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1. ARTICLE: WHEN COURTS DETERMINE LEGISLATIVE INTENT: HARSH CRITERIA FOR LIFETIME BENEFITS UNDER THE SOUTH CAROLINA WORKERS' COMPENSATION ACT, 8 Charleston L. Rev. 451

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CRITERIA FOR LIFETIME BENEFITS UNDER THE SOUTH CAROLINA  
WORKERS' COMPENSATION ACT**

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**LexisNexis Summary**

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... A traumatic brain injury may occur as a result of a closed head injury, such as a whiplash type injury when the skull does not fracture, or a penetrating head injury, such as when a bullet pierces the skull. ... The court found that the statute did not require that total and permanent disability be solely the result of physical brain damage; "the statute only requires that a claimant be totally and permanently disabled and suffer physical brain damage as a result of the injury , " not physical brain damage causing disability. ... The South Carolina Workers' Compensation Commission found that Sparks had sustained a compensable head injury and was totally and permanently disabled but denied him lifetime benefits because he did not suffer "physical brain damage." ... The single commissioner found that Baker "did not suffer a physical brain injury or any resulting physical brain damage as a result of the accident and denied Baker's request for lifetime benefits." ... Later, the court of appeals relied on the holding in Crisp that "the severity of the injury is the lynchpin of the analysis" and interpreted "the inclusion of "physical brain damage' among the most serious injuries within the statutory exception to the five-hundred-week cap on benefits as an indication that the legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment." ... The statutes provides: "any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life." ... Part V describes workers' compensation systems in other jurisdictions, specifically, how North Carolina, Virginia, and New York have approached brain injuries and awarded lifetime benefits under their workers' compensation acts. ...

**Text**

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[\*452]

I. INTRODUCTION

KELLY ALFREDS

Since the implementation of state workers' compensation acts, work-related injuries in the United States have declined even though employment has more than doubled.<sup>1</sup> However, every year, approximately five million workers sustain an injury on the job.<sup>2</sup> Over half of those injuries are so severe that they cause the worker to miss time from work.<sup>3</sup>

Certain injuries, such as brain injuries, are extremely serious, and the residual effects are often debilitating and incapacitating.<sup>4</sup> Previously, when those effects occurred, the injured worker was often entitled to lifetime benefits under the South Carolina Workers' Compensation Act.<sup>5</sup> Recently, however, the South Carolina Supreme Court has required that brain injuries be "severe" in order for an injured worker to be entitled to lifetime benefits under the Act.<sup>6</sup> Because this severe requirement remains undefined, confusion and disagreement has resulted among medical professionals and injured workers.<sup>7</sup>

This Note attempts to draw attention to a developing problem under the South Carolina Workers' Compensation Act. [\*453] The system is eroding from its original goals of efficiency, predictability, and fairness; applying inconsistent case law and statutory language; and leaving behind the quid pro quo principle while the injured worker remains less fortunate with no adequate remedy.<sup>8</sup>

Part II of this Note describes how a traumatic brain injury is more significant than one might realize.<sup>9</sup> Traumatic brain injury is a major cause of death and disability worldwide<sup>10</sup> and presents social, economic, and health problems.<sup>11</sup> It is essential to understand the various ways to diagnose and treat a traumatic brain injury when determining compensation for the injured worker under the South Carolina Workers' Compensation Act.<sup>12</sup>

<sup>1</sup> Occupational Safety and Health Admin., Dep't of Labor, OSHA Fact Sheet: OSHA Requirement When a Worker Experiences a Job-Related Injury or Illness, <http://perma.cc/432X-YEZ6> (last visited May 27, 2014).

<sup>2</sup> Id. Last year, 62,213 accident claims were filed with the South Carolina Workers' Compensation Commission. Annual Report FY 2012-2013, S.C. Workers' Comp. Comm'n, <http://perma.cc/JX88-QPJC> (last visited May 27, 2014).

<sup>3</sup> [Occupational Safety and Health Admin.](#), *supra* note 1.

<sup>4</sup> See C. Konrad et al., Long-term Cognitive and Emotional Consequences of Mild Traumatic Brain Injury, *Psychol. Med.*, Sept. 2010, at 8-12.

<sup>5</sup> S.C. Code Ann. § 42-9-10(C) (Supp. 2013).

<sup>6</sup> See [Sparks v. Palmetto Hardwood, Inc.](#), 750 S.E.2d 61, 63-64 (S.C. 2013); [Crisp v. SouthCo., Inc.](#), 738 S.E.2d 835, 843-44 (S.C. 2013); see also [Fragosa v. Kade Constr., LLC](#), No. 2012-212279, 2013 WL 6192428, at 3-4 (S.C. Ct. App. Nov. 27, 2013); [Baker v. Hilton Hotels Corp.](#), 752 S.E.2d 279, 282-83 (S.C. Ct. App. 2013) (citing both Sparks and Crisp to determine when a person has suffered a severe brain injury).

<sup>7</sup> See Bruce H. Stern, Traumatic Brain Injury: Is It Time We Stop Using the Terms Mild, Moderate and Severe?, N.J. L. Blog (Mar. 27, 2013, 8:28 AM), <http://perma.cc/YDH7-VMFW>.

<sup>8</sup> See *infra* Parts VII, VIII.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See Mark Faul et al., Traumatic Brain Injury in the United States: Emergency Department Visits, Hospitalizations and Deaths 2002-2006, Centers for Disease Control & Prevention (2010), available at <http://perma.cc/EV8A-DFTJ>.

<sup>11</sup> About Brain Injury, Brain Inj. Ass'n of Am. (Oct. 12, 2012), <http://perma.cc/46MN-QXRM>.

<sup>12</sup> See generally *infra* Parts II-IV.

Part III provides a brief overview of the South Carolina Workers' Compensation Act and explains the different ways in which a person is compensated for a brain injury under the statute.<sup>13</sup> Part IV examines how the courts in South Carolina have applied the statute to brain injuries in workers' compensation claims.<sup>14</sup> Specifically, this Part describes four recent decisions by South Carolina appellate courts: (1) *Sparks v. Palmetto Hardwood, Inc.*;<sup>15</sup> (2) *Crisp v. SouthCo., Inc.*;<sup>16</sup> (3) *Baker v. Hilton Hotels Corp.*;<sup>17</sup> and (4) *Fragosa v. Kade Construction, LLC.*<sup>18</sup> Part V describes workers' compensation systems in other jurisdictions,<sup>19</sup> specifically, how North Carolina, Virginia, and New York have approached brain injuries and awarded lifetime [\*454] benefits under their workers' compensation acts.<sup>20</sup> Part VI provides an analysis of how the courts interpreted the statute and the reasons for clarification.<sup>21</sup> Part VII offers a solution to guide the courts and legislature in determining the proper definition.<sup>22</sup>

## II. TRAUMATIC BRAIN INJURY: WHAT IS IT?

Approximately 1.5 to 2 million head injuries occur in the United States each year, with roughly 275,000 of those injured admitted to the hospital.<sup>23</sup> Traumatic brain injuries result in approximately 52,000 deaths per year<sup>24</sup> and cause permanent neurological disability in an additional 70,000 to 90,000 people.<sup>25</sup> The economic burden of both the lost productivity and the cost of medical care are estimated to be approximately \$ 100 billion per year in the United States.<sup>26</sup>

### A. Defining Traumatic Brain Injury

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<sup>13</sup> See *infra* Part III.

<sup>14</sup> See *infra* Part IV.

<sup>15</sup> [750 S.E.2d 61 \(S.C. 2013\)](#).

<sup>16</sup> [701 S.E.2d 762 \(S.C. Ct. App. 2010\)](#).

<sup>17</sup> [752 S.E.2d 279 \(S.C. Ct. App. 2013\)](#).

<sup>18</sup> [No. 2012-212279, 2013 WL 6192428 \(S.C. Ct. App. Nov. 28, 2013\)](#).

<sup>19</sup> See *infra* Part V.

<sup>20</sup> See *infra* Part V.

<sup>21</sup> See *infra* Part VI.

<sup>22</sup> See *infra* Part VII.

<sup>23</sup> Faul, *supra* note 10; see also Brain Inj. Ass'n of Am., *supra* note 11; 72 Am. Jur. Proof of Facts 3d Traumatic Brain Injuries § 2 (2003).

<sup>24</sup> Brain Inj. Ass'n of Am., *supra* note 11; Am. Jur. Proof of Facts, *supra* note 23, at § 2.

<sup>25</sup> Am. Jur. Proof of Facts, *supra* note 23, at § 2.

<sup>26</sup> See Paul E. Marik et al., Management of Head Trauma, 122 Chest J. 699 (2002); see also Am. Jur. Proof of Facts, *supra* note 23, at § 2.

