THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1303989

Clarence B. Jenkins, Employee, ... Appellant,

v.

Amazon.Com DEDC, LLC, Employer, and
American Zurich Ins. Co., Carrier, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant Clarence B. Jenkins, Claimant below, filed his first Form 50 Request for Hearing in June 2013, alleging he was injured on February 10, 2013 when he "bent down to pick up a fallen object when he hit his head on [a] metal shelf." He claimed compensable injury to his "head, double vision, headaches, and dizziness" as a result of the February 10, 2013 accident. At that time, he was represented by counsel. (Form 50, dated June 24, 2013, R. p. 205). Respondents admitted the accident but denied both the extent of Appellant's alleged injuries and that his alleged condition at that time was work-related. (Form 51, dated July 18, 2013, R. p. 204). The parties entered into a Consent Order in which Respondents agreed to authorize an evaluation with Dr. Mohammed Abu-Ata, due to Appellant's claims that he suffered "from headaches, dizziness, and vision blurriness ..." (Consent Order, served August 13, 2013, R. pp. 42-44).

Sometime in September or October of 2013, Appellant dismissed his attorney and began to represent himself *pro se*. He filed a Form 50 alleging injury to his "head, eyes, neck and ears," and seeking mileage reimbursement. (Form 50 dated November 23, 2013, R. p. 202). Respondents' Form 51 explained that the mileage had been denied because it had been incurred for medical treatment that was unauthorized. (Form 51, dated January 9, 2014, R. p. 201). Commissioner Andrea C. Roche heard the parties on March 12, 2014,[1] and later held that Appellant was entitled to reimbursement for travel for authorized medical treatment with Dr. Abu-Ata and Dr. Jervey. However, she found

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[1] At some point, Commissioner Roche ordered the parties to mediation. (R. p. 119, lines 1-11) (Supp. R. p. 27, lines 2-4).

that Appellant was not entitled to reimbursement for medical treatment provided by non-authorized healthcare providers, including Dr. Eden[2] and Dr. Paysinger. (Single Commissioner Decision and Order, filed May 27, 2014, R. pp. 38-41) ("2014 Single Commissioner Decision").

Appellant appealed the 2014 Single Commissioner Decision to the Full Commission. The Commission affirmed the 2014 Single Commissioner Decision and also found that the treatment Appellant had sought at the Providence Hospital Emergency Room on September 19, 2013 was not causally related to his workplace injury.[3] (Commission Decision, filed Nov. 18, 2014, R. pp. 33-37). This Commission Decision was not appealed.

Appellant filed additional Form 50s in October 2014, (Form 50, dated Oct. 6, 2014, R. pp. 199-200) (Form 50, dated Oct. 13, 2014), to which Respondents responded. (2nd Amended Form 51, dated Oct. 17, 2014, R. p. 198) (3rd Amended Form 51, dated Oct. 23, 2014, R. p. 197). Both parties requested mediation pursuant to S.C. Code Reg. § 67-1801(B). A hearing was scheduled before Commissioner T. Scott Beck, (Notice of Hearing, dated Nov. 25, 2014); however, the parties agreed to mediation in lieu of a hearing. Both this mediation and the prior one ordered by Commissioner Roche were unsuccessful. (R. p. 102, lines 8-11) (Supp. R. p. 27, line 2 – p. 29, line 5).

The instant proceeding was initiated when Appellant filed a Form 50 in February 2015 claiming injury to his "head, eyes, neck, legs and feet" and seeking additional medical treatment. Appellant asserted that "Amazon and Sedgwick has refused to allow

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[2] Dr. Eden is Appellant's family doctor. (R. p. 150, lines 13-18).

[3] Medical reports from Providence Hospital's ER indicate that Appellant sought treatment for pain and swelling in his left ear. (R. pp. 256-259).

medical treatment as recommended by Dr. Atta and others." (Form 50, dated February 25, 2015, R. pp. 195-196).

Respondents Amazon.com DEDC, LLC (employer) and its carrier, now American Zurich Ins. Co., filed a responsive Form 51, acknowledging that Appellant struck his head, but denying that he "sustained injury entitling him to compensation," and/or that the accident affected Appellant's "eyes, neck, leg and/or feet." Respondents also asserted that they had provided appropriate medical treatment, that Appellant had reached maximum medical improvement ("MMI"), and that any on-going problems he was having were not related to his February 10, 2013 accident. Respondents joined in Appellant's request for a hearing. (Form 51, dated April 2, 2015, R. p. 194).

A hearing was set for May 21, 2015 before Single Commissioner R. Michael Campbell. (Notice of Hearing, dated March 19, 2015, R. p. 163). Prior to the scheduled hearing, Respondents filed and served on Appellant a Form 58, Pre-Hearing Brief. (Respondents' Form 58 Pre-Hearing Brief, dated May 11, 2015, R. p. 191). They also served Appellant with 218 pages of medical records and other evidence they intended to submit to the Commission pursuant to Section 1-23-330, often referred to as "APA Exhibits," as well as the deposition transcript of Dr. David Stickler. (Notice of Witnesses and Written Medical Reports to be Introduced as Direct Evidence on Behalf of Defendant, dated May 11, 2015, R. pp. 192-193). Appellant neither filed a Pre-Hearing Brief nor provided Respondents notice prior to the hearing of any documents he proposed to submit to the Commission.

