

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.

RECORD ON APPEAL

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant

Chadwick D. Pye
THE CHAD PYE LAW FIRM
Post Office Box 6346
Spartanburg, SC 29304
(864) 583-5658
(864) 583-5672 (facsimile)
cpye@chadpye.com

David H. Keller
CONSTANGY, BROOKS &
SMITH
105 N. Spring St., Ste. 105
Greenville, SC 29601
(864) 242-2577

Attorney for Respondent

INDEX

Orders

Order of January 20, 2012 (Hearing Commissioner)	1
Order of July 2, 2012 (Appellate Panel)	6
Order of June 3, 2013	24

Pleadings, Motions, and Exhibits

Form 50 of April 25, 2011	25
Form 50 of April 26, 2011	26
Form 21 and Motion of September 14, 2011, with attachments	27
Form 58 and Amended APA Submission of Claimant	30
Form 58 and APA Submission of Employer	55
Respondents' Form 30 of February 3, 2012	87
Claimant's Memorandum of Law of May 1, 2012, with affidavit	90
Motion to Stay Appeal	97

Transcripts

Transcript of Hearing	106
Certificate of Counsel	117

rec'd
1/20/12

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

WCC FILE No. 1104303

Kerry Levi,
Employee/Claimant

vs.

Northern Anderson County EMS

And

Berkshire Hathaway Homestate Co.
Carrier,

Defendants.

DECISION AND ORDER

DATE OF HEARING:

Hearing held in Greenville, SC on January 3, 2012

APPEARANCES:

Claimant appeared and represented by Michael
Hart, Esquire of Greenville, South Carolina.

Defendants represented by David Keller, Esquire of
Greenville, South Carolina.

PURPOSE OF THE HEARING:

To determine all issues as set forth in the
Defendant's Motion to Dismiss.

COMMISSIONER:

Commissioner Avery B. Wilkerson

FILED:

January 20, 2012

STIPULATIONS

The parties stipulated at the hearing to the following:

1. Notice of the hearing was timely and properly served upon all parties of interest.
2. The South Carolina Workers' Compensation Commission has jurisdiction over this claim.
3. Venue is proper in Greenville County.
4. Claimant's average weekly wage is \$441.09 with a corresponding compensation rate of \$294.07.
5. Claimant suffered a compensable injury in the course and scope of her employment on March 10, 2011 and March 29, 2011.

A.P.A. SUBMISSIONS

Pursuant to the South Carolina Administrative Procedures Act and Regulations of the South Carolina Workers' Compensation Commission, the following records and documents were submitted into evidence.

1. Center for Health & Occupational Services dated 03/15/11 - 05/23/11, pages 1-12.
2. SE Neurosurgical & Spine Institute dated 05/06/11 - 09/21/11, pages 13-20.

CLAIMANT'S EXHIBITS

EXHIBIT #1 Letter from Allstate Insurance to Ms. Levi dated 04/10/11
EXHIBIT #2 Letter from Allstate Insurance to Dick James Law Firm dated 12/29/11
EXHIBIT #3 Letter from Allstate Insurance to Dick James Law Firm dated 05-09-11

DEFENDANT'S APA SUBMISSION

3. Dr. Stacey Newsom dated 03-22-11- 05/23/11 pages 1-8.
4. Doctors Care dated 03/10/11, pages 9-12
5. Dr. Timothy McHenry dated 04/27/11- 06/08/11, pages 13-19
6. SCDOT Accident Report page 20
7. Allstate Proof of Payment to Claimant dated 09/09/11 pages 21-22
8. Form 20 pages 23
9. Form 18 from File No.:1104303 dated 08/31/11, page 24
10. Trial Memorandum dated 12/20/11, pages 25-28.

STATEMENT OF THE CASE

Defendants filed a Motion to Dismiss Claimant's claim for date of accident of March 29, 2011 in which Claimant injured her back again when she was in an ambulance driven by a co-employee, Josh Thomas, and she and Josh Thomas were rear ended by another driver. Defendants claim this accident severely aggravated Claimant's pre-existing condition from her earlier injury in the March 10, 2011 work related accident where Claimant injured her back while lifting a patient. Defendants claim that Claimant had selected her remedy in her automobile accident claim of March 29, 2011 when she accepted \$550.00 from Allstate Insurance, the liability carrier for the vehicle that struck the ambulance in which she was riding.

FINDINGS OF FACT

IT IS FOUND AS FACT:

1. That the parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act, as amended, with Northern Anderson County EMS, as the employer, Berkshire Hathaway Homestate Company as the carrier, and the Claimant as the employee.

2. The South Carolina Workers' Compensation Commission has jurisdiction to hear the Claimant's claim for benefits.
3. Venue in Greenville County is proper.
4. Notice of the hearing was timely and properly served upon all parties of interest.
5. Claimant's stipulated average weekly wage is \$441.09 with a corresponding compensation rate of \$294.07.
6. Claimant suffered a compensable injury in the course and scope of her employment on March 10, 2011 while lifting a patient while working as an EMS and March 29, 2011 when the ambulance she was riding in as an EMS was rear-ended.

CONCLUSIONS OF LAW

Under Section 42-1-160, the Defendants are subject to the provision of the South Carolina Workers Compensation Act.

1. Under Section 42-1-130, the Claimant was a covered employee.
2. Under Section 42-1-140, the employer was a covered employer.
3. Under Section 42-3-15, there was an employee/employer relationship.
4. Under Section 42-3-180, this Commission has jurisdiction over the parties to hear the issues herein.
5. Under Section 42-17-20, venue in Greenville, S.C. was proper and stipulated.

Under Regulation 67-607, notice of the hearing was properly served.

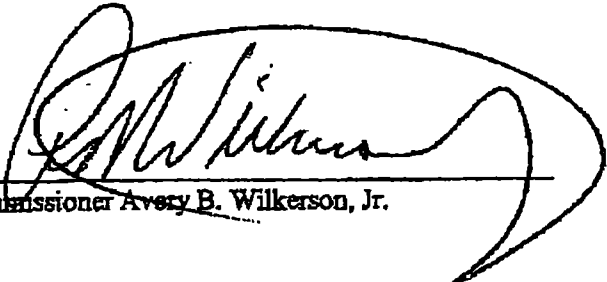
ORDER

NOW, THEREFORE, IT IS ORDERED that based upon the evidence presented to me in each party's brief, I determine that the Claimant did not select a remedy and was only compensated by Allstate for her pain and suffering and the Defendant's would still be able to maintain a lien for any medical treatment causally related to the accident of March 29, 2011.

IT IS FURTHER ORDERED that a hearing will be set on Defendant's Form 21 to determine if the Claimant has reached maximum medical improvement or whether she is entitled to further medical treatment at a time convenient to all parties.

IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1104303 & WCC FILE NO. 1104304

KERRY LEVI,

EMPLOYEE,
CLAIMANT/RESPONDENT,

V.

NORTHERN ANDERSON COUNTY EMS,

EMPLOYER,

AND

BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY, CARRIER,
DEFENDANTS/APPELLANTS.

Appellant Panel Review held in Columbia,
South Caroling on May 22, 2012 per notices
timely and properly served on all parties of interest.
Appellate Panel Decision and Order filed
7/2, 2012.

APPEARANCES:

Claimant/Respondent represented by
Chadwick D. Pye, Esq. of Spartanburg, South Carolina

Defendants, Appellants represented by
David Hill Keller, Esq. of Greenville, South Carolina

STATEMENT OF THE CASE

This matter comes before the Full South Carolina Workers' Compensation Commission based on the petition of the Defendants, appealing the order of Commissioner Avery B. Wilkerson, Jr. dated January 20, 2012. The Defendants had filed a motion to dismiss based on election of remedy and had also filed a Form 21 to request a stop payment of temporary total disability compensation. The Order of Commissioner Wilkerson, on appeal, was directed to the motion only.

Commissioner Wilkerson determined that the Claimant had not elected her remedy by settling her third party claim with Allstate Insurance Company.

In his Order, Commissioner Wilkerson made the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

IT IS FOUND AS FACT:

1. That the parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act, as amended, with Northern Anderson County EMS, as the employer, Berkshire Hathaway Homestate Company as the carrier, and the Claimant as the employee.
2. The South Carolina Workers' Compensation Commission has jurisdiction to hear the Claimant's claim for benefits.
3. Venue in Greenville County is proper.
4. Notice of the hearing was timely and properly served upon all parties of interest.

5. Claimant's stipulated average weekly wage is \$441.09 with a corresponding compensation rate of \$294.07.
6. Claimant suffered a compensable injury in the course and scope of her employment on March 10, 2011 while lifting a patient while working as an EMS and March 29, 2011 when the ambulance she was riding in as an EMS was rear-ended.

CONCLUSIONS OF LAW

Under Section 42-1-160, the Defendants are subject to the provision of the South Carolina Workers' Compensation Act.

1. Under Section 42-1-160, the Defendants are subject to the provision of the South Carolina Workers' Compensation Act.
2. Under Section 42-1-130, the Claimant was a covered employee.
3. Under Section 42-3-15, there was an employee/employer relationship.
4. Under Section 42-3-180, this Commission has jurisdiction over the parties to hear the issues herein.
5. Under Section 42-17-20, venue in Greenville S.C. was proper and stipulated.

Under Regulation 67-607, notice of the hearing was properly served.

ORDER

NOW, THEREFORE, IT IS ORDERED that based upon the evidence presented to me in each party's brief, I determine that the Claimant did not select a remedy and was only compensated by Allstate for her pain and suffering and the Defendant's would still be able to maintain a lien for any medical treatment causally related to the accident of March 29, 2011.

IT IS FURTHER ORDERED that a hearing will be set on Defendant's Form 21 to determine if the Claimant has reached maximum medical improvement or whether she is entitled to further medical treatment at a time convenient to all parties.

Oral Argument was held before a three member panel of the South Carolina Workers' Compensation Commission on Defendants' appeal on May 22, 2012 in Columbia. Since that time the panel has considered the arguments of the parties, the briefs and the file of the South Carolina Workers' Compensation Commission to include all APA Submissions. After review, the panel unanimously reversed the Order of Commissioner Wilkerson.

According the file and APA Submissions, the Claimant had two injuries. The Claimant's first injury occurred on or about March 10, 2011. She was working as a paramedic for Northern Anderson County EMS when she was moving a large patient from a bed to a wheelchair. She and another paramedic were using a sliding board to move the patient. The patient started to fall from the board and Claimant grabbed the patient and felt a "pop" in her back. The medical records indicate Claimant received a brief period of medical treatment from Doctors Care and Dr. Newsom at the Greenville Memorial Hospital Center for Health and Occupational Services. She was released back to light duty and was released fully by Dr. Newsom on March 22, 2011.

On March 29, 2011, Claimant was in an ambulance driven by a co-employee, Josh Thomas, when she and Thomas were rear ended by another driver. This accident severely aggravated her preexisting condition from her early injury and since that time, she has received ongoing medical care and treatment as outlined in the Commission's file.

Through investigation, the Defendants subsequently determined the owner of the vehicle which struck Thomas and the Claimant was Donald Proell. Mr. Proell was insured

by Allstate Insurance Company. The Claimant settled with Allstate Insurance Company in the amount of \$550.00 on April 10, 2011, and that check was cashed by the Claimant on April 19, 2011. (APA p. 22). The Claimant never filed any Forms with the South Carolina Workers' Compensation Commission or the carrier and never advised the Commission, the employer or the carrier of the settlement.

The sole issue before the Commission is whether the acceptance of the \$550.00 settlement on April 12, 2011 constitutes an election of remedy under §42-1-560 and the case law attendant thereto.

At oral argument, the Claimant conceded that had she taken a settlement for the automobile accident she would have elected her remedy. However, it was Claimant's contention that the claim was still open and that she had never settled the claim. Rather, she urges the injuries she was compensated for by Allstate were not covered by Title 42 and Defendant's are free to seek additional recovery from Allstate.

It is the contention of the Claimant because she did not settle her claim with Allstate for anything involving the Workers' Compensation accident, somehow her settlement does not affect the Defendants. However, this theory is not supported by the case law. Rather the very purpose for the strict, bright line rule of South Carolina case was to protect the Defendants' lien and right to subrogation. The Defendants now have no right to collect against Allstate without having to file a lawsuit against them in Circuit Court, and the likelihood that such a lawsuit would be successful is unknown. Further, the Commission notes that South Carolina appellate cases state once a settlement occurs the Commission loses subject matter jurisdiction.

The file of the South Carolina Workers' Compensation Commission contains a letter from Allstate noted as Claimant's exhibit 1 to the Claimant's APA which states "as we agreed, I will be sending a check to you and a separate letter in the amount of \$550.00 for a full and final settlement of your injury claim. Please understand that signing and cashing this check settles your claim from the above accident..." The file further contains a letter dated December 29, 2011 from Allstate to the Dick James Law Firm which states "this will confirm that Allstate paid and Ms. Levi cashed a settlement check for \$550.00. This was for pain and (sic) suffering only with the understanding we would pay for reasonable and related medical bills." It is a specific finding of the panel of the Full Commission that the two letters, submitted by the Claimant herself, constitute sufficient proof, by preponderance of the evidence, that Claimant did indeed settle her claim and the settlement constituted an election of remedies because the same was made (1) without following the notice provisions of Title 42 and (2) was done without regard to the rights of the Defendants to be reimbursed for indemnity benefits it has already paid to the Claimant and for additional indemnity benefits which she is seeking, even if additional medical benefits might be available to her.

The initial case involving election of remedy, decided under a previous statute was Stroy v. Millwood Drug Store, Inc., 235 SC 52, 109 S.E.2d 706 (1959). The statute in effect at the time of the Stroy case had a similar provision to the current statute concerning election of remedy. The statute in 1958 specifically held the filing of a tort claim and the prosecuting of that claim by the employee, represented an election of remedy. Important to the construction of the current matter is the Court's determination that a settlement has the same effect as a trial because the seeking and collection of any settlement without notice deprives the Defendants of their subrogation rights against the third-party insurance carrier.

The Court, citing Professor Larson further stated "since the object of third-party statutes is to effect an equitable adjustment of the rights of all the parties, it would defeat this objective to allow the employee to demand compensation from the employer after having destroyed the employer's normal right to obtain reimbursement from the third-party." 109 SE2d @ 709.

