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.

REPLY BRIEF

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ARGUMENT

A. This Is Not a "Substantial Evidence" Case. Appealability and Justiciability are Questions of Law.

The respondents argue that there is only one issue in this appeal: whether substantial evidence supports the finding that Kerry Levi settled her third party case and forfeited her right to pursue a workers' compensation claim. (Brief of Respondents, pp.2, 16). This argument should not be persuasive. At no point in her appellant's brief did Ms. Levi raise or argue this question.

Ms. Levi's principal brief raises two issues, both of which are questions of law. The first is whether this Court should vacate the appellate panel's decision because the hearing commissioner's order was not immediately appealable. The second is whether this Court should vacate the appellate panel's decision because the question whether Ms. Levi "settled" anything is not ripe as long as her third party suit is pending. Neither question is a "substantial evidence" question. Neither question involves reviewing any factual findings.

B. Error Preservation Does Not Apply to Questions of Appealability or Justiciability.

According to the respondents, this appeal should be dismissed because Ms. Levi never argued appealability or justiciability to the hearing commissioner or the appellate panel. See (Brief of Respondents, pp.5-6). This argument should not be persuasive. Error preservation does not apply to these issues.

None of the cases cited in the respondents' brief involve appealability or justiciability. See (Brief of Respondents, p.6). *Busillo v. City of North Charleston* was a civil case involving objections to evidence and to a special verdict form. 404 S.C. 604, 745

S.E.2d 142 (Ct. App. 2013). *Holston v. Allied Corp.* was a workers' compensation case involving whether an injury arose out of the course and scope of employment. 300 S.C. 174, 386 S.E.2d 793 (Ct. App. 1989). *Wilder Corp. v. Wilke* was a foreclosure case where the issues involved financial payments, interest calculations, and evidentiary objections, see 330 S.C. 71, 497 S.E.2d 731 (1998), and *Drake v. Raybestos-Manhattan, Inc.*, was a workers' compensation case that was remanded for more detailed factual findings. See 241 S.C. 116, 127 S.E.2d 288 (1962). These cases do not indicate or suggest that error preservation applies to appealability or justiciability.

The law in this area appears to be settled, and the law is that appealability and justiciability may be raised at any time. Just as an appellate court generally does not address arguments that were not presented to a lower court, so too does an appellate court usually refuse to raise issues on its own. Yet, there are several cases where appellate courts have raised appealability on the court's motion. See, e.g., *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010) (dismissing the appeal); *Main Corp. v. Black*, 357 S.C. 179, 592 S.E.2d 300 (2004) (same); and *St. Francis Xavier Hosp. v. Ruscon/Abco*, 285 S.C. 584, 330 S.E.2d 548 (Ct. App. 1985) (same). If appealability was subject to error preservation rules, all of these cases would be written differently.

These cases are not outliers. If appealability was subject to error preservation rules, all of the cases cited in Ms. Levi's principal brief would be written differently. See (Brief of Appellant, section (I)(c), at pp.5-6). Each of those cases involved the Supreme Court vacating a decision of this Court because the order that this Court reviewed was not immediately appealable. This Court is capable of making its own determination, but there

is no meaningful difference between the circumstances presented in those decisions and the circumstances of Ms. Levi's case. These are all horses of the same color.

If justiciability was subject to error preservation rules, it would be impossible for a case to be rendered moot or unripe by events that occurred after the lower court's decision. A number of justiciability cases—including two of the cases Ms. Levi cited in her principal brief—recognize that it is perfectly acceptable for subsequent events to turn a justiciable controversy into a non-justiciable one. See (Brief of Appellant, p.8) (citing *Treasured Arts, Inc. v. Watson*, 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995) and *Misegades Douglas v. Schuyler*, 456 F.2d 255, 255 (4th Cir.1972)). Nobody could reasonably disagree that error preservation applies to most arguments and issues, but it appears to be settled that issues of appealability and justiciability are treated differently.

C. The Respondents' Argument Is Not Faithful to the Current Version of the Third Party Statute, Which Instructs That There Is No Way for Someone like Ms. Levi to Damage the Respondents' Subrogation Rights.

Error preservation is the only argument that is responsive to the questions presented for this Court's review. The rest of the respondents' argument focuses on their claim that Ms. Levi has destroyed the their subrogation rights. This argument should not be persuasive. It is not justified by the current version of the third party statute.

Under the current version of the statute, there is no way Ms. Levi could have negatively impacted the respondents' rights. Subsection (a) of the statute gives the respondents a lien on any money Ms. Levi received in the third party suit, and subsection (f) says that even if Ms. Levi settled the third party suit without the respondents' consent, the

settlement has no effect—none—on the respondents' rights. See S.C. Code Ann. § 42-1-560 (1985). This should not be debatable. It is what the statute says.

The reason *Stroy v. Millwood Drug Store* did not recognize this is because it was governed by a previous version of the statute. *Stroy* was decided in 1959, see 235 S.C. 52, 109 S.E.2d 706, but the legislature did not amend the third party statute to protect the rights of employers and carriers until 1969, ten years later. See Act. No. 355, 1969 S.C. Acts 622.

Several cases have involved the amended version of the statute, but all of these cases reference *Stroy* and the proposition that the claimant's conduct can damage the carrier's rights. See *Fisher v. South Carolina Dep't of Mental Retardation-Coastal Center*, 277 S.C. 573, 576-77, 291 S.E.2d 200, 201 (1982) (citing *Stroy*); *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 23, 370 S.E.2d 104, 107 (Ct. App. 1988) (citing *Fisher*); and *Kimmer v. Murata of America, Inc.*, 372 S.C. 39, 51-52, 640 S.E.2d 507, 513 (Ct. App. 2006) (citing *Hudson*, *Fisher*, and *Stroy*).

Nobody is taking issue with the results these cases reached. Nobody is arguing that an injured worker should be able to settle (or lose) a third party suit and then pursue a workers' compensation claim. But when these cases suggest that a settlement has a negative financial impact on the employer or carrier, they are wrong. The statute protects the employer and carrier against such damage.

The respondents say that Ms. Levi has forced them to go to the time and expense of bringing the third party case if they want to pursue their rights. This is true, but it misses the fact that the respondents would be in the same position if Ms. Levi had elected not to pursue a third party case at all. Subsection (c) of the statute envisions this scenario; it allows the

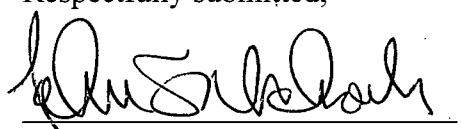
employer or carrier to file the third-party suit if the injured worker elects not to. What the respondents call "prejudice" is simply the cost of doing business under the statute.

Yes, Ms. Levi accepted $550 from the at-fault driver's insurance company. This was two weeks after her work-related car crash, and Ms. Levi said in an affidavit that her boss advised her to take the money. See (R. p. 96). But regardless of who is telling the truth—and regardless of whether this was a full settlement of the third party claim—some things should not be debatable. This did not impact the respondents' rights.

CONCLUSION

This Court should hold that the commission'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. The Court should accordingly vacate the commission's decision and remand these claims.

Respectfully submitted,



September 27, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

September 30, 2013

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Brief of Appellant, Reply Brief* and *Certificate of Compliance* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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