The parties were heard on May 21, 2015 by Single Commissioner Campbell, who asked Appellant numerous times whether he wanted to obtain legal counsel. Appellant

declined. (R. p. 106, line 7 – p. 108, line 10) (R. p. 111, line 16 – p. 113, line 16). At the hearing, Appellant argued that Respondents had not submitted all of the medical records into evidence that he, Appellant, thought were necessary. (R. p. 97, lines 13-21). Counsel for Respondents pointed out that Appellant had been urged to retain an attorney and that Respondents were not responsible for making Appellant's case for him. (R. p. 97 lines 23-25). Appellant indicated that he had brought documents with him to the hearing that he wanted to submit to the Commission as part of the record. After explaining the process to Appellant, and upon objection by Counsel for Respondents, Commissioner Campbell ruled that the documents Appellant brought to the hearing would not be admitted into the record. (R. p. 98, line 1 – p. 100, line 8). Appellant was advised that he could withdraw his Form 50 in order to engage a lawyer to represent him, although Respondents indicated that they were prepared to go forward on their Form 51. Appellant repeated that he did not want to withdraw his Form 50 in order to obtain counsel and that he "would like to go ahead and proceed ..." (R. p. 102, line 22 – p. 113, line 12). Appellant agreed that he had been told several times throughout his claim that he had the opportunity to retain counsel. (R. p. 131, line 23 – p. 132, line 3).

Commissioner Campbell explained to Appellant that certain items submitted by Respondents at the hearing – his Twitter and Facebook accounts – were allowed because they were public records, and Appellant had testified that they were his accounts. (Supp. R. p. 5, lines 8-20). Appellant submitted some additional "public document" exhibits at the hearing: a page from the Mickle & Bass website, a newspaper article concerning Voorhees College, an internet definition of "syncope," the deposition notices for Dr. Abu-Ata and Dr. Stickler, and various subpoena notices, all of which were admitted into

the record. (Supp. R. p. 26, line 22 – p. 31, line 14) (Supp. R. p. 33, line 18 – p. 35, line 1) (Supp. R. p. 42, line 6 – p. 43, line 5) (Supp. R. p. 46, line 1 – p. 49, line 23).

Commissioner Campbell issued his decision on August 14, 2015, finding that Appellant had reached MMI on or before October 23, 2013, that "the medical evidence supported a causal relationship from the work injury to [Appellants] complaints of initial headaches only," and that Appellant's current symptoms were not related to his work-related incident. (Single Commissioner Decision & Order, Aug. 14, 2015, R. pp. 23-27) ("Single Commissioner Decision"). He further found that Appellant "lacks credibility." (R. pp. 27-28).

Appellant filed a Form 30, Request for Commission Review on August 25, 2015. Attached to his Form 30 were 38 separately-stated questions regarding the Single Commissioner Decision, including, among other things, whether Commissioner Campbell erred in refusing to allow Appellant to submit the documents that he brought with him to the hearing, whether Appellant had reached MMI, and whether the credibility finding was improper. In addition, Appellant attempted to attach numerous exhibits to his Form 30 that had not been submitted either prior to or at the hearing before Commissioner Campbell. (Form 30, dated Aug. 25, 2015, R. pp. 185-190).

On September 24, 2015, Respondents filed a motion to exclude the evidence attached to Appellant's Form 30. Citing S.C. Code Ann. § 42-17-50 and S.C. Code Reg. § 67-707, Respondents argued that these materials were not "properly before the Workers' Compensation Commission as after-discovered evidence, or as admissible evidence in any other manner ..." (Respondents Motion to Exclude Appellant's Exhibits to the Form 30, filed Sept. 24, 2015, R. pp. 65-66) ("Motion to Exclude").

In response, Appellant filed a motion to include the exhibits attached to his Form 30. Among other things, Appellant argued that, pursuant to S.C. Code Reg. § 67-611, he was not required to file a Pre-Hearing Brief, and that the materials he sought to have added to the record included materials that Respondents had "previously obtained ... through subpoenas and other actions." (Plaintiff's Motion to Include Appellant's Exhibits to the Form 30, dated Sept. 28, 2015, R. pp. 62-64).

Respondents filed a Reply, agreeing that a *pro se* claimant is not required to submit a Form 58 Pre-Hearing Brief, but arguing that all moving parties, including *pro se* claimants, must file and serve any written expert reports he or she intends to rely on at the hearing at least fifteen days before the hearing pursuant to S.C. Code Reg. § 67-612. In addition, Respondents argued that S.C. Code Reg. § 67-707 sets the requirements for evidence to be admitted by the Full Commission on review, which Appellant failed to satisfy. (Defendants' Reply to Claimant's Motion to Include Appellant's Exhibits to the Form 30, filed Oct. 12, 2015, R. pp. 59-61).

