

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

APPELLATE CASE NO.: 2015-002116

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SC Court of Appeals

DANNY B. CRANE..... APPELLANT,

v.

RABER'S DISCOUNT TIRE RACK, EMPLOYER, AND SOUTH
CAROLINA UNINSURED EMPLOYERS FUND, CARRIER, RESPONDENTS.

FINAL BRIEF OF RESPONDENT
S.C. UNINSURED EMPLOYERS' FUND

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STATEMENT OF ISSUES ON APPEAL

1. Did the Workers' Compensation Appellate Panel err in affirming the Single Commissioner's finding of fact that Petitioner was not a credible witness where the medical records provided by the Petitioner/Claimant contained inconsistent reports to medical providers, the Petitioner/Claimant gave testimony which was inconsistent with those same medical records, and the Single Commissioner found the Petitioner/Claimant's behavior at the Hearing to be disingenuous?
2. Did the Workers' Compensation Appellate Panel err in affirming the Single Commissioner's finding that Petitioner's hearing injury resolved or returned to baseline where the medical records provided by Petitioner show no complaints of hearing loss at subsequent doctor's visits?
3. Did the Workers' Compensation Appellate Panel err in affirming the Single Commissioner's finding that Petitioner is not entitled to temporary total disability compensation because Petitioner did not present any credible evidence that he is unable to perform his job duties as a result of his injuries from the subject work incident?
4. Did the Workers' Compensation Appellate Panel err in relying on electronic medical records introduced by Petitioner where there evidence in the record that the default setting on those records is "normal" and where there is other evidence to support the Commission's finding that Petitioner's hearing injury had resolved or returned to baseline by that date?

5. Did the Workers' Compensation Appellate Panel err in affirming the Single Commissioner's finding that Petitioner is not entitled to a disability award for hearing loss pursuant to Regulation 67-1102 where the Commission properly found Petitioner did not suffer a permanent injury from the subject work incident?

STATEMENT OF THE CASE

The Single Commissioner Hearing. On March 11, 2014, Petitioner Danny Crane (“Petitioner”) filed a Form 50 Request for Hearing. (R. p. 60). Petitioner requested a finding of compensability, temporary total disability benefits, reimbursement for expenses already incurred, and an order requiring defendants to provide further medical treatment. (R. p. 60). Petitioner alleged injuries to his head and brain, bilateral hearing loss, aggravation of pre-existing psychological condition, and a vestibular disturbance, including problems with dizziness and balance. (R. p.64-65).

On March 24, 2014, South Carolina Uninsured Employers’ Fund (“UEF”) filed a Form 51 Employer’s Answer to Request for Hearing. The UEF denied all elements of the claim. (R. p. 61).

A hearing on Petitioner’s alleged injuries was held before Commissioner Susan S. Barden on June 26, 2014. (R. p. 171-252).

On December 16, 2014, Petitioner filed a Motion to Submit Additional Evidence. This newly submitted evidence included a report from an additional medical provider. (R. p. 162). Commissioner Barden granted the Motion. (R. p. 23-24).

On April 30, 2015, Commissioner Barden issued a final Decision and Order finding that the Employer was subject to the Workers’ Compensation Act, that Petitioner sustained an injury to his ears on the date of the accident and ordered Petitioner be reimbursed for his Emergency Room visit on February 19, 2014, his CT scan and associated visits, his two visits to his treating ENT, and his follow-up visit to Barnwell Family Practice. (R. p. 1-40). Commissioner Barden denied compensation for any future medical benefits, temporary total disability payments, and any permanent impairment as a result of the incident. (R. p. 39-40).

The Appellate Panel. Petitioner timely filed a Form 30 Notice of Appeal on May 12, 2015. (R. p. 169). The Full Commission Appellate Panel heard oral arguments on July 21, 2015. (R. p. 41). On October 1, 2015, the Appellate Panel issued a final Decision and Order affirming the Single Commissioner's Order in full. (R. p. 41-59).

Petitioner timely filed and served a Notice of Appeal to this Court on October 9, 2015.

STATEMENT OF FACTS

This case arises out of an incident which occurred on February 19, 2014 at Raber's Discount Tire Rack (hereinafter "Raber's Tire"). On February 19, 2014, Petitioner, while working at Raber's Tire, bent down to inspect a noise coming from a tire changer when an air line hose became disconnected, causing a loud noise. (R. p. 196). The entire incident was documented on videotape. (R. p. 124). The video shows Petitioner move away from the tire changer and hold his head and ears. (R. p. 124). The video then shows Petitioner talk to a co-worker and then pull out his phone. (R. p. 124, 237). The video then shows Petitioner return to work. (R. p. 124).

