THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Derrick L. Williams, Commissioner
David W. Huffstetler, Commissioner
Susan S. Barden, Commissioner

W.C.C. File No. 0922023

Kimberly Mahaffey . . . . . **Appellant,**

v.

Onetone Telecom, Inc. and
State Auto Insurance Companies . . . . . **Respondents.**

APPELLANT'S BRIEF

Larry C. Brandt (S.C. Bar #856)
Larry C. Brandt, P.A
P.O. Box 738
3691 Blue Ridge Boulevard
Walhalla, SC 29691
864/638-5406
Attorney for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

OTHER

STATEMENT OF ISSUES ON APPEAL

1: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in finding and concluding that Appellant did not suffer any compensable injuries by accident to her shoulders, knees or any other body parts from the accident on July 21, 2009 and is, therefore, not entitled to any benefits under this title as same is clearly erroneous in view of the reliable, probative and substantial evidence in the whole record.

2: The Workers' Compensation Commission Appellate Panel erred in concluding, as a matter of law, that Appellant did not suffer any compensable injuries by accident to her shoulders, knees or any other body part from the accident on or about July 21, 2009 and is, therefore, not entitled to any benefits as such is not supported by substantial evidence.

3: The Workers' Compensation Commission Appellate Panel erred in concluding, as a matter of law, that Appellant did not suffer any compensable injuries by accident to her shoulders , knees or any other body part from the accident on or about July 21, 2009 and is, therefore, not entitled to any benefits as the substantial evidence, on the whole record, supports and/or proves Appellant's claims.

4: The Workers' Compensation Commission Appellate Panel erred in concluding, as a matter of law, that Respondents are not responsible for the past or future treatment for Appellant's shoulders and knees as the substantial evidence in the record clearly entitles Appellant to such relief pursuant to the Workers' Compensation Act.

5: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in finding and concluding that the Respondents are not responsible for past or future medical treatment for the Appellant's shoulders and knees and said conclusion is, clearly, erroneous in view of the reliable, probative and substantial evidence in the whole record.

6: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in denying Appellant's claim for benefits under the Workers' Compensation Act as its Decision is not supported by substantial evidence.

7: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in affirming the Hearing Commissioner's finding that Appellant lacked credibility as the finding is based, in whole or in part, upon the result of an in-court experiment which the Hearing Commissioner conducted with his computer, notwithstanding that his experiment failed to duplicate the same circumstances and conditions prevailing nor did it replicate the manner and method in which Appellant testified that she downloaded her computer to

another computer, reloaded MicroSoft and then reloaded the form onto her computer from a flash drive from the other computer.

8: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in that its Decision was, certainly, influenced by the Hearing Commissioner's finding that Appellant was not credible, particularly on the issue as to when Defendants' Exhibit #2 (the incident report), was created as the experiment did not duplicate the same circumstances and conditions prevailing on January 23, 2010, and did not replicate the method and manner in which Appellant testified that she downloaded her computer to another computer, reloaded MicroSoft and then reloaded the form onto her computer from a flash drive from the other computer.

9: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, and abused its discretion in relying upon the testimony of Keith Nichols to impeach Appellant's testimony on the issue of when the incident report **(R.p.267)**, was created as the Panel clearly misapprehended and/or misinterpreted Mr. Nichols' testimony as same falls far short of impeaching what Appellant says that she did.

10. The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in finding that the Appellant lacked credibility based on the testimony of Scott Loggins, Kim Smagala, Keith Nichols, Kunniseth Chea and APA 1, Pages 7 and 8, and APA 2, Page 10, as such finding is not supported by substantial evidence considering the record as a whole.

11: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in finding that Appellant lacked credibility overall as the finding is not supported by the substantial evidence of the case.

12: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in finding that the incident report **(R.p.267)** was created on January 23, 2010, not July 22, 2009, as the substantial evidence in the case does not support that finding.

13: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in failing to reopen the record for the taking of the testimony of Beth Moore and/or examining the flash drive used by Appellant in reloading her computer on January 23, 2010 in order to determine the exact date that the incident report **(R.p.267)** was created as same denied Appellant due process in the determination of her claim.

14: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in finding and concluding that the Appellant did not suffer any compensable injuries by accident to her shoulders, knees or any other body part from the accident on July 21, 2009 and is, therefore, not entitled to any benefits under the Workers' Compensation Act inasmuch as it fully ignored the fact that the Hearing Commissioner was influenced by caprice, passion and prejudice and/or other improper motives in conducting the hearing in such a biased and non-objective way that Appellant was denied due process.

15: The Workers' Compensation Commission Appellate Panel erred in affirming the findings and decisions of the Hearing Commissioner as the Hearing Commissioner was obviously moved by caprice, passion and prejudice against Appellant's claim.

16: The Workers' Compensation Commission Appellate Panel erred in affirming the Decision and Order of the Hearing Commissioner as a review of the record as a whole clearly reveals that Appellant was denied due process by the Hearing Commissioner in the method and manner in which he conducted the hearing and considered evidence which was clearly inadmissible.

17: The Workers' Compensation Commission Appellate Panel erred, as a matter of law, in finding that Appellant's explanation for not advising her doctor on March 19, 2010 of her symptoms to be unreasonable and contrary to common sense based on APA 1, Pages 7 and 8, of Appellant's testimony, as there is no substantial evidence to support this finding considering the record as a whole.

18: The Workers' Compensation Commission Appellate Panel erred in affirming the Decision of the Hearing Commissioner without considering, in any way, the testimony of Janis Mahaffey, mother of Appellant, whose testimony was stipulated to by employer without reservation or challenge to her credibility and which fully corroborated Appellant's claim of injuries resulting from Appellant's fall at work on July 21, 2009.