In response, Appellant filed a second motion seeking to have additional exhibits included in the record, beyond those attached to his Form 30. (Claimant's Motion to Include Appellant's Additional Medical Records, filed Oct. 20, 2015, R. pp. 56-58) ("Motion to Include").

The parties filed briefs with the Full Commission, which heard oral argument on December 14, 2015. At the outset, Appellant was advised that he had a right to be represented by an attorney and asked whether he still wanted to go forward with the appellate hearing. Appellant stated that he did not want an attorney and was ready to proceed. (R. p. 70, lines 2-16). The Appellate Panel of the Full Commission first heard

argument on the motions concerning the additional evidence Appellant wanted included in the record. Appellant clarified that he was seeking to have all of the documents he had brought to the hearing before Commissioner Campbell admitted, as well as the additional documents attached to both his Form 30 and later Motion to Include. (R. p. 72, line 11 – p. 75, line 20). The Appellate Panel conferred off the record, after which Commissioner Wilkerson stated the decision of the Panel to grant Respondents' Motion to Exclude and deny Appellant's motions to include his exhibits and additional medical reports. Appellant was again reminded that he had the right to be represented by counsel, which he declined. (R. p. 76, lines 5-20).

The Appellate Panel issued its decision on February 26, 2016. First, the Commission repeated its ruling concerning the extra-record materials Appellant had attempted to submit. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed Feb. 26, 2016, R. pp. 3-5) ("Commission Decision"). Second, the Appellate Panel affirmed the Single Commissioner Decision and Order, only revising the Findings of Fact to delete the credibility finding. (R. pp. 6-13). Specifically, the Commission held that Appellant "experienced an incident on February 10, 2013," when he "struck his head on the edge of a table while bending over to retrieve an object from the floor," but that he did not lose consciousness or experience any alteration in awareness. Appellant received immediate medical care and medical records do not indicate any "neurological deficits or other injury." (R. pp. 6-7). An MRI scan, nerve conduction studies and EMG testing all returned normal results. Neurological evaluations by two neurologists, Dr. Charles S. Jervey and Dr. David Stickler, found no cognitive impairment and concluded that Appellant's "alleged on going symptoms" were

not related to his work incident. Dr. Stickler opined that Appellant had likely reached MMI by October 23, 2013, "there was no permanent impairment to the Claimant's brain," and that there were no objective findings that would require any physical restrictions as a result of the work incident. The Commission held that the evidence "supports a causal relationship from the work injury to [Appellant's] complaints of initial headaches only," and does not support any causal relationship to his complaints regarding his eyes, ear, legs, feet, neck, shoulders, hands, back and anxiety. (R. pp. 8-10). As a result, the Commission ruled that Appellant is not entitled to any additional medical treatment or evaluation past October 23, 2013, or any temporary or permanent disability benefits. (R. pp. 12-13).

Appellant timely appealed to this Court.

FACTUAL BACKGROUND

Appellant began working for Amazon.com on September 2, 2012. (R. p. 140, lines 21-23). He testified that he has a B.S. in Marketing from South Carolina State University. (R. p. 132, lines 13-18). He is proficient in and/or is able to operate Microsoft Word, Microsoft Excel, Microsoft Power Point, Microsoft Access, Microsoft Publisher, Adobe Acrobat. (R. p. 132, line 19 – p. 133, line 16).

Starting in 1994, Appellant worked as a Probation and Parole Agent, after which he was out of work for about a year and a half. He then worked as a customer service representative for APAC Tele-Services for about a year and a half, and then was out of work for six months. He then worked as a collections and billing specialist with Adecco Staffing for about six months. He next worked for Voorhees College for about six and a half years, starting as a case manager with the Welfare to Work Program and working up

to Assistant Director of the One Stop program, and finally in Admissions and Recruiting. Appellant's employment with Voorhees College was terminated in December 2006. (R. p. 133, line 18 – p. 135, line 11) (R. pp. 253-254). Appellant testified that he was fired due to "a corrupt plan by Voorhees College" to harass him and create a hostile work environment. (R. p. 135, line 17 – p. 138, line 18). He then worked as a Career Skills Instructor at Bamberg Job Corps for about five months, after which he was out of work from 2007 until he began working for Amazon in 2012. (R. p. 138, line 22 – p. 140, line 20). Appellant agreed that, between 1994 and 2015, he had been employed at five or so different positions over 11 and a half years, and out of work for about nine years, drawing unemployment during some of those nine years of unemployment. (R. p. 140, line 18 – p. 141, line 3).

Appellant testified that, on February 10, 2013, he dropped something on the floor and bent over to pick it up, hitting the right side of his head on the table. He kept working but eventually went to AmCare, Amazon's in-house clinic. (R. p. 143, line 25 – p. 144, line 21). Appellant testified that there was no blood or bruising, although he said there was "a mark and a soft spot." (R. p. 142, lines 7-11). Appellant reported that he did not pass out, lose consciousness or experience any alteration in awareness. (R. p. 145, lines 8-10) (R. p. 174, line 23 – p. 175, line 3). AmCare noted the injury site was "unremarkable." Appellant declined any first aid treatment and only asked for over-the-counter medication for his headache. (R. pp. 251-252).