Petitioner's wife later took Petitioner to the Emergency Room at Barnwell County Hospital. The Emergency Room records note that Petitioner complained of an ear injury, ringing in his ears, difficulty hearing, and right ear facial pain. (R. p. 74-75). The records state that Petitioner was found to be alert and oriented with a normal mood/affect. (R. p. 74-75). Additionally, the records state that Petitioner's head was atraumatic and a "disoriented" option was not checked or marked. (R. p. 74-75). The records do not indicate Petitioner had any bruising or marks as a result of being hit being struck in the head. (R. p. 69-77). The records also do not note any memory loss, headaches, or dizziness. (R. p. 69-77). No brain diagnostic tests were ordered and Petitioner was sent home with antibiotic eardrops for an outer ear or middle ear infection. (R. p. 69-77).

The emergency room referred Petitioner to Ear Nose and Throat specialist, Dr. John F. Ansley. Petitioner visited Dr. Ansley the day after the incident. (R. p. 89). Dr. Ansley's notes indicate Petitioner reported a machine blew up in his face and that Petitioner was having some difficulty hearing. (R. p. 89). Petitioner complained only of hearing loss at this appointment. (R. p. 89). Dr. Ansley diagnosed Petitioner with bilateral tympanic membrane perforations, and

performed a Pure Tone Audiogram (“PTA”) which showed severe sensorineural hearing loss. (R. p. 90). Dr. Ansley scheduled Petitioner for a follow-up visit, noting that he expected Petitioner’s hearing to improve. (R. p. 89).

Dr. Ansley also ordered a CT scan. This CT scan was performed on February 25, 2014. (R. p. 78-79, 91). The results showed normal auditory canals, normal ossicles, normal tympanic cavities, and chronic sinusitis. (R. p. 78-79, 91).

Petitioner had a follow-up appointment with Dr. Ansley on March 6, 2014. (R. p. 92). At this appointment, Dr. Ansley performed a second PTA test. (R. p. 93). Inexplicably, this second test showed that Petitioner’s hearing had worsened and not improved. (R. p. 92-93). Dr. Ansley wrote “he actually had a shift downward on audiogram” and ruled out sensorineural hearing loss as a diagnosis (R. p. 92). Dr. Ansley then recommended Petitioner receive a “more objective measure of his hearing” and scheduled an Auditory Brainstem Response (“ABR”) test for Petitioner at the Medical University of South Carolina. (R. p. 92). Dr. Ansley’s notes do not indicate any complaints of headaches, dizziness, balance problems, or memory loss. (R. p. 89-94).

Dr. Ansley requested Petitioner schedule a follow-up appointment after receiving the more objective ABR test. (R. p. 92). Petitioner never returned to see Dr. Ansley and never had the ABR test. (R. p. 215).

On March 26, 2104, Petitioner fell getting out of his bathtub and was admitted to the Barnwell County Emergency Room for a rib fracture and wheezing. (R. p. 80-88). Petitioner testified that his fall was caused by the balance, dizziness issues he experienced after the subject work incident. Petitioner stated “I have fell out of, you know, trying to get out of the tub and broke my ribs.” (R. p. 202). However, the emergency room records do not indicate that the fall was caused by any dizziness or loss of balance. (R. p. 80-88). In fact, dizziness and balance

problems are not mentioned at all in the records. (R. p. 80-88). While the records confirm Petitioner's history of migraines, depression, Bipolar disorder, and a 1990 coma following a motor vehicle accident, they do not list any complaints or history of hearing loss, new headaches, cognitive difficulty, dizziness, memory loss, or even reference the subject work incident. (R. p. 7).

On March 31, 2014, Petitioner had a follow-up appointment for his rib fracture with his primary care physician's practice. (R. p. 95). These records note Petitioner "fell last Tuesday morning getting out of bath. Was seen in ER and given oxycodone for pain management but is now out of medication. Patient is now in pain on right side. Patient did not hit head when fell. Having trouble obtaining a full breath. Stopped smoking early last week. The patient is a 37 year old male who presents with a complaint of right rib pain." (R. p. 95). The records do not mention any problems with Petitioner's hearing or that Petitioner's fall was caused by a dizzy spell. (R. p. 95-99). In fact, the record later states "[u]pon examination of the ears, nose, mouth and throat – ... otoscopic exam reveals normal external auditory canals with tympanic membranes clear and mobile..." (R. p. 96). Under Assessments, the treating physician listed only rib fracture, sinusitis, nicotine addiction, and bipolar affective disorder. (R. p. 96-97). There is no mention of any hearing problems. (R. p. 95-99).