19: The Workers' Compensation Commission Appellate Panel erred in affirming the Decision of the Hearing Commissioner without considering, in any way, the medical records of Dr. Sean McCallum and his opinion, expressed to a reasonable degree of medical certainty, that Appellant's injuries were caused by her fall at work on July 21, 2009.

STATEMENT OF CASE

The Appellant (Claimant) in this case filed a Form 50 (WCC #0922023) on October 28, 2010, alleging that she had sustained injury to her right and left knees and right and left shoulders on July 21, 2009 and seeking benefits under the S.C. Workers' Compensation Act.

The Respondent (Employer) filed a Form 51 on November 9, 2010 denying the claim pending further investigation on the grounds that Appellant did not seek medical treatment until one (1) year after a minor accident.

The case came before Commissioner T. Scott Beck on December 1, 2010 and on March 14, 2011, Commissioner Beck issued an Order finding that Appellant suffered a minor accident arising from her employment but did not suffer any compensable injuries from the accident. Accordingly, Commissioner Beck denied Appellant's claim for benefits arising from her alleged injuries to Appellant's shoulders and knees.

The ruling was appealled by Appellant and the appeal came before the Commission Appellate Panel on August 15, 2011; however, due to a computer problem in Appellant's attorney's office, notice of the hearing was not received by Appellant's attorney so the matter was considered and determined solely upon the record and briefs which had been submitted by the parties.

On November 13, 2011, the Commission Appellate Panel issued its Decision and Order affirming the ruling of Commissioner Beck.

Notice of Appeal was then filed on December 2, 2011.

STATEMENT OF FACTS
(Summary of Testimony/Evidence)

Kimberly Mahaffey testified at the hearing that she fell in the presence of Ms. Smagala who helped her get up. She stated that she fell over a phone cord that was stretched across the walking aisle about knee high and, immediately after she fell, she felt like she was going to pass out and was hurting in her knees and shoulder. **(R.p.57, ll.8-22)** She said she told Ms. Smagala about her pains **(R.p.58, l.23-p.59, l.4)**, although Ms. Smagala says that her only complaint at the time was that she felt dizzy **(R.p.181, ll.23-25; p.182, ll.13-16).** Ms. Smagala does state, however, that the following day she came into work "complaining or moaning about some pain." **(R.p.183, ll.8-9)** Ms. Mahaffey testified that after she fell, she was hurting in her right knee the most, although the left knee was also hurting. **(R.p.59, ll.1-9)** She does not recall complaining about her shoulders at the time of the accident. **(R.p.59, ll.15-18)** After she got up from the fall, she sat in a chair for a little while before collecting herself before she was able to leave. **(R.p.58, ll.15-18)** According to Ms. Mahaffey she sat in the chair for about twenty to twenty-five minutes **(R.p.59, ll.22-25),** although Ms. Smagala testified it was only two or three minutes. **(R.p.181, l.23-p.182, l.1)** Ms. Mahaffey reported for work the next day and continued to work on a regular basis until she quit to take another job on October 4, 2010. **(R.p.60, ll.6-16; p.56, l.22-p.57, l.5)** Ms. Mahaffey testified that the following day she told another fellow employee and Kimberly Smagala that she thought that she needed to go to the doctor, but Ms. Smagala informed her they were looking for people to fire and not to rock the boat. **(R.p.60, ll.8-25)** Ms.

Smagala, of course, denies this. Ms. Mahaffey also testified that she asked Kimberly Smagala about filing an incident report but she was told that they didn't have one. She then created the form that has been admitted into evidence as Claimant's Exhibit #3 **(R.p.203)** on July 7, 2009 and filled it out that day stating that she was hurting, had pain in her shoulders and knees. **(R.p.61, ll.1-23)** She testified that she offered the form to Kimberly Smagala but was told to keep it. She also asked about going to the doctor, but Ms. Smagala told her that she needed to file it under her own insurance and not complain about it. **(R.p.61, l.24-p.62, l.2)** Ms. Mahaffey did not go to the doctor about her injuries until in or about June 2010 when she saw Henry Ramirez, a Physician's Assistant. **(R.p.72, ll.6-15)** She then went to Dr. McCallum, an orthopedic, on or about August 11, 2010 **(R.p.157)** She states that she finally went to the doctor because the condition was getting worse and the pain was becoming unbearable. **(R.p.62, ll.16-24)**

Ms. Mahaffey testified that she asked Ms. Smagala several times about going to the doctor but each time Ms. Smagala would tell her not to complain about it and discouraged her from seeking medical attention for her injuries. **(R.p.62, l.25-p.63, l.4)** At some point in early 2010, Ms. Smagala was replaced as Ms. Mahaffey's supervisor by Beth Moore who then went to higher management and asked for permission for Ms. Mahaffey to go to the doctor. **(R.p.63, ll.5-7)** She also had a conversation with Mr. Loggins, President of the company, who told her to go to the doctor and the company would pay for it. **(R.p.63, ll.8-23)** At that time, the Human Resources Manager, Ms. Mitzi Worley, asked Ms. Mahaffey for a

description of the accident and, at that time, Ms. Mahaffey gave her a copy of the incident report **(R.p.64, ll.19-25)** which she had tried to give to Ms. Smagala the day after the accident. Ms. Mahaffey testified that she had not had any kind of traumatic event between the date of a previous injury and repair to her right knee and the date of her fall on July 21, 2009 and that she has not had any other falls or traumatic experiences or injuries to her knees or shoulders since July 21, 2009. **(R.p.67, l.9-p.68, l.7)** It is of note here that the record is totally void of any evidence of any other accidents, traumatic events or injuries to the right knee or right shoulder other than those received in the July 21, 2009 accident. Defense Exhibit #2 **(R.pp.266,267)** was placed into evidence by the Employer and is an email sent from Mitzi Worley asking Ms. Mahaffey to provide a description of what happened when she fell at work and a contact number. **(R.p.74, ll.1-25)** The Employer also offered into evidence some printout of some kind by the IT Director of the company, Keith Nichols, indicating that the form may have been created on January 23, 2010, not July 22, 2009. **(R.p.76, ll.8-25; p.268)** The medical records **(R.pp.148-153)** and the records of Dr. McCallum **(R.pp.154-158)** were also entered in the record and they clearly diagnose a torn rotator cuff in Claimant's right shoulder and a torn meniscus in her right knee. Dr. McCallum further stated that, in his opinion to a reasonable degree of medical certainty, the injuries for which he was/is treating her were caused from the fall at work of approximately one (1) year previously on July 21, 2009. **(R.p.154; p.78, l.16-p.79, l.2)** Ms. Mahaffey testified that her knees and shoulder had gotten progressively worse since the accident occurred. In response