Precise definitions and unambiguous diagnostic measures are essential for epidemiology, treatment, and research in any disease.<sup>27</sup> Hardly any attention has been given to defining traumatic brain injury, however, because many medical professionals feel that the term is self-explanatory.<sup>28</sup>

The Brain Injury Association of America defines traumatic [\*455] brain injury<sup>29</sup> as "an alteration in brain function, or other evidence of brain pathology, caused by an external force."<sup>30</sup> Another definition is "damage to the brain resulting from external mechanical force, such as rapid acceleration or deceleration, impact, blast waves, or penetration by a projectile."<sup>31</sup> The definition of traumatic brain injury has not been consistent among the medical field and varies according to specialties and circumstances, which has been problematic,<sup>32</sup> especially when courts determine whether a person has sustained a traumatic brain injury.<sup>33</sup>

A traumatic brain injury may occur as a result of a closed head injury, such as a whiplash type injury when the skull does not fracture,<sup>34</sup> or a penetrating head injury, such as when a bullet pierces the skull.<sup>35</sup> Trauma from both injuries can cause brain damage, even if there is no external evidence of damage.<sup>36</sup> Examples of conditions described as manifestations of traumatic brain injury include: skull fractures, brain concussion, brain contusion, epidural hematoma, subdural hematoma, brain herniation, and post-concussive syndrome.<sup>37</sup> Symptoms [\*456] associated with

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<sup>27</sup> David K. Menon et al., Position Statement: Definition of Traumatic Brain Injury, 91 Arch. Phys. Med. Rehab. 1637, 1637 (Nov. 2010); see generally John S. Haller, Medicine in Perspective: Industrial Accidents - Worker Compensation Laws and the Medical Response, 148 West J. Med. 341 (Mar. 1988) (discussing the physician's role in workers' compensation cases historically).

<sup>28</sup> Menon et al., supra note 27, at 1607; see also Stern, supra note 7.

<sup>29</sup> Traumatic brain injury is distinguished from anoxic brain injury, which occurs when the brain is deprived of oxygen. Traumatic brain injury results in bruising and swelling of the brain, whereas anoxic brain injury causes brain cells to die as a result of oxygen deprivation. David F. Long, What is Anoxic Brain Injury? Brain Injury Ass'n of Minn., available at <https://www.braininjurymn.org/library/archive/Anoxia-ProfessionalArticle.pdf>.

<sup>30</sup> Brain Inj. Ass'n of Am., supra note 11. The Brain Injury Association of America's Board of Directors adopted this definition of traumatic brain injury in 2011, and follows the definition with the statement: "This definition is not intended as an exclusive statement of the population served by the Brain Injury Association of America." Id. See also Menon et al., supra note 27, at 1638.

<sup>31</sup> Maj A. Pushkarna, et al., Head Injuries, 66 Med. J. Armed Forces India 321, 321 (2010).

<sup>32</sup> Fabio Rios Freire et al., Cognitive Rehabilitation Following Traumatic Brain Injury, 5 Dementia & Neuropsychologia 17, 17-18 (2011), available at <http://perma.cc/D3DR-UZ5L>.

<sup>33</sup> Stern, supra note 7.

<sup>34</sup> Brain Inj. Ass'n of Am., supra note 11; see also Am. Jur. Proof of Facts, supra note 23, at § 5.

<sup>35</sup> Am. Jur. Proof of Facts, supra note 23, at § 5.

<sup>36</sup> Konrad et al., supra note 4.

<sup>37</sup> Am. Jur. Proof of Facts, supra note 23, at § 5.

traumatic brain injury vary among individuals.<sup>38</sup> However, it is not uncommon that traumatic brain injuries may not involve any symptoms at the time of the accident.<sup>39</sup>

## B. Levels of Traumatic Brain Injury

Brain injuries are distinguished according to their severity and are categorized as severe, moderate, or mild.<sup>40</sup> A severe traumatic brain injury (sTBI) occurs when a "prolonged unconscious state or coma lasts days, weeks, or months."<sup>41</sup> The mortality rate for patients with sTBI is approximately 40%.<sup>42</sup> A moderate level traumatic brain injury occurs when there is "a loss of consciousness that lasts from a few minutes to a few hours, when confusion lasts from days to weeks, or when physical, cognitive, and/or behavioral impairments last for months or are permanent."<sup>43</sup> A mild traumatic brain injury (mTBI)<sup>44</sup> is often used interchangeably with concussion, cerebral concussion, or mild head injury.<sup>45</sup> Duration of symptoms<sup>46</sup> vary [\*457] from temporary<sup>47</sup> to lasting "from several minutes to days, weeks, months, or even longer in some cases."<sup>48</sup> The majority of patients with mTBI eventually recover; however, the recovery time varies significantly with each person.<sup>49</sup>

What amounts to the mildest form of TBI is the subject of disagreement,<sup>50</sup> which led the American Congress of Rehabilitation to develop a definition of mild traumatic brain injury in 1993:

A patient with mild traumatic brain injury is a person who has had a traumatically induced physiological disruption of brain function, as manifested by at least one of the following: 1. any

<sup>38</sup> Symptoms may include any of the following: loss of consciousness; memory loss; feeling dazed, disoriented, lethargic or confused; focal neurological deficits; bleeding from the head or face; diminished pulse or respiration rate; vomiting; partial paralysis/numbness; shock; seizure anxiety; headaches; coma; nausea; sleep-deprivation; impaired balance/coordination; impaired sexual functioning; or clear fluid draining from the ear or nose. This list is not conclusive. See Facts about Concussion and Brain Injury, Centers for Disease Control & Prevention, <http://perma.cc/4Nfy-SYJ9> (last visited Mar. 22, 2014); Severe Traumatic Brain Injury, Centers for Disease Control & Prevention, <http://perma.cc/4P2T-UXWT> (last visited May 27, 2014); Lindsay Corley, Living with a 'Borrowed Brain', CNN Health (Mar. 10, 2013, 9:01 PM), <http://perma.cc/J8TH-7AVW>.

<sup>39</sup> See sources cited supra note 38.

<sup>40</sup> Brain Inj. Ass'n of Am., supra note 11.

<sup>41</sup> Id. Symptoms may include: coma, vegetative state, or a minimally responsive state. Id.

<sup>42</sup> Am. Jur. Proof of Facts, supra note 23, at § 7.

<sup>43</sup> Brain Inj. Ass'n of Am., supra note 11.

<sup>44</sup> mTBI represents approximately 80% of all patients with TBI. Am. Jur. Proof of Facts, supra note 23, at § 7.

<sup>45</sup> Tim Anderson et al., Concussion and Mild Head Injury, 6 Prac. Neurology 342, 342 (2006).

<sup>46</sup> Symptoms may include: headache, fatigue, emotional mood swings, sleep-related disturbances, sensitivity to light or noise, balance problems, cognitive impairment (including decreased concentration, memory problems, and decreased speed of thinking), depression, and may or may not involve a loss of consciousness. Brain Inj. Ass'n of Am., supra note 11.

<sup>47</sup> Id.

<sup>48</sup> Heads Up: Facts for Physicians About Mild Traumatic Brain Injury (mTBI), Centers for Disease Control & Prevention (2012), available at <http://perma.cc/T6FC-27KJ>.

<sup>49</sup> Brain Inj. Ass'n of Am., supra note 11.

<sup>50</sup> Stern, supra note 7.

period of loss of consciousness; 2. any loss of memory for events immediately before or after the accident; 3. any alteration in mental state at the time of the accident (eg, feeling dazed, disoriented, or confused); and 4. focal neurological deficit(s) that may or may not be transient; but where the severity of the injury does not exceed the following: loss of consciousness of approximately 30 minutes or less; after 30 minutes, an initial Glasgow Coma Scale (GCS) of 13-15; and posttraumatic amnesia (PTA) not greater than 24 hours.<sup>51</sup>

This definition did not require a loss of consciousness, which has led to multiple researchers advancing various similar, but at times dissimilar, definitions of mild traumatic brain injury.<sup>52</sup>

Since moderate to severe traumatic brain injuries are easier [\*458] to define and diagnose,<sup>53</sup> the problem is defining and diagnosing mild traumatic brain injuries.<sup>54</sup> Each year most of the estimated 1.5 million Americans who sustain mTBIs are never diagnosed, and less than one in twenty patients receive the treatment needed.<sup>55</sup> Trauma physicians misdiagnose 72% of the cases, and emergency room physicians misdiagnose 52%, even when the patient has clearly documented symptoms.<sup>56</sup> Laboratory work,<sup>57</sup> EEG,<sup>58</sup> PET,<sup>59</sup> MRI,<sup>60</sup> and CT<sup>61</sup> scans usually only detect

<sup>51</sup> American Congress of Rehabilitation Medicine, Definition of Mild Traumatic Brain Injury, 8 J. Head Trauma Rehabilitation 86, 86 (1993).

<sup>52</sup> See Ronald M. Ruff & Paul Jurica, In Search of a Unified Definition for Mild Traumatic Brain Injury, 13 Brain Inj. 943 (1999); Ronald M. Ruff et al., Recommendations for Diagnosing a Mild Traumatic Brain Injury: A National Academy of Neurophysiology Education Paper, 24 Archives Clinical Neurophysiology 3 (2009) available at <http://perma.cc/F48U-73RC>; Mgmt. of Concussion/mTBI Working Grp., Management of Concussion/mild Traumatic Brain Injury (2009).

<sup>53</sup> See Am. Jur. Proof of Facts, supra note 23, at § 8 (stating that large numbers of patients with mTBIs go undiagnosed or untreated).

<sup>54</sup> Id.; [Anderson et al., supra](#) note 45, at 342-43.

