IN 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.**

RESPONDENTS FINAL BRIEF

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STATEMENT OF THE CASE

Appellant/Claimant in this case filed a Form 50, WCC File No.: 0922023, on October 28, 2010, alleging that she had sustained injuries to both her right and left knees and both her right and left shoulder on July 21, 2009, and seeking benefits under the South Carolina Workers' Compensation Act. (R. pp. 27-28)

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 year after a minor accident. (R. p. 29)

On November 2, 2010, the Claimant was deposed in addition to her supervisor, Kimberly Smagala, and the Director of Operations, Kunniseth Chea. The Appellant identified several witnesses in her deposition, including several ex-employees that she alleged could provide support for her claims. The deposition testimony of the Appellant was in nearly complete conflict with the deposition testimony of her supervisor and operations manager regarding allegations of injury, requests for medical treatment, and submission of an incident report.

The case came before Commissioner Beck on December 1, 2010. The only witness who appeared on behalf of the Claimant was her mother, Janis Mahaffey. None of the alleged witnesses previously identified in Appellant's deposition were deposed or subpoenaed to the hearing.

On March 14, 2011, Commissioner Beck issued an Order finding 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 both shoulders and both knees. (R. pp. 13-26)

The ruling was appealed by Appellant and the appeal came before the Full Commission for a hearing on August 15, 2011. Oral argument was requested, but Appellant failed to appear for the scheduled appeal hearing. The Full Commission then decided the matter upon the record and the Briefs which had been submitted by the parties. (R. pp. 40-46)

No objection was made by the Appellant regarding the Full Commission issuing its Order without oral argument.

The Full Commission issued an Order on November 13, 2011. By unanimous decision, the Full Commission found that the Hearing Commissioner's Order should be affirmed in its entirety. Appellant's counsel was fined $100.00 for failing to attend the hearing. It was noted that the Appellant's attorney did not receive notice of oral argument because the e-mail was caught in his spam filter. (R. pp. 4-12)

Notice of Appeal was then filed on December 2, 2011. (R. pp. 36-39) After several extensions were granted to the Appellant, an Initial Brief was filed on May 18, 2012. An extension was granted to Respondents for submitting their brief as well.

SUMMARY OF THE EVIDENCE

Appellant was involved in a very minor accident on July 27, 2009, when she tripped over a phone cord while leaving work. (R. p. 57, lines 2-7 and p. 90, lines 20-22) She got up and drove herself home a few minutes later. (R. p. 58, lines 15-18 and p. 59, lines 22-25) She did not seek any medical treatment and she reported to work the following day. Appellant claimed that she asked for medical treatment the day after the

accident, but was told by her supervisor, Kim Smagala, not to "rock the boat". (R. p. 60, lines 6-25) Instead, she claimed her supervisor suggested she go to the doctor using her health insurance. (R. p. 80, lines 8-18) The supervisor, Kim Smagala, testified that she told Appellant the company would send her to the doctor if she was hurt and that Appellant declined medical treatment. (R. p. 183, lines 8-12; p. 188, line 17-p. 189, line 3) It is undisputed that Appellant did not seek any type of medical treatment on referral from the company, or using her health insurance until March 19, 2010. (R. p. 80, line 8-p.81, line 1) When she sought medical treatment in March, nearly 8 months later, it was not for her alleged work injuries. (R. p. 82, line 19-p. 83, line 3; p. 98, lines 10-14)

Appellant testified that after July of 2009 she did not complain again about her injuries from the work accident until April of 2010. She then claims to have complained about her problems to her new supervisor, Beth Moore. Beth Moore was no longer an employee of the Respondent/Employer at the time Appellant filed her Form 50 on October 28, 2010. Ms. Moore was identified as a potential witness by Appellant in her deposition on November 2, 2012. Ms. Moore was not deposed or called as a witness at the hearing. (R. p. 86, lines 6-16) She was not listed as a potential witness in Appellant's Pre-Hearing Brief. (R. pp. 30-32) Neither Appellant's Personnel file nor Employment records reflected that she ever complained of injuries to Ms. Moore.