No other medical records related to the February 19 work incident exist until May 19, 2014. (R. p. 115). Petitioner did not return to Dr. Ansley. (R. p. 215). He did not receive the more objective ABR test at the Medical University of South Carolina which Dr. Ansley recommended. (R. p. 214-215). Instead, three months after the accident, at the recommendation of his attorney, Petitioner went to see Dr. David S. Rogers at the Oaktree Medical Centre Department of Neurology. (R. p. 115). Dr. Rogers is located in Greenville, more than seventy-

seven miles from Petitioner's home – a fact which Petitioner was able to easily recall at the Single Commissioner's hearing despite his claims of memory loss. (R. p. 249).

Petitioner reported to Dr. Rogers that he was struck in the head by an object during the incident at Raber's Tire on February 19, 2014. (R. p. 115). This is inconsistent with Petitioner's medical records from the day of the subject work incident. (R. p. 69-77). He reported that the resulting head injury has since been causing dizziness and balance problems. (R. p. 116). He reported he had fallen several times since the accident due to these balance issues and that his rib fracture on March 26, 2014 was caused by this balance problem. (R. p. 116). Petitioner also told Dr. Rogers that he was bleeding from his ears after exposure to loud noises, having cognitive and memory difficulties, and experiencing irritability and anxiety. (R. p. 116). Dr. Rogers found that Petitioner suffered from an "apparent *healed* 60% tear of the right tympanic membrane. More complete approximately 80% tear in the left tympanic membrane [emphasis supplied]." (R. p. 118). Dr. Rogers assigned permanent impairments, including an impairment for a "closed head injury with resultant post-concussive syndrome." (R. p. 119-120). Claimant also told Dr. Rogers that he never returned to work at Raber's Tire after the subject work incident on February 19. (R. p. 117).

Petitioner was the only witness to testify at the Single Commissioner hearing and his testimony varied greatly from the medical records his counsel introduced into evidence. Petitioner claimed he sustained an aggravation of a pre-existing psychological condition, a vestibular disturbance causing dizziness and other balance issues, brain injury, memory loss, headaches, and hearing loss. (R. p. 178). Petitioner testified the hose came loose from a tire changer at Raber's Tire, struck him in the forehead, and left a bruise on his right forehead as a result. (R. p. 197). Petitioner also testified he remembered being on his hands and knees immediately after the incident. (R. p. 198). The photos provided in Petitioner's Initial Brief show

Petitioner standing. Petitioner testified he remembered texting his wife immediately after the incident. (R. p. 233). He also recalled telling his co-worker, Chad, that Petitioner could not hear anything. (R. p. 233-35). However, Petitioner was unable to remember that he returned to work immediately after the incident despite the video evidence to the contrary. (R. p. 233-35).

Petitioner testified he reported memory loss to the Emergency Room staff on the day of the accident. (R. p. 212). However, there are no such complaints included in Petitioner's records from the date of the subject work incident. (R. p. 69-77). Additionally, Petitioner testified he had a bruise on his forehead which was visible to the Emergency Room staff which was caused by being struck in the head by the air hose. (R. p. 213). Again, this claim is not reflected in Petitioner's medical records from the date of the incident. (R. p. 69-77).

As to his ear injury, Petitioner testified his ears would bleed onto his pillows at night. (R. p. 199-200). He stated this bleeding was caused by wearing the amplifier he bought at Walgreens. (R. p. 198-99). He stated that the noises from the electric fans, bright lights, and electric pump gave him headaches and that his ears would bleed later that evening onto his pillows. (R. p. 198-99). Petitioner testified that, on another occasion, his children turned the music in the car up so loud that it caused his ears to bleed. (R. p. 199-200). He stated the music was so loud that his mother-in-law complained when he pulled up to the house. (R. p. 199-200).

Petitioner denied he was ever diagnosed with bipolar disorder and denied that he ever reported to any treating doctor that he was ever diagnosed with bipolar disorder. Petitioner stated: "Why would I tell them if I had bipolar if I wasn't diagnosed with it?" (R. p. 218). However, Petitioner reported his Bipolar diagnosis to Dr. Rogers one month prior to the Single Commissioner hearing. (R. p. 117).

Petitioner admitted he had a history of migraines prior to the subject accident. (R. p. 219-20). However, he qualified this by saying "everybody has migraines." (R. p. 219). He admitted

he was diagnosed with migraines and was prescribed migraine medication prior to the subject accident. (R. p. 220).

As to his claim for temporary disability benefits, Petitioner testified he returned to work at Raber's Tire "a couple of days," but could never complete a full day because of his headaches. (R. p. 226). However, Petitioner told Dr. Rogers only a month prior to the hearing that he never returned to Raber's Tire after the February 19 accident. (R. p. 117).