<sup>55</sup> Am. Jur. Proof of Facts, supra note 23, at § 8.

<sup>56</sup> Id.; Mary Ann Moon, ER, Trauma Doctors Often Miss Diagnosis of Mild Brain Injury, Fam. Prac. News, (Feb. 1, 2000). Reasons for the misdiagnosis may be a result of the patient's disorientation or inability to recall the facts of the injury, and sometimes physicians must rely on persons other than the patient as a source of information about the injury and patient's symptoms. Am. Jur. Proof of Facts, supra note 23, at § 8. Physical injuries that generally require more immediate medical attention often occur along with TBI; therefore, the signs and symptoms of TBI are often not discovered until the more pressing physical injuries are treated. Id. Also, some mTBI symptoms overlap with the symptoms of other head or bodily injuries, making diagnosis more difficult. Id. In addition, diagnosis is difficult because injuries are often not external and not visible through conventional diagnostic tools. Ming-Xiong Huang et. al., Integrated Imaging Approach with MEG and DTI to Detect Mild Traumatic Brain Injury in Military and Civilian Patients, 26 J. Neurotrauma 1, 1 (2008).

<sup>57</sup> Am. Jur. Proof of Facts, supra note 23, at § 8.

<sup>58</sup> Id.

<sup>59</sup> Id.. Positron emission tomography scan is a computerized technique that uses radioactive substances to produce a three-dimensional image that reflects the metabolic and chemical activity of the brain. Positron Emission Topography (PET), Gale Encyclopedia of Medicine, Vol. 4, 2677-78 (Jacqueline L. Longe et al. eds., 2d ed. 2002).

<sup>60</sup> Am. Jur. Proof of Facts, supra note 23, at § 8. Magnetic resonance imaging is a diagnostic technique that provides high quality cross-sectional images of organs within the body without x-rays or other radiation. Magnetic Resonance Imaging, Gale Encyclopedia of Medicine, Vol. 3, 2081-85 (Jacqueline L. Longe et al. eds., 2d ed. 2002).

<sup>61</sup> Am. Jur. Proof of Facts, supra note 23, at § 8. Computed tomography is a diagnostic technique which uses a computer and x-rays to produce clear cross-sectional images of tissue. CT scans are clearer and more detailed than x-rays. Computed Tomography Scans, Gale Encyclopedia of Medicine, Vol. 2, 875-78 (Jacqueline L. Longe, et al. eds., 2d ed. 2002).

moderate and severe TBI.<sup>62</sup> However, technological advances [\*459] offer potential for improving diagnostic accuracy in mTBI situations.<sup>63</sup>

Once it is confirmed the individual has suffered a traumatic brain injury, emergency physicians typically determine the severity of a brain injury by using the Glasgow Coma Scale (GCS), which constitute three tests: eye, verbal, and motor responses.<sup>64</sup>

Glasgow Coma Score		
Eye Opening (E)	Verbal Response (V)	Motor Response (M)
4=Spontaneous	5=Normal conversation	6=Normal
3=To voice	4=Disoriented conversation	5=Localizesto pain
2=To pain	3=Words, but not coherent	4=Withdraws to pain
1=None	2=No words-only sounds	3=Decorticate posture
	1=None	2=Decerebrate
		1=None

Total = E+V+M<sup>65</sup>

The score is determined by the sum of the three tests.<sup>66</sup> The [\*460] lowest possible score is three (deep coma or death), while the highest is fifteen (fully awake person).<sup>67</sup> A GCS score of eight or below is a severe brain injury; a score of nine to twelve is moderate injury; and thirteen to fifteen is considered a mild injury.<sup>68</sup>

### III. THE SOUTH CAROLINA WORKERS' COMPENSATION ACT

Today, workers' compensation programs are implemented in each of the fifty states, the District of Columbia, and U.S. territories.<sup>69</sup> The necessity for workers' compensation legislation arose out of the increase in industrial accidents during the industrial revolution<sup>70</sup> and a simultaneous decrease in the employee's common-law remedies for his or her injuries.<sup>71</sup>

<sup>62</sup> Am. Jur. Proof of Facts, supra note 23, at § 5.

Patients with moderate or severe traumatic brain injury should undergo a CT after their condition has been stabilized. Although CT is not routinely done for patients with mild traumatic brain injury, those who exhibit symptoms including loss of consciousness, nausea or vomiting, post-traumatic seizure or amnesia should undergo CT imaging as well.

Id. at § 8 n. 3.

<sup>63</sup> See generally Menon et al., supra note 27, at 1637-40 (explaining the different ways to diagnose TBI); Brain Inj. Ass'n of Am., supra note 11. Magnetoencephalography (MEG) can measure and localize abnormal low-frequency neuronal magnetic signals that are generated from injured brain tissues. Huang, supra note 56, at 2. Recent innovative scans can test the water content in the brain or the sugar content in the brain to indicate a mTBI. Id. Integrating the MEG and DTI approaches provides a more sensitive diagnosis than conventional CT or MRI because it detects subtle neuronal injury in mTBI. Id.

<sup>64</sup> Brain Inj. Ass'n of Am., supra note 11.

<sup>65</sup> Id.

<sup>66</sup> See Freire et al., supra note 32, at 19; Brain Inj. Ass'n of Am., supra note 11.

<sup>67</sup> Freire et al., supra note 32, at 19; Brain Inj. Ass'n of Am., supra note 11.

<sup>68</sup> Freire et al., supra note 32, at 19; Brain Inj. Ass'n of Am., supra note 11.

<sup>69</sup> Ishita Sengupta et al., Workers' Compensation: Benefits, Coverage, and Costs, 2011 5, available at <http://perma.cc/5NCY-2RWV>.

<sup>70</sup> 1 Lex K. Larson, Larson's Workers' Compensation Law § 2.07 (Matthew Bender rev. ed., 2013). Under the common law, an injured worker had to bring a tort claim prove that his or her injuries were due to employer negligence. Id.; Richard A. Epstein, The

## A. Purpose of the Workers' Compensation Act

Workers' compensation laws are designed to provide a satisfactory means of handling on-the-job injuries and resulting disabilities.<sup>72</sup> These laws have two main purposes: (1) exempting [\*461] employers from tort claims when employees sustain injuries;<sup>73</sup> and (2) providing employees relatively quick, equitable, and predictable relief.<sup>74</sup>

Industrial accidents are accepted as a fact of life, and the workers' compensation system exists to deal with the consequences in as quick and efficient a manner as possible. Workers' compensation is analogous to no-fault insurance.<sup>75</sup> Compensation for lost wages is paid for a period of disability and as a lump sum for any residual disability.<sup>76</sup> Employers also must pay for the workers' medical costs so the injured worker can be rehabilitated and return to work as soon as possible.<sup>77</sup>

Additionally, workers' compensation pays benefits to families of workers who die as a result of work-related injuries or illnesses.<sup>78</sup>

## B. Ratification and Scope of the South Carolina Workers' Compensation Act

In 1935, South Carolina passed the Workers' Compensation Act.<sup>79</sup> Under this statute, the South Carolina Industrial Commission<sup>80</sup> was created to organize and enforce the workers' compensation law (hereinafter Act).<sup>81</sup> Over the years, statutes, case law, and administrative policies and procedures have amended the law, but the main purpose has remained the [\*462] same.<sup>82</sup>

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Historical Origins and Economic Structure of Workers' Compensation Law, 16 Ga. L. Rev. 775, 775-76 (1982). Employees were not successful in these suits because the employers could use three common-law defenses to avoid liability: assumption of risk, the fellow worker rule, or contributory negligence. *Id.* at 776. If, however, an employee's suit was successful, then the employers were at a risk for substantial and unpredictable losses. *Id.*

<sup>71</sup> See Paul Starr, *The Social Transformation of American Medicine 200-04* (1982); see also Kenneth A. DeVille, *Medical Malpractice in Nineteenth-Century America: Origins and Legacy* (1990).

<sup>72</sup> Injured Workers' Advocates, *The Origin of Workers' Injury Laws in the U.S.*, YouTube (Aug. 1, 2012), <http://perma.cc/Z63T-UF4J>.

<sup>73</sup> See Gregory P. Guyton, *A Brief History of Workers' Compensation*, 19 Iowa Orthopaedic J. 106, 108-09 (1999) (explaining that employees can sue third parties who may be responsible for their on-the-job injuries but any proceeds from such suits must first go to reimburse their employer's compensation insurance carrier).

<sup>74</sup> *Id.*; see also Injured Workers' Advocates, *supra* note 72.

<sup>75</sup> *Id.*

<sup>76</sup> Guyton, *supra* note 73 at 109.

<sup>77</sup> *Id.*

<sup>78</sup> Larson, *supra* note 70, at § 98.01.

<sup>79</sup> Acts and Joint Resolutions of the General Assembly of the State of South Carolina, Pub. L. No. 610 § 5(b) (1936).