While Commissioner Wilkerson noted State Farm Company stated they were still liable for the medical portions for the claim, (Plaintiffs APA p. 15), nonetheless, the signature of the Claimant on the settlement from the insurance carrier bars any possibility of further recovery for indemnity by Defendant's. The Defendants paid the Claimant temporary total disability compensation for ten months. The Claimant is currently claiming additional temporary total disability compensation and significant permanency up to and including total permanent disability. Because of the Claimant's settlement of the third-party claim the Defendants have no opportunity to subrogate the indemnity portions of the claim against State Farm.

The other significant holding in Stroy is that the violation of the third-party statute deprives the South Carolina Workers' Compensation Commission of jurisdiction over the claim.

Under the current statute, amended by the legislature in 1978, the Claimant has the opportunity to seek a judgment against a third-party, seek a workers' compensation award, or proceed with both. §42-1-560. However, should the Claimant decide to proceed against both the third-party and the Workers' Compensation carrier, it is necessary for her to place the employer, carrier and Commission on notice of a potential claim. §42-1-560(b). Further, the employee may not settle the third-party claim without approval of the employer and

carrier. §42-1-560 (f). The settlement of the third-party case without the proper notices and consent of the employer and carrier constitutes an election of remedy. Fisher v. SCDMR, 277 SC 573, 291 SE2d 200 (1982); Kimmer v. Murata of America, Inc., 372 SC 39, 640 SE2d 507 (Ct. App. 2006), cert. den. 10/18/2007.

In the Fisher case the Claimant, Blurette Fisher was injured at Sears Roebuck while shopping for clothing for her employer, the Department of Mental Retardation. The injuries were completely admitted by Defendants, the DMR and the South Carolina State Workers' Compensation Fund.

Without the knowledge of the employer, the carrier or the Workers' Compensation Commission, the Claimant settled with Sears Roebuck. Justice Ness writing for the Court affirmed the finding of the Single Commissioner, Full Commission and Circuit Court that the failure of the Claimant to comply with the notice provisions of §42-1-560, consistent with the Stroy holding, deprived the Workers' Compensation Commission of subject matter jurisdiction.

The Court unanimously held §42-1-560 sets forth the terms and conditions which *must* be met in order for the Claimant to maintain both a workers' compensation claim and a liability claim at the same time. The Court further held while the code section does not specifically state the Claimant may not settle with the third-party without the carrier's consent, nonetheless "it is clear from a reading of a statute that the legislature did not intend for a claimant to settle his third-party case without regard to the employer's right for subrogation...and still maintain a workmen's (sic) compensation claim." 291 SE2d @ 201. The court further held the Claimant's noncompliance with the statutory procedure and her disregard of the rights and remedies of the carrier violated §42-1-560 and Stroy. Therefore

she had elected her remedy and waived any rights she may have had under the South Carolina Workers' Compensation Act. Id. Justice Ness further cited the Stroy case for the proposition that allowing an employee to accept compensation from the third-party tortfeasor without regard to the Defendants' lien defeated the objectives of §42-1-560. The Court specifically held "Appellant's noncompliance with the statutory procedure and disregard for the rights and remedies of the carrier violates the spirit of the act. It is clear Mrs. Fisher made an election and has waived any rights she may have had under the South Carolina Workmen's (sic) Compensation Act." 291 SE2d @ 201.

The Fisher case, of course, was a South Carolina Supreme Court case and it was cited directly and confirmed in the Kimmer case. In Kimmer the Claimant was seriously injured in an automobile accident. He subsequently settled for the policy limit of the third-party driver's policy in the amount of \$15,000.00. This settlement was undertaken without the knowledge, permission or consent of the employer and carrier and was unknown to the Commission. The Single Commissioner and Full Commission dismissed Kimmer's claim for failure to comply with the terms and provisions of §42-1-560. The Circuit Court reversed and awarded the Claimant total and permanent disability giving the Defendant's a credit of \$10,000.00, the actual amount of the settlement received by Kimmer. The Court reasoned since it was giving a \$10,000.00 credit to the employer and carrier, they had suffered no prejudice.

The Court of Appeals reversed and reinstated the determination of the Full Commission on several grounds. First, the Court held the settlement of a third-party claim without consent of the employer and carrier is a per se violation of §42-1-560 and results, automatically, in an election of remedy. The Court specifically stated because Kimmer

resolved his third-party claim against the tortfeasor without notice to Murata his actions resulted in an election of remedy. The Court specifically noted taking a settlement without notice was clearly forbidden by Fisher, and any such settlement constituted an election of remedy on the part of the Claimant. The Court further held prejudice is not an issue under §42-1-560. The Court reasoned prejudice cannot be an issue when the statute itself does not mention prejudice.

The Court concluded in Kimmer "...that the settlement of the third-party claim without notice to the employer and carrier bars a Workers' Compensation action. We hold that prejudice is NOT an element to be considered in regard to the failure to give the mandated statutory notice..." 640 SB2d @ 513-514.

However, the Court also specifically held prejudice is implicit and assumed within the terms and provisions of the act when the employer and the carrier are denied the right to participate in litigation or effect the full and final release of the Claimant. The Carrier, further, by virtue of the Claimant's settlement without notice has no opportunity to investigate whether there are other assets or other coverages available to the Claimant from the third-party.

The Kimmer case cites three other South Carolina Workers' Compensation cases which further support the election of remedy in a case such as this one. First, the Court cited Johnson v. Pennsylvania Millers Mut. Ins. Co., 292 SC 33, 354 SE2d 791 (Ct. App. 1987). In Johnson, the Claimant prosecuted a case to a final and adverse conclusion. Because neither the Single Commissioner nor the Full Commission had determined whether the notice requirements of §42-1-560 had been met the Court remanded the case back for such a determination. However, the Court noted if the notice and consent provisions of §42-1-560

had not been complied with, then the Claimant would have elected his remedy under Fisher.

The Court further cited Hudson v. Townsend Saw Chain Co., 296 SC 17, 370 SE2d 104 (Ct. App. 1988), in which the Claimant also prosecuted the claim to a final adverse conclusion. However, in Hudson the Commission had specifically found as a fact that the Claimant had not put employer and carrier on notice of the third-party claim and the Court held the Claimant had, therefore, elected his remedy under Fisher. The Court also noted in Hudson, had the Claimant settled the case during the litigation process without notice and consent, the Supreme Court's holding in Fisher would have also barred him from pursuing a Workers' Compensation claim thereafter.

Another South Carolina Supreme Court case decided in a different context, nonetheless affirms the importance of notice as it relates to election of remedy. In the case of Talley v. John-Mansville Sales Corp., 285 SC 117, 328 SE2d 621 (1985), the Court held it could not carve out an exception to the election of remedy in the statute as this was a matter for the legislature. In Talley, a group of asbestos plaintiffs found themselves in a predicament caused by two different statutes. It was necessary for the asbestos plaintiffs to file claims within the statute of limitations in Circuit Court. However, because they suffered no disability under Chapter 11 of Title 42, they could not file a Workers' Compensation claim. The Court would not allow them to put the employer and Workers' Compensation carrier on notice because there was no current Workers' Compensation claim. Because the Court would not carve out an exception to the notice requirement it ordered that the Defendants be allowed to file their claims in Circuit Court with the claims being held in abeyance and stayed until such time as they could put the Workers' Compensation carrier on notice pursuant to the terms of the statute. (Within 30 days of the commencement thereof).

Finally, the most recent case in this line of cases is Callahan v. Beaufort County School District, 375 SC 92, 651 SE2d 311 (2007). In Callahan the Court did not directly address the issue currently before the Commission. However, the Supreme Court cited Fisher as good law. The Claimant in Callahan filed suit in State Court and then removed the case to Federal Court. However, in the interim the Claimant voluntarily dismissed her third-party suit pursuant to Rule 41 FRCP. The Court held that a voluntary dismissal leaves the situation as though no suit had ever been filed.

The Court, therefore, allowed the Claimant to go forward with her third-party claim because of the voluntary non-suit. The Court, nonetheless, held specifically that the notice provisions of §42-1-560 "must be strictly followed in order for a claimant to preserve her right to proceed against both the employer and the third-party." 651 SE2d @ 314. This is, precisely the holding of Fisher and Kimmer.

It is undisputed that the Claimant settled her third party case with State Farm Insurance Company on or about April 12, 2011, some two weeks after her accident. It is further undisputed that she did not follow the notice requirements of §42-1-560. The case law, cited hereinabove is unquestionably clear that the Claimant's action constitutes an election of remedy. There has never been a holding to the contrary in South Carolina and as recently as 2006, the Court confirmed that the notice provisions of §42-1-560 "must be strictly followed in order for a Claimant to preserve her right to proceed against both the employer and the third party." Kimmer.

The Claimant also alleges that her injuries are not due to the motor vehicle accident of March 29, 2011, but rather were due to a previous admitted injury which occurred on or

about March 10, 2011. The medical records submitted by the parties, however, do not support this contention.

The Claimant was originally injured on March 10, 2011 while lifting a patient. The Claimant was seen at Doctors Care and was eventually referred to Dr. Stacey Newsom at the Center For Health & Occupational Services. By March 22, 2011 the Claimant had fully recovered from her lifting injury. The medical records state specifically that the Claimant "denies any pain today." (Defendants APA p. 1). She further denied any symptoms upon straight leg raising. (Defendants APA p. 1). The Claimant further indicated that she had bruises and scratches on her upper extremities because she had been working in her yard. (Defendants APA p. 1).

Dr. Newsom fully released the Claimant on March 22, 2011 to return to work without restrictions. (Defendants APA p. 1).

The Claimant suffered the current injury on March 29, 2011 when she was struck and rear ended while riding in an ambulance with a coworker, Josh Thomas. Dr. Newsom saw the Claimant on March 31, 2011 and indicated she was seeing the Claimant "due to a new injury." (Defendants APA p. 2). The doctor further noted the history of the accident, the Claimant being a restrained passenger in an ambulance which was struck from behind. The doctor noted the Claimant "reports having increased parenthesis in the right leg." (Defendants APA p. 2).

Dr. Newsom further noted the Claimant had suffered an exacerbation of a lumbar herniated disc and leg parenthesis "after MVA." (Defendants APA p. 2). The doctor further referred her to physical therapy and allowed her to return to light duty on March 31, 2011 with a 20 pound weight restriction. On April 14, 2011 the Claimant had not improved and

Dr. Newsom recommended a neurological consult. (Defendants APA p. 3). The doctor further noted on April 14, 2011 that the Claimant's diagnosis was "lumbar HNP exacerbated by recent MVA." (Defendants APA p. 4). On April 26, 2011 Dr. Newsom reported the Claimant was improved but that a record search indicated she was abusing prescription drugs and obtaining controlled substances from multiple providers and pharmacies. (Defendants APA p. 5). Dr. Newsom dismissed the Claimant on May 3, 2011 to return to work with restrictions and further advised her to follow up with a neurosurgical consult. On May 23, 2011 the Claimant was seen again and at that time Dr. Newsom had obtained records from Dr. James Taylor from March 5, 2011, five days before her first accident and that she had, on multiple occasions, requested narcotic medication. (Defendants APA p. 7). After the doctor advised Claimant they would no longer provide her with narcotic medications, the Claimant asked for Lortab and sleeping pills. (Defendants APA p. 7). The doctor further had obtained a medical record from Mountain View Family Practice that Claimant had advised the doctor at Mountain View that she needed Oxycodone for pain. It appears from the doctor's note the Claimant walked out of the office in disgust because Dr. Newsom would not provide her with additional prescriptions. (Defendants APA p. 7). Dr. Newsom also referred the Claimant to a drug addiction assessment program and advised her that any pain management would have to be done through the neurosurgeon, Dr. McHenry. (Defendants APA p. 7).

The Claimant's neurosurgeon, Dr. Timothy McHenry first saw Claimant on April 27, 2011 approximately one month after the second accident. At that time Dr. McHenry noted the Claimant had positive straight leg raising and parenthesis down her leg. The Commission will recall when the Claimant was released from Dr. Newsom before the second

accident she had negative straight leg raising. (Defendants APA p. 17). Dr. McHenry's diagnosis was a displaced lumbar intervertebral disc after the motor vehicle accident. Dr. McHenry's partner, Dr. Charles Kanos saw the Claimant on June 8, 2011. The Claimant did not tell Dr. Kanos of the second injury/motor vehicle accident, but did indicate she improved and returned to work before her back started hurting again. (Defendants APA p. 18).

Dr. McHenry subsequently performed a surgical procedure on the Claimant and released her on July 22, 2011 with a 13% impairment to the back. However, based on the medical records, the Claimant's contention that all of her current symptoms and surgery are due to the original injury of March 10, 2011 are not supported. In fact, the record is clear the Claimant improved, returned to full duty and then suffered a herniated disc with nerve root impingement after the motor vehicle accident.

Based on the evidence in the record are the following FINDINGS OF FACT:

1. That the Claimant suffered an admitted injury by accident to her lower back occurring on or about March 10, 2011 when she was lifting a patient.
2. That, thereafter, the Defendants provided medical care and treatment to the Claimant at the hands of the medical providers, aforesaid.
3. That the Claimant was released to full duty without restriction on March 22, 2011.
4. That the Claimant returned to work without restrictions upon the release of Dr. Newsom.
5. That the Claimant suffered a second injury by accident involving a motor vehicle accident, occurring on or about March 29, 2011 when she was struck and rear ended while riding in an ambulance.

6. That the Claimant was re-seen by Dr. Newsom for a new injury involving a ruptured disc.

7. That the Claimant's current period of disability is due solely to the motor vehicle accident of March 29, 2011.

8. That on or about April 10, 2011 the Claimant settled her claim for injuries sustained in the motor vehicle accident with Allstate Insurance Company in the amount of \$550.00.

9. That the \$550.00 payment was for full and final settlement of Claimant's personal injury claim, pursuant to the letter of April 10, 2011.

10. That the Claimant cashed the settlement check pursuant to Allstate's letter of April 10, 2011.

11. That the Claimant did not notify the employer, the carrier, or the Workers' Compensation Commission of the settlement of her third party claim pursuant to the terms and provisions of §42-1-560.

12. That the Defendants only discovered the settlement during Claimant's deposition testimony.

13. That the payment of \$550.00 to the Claimant without following the notice requirements of Title 42 constitutes an election of remedy under §42-1-560 and the case law, cited hereinabove.