to the issue raised by the Employer as to when the incident form was created, Ms. Mahaffey explained that she originally created it on July 22, 2009 but, because of trouble with her computer, her manager at the time, Beth Moore, told her to reload the Windows program on her computer, which required removing all information onto a flash drive, and then reloading the Windows program then putting the information back into the computer. She stated that she did this on Saturday, January 23, 2010. She further stated that her manager, Beth Moore, gave her directions to not wait for the IT guy as it had been two (2) weeks since they had complained so they decided to reload it themselves. She stated that "I used my laptop to do my work and I reloaded my desktop while she was reloading the computer." **(R.p.104, l.23-p.105, l.15; p.108, l.8-p.109, l.12)** She later explained on recall that, after reinstalling the MicroSoft Windows program on her work computer, she reloaded all of her documents on her work computer by using a flash drive from another computer. **(R.p.142, l.8-p.143, l.5)**

Scott Loggins testified that he was the President of Onetone and that Kimberly Mahaffey had never mentioned an accident or injury to him until sometime in June of 2010. He stated that she complained that she had fallen in July 2009 and was injured and wanted to go to the doctor. He then told her that if she had fallen and needed to go see a doctor, he would pay for it. He further stated, "as we have with other employees in the past, people have minor bruises and things happen around the office and that anytime anyone had a complaint or injury of any nature I have paid for an initial doctor visit to, you know, help save on the insurance

costs." In other words, he was avoiding the workers' compensation claim by merely paying for it out of the company coffer. Scott Loggins even says *"regarding the injury that he told Ms. Mahaffey that if she was hurt, go to the doctor."* Then after she went to the doctor, he realized there was going to be on going issues; that it wasn't just a simple go to the doctor for a bruise, everything is ok, just get checked out," and admitted that this concerned him and he reported the injury to his workers' compensation carrier. **(R.p.110, ll.21-23; p.112, ll.3-15; p.113, l.16-p.114, l.2)** Mr. Keith Nichols, the IT person with Onetone testified that Defendants' Exhibit #2 **(R.pp.266-268)** indicates that the work injury incident form was created on Saturday, January 23, 2010, at 1:06 P.M. and was modified on Wednesday, June 30, 2010. He stated that employees only have access to Microsoft software if they bring in their own personal copy, that he would not provide them with it. **(R.p.131, ll.17-23**). He further admitted that if Ms. Mahaffey had reloaded her computer with the Microsoft program, *"if she wiped everything out,"* she would have had to have downloaded her own files and save them in order to be able to put those back on the "machine." When asked how that would have affected Defendants' Exhibit #2 **(R.pp.266-268),** he answered that "whatever date she put it back on the computer, if that is, in deed, what happened." Then in response to the question: "So that would be the creation date?" he replied, "Yes sir." **(R.p.132, ll.2-13)**. He candidly admitted that if she loaded Microsoft Windows to her computer on January 23, 2010, his examination of the computer would only show a modification date, that it wouldn't show how it was modified, and that he could not tell how it was done. He

further stated that if you pull it up and you change anything at all on the document, whether it be spacing or add a sentence, a modification would occur. **(R.p.133, l.4-p.134, l.4)** When asked specifically if he could say that the document was not on that computer prior to January 2010, he answered, "Not unless it was reformatted, no sir." **(R.p.134, ll.1-4)** Although Mr. Nichols denied receiving any kind of written request for work on the computer, he stated that if somebody had mentioned it to him verbally he would not have necessarily required anything in writing **(R.p.135, ll.7-13)**. He candidly admitted that Ms. Mahaffey could have reloaded her computer with Windows without his knowledge. **(R.p.135, l. 24-p.136, l.1)**

While Mr. Nichols was testifying, Commissioner Beck did an "in court" experiment with his computer and then asked certain questions of Mr. Nichols which, at best, says nothing. **(R.p.136, l.3-p.138, l.16)** Commissioner Beck stated that he took a file from his computer with Windows XP to another computer that had Windows 7 system and then brought it back to his computer and it still showed the date the document was originally created under his property section. Commissioner Becks' experiment, however, did not take it off of a Windows program via a flash drive and completely reload the Windows program in his computer before he brought it back, therefore, his experiment had no validity whatsoever to the facts in this case and did not even come close to reflecting what actually happened in the reload of Ms. Mahaffey's computer. When Mr. Nichols was specifically asked the question:

"Would it matter if you transferred it to a machine and copied it to a flash drive and then took the flash drive back over to the original one?" He answered: "I am not sure on that. I would have to check and see if it does that." (R.p.140, ll.4-10) And when further asked, **"But you can't say today?" His answer was: "No sir." (R.p.140, ll.4-10)** Mr. Brandt recalled Ms. Mahaffey to explain exactly how it was done and she stated that she came back with a flash drive from another computer. **(R.p.142, l.21-p.143, l.1)** She stated that she copied the documents to a flash drive on another computer, reloaded the Windows, and then put the documents back on the computer from the flash drive. **(R.p.144, l.1-p.145, l.13)** She further stated that Beth Moore, her supervisor at the time, was the one who requested IT to come and reload her computer and was present when she reloaded her computer on January 23, 2010. **(R.p.143, ll.2-5)** She further stated that she still had the flash drive but wasn't sure if it was the one in her pocketbook at the hearing or the one she had at home. **(R.p.145, ll.11-16)** Mr. Martin specifically stated that if he could get a copy of the flash drive, he thought it would have the actual or initial creation date on it, to which Mr. Brandt stated he didn't have any objection to providing it. Mr. Brandt also opined that if the Commissioner was going to hold the record open to retrieve the flash drive, then it should also hold the record open for the taking of the deposition of Beth Moore, Ms. Mahaffey's manager. Commissioner Beck then curtly informed Mr. Brandt that he had had the opportunity "to get her here today," to which Mr. Brandt responded, "well I didn't know this issue was coming up today." He further informed the Court that his client didn't have the

flash drive with her and pointed out that the Employer had not asked for its production. Mr. Martin simply responded "that's fine" and Commissioner Beck then closed the hearing without allowing the flash drive to be retrieved and/or Beth Moore to be deposed. **(R.p.145, l.17-p.146, l.16)**

STANDARD OF REVIEW

Judicial review of a Workers' Compensation Commission Appellate Panel's Decision is governed by the substantial evidence rule of the Administrative Procedures Act **(S.C. Code. Ann. §1-23-380(A)(5)(d)(e) [1976]).** Pursuant to the APA, the Court of Appeals' review in a workers' compensation proceeding is limited to deciding whether the decision of the Appellate Panel of the Workers' Compensation Commission is unsupported by substantial evidence or is controlled by some error of law **[Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct.App. 2007)].** *"Substantial evidence,"* for purposes of judicial review of decisions of the Appellate Panel of the Workers' Compensation Commission, 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 conclusion the Appellate Panel reached in order to justify its action. It is something less than the weight of the evidence **[Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct.App. 2007); Pack v. S.C. Dept. of Transportation, 381 S.C. 526, 673 S.E.2d 461 (Ct.App. 2009)];** however, when the facts concerning a workers' compensation claim are not in dispute, the question of whether or not the

accident is compensable becomes purely of law. Furthermore, for an injury to *"arise out of"* employment for workers' compensation purposes, it must only appear to have originated from a risk connected with the employment and to have come from that source as a rational consequence." **[Ardis v. Combined Ins. Co., 380 S.C. 313, 669 S.E.2d 628 (Ct.App. 2008)]** Lack of conflict of evidence renders question of causal connection between injury and accident, which is ordinarily one of fact for the Commission, a question of law for decision by the Court **[Polk v. E.I DuPont De Nemours Co., Inc., 250 S.C. 468, 158 S.E.2d 765 (S.Ct. 1968)].**

DISCUSSION

In framing the issues on appeal, Appellant lists nineteen (19) errors, some of which are admittedly overlapping, but each of which warrants a reversal of the Order and Decision of the Hearing Commissioner and the Workers' Compensation Commission Appellate Panel and requires the entry of judgment in favor of Appellant or, at least, a ***new hearing de novo***.

Issues 1 through 6 are based upon the lack of substantial evidence supporting the Decision and/or the presence of substantial evidence to support Appellant's claims; issues 7 through 11 deal with the finding that Appellant lacked credibility; issue 12 is aimed at the finding as to when Defendants' Exhibit #2 was created and the significance thereof; issues 13 through 16 concern the failure of due process in the proceedings to date; issue 17 addresses the error in the finding that Appellant's explanation for not advising her doctor on March 19, 2010 of her

symptoms to be unreasonable and contrary to common sense; and issues 18 and 19 point out that the Hearing Commissioner, as well as the Workers' Compensation Commission Appellate Panel, totally ignored relevant, material and controlling evidence supporting Appellant's claim in rendering its opinions, particularly the stipulation of testimony of Janis Mahaffey, mother of Appellant, the medical records of Henry Ramirez and Dr. Sean McCallum and the unequivocally expressed expert medical opinion of Dr. Sean McCallum on the issue of proximate cause, all of which conclusively proves that Appellant's diagnosed injuries were caused by her admitted fall at work on July 21, 2009.

For purposes of discussion and/or argument of these issues, they are categorized under four (4) questions as follows:

1. Is the Workers' Compensation Commission Appellate Panel's Decision supported by substantial evidence? (Issues 1-7; 18 and 19)

2. Did the Workers' Compensation Commission Appellate Panel abuse its discretion and commit an error of law in totally disregarding the stipulation of testimony of Janis Mahaffey and the records of Dr. McCallum and Henry Ramirez on the issue of proximate cause? (Issues 1-7; 18 and 19)

3. Does the evidence support the Workers' Compensation Commission Appellate Panel's finding that Defendants' Exhibit #2 was originally created on January 23, 2010, rather than July 21, 2009, as claimed by Appellant, is it material to a determination of the case and is it sufficient to justify the finding that Appellant lacked credibility? (Issues 8-12 and 14-17)

4. Was the Workers' Compensation Commission Appellate Panel's Decision to affirm the Hearing Commissioner's refusal to hold open the record for the taking of the deposition of Beth Moore and obtaining the flash drive an abuse of discretion and a denial of due process? (Issues 13, 15 and 16)

Certainly, all of the issues raised are part and parcel of the substantial evidence issue, but each issue, individually and collectively, particularly those specific issues pertaining to conduct of the hearing, the improper in-court experiment, the utter disregard of certain evidence without even mention of same in the Decision, the flawed reasoning and finding of the Hearing Commissioner on plausibility and truthfulness of Appellant's testimony and the misinterpretation of a witness's testimony, emphasize the bias of the Hearing Commissioner and the Appellate Panel and the unfairness of the hearing and the Appellate Panel's affirmation thereof, and shows that Appellant's due process rights have been so trampled that, even if substantial evidence to support the award is found, a ***new hearing de novo*** is required in the interest of fair play and justice. Although all of these issues have already been addressed in the Brief submitted to the Workers' Compensation Commission Appellate Panel which is included in the record and incorporated herein by reference, Appellant also submits the following arguments in support of her claims.