Petitioner admitted Mr. Raber allowed Petitioner to return to work. (R. p. 226). Petitioner admitted he can still turn a rotor because that is only visual. (R. p. 228). Petitioner admitted he can still change a tire. (R. p. 228). However, Petitioner claimed that he was still unable to work because he could not hear, even after he purchased a hearing amplifier from Walgreens for his left ear. (R. p. 226-27). Petitioner claimed this amplifier caused the loud noises in the shop to be amplified and caused headaches. (R. p. 198-99). However, Petitioner also admitted that he had migraines which pre-dated this incident and did not introduce any evidence that these headaches were aggravated by the subject work incident. (R. p.219).

Additionally, Petitioner testified that the hearing amplifier was removable and he could adjust the volume. He testified that he was able to remove the amplifier and perform his work. (R. p. 229). He was also able to then put the amplifier back into his ear when necessary. (R. p.229). Petitioner's only concern was that might get run over if he could not hear a car coming. (R. p. 229). Petitioner could not provide an example of this ever happening. (R. p. 229).

Finally, and most importantly, the Petitioner's behavior at the hearing was so inconsistent and unbelievable that the Single Commissioner stopped the hearing. As the Commissioner stated in her Order, this was a hearing that begged to be videotaped. (R. p. 21). At the outset of the hearing, Petitioner made a clear point of having trouble hearing the Commissioner, asking her to raise her voice so Petitioner could hear her. (R. p. 21; 187-89). However, Petitioner was later

able to answer questions asked by his own attorney when asked at a normal level and with his back turned so that Petitioner was unable to lip read. (R. p. 21). The Single Commissioner noted that, at times, Claimant either looked at his hands while answering questions or had his back to the questioner. (R. p. 21). Petitioner even continued to answer questions from defense counsel while defense counsel was crouched down dealing with the video footage. (R. p. 22). Commissioner Barden noted she had trouble hearing defense counsel, and yet Petitioner was able to hear and answer the questions asked of him by the attorneys. (R. p. 21).

STANDARD OF REVIEW

The Administrative Procedures Act governs review of the full workers' compensation commission's decision. *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 732 S.E.2d 500 (2012). The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(5). The court may affirm the decision of the agency or remand the case for further proceedings. S.C. Code Ann. § 1-23-380(5). The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380. "This Court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence. *Pollack v. Southern Wine & Spirits of Am.*, 405 S.C. 9, 14, 747 S.E.2d 430, 432 (S.C. 2013). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the

conclusion that the administrative agency reached to justify its action." *Id.* "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007).

The Commission is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. *Hall v. United Rentals, Inc.*, 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006) ; *Glover v. Columbia Hospital of Richland County*, 236 S.C. 410, 114 S.E.2d 565 (1960). Where the medical evidence conflicts, the findings of fact of the Commission are conclusive. *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995).

The review must be conducted by the court and must be confined to the record. S.C. Code Ann. § 1-23-380(4).

ARGUMENT

Petitioner has raised seven issues on appeal. However, due to a failure by Petitioner to cite any legal authority or even address two of these issues in his initial brief, Respondent South Carolina Uninsured Employers' Fund ("Respondent") requests this Court deem those issues abandoned. Additionally, Petitioner's first issue on appeal – whether the commission erred as a matter of fact and law in finding that Appellant did not suffer from hearing loss in the accident – is contradictory to the findings of the Commission. The Commission did in fact find that Petitioner suffered a hearing loss; however the Commission found that this hearing loss was temporary and not permanent.

Respondent requests this Court affirm the findings of the Appellate Panel in full and hold that Petitioner's injuries resolved or returned to baseline by March 31, 2014, and therefore, Petitioner not entitled to any future medical benefits, temporary total disability payments, or any permanent impairment. These findings made by the Commission are supported by substantial evidence found in the record.

I. The Commission properly found that Petitioner is not a credible witness.

"[A]ny questions of credibility must be resolved by the Commission." *Smith v. S.C. Dep't of Mental Health*, 329 S.C. 485, 501, 494 S.E.2d 630, 638 (Ct. App. 1997). "It is logical for the [Appellate Panel], which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion." *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