Appellant returned to AmCare the next day. He again declined first aid but wanted to follow up "for safe measure." His pain level was "0/10" but he said he was "feeling hot and tired." (R. pp. 250-251). Appellant was seen at AmCare the following

day as well, when he asked to be seen at HealthWorks and reported complaints of headache, left neck and shoulder pain, "along with a vague description of 'irritation' ... when asked to provide a more detailed description of his symptoms, he stated 'I don't want to play 1000 questions.'" He again declined any first aid treatment. (R. pp. 249-250).

On February 14 & 15, 2013, Appellant was seen at Palmetto Health HealthWorks, complaining of headaches, pain in his neck, left shoulder and left eye. The medical notes indicate that Appellant admitted "that his headache is much improved and not having any significant visual disturbance or lightheadedness any more." He was released to return to work full duty without restrictions. (R. pp. 234-239). A CT scan of his head was normal. (R. p. 243).

A few months after his work incident, Appellant was seen at Palmetto Health with a chief complaint of elevated blood pressure. Appellant's neurological exam was normal. The diagnosis was headache and generalized weakness and lightheadedness. The medical report explained that, "[a]lthough it is not unusual to have some lingering headache and dizziness after a blow to the head, [Appellant's] current symptoms do not appear to be related to the February injury, and are more likely to be related to other non-work-related health problems." He was given Tylenol for his headaches, and provided some work restrictions for conditions unrelated to his work incident. (R. pp. 223-233).

Appellant was treated by Dr. Mahmoud Abu-Ata on August 26, 2013 and again on October 23, 2013. On August 26, 2013, Dr. Abu-Ata noted that Appellant "did not lose consciousness or awareness. No scalp laceration or bleeding but felt dizzy and drowsy and started having a headache later on that evening." (R. pp. 217-218).

Dr. Abu-Ata saw Appellant again on October 23, 2013. Dr. Abu-Ata's notes indicate Appellant still had "frequent headaches but not as severe," and that they were "associated with photophobia, phonophobia and odor sensitivity."[4] Appellant reported that his "dizziness and light headedness are better," although he still complained "of neck pain associated with pain radiating to arms and hands with bilateral hand pain and numbness," as well as pain and numbness in his legs. He reported that his "memory and concentration are better. He denies any recent vertigo, hearing loss, tinnitus, balance difficulties, falling, lower back pain ... upper or lower extremity weakness, double vision, eye pain, eye redness, ... seizures, syncope ..." Dr. Abu-Ata noted that Appellant was "back at work" and that he "was not interested in doing CSF exam for evaluation of headaches." (R. pp. 211-213). Sensory nerve conduction studies of Appellant's lower extremities were normal, as was an MRI of his brain.[5] (R. pp. 209-216).

Appellant was seen by Dr. Jervey on November 19, 2013. After evaluating both Appellant and Appellant's medical records, Dr. Jervey stated that, "[g]enerally, mild head injuries, such as this, would not be expected to cause permanent nor long-term recurring symptoms," and that he "would not expect any cognitive impairment to result with such a mild head injury ..." Although Dr. Jervey noted that the headaches were "causally related as regards to time," he was "unable to explain the persistence of the symptoms with such relatively mild head injury." He also did not think Appellant's other symptoms

[4] Photophobia is sensitivity to light, and phonophobia is sensitivity to noise. (R. p. 170, lines 11-14)

[5] At the hearing before the Single Commissioner, Appellant acknowledged that both the CT scan performed four days after his work incident and an MRI of his head performed eight months later were normal. (R. p. 145, line 12 – p. 146, line 16).

were causally related to his work incident and did not think any work restrictions were necessary. (R. pp. 219-220).

Appellant was seen by Dr. Stickler in August 2014. (R. pp. 206-208) (R. p. 169, lines 2-7). Dr. Stickler performed a "comprehensive neurologic examination." (R. p. 172, line 24 – p. 173, line 12). After examining Appellant and reviewing his medical records, Dr. Stickler stated that, "[t]here was no loss or alteration of consciousness to support that this was a concussive event," and opined, "within a reasonable degree of medical certainty that [Appellant's] chronic and escalating degree of headaches are not a result of what would be considered to be a mild degree of head trauma." Dr. Stickler found no causal relationship between Appellant's other reported symptoms (dizziness, leg pain and leg weakness) and his work incident.[6] He also stated "within a reasonable degree of medical certainty that [Appellant] is at maximal medical improvement." (R. pp. 206-208) (R. p. 177, lines 6-25).

At his deposition,[7] Dr. Stickler explained that, "typically, the majority of people who have even light degrees of head trauma improve within the first, you know, month, usually within a matter of weeks …" He agreed that the majority of cases would have resolved within eight months following a light head trauma. (R. p. 175, line 13 – p. 176, line 11). Dr. Stickler "did not document any abnormalities on my exam [of Appellant] that would indicate he had a permanent injury to his brain." (R. p. 176, lines 14-15). Dr. Stickler did not assign any restrictions that were the result of Appellant's work-related

[6] Dr. Stickler noted hypersensitivity in Appellant's left foot, but he did not believe that was related to the work incident, and the rest of Appellant's exam was normal. (R. p. 173, lines 15-24).

