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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 PETITION FOR REHEARING  
AND/OR RECONSIDERATION**

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APR 09 2013

**SC Court of Appeals**

Pursuant to **Rule 21, SCRAP**, Appellant, Kimberly Mahaffey (Mahaffey), hereby respectfully petitions the Court of Appeals for rehearing and/or reconsideration of its Unpublished Opinion #2013-UP-129, wherein the Court affirmed the Decision and Order of the Workers' Compensation Commission denying Appellant's workers' compensation claim.

This Petition is made upon the grounds that the Court of Appeals overlooked and/or misapprehended the facts and/or law as set forth regarding the issue of substantial evidence of proximate cause of Mahaffey's injuries, credibility and weight of witness testimony, particularly that of Dr. McCallum and Janis Mahaffey, and the refusal of the Hearing Commissioner to hold open the record for the taking of Beth Moore's deposition. In particular, Appellant respectfully submits that the applicable law as set forth in **Burnette v. City of Greenville, 737 S.E.2d 200 (Dec. 2012)**, **Potter v. Spartanburg School District Seven, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011)**, **Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (Sup. Ct. 2012)**, **McCloud v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984)** and **Trotter v. Trane Coil Facility, 384 S.C. 109, 681 S.E.2d 36 (Ct. App. 2009)**, as well as the cases cited in Appellant's Brief and herein requires a rehearing or reconsideration of the case and a modification of the opinion.

## DISCUSSION

### A. SUBSTANTIAL EVIDENCE OF PROXIMATE CAUSE

Dr. McCallum, stated in Appellant's initial office note, that the injuries to Mahaffey's shoulder and knee were caused by the work place fall about a year earlier and he subsequently opined, to a reasonable degree of medical certainty in a questionnaire sent to him by Appellant's attorney, that the injuries were caused by Appellant's fall at work on July 21, 2009. His testimony, through his records and the questionnaire on the issue of causation was required by law for Appellant to prove her claim [*McCloud v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984)]. Surely, if such evidence is required to prove her claim, medical expert testimony should be required to refute it and/or disprove it. If not, no claim could ever be proven if the Appellate Panel simply decides to disregard it. In such instance, there would be no check or balance, standard or requirement preventing the Worker's Compensation Commission from arbitrarily denying claims.

As a matter of law, some medical evidence refuting or challenging Dr. McCallum's determination of proximate cause is required to permit the Appellate Panel to disregard it. There is no such evidence, however, as the only evidence which arguably refutes Dr. McCallum's opinion is the fact that Appellant never went to the doctor for a year. In weighing this evidence, however, it must be kept in mind that Dr. McCallum knew that she had not sought medical attention for over a year and he, nevertheless, connected the injuries to the work place fall of July 21, 2009.

Appellant's argument on this point is further supported by *Michau v. Georgetown County*, 396 S.C. 589, 723 S.E.2d 804 (Sup. Ct. 2012) which holds that in repetitive trauma cases the statutory requirement that expert opinion or testimony be stated to a reasonable degree of medical certainty is not simply limited to claimants, but also applies to defendants notwithstanding that the statute is silent as to the requisite degree of proof to refute repetitive trauma claims. In other words, if an opinion supporting a repetitive trauma injury must be stated to a reasonable degree of medical certainty, an opinion refuting the claim must also adhere to the same standard; that is, it must be stated to a reasonable degree of medical certainty. It, therefore, follows that if medical testimony is relied upon to prove an element of a claim, medical testimony should be required to disprove it whether the proof is mandated by statute or required by case law. In other words, the standard to prove or disapprove a claim must be the same regardless of which side of the issue one is on. This is not to say, however, that the medical testimony as to causation must always be stated to a reasonable degree of medical certainty to either approve or disapprove causation as that is certainly not the law, but "like kind" evidence refuting the claim should be required to permit the Commission to disregard an opposing expert opinion whether stated to a reasonable degree of medical certainty or not.