QUESTION #1

IS THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL'S DECISION SUPPORTED BY SUBSTANTIAL EVIDENCE? (ISSUES 1-7; 18 and 19)

It is well settled law that a workers' compensation claimant must establish, by a preponderance of evidence, facts which will entitle him/her to an award and that any award or decision of the Workers' Compensation Commission must not be based on mere surmise, conjecture or speculation but, rather, must be based upon the substantial evidence in the record **[Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (S.Ct. 1965); Lorick v. S.C. Electric & Gas, 245 S.C. 513, 141 S.E.2d 662 (S.Ct. 1965)].**

In proving a workers' compensation claim, the following facts must be shown by a preponderance of the evidence:

1. That an accident occurred;
2. That employer was notified of the accident;
3. That claimant sustained an injury;
4. That the injury was caused by the accident;
5. That the claim was submitted or filed within two (2) years of the date of the accident.

If the substantial evidence is that these five (5) facts exist, the court must find that the claim is compensable and the Employer is required to provide necessary medical care and other benefits to treat the injury, as well as any other benefits provided by the Workers' Compensation Act. There must be more than a mere scintilla of evidence and any decision of the Appellate Panel based on mere

surmise, conjecture or speculation cannot prevail. Additionally, the claim must be decided in a manner in which reasonable, unprejudicial minds are guided without regard to gut feelings, philosophical principles or personal feelings toward the claimant. Although expert testimony is not necessarily required, the law is clear that if there is no competent or substantial evidence contradicting the expert testimony and the matters attested to are not within common knowledge, the opinion of the expert must be accepted without freedom to disregard it **[Etheredge v. Monsanto Co., 349 S.C. 451, 652 S.E.2d 679 (Ct.App. 2002); Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (S.Ct. 2004); Lizee v. S.C. Dept. of Mental Health, 367 S.C. 122, 623 S.E.2d 860 (Ct.App. 2005); Pack v. S.C. Dept. of Transportation, 381 S.C. 526, 673 S.E.2d 461 (Ct.App. 2009)].**

In this case, not only does the substantial evidence in the record as a whole clearly establish the validity of Appellant's claim, but the only credible evidence material to this matter clearly establishes an accident and an injury and the causal relationship of that injury to the accident entitling her to the benefits of the Workers' Compensation Act. There is absolutely no evidence in the record to refute the fact that (1) an accident occurred on July 21, 2009, when Appellant tripped over a phone cord and fell to the floor at her place of employment; and (2) she has indeed incurred a serious injury to her shoulders and knees, particularly the right shoulder and right knee as established by expert medical testimony of Dr. McCallum and diagnostic exams. **(R.pp. 154-160)** The Respondents have not contested or refuted either of these two (2) facts and timely notice and filing of the claim have been

admitted; therefore, the only element upon which there is any sort of dispute is that of a causal connection between the diagnosed injuries and the fall Appellant experienced in her place of work on July 21, 2009. In this regard, Respondents have denied that her injuries were, in fact, caused by the fall and have submitted in proof of their position the fact that it was eleven (11) months after the fall before Appellant made complaint of a serious injury to Respondents and requested to see a doctor. They also have alleged that Appellant lied about when she created Defendants' Exhibit #2 **(R.pp.265,267)** and her repeated complaints to Kimberly Smagala about her injuries and pains and her need for medical care. Careful analysis of the record, however, shows that approximately thirteen (13) months after the accident occurred, and well within the statute of limitations for filing a claim, Appellant was diagnosed with injuries to her right shoulder and right knee, and Dr. McCallum opined, to a reasonable degree of medical certainty, that those injuries were proximately caused by the fall that she had in her employment approximately one (1) year earlier on July 21, 2009. **(R.pp.154-158)** There is also a stipulation of testimony of Janis Mahaffey, Appellant's mother, that Appellant had continuously complained of pain in her shoulders and her knees since the date of the accident **(R.p.53, l.21-p.54, l.16)**, and the records of Henry Ramirez, a Physicians Assistant, to whom she was sent by her employer in June 2010 after she had complained of continued pain and requested to go to the doctor **(R.pp.148-153)**, supports Appellant's allegations that she had experienced the pain in her shoulders and

knees continuously since her fall and that she sought medical attention from Henry Ramirez on June 29, 2011 because her pain was getting worse.

Defendants' Exhibit #2 **(R.p.267; see also R.p.265)**, which is a written incident report form created by Appellant on her computer and about which there is much controversy, also unequivocally shows that at least six (6) months before Respondent says Appellant complained of pain to them, that Appellant was experiencing pain in her knees and shoulders from her fall on July 21, 2009. According to Appellant, she created the form, filled it out and offered it to Kim Smagala on July 22, 2009, but Ms. Smagala refused to accept it and told her that if she needed to go to the doctor that she would have to go on her own time and use her health insurance. **(R.p.244, l.20-p.245, l.24)** Although Ms. Smagala denied that any of that occurred, she did admit that she witnessed the fall, that Appellant complained of dizziness immediately after the fall, and that, the day after the fall, Appellant came to work **"complaining or moaning about some pain." (R.p.181, ll.23-25; p.182, ll. 13-16; p.183, ll.8-9)** This evidence, together with the stipulation of testimony of Janis Mahaffey, Appellant's mother with whom Appellant lived, that her daughter had complained of pain in her shoulders and knees continuously since the accident of July 21, 2009 **(R.p.53, l.21-p.54, l.16)**, as well as Defendants' Exhibit #2 **(R.p.267; see also R.p.265)**, clearly shows a causal connection of pain symptoms from date of the accident to the date of her diagnosis, and the opinion of Dr. McCallum that her injuries resulted from the fall clearly establishes the causal connection and controls the issue. **(See Argument, Question #2)** The type of

