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 REPLY BRIEF

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ARGUMENT

In replying to the Brief of the Respondents, it is respectfully submitted that Respondents' Brief misrepresents the facts in numerous particulars and Respondents' construction of the facts are simply not supported by the evidence. Errors or misrepresentations are as follows:

RESPONDENTS' SUMMARY OF THE EVIDENCE

1. ***In the Summary of the Evidence, on Page 2 of the Brief, Respondents state "the supervisor, Kim Smagala, testified that she told Appellant the company would send her to the doctor if she was hurt and that Appellant denied medical treatment. There is no testimony of that nature or to that effect. The only testimony of Ms. Smagala on the medical issue is found in the record as follows:***

Smagala Deposition
R.p.188, l.21-p.178, l.1

Q. Did she ask you about going to the doctor the following day?

A. No sir.

Q. Did you tell her that if she wanted to go to the doctor, she could go on her own?

A. No sir.

Then, again, in her deposition **(R.p.196, ll.9-12)**, Ms. Smagala was asked:

Q. Your testimony is that you never told her to go, she could go to doctor but she had to use her own insurance, or words to that effect?

A. I never said any such thing.

(R.p.196-p.197, l.5)

Q. Did you ever have any conversations with her about her accident or going to the doctor because of that accident in April of this year, 2010?

A. No.

Q. In June?

A. No sir.

Q. July?

A. No.

There is nothing else that Appellant could find in the deposition of Ms. Smagala relating to any conversations with Appellant about going to the doctor. Obviously, the statement that is made in the Summary of Evidence on Page 2, and cited above, is not true and is not supported, even indirectly, by the testimony of Ms. Smagala or any other evidence.

2. ***Under Summary of the Evidence, on Page 3, Respondents point out that when Appellant sought medical treatment in March, nearly eight (8) months later, it was not for her alleged work injuries; however, Respondents stop there and fail to explain that she went to the doctor because of her asthma due to what she believed to be mold in the building, notwithstanding that Respondents later suggest that Appellant's complaint to OSHA was a concocted complaint as a vendetta against her employer rather than a legitimate health concern.***

As will be pointed out later herein, Appellant was having significant problems with her asthma while in the work place and she explains the reason she thought that mold may be in the building. **(R.p.259, l.23-p.260, l.9; p.102, l.25-p.103, l.20)**

3. ***Respondents fail to state in their Summary of Facts the note of Henry M. Ramirez, PAC, regarding Appellant's visit to him on 3/19/2010 (APA #1,pp.7-8). The note states: "The chief complaint is: asthma seems to be progressively worse, has to use her rescue inhaler 2 times a day, thinks it is related to the building she works in, swelling in legs, and checked right foot."***

It is true that, on March 19, 2010, the medical records do not reflect any mention of her knees or shoulders, but it should be remembered that **Defendants' Exhibit #2 (R.p.267) [also Mahaffey Dep., Exh.#1 (R.p.265)]**, is the Incident Report about which there is much controversy and that, even under the Respondents' construction of the evidence accepting Commissioner's Beck finding that the document was created on January 23, 2010, it clearly establishes that three (3) months prior to her visit with Ramirez on March 19, 2010, Appellant had independently documented her complaint about her knees and shoulders hurting as a result of the fall at work on July 21, 2009.

4. ***On Page 3 of the Summary of the Evidence, Respondents further state: "Neither Appellant's personnel file nor employment records reflected that she ever complained of injuries to Ms. Moore."***

In this regard, it is respectfully submitted that neither the personnel file nor any other employment records were entered into evidence nor is there any testimony whatsoever to that effect; therefore, whatever is in or out of the personnel file or employment records is improper comment or argument by Respondents and cannot be considered in any way in deciding this case. The only evidence upon that issue is the testimony of the Appellant who states that, in "April or May of 2010," she went to Ms. Moore about going to the doctor because of her work related injuries

resulting from her fall on April 21, 2009. Even Respondents admit that Appellant's testimony upon the issue was that "she complained about her alleged work injuries the following month, April of 2010, to her then supervisor, Beth Moore.