14. That the Claimant's actions in violation of §42-1-560 constitute not only an election of remedy, but deprive the Commission of jurisdiction over the claim.

CONCLUSIONS OF LAW

1. That the parties to this action, Kerry Levi, employee, claimant and Northern Anderson County EMS, employer and Berkshire Hathaway Homestate Insurance Company, are subject to and bound by the terms and provisions of Title 42 of the South Carolina Code of Laws Annotated.

2. That pursuant to §42-1-160, the Claimant suffered an admitted injury to her lower back occurring on or about March 10, 2011 while lifting a patient.

3. That pursuant to §42-1-160, the Claimant achieved maximum medical improvement and was released without permanency or permanent restrictions on March 22, 2011.

4. That pursuant to §42-1-160, the Claimant suffered her current injury in a motor vehicle accident occurring on or about March 29, 2011.

5. That pursuant to §42-15-60 and §42-9-10, the Claimants current period of disability is related solely to the injury of March 29, 2011.

6. §42-1-560 contains the terms, provisions and requirements for the resolution of third party claims under Title 42.

7. That pursuant to §42-1-560, the Claimant may not settle her third party claim without the filing of the Forms and/or Notices specified by the Commission and placing the employer, carrier, and Workers' Compensation Commission on notice of the settlement.

8. That pursuant to §42-1-560, the Defendants have a right to participate in all aspects of the third party claim, and the Claimant maintains the statutory duty to protect the lien of the Defendants.

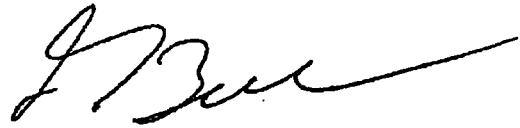
9. That pursuant to §42-1-560, the Claimant accepted a settlement in the amount of \$550.00 from Allstate Insurance Company without the requisite notifications.

10. That pursuant to §42-1-560 and the case law cited herein, such payment by Allstate and acceptance by the Claimant constitutes an election of remedy.

11. That upon acceptance of the settlement without the requisite notices to the Defendants, the Claimant's election of remedy deprives the Workers' Compensation Commission a further jurisdiction over the claim. Stroy; Fisher.

ORDER

For the reasons stated hereinabove, it is therefore ordered that the claim to benefits of Kerry Levi is dismissed, with prejudice, due to an election of remedy and the Defendants may immediately cease all benefits under Title 42.



Commissioner T. Scott Beck, Chairman



Commissioner Andrea C. Roche



Commissioner Melba L. James

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 2nd day of April 2013
By Valerie B. Deller
Administrative Assistant to the Commissioner

Chadwick D. Pye
David Hill Keller

The South Carolina Court of Appeals

Kerry Levi, Appellant,

v.

Northern Anderson County EMS, and Berkshire
Hathaway Homestate Insurance Company, Respondent.

Appellate Case No. 2012-212631

ORDER

After careful consideration of the parties' filings, Appellant's motion to stay this appeal while a third-party suit is pending is denied.


FOR THE COURT

Columbia, South Carolina

FILED

St. 6/3/13

cc:

John S. Nichols

David Hill Keller

Blake Alexander Hewitt

South Carolina Workers' Compensation Commission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



WCC File #: 1011709
Carrier File #: 55002883
Carrier Code #: 1034
Employer FEIN #: 57-0868164

Claimant's Name: Kerry Deanna Levi SSN: _____ Employer's Name: Northern Anderson County EMS
Address: _____ Address: 10703 Anderson Rd.
City: Laurens State: SC Zip: _____ City: Easley State: SC Zip: 29640
Home Phone: _____ Cell Phone: _____ Insurance Carrier: Cornhusker Casualty Company
Preparer's Name: Michael A. Hart Law Firm: The Dick James Law Firm Preparer's Phone #: (864) 298-0000

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:
☒ Injury ☐ Illness ☐ Repetitive Trauma

Date of Injury or Illness: 3/10/2011

- 1a. The claimant sustained an injury to back (Part(s) of Body Injured) on 3/10/2011 (Month/Day/Year) in Greenville county, state of SC.
Body part(s) affected are: Back.
- 1b. Briefly describe how the accident occurred. Claimant injured her back while lifting a patient.
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 3/10/2011 (Month/Day/Year) in the following manner:
Verbal to Supervisor, Gary Lell.
- ☒ 6. Due to injury, the claimant is in need of (check one):
☐ (a) medical examination and treatment for: _____
☒ (b) additional medical examination and treatment for: Back.
- ☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
TBD
- ☒ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
☐ (1) General Disability: ☐ Total ☒ (2) Specific Disability: ☐ Total
☐ (3) Wage Loss ☐ Partial ☒ Partial
- ☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:
TBD
- 10a. At the time of the injury, the Claimant was paid weekly wages of \$520.00, and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
- 11a. Further grounds or unusual aspects of claim: TBD
- 11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
Doctors Care- 6704 White Horse Road, Greenville, SC 29611. Greenville Hospital- 701 Grove Road, Greenville, SC 29605. Mountain View Family Practice- 398 The Parkway, Greer, SC 29650. Center for Occupational Health- 1020 Grove Rd, Greenville, SC 29605.
- 11c. To the best of your knowledge, did you have any prior permanent disability? NO
If yes, describe: _____
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☒ 13a. I am filing a claim. I am not requesting a hearing at this time.
- ☐ 13b. I am requesting a hearing. A \$25 fee is required.
14. Estimated time needed for hearing: _____

I verify the contents of this form are accurate and true to the best of my knowledge.
Michael A. Hart Plaintiff's Attorney
Title Attorney Email michael@dickjameslawfirm.com
Preparer's Signature Date 04/25/2011

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

50

Employee's Notice of Claim and/or
Request for Hearing

South Carolina Workers' Compensation Commission
1612 Marlon Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



LC File #: 1011709
Carrier File #: 55003001
Carrier Code #: 1034
Employer FEIN #: 57-0868164

Claimant's Name: Kerry Deanna Levi SSN: _____ Employer's Name: Northern Anderson County EMS
Address: _____ Address: 10703 Anderson Rd.
City: Laurens State: SC Zip: _____ City: Easley State: SC Zip: 29640
Home Phone: _____ Cell Phone: _____ Insurance Carrier: Cornhusker Casualty Company
Preparer's Name: Michael A. Hart Law Firm: The Dick James Law Firm Preparer's Phone #: (864) 298-0000

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: 3/29/2011

☒ Injury ☐ Illness ☐ Repetitive Trauma

- 1a. The claimant sustained an injury to reinjured back (Part(s) of Body Injured) on 3/29/2011 (Month/Day/Year) in Anderson county, state of SC.
Body part(s) affected are: Reinjured back.
- 1b. Briefly describe how the accident occurred. Claimant was in patient section of EMS vehicle and it was rear ended.
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 3/29/2011 (Month/Day/Year) in the following manner:
Verbal to Supervisor, Gary Lell.
- ☒ 6. Due to injury, the claimant is in need of (check one):
☐ (a) medical examination and treatment for: _____
☒ (b) additional medical examination and treatment for: Reinjured back.
- ☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
TBD
- ☒ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
☐ (1) General Disability: ☐ Total ☒ (2) Specific Disability: ☐ Total ☒ Partial
☐ (3) Wage Loss ☐ Partial
- ☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:
TBD
- 10a. At the time of the injury, the Claimant was paid weekly wages of \$620.00, and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
- 11a. Further grounds or unusual aspects of claim: TBD
- 11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
Greenville Memorial Hospital- 701 Grove Road. Greenville 29605. Mountain View Family Practice- 406 Memorial Dr., Ext. Greer, SC 29651. Southeastern Neurosurgical & Spine Institute- 111 Doctors Drive. Greenville, SC 29605.
- 11c. To the best of your knowledge, did you have any prior permanent disability? NO
If yes, describe: _____
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☒ 13a. I am filing a claim. I am not requesting a hearing at this time.
- ☐ 13b. I am requesting a hearing. A \$25 fee is required.
14. Estimated time needed for hearing: APR 27 2011

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature: Michael A. Hart Division of Claims
Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

Plaintiff's Attorney: Michael A. Hart michael@dickjameslawfirm.com Date: 04/26/2011
Title: Com Email: _____

WCC Form # 50
Revised 9/07

50

Employee's Notice of Claim and/or
Request for Hearing

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5675



WCC File #: 1104303 & 1104304
Carrier File #: 55003001
Carrier Code #: 1034
Employer FEIN #: 57-0868164

Claimant's Name: Kerry Levi SSN: _____ Employer's Name: Northern Anderson County EMS
Address: _____ Address: P.O. Box 51222
City: Laurens State: SC Zip: _____ City: Piedmont State: SC Zip: 29673
Home Phone: _____ Work Phone: () Insurance Carrier: Cornhusker Casualty Company
Preparer's Name: David Hill Keller Law Firm: Constangy, Brooks & Smith, LLP Preparer's Phone #: (864) 990-1882

The date of injury reported on Form 12A is: **March 10, 2011 & March 29, 2011**

Check appropriate section(s). The employer's representative requests a hearing to:

- I. ☐ **Stop payment of compensation.** Claimant has reached maximum medical improvement and Claimant continues to receive temporary compensation payments. The employer's representative requests a hearing pursuant to § 42-9-260(D) to stop payment of temporary compensation. A hearing requested pursuant to this section must be held within sixty days of the date of the request.

Claimant reached maximum medical improvement on _____ (m/d/yyyy) (copy of medical report must be attached).

Compensation payments are current as of _____ (m/d/yyyy) and shall continue until otherwise ordered or until Form 17 is signed by the claimant.

A Form 17 was offered and refused on _____ (m/d/yyyy).

- II. ☒ **Address suspension, termination, or reduction of temporary disability payments for any cause.**

☒ a. At any time pursuant to § 42-9-260(E).

☐ b. After the one-hundred-fifty day period has expired pursuant to § 42-9-260(F), R.67-505 and R.67-506.

The basis for the termination/ suspension is See Attached Motion

- III. ☐ **Determine if compensation is due pursuant to § 42-9-10, § 42-9-20 or § 42-9-30 and, if so, in what amount, based on the following grounds:**

Claimant reached maximum medical improvement on _____ (m/d/yyyy) (copy of medical report must be attached).

- IV. ☒ **Request Credit for Overpayment of temporary compensation pursuant to § 42-9-210.**

- V. ☐ **Determine amount of compensation for claims involving a fatality.** (Dependency investigation must be attached).

☐ a. Payment of unpaid balance of compensation when employee dies pursuant to § 42-9-280.

☐ b. Amount of compensation for death of employee due to accident pursuant to § 42-9-290.

A hearing requested pursuant to this section will be set on an expedited basis.

- A \$ 25.00 filing fee and updated Form 18 must be included with an employer's request for a hearing.
- An employer requesting a hearing must include certification that the request has been served on all parties in compliance with R.67-211.

Attorney at Law

September 14, 2011

Preparer's Signature

Title

Date

Constangy, Brooks & Smith, LLP, 105 N. Spring Street, Suite 105, Greenville, SC 29601

Address

1571288.1

Questions about the use of this form should be directed to the Judicial Department at 803-737-5675, or visit us online at www.wcc.sc.gov.

WCC Form # 21
Revised 04/18/2011

21

Employer's Request for Hearing

**BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

Kerry Levi,	)	
	)	
Employee/Claimant,	)	
	)	
vs.	)	WCC File 1104303 / 1104304
	)	
Northern Anderson County EMS,	)	
	)	
Employer,	)	
	)	
Berkshire Hathaway Homestate Companies,	)	
	)	
<u>Carrier/Defendants.</u>	)	

MOTION

It is respectfully submitted that the South Carolina Workers' Compensation Commission issue an Order pursuant to §42-9-260(E), stopping the Claimant's temporary total disability compensation upon the following grounds:

1. That the Claimant received an admitted injury by accident on March 10, 2011 involving her lower back, File No. 1104303.
2. The Claimant had no compensable lost time and returned to work.
3. That on March 29, 2011, the Claimant suffered an exacerbation of her first injury when she was involved in a motor vehicle accident while on the job. Found in WCC File No. 1104304.
4. That the motor vehicle accident claim was accepted and the Claimant was placed on temporary total disability compensation as a result thereof.

5. That the Defendants' have discovered that the Claimant settled the third party claim involving the motor vehicle accident of March 29, 2011 on April 19, 2011 with All State Insurance Company in the amount of \$550.00. (Attachment 1).

6. That pursuant to South Carolina Code of Laws Annotated §42-1-560, the Claimant has the duty and responsibility of placing the employer/carrier and workers' compensation commission on notice of any third party claim and/or settlement thereof.

7. That the Claimant did not place the employer/carrier or workers' compensation commission on notice of a third party claim or prosecution or settlement thereof.

8. That pursuant to the South Carolina cases of Fisher v. SC DMR, 277 SC 573, 291 SE2d 200 (1982), and Kimmer v. Murata of America, Inc., 372 SC 39, 460 SE2d 507 (Ct. App. 2006), the Claimant has elected her remedy.

9. That Kimmer, is clear that no prejudice is required for election of remedy, however, by settling for \$550.00, the Claimant, who has already incurred \$6,307.76 in indemnity in medical benefits has substantially harmed and prejudiced the Defendant's right to recoup its statutory lien against All State.

IT IS THEREFORE RESPECTFULLY SUBMITTED that the Commission issue an Order dismissing Claimant's claims with prejudice based on the doctrine of election of remedy found in §42-1-560 and attendant case law.

Respectfully submitted.