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. [*Etheridge v. Monsanto Co.*, 349 S.C. 451, 652 S.E.2d 678 (Ct. App. 2002); *Pack v. S.C. Dept. of Transportation*, 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009); *Burnette v. City of Greenville*, 737 S.E.2d 200 (Ct. App. Dec. 2012)] Our Courts have also clearly recognized that the natural consequences flowing from a compensable injury are compensable, absent an independent intervening cause, [*Mullinax v. Winn Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995); *Burnette v. City of Greenville*, 737 S.E.2d 200 (Ct. App. Dec. 2012)] and that while a finding of fact of the Commission will normally be upheld, such a finding may not be based on surmise, conjecture or speculation but must be founded on evidence of sufficient substance to afford a reasonable basis for it. [*Edwards v. Pettit Construction Co., Inc.*, 273 S.C. 576, 257 S.E.2d 754 (1979); *Burnette v. City of Greenville*, 737 S.E.2d 200 (Ct. App. Dec. 2012)]

It is respectfully submitted that the holding of the Court of Appeals in *Burnette v. City of Greenville*, 737 S.E.2d 200 (Ct. App. Dec. 2012) is analogous to Mahaffey's case and should be controlling. In the *Burnette* case, the Court of Appeals reasoned that there was no medical evidence challenging the conclusions of Burnette's doctors, therefore, there was no substantial evidence to support a finding by the Commission that claimant did not injure her lower back in a work related accident. The single commissioner based her finding upon her own examination of the claimant's MRI's and her belief that the latest MRI showed only a minimal protrusion with no nerve root displacement or impingement and comparatively no greater pathology of any significance of an earlier MRI. She then

found that if Burnette aggravated her low back condition in the accident in issue, the aggravation was temporary and her condition returned to base line or as the result of an intervening accident and to either an unspecified event “in late 2008 or the boat cover incident.” The Commissioner further stated that she strongly believed that Burnette had exaggerated her condition to various providers and to the undersigned in order to maximize her case award and that her testimony was liberally laced with exaggeration. Thus, she weighed and evaluated the medical evidence along with the other evidence and her view of claimant’s credibility and rendered her decision. The court, however, held that there was no evidence or testimony to support her findings even in the face of all of the principles in the Mahaffey Decision concerning the weighing of medical testimony and substantial evidence and held the Commission was not justified in ignoring the medical testimony concerning the extent of the injury or the cause thereof. Accordingly, the Court reversed the Commission’s Decision.

**B. CREDIBILITY AND WEIGHT OF THE EVIDENCE PRESENTED BY DR. MCCALLUM AND JANIS MAHAFFEY**

It is respectfully submitted that in dismissing Mahaffey’s arguments concerning the Appellate Panel’s findings regarding her credibility and the apparent dismissal of Dr. McCallum’s and/or Janis Mahaffey’s testimony, the Court misapprehended or misconstrued the true holding of the ***Burnette*** case addressing witness credibility. Although Appellant concedes that final determination of witness credibility and the weight to be accorded evidence is normally reserved to the

Commission, there was no finding by the Commission that Dr. McCallum's and/or Janis Mahaffey's testimony was not credible and submits that the mere fact that the decision goes against their testimony does not indicate that any such finding was made or that they were not credible. It is submitted that without such a finding their testimony must be taken as credible and, although the Commission's finding that Appellant, Kimberly Mahaffey, was not credible is erroneous and unjustified, the deciding issue here as to the Mahaffey claim is the unjustified disregard and/or dismissal of the testimony of Dr. McCallum and Janis Mahaffey. To dismiss their testimony, the Court was required to balance the evidence or weigh the evidence concerning the matters to which Dr. McCallum and Janis Mahaffey testified and, in so doing, the Court cited ***Potter v. Spartanburg School District Seven, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011)***. The general propositions of law referred to therein, as well as other cases set forth, were referred to by the Court of Appeals as a basis for disregarding that testimony. The ***Potter*** case, however, was a case that dealt with a medical expert opinion that was refuted or contradicted by another medical expert opinion. Certainly, when there are two (2) opposing opinions or conflicting opinions rendered in a case, the Appellate Panel must decide which of those opinions from the experts it should rely upon and/or follow. In essence, which opinion presented was the most credible? In that regard, other evidence certainly may be taken into consideration to assist the Court in its decision such as each medical expert's qualifications. In this case, there is no testimony refuting the testimony of either Dr. McCallum or Janis Mahaffey. In this case, the only thing that

