THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

W.C.C. File Nos. 1104303 & 1104304

Kerry Levi ..... Appellant,

v.

Northern Anderson County EMS
and Berkshire Hathaway
Homestate Insurance Company ..... Respondents.

INITIAL BRIEF OF APPELLANT

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QUESTIONS PRESENTED

I. Did the Workers' Compensation Commission Err When it Allowed Kerry Levi's Employer to Immediately Appeal an Order That Denied the Employer's Motion to Dismiss?

II. Should this Court Vacate the Commission's Decision That Ms. Levi "Settled" Her Third Party Lawsuit Because She Has Now Filed Suit Against the Third Party and That Suit Is Pending?

STATEMENT OF THE CASE

This case involves the part of the Workers' Compensation Act that allows someone to pursue a workers' compensation claim at the same time he is pursuing a civil lawsuit against the person who caused his work-related injury. See S.C. Code Ann. § 42-1-560 (1985). The civil suit is often called a "third party" suit. Someone could bring such a suit if, for example, he was hurt at work by the negligence of someone who was not a co-worker.

Kerry Levi is a paramedic and she suffered two work-related injuries to her back in March of 2011. The first occurred while Ms. Levi was moving a patient. The second occurred in a car crash. The car crash was caused by a third party.

About 4 weeks after the car crash, Ms. Levi initiated workers' compensation claims for both injuries. (Both Form 50's). Ms. Levi's employer and its insurance carrier accepted both claims. Ms. Levi began receiving temporary disability benefits in May of 2011. She also received various medical care, including back surgery performed in July of 2011.

In September of 2011, Ms. Levi's employer and its insurance carrier filed a motion to dismiss both claims. This request was based on the fact that about 2 weeks after the car crash, Ms. Levi accepted a $550 check from the at-fault driver's insurance company. See (Form 21 and Motion) (the employer's motion).

Ms. Levi's employer contended that this payment represented a "settlement" of Ms. Levi's potential suit against the third party. The employer claimed that Ms. Levi had not provided notice of this supposed settlement and that the supposed settlement damaged the employer's reimbursement rights under the statute for third party lawsuits. (Mot., p.2, ¶¶5, 9). The argument to dismiss both claims, rather than just the claim for the car crash, went that the settlement barred the claim for the second injury, and there was no value to the claim for the first injury because Ms. Levi had not missed any work. (Mot., p.1, ¶2).

Ms. Levi opposed this motion, arguing that she had not fully settled anything. Ms. Levi claimed that the $550 was limited to compensation for her pain and suffering from the crash, and she also claimed that she never signed a document releasing anyone from liability. Ms. Levi alleged that the employer's rights under the third party statute were completely intact, and she also alleged that not only had she advised her employer of the $550 payment, but the employer had advised her to take the money. See, e.g., (Claimant's Memorandum of Law, plus attachments) (a later memo containing Ms. Levi's arguments).

On January 20, 2012, a hearing commissioner issued an order denying the motion to dismiss. (Or. of 1/20/12). The hearing commissioner found that the $550 was for Ms. Levi's pain and suffering, and the commissioner also ordered a hearing for the purpose of determining whether Ms. Levi had reached the point of maximum medical improvement and whether she required any additional medical treatment. *Id.*

The respondents asked the full commission to review the denial of the motion to dismiss. (Respondents' Form 30). On May 22, 2012, an appellate panel of the commission conducted a hearing on the respondents' request.

The appellate panel reversed. The panel held that Ms Levi had indeed settled with the third party, that she had not notified her employer, and that in taking $550, Ms. Levi had deprived the commission of jurisdiction over the claim. The panel noted that the relevant statute was designed to give an employer the right to participate in all aspects of the third party claim, and the panel found that Ms. Levi had not complied with that statute. The panel also held that none of Ms. Levi's ongoing injuries were related to her original injury. In the panel's view, all of Ms. Levi's injuries were related to the car crash. See (Appellate Panel Or.) (the panel's order). This ended both of Ms. Levi's workers' compensation claims.

The appellate panel's order was dated July 2, 2012. On July 31, 2012, Ms. Levi served and filed a notice of appeal.

ARGUMENT

There are two reasons this Court should vacate the appellate panel's decision and return these claims to the commission. The first is that the panel's order is a nullity because the hearing commissioner's decision was not immediately appealable. The second is that this dispute is not ripe for review. In the time since the appellate panel's decision, Ms. Levi has filed a lawsuit against the third party who caused her car crash. That lawsuit is pending. Though the history of this case is admittedly unusual, Ms. Levi has followed the relevant statute, and the respondents' rights are intact. Until something changes, this is all premature.