injuries which Appellant has are consistent with falling and the fall as described is a commonly recognized mechanisms of such injuries. There is absolutely no evidence anywhere that the injuries resulted from normal wear and tear, internal weaknesses, other traumas or causes other than the fall. It is also significant to note that the Workers' Compensation Act merely requires an injured employee to give notice of the accident, but does not require that the injured employee give notice of the type or extent of injury anytime other than within the two (2) year limitations period for filing a claim. In essence, the attendant circumstances and the evidence supporting the causal connection to the accident are overwhelming in favor of Appellant's claim even if Appellant's testimony is completely disregarded in its entirety. As a result, the Decision of the Workers' Compensation Commission Appellate Panel that her injuries did not result from the fall is merely surmise, conjecture and speculation and is not supported by any reliable, probative or substantial evidence whatsoever. Accordingly, the Decision of the Appellate Panel must be reversed.

QUESTION #2

DID THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL ABUSE ITS DISCRETION AND COMMIT AN ERROR OF LAW IN TOTALLY DISREGARDING THE STIPULATION OF TESTIMONY OF JANIS MAHAFFEY AND THE RECORDS OF DR. MCCALLUM AND HENRY RAMIREZ ON THE ISSUE OF PROXIMATE CAUSE? (ISSUES 1-7; 18 AND 19)

Substantial evidence standards require that the Appellate Panel review the record as a whole to determine if a claimant in a workers' compensation case is entitled to benefits of the Workers' Compensation Act **[S.C. Code §42-1-10, et. seq.]**. This was apparently not done as the Panel merely affirmed the Hearing Commissioner's Decision without additional findings or comments and totally ignored the stipulation of testimony of Janis Mahaffey **(R.p.53, l.21-p.54, l.16)**, the records of Henry Ramirez **(R.pp.148-153)** and the records of Dr. Sean McCallum **(R.pp.154-157),** all of which causally connect Appellant's injuries to her fall at work on July 21, 2009. Neither the Hearing Commissioner's Decision nor the Appellate Panel's Decision even mentions this evidence and does not discredit it in any way. There is no conflict in the medical evidence as the records of Ramirez indicates that the problem emanates from Appellant's fall at work in latter July 2009 and Dr. McCallum unequivocally states that the injuries for which he was/is treating Appellant were, in his opinion to a reasonable degree of medical certainty, caused by the fall on July 21, 2009. **(R.p.154)** Respondents never offered any medical evidence or testimony to counter Dr. McCallum's opinion nor did they challenge it in any way other than to "nit pick" at the fact that the description of the fall given by Appellant and that recorded in McCallum's records are not exactly identical. The

difference, however, is without distinction. Common sense tells us that either description of the fall does not necessarily exclude the other nor render it inaccurate. Whether it was a straight on strike of the floor by the knees and shoulders or a twisting action that caused the injury, the mechanism of injury is fairly embraced in both descriptions. Common sense tells us that a trip over a phone cord about two (2) feet above the floor most probably involved both, a strike and a twist, and, certainly, no one has or can argue that Appellant did not extend her arms and hands to break her fall or catch herself as that is a normal human reaction. The doctor's note, however, does not mention anything in regard to her shoulders other than she fell on her right shoulder, but he emphatically opines the fall caused the injury to her right shoulder and right knee and, as previously pointed out herein, there is no other evidence to even suggest that the injuries came from any other event or condition. There is, therefore, no conflict in evidence as to the question of causal connection between Appellant's injuries and the accident and is, therefore, a question of law to be determined by this Court **[Polk v. E.I DuPont De Nemours Co., Inc., 250 S.C. 468, 158 S.E.2d 765 (S.Ct. 1968); Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (S.Ct. 1965)].**

Although medical opinion on causation is not necessarily binding upon the court, unless it is one for experts or skilled witnesses alone or concerns a matter of science or specialized art or other matters of which a layman can have no knowledge, opinions of medical experts may be conclusive even if not contradicted

by lay witnesses. **[Polk v. E.I DuPont De Nemours Co., Inc., 250 S.C. 468, 158 S.E.2d 765 (S.Ct. 1968)]** When the evidence is all one way and there is no other competent and substantial evidence to contradict the medical expert's opinion on causation, it must be accepted by a fact finding body and cannot be disregarded. **[Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (S.Ct. 1949)]** The testimony of Janis Mahaffey, Appellant's mother, further fortifies the connection. Furthermore, proof that a workers' compensation claimant sustained an injury may also be established by circumstantial and direct evidence where circumstances lead an unprejudiced mind to reasonably infer the injury was caused by the accident. **[Hieronymus v. Clarence Thomas Hamrick, III, D.M.D., 385 S.C. 1, 682 S.E.2d 512 (Ct.App. 2009)]** Certainly an unprejudicial mind would infer under the facts and circumstances of this case, that Appellant's injuries were caused by her fall at work on July 21, 2009. It is, therefore, submitted that Appellant has carried her burden of proof on the issue of causation even without her testimony being considered and that the Workers' Compensation Commission Appellate Panel committed clear error of law requiring reversal of its Decision. It is further submitted that this error also amplifies Appellant's claim that she was denied due process in this case and that the Hearing Commissioner and, evidently, the Appellate Panel were so prejudiced against her or so disposed to denying her claim that they totally ignored the law and the responsibility imposed upon them to be fair and just, and failed to afford her due process in deciding her claim. For these reasons, the Decision of the Workers' Compensation Commission Appellate Panel should be overruled.