5. ***On Page 4 of Respondents' Summary of Facts, Respondents state that Appellant admitted in her deposition that in May of 2010 she and two (2) co-workers were counselled for using Facebook at work and their hours were reduced thereby intimating that the work hours were reduced for misconduct at work regarding Facebook usage; however, there is no evidence to that effect.***

Appellant admitted that Facebook usage was routinely discussed in all yearly evaluations of all personnel regardless of whether the person being evaluated had used Facebook or not and in her testimony at the hearing **(R.p.256, l.19-p.257, l.2; p.88, ll.11-13; p.99, ll.6-11)** she admitted her hours were reduced, but there is absolutely no evidence that she was counselled about her personal use of Facebook or that her hours were reduced because of such. In fact, there is no evidence whatsoever as to the reason her hours were reduced.

6. ***Respondents claim as fact that Appellant filed an anonymous OSHA complaint against her employer alleging mold in the building from dripping water from the air conditioning but that is a mis-characterization of the situation.***

It is true that she did not tell her employer beforehand that she was filing the complaint and OSHA did not identify her as a complainant to her employer, but even Scott Loggins acknowledges that OSHA never discloses the complainant as a matter of policy. **(R.p.124, ll.13-18; p.127, l.20-p.128, l.5)** The evidence clearly shows that Appellant readily admitted that she complained because she was having

difficulty with her asthma and believes it may have been related to mold in the building but she never denied filing the complaint to anyone and readily admitted she did so when asked. **(R.p.259, l.23 - p.260, l.9; p.102, l.25-p.104, l.3)**

7. ***On Page 5 of the Summary of Facts, Respondents again assert as fact that, on the day following the accident, Appellant's supervisor (Kim Smagala) told Appellant to seek medical treatment if she needed it and Appellant declined, but that is blatantly untrue.***

As discussed in the first alleged error or misrepresentation above, Ms. Smagala never said anything close to that and, in fact, denied ever telling Appellant to go to the doctor at any time. **(R.p.188, l.21-p.189, l.3; p.196, ll.5-12; p.196, l.19-p.197, l.1)**

8. ***Respondents also reference the testimony of Keith Nichols, the company IT Director, and summarize his testimony in such a way that it leaves the impression that the modification date of June 30, 2010 (being the same day Appellant emailed the document to the company HR Manager after requesting treatment from company President, Scott Loggins), somehow proves Appellant altered the substance of the document on that date; however, the finding of the Commission was that the document, in its form as admitted into evidence, was created on January 23, 2010.***

The Commissions' finding above certainly disproves any intimation or inference that the substance of the document was altered on June 30, 2010, but Respondents also fail to disclose that Keith Nichols clearly stated that what he found indicated a creation date for the incident report **(R.pp.266-268; 265)** to be January 23, 2010, but admitted that on June 30, 2010 a modification would have been recorded even if only a margin or spacing of anything was altered and

everything else remained the same. **(R.p.133, ll.4-25)**

9. ***Respondents also make much to do about the fact that Appellant testified "for the first time at the hearing" that she brought in her own copy of Windows Software on January 23, 2010 and reinstalled it on her work station because of problems she was having with her computer, thereby intimating that she withheld material information on the issue until she testified at hearing.***

It is fact that the first time Appellant was confronted with this issue, asked about it in any way, or was even aware that there was an issue about the creation date of the document being other than July 22, 2009 as she had testified in her deposition, was right before the hearing before Commissioner Beck. There was no knowledge by Appellant or her attorney that the creation date would be challenged until they arrived at the courthouse that morning shortly before the hearing. **(R.p.145, l.17-p.146, l.19 as set forth below in 10)**

10. ***Respondents further totally misrepresent the issue about the flash drive and the position of Appellant in regards to producing it and falsely claim that Appellant's attorney objected to producing it.***

It is correct that Appellant testified, at first, that she "may" have it in her purse but then Appellant's attorney stated that she did not have the subject flash drive with her but offered to produce it. She did have a flash drive in her purse but it was not the correct flash drive and Appellant's attorney stated that he had no objection to producing the one in question and would do so. At no time, however, did he ever make the production of the thumb or flash drive contingent upon the record being held open for the taking of the deposition of Beth Moore. What occurred is clearly set forth in the Transcript **(R.pp.145-146)**, particularly **Page 145, line 17 through**

Page 146, line 10. It is as follows:

> Mr. Martin: "Okay, I think that could probably get to the bottom of it, Commissioner, if we could get a copy of that flash drive I would think that it would have the actual creation date on it."
>
> Commissioner Beck: Mr. Brandt?
>
> Mr. Brandt: I don't have any objection to that. I think also I was going to ask you to hold this open and give us the chance to take the deposition of Beth Moore. She has knowledge of all this.
>
> Commissioner Beck: You had that opportunity to get her here today.
>
> Mr. Brandt: Well, I didn't know this issue was coming up today, but – and get as, I guess, convoluted as it was with the computer stuff, but anyway that is obviously we don't have the flash drive here. He didn't ask for it.
>
> Mr. Martin: That is fine.

Once this colloquy occurred, the Commissioner closed the hearing and refused to hold the record open. At no time, however, did Appellant's attorney ever object to producing that flash drive or making his willingness to produce the flash drive contingent upon holding the hearing open for the testimony of Beth Moore. It is submitted, therefore, that to represent in the Summary of Facts that Appellant's attorney objected is absolutely not correct. As will be addressed later, Appellant believes that if this issue was critical to the case, and evidently it was because the Hearing Commissioner and the Commission Appellate Panel entered a finding in regards to it, that if the flash drive was examined, Beth Moore's testimony would be required to complete the story surrounding the flash drive and the reloading of the computer as she was there and approved Appellant's actions. It was upon that

issue that the Appellant's attorney desired to have Ms. Moore deposed and it was that issue that Appellant was not aware of until she and her attorney were advised of same on the day of the hearing shortly before it commenced.

QUESTION #1
IS THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL'S DECISION SUPPORTED BY SUBSTANTIAL EVIDENCE?

Addressing this issue, Respondents assert Appellant failed to prove a causal link between the accident in July of 2009 and injuries to her shoulder and knee, which were first diagnosed in June 2010, as the Commissioner did not find her explanations for her delay in treatment credible simply because she failed to mention any injuries to her employer or her own doctor for nearly a year. Appellant, however, gives a most plausible explanation for the year delay before receiving medical treatment and states that she did, in fact, initially request medical care at the time of the fall but was intimidated by Ms. Smagala, and that even though she was injured, hurting and having difficulties continuously she did not press for medical care until April 2010 when her shoulder began locking and the pain became unbearable. **(R.p.244, l.6-p.247, l.7; p.61, l.1-p.63, l.7)**

In the face of all of Appellant's testimony as to the problems with Ms. Smagala and the fact that she was intimidated and strongly discouraged from filing an initial complaint and/or seeing a doctor unless she saw one on her own and used her own health insurance, together with all the evidence concerning the working conditions and attitudes of management causing problems with many other employees besides Appellant, Appellant's explanation as to her delay was not only

very plausible, but the most plausible explanation for her delay in insisting on getting medical treatment.

Respondents also argue that the Appellant lacked credibility simply because the descriptions of the accident as stated in the medical questionnaire taken directly from Dr. McCallum's notes and the description of the accident provided by Appellant, were not identical and would have us believe that Dr. McCallum's opinion merely provided a causal connection of her injuries to a different accident other than the one Appellant was involved in at work on July 21, 2009; however, any difference in the descriptions put in the chart by Dr. McCallum and what Appellant told him and testified to is merely a difference without distinction. Dr. McCallum's initial office visit note of 8/11/2010 states "she ***tripped*** about a year ago, twisting her right knee and falling onto her right shoulder" and his response to the questionnaire unequivocally shows that his description of the accident and mechanism of injury refers to the work injury of July 21, 2009 in which she ***"tripped."*** The testimony of Appellant, as well as Ms. Smagala, clearly proves that she fell on July 21, 2009 because she ***"tripped"*** over a phone cord. Respondents have never denied the accident and the Workers' Compensation Commission found that Appellant did, in fact, trip over a phone cord on July 21, 2009 and suffer a compensable accident. There is no evidence, even inferentially, or otherwise, of "another" accident; therefore, it is submitted that Respondents' argument that there was an accident other than the one that occurred on July 21, 2009, is totally without foundation and is absurd.