the Respondents pointed to or presented to refute Dr. McCallum's testimony was the fact that Appellant did not seek medical attention for over a year. That evidence is not substantial and is insufficient to overcome uncontroverted medical expert testimony on causation. The *Potter* court specifically cited *Roper v. Kimbrells of Greenville*, 231 S.C. 453, 99 S.E.2d 52 (1957) and quoted from it as follows: "It is not for this court to balance objective against subjective findings of medical witnesses or to weigh the testimony of one witness against that of another. That function belongs to the Appellate Panel alone." Here, however, there is no finding of a medical witness against which the testimony of Dr. McCallum could be balanced nor was there testimony of one witness against that of another witness providing the Commission freedom to overlook, ignore or disregard the testimony of Dr. McCallum and/or Janis Mahaffey. It is, therefore, submitted that when that testimony is considered, the evidence is overwhelming that Appellant's injuries to her shoulder and knee were proximately caused by the work place accident.

It is further submitted that in regard to the Court's ruling concerning the issue of weight to be given the stipulated testimony of Janis Mahaffey and Dr. McCallum's medical evidence, the Court misapprehended or misconstrued *Tiller v. National Health Center of Sumter*, 334 S.C. 333, 513 S.E.2d 843 (1999) and completely ignored *Burnette v. City of Greenville*, *supra*. The principles of law from the *Tiller* case, which are cited by the Court, are not disputed but, unlike the case at bar, the *Tiller* case involved medical opinion which was not stated to a reasonable degree of medical certainty. In that regard, *Tiller* held that if medical testimony is not solely

relied upon to establish causation, the fact finder in a workers' compensation case **must** (mandatory) look to facts and circumstances of a case to determine causation. It further specifically held that medical testimony could be assisted or supplemented by lay testimony to support it. In the case at bar, Dr. McCallum's medical evidence was stated to a reasonable degree of medical certainty and Janis Mahaffey's testimony supported it. There was no testimony or other evidence of an intervening accident or other cause for Mahaffey's injuries and there was never testimony conflicting, either by different witnesses or in the testimony of the same witness which will allow the Commission to ignore the evidence and enter findings inconsistent therewith. The only evidence was the fact that Mahaffey did not seek medical attention for her injuries for quite some time. It is also interesting to note that the *Tiller* court cited ***Grice v. Dickerson, Inc., 241 S.C. 225, 127 S.E.2d 722 (1962)*** wherein it was held that where medical testimony definitely recognizes the possibility of a causal connection between the accident and the injury but no medical testimony states that connection to a reasonable degree of medical certainty the Commission **had** (emphasis added) to weigh the facts in light of the medical possibilities and draw inferences consistent with the medical testimony in the record. Surely, if under those circumstances the Commission is **required** to draw inferences consistent with the medical testimony in the record, it should be required to enter findings consistent with the medical testimony stated to "a reasonable degree of medical certainty" even without lay testimony support. In

this case, however, there was lay testimony support in the way of the Janis Mahaffey stipulation.

Further addressing this issue, it should be noted that there was no finding by the Commission that Dr. McCallum's and/or Janis Mahaffey's testimony was not credible and submits that the mere fact that the decision goes against their testimony does not indicate that any such finding was made or that they were not credible. It does indicate, however, that they did not even weigh it or consider it and under such circumstances it is submitted that their testimony or evidence must be taken as credible and medical evidence stated to a reasonable degree of medical certainty is controlling.

**C. HOLDING OPEN THE RECORD**

The Appellate Panel in affirming the Single Commissioner's Decision not to hold the record open for the production of the taking of Beth Moore's testimony, the Court of Appeals stated that the issue had not been raised in a timely manner and preserved for appeal. It is respectfully submitted, however, that it was raised at the Appellate Panel level, which was at the earliest point in time when it could have been done. Additionally, Appellant was not guilty of undue diligence in not deposing Beth Moore on the issue concerning the creation of the document for that issue was raised for the first time just before the hearing commenced and, until that time, Appellant was unaware that Respondents were challenging the document's creation in any way. All that Mahaffey was aware that they were challenging was the fact

that she had presented the document to them the day after the work place accident. During the hearing it became evident that Ms. Moore was a key witness in establishing the date of the creation of Exhibit #3 (See also: Respondents' Exhibit #1 to Mahaffey deposition) and that the Hearing Commissioner was concerned about credibility because of it. Obviously, her testimony as to the loading and re-loading of Mahaffey's computer in January had a bearing on the credibility issue and, in turn, would have assisted the Commission in correctly addressing the issue.

