

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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

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W.C.C. FILE NO.:0810190

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Bobby Baker, .....Employee/Claimant/Appellant,

vs.

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

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**FINAL REPLY BRIEF OF APPELLANT**

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Luke Rankin  
Rankin & Rankin  
Post Office Box 851  
Conway, South Carolina 29528-0851  
(843) 248-2405  
Attorneys for Appellant

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Luke Rankin  
Rankin & Rankin  
Post Office Box 851  
Conway, South Carolina 29528-0851  
(843) 248-2405  
Attorneys for Appellant

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## STATEMENT OF ISSUES ON REPLY

- I. **The Single Commissioner's and Appellate Panel's findings of fact regarding the treatment notes are unsupported by the record.**
- II. **The conclusions of the Single Commissioner and Appellate Panel are unsupported by the record.**

**I. The Single Commissioner's and Appellate Panel's findings of fact regarding the treatment notes are unsupported by the record.**

Respondents' argument that there is an absence of treatment notes that Baker suffered a physical brain injury and a presence of actual statements in the medical records that Baker did not suffer a physical brain injury is wholly unsupported by the record. In this respect, Appellant Baker takes issue with several of Respondents' statement of facts.

First, Respondents assert that "[c]laimant admitted he never discussed anything regarding memory difficulties or brain damage throughout the course of his treatment with Dr. McCaffrey." (**Brief of Respondent, p. 8-9**). In support of this sweeping statement, Respondents cite to three pages of Baker's testimony on cross-examination. However, contrary to Respondents' version of the testimony, Baker did not admit that he never discussed memory loss or brain injury. Rather, Baker testified that he attempted to raise it but was told that it could not be discussed. Baker's testimony was as follows:

Q. Okay. Now once again, in that treatment, in that phase of treatment with Dr. McCaffrey, you complained of the headaches, you complained of the pain over the scar, but you never complained of any memory problems to Dr. McCaffrey, did you.

A. He wouldn't discuss it with me.

Q. But you never even made mention of it did you?

A. It didn't make no difference. He wouldn't discuss it. He just told me "we can't discuss this," and it was stopped. No more was talked about it.

Q. Okay. So it's your testimony here today that you actually --- you actually attempted to discuss memory problems with Dr. McCaffrey?

A. I attempted to discuss my problems, and I was only able to discuss my back and my legs.

**(Transcript, January 4, 2011, p. 76-77)**

Second, Respondents assert that Baker admits he “never mentioned anything to the FCE examiner about memory loss or cognitive problems.” **(Brief of Respondent, p. 9)**. In Workers Compensation settings, the functional capacity evaluation (FCE) evaluator is hired to conduct a series of tests designed to measure physical strength, range of motion, stamina, and tolerance to functional activities, including lifting and carrying. The FCE evaluator is not a doctor. Contrary to Respondents’ version of the facts, Baker’s testimony regarding the FCE evaluator was as follows:

- Q. Okay, And then again, you never mentioned anything about memory loss or cognitive problems during that exam, did you?
- A. That was to see what I could pick up and move. It wasn’t nothing to do with the doctors.

**(R. p. 118)**

Third, Respondents state that Baker admits “he never mentioned anything with regard to memory problems and cognitive difficulties to Dr. Kang.” **(Brief of Respondent, p. 9)**. In support of this blanket statement, Respondents cite to one page of Baker’s testimony on cross-examination. However, contrary to Respondents version of the testimony, Baker did not admit that he never mentioned anything with regard to memory problems or cognitive difficulties in this testimony. Rather, Baker testified that he did make mention of memory and cognitive problems. Baker’s testimony was as follows:

- Q. Right. Okay. Now, you never mentioned any problems with memory or cognitive functioning to Dr. Kang either; is that correct?
- A. Yes, I did.

**(R. p. 118-119)**

Fourth, Respondents claim that Baker “acknowledge he received over two years of medical treatment without any discussion of or treatment for memory problems, cognitive difficulties or brain damage.” **(Brief of Respondent, p. 9)**. Baker testified as follows:

Q. Okay. But you would agree that in those first two years of medical treatment, there is no mention of you having any cognitive difficulties or physical brain injury; is that correct?

A. We can argue all day long.

Q. Well, I’m not – It’s just a yes or no question.

A. I mean, I’m just saying ---

Q. You agree that it’s not in the medical records, right?

A. I didn’t see it.

**(R. pp. 121-122)**. However, contrary to Respondents’ version of the facts, while medical records from Baker’s treating physicians do not reflect a diagnosis of post-injury cognitive deficits or physical brain injury, the medical records are replete with mention of symptoms of physical brain injury beginning on day one of treatment, including: weakness, fatigue, difficulty sleeping, intermittent ringing in his ears, decrease visual activity requiring glasses, headaches worsening over time, recent closed-head injury, upper extremity tremor, numbness, and tingling. **(R. pp. 263-459)**.