After the accident of July 21, 2009, Appellant's first medical visit of any kind was on March 19, 2010. At that time, Appellant went to her family doctor using her health insurance. (R. p. 97, line 18-p. 99, line 5) At this visit, her chief complaint was worsening of her asthma and swelling in her legs and right foot. (R. p. 81, lines 2-10 and lines 23-25; p. 36 lines 1-4; p. 152) Her family doctor's record for this visit specifically

provided, "no musculoskeletal symptoms, normal movement of all extremities, strength was normal, gait and stance normal." (R. pp. 152-153) The doctor prescribed Lasix for the fluid retention/swelling. (R. p. 82, lines 16-18) Appellant admitted she did not mention anything to her doctor about problems with either of her knees or shoulders at this visit. (R. p. 82, line 19-p. 83, line 3; p. 98, lines 10-14) It was her testimony that she complained about her alleged work injuries the following month (April of 2010) to her then-supervisor, Beth Moore. Appellant testified she first sought medical treatment for her alleged work injuries in June of 2010. (R. p. 62, lines 16-24)

On November 1, 2010, Dr. McCallum, the Appellant's treating orthopedist, completed a medical questionnaire prepared by Appellant's attorney. (Dr. McCallum had treated Appellant's knee following a prior workers' compensation accident with a previous employer.) According to the Questionnaire, the mechanism of injury was described as, "twisting her knee and falling onto her right shoulder." (R. p. 154) Dr. McCallums' medical record of August 11, 2010, also reflected Appellant fell onto her right shoulder. (R. p. 157) However, Appellant's testimony at the hearing and in her deposition was that she tripped over a phone cord and landed on all fours, both knees and catching herself with both hands. She did not fall on her right shoulder. (R. p. 57, lines 18-19; p. 77, lines 20-23)

Regarding the Appellant's credibility, she testified in her deposition that she was never counseled by her employer. (R. p. 34, lines 14-15) At the hearing, she admitted that in May of 2010, she and two co-workers were counseled for using Facebook at work and their hours were reduced. (R. p. 99, lines 6-11) Shortly thereafter, she and her two co-workers filed claims with the SC Employment Security Commission against the

Respondent/Employer seeking Unemployment Benefits for their reduction of hours. Their claims were denied. (R. p. 90, lines 3-7) Appellant also admitted that she and one of the same two co-workers made an anonymous complaint to OSHA alleging mold and dripping water from the air conditioning system. (R. p. 90, lines 13-19) Her claim resulted in a surprise inspection of Respondent/Employer's offices by OSHA. Her complaint was found unsubstantiated and not a single violation was documented by the inspector. Appellant then told Scott Loggins, company President of Respondent/Employer, at a company meeting in June of 2010 that she needed medical treatment for the injuries she suffered in an accident at work on July 21, 2009. (R. p. 63, lines 8-17 and lines 21-23) This was the first time that Respondent/Employer received any request for medical treatment from Appellant. (R. p. 122, lines 18-21) Appellant was then immediately referred to the company doctor the following day. (R. p. 112, lines 8-10)

Appellant produced an incident report that she claimed to have prepared herself on July 22, 2009, the day after the accident. (R. p. 61, lines 1-6 and lines 11-16; p. 72, line 23-p. 73, line 2) Appellant testified she found the form on the Internet and attempted to give it to her supervisor. (R. p. 61, lines 17-20) She admits never requesting any incident form or reporting an accident with Human Resources, despite her prior experience with workers' compensation claims. (R. p. 73, lines 11-25) Appellant's supervisor testified that Appellant never requested or offered her an incident report. The day following the accident, she told Appellant to seek medical treatment if she needed it and Appellant declined. (R. p. 183, lines 8-12; p. 188, line 17-p. 189, line 3)

The company IT Director, Keith Nichols, testified that he had analyzed Appellant's work station and he provided a screen shot which was marked as the third page of Exhibit 2 at the hearing. This reflected a creation date for Claimant's incident report of January 23, 2010, and a modification date of June 30, 2010. (R. p. 130, lines 3-13) June 30, 2010, was the same day that Claimant e-mailed the document to the company HR manager after requesting treatment from company president, Scott Loggins. (R. p. 130, line 25-p. 131, line 3) Appellant was specifically asked whether she had made any modifications to the document before e-mailing it to HR and she testified she had not. (R. p. 144, lines 1-9) The IT Director, testified that if Appellant had simply accessed and e-mailed the document on June 30, 2010, it would not reflect that the document had been modified. (R. p. 133, lines 9-16)

Appellant testified, for the first time at the hearing, that she had brought in her own copy of Windows software on January 23, 2010 and re-installed it on her work station because of problems she was having with her computer. She had downloaded all her files including the incident report, to a flash drive and then reloaded them on her computer after re-installing Windows. She claimed this caused the incident report to reflect the later creation date. (R. p. 76, line 19-25; p. 77, lines 6-11; p. 142, lines 12-20; p. 143, lines 16-19)