QUESTION #3

DOES THE EVIDENCE SUPPORT THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL'S FINDING THAT DEFENDANTS' EXHIBIT #2 WAS ORIGINALLY CREATED ON JANUARY 23, 2010, RATHER THAN JULY 21, 2009, AS CLAIMED BY APPELLANT, IS IT MATERIAL TO A DETERMINATION OF THE CASE AND IS IT SUFFICIENT TO JUSTIFY THE FINDING THAT APPELLANT LACKED CREDIBILITY? (ISSUES 8-12 AND 14-17)

It is respectfully submitted that the Hearing Commissioner and the Appellate Panel were in error, abused their discretion and destroyed the Appellant's due process right by allowing the Hearing Commissioner to perform an *"in-court experiment"* with his own computer and being substantially influenced by it to the prejudice of Appellant. The Hearing Commissioner's *"experiment"* did not even come close to duplicating, nor was it substantially similar, to what the Appellant said she did in the downloading of her files from her work computer to her laptop, reloading Windows on her work computer and then reloading the work computer with the document from the flash drive taken from her laptop. The statements made in the record by the Hearing Commissioner and his demeanor toward Appellant afterward, shows that *"his experiment"* caused him to believe she was not being truthful and, as a result, he was moved by caprice, passion and prejudice against Appellant to such an extent that he arbitrarily found her testimony was not credible and totally ignored all of the other evidence that proved her claim and the Appellate Panel condoned it. There is no doubt that the incident report **(R.p.267; see also R.p.265)** was created by Appellant and it was, **at least, by Respondents' own version of the evidence created as early as January 22, 2010.** Regardless of the

date upon which the document was actually created and filled out, it was created and given to the Appellant's employer well within the statute of limitations period for filing claims and, whether or not it was created on July 22, 2009 or January 23, 2010, merely proves that Appellant was complaining of problems with her shoulders and knees months before she went to Henry Ramirez in March 2010 for her asthma and/or was sent to him by her employer on June 29, 2010 because of her complaints resulting from her fall.

Notwithstanding the dispute and the concession of the Respondents that the document was created on January 23, 2010, it is further submitted that there is absolutely no credible or reliable evidence that it was created on any other date than the date the Appellant states she created it, to-wit: July 22, 2009.

The substance of the testimony of Mr. Nicols, the IT guy for the employer, was merely that there was some indication that the document **(R.p.267)** was created on January 23, 2010, not on July 22, 2009, as Appellant claims, but his testimony does not establish with any degree of reliable certainty when the document was actually created. He candidly admitted that he did not know what had happened with the computer, how the document was placed on the computer and, until the hearing, did not even know that Appellant had removed all the files from her work computer, then, after reloading her work computer with Windows, she reloaded her files back onto the work computer from a flash drive taken from her laptop. In fact, he candidly admitted that, if that happened, he could not say when

the form was created. **(R.p.140, ll.4-10)** He also admitted that he could not say that the document was not on the computer prior to January 23, 2010. **(R.p.134, ll.1-4)**

It is apparent that the Hearing Commissioner, Commissioner Beck, became distracted by the document, afforded it undeserved significance, determined that the Appellant was being untruthful because of her assertion that she had created it, filled it out and attempted to give it to Ms. Smagala in July 22, 2009, and lost sight of all the other evidence supporting Appellant's claim. The real substance of the document **(R.pp.267; 265)** is that Appellant recorded she was having pain in her shoulders and knees as a result of the July 21, 2009 accident long before she sought medical attention for them. There is no contest to the fact that the Respondents had knowledge of the accident at the moment it occurred as it was witnessed by Appellant's supervisor, Kim Smagala, and, on the day after the accident, Appellant came to work and complained of pain to Ms. Smagala. **(R.p.183, ll.7-12)** The stipulation of testimony of Appellant's mother was not challenged or contested in any way, and it fully corroborates Appellant's constant complaints of pain in her shoulders and knees from the date of the accident. It is obvious that Commissioner Beck was a bit miffed with Appellant, to say the least, and stepped out of his role as an impartial arbiter to conduct an in-court experiment with his own computer, without the knowledge of either attorney or the parties to the case, and, once that was done, he did not believe anything else Appellant said. His experiment, however, did not even come close to duplicating, nor was it substantially similar, to what the Appellant said she did in downloading her files to

another computer, then copying them on a flash drive, reloading Windows, and then reloading the work computer with a document from the flash drive. He even stated that he wasn't sure he was comparing apples to apples. **(R.p.136, ll.3-10)** Although Appellant's attorney could not find any cases concerning an in-court experiment in a workers' compensation case, much less a hearing commissioner performing one on his own volition, what Commissioner Beck did was just so patently unfair and prejudicial that it totally destroyed the due process rights of Appellant. The rule is clear that in a trial of a case with a jury, that an in-court experiment must meet the test enunciated in **McDowell v. Floyd, et. al., 240 S.C. 158, 125 S.E.2d 4 (1962)** and then, again, restated in **Doremus v. Atlantic Coastline Railroad Co., 242 S.C. 123, 130 S.E.2d 370 (S.Ct. 1963),** as follows:

> ***"One desiring to make an experiment in court or to introduce evidence of an experiment made out of court should first show that the experiment is to be made or was made, as the case may be, under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy, otherwise the courts would not, as a general rule, permit the making of experiments or the introduction of evidence thereof."***

Certainly, the record shows that Commissioner Beck was clearly materially influenced by his experiment and accorded it great weight **(R.p.136, ll.7-10),** even though Mr. Nichols, the computer guy at Onetone, said that if Appellant did what she did, then he did not know what would show as the creation date, whether it would be the date that it was reloaded or some prior date. **(T.p.140, ll.4-10)** He also stated in response to a question from Commissioner Beck that *"if you move a file with the same name to a new machine that will have . . . . . a new created date from*

a new name to a new machine." **(R.p.136, l.25-p.137, l.3)** As a result, the experiment had no value and provided no proof at all that the document was not created when Appellant claims. Commissioner Beck also misconstrued or misunderstood the testimony of Mr. Nichols as establishing with certainty the January 23, 2010 date. This merely compounded the problem as his finding that Appellant was not credible was then based on two (2) grave errors and was totally without any basis whatsoever. In essence, Commissioner Beck and the Appellate Panel placed great weight on when Defendants' Exhibit #2 was created, although that bears little, if anything, on the issue of causation and whether Appellant should be compensated and allowed to receive medical care for her injuries resulting from her accident, the occurrence of which is not refuted, and the causal connection of which is clearly established and controlled by other evidence.