Moreover, Respondents’ argument that the record contains no evidence of cognitive deficits for two years following the injury focuses on entries in Baker’s medical noting his mental status as “normal”. **(Brief of Respondent, p. 5,6, 12)**. Respondents

point to these entries as evidence that Baker did not suffer cognitive deficits following the accident and did not complain of the same until Dr. Brabham's psychological and vocational evaluation in July 2010. Respondents' argument is counterintuitive, however, because Respondents' own expert, Dr. Deysach, classifies Baker as "mildly handicapped" and opines that Baker suffers from cognitive deficits. **(R. pp. 460-467)** While Dr. Deysach notes Baker's cognitive deficits, he differed from Dr. Brabham by opining that the cognitive deficits were pre-injury and/or developmental. **(Id.)** As a result, according to Respondents, at all relevant times, Baker exhibited cognitive deficits. Therefore, according to Respondents' own theory of the facts, Baker's "basically developmental" cognitive deficits were present at all times but managed to go undetected, ignored, and disregarded by his treating physicians and within the treating physicians' notes and narratives.

Notwithstanding Respondents' contradictory and unsubstantiated version of the facts regarding Baker's cognitive deficits, memory loss and cognitive deficits are but a few of the many symptoms of physical brain damage. The record reflects Baker complained of and was treated for a variety of symptoms of physical brain injury immediately following the injury. **(R. pp. 263-459)** As a result, the findings of fact upheld by the Commission and propounded by the Respondents regarding the lack of medical evidence of physical brain injury in the treating physicians' records are wholly without evidentiary support.

**II. The conclusions of the Single Commissioner and Appellate Panel are unsupported by the record.**

The Appellate Panel committed the following reversible error by making findings of fact and conclusions of law without any evidentiary support in the record and in reliance on errors of law:

- a) **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)**

It is hardly disputed by Respondents, if at all, that Baker suffered an on-the-job head injury. As set forth in Baker’s Initial Brief, the record is replete with mentions of head injury. (R. pp. 263-459) Further, Baker’s medical records reflect symptoms of brain injury throughout his course of treatment. (Id.)

As a result, the Appellate Panel committed reversible error and erred in finding as fact 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.”

- b) **“No medical tests or imaging studies were conducted as a result of complaints of a physical brain injury or physical brain damage.” (R. p. 21, ¶6).**

Although it is agreed that no brain imaging studies were conducted<sup>1</sup>, contrary to the Appellate Panel’s finding, medical tests by Dr. Brabham, Dr. Waid, and/or Dr. Deysach were conducted as a result of Mr. Baker’s complaints of symptoms of physical brain damage and Baker was treated by Dr. McCaffery, unsuccessfully, for his frequent headaches. (R. p. 316).

As a result, the Appellate Panel committed reversible error and erred in finding as fact that no medical tests were conducted as a result of complaints of physical brain injury or physical brain damage.

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<sup>1</sup> See 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) (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.”).

- c) **“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).**

The Appellate Panel’s findings 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,” completely ignores and contradicts its further finding that Baker suffered cognitive deficits. (R. p. 21, ¶7 and ¶12-13). Further, 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. (R. p. 447) Moreover, Dr. Brabham concluded “Mr. Baker exhibits literally each and every one of these clinically significant indicators” of physical brain damage.” (Id.) Dr. Deysach, however, did not review any such medical records. (R. pp. 460-467)

As a result, the Appellate Panel committed reversible error and erred in finding as fact that Baker’s mental status was “normal” and at the same time holding that Baker suffered from cognitive defects.

- d) **The Appellate Panel erred in relying on Dr. Deysach’s report which was based on unsubstantiated and/or erroneous facts regarding Baker’s medical history. (R. p. 21, ¶12-14).**

Dr. Deysach’s 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. 460-467**). For an example of the errors, Dr. Deysach concludes that “no other post-concussive symptoms were noted in the medical records summarized by Dr. Brabham [on 07/20/10].” (**Id.**) Dr. Deysach appears to rely<sup>2</sup> heavily 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.” (**Id.**) 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, which he did not, Dr. Deysach would have reviewed documentation of Mr. Baker’s significant other post-concussive symptoms. (**Id.**)

Unfortunately, Dr. Deysach did not review the medical records. In addition to his failure to review the underlying records, Dr. Deysach’s report is unclear as to the patient. 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. (**Id.**) Clearly, any references or conclusions regarding “Jeffery” are erroneous.