David Hill Keller
Constangy, Brooks & Smith, LLP



Claimant's Name: Kerry Deanna Levi Employer's Name: Northern Anderson County EMS
Address: _____ Address: P.O. Box 51222
City: Travelers Rest State: SC Zip: _____ City: Piedmont State: SC Zip: 29673
Home Phone: (864)872-1590 Work Phone: () Carrier: Comhusker Casualty Company
Preparer's Name: Michael Hart, Esquire Preparer's Phone #: (864) 298-0000

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$294.07 2. AWW: \$441.09 Date of Injury: 3/10/11 & 3/29/11
3. Type of injury and body part(s): Back
4. Facts in controversy: Carrier filed a Form 21 and Motion to Dismiss dated 9/14/11. Claimant was diagnosed with a displaced lumbar intervertebral disc by Dr. Kanos on 5/6/11 and he recommended a L5-S1 microdiscectomy. Carrier would not authorize the surgery as recommended by the treating physician. Ms. Levi continued to have pain in her back and in July, 2011 she began experiencing numbness and tingling in her leg and foot. On 7/5/11 Ms. Levi went to the emergency room due to her leg and foot going numb and Dr. McHenry perform surgery on Ms. Levi at that time. Ms. Levi contends that all of her pain and symptoms are due to her injury of 3/10/11 and not the accident of 3/29/11. Claimant is still attending physical therapy and has not reached MMI at this time.
5. Legal issues involved: Whether or not carrier can stop payment based on their Form 21 and request credit for over payments and whether or not Claimant is at MMI from her accident date of 3/10/11. Carrier contends that Claimant settled the third party claim on 4/19/11 with Allstate in the amount of \$550.00 and failed to notify the carrier of same. Carrier has filed a Motion to Dismiss the claim for date of accident of 3/29/11.
6. Unusual aspects: _____
7. Witnesses (designate if expert):* Experts pursuant to APA exhibits; claimant; all persons listed on Employer's Form 58
8. Exhibits: Letter from Allstate Insurance dated 4/10/11 to Kerri Levi from Cynthia Anderson-Weisbrich
Claimant reserves the right to submit additional exhibits in response to Defendant's evidence; APA exhibits
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance): Reports pursuant to Reg. 67-612
10. Name, address, and specialty, if any, of the treating physician: Dr. Charles Kanos and Dr. Timothy McHenry, Southeastern Neurosurgical and Spine Institute, 111 Doctors Drive, Greenville, SC 29602; Center for Health & Occupational Services, 1020 Grove Road, Greenville, SC 29605.
11. Impairment rating(s); body part(s); physician and date of opinion: Lumbar spine- Claimant has not received an impairment rating at this time.
12. I am amending my Form 50/51 in the following manner: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Signature: Michael Hart, Esquire Email: Michael@dickjameslawfirm.com

Date of hearing: 1/3/12 Time needed for hearing: 30 minutes

On behalf of ☒ Claimant ☐ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.
* Commissioners reserve the right to admit expert witnesses at hearings.

**BEFORE THE SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION
W.C.C. FILE NO. 1100304 & 1104303**

KERRI LEVI

Employee / Claimant,

Vs.

**NORTHERN ANDERSON COUNTY
EMS**

and

**CORNHUSKER CASUALTY
INSURANCE COMPANY**

Defendants

**AMENDED
ADMINISTRATIVE
PROCEDURES ACT SUBMITTAL**

**TO: THE HONORABLE AVERY B. WILKERSON, JR., COMMISSIONER FOR
SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION, AND TO
DAVID H. KELLER, ATTORNEY FOR DEFENDANTS**

YOU ARE HEREBY NOTIFIED THAT The Dick James Law Firm, pursuant to the provision of the South Carolina Workers' Compensation Act and South Carolina Code Section I-23-330, (1976, as amended), herewith submits the following medical reports as direct evidence on behalf of the Claimant, to wit:

<u>NAME OF PHYSICIAN/OTHER</u>	<u>DATE OF REPORTS</u>	<u>PAGE NOS.</u>
APA #1 Center for Health & Occupational Services	3/15/11 - 5/23/11	1-12
APA #2 SE Neurosurgical & Spine Institute	05/06/11 - 9/21/11	13-20

CLAIMANT'S EXHIBITS

EXHIBIT #1 Letter from Allstate Insurance to Ms. Levi dated 4/10/11
EXHIBIT #2 Letter from Allstate Insurance to Dick James Law Firm dated 12/29/11
EXHIBIT #3 Letter from Allstate Insurance to Dick James Law Firm dated 5-9-11

YOU ARE FURTHER HEREBY NOTIFIED that you have the right to Cross-examination; and, should you desire to exercise said right, you are to forthwith Schedule the

deposition of any of the physicians, whose reports are submitted, for the purpose of cross-examination.

YOU ARE FURTHER NOTIFIED that the originals of the documents referred to herein, or photocopies from the physicians/others, are being forwarded to the South Carolina Workers' Compensation Commission, for inspection in the file of the South Carolina Workers' Compensation Commission and inclusion into the evidence on behalf of the Plaintiff.

Respectfully submitted,
THE DICK JAMES LAW FIRM

Michael A. Hart

Michael A. Hart, Esq.
611 N. Main Street
Greenville SC 29602
(864) 298-0000
Attorney for Claimant

Dated: Dec 29, 2011
Greenville, South Carolina

CLAIMANT'S

APA #1

CENTER FOR HEALTH & OCCUPATIONAL SERVICES

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES

Patient Information

(Please print clearly, complete form in its entirety, and return to desk along with insurance cards)

Date: 3/15/11

Name Levi Derry Dranna "Chartier"
Last First Middle Maiden

Address _____
Street City
Laurens SO Laurens
State Zip County of Residence

Phone N/A Age 37 Sex M F Race _____
Home Cell

Date of Birth 11/27/73 Social Security No. _____ Marital Status Separated

E-Mail Address _____
=====

Employer Northam Anderson Ems Employment Status Full time
(Full time, Part time, etc.)

Occupation Paramedic Length of Employment 5 years Phone 214-864-7

Employer's Address 11703 Anderson Rd Eastley SC 29104
Street City State Zip

Next of Kin/Local Contact _____ none _____ Relation to Patient father

Spouse's Name Separated Spouse's Employer _____

Spouse's Daytime Phone _____ Spouse's Date of Birth _____
=====

Please check if appropriate: .

Work Related Injury ☒ Automobile Accident _____ Other Accident _____ Place Occurred Dalmon

Date of Accident or Injury Last Thursday How Occurred moving a heavy east
_____ pt.

Insurance Information (This includes Medicare and Medicaid)

Primary Insurance _____ Policy No. _____

Insured's Name _____ Date of Birth _____ Relation to Patient _____
=====

Secondary Insurance _____ Policy No. _____

Insured's Name _____ Date of Birth _____ Relation to Patient _____
=====

**GHS Center for Health and
Occupational Services**

1020 Grove Road
Greenville, SC 29605
Phone (864) 455-2300
Fax (864) 455 2399

Name Kerry Levi SS# _____

Company NACEMS

Date of Injury 3/10/11

Diagnosis: Lumbar HNP

Medications: Ibuprofen

Work Status: May return to work on 3/22/11

☒ Full Duty

☐ Modified Duty:

[None = N] [Rarely = R] [Occasional = O] [Frequently = F] [As Tolerated = AT]

- ☐ Lift, push or pull no more than ____ lbs. []
- ☐ Bend or Twist []
- ☐ Walk and Stand []
- ☐ Sit/Stand as needed
- ☐ Sedentary Work, change positions as needed
- ☐ No use of _____
- ☐ Forceful or Repetitive use of (right/left) hand and arm []
- ☐ Overhead use of (right/left) arm []
- ☐ Squat or kneel []
- ☐ Climb or work at heights []
- ☐ Awkward or Static postures []
- ☐ No operating heavy machinery or Commercial Motor Vehicle
- ☐ Elevate affected area _____
- ☐ Use crutches as needed for ambulation
- ☐ Use _____ splint as needed
- ☐ Other _____

*Recommend three man
truck with crane
by Proaxis.*

Instructions:

- ☐ Stay active during your recovery.
- ☒ Use over the counter pain relievers by package directions and/or follow prescription directions.
- ☒ Report any problems with medications to your provider.
- ☒ Apply ice or heat to the affected areas as needed.
- ☒ Begin gentle stretches as demonstrated in clinic or in your self care handout.
- ☐ Elevate the affected area to reduce swelling.
- ☐ Wash wound with soap and water ____ times per day.
- ☐ May apply antibiotic ointment.
- ☐ Keep bandage clean and dry.
- ☐ Seek care for any signs of infection including increasing redness, swelling, pain or drainage.
- ☐ Other: _____

Follow Up: 2 weeks

- ☐ Appointment Date: _____ Time: _____ Provider: _____
- ☐ Maximum Medical Improvement: Contact your employer prior to making further appointments.
- ☐ Referral to _____ You will be contacted with an appointment.

Physician/NP: [Signature] Date: 3/22/11

return yellow copy to your employer

Revised 3/09

**GHS Center for Health and
Occupational Services**

1020 Grove Road
Greenville, SC 29605
Phone (864) 455-2300
Fax (864) 455 2399

Name Kerry D. Levi SS# _____

Company NAC EMS

Date of Injury 3-10-11

Diagnosis: Lumbar radiculopathy

Medications: Oral prednisone; Ultracet as needed

Work Status: May return to work on 3/15/11

☐ Full Duty

☒ Modified Duty:

[None = N] [Rarely = R] [Occasional = O] [Frequently = F] [As Tolerated = AT]

☒ Lift, push or pull no more than 20 lbs. [AT]

☒ Bend or Twist [AT]

☐ Walk and Stand []

☐ Sit/Stand as needed

☐ Sedentary Work, change positions as needed

☐ No use of _____

☐ Forceful or Repetitive use of (right/left) hand and arm []

☐ Overhead use of (right/left) arm []

☐ Squat or kneel []

☐ Climb or work at heights []

☐ Awkward or Static postures []

☐ No operating heavy machinery or Commercial Motor Vehicle

☐ Elevate affected area _____

☐ Use crutches as needed for ambulation

☐ Use _____ splint as needed

☐ Other _____

Instructions:

☐ Stay active during your recovery.

☐ Use over the counter pain relievers by package directions and/or follow prescription directions.

☐ Report any problems with medications to your provider.

☐ Apply ice or heat to the affected areas as needed.

☐ Begin gentle stretches as demonstrated in clinic or in your self care handout.

☐ Elevate the affected area to reduce swelling.

☐ Wash wound with soap and water _____ times per day.

☐ May apply antibiotic ointment.

☐ Keep bandage clean and dry.

☐ Seek care for any signs of infection including increasing redness, swelling, pain or drainage.

☐ Other: _____

Follow Up: 3/22/11

☐ Appointment Date: _____ Time: _____ Provider: _____

☐ Maximum Medical Improvement: Contact your employer prior to making further appointments.

☐ Referral to _____ You will be contacted with an appointment.

Physician/NP: _____

Date: 3-15-11

return yellow copy to your employer

Revised 3/09

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES -

OUTPATIENT VISIT

Name: Kerry Levi
SSN:

Date of Service: 03-15-11
Date of Injury: 03-10-11

Subjective: Patient is a paramedic with Northern Anderson County EMS who comes to clinic today after an Emergency Department visit for back pain. She states that she caught a patient that was falling and had the sudden onset of pain in her back. The pain has been radiating to the right leg. She denies any significant numbness, weakness or paresthesias in the leg. She was seen in the Emergency Department on the day of injury. An MRI of the lumbar spine was performed which was notable for a 6 x 6 mm disc extrusion displacing the right S-1 nerve root. She was placed on Prednisone dose pack and Valium. She is tolerating the medications but is requesting something for pain. She currently rates her pain as 2 to 3/10. Patient denies any previous back pain or problems; however, when requesting authorization to retrieve her Emergency Department records related to her back she gave explicit permission only to review records from the lumbar spine related to the March 10, 2011 injury but not other records related to her low back. Patient states that she is eager to return to full duty as a paramedic.

Past Medical History: Per HPI, otherwise noncontributory.

Medications: Prednisone and Valium.

Allergies: Morphine. Reports that she is unable to use anti-inflammatories for one year due to a Nissen Fundoplication.

Review of Systems: Constitutional: Negative. Respiratory: Negative. Cardiovascular: Negative. GI: Negative. Musculoskeletal: Per HPI. Neurologic: Per HPI.

Objective: General: Patient is a pleasant female in no distress. She ambulates in the clinic without difficulty. Vital signs are stable. Chest: Clear to auscultation. Cardiovascular: Regular rate and rhythm without murmurs, rubs or gallops. Musculoskeletal: Inspection of the lumbar spine reveals no skin lesion or deformity. She has minimal tenderness to palpation over the midline. No muscle spasm is noted. Neurologic Exam: Strength in the lower extremities is within normal limits. Deep tendon reflexes are symmetric and physiologic. Sensation is intact to light touch. Straight leg raises are positive on the right. Extremities: No clubbing, cyanosis or edema. Pulses are intact.

Impression: Lumbar HNP.

Plan:

1. Continue with Prednisone taper. Patient has requested a prescription for Ultracet. She does report a past history of seizure disorder and understands that there is the potential for this medication to slightly increase her risk of a seizure. She states that she has used it in the past without difficulty. She is given a prescription for Ultracet one to two po q6h prn pain, dispense 30 with no refill.
2. She is encouraged to remain active and is given a self-care handout for lumbar disc herniation.
3. We discussed return to work. She is very eager to return to full duty which includes heavy lifting. Recommend that she have a gradual transition back to her regular activities at work.
4. Return to clinic in one week or sooner for any problems or concerns.

Work Status: May return to work on 03-15-11 with the following restrictions:

1. Lift, push or pull no more than 20 pounds as tolerated.
2. Bend and twist as tolerated.

Stacey Newsom, M.D., MPE

llr 03-17-11

C: Northern Anderson County EMS, Dana Lee, PO Box 51222, Piedmont, SC 29673
Brown and Brown, PO Box 16837, Greenville, SC 29607

MAR 18 2011

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES

OUTPATIENT VISIT

Name: Kerrv Levi
SSN:

Date of Service: 03-22-11
Date of Injury: 03-10-11

Subjective: Patient follows up in clinic for her lumbar HNP. She states that she has had improvement. She denies any pain today. She reports some occasional paresthesias in the right leg associated with minor discomfort; however, feels that she is doing very well. She denies any side effects from her medication. She is currently out of the Ultracet. She returned to light duty for two days and states that she did very well. Only a little discomfort with getting in and out of the truck.

I had received a call from Northern Anderson County BMS with regard to a fitness for duty question. Apparently Mrs. Levi was noted to be possibly having some medication side effects and seemed "out of it". When questioned Mrs. Levi adamantly denies any side effects from her medications. She states that she did well on light duty. She does report stressors at home and at work due to the possibility of having to be out of work. She states this is causing a lot of anxiety. She reports that her only medication at this point is Keppra. Other treating physicians include Mountain View Family Practice and her neurologist, Dr. Boor.