On cross-examination, she was asked about the flash drive. She testified she may have it in her purse. (R. p. 145, lines 2-16) Respondents' attorney asked for the thumb drive to be produced for review. (R. p. 145, lines 17-21) Appellant's attorney then indicated Appellant did not have the flash drive with her, but would attempt to produce it

if the record was held open for taking the deposition of Beth Moore. The Commissioner declined. (R. p. 145, line 22-p. 146, line 21)

Appellant's only witness was her mother, Janis Mahaffey. Appellant's mother did not witness the accident. It was stipulated that her testimony would be cumulative of Appellant's testimony. It was not stipulated that her testimony was true. (R. p. 54, lines 2-16)

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.,* 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Specifically, section 1-23-380 of the South Carolina Code (Supp.2010) provides this court may not substitute its judgment for the Appellate Panel's judgment as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. *See Hamilton v. Bob Bennett Ford,* 336 S.C. 72, 76, 518 S.E.2d 599, 600-01 (Ct.App.1999), *modified on other grounds,* 339 S.C. 68, 528 S.E.2d 667 (2000), *overruled on other grounds, Allison v. W.L. Gore & Assocs.,* 394 S.C. 185, 714 S.E.2d 547 (2011) (interpreting section 1-23-380).

The appellate court is prohibited from overturning findings of fact by the Appellate Panel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund,* 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct.App.2005).

DISCUSSION

The Appellant raised 17 enumerated grounds for appeal to the Full Commission. However, Appellant consolidated these 17 grounds "into four (4) broad categories" in Appellant's Brief to the Full Commission. (R. p. 283)

In Appellant's Brief to this Court, she has raised 19 enumerated grounds for appeal. Some of the grounds for appeal are substantially similar to those previously raised, some are significantly different from those previously raised, and some are new, not having been raised previously.

I. IS THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL'S DECISION SUPPORTED BY SUBSTANTIAL EVIDENCE?

Yes. "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). " In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." *Shealy v. Aiken Cnty.,* 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). " The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]." *Id.* " It is not the task of this Court to weigh the evidence as found by the [Appellate Panel]." *Id.* Further, the trier of fact has the prerogative to believe one part of a witness's testimony while simultaneously disbelieving other parts of the same witness's testimony. *See Holcombe v. Dan River Mills,* 286 S.C.

223, 225, 333 S.E.2d 338, 340 (Ct.App.1985) (" The Commission in workers' compensation cases sits as a jury does. It is elementary that a jury may believe part or all of a witness's testimony[.]").

The Hearing Commissioner found Appellant suffered a compensable accident. It was not disputed that Appellant has injuries to her right shoulder. However, no causal link was established between the accident in July 2009 and the injuries to Appellant's shoulder first diagnosed in June of 2010. In fact, Appellant's own doctor examined her in March of 2010 and found no musculoskeletal problems. Moreover, Appellant did not complain of any problems with her knees or shoulders when she saw her doctor in March 2010. Her only complaints were related to asthma and fluid retention causing swelling in her ankles. The Commissioner did not find her explanations credible regarding her failure to mention any injuries to her employer or her own doctor for nearly a year.

Appellant's physical complaints first arose shortly after being counseled for Facebook usage at work in May of 2010. In quick succession, Appellant demanded medical treatment; filed an unemployment claim while still working; and submitted an anonymous complaint to OSHA. This gave the appearance she had a vendetta against her employer. Conflicts between her testimony, the other witnesses' testimony, and her own medical records provided more than substantial evidence to support the Hearing Commissioner's finding that she lacked credibility.

Appellant failed to produce any witnesses supportive of her story. Respondents stipulated that her mother would provide cumulative testimony to Appellant. Respondents did not stipulate her mother's testimony was true. Moreover, her mother had no knowledge of the accident, anything that occurred at work, or regarding

Appellant's medical treatment. It was Appellant's duty to establish by a preponderance of the evidence that her injuries were causally-related to the accident that occurred 11 months prior. She failed to do so.

II. DID THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL ABUSE ITS DISCRETION AND COMMIT AN ERROR OF LAW IN TOTALLY DISREGARDING THE STIPULATED TESTIMONY OF JANIS MAHAFFEY AND THE RECORDS OF DR. MCCALLUM AND DR. HENRY RAMIREZ ON THE ISSUE OF PROXIMATE CAUSE?