Respondents further argue that Appellant's physical complaints first arose after being counselled for Facebook usage at work in May of 2010; however, the record does not bear that out. Appellant testified that she complained several times about her problems and even Ms. Smagala admits that she complained on the day following the accident **(R.p.183, ll.7-12)**. The stipulation of testimony of Appellant's mother says she complained of being hurt at work and had continuing complaints of pain in her shoulder and knee continuously from the time of the accident until the date of the hearing. The incident report form, even if the creation date of January 23, 2010 is accepted, also establishes that she was having problems with her shoulder and knee as of January 23, 2010, well before Facebook usage was discussed with her in her job evaluation in or about May 2010.

Respondents even go further and argue that the filing of the workers' compensation claim is unfounded and is simply a vendetta against her employer, but this, too, has absolutely no foundation and does not support the claim. The only thing Respondents' "evidence" establishes is that the timing of Appellant's request for medical care in April 2010 and her filing for unemployment because her hours were reduced from 40 to 32 per week, and her filing of an OSHA complaint about mold in the building sometime in June or July were close in time to each other, but it is no proof of a "vendetta" or substantial evidence supporting the Workers' Compensation Commission's finding that she lacked credibility. It is, at best, a gargantuan leap across the ocean of evidence proving that Appellant is entitled to workers' compensation benefits. There is no evidence in the record that she was ever counselled or reprimanded for personally using Facebook and the Workers'

Compensation Commission never made such a finding. The only evidence on this issue was provided by Appellant in response to the "accusative" questions by the Respondents' counsel, but Appellant gave a very plausible and reasonable explanation for filing the unemployment claim and the OSHA complaint and expressly denied that she was counselled for her personal use of Facebook at work. In her deposition, Appellant testified that Facebook usage was routinely discussed in general with each employee during evaluations regardless of who had done it **(R.p.256, l.21-p.257, l.2)**. She did not state that she was counselled personally and there is no evidence whatsoever to contradict that. There is also absolutely no evidence as to the reason for her reduction of hours other than her employer merely reduced the hours of three (3) employees at the same time. Appellant admitted her hours were reduced close to the time of her evaluation but there is no evidence that it was anything more than happenstance, especially in light of the fact that there is no record or testimony by anyone testifying as to why her hours were reduced. Respondents' counsel's questions on these matters were couched in an accusatory light, but counsel's questions are not evidence and not one (1) witness was produced to refute anything Appellant said about any of these matters.

Appellant did file an unemployment claim which was denied, but that does not show anything other than Appellant sought benefits to which she thought she may be entitled but was not sure. **(R.p.259, ll.10-13)** To characterize her act as evidence of a vendetta or as a complaint is unfair and without any foundation whatsoever and certainly does nothing to impeach her credibility.

Appellant also clearly testified to legitimate reasons why she filed an OSHA complaint and her concerns that mold in the building was causing her asthma to become active and very problematic. **(R.p.102, l.25-p.104, l.21; p.259, l.23-p.260, l.9)** The testimony of Mr. Loggins even supports Appellant's claims that the building had water problems **(R.p.117, l.16-p.118, l.9)** and it is common knowledge that the problems which he and Appellant described are commonly associated with mold which, in turn, is causally connected with asthma and/or other bronchial problems. Mr. Loggins also dates the OSHA complaint around the end of June, July 2010 **(R.p.125, ll.11-18),** not April 2010, and candidly admits that OSHA does not reveal the person who files complaints against anyone **(R.p.124, ll.13-18; p.127, l.20-p.128, l.5)**, thereby refuting Respondents' assertion that the OSHA complaint was anonymously filed. To the contrary, the evidence clearly shows that Appellant, when first asked, candidly admitted that she filed the complaint and there is no evidence that she did it anonymously or has ever denied doing it. Obviously, Appellant filed a complaint without telling her employer but that proves nothing more than she filed a complaint and certainly cannot be stretched into evidence of a vendetta. How then can anyone deduce with any reasonable degree of probability that Appellant had a vendetta against her employer so as to justify any finding that she lacked credibility.