Medications: Keppra.

Allergies: Morphine. Does not tolerate anti-inflammatories.

Objective: General: Patient is a pleasant female. She appears mildly anxious. Affect is a little flat. She is alert and oriented. Speech is clear and fluent. Normal gait. She rates her pain as 0/10. Chest: Clear to auscultation. Cardiovascular: Regular rate and rhythm without murmurs, rubs or gallops. Musculoskeletal: Full range of motion of spine and extremities. No tenderness over the low back. Neurologic Exam: Strength in the extremities is within normal limits. Deep tendon reflexes are symmetric and physiologic. She reports that sensation is intact to light touch. She denies any symptoms with straight leg raises. No clubbing, cyanosis or edema. She has some bruises and scratches to the upper extremities and states that she was working in her yard. No bruising on the trunk is noted.

Impression: Lumbar HNP.

Plan:

1. Tylenol as needed.
2. Continue self-care instructions in herniated disc handout.
3. In regard to fitness for duty issues patient states that she feels well and denies any medication side effects. She has agreed to release medical records from her other treating physicians for medication reconciliation.
4. I have spoken with Northern Anderson County who will be observing for any performance issues and has been advised to return her to clinic for any concerns.
5. Tylenol as needed for pain. She knows to notify the clinic if she is having any worsening symptoms.
6. Return to clinic in two weeks for a recheck.
7. Recommendation for a three man truck until Mrs. Levi has been cleared through Proaxis therapy per their established FCE protocol.

Work Status: May return to work on 03-22-11 without restriction.

Stacey Newsom, M. D., MPH

SN/1lr 03-24-11

C: Northern Anderson County BMS, Dana Lee, PO Box 51222, Piedmont, SC 29673

Brown and Brown, PO Box 16837, Greenville, SC 29607

MAR 28 2011

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES

Patient Information

(Please print clearly, complete form in its entirety, and return to desk along with insurance cards)

Date: 3/31/11

Name Levi Kerry Deanna Chortier
Last First Middle Maiden

Address Lawrens
Street City

SC Laurens
State Zip County of Residence

Phone N/A Age 37 Sex M F Race C
Home Cell

Date of Birth 11/27/73 Social Security No. Marital Status Married

E-Mail Address

Employer vital care Employment Status Full time
(Full time, Part time, etc.)

Occupation Paramedic Length of Employment 5 years Phone

Employer's Address 10703 Anderson Rd Eastley SC 29040
Street City State Zip

Next of Kin/Local Contact Ben Levi Phone Relation to Patient husband

Spouse's Name SAA Spouse's Employer Glaazey mtn. Fire Dept.

Spouse's Daytime Phone Spouse's Date of Birth

Please check if appropriate:

Work Related Injury Automobile Accident X Other Accident Place Occurred Interstate 85

Date of Accident or Injury 3/29/11 How Occurred some hit back of ambulance

Insurance Information (This includes Medicare and Medicaid)

Primary Insurance Policy No.

Insured's Name Date of Birth Relation to Patient

Secondary Insurance Policy No.

Insured's Name Date of Birth Relation to Patient

**GHS Center for Health and
Occupational Services**

1020 Grove Road
Greenville, SC 29605
Phone (864) 455-2300
Fax (864) 455 2399

Name Kerry D. Levi SS# _____

Company NACEMS

Date of Injury (New) 3-29-11

Diagnosis: Lumbar HNP impingement of leg

Medications: as given in ED Symptoms S/p MVA

Work Status: May return to work on 3/31/11

☐ Full Duty

☒ Modified Duty:

[None = N] [Rarely = R] [Occasional = O] [Frequently = F] [As Tolerated = AT]

☒ Lift, push or pull no more than 20 lbs. [AT]

☐ Bend or Twist []

☐ Walk and Stand []

☐ Sit/Stand as needed

☐ Sedentary Work, change positions as needed

☐ No use of _____

☐ Forceful or Repetitive use of (right/left) hand and arm []

☐ Overhead use of (right/left) arm []

☐ Squat or kneel []

☐ Climb or work at heights []

☐ Awkward or Static postures []

☐ No operating heavy machinery or Commercial Motor Vehicle

☐ Elevate affected area _____

☐ Use crutches as needed for ambulation

☐ Use _____ splint as needed

☐ Other _____

*Recommend three
man truck*

Instructions:

☒ Stay active during your recovery.

☒ Use over the counter pain relievers by package directions and/or follow prescription directions.

☒ Report any problems with medications to your provider.

☒ Apply ice or heat to the affected areas as needed.

☒ Begin gentle stretches as demonstrated in clinic or in your self care handout.

☐ Elevate the affected area to reduce swelling.

☐ Wash wound with soap and water _____ times per day.

☐ May apply antibiotic ointment.

☐ Keep bandage clean and dry.

☐ Seek care for any signs of infection including increasing redness, swelling, pain or drainage.

☐ Other: _____

Follow Up: 2 weeks

☐ Appointment Date: _____ Time: _____ Provider: _____

☐ Maximum Medical Improvement: Contact your employer prior to making further appointments.

☐ Referral to _____ You will be contacted with an appointment.

Physician/NP: _____

Date: 3/31/11

return yellow copy to your employer

Revised 3/09

FAXED

APR 15 2011

CBM
1:10 PMGHS Center for Health and
Occupational Services1020 Grove Road
Greenville, SC 29605
Phone (864) 455-2300
Fax (864) 455 2399Name Kerry Levi SS# _____Company NAC EMSDate of Injury 3-29-11Diagnosis: Lumbar HNPMedications: Zylerel, UltramWork Status: May return to work on 4/13/11☒ Full Duty☐ Modified Duty:

[None = N] [Rarely = R] [Occasional = O] [Frequently = F] [As Tolerated = AT]

- ☐ Lift, push or pull no more than ____ lbs. []
- ☐ Bend or Twist []
- ☐ Walk and Stand []
- ☐ Sit/Stand as needed
- ☐ Sedentary Work, change positions as needed
- ☐ No use of _____
- ☐ Forceful or Repetitive use of (right/left) hand and arm []
- ☐ Overhead use of (right/left) arm []
- ☐ Squat or kneel []
- ☐ Climb or work at heights []
- ☐ Awkward or Static postures []
- ☐ No operating heavy machinery or Commercial Motor Vehicle
- ☐ Elevate affected area _____
- ☐ Use crutches as needed for ambulation
- ☐ Use _____ splint as needed
- ☐ Other _____

Instructions:

- ☒ Stay active during your recovery.
- ☒ Use over the counter pain relievers by package directions and/or follow prescription directions.
- ☒ Report any problems with medications to your provider.
- ☒ Apply ice or heat to the affected areas as needed.
- ☒ Begin gentle stretches as demonstrated in clinic or in your self care handout.
- ☐ Elevate the affected area to reduce swelling.
- ☐ Wash wound with soap and water ____ times per day.
- ☐ May apply antibiotic ointment.
- ☐ Keep bandage clean and dry.
- ☐ Seek care for any signs of infection including increasing redness, swelling, pain or drainage.
- ☐ Other: _____

Follow Up: after neurosurgical consult

- ☐ Appointment Date: _____ Time: _____ Provider: _____
- ☐ Maximum Medical Improvement: Contact your employer prior to making further appointments.
- ☐ Referral to Neuro Surgery. You will be contacted with an appointment.

Physician/NP: Stanley A. Newsom, MD, MPHDate: 4-14-11

return yellow copy to your employer

Revised 3/09

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES

OUTPATIENT VISIT

Name: Kerry Levi
SSN:

Date of Service: 03-31-11
Date of Injury: 03-29-11

Subjective: Patient follows up in clinic prior to schedule due to a new injury. She was a restrained passenger in the ambulance when it was struck from behind. She reports having increased paresthesias in the right leg. She was seen in the Emergency Department. X-rays were performed. No acute process was noted. She was given Hydrocodone, Flexeril and Prednisone. She denies any problems with the medications. She is rating her pain as 0 to 7. She denies any numbness or weakness in the extremity. No change in bowel or bladder. The paresthesias are in the right gluteal region and into the right lateral aspect of the leg and foot.

Medications: Hydrocodone, Flexeril and Prednisone.

Allergies: Morphine, Darvocet, Codeine and Phenergan.

Review of Systems: Constitutional: Negative. Respiratory: Negative. Cardiovascular: Negative. GI: Negative. Musculoskeletal: Per HPL. Neurologic: Per HPL.

Objective: General: Patient is a pleasant female. She is in no distress. She ambulates in the clinic without difficulty. Chest: Clear to auscultation. Cardiovascular: Regular rate and rhythm without murmurs, rubs or gallops. Musculoskeletal: Inspection of the lumbar spine reveals no deformity or bruising. Deep tendon reflexes are symmetric and physiologic at the knee and ankle. She reports some mild decrease in light touch to the right lateral aspect of the lower extremity compared to the left. Straight leg raises are negative. Extremities: No clubbing, cyanosis or edema. Heel walk, toe walk, squat and rise without difficulty. Pulses are intact.

Impression:

1. Lumbar HNP exacerbation of leg paresthesias after MVA.

Plan:

1. Continue with current medication.
2. Referral to physical therapy.
3. Return to clinic in 2 weeks or sooner for any problems or concerns. We have discussed referral for LESI. She would like to try therapy as she is a little fearful of the procedure.

Work Status: May return to work on 03-31-11 with the following restrictions:

1. Lift, push or pull no more than 20 pounds.
2. Recommend three man truck.

Stacey Newton, M.D., M

SN/IR 04-01-11

C: Northern Anderson County EMS, Dana Lee, 10703 Anderson Road, Easley, SC 29642

APR 06 2011

CENTER FOR HEALTH AND OCCUPATIONAL SERVICE

OUTPATIENT VISIT

Name: Kerry Levi
SSN:

Date of Service: 04-14-11
Date of Injury: 03-29-11

Subjective: Patient follows up in clinic for her lumbar HNP. She states that she has had improvement. She rates her pain as 0/10. She has some mild discomfort in the right leg in the morning, which resolves during the day. She denies any weakness or paresthesias. No change in bowel or bladder. She states that she feels ready to return to regular work. She is using Advil or Ultracet on occasion. She denies any problems with the medications. No new complaints today.

Medications: Advil, Ultram; others noted in the chart.

Allergies: Morphine, Darvocet, Codeine and Phenergan.

Review of Systems: Constitutional: Negative. Respiratory: Negative. Cardiovascular: Negative. GI: Negative. Musculoskeletal: Per HPI. Neurologic: Per HPI.

Objective: General: Patient is a pleasant female in no distress. She ambulates in the clinic without difficulty. Chest: Clear to auscultation. Cardiovascular: Regular rate and rhythm without murmurs, rubs or gallops. Musculoskeletal: Inspection of the low back reveals no deformity. There is no tenderness. Neurologic Exam: Strength in the lower extremities is within normal limits. She is able to heel walk, toe walk, squat and rise. Deep tendon reflexes are symmetric and physiologic. Sensation is intact to light touch. Straight leg raises are mildly positive on the right. Extremities: No clubbing, cyanosis or edema. Pulses are intact.

Impression: Lumbar HNP exacerbated by recent MVA.

Plan:

1. Continue with current medications.
2. We discussed her leg symptoms. She states that she is not interested in consultation for LESI. Given her persistent symptoms would recommend neurosurgery consult for recommendations.
3. She can return to clinic after the consult is complete.

Work Status: May return to work on 04-13-11 without restriction.

Stacey Newsom, M.D., MPH

SN/1lr 04-15-11

C: Northern Anderson County EMS, Dana Lee, 10703 Anderson Road, Easley, SC 29642

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES

OUTPATIENT VISIT

Name: Kerry Levi
SSN:

Date of Service: 05-23-11
Date of Injury: 03-29-11

Subjective: Patient follows up for a recheck of lumbar HNP and fitness for duty evaluation. She states that her leg pain is worsening. She reports 9/10 pain today. She reports weakness in the great toe on the right. No change in bowel or bladder. She has seen Dr. McHenry who has discussed options. Patient has elected surgical intervention. She denies any problems with her medications.

Review of available recent medical notes include office visit with MD360, Dr. James Taylor on March 5, 2011, which is approximately five days before her original back injury on March 10, 2011. She was seen for foot pain and states that she twisted her foot again. Notable in the plan section is that patient has a normal foot x-ray. She has been in multiple times requesting narcotics. I informed her tonight we would no longer treat her for any issues pertaining to pain. She would have to see her ortho or PCP. Patient expressed understanding but continued to ask for Lortab and sleeping medication. Follow up with PCP or ortho as needed. Second record available today is from May 11, 2011. Mountain View Family Practice. Patient presents for management of back pain and disc herniation. She does not feel she can afford her Lyrica and the Lortab is not helping. She requests a prescription for Oxycodone. Offered to increase Lyrica dose and give her a drug coupon which would reduce the price of Lyrica. Per patient Dr. McHenry told her that he did not want her to take Oxycodone for pain. I have asked patient to discuss pain management with Dr. McHenry, as I think we should have one physician coordinating her pain management. At this point patient got up and walked out of my office without any prescriptions.

Medications: Lyrica, Lortab; others noted in the chart.

Allergies: Morphine, Nubain, Darvocet, Codeine and Phenergan.

Review of Systems: Constitutional: Negative. Respiratory: Negative. Cardiovascular: Negative. GI: Negative. Musculoskeletal: Per HPI. Neurologic: Per HPI.

Objective: General: Patient is a pleasant female. Her affect is flat. Speech is clear and occasionally hesitant. Chest clear to auscultation. Cardiovascular: Regular rate and rhythm without murmurs, rubs or gallops. Musculoskeletal: Inspection of the lumbar spine reveals no rash or deformity. There is no tenderness to palpation. Neurologic Exam: Strength in the lower extremities is within normal limits. She has give way weakness in the right toe which is inconsistent with distraction. Straight leg raises are positive on the right. Extremities: No clubbing, cyanosis or edema. Pulses are intact.

Impression:

1. Lumbar HNP.
2. Fitness for duty evaluation.

Plan:

1. Follow up with neurosurgery as scheduled.
2. In regard to fitness for duty evaluation patient has been given information on referral to the Pavilion for an addiction assessment and healthcare worker fitness for duty evaluation. She verbalizes understanding. She will remain on current restrictions until the evaluation and recommendations are reviewed. I also feel it would be beneficial for Mrs. Levi to be under the care of a pain management specialist to centralize and coordinate her prescription pain medications.