It is, therefore, submitted that the Workers' Compensation Commission Appellate Panel erred in affirming any decision of Commissioner Beck because he was materially and prejudicially influenced by erroneous evidence and/or information, and that the erroneous evidence and information bore significantly on his determination that Appellant was not credible. For this reason, and this reason alone, this Court should overrule the Workers' Compensation Commission Appellate Panel's Decision and declare the claim compensable or, if not, at least, remand for a ***new trial de novo***.

QUESTION #4

WAS THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL'S DECISION TO AFFIRM THE HEARING COMMISSIONER'S REFUSAL TO HOLD OPEN THE RECORD FOR THE TAKING OF THE DEPOSITION OF BETH MOORE AND OBTAINING THE FLASH DRIVE AN ABUSE OF DISCRETION AND A DENIAL OF DUE PROCESS? (ISSUES 13, 15 AND 16)

The Appellate Panel's refusal to hold open the record to examine the flash drive which Appellant says she used to download the document and to accurately duplicate what had occurred in the reloading of the computer after the installation of the Windows program, together with his denial of Appellant's request to take the deposition of Beth Moore is certainly indicative of a desire to deny benefits based on mere surmise, conjecture and speculation rather than the truth and effectively denied Appellant due process.

In **Trotter v. Trane Coil Facility, 384 S.C. 109, 681 S.E.2d 36 (Ct.App. 2009),** a case on point with the issue here, the court held that administrative agencies are required to meet minimum standards of due process and, in cases where important decisions turn on questions of fact, due process, at least, requires an opportunity to present favorable witnesses. Although Appellant firmly believes that the date of the creation of the document is immaterial to the determination of the issues before the Commission and that, even if Appellant is held not to be credible, compensation still cannot be denied, the refusal to hold the record open to take the deposition of Beth Moore, as well as examining the flash drive, is analogous to the **Trotter** case *(supra)* in which the court held that the Appellate Panel of the Workers' Compensation Commission abused its discretion by not

granting employer's motion for a continuance or keeping the record open for deposition of claimant's supervisor as the supervisor was the person whom claimant was to inform regarding any work related injury and the supervisor's testimony was material to the issue of whether the claimant gave notice of alleged lower back injury prior to seeking medical help. The court stated for that reason it was improper to exclude the claimant's supervisor under those circumstances as the employer had no way, without supervisor testimony, of contesting the issue of notice. Here, without the testimony of Beth Moore and an examination of the flash drive which was used to reload Defendants' Exhibit #2 onto Appellant's work computer after MicroSoft Windows was reinstalled, there was/is no way for the Appellant to directly contest the evidence adduced by Respondents that the document was created on January 23, 2010, rather than July 22, 2009.

It is, therefore, submitted that the Decision of the Workers' Compensation Commission Appellate Panel must be reversed and/or, in the alternative, that the case be remanded for the taking of the testimony of Beth Moore and the examination of the flash drive and then the case be reconsidered and a new decision rendered by the Workers' Compensation Commission Appellate Panel with consideration of the evidence so obtained.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that Appellant's due process rights have been totally disregarded and that Appellant's claim for workers' compensation benefits was not fairly adjudicated by un-prejudiced minds or in accordance with the evidence and applicable law. Clearly, Appellant has met her

burden of proof in this case. There is no basis in the record upon which impeachment of Appellant's credibility is justified in any degree and, certainly, not to such an extent that her testimony should be totally disregarded. Even if it is disregarded, however, the testimony of Kimberly Smagala that the accident occurred, the records of the treating physician clearly establishing his medical diagnosis of injury to the shoulder and the knee, the stipulated testimony of Appellant's mother corroborating Appellant's constant complaints of shoulder and knee pain from the date of the accident to present date, and the opinion of the treating physician that, to a reasonable degree of medical certainty, the torn rotator cuff/labrum and torn meniscus in her right shoulder and leg were/are the result of and proximately caused by the fall on July 21, 2009, conclusively proves the claim. There is no evidence whatsoever that her established injuries were caused by anything other than the fall on July 21, 2009, and the substantial evidence of the record as a whole dictates that the finding of the Workers' Compensation Commission Appellate Panel be reversed and judgment entered in favor of the Appellant.

Respectfully submitted,

Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Boulevard
Walhalla, SC 29691
864/638-5406

By: Larry C. Brandt
Larry C. Brandt (S.C. Bar #856)
Attorney for Appellant

October 10, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Derrick L. Williams, Commissioner
David W. Huffstetler, Commissioner
Susan S. Barden, Commissioner

W.C.C. File No. 0922023

Kimberly Mahaffey . . . . . **Appellant,**

v.

Onetone Telecom, Inc. and
State Auto Insurance Companies . . . . . **Respondents.**

CERTIFICATE OF COUNSEL
(Appellant's Final Brief)

The undersigned certified that ***APPELLANT'S BRIEF*** complies with Rule 211(b), SCACR.

October 10, 2012

Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Blvd.
Walhalla, SC 29691
864/638-5406

By: Larry C. Brandt
Larry C. Brandt, Attorney
S.C. Bar #856