[7] Although he did not attend, Appellant agreed that he had been provided notice and opportunity to participate in the deposition of Dr. Stickler. (R. p. 129, line 23 – p. 130, line 6).

injury. (R. p. 170, lines 8-15). Nothing in Dr. Stickler's exam suggested Appellant needed any further medical examination or treatment as a result of his work-related injury. (R. p. 179, line 23 – p. 180, line 22). Finally, Dr. Stickler opined that Appellant reached MMI within the time frame of October 23, 2013. (R. p. 175, line 17 – p. 176, line 11). All of Dr. Stickler's opinions were "stated within a reasonable degree of medical certainty." (R. p. 181, lines 21-25).

At the May 21 hearing, Appellant testified that, although he has seen 13 or so medical practitioners, his condition has gotten worse. He testified that he has "headaches, nervousness, even when typing on the computer my shoulder and stuff gets so tight and so hurting until I have to stop." (R. p. 152, lines 3-16). He testified that he cannot shop as much, noise bothers him, bright lights bother him, smells bother him, all of which prevents him from working. (R. p. 152, line 21 – p. 154, line 4). Although he testified that working on his computer was hard and wore him out, (R. p. 158, lines 9-17), he sends emails on a regular basis, (R. p. 147, line 21 – p. 148, line 12), and communicates on Twitter regularly, sending 1066 tweets over the course of a year. (R. p. 159, line 3 – p. 160, line 25) (Supp. R. pp. 51-100). Appellant agreed that Defendants' Exhibit #4 was his Facebook account. (R. p. 162, lines 15-25; Supp. R. p. 5, line 1). He also agreed that, despite his alleged problems and sensitivity to noise, he participated in a rally at the State House for South Carolina State, and attended the Springfield Democrats Rally. (Supp. R. p. 7, lines 9-22) (Supp. R. pp. 101-104).

Appellant was able to continue working during the initial months following his accident. (R. p. 144, lines 18-24) (R. pp. 206-208, 211, 221, 226, 234-235). Appellant testified that, "on at least three occasions," he was sent home from work due to high

blood pressure, (R. p. 120, line 24 – p. 121, line 14) (Supp. R. p. 33, lines 2-10); however, that condition pre-dated his injury, (R. pp. 223-228), and has not been causally linked to his February 2013 accident.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2013). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162,

163 (1992). The appellate "Court's review is restricted to the evidence considered by the appellate panel in reaching its decision." Martin v. Rapid Plumbing, 369 S.C. 278, 288, 631 S.E.2d 547, 553 (Ct. App. 2006).

ARGUMENTS

I. The Commission Decision that Appellant's current symptoms are not related to his workplace injury is supported by substantial evidence.

Although not specifically articulated by Appellant as an issue on appeal, his main claim appears to be that, for a multitude of reasons, the Commission erred in finding that his current symptoms and ailments are not work-related and, therefore, that he is not entitled to either compensation or continued medical treatment. Appellant's argument is based on his assumption that his current symptoms are related to his February 10, 2013 bump to his head, and that his array of symptoms, "*can* occur with a head injury if it's not properly treated." (R. p. 117, lines 2-8) (*see also* R. p. 146, lines 23-25 (Appellant arguing that hitting his head "*probably* did affect my ... neck and different things, so")) (emphasis added). However, workers' compensation awards cannot be based on surmise, conjecture and speculation but instead must be based on the evidence in the record. *E.g.*, Bundrick v. Powell's Garage & Wreckage Serv., 248 S.C. 496, 503, 151 S.E.2d 437, 441 (1966). Appellant can point to no medical evidence or opinion to support his assertions.

The Commission Decision, however, is supported by substantial, probative and reliable evidence in the record. Dr. Stickler opined, to a reasonable degree of medical certainty, both that Appellant had reached MMI and that his current complaints were not related to his workplace injury. (R. pp. 206-208) (R. p. 177, lines 6-25) (R. p. 178, line 8 – p. 181, line 25). Dr. Jervey's medical opinion is in accord. (R. pp. 219-220). That Dr. Abu-Ata may not have released Appellant from his care and/or might even have a

contrary opinion, which Respondents do not concede, does not mean the Commission Decision lacks substantial evidentiary support in the record. Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001).

In addition, a number of Commissioner Campbell's findings of fact and conclusions of law were not challenged by Appellant in his Form 30, which are, as a result, the law of this case. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) (findings of fact and law that are not within the scope of exceptions to the Full Commission become the law of the case); Stone v. Roadway Express, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006) ("[o]nly issues raised and ruled upon by the commission are cognizable on appeal"); Brunson v. American Koyo Bearings, 367 S.C. 161, 165-66, 623 S.E.2d 870, 872 (Ct. App. 2005) (the "findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full commission ...."). Even reading Appellant's Form 30 liberally, these unchallenged findings of fact include:

- Finding of Fact No. 12 ("Medical evidence supports a causal relationship from the work injury to Claimant's complaints of initial headaches only");
- Finding of Fact No. 13 ("Medical evidence fails to support any causal relationship to Claimant's other complaints or symptoms, including his eyes, ear, legs, feet, neck, shoulders, hands, back and anxiety");
- Finding of Fact No. 14 ("Claimant has seen numerous medical care practitioners in several different settings over a period of almost two years without

acknowledgement by Claimant that any treatment has improved the Claimant's description of his complaints and symptoms");

- Finding of Fact No. 15 ("Claimant complains of ongoing symptoms and multiple conditions that he says prevent him from working. However, Claimant is able to drive a car, work on his computer, actively email, actively post on Twitter and actively post on Facebook .... His attendance a rallies is inconsistent with his complaints that noise triggers his symptoms"); and,
- Finding of Fact No. 19 ("Claimant has sustained no permanent specific loss of use to any body parts because of his work incident").