<sup>80</sup> The name of the Commission was later changed to the South Carolina Workers' Compensation Commission in 1986. Overview, South Carolina Workers' Comp. Comm'n, <http://perma.cc/J2YB-F2SU> (last visited May 27, 2014).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

An employee is presumed to be a covered employee under the Act; however the Act has some statutory exemptions.<sup>83</sup> Employers covered by the Act are required to maintain insurance sufficient for the payment of compensation or provide proof to the Commission of their ability to pay if an employee is injured.<sup>84</sup> The South Carolina Department of Insurance is responsible for approving rates, and the National Council on Compensation Insurance (NCCI) is responsible for managing the workers' compensation insurance rating in South Carolina.<sup>85</sup>

[\*463] In South Carolina, three methods for obtaining disability compensation exist: (1) total disability,<sup>86</sup> (2) partial disability,<sup>87</sup> and (3) scheduled disability.<sup>88</sup> The first two methods are based on the economic model, which defines disability and incapacity in terms of the claimant's loss of earning capacity as a result of the injury.<sup>89</sup> The third method, scheduled disability, provides awards for disability based upon degree of medical impairment to specified body parts and conclusively relies upon the medical model with the presumption of lost earning capacity.<sup>90</sup> Generally, an injured claimant proceeds under the Act's general disability sections or under the scheduled disability section.<sup>91</sup>

### C. Approaches to Compensating Physical Brain Injuries

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<sup>83</sup> S.C. Code Ann. § 42-1-130 (2013); Grady L. Beard et al., *The Law of Workers' Compensation Insurance in South Carolina* 2 (6th ed. 2012). The exceptions include: railroad and railway express companies, federal employees (S.C. Code Ann. § 42-1-360 (Supp. 2013)), state officers and employees elected by the people or the General Assembly or appointed by the Governor (S.C. Code Ann. § 42-1-130 (Supp. 2013)), employees of municipal corporations and political subdivisions of the state who are elected by the people or governing body and who act in "purely administrative capacities" and serve a definite term of office (S.C. Code Ann. § 42-1-130 (Supp. 2013)), certain casual employees (S.C. Code Ann. § 42-1-360(1) (Supp. 2013)), businesses with less than four employees (S.C. Code Ann. § 42-1-360(2) (Supp. 2013)), and agricultural employees and persons selling agricultural products (S.C. Code Ann. §§42-1-360(4),(6) (Supp. 2013)). An agricultural employer can voluntarily elect to come under the Act (S.C. Code Ann. § 42-1-360(4)). See also [Roman v. Sunny Slope Farms, Inc.](#), 817 F.2d 1116 (4th Cir. 1987). Other exceptions include: deputy enforcement officers (S.C. Code Ann. § 50-3-315 (Supp. 2013)), prisoners (S.C. Code Ann. § 42-1-500; S.C. Code Ann. § 42-1-470 (Supp. 2013)); see generally [Last v. MSI Const. Co., Inc.](#), 409 S.E.2d 334 (S.C. 1991) (holding claimant's incarceration did not constitute a permanent refusal to accept medical care); Noralyn O. Harlow, Annotation, Workers' Compensation: Incarceration as Terminating Benefits, 54 A.L.R. 4th 241 (1987) (discussing whether an incarcerated claimant is entitled to workers' compensation benefits if he sustained the injury prior to incarceration). However, both the attorney general and supreme court have ruled that work-release prisoners may be eligible for benefits if they are injured while engaged in private employment. [Hamilton v. Daniel Int'l Corp.](#), 257 S.E.2d 157 (S.C. 1978). An employer who had a total annual payroll during the previous year of less than three thousand dollars may be exempt from the Act. S.C. Code Ann. § 42-1-360(2). Independent contractors are not within the scope of the Act. [Young v. Warr](#), 165 S.E.2d 797 (S.C. 1969); [Carter's Dependents v. Palmetto State Life Ins. Co.](#), 38 S.E.2d 905 (S.C. 1946).

<sup>84</sup> S.C. Code Ann. § 42-5-20 (Supp. 2013).

<sup>85</sup> S.C. Code Ann. §§38-73-490, 42-5-20 (Supp. 2013); South Carolina Workers' Comp. Comm'n, *supra* note 80.

<sup>86</sup> S.C. Code Ann. § 42-9-10(A) (Supp. 2013).

<sup>87</sup> S.C. Code Ann. § 42-9-20 (Supp. 2013).

<sup>88</sup> S.C. Code Ann. § 42-9-30 (Supp. 2013).

<sup>89</sup> [Wigfall v. Tideland Utils., Inc.](#), 580 S.E.2d 100, 102 (S.C. 2003).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

In general, an injured worker covered by the Act may not receive compensation for a period exceeding five hundred weeks.<sup>92</sup> The statute, however, provides an exception as follows:

Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life.<sup>93</sup>

As interpreting the text of the Act is a question of law,<sup>94</sup> [\*464] courts look to the plain and ordinary meaning,<sup>95</sup> the legislative purpose and intent,<sup>96</sup> and the interpretation of similar statutes in neighboring jurisdictions.<sup>97</sup> Workers' Compensation statutes are typically construed liberally<sup>98</sup> in favor of the claimant and coverage.<sup>99</sup>

Under the statute, the commission must find the claimant is "totally and permanently disabled" in order to award lifetime benefits.<sup>100</sup> "The generally accepted test of total disability is inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'"<sup>101</sup> Thus, total disability does not require complete helplessness.<sup>102</sup>

A claimant must be either a paraplegic, a quadriplegic, or have suffered "physical brain damage" to fall under the exception to the five-hundred-week limitation and receive compensation benefits for the remainder of the claimant's life.<sup>103</sup> Quadriplegia and paraplegia are well-defined within the

<sup>92</sup> S.C. Code Ann. § 42-9-10(A) (Supp. 2013). "The 500 week limitation, however, represents the limit of the monetary amount of compensation that may be recovered. It has no relation to the duration or the extent of the injury. A permanent impairment, by definition, lasts for a lifetime." James v. Anne's Inc., 701 S.E.2d 730, 736 (S.C. 2010).

<sup>93</sup> S.C. Code Ann. § 42-9-10(C) (Supp 2013).

<sup>94</sup> CFRE, LLC v. Greenville Cnty. Assessor, 716 S.E.2d 877, 881 (S.C. 2011) (citing City of Rock Hill v. Harris, 705 S.E.2d 53, 54 (S.C. 2011)).

<sup>95</sup> First Baptist Church of Mauldin v. City of Mauldin, 417 S.E.2d 592, 593 (S.C. 1992) (citing Bryant v. City of Charleston, 368 S.E.2d 899 (S.C. 1988)).

<sup>96</sup> See Charleston Cnty. Sch. Dist. v. State Budget & Control Bd., 437 S.E.2d 6, 8 (S.C. 1993).

<sup>97</sup> See Jones v. State Farm Mut. Auto. Ins. Co., 612 S.E.2d 719, 724 (S.C. Ct. App. 2005) ("If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself.").

<sup>98</sup> Carter v. Penney Tire & Recapping Co., 200 S.E.2d 64, 67 (S.C. 1973); Shealy v. Aiken Cnty., 535 S.E.2d 438, 442 (S.C. 2000) (citing Dickert v. Metro. Life Ins. Co., 411 S.E.2d 672, 674 (S.C. Ct. App. 1991), aff'd in part, rev'd in part, 428 S.E.2d 700 (S.C. 1993)) (noting that the workers' compensation statute is liberally construed in furtherance of the "beneficial purposes for which it was designed").

<sup>99</sup> Anderson v. Baptist Med. Ctr., 541 S.E.2d 526, 530 (S.C. 2001).

<sup>100</sup> S.C. Code Ann. § 42-9-10(C) (Supp 2013).

<sup>101</sup> Wynn v. Peoples Natural Gas Co., 118 S.E.2d 812, 818 (S.C. 1961) (quoting Lee v. Minneapolis St. Ry. Co., 41 N.W.2d 433, 436 (Minn. 1950)).

<sup>102</sup> See id.

<sup>103</sup> S.C. Code Ann. § 42-9-10(C).

medical community.<sup>104</sup> The problem becomes interpreting the meaning of [\*465] physical brain damage.<sup>105</sup>

A claimant may sustain a physical brain injury but be unable to prove he is permanently and totally disabled.<sup>106</sup> Rather, a claimant must show he or she has sustained a severe and permanent brain injury,<sup>107</sup> which was causally related to his or her work-related accident,<sup>108</sup> and is unable to return to any gainful employment in order to receive lifetime benefits.<sup>109</sup>

A helpful case for illustrating the connection between the physical brain damage requirements and the permanent and total disability requirement is *Pearson v. JPS Converter & Industrial Corp.*<sup>110</sup> In *Pearson*, the claimant was injured on the job when he fell and struck his head.<sup>111</sup> His physician recommended that he attend a post-acute brain injury program, and if he was not going to attend, then the physician "considered him to have reached maximum medical improvement."<sup>112</sup> Without further medical improvement, "he was not an acceptable employee in any gainful situation."<sup>113</sup> Another doctor opined that *Pearson* was permanently and totally disabled and that because [\*466] of his closed head injury, he would likely never work again and his mental status would further decline.<sup>114</sup> The court found that the statute did not require that total and permanent disability be solely the result of physical brain damage; "the statute only requires that a claimant be totally and permanently disabled and suffer physical brain damage as a result of the injury[.]"<sup>115</sup> not physical brain damage causing disability.<sup>116</sup> Even though the court agreed that *Pearson's* total and

<sup>104</sup> Quadriplegia is:

impairment or loss of motor and/or sensory function in the cervical segments of the spinal cord due to damage of neural elements within the spinal canal. [Quadriplegia] results in impairment of function in the arms as well as typically in the trunk, legs, and pelvic organs, i.e. including the four extremities.