As a result, Dr. Deysach’s report is premised on significant and relevant errors of fact and the Single Commissioner and Appellate Panel erred in relying on Dr. Deysach’s opinion.

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<sup>2</sup> In fact, this portion of his report appears in **bold**.

- e) **“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).**

As set forth above, it is hardly contested that Baker suffered a work-related head injury. The Appellate Panel’s holding otherwise is wholly unsupported by the evidence. Further, Dr. McCaffrey specifically concluded on March 11, 2009, that Mr. Baker “is totally/permanently disabled within a reasonable degree of medical certainty in reference to his....*headaches*.” (R. p. 316). This is not disputed.

The Appellate Panel committed reversible error and erred in finding that Mr. Baker did not suffer a head injury.

- f) **There is insufficient evidence in the record to support a finding of physical brain damage pursuant to S.C.Code Ann. §42-9-10(C) because the medical records of several physicians who treated Claimant following the accident made no reference to a brain injury or physical brain damage. See Crisp v. SouthCo., Inc., 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010), *cert. granted*. Claimant failed to meet his burden of proving he sustained a physical brain injury or physical brain damage. (R. p.20, ¶4).**

The Appellate Panel erred in concluding that Baker failed to meet his burden of proving he sustained a physical brain injury or physical brain damage because it misapplied Crisp v. SouthCo., Inc., 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010) and failed to apply the appropriate burden of proof for physical brain injury.

The Crisp parallels the present case in that there was no MRI scan revealing any brain abnormalities. However, as set forth in 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), such evidence is not dispositive and is but one element of an analysis of physical brain injury. In the present case, however, unlike Crisp, the record is replete with

evidence of other symptoms of physical brain injury. **(R. pp. 263-459).** Further, unlike Crisp, Baker was complaining of initial of head trauma – i.e. being hit in the head with a ceiling tile – and was initially treated for head trauma – i.e. a scalp laceration – as a result of the work related accident. **(Id.)** Lastly, unlike Crisp, Baker’s headaches were a chief complaint reflected in the treatment record and for which he received unsuccessful pharmacological treatment over a substantial period of time. **(Id.)** As a result, the record in this case contains substantial additional evidence of traumatic brain injury than noted in Crisp and it was error for the panel to apply Crisp to find Baker failed to present substantial evidence of traumatic brain injury.

Further, 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.

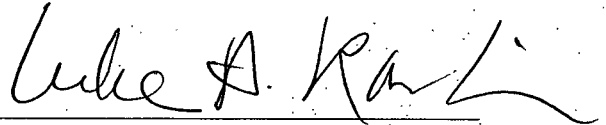
The Appellate Panel’s conclusions in paragraphs 12 and 13 of the Decision and Order dated October 31, 2011, that “the reason Claimant is unlikely to return to gainful employment is due to his orthopedic injuries and not cognitive limitations,” and that while Mr. Baker “may have sustained an injury to the head with brief and mild-post concussive symptoms, the data does not support a finding of physical brain damage,” fails to recognize the principle set forth in Pearson. **(R. p. 21, ¶12-13).**

As a result, the Single Commissioner and the Appellate Panel erred as a matter of law in applying Crisp, and failing to apply the holding in Pearson, to the present case.

**CONCLUSION**

For the reasons set forth herein and in Baker's Initial Brief, and 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,



Luke Rankin  
Rankin & Rankin  
Post Office Box 851  
Conway, South Carolina 29528-0851  
(843) 248-2405  
Attorneys for Appellant

Dated: 12/10/12  
Conway, South Carolina

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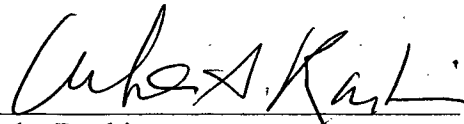
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Hilton Hotels Corporation and ACE American Insurance Company are ..... Respondents.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,



Luke Rankin  
Rankin & Rankin  
Post Office Box 851  
Conway, South Carolina 29528-0851  
(843) 248-2405  
Attorneys for Appellant

Dated: 12/10/12  
Conway, South Carolina

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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 Reply 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 10<sup>th</sup> day of December, 2012.

Other Counsel of Record:

Aisha G. Taylor  
Collins & Lacy, P.C.  
Post Office Box 12487

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SC Court of Appeals

Columbia, South Carolina 29211  
(803) 256-2660  
Attorneys for Respondents

Rachel H. Allen

Conway, South Carolina