Name: Kerry Levi
SSN:

Date of Service: 05-23-11
Date of Injury: 03-29-11
Page 2

Work Status: May return to work on 05-23-11 with the following restrictions.

1. No driving company vehicle or direct patient care.

Addendum: Patient left the office stating that she did not want a copy of her work restrictions. She did verbalize understanding of the follow up recommendations and instructions.

Stacey Newsom, M. D., MPH

SN/1lr 05-25-11

C: Northern Anderson County EMS, Dana Lee, PO Box 51222, Piedmont, SC 29673
Brown and Brown, PO Box 16837, Greenville, SC 29607

12

CLAIMANT'S

APA #2

SOUTHEASTERN NEUROSURGICAL & SPINE INSTITUTE

PROGRESS NOTES

Patient: LEVI, KERRY D
DOB: 11/27/1973 **Age:** 37 Y **Sex:** Female
Phone:
Address: LAURENS, SC
Pcp: James Franklin, MD

Provider: Timothy McHenry, MD
Date: 05/06/2011

Subjective:

CC:

1. Rto to discuss surgery.

HPI:

History of Present Illness:

Pain: cramping, radiating, weakness & numbness, satisfactorily controlled. Pain score is 7/10 today.

SPINE:

Mr. and Ms. Levi returned today for followup. Ms. Levi continues to have right radicular leg pain and paresthesias. She continues to have weakness in her right foot and ankle. She states the symptoms have worsened slightly. They have discussed treatment options further at home and today are committed to surgery and consider this her best option to recover. Overall, the interaction was much more harmonious and appropriate, in my opinion.

ROS:

CONSTITUTIONAL:

Fever no. Weight Loss no. Weight Gain no. Fatigue no. Chills no. Night Sweats no.

CARDIOVASCULAR:

Chest Pain no. Irregular Heart Beat no. Poor Circulation no. Leg/feet swelling no. Leg/foot ulcer no.

GENITOURINARY:

Blood in urine no. Pain in urinating no. Unable to urinate no. Bladder Infection no. Frequent Urination no. Difficulty with urination no.

NEUROLOGICAL:

Paralysis no. Frequent Headaches no. Seizures **yes**. CVA/ITA no. Syncope no. Anxiety/Depression no. Tremors no. Speech Problems no. Feeling of hopelessness no. Sleep disturbance no. Vision Changes no.

-EYES:

Decreased Vision no. Cataracts no.

RESPIRATORY:

COPD no. Asthma no. Persistent Cough no. Shortness of Breath no. Wheezing no. Pneumonia no.

ENT:

Recent loss of hearing no. Sinusitis no. Headache no.

GASTROINTESTINAL:

GERD **yes**. PUD/Gastritis no. Liver Problems no. Stomach Pain no. Diarrhea no. Abdominal Pain no. Nausea/Vomiting no. Black tar-like or bloody stool no.

SKIN:

Rash or itching no. Dryness of Skin no. Ulcer **yes**. Cancer no. Open sores no. New Moles no. Poor wound healing no. Skin Infection no.

PSYCHIATRIC:

Depression no. Bipolar Disease no.

ENDOCRINE:

Diabetes no. Thyroid disease no. Heat intolerance no. Cold intolerance no.

HEME/LYMP:

Anemia no. Bleeding Problems no. Blood Transfusion no. Bruises no.

ALLERGIC/IMMUNOLOGIC:

Seasonal no. Iodine no. Food Allergies no.

MUSCULOSKELETAL:

Joint Swelling or Stiffness no. Muscle aches no. Joint Pain no. Pain in multiple joints no.

13

Weakness no.

No changes found in review of system since last checked on, No chest pain or shortness of breath.

Medical History: Seizure Disorder/Epilepsy, HX OF HGERD, Hernia, Esophageal ulcer.

Surgical History: Nissen fundoplication, hysterectomy, c-section X 5, Left wrist ORIF, Medial plantar fascia release, tarsal tunnel release, calcaneal spur excision/Dr Tom Anderson 11-17-2010.

Hospitalization/Major Diagnostic Procedure: see surg hx.

Family History: Family: HTN Father: alive 65 yrs HYPERTENSION, HYPERLIPIDEMIA Mother: alive 60 yrs HYPERLIPIDEMIA, HYPERTENSION
3 STEP CHILDREN.

Social History: no Alcohol. Smoking: yes Are you a: current smoker, How many cigarettes a day do you smoke? 11-20. no Recreational drug use.

Resides in Greenville, is married.

Medications: Keppra tablet 1000 mg 1 tab(s) 2 times a day, Lyrica, Medication List reviewed and reconciled with the patient

Allergies: NSAIDs, nubain, Darvocet N 50, morphine.

Objective:

Vitals: Ht 64, Wt lbs 169, Wt kg 76.66, BMI 29.01, HR 76.

Past Orders:

Examination:

SHCC SM Spine:

On physical examination, straight-leg raise on the right side reproduces posterolateral radicular leg pain down to the ankle. Decreased sensation over the right third toe dorsum and lateral heel. She is 3/5 in right foot eversion and ankle dorsiflexion and 0/5 in right great toe extension. No significant changes in neurologic status compared with last week.

Assessment:

Assessment:

1. DISPLACED LUMBAR INTERVERT DISC - 722.10 (Primary)

Plan:

1. DISPLACED LUMBAR INTERVERT DISC Refill Lyrica, 75 mg, 1 tab, PO, BID, 60, Refills 1; Start Lortab 7.5/500 tablet, 500 mg-7.5 mg, 1 tab(s), orally, every 6 hours, 5 day(s), 40, Refills 0. We discussed lumbar microdiscectomy surgery, which would be a right-sided L5-S1 microdiscectomy. We discussed again the option of injection as well, and she would like to proceed with surgical treatment. We discussed risks including infection, damage to nerve with loss of function or paralysis, recurrence of symptoms from either re-herniation or scar formation, persistence of symptoms, need for further surgery, medical risks including heart attack, stroke, blood clot and/or death. We will arrange for surgery on an elective basis. TM/bep.

Immunizations:

Labs:

Preventive:

Follow Up: for surgery

Provider: Timothy McHenry, MD

Patient: LEVI, KERRY D **DOB:** 11/27/1973 **Date:** 05/06/2011

Electronically signed by Timothy McHenry MD on 05/11/2011 at 09:33 AM EDT

Sign off status: Completed

14

CLAIMANT'S

EXHIBIT #1

LETTER FROM ALLSTATE INSURANCE TO
KERRI LEVI DATED APRIL 10, 2011



Allstate. Palmetto
P.O. BOX 660636
DALLAS TX 75266
You're in good hands.



Kerri Levi

LAURENS SC

April 10, 2011

INSURED: DONALD PROELL
DATE OF LOSS: March 29, 2011
CLAIM NUMBER: 0196922777 CCW

PHONE NUMBER: 800-366-8997
FAX NUMBER: 866-467-2763
OFFICE HOURS: Mon - Fri 8:00 am - 5:30 pm,
Sat 8:00 am - 2:00 pm

Dear Kerri Levi,

This letter is a follow up to our conversation today. As we agreed, I will be sending a check to you in a separate letter in the amount of \$550.00 for full and final settlement on your injury claim. Please understand that signing and cashing this check settles your claim from the above accident. Any medical expenses incurred by you from this loss will be presented to us from your Workman Compensation Adjuster. Should you have any questions, you may contact me at 1-800-366-8997, extension 3688 during the hours of 9:00 am and 5:30 pm, Monday thru Friday.

Sincerely,

CYNTHIA ANDERSON-WEISBRICH

CYNTHIA ANDERSON-WEISBRICH
800-366-8997 Ext. 3688
Allstate Insurance Company

GENI001

0196922777 CCW

1000020110411TR002005370001001008379



CLAIMANT'S EXHIBIT #2
Letter from Allstate to Dick James Law Firm dated 12/29/11



Allstate

You're in good hands.

Palmetto
PO BOX 7068
COLUMBIA SC 29202



THE DICK JAMES LAW FIRM LLC
611 N MAIN ST
GREENVILLE SC 296011611

December 29, 2011

INSURED: DONALD PROELL
DATE OF LOSS: March 29, 2011
CLAIM NUMBER: 0196922777 NRO
KERRI LEVI

PHONE NUMBER: 800-366-8997
FAX NUMBER: 866-467-2763
OFFICE HOURS:

Dear THE DICK JAMES LAW FIRM LLC,

This will confirm that Allstate paid and Ms. Levi cashed a settlement check for \$550.00. This was for her pain and suffering only with the understanding we would pay for the reasonable and related medical bills.

Sincerely,

RICHARD OZEGOVICH

RICHARD OZEGOVICH
800-366-8997 Ext. 3738
Allstate Insurance Company

GENI001

0196922777 NRO

CLAIMANT'S EXHIBIT #3
Letter from Allstate to Dick James Law Firm dated 05/09/11



Allstate
You're in good hands.

Palmetto
1400 BROWNING ROAD
COLUMBIA SC 29210

|||||
THE DICK JAMES LAW FIRM LLC

PO BOX 2548

GREENVILLE SC 29602-2548

May 09, 2011

INSURED: DONALD PROHL

DATE OF LOSS: March 29, 2011

CLAIM NUMBER: 0196922777 NKE

PHONE NUMBER: 800-366-8997

FAX NUMBER: 866-467-2763

OFFICE HOURS: Mon - Fri 8:00 am - 5:30 pm,
Sat 8:00 am - 2:00 pm

Your client Kerri Levi

Dear Michael Hart,

Thank you for discussing the above noted matter with me this morning. It appears that your client has accepted the sum of \$550 for his general damages from this auto accident. I look forward to reviewing this matter with you further as more details become available. I have attached a copy of the closing letter and check for pain and suffering in the amount of \$550 for your review.

Let me know if I may be of further assistance.

Sincerely,

KEVIN EVANS

KEVIN EVANS

800-366-8997 Ext. 3642

Allstate Insurance Company

GENI001

0196922777 NKE



Claimant's Name: Kerry Levi Employer's Name: Northern Anderson County EMS
Address: _____ Address: P.O. Box 51222
City: Laurens State: SC Zip: _____ City: Piedmont State: SC Zip: 29673
Home Phone: _____ Work Phone: _____ Carrier: Cornhusker Casualty Company
Preparer's Name: David Hill Keller Preparer's Phone #: 864 990 1882

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$294.07 2. AWW: \$ 441.09 Date of Injury: 03/10/11 & 03/29/11
3. Type of injury and body part(s): Back
4. Facts in controversy: May Defendant's stop payment of temporary total disability; extent of permanency.
5. Legal issues involved: See # 4; amount of overpayment
6. Unusual aspects: Defendant's filed a Form 21 on 09/14/2011; case was not set until January
7. Witnesses (designate if expert):* Claimant's supervisor
8. Exhibits: Deposition of Claimant
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
See Form 58A
10. Name, address, and specialty, if any, of the treating physician: Dr. Timothy McHenry; Neurosurgeon; Greenville, SC
11. Impairment rating(s); body part(s); physician and date of opinion: MMI on 07/22/2011; rate 13% back; Dr. McHenry 11/18/2011
12. I am amending my Form 50/51 in the following manner: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Signature: [Signature]

Email: dhkeller@constangy.com

Date of hearing: February 7, 2012

Time needed for hearing: 1 Hour

On behalf of ☐ Claimant ☒ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.
* Commissioners reserve the right to admit expert witnesses at hearings.



Claimant's Name: Kerry Levi Employer's Name: Northern Anderson County EMS
Address: _____ Address: P.O. Box 51222
City: Laurens State: SC Zip: _____ City: Piedmont State: SC Zip: 29673
Home Phone: _____ Work Phone: _____ Carrier: Cornhusker Casualty Company
Preparer's Name: David Hill Keller Preparer's Phone #: (864) 990-1882

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND
MICHAEL HART, ATTORNEY FOR CLAIMANT

YOU ARE HEREBY NOTIFIED THAT DEFENDANTS, pursuant to the provisions of the South Carolina Workers' Compensation Act and South Carolina Code Section 1-23-330, (1976, as amended), herewith submits the following medical reports as direct evidence on behalf of the defendants, to wit:

NAME OF PHYSICIAN/OTHER	DATE OF REPORT	NO. OF PAGES
Dr. Stacey Newsom	03/22/11 – 05/23/11	01 – 08
Doctors Care	03/10/11	09 – 12
Dr. Timothy McHenry	04/27/11 – 06/08/11	13 – 25

YOU ARE FURTHER HEREBY NOTIFIED that you have the right of cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the depositions of any of the physicians, whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER NOTIFIED that the originals of the documents referred to herein, or photocopies received from said physicians/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission, for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into the evidence on behalf of the employer-defendant.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the defendants:

See Form 58;



David Hill Keller
Constangy, Brooks and Smith, LLP
105 N. Spring Street, Suite 105
Greenville, SC 29601

January 30, 2012

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES

OUTPATIENT VISIT

Name: ~~Kerry Levi~~
SSN:

Date of Service: 03-22-11
Date of Injury: ~~03-10-11~~

Subjective: Patient follows up in clinic for her lumbar HNP. She states that she has had improvement. She denies any pain today. She reports some occasional paresthesias in the right leg associated with minor discomfort; however, feels that she is doing very well. She denies any side effects from her medication. She is currently out of the Ultracet. She returned to light duty for two days and states that she did very well. Only a little discomfort with getting in and out of the truck.

I had received a call from Northern Anderson County EMS with regard to a fitness for duty question. Apparently Mrs. Levi was noted to be possibly having some medication side effects and seemed "out of it". When questioned Mrs. Levi adamantly denies any side effects from her medications. She states that she did well on light duty. She does report stressors at home and at work due to the possibility of having to be out of work. She states this is causing a lot of anxiety. She reports that her only medication at this point is Keppra. Other treating physicians include Mountain View Family Practice and her neurologist, Dr. Boor.

Medications: Keppra.

Allergies: Morphine. Does not tolerate anti-inflammatories.

