two years prior to his neuropsychological evaluations reflect neurological complaints, including disturbances of gait leading to fall, ringing in the ears, changes in visual acuity, frequent headaches, all of which were reviewed by Dr. Brabham and identified as significant indicators of physical brain damage. Moreover, Dr. Brabham concluded “Mr. Baker exhibits literally each and every one of these clinically significant indicators” of physical brain damage. (R. p. 447).

In contrast, Dr. Deysachs’ report specifically identifies that he did not review or rely on any of the medical reports or records throughout the course of Mr. Baker’s medical treatment, except for the emergency room records, including the notes and records two years prior to his neuropsychological evaluations. Despite not having reviewed the medical records, and in some cases making historical findings inconsistent with the medical records, Dr. Deysach concludes, without evidentiary support that “the data did not appear to support the presence of an acquired brain injury nor restrictions in productivity or quality of life as a result of the physical brain damage”. (R. p. 467) For example, Dr. Deysach concludes that “no other post-concussive symptoms were noted in the medical records summarized by Dr. Brabham [on 07/20/10].” Dr. Deysach appears to

rely heavily¹ on an assumption that, other than complaints of “intermittent ringing in his ears” one month following the injury, and “increasing problems with left occipital headaches” a month later, that “no other post-concussive symptoms were noted in the medical records.” (R. p. 461) However, if Dr. Deysach had reviewed the medical records, or the report of Dr. Waid, or the opinion and addendum of Dr. Brabham on October 12, 2010, Dr. Deysach would have reviewed Mr. Baker’s significant other post-concussive symptoms set forth above. Further, Dr. Deysach refers to Mr. Bobby Baker as “Jeffery” at times in his report, and lists data for “Jeffery” as the basis for his opinion. (R. p. 463) As a result, Dr. Deysach’s report is premised on significant and relevant mistakes of fact.

Because of Dr. Deysach’s erroneous findings of fact, Dr. Deysach conclusion and the conclusion of the Appellate Panel that Mr. Baker’s mental status was reported as “normal” is without evidentiary support. The Appellate Panel committed reversible error and erred in finding that Mr. Baker did not suffer physical brain damage.

Fourth, the Appellate Panel found that: “Dr. McCaffrey, with whom Claimant treated for approximately nine months, placed Claimant at maximum medical improvement in March of 2009, without any mention of a head injury or brain damage.” (R. p. 21, ¶8) Further, the Appellate Panel found that: “It was not until Claimant saw Dr. Brabham, prior to the original hearing date, that a brain injury or physical brain damage was mentioned.” (R. p. 21, ¶10). These finding are not supported by any evidence in the record. Contrarily, Dr. McCaffrey specifically concluded on March 11, 2009, that Mr. Baker “is totally/permanently disabled within a reasonable degree of medical certainty in

¹ In fact, this portion of his report appears in **bold**.

reference to his...headaches.” (R. p. 316) Further, this finding is contradicted by Paragraph 13 of the Appellate Panel, which states that “Claimant may have sustained an injury to the head with brief and mild post-concussive symptoms”. (R. p. 21, ¶13) In addition, this finding also fails to recognize that physical brain damage can be proven by circumstantial evidence. See, e.g., Irby v. The New Telephone Co., 2003 WL 22145859 (N.C. App. 2003) (upholding a finding of traumatic brain damage despite lack of direct evidence of head injury or positive objective tests); Whitman v. Standard Corp., W.C.C. File No. 0015768 (Nov. 5, 2005), 2005 WL 4684253 at 23 (S.C. Work. Comp. Comm. 2005) (finding “it is abundantly clear from the review of case law that lack of a structural finding on a scan is not at all dispositive as to brain damage.”). Such circumstantial evidence, i.e. Baker’s symptoms of physical brain damage, was present in his medical records from day one.

As a result, the Appellate Panel’s decision to rely on Dr. Deysach’s report and conclude that Mr. Baker’s cognitive limitations are developmental and find a lack of support for physical brain injury is without evidentiary support.

The Appellate Panel committed reversible error and erred in finding that Mr. Baker did not suffer physical brain damage.

III. The Single Commissioner and Appellate Panel erred in as a matter of law in relying on Crisp v. South Co., Inc., 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010)?

Recently, the South Carolina Supreme Court granted certiorari to review Crisp v. South Co., Inc., 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010). The Crisp court’s reversal of the Circuit Court’s finding of physical brain damage seemed to turn on the substantial evidence standard. The Court noted that Crisp presented no evidence of

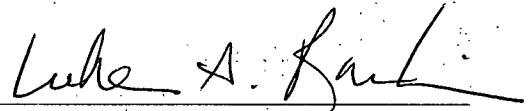
concussion or headaches in medical records. In this case, however, Dr. Deysach admits that Mr. Baker suffered a work related head injury with mild post-concussive symptoms. Further, the Single Commissioner agreed with this finding, and the Respondent has not appealed from this finding. Moreover, as discussed above, the Appellate Panel's findings of fact are supported only by Dr. Deysach's report, which was premised on errors of fact.

Therefore, the Appellate Panel's Decision and Order that Mr. Baker did not suffer physical brain injury, is not supported by any evidence in the record and should be reversed.

CONCLUSION

As a result of the errors of law and findings of fact without evidentiary support by the Appellate Panel, this court should reverse the finding of the Appellate Panel and single commissioner, and hold that Mr. Baker suffered a physical brain injury and entitled to lifetime benefits under S.C. Code Ann. §42-9-10(C).

Respectfully Submitted,



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Dated: 12/10/12
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

T. SCOTT BECK, COMMISSIONER, CHAIR
DERRICK L. WILLIAMS, COMMISSIONER

W.C.C. FILE NO.:0810190

Bobby Baker,Employee/Claimant/Appellant,

vs.

Hilton Hotels CorporationEmployer,

AND

ACE American Insurance CompanyCarrier/Defendants.

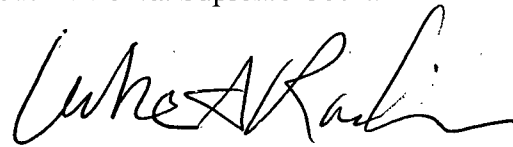
OF WHOM

Hilton Hotels Corporation and ACE American Insurance Company are Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b)
SCACR and the August 13, 2007 Order of the South Carolina Supreme Court.

Respectfully submitted,



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PROOF OF SERVICE

I, Rachel H. Allen, an employee of Rankin & Rankin, attorneys for Bobby Baker in the above-entitled action, certify that I have served the Final Brief of Appellant, Certificate of Counsel, and Proof of Service on all parties to this matter by depositing a copy in the United States Mail, first class postage prepaid on the 10th day of December, 2012.

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