Steven C. Kirshblum et al., *International Standards for Neurological Classification of Spinal Cord Injury*, 34 *J. Spinal Cord Med.* 535, 536 (2011). Paraplegia is "impairment or loss of motor and/or sensory function in the thoracic, lumbar or sacral (but not cervical) segments of the spinal cord, secondary to damage of neural elements within the spinal canal." *Id.*

<sup>105</sup> See [Sparks v. Palmetto Hardwood, Inc.](#), 750 S.E.2d 61, 63-65 (S.C. 2013); [Crisp v. SouthCo., Inc.](#), 738 S.E.2d 835, 841-44 (S.C. 2013); [Fragosa v. Kade Constr., LLC](#), No. 2012-212279, 2013 WL 6192428 at 1 (S.C. Ct. App. Nov. 27, 2013); [Baker v. Hilton Hotels Corp.](#), 752 S.E.2d 279, 282-83 (S.C. Ct. App. 2013).

<sup>106</sup> Those workers would be able to claim benefits under S.C. Code Ann. Regs. 67-1101(c), which provides ranges of compensation for partial loss of the use of the brain. S.C. Code Ann. Regs. 67-1101(c) (2010).

<sup>107</sup> S.C. Code Ann. § 42-9-10(C) (Supp. 2013).

<sup>108</sup> S.C. Code Ann. § 42-1-160(A) (Supp. 2013).

<sup>109</sup> See [Coleman v. Quality Concrete Prods., Inc.](#), 142 S.E.2d 43, 44 (S.C. 1965); [Wynn v. Peoples Natural Gas Co.](#), 118 S.E.2d 812, 818 (S.C. 1961); [Colvin v. E.I. Du Pont De Nemours Co.](#), 88 S.E.2d 581, 585 (S.C. 1955).

<sup>110</sup> [489 S.E.2d 219 \(S.C. Ct. App. 1997\).](#)

<sup>111</sup> [Id. at 220.](#)

<sup>112</sup> [Id. at 221.](#)

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> [Id. at 222.](#)

<sup>116</sup> *Id.*

permanent disability was caused as a result of physical brain damage that he suffered from the work-related accident, Pearson was entitled to lifetime medical care and treatment and lifetime compensation benefits under the Act.<sup>117</sup>

South Carolina's courts have recognized that varying degrees of injuries are listed in the lifetime benefits statute.<sup>118</sup> Though it deals with paraplegia rather than physical brain damage, *Reed-Richards v. Clemson University* demonstrates that varying degrees of injuries are recognized under the Act if accompanied by permanent and total disability.<sup>119</sup> In *Reed-Richards*, the claimant sustained a compression fracture of her spine as a result of a car accident arising out of and in the scope of her employment.<sup>120</sup> Her treating physician opined that she was an incomplete paraplegic.<sup>121</sup> The appellate court found that the diagnosis of incomplete paraplegia was included under the statutory phrase "paraplegic,"<sup>122</sup> as nothing in the statute differentiates between levels of paraplegia.<sup>123</sup> The court considered the "liberal purpose" of construing the workers' [\*467] compensation laws in favor of the claimant.<sup>124</sup> The court simply stated that "there was no need for the legislature to specify that a claimant can recover lifetime benefits based on a diagnosis of incomplete paraplegia if the claimant [was] totally and permanently disabled as a result of this condition."<sup>125</sup>

#### IV. SOUTH CAROLINA CASES ON PHYSICAL BRAIN DAMAGE

Four recent South Carolina cases have addressed whether a claimant who has suffered a brain injury is entitled to lifetime benefits under the Act.<sup>126</sup> The South Carolina Supreme Court determined that a physical brain injury must be both severe and permanent for a claimant to be entitled to lifetime benefits under the Act.<sup>127</sup> The first two cases, *Sparks v. Palmetto Hardwood, Inc.*,<sup>128</sup> and *Crisp v. SouthCo., Inc.*,<sup>129</sup> are supreme court cases in which the court adopted a

<sup>117</sup> *Id.*

<sup>118</sup> See [Reed-Richards v. Clemson Univ.](#), 638 S.E.2d 77 (S.C. Ct. App. 2006).

<sup>119</sup> *Id.*

<sup>120</sup> [Id. at 78.](#)

<sup>121</sup> *Id.* The claimant suffered loss of motor and/or sensory function in the thoracic, lumbar, or sacral segments of the spinal cord secondary to damage of neural elements within the spinal canal. *Id.*

<sup>122</sup> [Id. at 80.](#)

<sup>123</sup> [Id. at 79.](#)

<sup>124</sup> [Id. at 79](#); [Lizee v. S.C. Dep't of Mental Health](#), 623 S.E.2d 860, 864 n.2 (S.C. Ct. App. 2005) (noting "the principle that workers' compensation laws in general ... are to be liberally construed in favor of claimants and coverage").

<sup>125</sup> [Reed-Richards](#), 638 S.E.2d at 80.

<sup>126</sup> See [Sparks v. Palmetto Hardwood, Inc.](#), 750 S.E.2d 61, 63-64 (S.C. 2013); [Crisp v. SouthCo, Inc.](#), 738 S.E.2d 835, 843-44 (S.C. 2013); see also [Fragosa v. Kade Constr., LLC](#), No. 5185, 2013 WL 6192428, at 3-4 (S.C. Ct. App. Nov. 27, 2013); [Baker v. Hilton Hotels Corp.](#), 752 S.E.2d 279 (S.C. Ct. App. 2013).

<sup>127</sup> [Sparks](#), 750 S.E.2d at 64; [Crisp](#), 738 S.E.2d at 843-44.

<sup>128</sup> [Sparks](#), 750 S.E.2d 61

<sup>129</sup> [Crisp](#), 738 S.E.2d 835.

severity requirement. The next two cases, *Baker v. Hilton Hotels Corp.*,<sup>130</sup> and *Fragosa v. Kade Construction, LLC*,<sup>131</sup> illustrate how the court of appeals has applied the rule.

#### A. *Sparks v. Palmetto Hardwood, Inc.*

*Sparks*<sup>132</sup> involved a saw operator employed by Palmetto Harwood, Inc., who sustained injuries when a piece of metal [\*468] struck him in the head while on the job.<sup>133</sup> Six doctors considered whether Sparks had suffered a physical brain injury.<sup>134</sup> Two doctors stated that Sparks might have suffered a mild brain injury because of the pain and psychiatric disturbances he was experiencing, three doctors stated that he had suffered a physical brain injury, and one doctor opined he did not suffer a physical brain injury.<sup>135</sup>

*Sparks* testified at the workers' compensation hearing that he suffered from "substantial head pain, loss of cognitive ability, and other brain-function-related symptoms, including inability to read without severe headache, loss of his mathematical abilities, inability to balance while standing or [walking] without a cane, hand tremors, anxiety, and more."<sup>136</sup> The South Carolina Workers' Compensation Commission found that Sparks had sustained a compensable head injury and was totally and permanently disabled but denied him lifetime benefits because he did not suffer "physical brain damage."<sup>137</sup> The Commission awarded Sparks five hundred weeks of compensation.<sup>138</sup>

On appeal, the South Carolina Circuit Court remanded the case to the Commission to explain: (1) whether "physical brain injury" was intended to be the same as or different from "physical brain damage," and (2) to explain the findings that Sparks suffered a compensable head injury yet no physical brain injury.<sup>139</sup> On remand, the Commission stated that Sparks did not carry his burden of proof to establish physical brain damage and even though the finding "notes an injury-by-accident to the brain," it did not constitute "damage to the brain."<sup>140</sup>

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<sup>130</sup> [752 S.E.2d 279 \(S.C. Ct. App. 2013\).](#)

<sup>131</sup> [No. 2012-212279, 2013 WL 6192428 \(S.C. Ct. App 2013\).](#)

<sup>132</sup> [750 S.E.2d 61.](#)

<sup>133</sup> [Id. at 62.](#)

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* This demonstrates the fact that there is substantial disagreement in the medical community regarding what constitutes a mild TBI. See *supra* Part II.