No. As recently noted by our Supreme Court in Fairchild v. South Carolina Department of Transportation, 27112 (April 11, 2012 SCSC):

> A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989); *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

Dr. McCallum completed a Medical Questionnaire prepared by Appellant's attorney. The Medical Questionnaire recited the mechanism of injury as: "twisting her knee and falling onto her right shoulder". In her deposition and at the hearing, Appellant testified that she landed on her knees and caught herself on both hands. She did not twist her knee. She did not land on her shoulder. She did not fall on her shoulder. She did not hit her shoulder. The description of the accident provided by Appellant was significantly different that the description provided in the Medical Questionnaire and Dr. McCallum's notes. The testimony of Appellant contradicted Dr. McCallum's opinion. Dr.

McCallum's opinion provided a causal-connection to a different accident than the one Appellant was involved in at work on July 21, 2009.

Henry Ramirez referred Appellant to Dr. McCallum. He did not provide any opinions regarding a causal-connection. Notably, Henry Ramirez was the same medical provider that Appellant saw in March 2010 complaining about fluid retention in her ankles. Again, his note from March 19, 2010, reflects: "swelling in legs, and check right foot; No musculoskeletal symptoms; normal movement of all extremities". (R. pp. 7-8) The Hearing Commissioner's findings reflect he did not totally disregard these medical opinions. Rather, he considered these medical records carefully in determining that that they conflicted with Appellant's description of the accident. As such, the medical records did not support a causal-connection to the accident described by Appellant occurring on July 27, 2009.

As noted above, the Defendants stipulated the testimony of Appellant's mother would be cumulative, not true. In light of her mother not having been present at the time of the accident, at any time at work, or during her medical visits, the cumulative testimony she provided would only provide minimal support to Appellant's story, if it were true.

III. DOES THE EVIDENCE SUPPORT THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL'S FINDING THAT DEFENDANTS EXHIBIT 2 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?

The evidence supports the Appellate Panel's finding that Exhibit 2 was created on January 23, 2010; however, this was not necessary to a finding that Appellant lacked credibility in light of the other substantial evidence supporting such a finding.

Appellant did not raise an objection to the "in-court experiment" at the hearing. So this

issue has not been preserved.

> "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). "Nevertheless, these rules must also be applied consistently and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it…",

Atlantic Coast Builders and Contractors, LLC v. Lewis, 27044 (SCSC May 16, 2012). "*S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (holding that to be preserved for appellate review, an issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity)." Allegro, Inc. v. Scully, 4997 (July 11, 2012 SCCA

Appellant failed to previously raise the issue of due process. The Appellant cannot raise an issue for the first time on appeal. "it is axiomatic that an issue cannot be raised for the first time on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Appellant's story about the incident report was fishy, especially considering all her other conflicting testimony. Respondent's evidence reflected the incident report was

created in January 2010 and modified on the day it was submitted to HR on June 30, 2010. Appellant testified it was created the day after the accident, July 22, 2009, and offered to her supervisor the same day. Her supervisor testified she was never offered any incident report by Appellant. Appellant never mentioned any modifications to her computer until the hearing, after her attorney was provided with a copy of the screen-shot showing the document was created in January 2010. Appellant then claimed a request was submitted to IT, but IT did not respond so she reloaded software on her computer herself. The company IT Manager testified he never received any such request from Appellant or her supervisor. Appellant testified she made no modifications to the Incident Report after it was created and she did not modify it in any way in June of 2010. The company IT Manager testified the document would not reflect it was modified if she merely opened it and e-mailed it as she claims. Appellant testified at the hearing that the saved Incident Report may be on the thumb drive in her purse. When Respondents attorney suggested she provide the thumb drive for review, Appellant's attorney stated she did not have it and would only produce it if the record was held open to allow the taking of the deposition of another witness.

Appellant stretches credulity when she argues "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" (Appellant's Brief). Moreover, this entire line of argument by Appellant is meritless. There are multiple inconsistencies in Claimant's testimony unrelated to the Incident Report. The Commissioner's finding that she lacked credibility was well supported by her conflicting and inconsistent testimony discussed previously. There is no basis for Appellant's argument that the Commissioner

was substantially influenced by the Incident Report or the screen-shot showing its creation date. The Hearing Order does not even mention an in-court experiment, much less any significant weight being given to one.

Assuming *arguendo* that the "in-court experiment" was in error, then it was harmless error. As noted by McGriff v. Worsley Companies, Inc., 376 S.C. 103, 654 S.E.2d 856 (S.C.App. 2007):

> *Sligh v. Newberry Elec. Coop., Inc.,* 216 S.C. 401, 411, 58 S.E.2d 675, 684 (1950), suggests that if an erroneously admitted document does not constitute the basis for an award, then it is harmless error. If the appellate panel's mere acknowledgment of Chennault's second statement was indeed erroneous, we find it was harmless error.