In making a determination as to a witness' credibility, the Commission may consider inconsistent statements by a Petitioner to both his medical providers and to the Commission. *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 681 S.E.2d 595 (S.C. Ct. App. 2009). In *Fishburne v. ATI Sys. Int'l*, the Petitioner was the only witness to testify on her behalf. *Id.* During the Single Commissioner's hearing, the Petitioner exaggerated her symptoms and made statements which were inconsistent with her medical records. *Id.* Additionally, the Single Commissioner relied upon his/her own impressions of the witness at the hearing. *Id.* The Single Commissioner's order specifically stated the Petitioner "ambulated into the hearing room with a cane that no doctor prescribed. ... [P]resented herself as continually wiping tears [the] Commissioner never observed, and constantly made loud sniffing sounds from a nose that ... never 'ran'." *Id.* This conduct, in addition to the Petitioner's inconsistent statements, caused the Single Commissioner to question

the witness' credibility. *Id.* On appeal, the Court found that these findings contained in the record were substantial evidence sufficient to support the Commission's finding that the Petitioner's testimony was not credible. *Id.*

In the present case, Petitioner argues that the Single Commissioner and Appellate Panel "disregard[ed] the video and medical evidence, while substituting an unfounded credibility finding." (Appellant's Initial Br., p. 12). This is simply not true. In making its finding that Petitioner is not a credible witness, the Commission relied on the medical records submitted by Petitioner, the video recording of the February 19 incident, as well as Petitioner's own testimony and actions at the Single Commissioner hearing – all of which contained inconsistencies and exaggerations. This evidence all supports the Commission's finding that the Petitioner is not a credible witness.

First, the Appellate Panel's ruling is supported by Petitioner's wildly inconsistent medical evidence. This reliance on Petitioner's own evidence is hardly speculation, as Petitioner asserts in his appeal. For example, on the day of the subject work incident, Petitioner complained only of an ear injury, ringing in his ears, difficulty hearing, and right ear facial pain. (R. p. 69-77). These records are consistent with Petitioner's complaints to Ear Nose and Throat specialist, Dr. John F. Ansley the following day. There, Petitioner complained only of hearing loss. (R. p. 89). Then on May 19, three months after the accident, Petitioner reported to Dr. Rogers that he was hit in the head by the air hose during the work incident on February 19. (R. p. 115). However, Petitioner's records from the Emergency Room that day note Petitioner's injury was atraumatic. (R. p. 69-77). Petitioner also reported to Dr. Rogers that he was suffering from balance problems, that he had fallen several times due to these balance problems, he was bleeding from his ears, suffering from anxiety, and having cognitive and memory problems. (R. p. 116). However, Petitioner's emergency room records from the day of the work incident are void of any mention

of head trauma. (R. p. 69-77). Petitioner's medical records from his intervening doctor visits are devoid of any complaints of head trauma, balance problems, bleeding from the ears, or memory loss. (R. p. 69-121). Yet, Petitioner testified that his rib injury was caused by one of his resulting dizzy spells. (R. p.202).

Similarly, Petitioner's records from his March 26 visit to the ER for his rib injury list every other prior medical condition from which Petitioner has ever suffered, yet is completely devoid of any mention of the February 19 incident. (R. p. 80-86). Under "Past History", Petitioner listed his 1990 coma, a prior leg injury, and his pre-existing headaches, Bipolar disorder, anxiety and depression, but yet did not mention Petitioner's most recent accident – the accident which resulted in the condition which Petitioner claims caused his fall and rib fracture. (R. p. 9).

Additionally, Petitioner's alleged medical problems from the February 19 incident seem to get progressively worse with each new doctor, yet Petitioner has not submitted any evidence as to why his health has inexplicably devolved. In fact, the medical evidence submitted by Petitioner shows that Dr. Ansley expected Petitioner's hearing to improve during the two-week interim between their appointments. (R. p. 89) When Petitioner's hearing did not improve during that time period, Dr. Ansley ordered "more objective" testing for Petitioner. (R. p. 93). However, Petitioner failed to have these tests performed. (R. p. 215).

The medical records submitted by Petitioner are also inconsistent with Petitioner's testimony at the Single Commissioner hearing. Petitioner testified that he was struck in the head during the incident and that he had a visible bruise on his forehead. (R. p. 197, 213). However, the records from Petitioner's emergency room visit on February 19 specifically state "atraumatic." (R. p. 74). Petitioner testified he reported to the emergency room doctors that he had memory loss. (R. p. 212-13). Yet these records do not mention any sort of memory loss. (R.

p. 69-77). Petitioner stated in his testimony that his March 26 fall from his bathtub was caused by the dizziness he had been experiencing since the subject incident. (R. p. 202-03). However, the medical records from that evening do not indicate any reports of dizziness and the medical history does not even reference the February 19 visit. (R. p. 80-86). Finally, Petitioner testified that he was never diagnosed with Bipolar disorder. (R. p. 218). However, the medical records submitted by Petitioner indicate he was diagnosed with Bipolar disorder in 2007. (R. p. 95). Additionally, Petitioner reported to Dr. Rogers only a month prior to his hearing testimony that he had, in fact, been diagnosed with bipolar disorder. (R. p. 115). Petitioner also reported his Bipolar diagnosis to the emergency room doctors on the date of his rib injury. (R. p. 80-86).