Objective: General: Patient is a pleasant female. She appears mildly anxious. Affect is a little flat. She is alert and oriented. Speech is clear and fluent. Normal gait. She rates her pain as 0/10. Chest: Clear to auscultation. Cardiovascular: Regular rate and rhythm without murmurs, rubs or gallops. Musculoskeletal: Full range of motion of spine and extremities. No tenderness over the low back. Neurologic Exam: Strength in the extremities is within normal limits. Deep tendon reflexes are symmetric and physiologic. She reports that sensation is intact to light touch. She denies any symptoms with straight leg raises. No clubbing, cyanosis or edema. She has some bruises and scratches to the upper extremities and states that she was working in her yard. No bruising on the trunk is noted.

Impression: Lumbar HNP.

Plan:

1. Tylenol as needed.
2. Continue self-care instructions in herniated disc handout.
3. In regard to fitness for duty issues patient states that she feels well and denies any medication side effects. She has agreed to release medical records from her other treating physicians for medication reconciliation.
4. I have spoken with Northern Anderson County who will be observing for any performance issues and has been advised to return her to clinic for any concerns.
5. Tylenol as needed for pain. She knows to notify the clinic if she is having any worsening symptoms.
6. Return to clinic in two weeks for a recheck.
7. Recommendation for a three man truck until Mrs. Levi has been cleared through Proaxis therapy per their established FCE protocol.

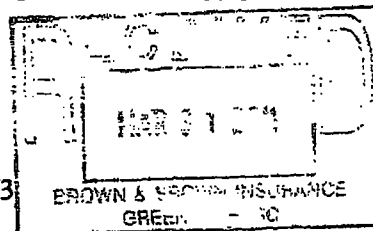
Work Status: May return to work on 03-22-11 without restriction.

Stacey Newsom, M. D., MPH

SN/1r 03-24-11

C: Northern Anderson County EMS, Dana Lee, PO Box 51222, Piedmont, SC 29673

Brown and Brown, PO Box 16837, Greenville, SC 29607



CENTER FOR HEALTH AND OCCUPATIONAL SERVICES**OUTPATIENT VISIT**

Name: Kerry Levi

Date of Service: 03-31-11

SSN: --

Date of Injury: --03-29-11

Subjective: Patient follows up in clinic prior to schedule due to a new injury. She was a restrained passenger in the ambulance when it was struck from behind. She reports having increased paresthesias in the right leg. She was seen in the Emergency Department. X-rays were performed. No acute process was noted. She was given Hydrocodone, Flexeril and Prednisone. She denies any problems with the medications. She is rating her pain as 0 to 7. She denies any numbness or weakness in the extremity. No change in bowel or bladder. The paresthesias are in the right gluteal region and into the right lateral aspect of the leg and foot.

Medications: Hydrocodone, Flexeril and Prednisone.

Allergies: Morphine, Darvocet, Codeine and Phenergan.

Review of Systems: Constitutional: Negative. Respiratory: Negative. Cardiovascular: Negative. GI: Negative. Musculoskeletal: Per HPI. Neurologic: Per HPI.

Objective: General: Patient is a pleasant female. She is in no distress. She ambulates in the clinic without difficulty. Chest: Clear to auscultation. Cardiovascular: Regular rate and rhythm without murmurs, rubs or gallops. Musculoskeletal: Inspection of the lumbar spine reveals no deformity or bruising. Deep tendon reflexes are symmetric and physiologic at the knee and ankle. She reports some mild decrease in light touch to the right lateral aspect of the lower extremity compared to the left. Straight leg raises are negative. Extremities: No clubbing, cyanosis or edema. Heel walk, toe walk, squat and rise without difficulty. Pulses are intact.

Impression:

1. Lumbar HNP exacerbation of leg paresthesias after MVA.

Plan:

1. Continue with current medication.
2. Referral to physical therapy.
3. Return to clinic in 2 weeks or sooner for any problems or concerns. We have discussed referral for LESI. She would like to try therapy as she is a little fearful of the procedure.

Work Status: May return to work on 03-31-11 with the following restrictions:

1. Lift, push or pull no more than 20 pounds.
2. Recommend three man truck.

Stacey Newcom, M.D., M

SN/1lr 04-01-11

C: Northern Anderson County EMS, Dana Lee, 10703 Anderson Road, Easley, SC 29642

FAXED

APR 15 2011

com
1:10 PM

GHS Center for Health and Occupational Services 1020 Grove Road Greenville, SC 29605 Phone (864) 455-2300 Fax (864) 455 2399	Name <u>Kerry Lev.</u> SS# _____
	Company <u>NAC EMS</u>
	Date of Injury <u>3-29-11</u>

Diagnosis: Lumbar HNPMedications: Ibuprofen, UltramWork Status: May return to work on 4/13/11☒ Full Duty☐ Modified Duty:

(None = N) (Rarely = R) (Occasional = O) (Frequently = F) (As Tolerated = AT)

- ☐ Lift, push or pull no more than ____ lbs. []
- ☐ Bend or Twist []
- ☐ Walk and Stand []
- ☐ Sit/Stand as needed
- ☐ Sedentary Work, change positions as needed
- ☐ No use of _____
- ☐ Forceful or Repetitive use of (right/left) hand and arm []
- ☐ Overhead use of (right/left) arm []
- ☐ Squat or kneel []
- ☐ Climb or work at heights []
- ☐ Awkward or Static postures []
- ☐ No operating heavy machinery or Commercial Motor Vehicle
- ☐ Elevate affected area _____
- ☐ Use crutches as needed for ambulation
- ☐ Use _____ splint as needed
- ☐ Other _____

Instructions:

- ☒ Stay active during your recovery.
- ☒ Use over the counter pain relievers by package directions and/or follow prescription directions.
- ☒ Report any problems with medications to your provider.
- ☒ Apply ice or heat to the affected areas as needed.
- ☒ Begin gentle stretches as demonstrated in clinic or in your self care handout.
- ☐ Elevate the affected area to reduce swelling.
- ☐ Wash wound with soap and water ____ times per day.
- ☐ May apply antibiotic ointment.
- ☐ Keep bandage clean and dry.
- ☐ Seek care for any signs of infection including increasing redness, swelling, pain or drainage.
- ☐ Other: _____

Follow Up: After non-surgical consult

- ☐ Appointment Date: _____ Time: _____ Provider: _____
- ☐ Maximum Medical Improvement: Contact your employer prior to making further appointments.
- ☐ Referral to Neuro Surgery You will be contacted with an appointment.

Physician/NP: Stacey A. Newsom, MD, MPH Date: 4-14-11

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES

OUTPATIENT VISIT

Name: Kerry Levi
SSN:

Date of Service: 04-14-11
Date of Injury: 03-29-11

Subjective: Patient follows up in clinic for her lumbar HNP. She states that she has had improvement. She rates her pain as 0/10. She has some mild discomfort in the right leg in the morning, which resolves during the day. She denies any weakness or paresthesias. No change in bowel or bladder. She states that she feels ready to return to regular work. She is using Advil or Ultracet on occasion. She denies any problems with the medications. No new complaints today.

Medications: Advil, Ultram; others noted in the chart.

Allergies: Morphine, Darvocet, Codeine and Phenergan.

Review of Systems: Constitutional: Negative. Respiratory: Negative. Cardiovascular: Negative. GI: Negative. Musculoskeletal: Per HPI. Neurologic: Per HPI.

Objective: General: Patient is a pleasant female in no distress. She ambulates in the clinic without difficulty. Chest: Clear to auscultation. Cardiovascular: Regular rate and rhythm without murmurs, rubs or gallops. Musculoskeletal: Inspection of the low back reveals no deformity. There is no tenderness. Neurologic Exam: Strength in the lower extremities is within normal limits. She is able to heel walk, toe walk, squat and rise. Deep tendon reflexes are symmetric and physiologic. Sensation is intact to light touch. Straight leg raises are mildly positive on the right. Extremities: No clubbing, cyanosis or edema. Pulses are intact.

Impression: Lumbar HNP exacerbated by recent MVA.

Plan:

1. Continue with current medications.
2. We discussed her leg symptoms. She states that she is not interested in consultation for LESI. Given her persistent symptoms would recommend neurosurgery consult for recommendations.
3. She can return to clinic after the consult is complete.

Work Status: May return to work on 04-13-11 without restriction.

Stacey Newsom, M.D., MPH

SN/11r 04-15-11

C: Northern Anderson County EMS, Dana Lee, 10703 Anderson Road, Easley, SC 29642

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES

OUTPATIENT VISIT

Name: Kerry Levi
SSN:

Date of Service: 04-26-11
Date of Injury: 03-29-11

Subjective: Patient follows up in clinic for her lumbar HNP. She states that she is doing well. Her back pain is at 0/10. She has occasional pain in the right leg which she rates as 4/10. She has occasional paresthesias. No change in bowel or bladder. No lower extremity weakness. She states that her only medications at this time are Keppra and Lyrica which was started by her neurology doctor. She is awaiting neurosurgical consultation.

Since her last visit an additional concern has been raised in regard to fitness for duty. A complaint was voiced to Dr. Marty Lutz, Medical Control for Northern Anderson County EMS. An emergency department staff member had stated that Mrs. Levi appeared impaired while on duty.

Medications: Lyrica and Keppra.

Allergies: Morphine, Nubain, Darvocet, Codeine and Phenergan.

Review of Systems: Constitutional: Negative. Respiratory: Negative. Cardiovascular: Negative. GI: Negative. Musculoskeletal: Per HPI. Neurologic: Per HPI.

Objective: General: Patient is a pleasant female in no distress. She has a flat affect today. Neurologic Exam: Alert and oriented. Speech is mildly hesitant. Normal gait. Strength in the lower extremities is within normal limits. Deep tendon reflexes are symmetric and physiologic. Sensation is intact to light touch. Straight leg raises are positive on the right. Extremities: No clubbing, cyanosis or edema. Pulses are intact.

Impression:

1. Lumbar HNP.
2. Fitness for duty.

Plan:

1. Follow up with neurosurgical consultation.
2. I have had an opportunity to review Mrs. Levi's South Carolina DHEC patient prescription history report. The report is concerning for multiple prescriptions for control substances along with multiple providers and pharmacies being utilized. It does not appear that she has been forthcoming with her medication history. Given the recent complaints from co-workers and ED staff the recommendation is for EAP referral. Until the fitness for duty issue has been resolved she will be on recommended restrictions of no driving company vehicle and no responsibility for direct patient care.

Stacey Newsom, M. D., MPH

SN/lr. 05-03-11

C: Northern Anderson County EMS, Dana Lee, 10703 Anderson Road, Easley, SC 29642
Corn Husker Casualty Company, Shawn Hine, PO Box 881716, San Francisco, California 94188

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES**OUTPATIENT VISIT**

Name: Kerry Levi
SSN:

Date of Service: 05-03-11
Date of Injury: 03-29-11

Subjective: Patient returns to clinic with questions regarding her work status and her recent neurosurgical consultation. She states that she has been out of work for the last week and has not received a paycheck. She is inquiring what she needs to do to get a paycheck. She also is aware that the employer has requested that her care be transferred to another surgeon within the spine center. She states that she was comfortable with the surgeon that evaluated her and would like to continue treatment with him.

In regard to her symptoms she states that she currently is doing well. She has no back pain. Her leg pain is rated as 3/10. She is reporting some weakness in the great toe on the right which is a new complaint today. She is using Lyrica without difficulty.

Medications: Lyrica and Keppra.

Allergies: Morphine, Nubain, Darvocet, Codeine and Phenergan.

Review of Systems: Constitutional: Negative. Respiratory: Negative. Cardiovascular: Negative. GI: Negative. Musculoskeletal: Per HPI. Neurologic: Per HPI.

Objective: General: Patient is a pleasant female. Affect is appropriate. She ambulates in the clinic without difficulty. Strength in the lower extremities is within normal limits. She has some give way weakness in the great toe on the right. She can squat and rise without difficulty. Sensation is intact to light touch. Straight leg raises are positive on the right. Extremities: No clubbing, cyanosis or edema. Pulses are intact.

Impression: Lumbar HNP.

Plan:

1. Continue with current medications.
2. In regard to her questions above, she was advised to contact the workers comp insurance carrier. She is already aware of the adjusters name and phone number and verbalizes understanding in how to proceed.
3. Patient's husband was present for the recommendations and discussion portion of the encounter.
4. Follow up with neurosurgery as scheduled.
5. Fitness for duty issue remains. Patient is concerned today that cost of the EAP process may hinder her ability to complete that requirement. Will discuss this with nurse case manager, Lynn Jacobs, R.N. to help clarify what options and cost are regarding the EAP process.
6. Return to clinic in 3 weeks for follow up of fitness for duty.

Work Status: May return to work on 05-03-11 with the following restrictions:

1. Three man truck without driving or direct patient care.

Stacey Newton, M.D., MPH

SN/11r 05-05-11

C: Northern Anderson County EMS, Dana Lee, PO Box 51222, Piedmont, SC 29673

Brown and Brown, PO Box 16837, Greenville, SC 29607

CENTER FOR HEALTH AND OCCUPATIONAL SERVICES

OUTPATIENT VISIT

Name: Kerry Levi
SSN:

Date of Service: 05-23-11
Date of Injury: 03-29-11

Subjective: Patient follows up for a recheck of lumbar HNP and fitness for duty evaluation. She states that her leg pain is worsening. She reports 9/10 pain today. She reports weakness in the great toe on the right. No change in bowel or bladder. She has seen Dr. McHenry who has discussed options. Patient has elected surgical intervention. She denies any problems with her medications.

Review of available recent medical notes include office visit with MD360, Dr. James Taylor on March 5, 2011, which is approximately five days before her original back injury on March 10, 2011. She was seen for foot pain and states that she twisted her foot again. Notable in the plan section is that patient has a normal foot x-ray. She has been in multiple times requesting narcotics. I informed her tonight we would no longer treat her for any issues pertaining to pain. She would have to see her ortho or PCP. Patient expressed understanding but continued to ask for Lortab and sleeping medication. Follow up with PCP or ortho as needed. Second record available today is from May 11, 2011. Mountain View Family Practice. Patient presents for management of back pain and disc herniation. She does not feel she can afford her Lyrica and the Lortab is not helping. She requests a prescription for Oxycodone. Offered to increase Lyrica dose and give her a drug coupon which would reduce the price of Lyrica. Per patient Dr. McHenry told her that he did not want her to take Oxycodone for pain. I have asked patient to discuss pain management with Dr. McHenry, as I think we should have one physician coordinating her pain management. At this point patient got up and walked out of my office without any prescriptions.