IV. WAS THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL 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?

No. As noted previously, Appellant failed to raise the issue of Due Process on appeal to the Full Commission. She cannot raise this issue for the first time in her appeal to this court. "it is axiomatic that an issue cannot be raised for the first time on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

The sole case relied upon by Appellant to support this argument has been reversed.

Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (S.C. 2011) reversed the Court of Appeals decision from the same case cited by Appellant.

> A commissioner has the authority to postpone a scheduled hearing in a workers' compensation

> matter for "good cause," which includes such reasons as illness and the need for additional discovery. S.C.Code Ann. Regs. 67-613(B) (Supp.2010); *see also id.* 67-215(A)(5) (motions).
>
> The granting or refusal of a request for a continuance rests in the sound discretion of the hearing commissioner, whose ruling will not be disturbed unless a clear abuse of discretion is shown. *Gurley v. Mills Mill,* 225 S.C. 46, 80 S.E.2d 745 (1954); *see also Williams v. Bordon's, Inc.,* 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980) (" It has long been the rule in this State that motions for a continuance are addressed to the sound discretion of the trial judge, and his ruling will not be upset unless it clearly appears that there was an abuse of discretion to the prejudice of appellant.").
>
> For appellate purposes, an abuse of discretion occurs where the ruling is based on an error of law or, where the ruling is grounded upon factual findings, is without evidentiary support. *Sundown Operating Co. v. Intedge Indus., Inc.,* 383 S.C. 601, 681 S.E.2d 885 (2009); *Clark v. Cantrell,* 339 S.C. 369, 529 S.E.2d 528 (2000); *Bartlett v. Rachels,* 375 S.C. 348, 652 S.E.2d 432 (Ct.App.2007); *Burroughs v. Worsham,* 352 S.C. 382, 574 S.E.2d 215 (Ct.App.2002).
>
> " Of necessity it must be left to the commission to determine whether or not a case shall proceed to trial or be continued." *Gurley,* 225 S.C. at 51-52, 80 S.E.2d at 747. Where a party is not prejudiced by the denial of a motion for a continuance, reversal is not required. *Wright v. Hiester Constr. Co.,* 389 S.C. 504, 698 S.E.2d 822 (Ct.App.2010).

Appellant was aware this was a denied claim and her employer disputed her version of the facts. Appellant's attorney deposed Kim Smagala and Kunniseth Chea on the same day Appellant was deposed. Appellant identified several ex-coworkers that would purportedly support her version of the case. Appellant specifically identified Beth

Moore, an ex-employee of her employer as someone that would support her story. Beth Moore was not deposed. She was not listed as a witness on Appellant's Pre-Hearing Brief. She was not subpoenaed to attend the hearing. Appellant's attorney did not even suggest holding the record open for Beth Moore's testimony until the conclusion of Appellant's cross-examination. Nothing prevented Appellant from having Beth Moore provide testimony or attend the hearing as a witness. To suggest that Appellant's due process rights were violated by not holding the record open for Beth Moore's testimony to be obtained requires imagination.

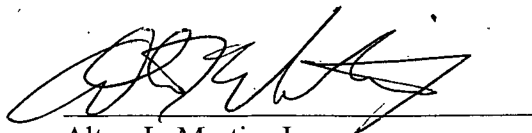
More troubling still is Appellant's argument that her rights were violated for not holding the record open for submission of the flash drive. Respondent, not Appellant, requested Appellant produce the drive which she previously testified was in her purse. Her attorney first noted she did not have the flash drive, then objected to producing it unless the record was held open for obtaining the testimony of Beth Moore. The Commissioner said no.. Respondent did not object. Appellant did not object. Appellate now seeks to use Respondents denied request as a basis for her appeal. It was Appellant's attorney who objected to providing the flash drive. Appellant cannot use the granting of her own objection as grounds for appeal.

The Hearing Commissioner and Appellate Panel did not violate Appellant's due process rights by refusing to hold the record open.

CONCLUSION

The Appeal is without merit and the Order of the Full Commission should be affirmed in its entirety.

Respectfully submitted,



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October 16, 2012

IN 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,**

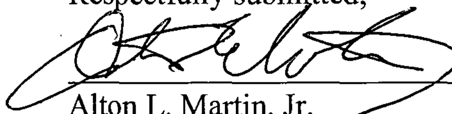
v.

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

CERTIFICATE

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCAR.

Respectfully submitted,



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