Notably, Petitioner dropped his claim for a brain injury on the appeal to the Full Commission. Due to Petitioner's credibility issues at the hearing and his inconsistent complaints to medical providers, the Single Commissioner denied Petitioner's claim for brain injury and Petitioner did not appeal this finding. (R. p. 31). The Commissioner noted this decision stemmed from Petitioner's ability to make mileage calculations and recall minute details of the accident on the spot at the hearing. (R. p. 27). Additionally, there was no evidence submitted showing that Petitioner was ever hit in the head during the accident or that he complained of being hit in the head before stating this to Dr. Rogers three months after the incident. The Commission found this lack of medical evidence, combined with Petitioner's medical history of a coma, created serious doubts about Petitioner's credibility and decision to bring a claim for brain injury.

Finally, and most importantly, the Single Commissioner relied heavily on her impressions of Petitioner's behavior from the hearing. The Commissioner noted this was a hearing that begged to be videotaped. (R. p. 25-26). Petitioner first made a clear point of being unable to hear the Commissioner, yet later in the hearing appears perfectly able to hear the attorneys on direct and cross examination. (R. p. 25-26). Additionally, when the security video

was played, Petitioner turned around to watch the video, he turned his back to the attorneys and turned his “better” ear to the Commissioner. (R. p. 25-26). However, even with his back turned and his bad ear now turned toward counsel, Petitioner continued to answer questions asked by counsel for the employer. (R. p. 25-26). At times the Commissioner had trouble hearing the Commissioner’s questions, but Petitioner continued to answer counsel’s questions with no request that he speak up. (R. p. 25-26).

Petitioner now argues that these inconsistencies in his ability to hear are proof of his hearing loss. In support of this argument, Petitioner asserts that the reason Petitioner heard some questions with ease and struggled to hear the Commissioner is because Petitioner was wearing a hearing amplifier in his left ear. Petitioner testified he wears this aid in his left ear because it is the better ear. However, even this statement is inconsistent with the medical evidence provided by Petitioner. Dr. Rogers opined, “[p]atient demonstrates apparent *healed* 60% tear of right tympanic membrane. More complete approximately 80% tear in the left tympanic membrane. Both TMs were inject, *left being affected more greatly than right* [emphasis supplied].” (R. p.118).

All of the reasons cited by the Commission – inconsistent testimony, inconsistent statements to medical providers, and exaggerated testimony at the hearing – are consistent with those reasons cited in *Fishburne*, and constitute substantial evidence upon which to confirm the Appellate Panel’s holding that Petitioner is not a credible witness.

II. The Appellate Panel properly found that Petitioner’s hearing injury resolved or returned to baseline by March 31, 2014.

The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. *Ballenger v. S. Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 683 (1946); *Tiller v. National Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845, (S.C. 1999). Thus, while medical testimony is entitled to

great respect, the fact finder may disregard it if other competent evidence is presented. *Id.* “Where the medical evidence conflicts, the findings of fact of the Commission are conclusive. *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995). “[I]t is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That function belongs to the Appellate Panel alone.” *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127, (S.C. Ct. App. 2011) (quoting *Roper v. Kimbrell's of Greenville*, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)).

Petitioner cites *Burnette v. City of Greenville* in support of its position that the Commission’s findings of fact regarding Petitioner’s alleged injuries should be reversed. In *Burnette*, the Commission’s Order included medical evidence and findings which were not supplied by any medical provider or contained in any medical records. 401 S.C. 417, 737 S.E.2d 200 (S.C. Ct. App. 2012). The Court stated “[b]ecause no evidence indicates this opinion originated from a medical provider, yet it appears in the single commissioner's order, we are forced to conclude it is the medical opinion of the single commissioner, adopted by the Commission.” *Id.* The court found that, because the medical opinion in the order came from the commissioner, and the record on appeal did not otherwise contain any evidence which challenged the opinions provided by the Petitioner’s treating providers, the findings of the Single Commissioner were unsupported by substantial evidence. *Id.*

The present case is distinguished from *Burnette*. First, the medical evidence cited in the Commission’s Order can be cited back to the medical records introduced. In making its finding that Petitioner’s hearing loss resolved by March 31, 2014, the Commission relied on the notes in Petitioner’s Emergency Room records from the night of Petitioner’s fall in his bathroom and Petitioner’s follow-up appointment with his primary care physician’s office. (R. p. 27-29).