<sup>136</sup> [Sparks, 750 S.E.2d at 62.](#)

<sup>137</sup> *Id.* The Commission found that Sparks' testimony regarding the extent of his brain injury was not credible and no evidence indicated that he was "dazed and confused after his head injury or suffered nausea, vomiting, cognitive impairments, or post-concussive headaches." *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> [Id. at 62-63.](#)

[\*469] The supreme court affirmed the Commission.<sup>141</sup> The court reasoned that the general assembly intended a more restrictive meaning of physical brain damage because the phrase only applied as an exception to the normal five-hundred-week limitation for benefits.<sup>142</sup> The court also noted that physical brain damage was listed along with paraplegia and quadriplegia, both of which are permanent physical impairments, and thus the general assembly meant to require severe, permanent impairment of normal brain function for an injured worker to be deemed physically brain damaged.<sup>143</sup>

The court also looked at other workers' compensation statutes where the general assembly used the term "brain damage."<sup>144</sup> The court noted that in § 42-9-400(d) (Supp. 2011), the term brain damage is more clearly defined as permanent and physical damage to the brain.<sup>145</sup> In addition, the court noted that a restrictive definition of physical brain damage is consistent with the purpose of the workers' compensation statutes to provide only minimal compensation.<sup>146</sup> However, the court notably failed to reference the principles of liberal construction and construing workers' compensation laws in favor of claimants.<sup>147</sup> Finally, the court also required that the damage be "physical," which "means "of or pertaining to the body, as distinguished from the mind or spirit; bodily' and "of or [\*470] pertaining to material things.'"<sup>148</sup>

#### B. Crisp v. SouthCo., Inc.

Crisp, an employee of SouthCo., was installing fence poles into the ground, when the 600-pound bucket of a Bobcat detached and fell on him.<sup>149</sup> At the emergency room, Crisp was treated for cuts and bruises to the back of his head and a complex fracture in his right hand.<sup>150</sup> Crisp testified in a deposition that he "began experiencing problems with his memory and difficulties mentally processing information, concentrating on more than one task, and keeping up with daily tasks ... ."

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<sup>141</sup> [Id. at 63.](#)

<sup>142</sup> [Id.](#)

<sup>143</sup> [Id.](#)

<sup>144</sup> [Id.](#)

<sup>145</sup> [Id.](#)

<sup>146</sup> [Id. at 64](#); see also [Town of Mt. Pleasant v. Roberts, 713 S.E.2d 278, 283 \(S.C. 2011\)](#); [Wigfall v. Tideland Utils., Inc., 580 S.E.2d 100, 107-08 \(S.C. 2003\)](#). In [Wigfall](#), the court stated that the purpose of the workers' compensation provisions is "to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation. In exchange for these benefits, the parties and society as a whole bear some costs." [580 S.E.2d at 107](#) (internal citations omitted). The court further noted that these benefits "are not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others." [Id. at 108.](#)

<sup>147</sup> [Reed-Richards v. Clemson Univ., 638 S.E.2d 77, 80 \(S.C. Ct. App. 2006\)](#); [Lizee v. S.C. Dep't of Mental Health, 623 S.E.2d 860, 864 n.2 \(S.C. Ct. App. 2005\)](#) (noting "the principle that workers' compensation laws in general ... are to be liberally construed in favor of claimants and coverage.").

<sup>148</sup> [Sparks, 750 S.E.2d at 64](#) (citing American Heritage Dictionary 935 (2d College ed. 1991)).

<sup>149</sup> [Crisp v. SouthCo., Inc., 738 S.E.2d 835, 837 \(S.C. 2013\)](#); [Brief of Petitioner at 5, Crisp v. SouthCo., Inc., 738 S.E.2d 835 \(S.C. 2013\)](#).

<sup>150</sup> [Crisp, 738 S.E.2d at 837.](#)

<sup>151</sup> However, the treating physicians did not document in their records that Crisp sustained a head injury. <sup>152</sup> Crisp was evaluated by two clinical psychologists: One opined that Crisp “sustained physical brain damage as a result of his work injury ... ,” <sup>153</sup> while the other opined that Crisp “did not sustain a traumatic brain injury nor was there any objective medical evidence of a brain abnormality.” <sup>154</sup>

A single commissioner determined that Crisp had not sustained a physical brain injury, but had not reached maximum medical improvement and needed additional medical care and treatment in a brain injury program. <sup>155</sup> Crisp appealed to the full commission, which unanimously affirmed. <sup>156</sup> On appeal, the circuit court reversed and held that the commission’s order was inconsistent because it determined that Crisp had not sustained a physical brain injury but had brain injury related conditions. <sup>157</sup> [\*471] The defendants appealed and the court of appeals found that Crisp did not sustain a physical brain injury, reversing the circuit court and upholding the Commission’s decision. <sup>158</sup>

The South Carolina Supreme Court held the inclusion of “physical brain damage” among other serious injuries (i.e., paraplegia and quadriplegia), indicated that the legislature meant a brain injury so severe that the claimant could not return to gainful employment. <sup>159</sup> Relying on Sparks, the court stated the legislature’s intent was to award a claimant lifetime benefits only in the most serious cases of brain injury - where the brain injury was both permanent and physical. <sup>160</sup> But the court focused on the severity of the injury as the lynchpin of the analysis. <sup>161</sup> The court also noted that the statute <sup>162</sup> defines “permanent physical impairment” to mean “any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed.” <sup>163</sup> Crisp was denied lifetime benefits. Crisp stands for the proposition that there must be sufficient evidence in the record to support a finding of physical brain damage, and the

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<sup>151</sup> [Id. at 838.](#)

<sup>152</sup> [Id. at 837.](#)

<sup>153</sup> [Id. at 838.](#)

<sup>154</sup> *Id.*

<sup>155</sup> [Id. at 839](#); Order of the Single Commissioner at 17-20, *Crisp v. SouthCo*, No. 0402927 (S.C. Workers’ Comp. Comm’n Aug. 1, 2006).

<sup>156</sup> [Crisp, 738 S.E.2d at 840.](#)

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> [Id. at 842.](#)

<sup>161</sup> *Id.*

<sup>162</sup> S.C. Code Ann. § 42-9-400(d) (Supp. 2013).

<sup>163</sup> [Crisp, 738 S.E.2d at 843](#) (citing SC Code Ann. § 42-9-400(d) (Supp. 2011)).

brain damage must be serious in order for the claimant to be entitled to lifetime benefits under the Act.<sup>164</sup>

### C. Baker v. Hilton Hotels Corp.

Baker was a maintenance worker who sustained a head injury when a piece of ceiling tile fell, knocking him to the ground and causing him to lose consciousness.<sup>165</sup> He was initially diagnosed with a scalp laceration and a head contusion.<sup>166</sup> At his [\*472] hearing before the commissioner, Baker's wife testified that Baker suffered from "memory loss, confusion, and forgetfulness" and that his "personality changed after the accident."<sup>167</sup> The single commissioner found that Baker "did not suffer a physical brain injury or any resulting physical brain damage as a result of the accident and denied Baker's request for lifetime benefits."<sup>168</sup>

When Baker appealed, the appellate panel affirmed the commissioner's order.<sup>169</sup> The appellate panel concluded Baker may have sustained an injury to the head with brief and mild post-concussive symptoms but the evidence did not support a finding of physical brain damage.<sup>170</sup>

Later, the court of appeals relied on the holding in Crisp that "the severity of the injury is the lynchpin of the analysis" and interpreted "the inclusion of 'physical brain damage' among the most serious injuries within the statutory exception to the five-hundred-week cap on benefits as an indication that the legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment."<sup>171</sup> The court noted that Crisp was "in harmony 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."<sup>172</sup> The court of appeals also relied on Sparks, in which the state supreme court concluded that physical brain damage is permanent and severe and declined to require that physical brain damage be proven through an "objective diagnostic medium."<sup>173</sup>

As a result, the court of appeals affirmed the appellate panel's finding there was insufficient evidence in the record to [\*473] support a finding of physical brain damage because the post-accident medical records made no reference to a brain injury or physical brain damage.<sup>174</sup>

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<sup>164</sup> [Id at 844.](#)

<sup>165</sup> [Baker v. Hilton Hotels Corp., 752 S.E.2d 279, 279-80 \(S.C. Ct. App. 2013\).](#)

<sup>166</sup> [Id. at 280.](#)

<sup>167</sup> [Id. at 281.](#)

<sup>168</sup> Id.

<sup>169</sup> Id.

<sup>170</sup> Id. The appeal skips over the circuit court and goes directly to the court of appeals if the date of accident is after July 1, 2007. See [Crisp v. SouthCo., Inc., 701 S.E.2d 762, 764 n.1 \(S.C. Ct. App. 2010\).](#)

<sup>171</sup> [Baker, 752 S.E.2d at 282](#) (quoting [Crisp, 738 S.E.2d at 843](#)).

<sup>172</sup> Id. (quoting [Crisp, 738 S.E.2d at 843](#)).

<sup>173</sup> Id. (quoting [Sparks v. Palmetto Hardwood, Inc., 750 S.E.2d 61, 64 \(S.C. 2013\)](#)).

<sup>174</sup> Id. at 283.

#### D. Fragosa v. Kade Construction, LLC

Fragosa, a construction worker, was hit in the head by a crane and knocked off a parking garage roof.<sup>175</sup> He was in a coma for two weeks after the accident and had multiple diagnoses, including subdural and epidural hematomas, bilateral frontal contusions, scalp laceration, and skull fracture.