Respondents lastly assert that Appellant failed to produce any witness supportive of her story, but then follows that statement with admitting that her mother's stipulated testimony supported same. Certainly, Ms. Smagala confirms

the fall and the fact that she was complaining the day after the fall **(R.p.179, ll.7-22; p.183, ll.7-12)**, and the incident report form, even if January 23, 2010 is accepted as the creation date, certainly supports that she was injured and having complaints and pain/problems with her shoulder and knee prior to April of 2010 when she pressed for and was subsequently afforded medical treatment for one (1) doctor's visit from her employer. It is true that the Respondents did not stipulate that the mother's testimony was true but merely that, if she were called, she would testify as the stipulation so stated; however, she was a witness whose testimony was supportive of her daughter's story of being injured at work and her continuing problems from the date of the injury, all of which establishes causal relation of her injuries to the accident that occurred on July 21, 2009.

QUESTION #2

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 HENRY RAMIREZ, PAC, ON THE ISSUE OF PROXIMATE CAUSE?

This issue has been fully briefed by Appellant in her Initial Brief at Pages 21 through 23; however, Appellant wishes to further comment upon certain aspects of Respondents' argument.

In response to this issue, Respondents' twist into this argument what they perceive to be an inconsistent description of the mechanism of injury from which Appellant claims her injuries arose and make much ado about the mechanism of injury being described as "twisting her knee and falling onto her right shoulder."

(R.p.154) and the fact that Dr. McCallum's medical record of August 11, 2010 also reflected Appellant fell onto her right shoulder. **(R.p.157)** Respondents then argue that since Appellant's description of what happened is not identical or consistent with the description in the medical records of Dr. McCallum that there was some other event or accident which caused the injuries about which Appellant complains. **(R.p.57, ll.8-19; p.77, l.20-p.79, l.7)** The bottom line, however, is that Appellant did not have control of what the doctor wrote in the records after she related her history to him but that notwithstanding, the two (2) descriptions of what occurred are not inconsistent. Common sense tells us that a twisting action would occur with a fall and landing as described by Appellant; that the extension of her arm straight out in front of her and landing on her hand, is common to fall victims; and that the fall that Appellant experienced would also cause trauma to her shoulder. It is, therefore, submitted that the difference in the description is totally without distinction, is consistent with a trip and fall accident and fully supports the fact that Dr. McCallum was treating her for injuries arising from the accident of July 21, 2009. The questionnaire submitted by Appellant's counsel to the doctor merely asked him if the accident as he described "twisting of her knee and falling onto her right shoulder" **(R.p.154)** was the same accident from which her injuries were derived as a result of her fall at work approximately one (1) year before on July 21, 2009. Appellant's counsel used the doctor's language from his records merely to assure that Dr. McCallum was referencing the same accident and injuries that occurred to Appellant on July 21, 2009. In response to the questionnaire, Dr. McCallum

unequivocally stated that in his opinion, to a reasonable degree of medical certainty, that her injuries were, in fact, proximately caused by her fall at work on July 21, 2009. It is also of note that his description of how the accident occurred -i.e., ***"tripping"*** is consistent with the testimony of Appellant and Ms. Smagala and what she told the doctor upon the doctor's visit. It is only the mechanism of injury -i.e., the forces at work on her knee and shoulder as a result of her ***tripping*** at work approximately one (1) year prior to Appellant's visit with Dr. McCallum that is arguably different. Clearly, Dr. McCallum's opinion provided the requisite causal connection to the work related accident of July 21, 2009, and there is absolutely no proof, inferentially or otherwise, that another tripping or similar accident occurred between April 21, 2009 and August 18, 2010, when Appellant first saw Dr. McCallum.

As for Respondents' argument concerning Henry Ramirez's records, it is true that Ramirez office visit note of March 19, 2010 did not provide any opinions regarding a causal connection but his records do report Appellant's testimony that she was having significant problems with her asthma which she honestly believed to be related to mold in her work place about which she filed an OSHA complaint. In other words, his record vouches for her credibility that she was genuinely concerned that her work place may be causing her health problems, was not a safe place for her to work and was not merely a vendetta. It costs money for someone with expertise to test or look for mold and it is totally unfair to punish and markdown Appellant's credibility because she asserted a right in an attempt to protect herself from a health standpoint. It should also be noted that her belief that mold may be

in the building and causing her problems with her asthma is supported by the testimony of Mr. Loggins. **(R.p.117, l.16-p.118, l.9)** It is, therefore, submitted that Ramirez's records, even though they do not address the shoulder and knee on that date, vouch for Appellant's overall credibility and/or honesty of her actions.