Despite Petitioner's testimony to the contrary, the only clinical impression listed in Petitioner's Emergency Room records from that night is the right rib condition. (R. p. 28, 80-86). The subject work incident was not listed under Petitioner's Past History and the notes do not indicate that Petitioner's fall was caused by any symptoms of dizziness. (R. p. 80-86). Due to this lack of evidence to corroborate Petitioner's testimony that he continues to suffer from hearing loss, the Commission found that Petitioner's injuries resolved by March 31, 2014. (R. p.39).

Petitioner asserts that the Commission "inexplicably puts great weight on 'normal' post-accident hearing in Dr. Mol Ky's medical records" following Petitioner's fall from his bath tub. Petitioner asserts that he was not being treated for his hearing, but instead, was being treated for broken ribs. However, this assertion ignores Petitioner's testimony at the hearing that his fall was caused by the dizziness and headaches which Petitioner claims were caused by the subject work incident. (R. p: 116, 202). The medical records do not state the fall was caused by any dizziness or instability. (R. p. 80-86). Petitioner's medical history listed on the night of Petitioner's fall includes a long list of prior accidents, including a motor vehicle accident which occurred in 1990. (R. p. 7). However, the records do not mention the subject work incident at all. (R. p. 80-86).

Finally, the only evidence which contradicts the finding of the Commission that Petitioner's injury resolved by March 31, 2014 is the medical exam performed by Dr. Rogers three months later. However, the Commission properly found that Dr. Rogers' report was unreliable based on the inconsistent medical history provided to Dr. Rogers by Petitioner. (R. p.53).

Based on these notes and the finding that Petitioner is not a credible witness, the Commission properly found that Petitioner's injury resolved or returned to baseline by March 31,

2014. Furthermore, based upon this finding, the Commission properly ordered Petitioner was not entitled to any future medical benefits, including Petitioner's requested ABR test.

III. The Appellate Panel properly found that Petitioner is not entitled to temporary total disability compensation because Petitioner failed to present any evidence that he is unable to perform his job duties as a result of the subject work incident.

The Commission correctly found that Petitioner did not prove by the greater weight of the evidence that he was unable to work, and therefore, is not entitled to any temporary disability payments under SC Code Ann § 42-9-260. The Petitioner bears the burden of proving entitlement to temporary disability compensation. *Lee v. Bondex, Inc.*, 406 S.C. 97, 749 S.E.2d 155 (S.C. Ct. App. 2013). To show that one is entitled to temporary total disability benefits, one must prove that the incapacity for work resulting from an injury is total. S.C. Code Ann. § 42-9-10 (Supp. 2012); *Lee*, 406 S.C. at 102, 749 S.E.2d at 157. The Petitioner satisfies his burden by proving work restrictions that prevent him from performing his regular job and the unavailability of light-duty employment through the same employer. *Id.* However, Petitioner did not submit any evidence that his incapacity to work is total and that light-duty was unavailable with Raber's Tire.

The only evidence supporting claims that he is unable to work came from the Petitioner himself. Petitioner testified he returned to work a couple of days for half-days but could never make it to the end of a shift. (R. p. 226). However, Petitioner told Dr. Rogers that he never returned to work at Raber's Tire after the subject work incident on February 19. (R. p.117).

Petitioner admitted Mr. Raber allowed Petitioner to return to work. (R. p. 226). Petitioner admitted he can still turn a rotor because that is only visual. (R. p. 228). Petitioner admitted he can still change a tire. (R. p. 228). Petitioner stated that when he wore the amplifier he bought at Walgreens, the noises from the electric fans, bright lights and electric for the lift in the shop gave him headaches. (R. p. 204-05). However, Petitioner also admitted he had pre-existing migraines,

for which he was prescribed medication, prior to this incident. (R. p. 219-220). Petitioner has presented no evidence that his pre-existing headaches have been aggravated by this incident.

Additionally, Petitioner testified that the hearing amplifier was removable and he could adjust the volume. He stated he could remove the amplifier and perform his work. (R. p. 226-229). Petitioner could then put the amplifier back into his ear when necessary. (R. p. 226-229). Petitioner's only concern was that he might be hit by a car if he could not hear the car coming. (R. p. 229). However, he never had an incident where he almost hit anyone in the garage while he was driving. (R. p. 229).

None of the testimony offered by Petitioner shows that he is actually unable to perform his job duties. The video introduced by Petitioner shows Petitioner return to work immediately following the subject work incident. Therefore, Respondent requests this Court affirm the finding of the Commission and find that Petitioner is not entitled to temporary disability benefits.