<sup>176</sup> A neuropsychologist noted Fragosa had sustained a skull fracture with minor structural change to the brain but the diagnostic studies (i.e., EEGs, CTs, and MRIs) were “unremarkable.”<sup>177</sup>

Another neuropsychologist determined Fragosa had a right temporal lobe injury but stated there was no evidence of brain damage.<sup>178</sup> A psychologist and brain injury specialist concluded that Fragosa sustained multiple post-concussion injuries, “resulting in continuing and severe symptoms clearly associated with a physical traumatic brain injury,” and that he was permanently unable to return to gainful employment.<sup>179</sup>

The single commissioner held Fragosa was totally and permanently disabled but he was not entitled to lifetime benefits because he did not suffer a physical brain injury or physical brain damage.<sup>180</sup> The appellate panel affirmed.<sup>181</sup> On appeal, the court of appeals differentiated between a physical brain injury, which is compensated under Regulation 67-1101, and physical brain damage, which is compensated under § 42-9-10(C) of the Act.<sup>182</sup> Because physical brain damage is not statutorily defined, the [\*474] court looked to the decision in Crisp.<sup>183</sup> The court of appeals noted that “the question of whether an employee has sustained either a physical brain injury or physical brain damage “gives rise to the coextensive question of what proof is required in these cases;”<sup>184</sup> however, the court in Crisp was “reluctant to require use of a specific diagnostic tool in proving” a brain injury.<sup>185</sup> The court of appeals remanded the case to the appellate panel for clarification of whether Fragosa’s injuries included an injury to the brain and, if so, whether such injury was of sufficient severity to reach the level of physical brain damage under § 42-9-10(C).<sup>186</sup>

#### V. OTHER STATES’ APPROACHES TO BRAIN INJURY

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<sup>175</sup> [Fragosa v. Kade Constr., LLC, No. 2012-212279, 2013 WL 6192428, at 1](#) (S.C. Ct. App. Nov. 27, 2013).

<sup>176</sup> Id.

<sup>177</sup> Id.

<sup>178</sup> Id.

<sup>179</sup> Id. at 2.

<sup>180</sup> Id. at 3.

<sup>181</sup> Id.

<sup>182</sup> Id. at 4.

<sup>183</sup> Id. at 5.

<sup>184</sup> Id.

<sup>185</sup> Id. (citing [Crisp v. SouthCo., Inc., 738 S.E.2d 835, 844 \(S.C. 2013\)](#)).

<sup>186</sup> Id. at 5.

A number of states have a workers' compensation statute that provides lifetime benefits for an injured worker who has sustained brain damage.<sup>187</sup> In light of the recent South Carolina court decisions, which have read a severity requirement for compensable brain damage into the Act, it is helpful to evaluate other states' approaches to brain injury.<sup>188</sup> These statutes illustrate that requiring severity is not uniform across all states.<sup>189</sup>

One approach taken by Virginia and New York is to adopt an exception to the rule for permanent and total disability compensation that relies on the employee's ability to return to work instead of whether the injury is permanent and severe.<sup>190</sup> For example, the Virginia statute permits lifetime benefits for "injury to the brain which is so severe as to render the employee permanently unemployable in gainful employment."<sup>191</sup> Similarly, [\*475] in New York, a brain injury results in permanent total disability "when the evidence establishes that the injured worker is no longer employable in any capacity."<sup>192</sup> The number of weeks the employee may receive compensation is based on the percentage of his loss of earning capacity.<sup>193</sup> If the injured worker sustained a brain injury and his loss of earning capacity is 95% or higher, he is entitled to receive only 525 weeks of compensation.<sup>194</sup> However, under Workers' Compensation Law § 11, when an employee suffers a "grave injury" (such as a brain injury that results in permanent total disability making the injured worker no longer employable in any capacity), the employer may also be liable to third parties for indemnification or contribution.<sup>195</sup>

On the other hand, North Carolina has expressly written severity into the text of its workers' compensation laws.<sup>196</sup> "The decisions of North Carolina courts interpreting that state's workers' compensation statute are entitled to weight in some instances because the South Carolina statute was fashioned after North Carolina's."<sup>197</sup> Like South Carolina, the North Carolina workers' compensation statute provisions should be liberally construed to effectuate a broad intent of the Act to provide compensation for injured workers.<sup>198</sup>

North Carolina's statute on permanent total disability allows an employee to receive extended benefits over the five-hundred-week limit if he or she sustains a "severe brain or closed head injury

<sup>187</sup> See Employment: Workers' Compensation: Nature of Injury and Degree of Disability (Statutes), Thomson Reuters/West (Nov. 2012) (detailing various states' workers' compensation laws).

<sup>188</sup> Id.

<sup>189</sup> Id.

<sup>190</sup> Va. Code Ann. § 65.2-503(c) (West 2012); [Rubeis v. Aqua Club, Inc., 821 N.E.2d 530, 532 \(N.Y. App. Div. 2004\)](#).

<sup>191</sup> Va. Code Ann. § 65.2-503(c)(3) (West 2012).

<sup>192</sup> [Rubeis, 821 N.E.2d at 532](#).

<sup>193</sup> Disability Classifications, New York State Workers' Compensation Board, <http://perma.cc/7NZP-7M85> (last visited May 27, 2014 1:29 PM).

<sup>194</sup> Id.

<sup>195</sup> Minkowitz, Practice Commentary, McKinney's Con. Laws of N.Y., Book 9, Worker's Comp. Law § 11; [Rubeis, 821 N.E.2d at 532](#).

<sup>196</sup> N.C. Gen. Stat. Ann. § 97-29(d)(3)(a)-(d) (West Supp. 2013).

<sup>197</sup> [Adams v. Texfi Indus., 464 S.E.2d 109, 112 \(S.C. 1995\)](#).

<sup>198</sup> See N.C. Gen. Stat. Ann. § 97-29(d)(3)(a)-(d) (West Supp. 2013).

as evidenced by severe and permanent: sensory or motor disturbances; communication disturbances; complex integrated disturbances of cerebral function; or neurological disorders”<sup>199</sup> unless “the employer shows by a preponderance of the evidence that the employee is capable of returning to suitable [\*476] employment ... .”<sup>200</sup>

North Carolina includes the word “severe” in the language of the statute.<sup>201</sup> The courts in North Carolina have defined a permanent and total disability as one in which an employee sustains an injury which results in his inability to function in any work related capacity at any time in the future.<sup>202</sup>

## VI. SEVERITY SHOULD NOT BE REQUIRED

In the summer of 2013, the court imposed a requirement that all brain injuries be “severe” in order for a person to receive lifetime benefits.<sup>203</sup> This was the first time the South Carolina Supreme Court has ever said a brain injury has to be severe under the Workers’ Compensation Act.<sup>204</sup> When the South Carolina Supreme Court adopted the “severe” requirement in *Crisp*,<sup>205</sup> it was a step backwards for employees suffering from brain damage. Because of the way South Carolina interpreted physical brain injury under the statute,<sup>206</sup> it has resulted in a denial of workers’ compensation benefits to people who should [\*477] have been entitled to lifetime benefits.<sup>207</sup> Section 42-9-10(C) indicates a claimant is entitled to lifetime benefits for paraplegia, quadriplegia, and physical brain injury,<sup>208</sup> and the court has added words of significance to the statute and caused ambiguity in the meaning of the added requirements. This section argues that severity should not be required because: (1) South Carolina need not rely on the North Carolina statute and (2) severity adds ambiguity to the Act’s application.

<sup>199</sup> Id.

<sup>200</sup> Id. at § 97-29(d); See also [Dishmond v. Int’l Paper Co.](#), 512 S.E.2d 771, 774 (N.C. Ct. App. 1999) (affirming the Commission’s award of total permanent disability where there was competent evidence in the record that total disability was the consequence of the employee’s brain injury and where evidence indicated the employee “could no longer function in a work environment”); [Slizewski v. Int’l Seafood, Inc.](#), 264 S.E.2d 810, 814 (N.C. Ct. App. 1980) (finding the evidence supported a finding that claimant “suffered permanent brain injury and [was] permanently unable to function in a work related capacity”).

<sup>201</sup> N.C. Gen. Stat. § 97-29(d)(3) (West 2013).

<sup>202</sup> [Gamble v. Borden, Inc.](#), 263 S.E.2d 280, 281 (N.C. Ct. App. 1980). *Slizewski* provides an example of the North Carolina statute in action. [264 S.E.2d 810](#). *Slizewski* was a healthy young man, who, after being injured at work sustained a hematoma, which caused him to experience seizures, paralysis in his left hand, partial paralysis in his left leg and face, and required him to wear glasses because of reduced visual capabilities. [Id. at 811](#). The court held that the nature of *Slizewski*’s injury was severe in that he suffered permanent brain injury, and that he was permanently unable to function in a work-related capacity. [Id. at 814](#). Therefore, he was entitled to an award of lifetime benefits under the statute. *Id.*

<sup>203</sup> See discussion *supra* Part IV.

<sup>204</sup> See [Sparks v. Palmetto Hardwood](#), 750 S.E.2d 61, 63-64 (S.C. 2013); [Crisp v. SouthCo., Inc.](#), 738 S.E.2d 835, 842-44 (S.C. 2013).

<sup>205</sup> [Crisp](#), 738 S.E.2d at 843.

<sup>206</sup> S.C. Code Ann. § 42-9-10(C) (Supp. 2013).

<sup>207</sup> See, e.g., [Sparks](#), 750 S.E.2d at 65; [Crisp](#), 738 S.E.2d at 844; see also [Baker v. Hilton Hotels Corp.](#), 752 S.E.2d 279, 285 (S.C. Ct. App. 2013); [Fragosa v. Kade Constr., LLC](#), No. 2012-212279, 2013 WL 6192428, at 5 (S.C. Ct. App. Nov. 27, 2013).