I. This Court Should Vacate the Commission's Decision Because the Denial of a Motion to Dismiss Is Not Immediately Appealable.

The first reason this Court should vacate the commission's decision is that the hearing commissioner's decision was not immediately appealable. The Workers'

Compensation Act provides that there must be some sort of "award" before a party can appeal to the appellate panel. An order denying a motion to dismiss is not an "award."

a. A Party Cannot Appeal a Hearing Commissioner's Decision until There Has Been an Award.

Workers' compensation hearings are principally governed by statute, and section 42-17-50 of the code (Supp. 2012) is the statutory authority for appellate panel review.[1] This statute instructs a party how to initiate a request for the panel to review a claim, and it also identifies the type of orders that a party may immediately appeal to the panel.

The statute requires some sort of "award." The deadline for filing an appeal is 14 days after receiving notice of the hearing commissioner's "award," and the statute further provides that if there are good grounds for doing so, the commission will review the "award" and amend the "award."

An "award" is not the same as a hearing commissioner's "order." Otherwise, every decision by a hearing commissioner is immediately appealable. At a minimum, the term award describes a decision that grants some sort of compensation (either financial payments or medical treatment) or directs that compensation is not payable and denies a claim. See, e.g., *Riddle v. Fairforest Finishing Co.*, 198 S.C. 419, 422, 18 S.E.2d 341, 342 (1942) (noting that the hearing commissioner "direct[ed] an award as follows: The claim is dismissed and compensation is denied."). In recognition of this principle, the Supreme Court has observed that there are several types of decisions that are either not reviewable until after the commission makes a final award, or, in some cases, not reviewable at all. See *Chastain*

[1]Per regulation, a panel of commissioners handles the process of "full commission" review. See 8 S.C. Code Ann. Regs. 67-709 (2012).

v. Spartan Mills, 228 S.C. 61, 65-66, 88 S.E.2d 836, 837-38 (1955) (dismissing the appeal of an order that neither granted nor denied compensation).

b. An Order Denying a Motion to Dismiss Decides Nothing and Is Not an Award.

The decision that the respondents appealed to the appellate panel is not an award. The hearing commissioner did not grant Ms. Levi any compensation, nor did he deny Ms. Levi any compensation. Instead, the order scheduled a hearing for the purpose of determining whether Ms. Levi had reached maximum medical improvement and was entitled to any further medical treatment. (Or. of 1/20/12, p.2). This order contemplates that an "award" will come later. The reference to a future hearing on maximum medical improvement is nothing if not an implicit recognition that the award, if any, is yet to come.

This is not materially distinguishable from a circuit court order that denies a motion to dismiss or a motion for summary judgment. Neither type of order is immediately appealable. See, e.g., *McLendon v. South Carolina Dep't of Highways and Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994). The rationale for this rule is that an order denying either of these motions does not finally decide anything. As the court explained in *McLendon*, "[l]ike the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." *Id.* at 526 n.2, 443 S.E.2d at 540 n.2.

c. Appealability Is Not Subject to Error Preservation Rules and Is Jurisdictional.

If a lower court improperly reviews an order that is not immediately appealable, the proper remedy is to vacate the lower court's decision. The Supreme Court followed this

approach in *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000), and another application of this reasoning is the decision in *South Carolina Department of Transportation v. McDonald's Corporation*, 375 S.C. 90, 650 S.E.2d 473 (2007). These decisions are virtually identical. Both involved the Supreme Court vacating a decision of this Court because the underlying order—a circuit court order—was not immediately appealable.

In both cases, the Supreme Court raised appealability on its own motion. These decisions are not outliers. The court has used the same approach on other occasions. See *Baldwin Const. Co., Inc. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004) (vacating this Court's review of an unappealable order); *Johnson v. Paraplane Corp.*, 321 S.C. 316, 468 S.E.2d 620 (1996) (same). The court has described the defects in these cases as defects of "appellate" jurisdiction—not "subject matter" jurisdiction. *Great Games, Inc. v. South Carolina Dep't of Rev.*, 339 S.C. 79, 83 n.5, 529 S.E.2d 6, 8 n.5 (2000).

This Court should apply the same reasoning in the case at hand. Just as this Court erred in addressing the merits in *Leviner* and *McDonald's*, so too did the appellate panel err in considering the respondents' appeal of the denial of their motion to dismiss Ms. Levi's claims. The workers' compensation commission is admittedly different from this Court and the circuit court. The commission is an administrative agency and is not a part of the unified judicial system. But this difference cannot be meaningful in terms of deciding what orders are immediately appealable. There is no reason to treat the commission's denial of a motion to dismiss differently from a court's denial of a motion to dismiss. The critical facts are that these orders "decide nothing," appellate jurisdiction is controlled by statute, and when the lower court or agency lacks appellate jurisdiction, any decision below should be vacated.