IV. The Appellate Panel properly relied upon electronic medical records introduced by Petitioner's counsel.

Petitioner fails to cite any authority in his brief as to why it was improper for the Commission to rely upon electronic medical records which were admitted into evidence at the request of Petitioner. Petitioner simply states: "Furthermore, these are electronic medical records (EMR). The default setting on EMR is normal for every condition."

An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory. *See In the Matter of the Care & Treatment of McCracken*, 346 S.C. 87, 92-3, 551 S.E.2d 235, 238-39 (2001) (finding issues were abandoned because there was no specific legal ground upon which the court could rely); see also *Pack v. S.C. Dep't of Transp.*, 381 S.C. 526, 532, 673 S.E.2d 461, 464 (Ct. App. 2009) (holding appellant abandoned issue when she cited no legal authority to support her argument). Where an appellant's brief suggests other facts that could have been considered by the Appellate Panel, but fails to provide the court with no

substantive legal authority upon which to rely, the issue is abandoned. *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 716 S.E.2d 123 (S.C. Ct. App. 2011). Because Petitioner fails to cite any legal authority which supports his contention that electronic medical records are unreliable, this Court should find that this issue was abandoned by Petitioner.

To the extent this Court does not deem the issue abandoned, Petitioner's conclusory statement that "[t]he default setting on EMR is normal for every condition" is unsupported by any evidence contained in the record. There is no testimony to support this contention or any testimony to show that the EMR software for the records referenced by Petitioner had default settings of normal.

Finally, even if Petitioner were able to show that the default setting on the emergency room records is normal, this record still contradicts Petitioner's testimony at the Single Commissioner's hearing. Petitioner stated that he went to the emergency room that night because he tripped getting out of the bathtub due to the dizziness and balance problems. (R. p. 202). Petitioner is still incorrect in stating that Petitioner was seeking treatment *only* for a broken rib at the time of this appointment. By Petitioner's own testimony, Petitioner fell and consequently broke his rib as a direct result of the symptoms he suffered following the subject incident. (R. p. 116, 202). Yet, Petitioner failed to report the alleged causation of Petitioner's fall. (R. p. 80-86).

V. The Commission properly denied Petitioner's claim for a disability award pursuant to Regulation 67-1102.

Petitioner asserts that the Commission failed to make a disability award for hearing loss under Regulation 67-1102. Again, Petitioner does not address this issue anywhere in Petitioner's Initial Brief. Petitioner only states "Once Crane reaches MMI, he should receive a disability award based on the hearing loss and balance problems caused by the workplace accident." Respondent, therefore, request this Court find that Petitioner has abandoned this issue.

To the extent Petitioner has not abandoned this issue on appeal, Regulation 67-1102 provides that the method of calculation for a hearing handicap. The regulation also provides that a pure tone audiogram should be used as the method for the calculation. Although Petitioner does not address this issue in his brief, counsel for Petitioner seems to imply that because the ABR testing, which is required in the statute, showed profound hearing loss, the Commission must follow the regulation and automatically award disability compensation.

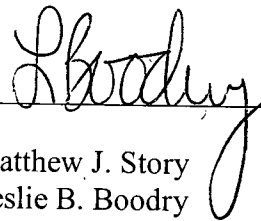
Petitioner appears to assert that the results of the ABR testing are completely conclusive as to Petitioner's alleged hearing loss. However, if that were correct, there would be no reason for a hearing in the first place. Additionally, this assertion overlooks the note made by Dr. Ansley after Petitioner's first ABR test in which she expected his hearing to improve.

Finally, Petitioner argues that the medical evidence shows that Petitioner's hearing loss has remained consistent throughout all of the records. However, there is no medical evidence or testimony to support this statement.

CONCLUSION

For the reasons stated, Respondent respectfully requests this Court affirm the decision of the Appellate Panel.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

APPELLATE CASE NO.: 2015-002116

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v.

**RABER'S DISCOUNT TIRE RACK, EMPLOYER, AND SOUTH
CAROLINA UNINSURED EMPLOYERS FUND, CARRIER,RESPONDENTS.**

CERTIFICATE OF COMPLIANCE

I certify that I have complied with Rule 211(b) of the South Carolina Appellate Court Rules.

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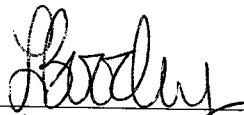
RABER'S DISCOUNT TIRE RACK, EMPLOYER, AND SOUTH
CAROLINA UNINSURED EMPLOYERS FUND, CARRIER, RESPONDENTS.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent, South Carolina Uninsured Employers' Fund's Initial Brief and Designation of Matter was served upon the following parties on the ____ day of September, 2016, via United States mail:

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