<sup>208</sup> S.C. Code Ann. § 42-9-10(C) (2013).

### A. South Carolina Erroneously Interpreted the Statute

The court overstepped its bounds by adding in an additional requirement to the statute, unlike North Carolina,<sup>209</sup> since the word "severe" is not part of the statutory language.<sup>210</sup> By injecting the word "severe" into the statute, the court has neither viewed the statute strictly nor has it construed the statute in favor of the injured worker. By narrowing the statute even further, the court misunderstood the intent of the legislature, destroyed the meaning of the entire context by adding a word of significance that is clearly repugnant to the statute, and contradicted the holdings of prior case law.<sup>211</sup>

Justice Pleicones noted in his concurring opinion in *Crisp* that the "language of other states' statutes cannot guide our interpretation of different language adopted by the general assembly. Even to the extent we give great weight to the North Carolina courts' interpretation of its workers' compensation act, this is true only when the courts deal with identical statutory language."<sup>212</sup> This further evidences that the court erroneously [\*478] interpreted the statute by overreaching and injecting additional language into the statute.<sup>213</sup>

### B. Severity Adds Ambiguity

By reading a severity requirement into the statute, the Court adds ambiguity and confusion to the application of the statute. By tying the injury to a showing of permanent and total disability, the statute contains its own severity requirement.<sup>214</sup> The statute provides: "any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life."<sup>215</sup>

As discussed above, the term severe in the context of a brain injury is a complicated term that has many different definitions.<sup>216</sup> Most physical brain injuries are characterized as mild at first but could progress to severe over the course of time, which could lead to significant cognitive and physical functioning deficits or death.<sup>217</sup> This progression is especially distressing for older workers when the effects of aging set in and increase the disability of brain injury at a faster and

<sup>209</sup> N.C. Gen. Stat. Ann. § 97-29(d)(3)(a)-(d) (West Supp. 2013).

<sup>210</sup> S.C. Code Ann. § 42-9-10(C) (2013).

<sup>211</sup> Mainly, the narrowing of the statute contradicted *Reed-Richards v. Clemson University* because the court in *Reed-Richards* interpreted the statute broadly. [638 S.E.2d 77, 80 \(S.C. Ct. App. 2006\)](#).

<sup>212</sup> [Crisp, 738 S.E.2d at 844-45](#), (Pleicones, J. concurring); see also [Flemon v. Dickert-Keowee, Inc., 190 S.E.2d 751, 752 \(S.C. 1972\)](#).

<sup>213</sup> See [Crisp, 738 S.E.2d at 844-45](#).

<sup>214</sup> S.C. Code Ann. § 42-9-10(C) (Supp. 2013).

<sup>215</sup> *Id.*

<sup>216</sup> See, e.g., Brain Inj. Ass'n of Am., *supra* note 11; Freire et al., *supra* note 32; [Crisp, 738 S.E.2d at 842](#); [Petition for Rehearing at 4, Crisp, 738 S.E.2d at 835](#) (No. 2010-180906). See also *supra* Part II.A.

<sup>217</sup> See Brain Inj. Ass'n of Am., *supra* note 11.

more debilitating rate.<sup>218</sup> Also, brain injuries are often misdiagnosed because the usual diagnostic studies, such as MRIs, only detect gross abnormalities and do not detect mild and moderate brain injuries.<sup>219</sup>

It is necessary to specify what severe means in regards to the statute because if the legislature intended the meaning to be consistent with what severe means to a medical doctor in diagnosing a traumatic brain injury, then an injured worker is not entitled to lifetime benefits unless they are in a vegetative [\*479] state.<sup>220</sup> Since a severe brain injury to a medical professional is an extreme condition, perhaps the courts need to change the term to mild or moderate instead of severe.<sup>221</sup> The courts must realize that brain injuries can be mild and the symptoms may not appear right away; people with brain injuries may look asymptomatic even though they are acting or feeling differently.<sup>222</sup>

Articulating severity as the standard for lifetime benefits due to a brain injury makes the lifetime benefits statute narrower than its intended scope.<sup>223</sup> The use of the word severe in the statute carries significant consequences, especially when the effect of using this word is denying benefits to legitimately injured workers, which is the exact opposite of the purpose and mission of the South Carolina Workers' Compensation Act.

## VII. A PROPOSED SOLUTION

There are two possible solutions: judicial or legislative. One possible solution is for the courts to define what a severe brain injury is and establish criteria so it is clear to the lower courts whether a person may or may not be entitled to lifetime benefits.<sup>224</sup> The courts should look to the medical definition and diagnostic criteria.<sup>225</sup>

With the courts reading a severity requirement into the Act, another option is for the legislature to intervene. This route may be arduous and expensive but may be necessary if the courts do [\*480] not reconsider their rulings.<sup>226</sup> By amending the statute, the legislature should state severity is not required. However, if that fails and the lower courts are left with the severe requirement, the

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<sup>218</sup> Id.

<sup>219</sup> Menon et al., *supra* note 27, at 1638-39.

<sup>220</sup> Brain Inj. Ass'n of Am., *supra* note 11; Andrew I.R. Maas et al., Moderate and Severe Traumatic Brain Injury in Adults, 7 *Lancet Neurology*, 728, 729-32.

<sup>221</sup> Brain Inj. Ass'n of Am., *supra* note 11.

<sup>222</sup> See Brain Inj. Ass'n of Am., *supra* note 11.

<sup>223</sup> See S.C. Code Ann. § 42-9-10(c) (Supp. 2013); [Charleston Cnty. Sch. Dist. v. State Budget and Control Bd.](#), 437 S.E.2d 6, 8 (S.C. 1993).

<sup>224</sup> Larson, *supra* note 70, at § 1.02.

<sup>225</sup> See *supra* notes 27-62 and accompanying text for further discussion of this issue. It would also be helpful if the medical community agreed on a proper definition of traumatic brain injury so the courts and medical experts can apply a more precise and uniform way of determining whether someone has suffered a brain injury and identify the proper methods to diagnose a brain injury. See Brain Inj. Ass'n of Am., *supra* note 11; Freire et al *supra* note 32 (discussing different medical definitions).

<sup>226</sup> Larson, *supra* note 70, at § 51.06.

legislature should at least define the term severe.<sup>227</sup> In that case, the legislature should amend the statute as follows:

#### Severity for purposes of § 42-9-10(C)

(1) The term severe means: Any permanent condition which is expected to give rise to a long-term need for specialized health, social, and other services, and which makes the person with that impairment dependent upon others for assistance to secure these services and causes a hindrance or obstacle to return to any gainful employment.

(2) Symptoms and conditions described as manifestations of a severe injury may vary from person to person and must be determined by means of expert opinion or testimony stated to a reasonable degree of medical certainty.<sup>228</sup>

The goal of this proposed amendment is to clarify the application of the term and introduce a certain definition to permit a broad formulation of the term severe in keeping with the principles and purposes of the Act.<sup>229</sup>

Whatever the route, one thing remains clear: there is an [\*481] increased need to strengthen the courts' knowledge and understanding of traumatic brain injuries and broaden the scope of the language contained in the statute in order to protect the injured workers as the legislature intended.<sup>230</sup>

## VIII. CONCLUSION

The original purpose of the South Carolina Workers' Compensation Act was to provide injured workers and employers with a predictable and efficient means of dispute resolution; yet, the current severity requirement for brain injury is inefficient and unpredictable. What was once a program to compensate injured workers for injuries sustained on the job has now become a confusing and inconsistent line of case law that contradicts the language of the statutes and the goal of the Act. The addition of the word "severe" as a requirement under the statute was erroneous, and the case law supporting this decision should be overruled and given a consistent meaning with the statutory scheme. A statutory clarification would help the incompatibility of the case law and statutory language and ultimately settle the issue to bring some peace of mind to the legal community and

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<sup>227</sup> See supra notes 40-57 and accompanying text.

<sup>228</sup> Compare S.C. Code Ann. § 42-9-400(d) (2013) (defining "permanent physical impairment as a permanent condition ... of such seriousness as to constitute a hindrance or obstacle to obtaining employment"), with S.C. Code Ann. § 42-9-10(C) (Supp. 2013) (where the statute does not include the word severe).

<sup>229</sup> See generally Larson, supra note 70, at § 1.01. North Carolina established the Brain Injury Advisory Council in the Department of Health and Human Services to review brain injuries in North Carolina. N.C. Gen. Stat. Ann. § 143B-216.65 (West 2009). One of its duties includes reviewing "how the term 'traumatic brain injury' is defined by [North Carolina] and federal regulations and to determine whether changes should be made to the State definition." N.C. Gen. Stat. Ann. § 143B-216.65 (1) (West 2012). South Carolina also had a similar council called the Trauma Advisory Council under the Department of Health and Environmental Control. S.C. Code Ann. § 44-61-530 (2013). Another possible solution is for South Carolina to implement a Trauma Advisory Council similar to the North Carolina Brain Injury Advisory Council to assist with changing the statute by drafting a proposed amendment to the statute to reverse the courts or adopt a broad definition.

<sup>230</sup> See generally Guyton, supra note 73, at 106-10 (providing a history of workers' compensation).

restore the original goals of the Act. With four recent court decisions, now is the time for the legislature to intervene.

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