The Court should hold that the hearing commissioner's order was not an "award," and the Court should therefore hold that the order was not immediately appealable. As a result, the Court should vacate the appellate panel's decision.

II. The Court Should Vacate the Commission's Decision Because the Question Whether Ms. Levi Settled Her Potential Third Party Case Is Not Ripe for Review.

The second reason this Court should vacate the appellate panel's decision is that this dispute is not ripe for review. After the appellate panel's decision, Ms. Levi filed a lawsuit against the third party who caused her car crash. This suit was proper under the third party statute, and the suit is pending. The history of this case is unusual, but as long as Ms. Levi's third party suit is pending, the question of whether she "settled" anything is premature.

a. Contingent Disputes Are Not Ripe for Decision.

An adjudicative body (a court or an administrative agency) does not decide cases unless there is an actual case or controversy. This is commonly referred to as the doctrine of "justiciability." Appellate courts often describe "justiciable controversies" by saying what such controversies are *not*. For example, the Supreme Court has described that a justiciable case is a "real and substantial controversy" and not a dispute that is "of a contingent, hypothetical or abstract character." *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 566, 155 S.E.2d 618, 621 (1967).

One component of a case's justiciability is that the case is "ripe" for review. This means that the circumstances of the case have solidified, as opposed being contingent.

This principle has been applied on a number of occasions. South Carolina's appellate courts have used ripeness to reject a premature challenge to a license modification scheme,

Waters v. South Carolina Land Resources Conservation Commission, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996) (no one had applied to modify the license); whether the re-enactment of the death penalty applied retroactively, *Hitter v. McLeod*, 274 S.C. 616, 618-19, 266 S.E.2d 418, 419-420 (1980) (the petitioning party was not facing a criminal prosecution); and the question whether a circuit court's findings would be entitled to preclusive effect in an administrative proceeding. *Baber v. Greenville County*, 327 S.C. 31, 44-45, 488 S.E.2d 314, 321 (1997) (no administrative proceedings was pending). In each case, a contingency prevented the dispute from being appropriately postured for a decision.

b. Defects in "Ripeness" Can Be Raised at Any Time.

Justiciability can be raised at any time and is sometimes based on acts that occur during the course of litigation.

For example, the Fourth Circuit has held that a request to see the contents of a patent application became moot when, subsequent to the trial court's decision, the application was approved and made available for the public's inspection. *Misegades Douglas v. Schuyler*, 456 F.2d 255, 255 (4th Cir.1972) (cited in *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006)). The Supreme Court of South Carolina applied similar reasoning in *Treasured Arts, Inc. v. Watson*, where the court dismissed a challenge to whether a printing company's advertising promotion constituted an illegal lottery. Because the advertising promotion expired during the appeal, the dispute became moot. 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995).

The rationale underlying this rule is that if the case loses its character as a concrete dispute and becomes hypothetical or contingent, the dispute is not a real case or controversy.

c. The Question Whether Ms. Levi "Settled" Her Third Party Case Is Not Ripe as Long as That Case Is Pending.

The circumstances of this dispute have been rendered contingent by the fact that Ms. Levi has filed a civil lawsuit against the third party who caused her car crash. This Court can take judicial notice of the pleadings in that lawsuit, and the Court can also take judicial notice of the documents Ms. Levi filed with the commission in order to satisfy the commission's requirements for third party lawsuits. *Stanley Smith & Sons, Inc. v. Dumas*, 315 S.C. 30, 33, 431 S.E.2d 595, 596 (Ct. App. 1993) (where this Court examined the record of a separate and unrelated case). As of the writing of this brief, Ms. Levi's suit is pending against the third party and has not been resolved, but the pendency of the suit should make one thing plain: whether Ms. Levi settled anything with the third party is an open question.[2]

Some of the unusual aspects of this case are attributable to the third party statute and how it operates. The statute gives the employee the initial right to file a third party lawsuit. See S.C. Code Ann § 42-1-560(b) (1985). Then, the statute specifies periods of time where the right to sue passes from the employee to the employer, and the right to sue ultimately *returns* to the employee. See § 42-1-560(c). In practice, this means that throughout the time the respondents were asking the commission to dismiss Ms. Levi's workers' compensation claims, someone—either Ms. Levi or the respondents—had the right to sue the third party.