It is true that the testimony of Appellant's mother was only stipulated to as being what she would say if sworn under oath and called to testify at the hearing and that the Respondents never stipulated to its truth; however, Respondents in one place make the comment in the Summary of Facts that Appellant failed to produce any witness supportive of her story; yet, in this part of the Brief, state that the mother's testimony would only "provide minimal support to Appellant's story if it were true." It is submitted that the mother's credibility was never questioned and her credibility at trial was never challenged. Mrs. Mahaffey's testimony clearly supports her daughter's claim about her injury at work and her continuous problems with her knee and shoulder from the date of the accident, April 21, 2009 to present date. That, coupled with the testimony of Dr. McCallum and the testimony of Kim Smagala, clearly entitles the Appellant to the benefits under the Workers' Compensation Act.

QUESTION #3

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

Respondents state "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". Obviously, the Hearing Commissioner, as well as the Commission Appellate Panel, evidently thought that it was necessary and put great emphasis on it as is disclosed in the record. **(R.p.136, ll.3-10)** They then used that finding as a reason for discounting Appellant's credibility when, in fact, it supports Appellant's credibility by showing that she had complaints related to her fall two (2) months before going to see Ramirez on March 19, 2010. They misconstrued the importance of it, as well as what it really proved and thereby abused its discretion in construing the evidence to impeach her credibility.

Respondents also argue that Appellant cannot now raise an objection to the "in court experiment" inasmuch as Appellant did not raise the objection at the hearing; therefore, the issue has not been preserved. Although it is true that no objection was made to the experiment at the hearing because the Hearing Commissioner had already done the experiment by the time that Appellant's lawyer was aware that it had been conducted, the issue, in fact, was raised at the Appellate Panel level in grounds for appeal #8. At the hearing, Commissioner Beck did the

"experiment" without giving notice to anyone and when Appellant's counsel became aware of it, it was too late and totally futile to object because the damage had been done and Commissioner Beck already had been prejudiced by the outcome. Furthermore, Commissioner Beck was "the judge" that would have had to rule on the objection and, if he did not know that he should not have done it before, how was Appellant to expect to receive any kind of a favorable ruling on an objection after the fact. All of the law on "in court experiments" has to do with other witnesses conducting the experiments, not the presiding judge. In this case, the Commissioner is the judge and the jury and what he did is tantamount to jurors, without the knowledge of the court, conducting their own investigation of an accident scene, taking their own measurements and doing things outside the knowledge of the litigants or the court rather than rendering their decision on the evidence produced by the parties. Whether it is considered a violation of due process or not, it destroyed the fairness of the hearing as Commissioner Beck did not put it aside as he issued his order in conformity with his experiment results. Furthermore, it is respectfully submitted that the issue of due process is, in fact, preserved as the grounds for review #8 submitted to the Commission Appellate Panel clearly states, "the Hearing Commissioner erred in conducting his in hearing experiment with his own computer as it did not replicate what Appellant testified that she did in downloading her files to a flash drive, reinstalling Windows on her computer and then reloading the file on the computer by way of the flash drive." In this regard, it is submitted that the due process argument is fairly embraced within that exception and is preserved for this Court's review although the exception was not specifically

expressed using the words "due process." Interestingly, Respondents do not argue that the Hearing Commissioner's experiment was proper nor does Respondents make any attempt to support it in any way or show that it was consistent with what happened on the date the Appellant reloaded Windows onto her computer, to-wit: January 23, 2010. Instead, Respondents merely say Appellant didn't object to the experiment at the hearing but, again, as previously pointed out, the Commissioner who would have ruled on the objection had it been made at that time, was the one who conducted the experiment without advising the parties that he was going to do it, and it was only "after the fact" that Appellant realized what he had done. Whether it is considered lack of due process or whether Appellant objected or not, under the circumstances it did not replicate what Appellant said she did and, therefore, had no evidentiary value at all. Accordingly, consideration of it was/is an error of law requiring a reversal of the Appellate Panel's denial of Appellant's claim for medical care and other compensation.