(Single Commissioner Decision, R. pp. 26-28) (Form 30, R. pp. 185-190). All of these unchallenged Findings of Fact support the Commission's resolution of this claim.

Appellant alleges that Respondents have "refused to provide sufficient medical care as recommended" by Dr. Abu-Ata and others. However, Appellant's current complaints and symptoms properly were found not to be work-related and, as a result, Respondents are not required to provide medical treatment for them. In Munn v. Nucor Steel, 336 S.C. 28, 518 S.E.2d 289 (Ct. App. 1999), this Court explained that "any medical treatment claimed under § 42-15-60 must be causally related to the 'injury by accident' arising out of and in the course of employment." 336 S.C. at 32, 518 S.E.2d at 290.

This Court should hold that the Commission properly denied Appellant any ongoing benefits, including medical treatment.

II. Neither Commissioner Campbell nor the Appellate Panel erred in excluding the documents Appellant brought with him to the May 21 hearing.

Contrary to Appellant's assertions otherwise, the records he brought to the hearing without prior notice to Respondents were properly rejected. Appellant incorrectly argues that Commissioner Campbell required him to submit a Pre-Hearing Brief, pursuant to Reg. 67-611, in order to submit medical evidence into the record. While Reg. 67-611 on its face states that a *pro se* claimant does not need to file a Pre-Hearing Brief, Reg. 67-612 contains no such limitation and applies to both *pro se* and represented parties. Reg. 67-612(B) affirmatively requires that medical records, which are considered expert reports, be provided to the other party prior to the evidentiary hearing. S.C. Code Reg. § 67-612(B). (R. p. 85, lines 12-14). Appellant was on notice that, failure to comply with this requirement "may result in the exclusion of such reports from the evidence of the case." S.C. Code Reg. § 67-612(E).

Although he is proceeding *pro se*, "a party has a duty to monitor the progress of [his] case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." Goodson v. Am. Bankers Ins. Co. of Florida, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). Moreover, the South Carolina Supreme Court has stated that a *pro se* litigant "who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." State v. Burton, 356 S.C. 259, 265, 589 S.E.2d 6, 9 (2003). Appellant was repeatedly urged to obtain counsel, but declined to do so.

Appellant asserts that Respondents had some of the documents in their possession that he brought with him to the May 21 hearing, because they subpoenaed those documents from his treating physicians. While it is possible that Respondents had some of the documents Appellant proposed to submit to the Commission at the hearing, 1) that is not the test, and 2) there clearly were other documents they had never seen. (R. p. 108, lines 23-25) (R. p. 110, lines 4-7). Instead, as noted above, "[p]ursuant to Regulation 67-612, it is mandated that a moving party provide the report to the opposing party at least fifteen days before the scheduled hearing." Gadson v. Mikasa Corp., 368 S.C. 214, 226, 628 S.E.2d 262, 269 (Ct. App. 2006). One of the purposes underlying this rule was expressed by Commissioner Campbell at the May 21 hearing, which is to prevent "trial by ambush." (R. p. 107, lines 12-15). Pursuant to Reg. 67-612(B), Respondents had a due process right to know prior to the hearing what records Appellant would rely on in order to make his case. Since he failed to comply with Reg. 67-612(B), the Commission correctly and properly excluded the four file folders of materials Appellant brought with him to the May 21 hearing.

Furthermore, Appellant's assertion that Respondents "admitted" that Commissioner Campbell committed an error is incorrect. Respondent's Brief to the Commission only said, "[t]o the extent that Commissioner Campbell *may* have erred regarding Claimant's submission of Pre-hearing Brief, such error is harmless." (Respondent's Brief to the Full Commission, dated November 11, 2015, R. pp. 51-52) (emphasis added). This falls short of any admission that Commissioner Campbell committed legal error.

Finally, Respondents perpetuated no "fraud" in this case. Instead, they properly and timely submitted the medical records and evidence that support their case. (R. p. 98, lines 1-2 (explaining to Appellant that Respondents "are allowed to submit what they want to and what they don't want to")) (Supp. R. p. 36, lines 4-9 (same)). Respondents are not required to make Appellant's case for him. There simply is no evidence of any "fraud" or error in this case.

This Court should hold that the Commission properly excluded the documents Appellant brought with him to the May 21 hearing.