Other aspects of the case are attributable to nothing more than bad lawyering on Ms. Levi's behalf. Ms. Levi began receiving temporary compensation in May of 2011, which

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[2]The third party suit is *Levi v. Proell* and is pending in the court of common pleas for Greenville County. The case number is 2013-CP-23-01287.

means that until May of 2012, Ms. Levi had the initial right to sue under the third party statute. See § 42-1-560(b) (employee has the right to sue for one year after the carrier accepts liability). Ms. Levi could have filed the third party suit immediately after the respondents filed their motion to dismiss in September of 2011, but she did not.

Though these aspects of this case are unusual, they should not be difference-makers. Ms. Levi eventually initiated her third party case, and there does not seem to be any defect in the way she initiated that case. Whether Ms. Levi settled all or part of the third party case is a question that goes to the merits of *that* case—not her workers' compensation claim. If Ms. Levi has followed the statute, there is no statutory basis for a dismissal.

South Carolina's appellate courts have historically exercised a degree of flexibility with the third party statute. In *Callahan v. Beaufort County School District*, 375 S.C. 92, 651 S.E.2d 311 (2007), the Supreme Court held that the third party suit became a "nullity" when the plaintiff voluntarily dismissed it. Thus, a plaintiff who had initially failed to comply with the statute nevertheless had the opportunity to cure that defect and pursue a workers' compensation claim. In *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 328 S.E.2d 621 (1985), the Supreme Court imposed a stay in several third party cases in order to allow the injured parties to maintain their ability to pursue workers' compensation claims. Because *Talley* involved injuries that had not yet ripened into workers' compensation claims, the plaintiffs could not settle their third party claims without violating the statute and destroying their rights to workers' compensation. The stay allowed the plaintiffs to protect both claims.

These cases were treated differently from cases where the injured person clearly violated the third party statute. Examples of "clear violation" cases include *Kimmer v.*

Murata of Am., Inc., 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006) (settled the third party suit without giving notice), *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 370 S.E.2d 104 (Ct. App. 1988) (brought and lost the third party claim without giving notice), and *Fisher v. South Carolina Department of Mental Retardation-Coastal Center*, 277 S.C. 573, 291 S.E.2d 200 (1982) (settled the third party suit without giving notice). The reason for this disparate treatment is that the purpose of the third party statute is to deliver fair compensation to the employee *and* give effect to the employer's right to have a fair opportunity to protect its subrogation lien. See *Kimmer*, 372 S.C. at 47, 640 S.E.2d at 511 (stating this principle and referencing two Supreme Court decisions that do the same). When that purpose can be fulfilled, the court has been sympathetic to the needs of the injured party.

This statute's purpose can still be fulfilled here. The respondents have a full opportunity to participate in the third party suit. If they do not participate, it will only be because they do not want to.

Similarly, the respondents' subrogation lien remains completely intact. The current version of the statute commands this. See § 42-1-560(f) (any settlement made without the employer's written consent is invalid against the employer). If the respondents were concerned about their reimbursement rights, they could have exercised their rights under the statute and sued the third party. For whatever reason, they have never pursued their right to be reimbursed for the workers' compensation benefits they paid Ms. Levi.[3]

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[3]Under previous versions of this statute, a settlement would have destroyed the employer's right to reimbursement. In fact, it was once the case that a claimant could not pursue both a workers' compensation claim and a third party claim. The claimant had to pick. See 1952 Code § 72-123; see also *Stroy v. Millwood Drug Store, Inc.*, 235 S.C. 52, 109 S.E.2d 706 (1959) (construing this statute). Under the current law, these outcomes are not in play.

In the realm of possibility, it is possible that the third party may never even claim that the $550 payment constituted a settlement of its liability for Ms. Levi's car crash. If that proves to be the case, dismissing Ms. Levi's workers' compensation claims cannot be the proper result. Under those circumstances, there will be no basis for dismissing any workers' compensation claim. Because of these contingent and unresolved circumstances, the Court should hold that this dispute is not ripe and vacate the appellate panel's decision.

CONCLUSION

The Court should hold that the panel's order is a nullity because the hearing commissioner's decision was not immediately appealable. Alternatively, the Court should hold that this dispute is not ripe for review. In either case, the proper remedy is to vacate the appellate panel's decision and reinstate the decision of the hearing commissioner.

Respectfully submitted,

July 2, 2013

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APPELLANT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Order of January 20, 2012;
2 Order of July 2, 2012;
3. Form 50 of April 25, 2011;
4. Form 50 of April 26, 2011;
5. Form 21 and Motion of September 14, 2011;
6. Respondents' Form 30 of February 3, 2012;
7. Claimant's Memorandum of Law, plus attachments.

I certify that this designation contains no matter which is irrelevant to this appeal.

/Signature page attached

Respectfully submitted,

July 2, 2013

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Appellant's Initial Brief* and *Designation of Matter* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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