Respondents further aver that the Appellant's story about the incident report was "fishy," especially considering all her other conflicting testimony, and they point to specific instances about the testimony of Mr. Nichols, the IT Manager, and Ms. Smagala and the fact that she had other problems in her job; however, there is no internal conflicts in her testimony and Mr. Nichols' testimony did not contradict her. He merely testified as to what his records showed and explained his findings in the Transcript **(R.p.132, l.2-p. 133, l.2; p.140, ll.4-10).** Most importantly, his testimony on Page 86 **(R.p.132, ll.2-22),** is as follows:

Q. Okay. What effect would it have if she did bring in her own copy?

A. She would have reloaded and – but she would have had to save her own files to be able to put those back on the machine if she wiped everything out.

Q. How would that have affected that document that you printed out? Would it –

A. Whatever date she put it back on the computer, if that is indeed what happened, then –

Q. So that would be the creation date?

A. Yes, sir.

Q. So it could say it was created on January 23rd if she up loaded Microsoft to her computer on January 23rd?

A. If she reloaded the entire Windows operating system then that would be the only way to – just Microsoft Office, no, sir.

Q. Okay. So she would have to do the whole operating system?

A. Yes, sir.

Then on Page 94 **(R.p.140, ll.4-10):**

Q. Would it matter if you transferred it to a machine and copied it on a flash drive and then took the flash drive back over to the original one?

A. I am not sure on that. I would have to check and see if it does that.

Q. But you can't say today?

A. No, sir.

Respondents further argue that Appellant's attorney stated that in regards to producing the "thumb" (flash) drive he would only produce it if the record was held open to allow the taking of the deposition of another witness; however, the record clearly shows that is not true. Since this issue is addressed in the Appellant's Initial

Brief and the testimony as to what the Appellant's attorney actually said has been set out elsewhere, this point will not again be argued here although the Court's attention is again invited to Transcript **(R.pp.145-146),** which clearly reveals exactly what was said and what was done.

Respondents also argue there are "multiple inconsistencies in Claimant's testimony unrelated to the incident report." What inconsistencies are they referring to? Yes, there is some inconsistency between her testimony and what Ms. Smagala has said, but there are no internal inconsistencies in her testimony from her deposition through the hearing stage.

Respondent further argues 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 but, if that be the case, why did he even bother to mention it or cite it as a reason for discrediting her testimony? Commissioner Beck even stated in the hearing that he considered it very important. **(R.p.136, ll.3-10)**

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?

As Respondents correctly point out, a Commissioner's authority to continue a scheduled hearing in a workers' compensation matter, for good cause, is normally left to his discretion; however, the case cited by the Respondents is not apposite to the case at bar. The testimony of Mr. Nichols was heard for the first time at the

hearing and there was no prior notice that the creation date of the document was being challenged. It is true that Appellant's attorney did not suggest the holding of the record open for Beth Moore's testimony until the conclusion of the Appellant's cross-examination and only did so when it was moved by the Respondents' counsel that the flash drive be produced to get to the truth of the matter but, at that point, attorney for Appellant stated he had no objection to producing the flash drive for examination. He then suggested that the testimony of Beth Moore on the issue surrounding the flash drive also be obtained because all of the testimony pertaining to the flash drive issue was to the effect that Beth Moore knew about the problem with the computer which required Appellant to reload her computer with her own copy of Microsoft and the fact Appellant did that on January 23, 2010. Therefore, her testimony was relevant and critical in resolving any credibility issue concerning the flash drive or determining when the document was first created. Again, Appellant did not object to producing the flash drive and Appellant's attorney's suggestion that the record be held open for Ms. Moore was never contingent upon producing the flash drive. The Hearing Commissioner could very well have held the record open for the production of the flash drive and denied the taking of the deposition of Ms. Moore but then an issue would have really been created for appeal. Could it have been that, at that point in time, the Hearing Commissioner had already decided he was going to deny Appellant's claim and did not want to hear any more evidence which might very well invalidate his reasons for doing so?

CONCLUSION

It is, therefore, respectfully submitted, based upon the matters raised in the Appellant's Initial Brief, as well as presented in this Reply Brief, together with all other matters of record, that the relief requested by the Appellant should be granted and Respondents should be ordered to provide workers' compensation benefits to Appellant.

Respectfully submitted,

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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 Reply Brief)

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

October 10, 2012

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