III. The Appellate Panel properly denied Appellant's motion to add evidence to the record after the May 21 hearing.

The Commission properly excluded both the documents Appellant attached to his Form 30 and that he submitted with his Motion to Include. Regulation 67-707 provides that, in order to present additional and newly discovered evidence after the close of the evidentiary hearing, the moving party must establish that the new evidence is of the same nature and character required for granting a new trial *and* show that "the evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery." S.C. Code Reg. § 67-707.

The criteria for evidence that warrants granting a new trial include: "(1) ... the evidence is such as will probably change the result if a new trial is granted, (2) ... it has been discovered since the trial, (3) ... it could not have been discovered before the trial by the exercise of due diligence, (4) ... it is material to the issue, and (5) ... it is not merely cumulative or impeaching." Bettis v. Busbee, 283 S.C. 502, 505, 323 S.E.2d 536,

538 (Ct. App. 1984); *see also* In re Crawford, 205 S.C. 72, 80-81, 30 S.E.2d 841, 844 (1944) (explaining that after-acquired evidence is admissible if, among other things, it "was not known to the party who desires to introduce same at the time of the hearing before the Commissioner, and that by reasonable diligence this new evidence could not have been secured ..."); Martin, 369 S.C. at 287, 631 S.E.2d at 552 ("the evidence must not be known to the party and could not have been secured by reasonable diligence"). Failure to meet any one of the criteria constitutes grounds for excluding the material. *See* Bettis, 283 S.C. at 505, 323 S.E.2d at 538.

Regardless of whether Appellant could meet any of the other prongs, which is doubtful, Appellant cannot meet the second and third prongs. He has never alleged he did not know he had this evidence in his possession at the time of hearing. In fact, he brought four folders of materials with him to the hearing. Therefore, it is impossible for him to meet at least two prongs of the test.

In addition, Appellant did not file an affidavit with either his Form 30 or his Motion to Include, as required by Regulation 67-707(B), which states that, in order "to introduce new evidence into the record on a case on review, the party shall file a motion and affidavit with the Commission's Judicial Department." S.C. Code Reg. § 67-707(B). As a result, the Commission correctly and properly excluded the documents attached to Appellant's Form 30 and his Motion to Include from the record.

Appellate alleges that the Commission somehow committed legal error by conferring off the record and then announcing its decisions on the evidentiary motions pending before it. First, Commissioner Wilkerson initially explained the process by which the Appellate Panel was going to resolve the motions, including that the Panel

might ask the parties "to step outside" while they considered the motions. Appellant agreed to this process. (R. p. 71, lines 2-13). Second, there was nothing improper in the process by which the Appellate Panel considered the motions. Neither Appellant nor counsel for Respondents participated in the Appellate Panel's off-the-record deliberations.

In addition, the Commission is under no legal obligation, statutory or otherwise, to provide a detailed explanation for either granting or denying a motion to include additional and newly discovered evidence in the record. Despite that, Commissioner Taylor attempted to clarify for Appellant the reasons why it was proper for the Commission to deny his attempts to include materials to the record. (R. p. 84, line 25 – p. 85, line 19).

This Court should hold that the Commission properly denied Appellant's request to add evidence to the record after the May 21 hearing.

IV. The Commission properly held that Appellant reached MMI on October 23, 2013.

The Commission's determination that Appellant reached MMI on October 23, 2013 is supported by substantial evidence and should be upheld. In finding that Appellant had reached MMI for his work-related injury, the Commission specifically pointed to Dr. Stickler's medical report, (R. pp. 206-208), the medical records of Dr. Abu-Ata, (R. pp. 209-218), Dr. Jervey's medical report, (R. pp. 218-219), the medical records from Palmetto Health Richland and Palmetto Health HealthWorks, (R. pp. 222-233), and the transcript of Dr. Stickler's Deposition. (*See* R. p. 175, line 17 – p. 176, line 11).

A finding that a claimant has reached MMI, which is a factual determination to be made by the Commission, "means a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment." *E.g.*, Curiel v. Environmental Mgmt. Servs. (MS), 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). The "only required MMI determination" is for the compensable, work-related injury; there is no need for an employer to prove a claimant has reached MMI for other, non-work related issues. *See* Colonna v. Marlboro Park Hosp., 404 S.C. 537, 551, 745 S.E.2d 128, 136 (Ct. App. 2013). As noted above, there is substantial evidence to support the Commission's factual finding that Appellant reached MMI for the blow to his head, and no further MMI determination needed to be made since Appellant's other alleged conditions have never been found to be causally related to his work injury.

Appellant's argument that the Commission's regulations require submission of a Form 14B in this context is not preserved for appellate review, as he did not raise it in his Form 30 or before the Commission. An issue not raised in the application for review to the Full Commission is not preserved for appellate review. Clark v. Aiken County, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005).[8]

In any event, there is no merit to Appellant's argument. There is no requirement that the treating physician complete a Form 14B or release the claimant from all care (including for non-work-related issues) in order for the Commission to find a claimant has reached MMI. The Commission Regulatory Procedures Advisory relied on by

[8] Respondents also note that, to the extent Appellant raised issues in his Form 30 but did not address them in his Brief, those issues are deemed abandoned on appeal. Emerson Elec. Co. v. South Carolina Dept. of Rev., 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief); Simmons v. SC Strong, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct. App. 2013) (argument not preserved for appellate review where it was raised for the first time in a reply brief).