The Court also criticized Mahaffey stating that she could not preserve an issue for appeal by way of another party's objection or challenge; however, the record clearly shows that Appellant's attorney moved, independent of anything that Respondents did, for the taking of the testimony of Beth Moore and that the motion was not contingent upon production of the flash drive. It is true that if the flash drive had been produced, Beth Moore's testimony would have been even more relevant and necessary, but the fact remains that at no time during any of the proceedings leading up to the time of the hearing had there been any issue raised concerning the creation date of Exhibit #3. It is also evident that the issue with the creation date of Appellant's Exhibit #2 weighed heavily on Mahaffey's credibility and until that issue was raised, Mahaffey had no reason to depose Beth Moore.

### **CONCLUSION**

Based upon the foregoing, Appellant, Mahaffey, respectfully requests the Court of Appeals rehear and/or reconsider its opinion affirming the Decision and Order of the Workers' Compensation Commission on the basis that there was no

substantial evidence to support the Commission's Decision and the Court of Appeal's Opinion should be modified accordingly.

Respectfully submitted,

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**Attorney for Appellant**

April 5, 2013

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.**

**PROOF OF SERVICE**  
**(Appellant's Petition for Rehearing**  
**and/or Reconsideration)**

I certify that I have served the **APPELLANT'S PETITION FOR REHEARING AND/OR RECONSIDERATION** upon the **Respondents, by and through their attorney of record**, by depositing a copy of it in the United States Mail, postage prepaid, on **April 8<sup>th</sup>, 2013**, addressed as follows:

Mr. Alton L. Martin, Jr.  
(S.C. Bar #064076)  
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1415 Augusta Street  
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**Attorney for Respondents**

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APR 09 2013

April 8<sup>th</sup>, 2013

Larry C. Brandt, P.A. **SC Court of Appeals**  
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By: Debra C. Miller  
Debra C. Miller, Paralegal

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3-28-2013

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Kimberly Mahaffey, Appellant,

v.

Onetone Telecom, Inc., Employer, and State Auto  
Insurance Companies, Carrier, Respondents.

Appellate Case No. 2011-204388

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Appeal From The Workers' Compensation Commission

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Unpublished Opinion No. 2013-UP-129  
Heard March 7, 2013 – Filed March 27, 2013

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**AFFIRMED**

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Larry C. Brandt, of Larry C. Brandt, PA, of Walhalla, for  
Appellant.

Alton Lamar Martin, Jr., of Martin & Martin, PA, of  
Greenville, for Respondents.

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APR 09 2013

SC Court of Appeals

**PER CURIAM:** Kimberly Mahaffey appeals the Appellate Panel of the South  
Carolina Workers' Compensation Commission's (Appellate Panel) determination

*Transp.*, 372 S.C. at 301-02, 641 S.E.2d at 907 (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" (citation omitted)).

5. As to the single commissioner's consideration of Janis Mahaffey's stipulated testimony and Dr. Henry McCallum's medical evidence: *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339-40, 513 S.E.2d 843, 846 (1999) ("[T]he Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established."); *id.* at 340, 513 S.E.2d at 846 ("[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record."); *id.* ("Indeed, medical testimony should not be held conclusive irrespective of other evidence." (internal quotation marks omitted)); *id.* ("Expert medical testimony is designed to aid the [Appellate Panel] in coming to the correct conclusion; therefore, the [Appellate Panel] determines the weight and credit to be given to the expert testimony."); *id.* ("Once admitted, expert testimony is to be considered just like any other testimony.").

**AFFIRMED.**

**HUFF, WILLIAMS, and KONDUROS, JJ., concur.**

**LARRY C. BRANDT, P.A.**

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April 8, 2013

The Honorable Jenny Abbott Kitchings, Clerk  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

**Re: Mahaffey, Kimberly v. Onetone Telecom, Inc.**  
**Case Tracking #2011204388**

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of **Appellant's Petition for Rehearing and/or Reconsideration**. The **Proof of Service** is made a part of the Petition. Also enclosed is our check in the amount of \$25.00 for payment of the filing fee. By a copy of this letter, we are serving same upon Respondents' attorney. We trust you will find everything in order; however, if you have questions or need additional information, please let us know.

**LARRY C. BRANDT, P.A.**

*Debra Miller*

Debra C. Miller  
Paralegal

Enclosures

cc: Mr. Alton L. Martin, Jr.  
**Attorney for Respondents**

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