Appellant states that, matters resolved via informal conference or through settlement must include a Form 14B Physicians' Statement. While a "Form 14B or a narrative report from the treating physician is required for proper filing by the Defense to request stop payment of compensation," it is not required when the Employer files a request for hearing, which is the case here. (South Carolina Workers' Compensation Commission Regulatory Procedures Advisory, Jan. 25, 2012, R. pp. 281-282) (Form 51, dated April 2, 2015, R. p. 194).

Furthermore, there is no evidence that Dr. Abu-Ata ever refused either to fill out a Form 14B or to provide a medical rating. There simply is no indication that he has been requested to do either of those things. Although Appellant testified that, "Nurse Kelly Wells asked Dr. Ata for a medical rating," and "[h]e told her no," Respondent's counsel objected twice to testimony about what the doctor said, and those objections were sustained. (R. p. 125, lines 4-25). Thus, there is no evidence that Dr. Abu-Ata was asked and/or refused to provide either a medical rating or complete a Form 14B.

Because the Commission's determination that Appellant reached MMI as of October 23, 2013 is supported by substantial evidence in the record, this Court should affirm that finding.

V. Appellant's other issues have no merit.

The remaining issues raised by Appellant have no merit and should be dismissed. At the hearing, Appellant argued that Commissioner Campbell was being biased because he allowed Respondents to enter certain things into the record that had not been listed on their APA submission. (Supp. R. p. 26, lines 10-19). These included pages from Appellant's Facebook account and from his Twitter account, both of which are part of the

public record and both of which Appellant acknowledged were his. (R. p. 159, line 16 – p. 162, line 25; Supp. R. p. 5, lines 1-20). Commissioner Campbell did not exhibit any bias against Appellant. Instead, Appellant also was allowed to enter certain items that were part of the public record, including a page from the Mickle & Bass, LLC website, (Supp. R. p. 26, line 22 – p. 30, line 5), and an internet definition of "syncope." (Supp. R. p. 33, line 18 – p. 35, line 1).

Appellant's accusations that the Appellate Panel also was biased appear to be based on the facts that they: 1) upheld Commissioner Campbell's ruling regarding the four folders of documents Appellant brought to the May 21 hearing, and 2) denied his attempts to supplement the record. (R. p. 83, line 1 – p. 84, line 18). As explained in more detail above, those decisions were correct and, as a result, do not support Appellant's claim of bias.

Appellant takes issue with the fact that Respondents noticed Dr. Abu-Ata's deposition but did not take it. Respondents were under no obligation to take Dr. Abu-Ata's deposition. Instead, Appellant could have noticed and taken Dr. Abu-Ata's deposition if he desired to have this testimony in the record. As noted above, Appellant was provided advance notice of Dr. Stickler's deposition but chose not to attend. (R. p. 129, line 24 – p. 130, line 25). Any failure to produce and preserve evidence to support his case lies solely with Appellant. Goodson, 295 S.C. at 403, 368 S.E.2d at 689; State v. Burton, 356 S.C. at 265, 589 S.E.2d at 9.

Finally, Appellant's Brief contains numerous factual assertions that are incorrect and/or not supported by any evidence in the record. These include that Dr. Abu-Ata "refused to provide a medical rating," that he was referred to Dr. Abu-Ata "because of

post concussion syndrome ... which is compensable," that he has "post syndrome concussion which has become disabling with other medical problems," that he "was placed on a leave of absent from Amazon Fulfillment Center at least three times due injury, medical symptoms and medical documentations,"[9] and that he has been diagnosed with any work-related repetitive trauma injury. There is no evidence in the record to support these factual assertions, which should be rejected. "This court may not consider a fact which does not appear in the record on appeal. Rule 209(h), SCACR .... where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record." Cobb v. Benjamin, 325 S.C. 573, 581, 482 S.E.2d 589, 593 (Ct. App. 1997).[10]

[9] Appellant was sent home from Amazon due to his hypertension, (R. p. 120, line 24 – p. 121, line 14) (Supp. R. p. 33, lines 2-10), which pre-dated his injury and has never been causally related to his work injury. (R. pp. 223-228). The medical symptoms that prevented Appellant from continuing to work, such as avoiding loud noise and bright lights, have not been causally related to his work injury. (R. p. 176, lines 16-25; R. p. 178, line 1 – p. 179, line 17).

[10] Furthermore, these assertions appear in Appellant's Statement of the Case, in violation of Rule 208(b)(1)(C), SCACR, which provides that "[t]he statement shall not contain contested matters ..."

CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission Decision and dismiss Appellant's appeal with prejudice.

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October 10, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1303989

Clarence B. Jenkins, Employee, ... Appellant,

v.

Amazon.Com DEDC, LLC, Employer, and
American Zurich Ins. Co., Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents Amazon.Com DEDC, LLC and American Zurich Ins. Co. complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondents' Brief complies with the South Carolina Supreme Court's April 15, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

October 10, 2017

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