Medications: Lyrica, Lortab; others noted in the chart.

Allergies: Morphine, Nubain, Darvocet, Codeine and Phenergan.

Review of Systems: Constitutional: Negative. Respiratory: Negative. Cardiovascular: Negative. GI: Negative. Musculoskeletal: Per HPI. Neurologic: Per HPI.

Objective: General: Patient is a pleasant female. Her affect is flat. Speech is clear and occasionally hesitant. Chest clear to auscultation. Cardiovascular: Regular rate and rhythm without murmurs, rubs or gallops. Musculoskeletal: Inspection of the lumbar spine reveals no rash or deformity. There is no tenderness to palpation. Neurologic Exam: Strength in the lower extremities is within normal limits. She has give way weakness in the right toe which is inconsistent with distraction. Straight leg raises are positive on the right. Extremities: No clubbing, cyanosis or edema. Pulses are intact.

Impression:

1. Lumbar HNP.
2. Fitness for duty evaluation.

Plan:

1. Follow up with neurosurgery as scheduled.
2. In regard to fitness for duty evaluation patient has been given information on referral to the Pavilion for an addiction assessment and healthcare worker fitness for duty evaluation. She verbalizes understanding. She will remain on current restrictions until the evaluation and recommendations are reviewed. I also feel it would be beneficial for Mrs. Levi to be under the care of a pain management specialist to centralize and coordinate her prescription pain medications.

Name: Kerry Levi
SSN:

Date of Service: 05-23-11
Date of Injury: 03-29-11
Page 2

Work Status: May return to work on 05-23-11 with the following restrictions.
1. No driving company vehicle or direct patient care.

Addendum: Patient left the office stating that she did not want a copy of her work restrictions. She did verbalize understanding of the follow up recommendations and instructions.

Stacey Newsom, M. D., MPH

SN/lr 05-25-11

C: Northern Anderson County EMS, Dana Lee, PO Box 51222, Piedmont, SC 29673
Brown and Brown, PO Box 16837, Greenville, SC 29607

04/04/11 8:41 ZT

03/24/2011 THU 15:28 FAX 864 294 0424 Doctors Care

002/004

EXAM ROOM TIME

6:16



CHECKOUT TIME

6:30

TICKET NO.

ACCOUNT NUMBER

DATE

TIME

185540

03/10/11

05:49pm

DC BEREA

943888

NAME & ADDRESS

THURSDAY

LEVI, KERRY

DOB: 11/27/1973 (37 years)

GENDER: F

CENTRAL, SC

IBG:
CELL:

RELATION: OTHER

WRK:

INSURED: LEVI, KERRY

INS: WC/NON-ESTABLISHED

REASON: *DEMAND*

NICKNAME:

COPAY: WKC/ DS

INSURANCE

BALANCE \$0.00

ACCOUNT

BALANCE \$0.00

CURRENT

CHARGES

AMOUNT

PAID

NEW

BALANCE

CASH

CHECK

M.O

C.C

Personal Hx

Family Hx

Social Hx

DM

DM

Alcohol

HTN

HTN

Tobacco

Accident? ☐ yes ☐ no If yes, which state:

Date of Accident:

Prev. chart rev., no sig chg.: Above Hx rev.:

ROS (/ or O): Fatigue, Dizzy, Weak, Wt Loss, Fever, Chills, Nasal Congestion, Sinus Pain, Ear Pain, Sore Throat, SOB, CP, Cough, Sputum, Wheeze, ABD Pain, N, V, D, Constip, Dysuria, Freq, Urgency, Back Pain, Pelvic Pain, Vag, D/C, Headache, Syncope, Rash, All others negative

Allergies:

Medications:

☐ Made/Allergies Reviewed

WT

HT

BMI

BP

PULSE

RESP

TEMP

☐ LMP

☐ Tetanus

180

148/83

62

17

99.8

PHYSICAL: (see reverse) Omit if N/A

Chief Complaint:

(✓ if nml., O if abnml. & give details)

☐ General

☐ HEENT

☐ Neck

☐ Nodes

☐ Lungs

☐ CV

☐ Abd

☐ Back

☐ Ext

☐ GU

☐ Neuro

☐ Skin/Breasts

☐ Chaperone

☐ I.V.

☐ Injection

☐ Nebulizer

☐ Procedure

☐ Pulse Ox

Lifting v. heavy patient
with as per anesthetic
pain 10/10 worse walking
exam - no 7742 nod
Sx/tx

unable to walk
depressed so
TO ER due to severe pain
(not doing well)

back in lifting
at work
pre # 3402137
A/B # 840 0705 3805
SCD # 004708076
W # 313112638

- ☐ CBC
- ☐ EKG
- ☐ FBS
- ☐ Flu
- ☐ Hema
- ☐ Hgb A1C
- ☐ H. Pylori
- ☐ KOH
- ☐ Microalb
- ☐ Mono
- ☐ Strip
- ☐ Tetanus
- ☐ UA
- ☐ U Preg
- ☐ Wet Prep
- ☐ X-Ray

DIAGNOSIS:

Severe low back pain

unable to walk
suggest go to ER.
Start PT.
no work
nucynta 75 qid
recheck on Monday.
Off Work / School

☐ Patient Care Instructions Discussed

☐ Lifestyle Modification

☐ Preventative Recommendation(s)

☐ Prescriptions / OTC Meds

☐ Side Effects Discussed

☐ Follow-Up:

Return:

☐ Worsening symptoms:

☐ If not better:

Go to ER if:

Crutches/Splint/Supplies

☐ Given ☐ Recommended

PSR Notes:

ESTAB

992425 14W
9905 40W
51040X 30W
5230012 48W
52550X1 16W

Staff:

- I voluntarily consent to any and all health care treatment and diagnostic procedures provided by Doctors Care and its associated physicians, clinicians and other personnel. I understand that no guarantee has been or can be made as to the results of the treatment or the outcome of the procedure.
- I consent to the use and disclosure of my/our patient's protected health information for purposes of obtaining payment for services rendered to me/our patient, treatment and health care coordination consistent with the Doctors Care Notice of Privacy Practices.
- I authorize payment of medical benefits to Doctors Care physicians or their designee for services rendered.

Patient or Authorized Person's Signature:

Date:

4. Workers Compensation patients: I hereby authorize Doctors Care to speak to a rehabilitation specialist, my employer, my insurance carrier or other professionals involved in my case concerning my medical records and the treatment I have received or will receive.

Patient or Authorized Person's Signature:

Date:

04/04/11 8:36



Return To Work Form

- ☐ 2126 N Highway 81, Anderson, SC 29621 (864) 226-2660
☐ 6704 White Horse Road, Greenville, SC: 29611 (864) 294-1392
☐ 701 Congaree Road, Greenville, SC: 29607 (864) 458-7289
☐ 218 East Blackstock Road, Spartanburg, SC 29301 (864) 576-8646

- ☐ 4200 East North Street, Suite 5, Greenville, SC 29615 (864) 292-2266
☐ 210 W. Wade Hampton Blvd, Greenville, SC 29650 (864) 968-9144
☐ 35 Ray E. Talley Court, Simpsonville, SC 29380 (864) 947-7028

Name: Kerry Levi Arrival Time: 4:50 PM Discharge Time: 8:00 PM
 Date: 3-10-11 Company Name: Northern Anderson EMB

WORK STATUS: (Check Appropriate Boxes)

- ☐ 1. May perform full duty activities as of _____ without accommodations.
- ☒ 2. Off duty due to work-related condition.
 Estimated return to work date with modified duty: _____
 Estimated return to work date for full duty: _____
 RETURN FOR RE-EVALUATION AT THIS LOCATION ON _____ Time: _____
- ☐ 3. May work with the following accommodations as of: _____
- ☐ No lifting more than _____ lbs.
 - ☐ No operation of hazardous or fast-moving machinery, no driving.
 - ☐ Ground level work only, no ladders or heights.
 - ☐ No repetitive bending, stooping, squatting, pushing, jerking, twisting, or bouncing.
 - ☐ No continuous standing and/or sitting.
 - ☐ Minimum walking or climbing (including stairs) TO GR now 2nd unable
 - ☐ Limited use of _____ to walk after
 - ☐ No overhead lifting. injection
 - ☐ No high repetitive hand activities for extended periods of time.
 - ☐ No use of _____
- ☐ 4. Has reached Maximum Medical Improvement (MMI) Appointment
- ☐ 5. Return for re-evaluation at this office on Monday, 14th Time: _____
- Additional Comments: STOP Present pain medications
START Physical Therapy ASAP

PATIENT DISCHARGE INSTRUCTIONS:

Diagnosis: Severe Back Strain Medications: ☒ as directed ☐ as needed
 Wound or Injury Care: ☐ keep dry and clean ☐ do not remove dressing ☐ elevate extremity ☐ warm soaks
☐ ice every _____ ☐ apply heat every _____ ☐ wear elastic support/immobilizer/keep taped
☐ home exercise instructions given ☐ follow instructions sheet given ☐ bed rest for _____

REFERRAL: If a referral is made for physical therapy, or to another physician, please complete this section:

To: _____ Date: _____ Time: _____

For: _____

Address: _____

I understand the above instructions and what to do for my follow-up care. I have received a copy of these instructions for myself and for my employer.

Employee Signature: _____ Date: 3-10-11

Provider Signature: Kw Ganderke Date: 3-10-11

[MED-F017-(8-09)]

10

04/04/11 8:36



Return To Work Form

☐ 2126 N Highway 81, Anderson, SC 29621 (864) 226-2660
☐ 6704 White Horse Road, Greenville, SC 29611 (864) 294-1392
☐ 701 Congaree Road, Greenville, SC 29607 (864) 458-7289
☐ 218 East Blackstock Road, Spartanburg, SC 29301 (864) 576-8646

☐ 4200 East North Street, Suite 5, Greenville, SC 29615 (864) 292-2266
☐ 230 W. Wade Hampton Blvd, Greer, SC 29650 (864) 968-9144
☐ 35 Ray E. Talley Court, Simpsonville, SC 29680 (864) 967-7028

Name: Kerry Levi Arrival Time: 4:50 PM Discharge Time: 8:00 PM
 Date: 3-10-11 Company Name: Northern Anderson EMS

WORK STATUS: (Check Appropriate Boxes)

☐ 1. May perform full duty activities as of _____ without accommodations.

☒ 2. Off duty due to work-related condition.

Estimated return to work date with modified duty: _____

Estimated return to work date for full duty: _____

RETURN FOR RE-EVALUATION AT THIS LOCATION ON _____ Time: _____

☐ 3. May work with the following accommodations as of: _____

☐ No lifting more than _____ lbs.

☐ No operation of hazardous or fast-moving machinery, no driving.

☐ Ground level work only, no ladders or heights.

☐ No repetitive bending, stooping, squatting, pushing, jerking, twisting, or bouncing.

☐ No continuous standing and/or sitting.

☐ Minimum walking or climbing (including stairs)

☐ Limited use of _____

☐ No overhead lifting.

☐ No high repetitive hand activities for extended periods of time.

☐ No use of _____

*TO ER now 2nd unable
to walk after
injection*

☐ 4. Has reached Maximum Medical Improvement (MMI)

☐ 5. Return for re-evaluation at this office on Monday, 14th Time: Appointment

Additional Comments: STOP Present pain medicines
START Physical Therapy ASAP

PATIENT DISCHARGE INSTRUCTIONS:

Diagnosis: Severe BACK Strain

Medications:

☒ as directed

☐ as needed

Wound or Injury Care:

☐ keep dry and clean

☐ do not remove dressing

☐ elevate extremity

☐ warm soaks

☐ ice every _____

☐ apply heat every _____

☐ wear elastic support/immobilizer/keep taped

☐ home exercise instructions given

☐ follow instructions sheet given

☐ bed rest for _____

REFERRAL: If a referral is made for physical therapy, or to another physician, please complete this section:

To: _____ Date: _____ Time: _____

For: _____

Address: _____

I understand the above instructions and what to do for my follow-up care. I have received a copy of these instructions for myself and for my employer.

Employee Signature: _____ Date: 3-10-11

Provider Signature: Kerry Levi Date: 3-10-11

03/21/11 13:50 ZT

MHK-10-2011 17:04 From: N A C E M S

864 295 8644

To: 864 294 0424

P.1/1

03/10/2011 THU 17:03 FAX 864 294 0424 Doctors Care

001/001

tap back to 294 0424

medical affiliates

Worker's Compensation Authorization Form



Patient Information

Patient Name Kerry Levi Date of Injury 3/10/11

Type of Injury Back injury

Company Information

Company Name Northern Anderson Co. EMS Contact Person Dana Lee

Company Address 10703 Anderson Rd. Phone # 864 269-8047

WKC Carrier Name Homestake Companies WKC Contact Person

WKC Carrier Address Dept. 1617 Denver CO Phone # 80291 1-800-488-2930

Name of Temporary Agency Temporary Agency Contact Person

Temporary Agency Address Phone #

Temporary Agency's WKC Carrier Name Temporary Agency's WKC Contact Person

Temporary Agency's WKC Carrier Address Phone #

File Claim to this Contact (Employer or Carrier)

Is a drug screen required? ☒ Yes ☐ No If Yes, What Type? 10 panel
Has the employer filled out a 1st Report of Injury? ☐ Yes ☒ No

This certifies that the above information is correct.
I authorize the medical provider to provide medical treatment to the employee named above.
Signature Dana Lee Date 3/10/11
Printed Name Dana Lee Position Title Office Mgr.

Doctors Care Information

Form Completed By Initials

Center Date

[WKC-F002-(7-07)]

Progress Notes

Patient: LEVI, KERRY DEANNA
DOB: 11/27/1973 **Age:** 37 Y **Sex:** Female
Phone:
Address: , LAURENS, SC-
Pcp: James Franklin, MD

Provider: Timothy McHenry, MD
Date: 04/27/2011

Subjective:

CC:

1. NP/LUMBAR/GHS MRI L/PAI/SPK W/PT.

HPI:

History of Present Illness:

Pain: burning, tingling, throbbing, radiating, weakness & numbness, **not satisfactorily controlled. Pain score is 5-6/10 today.**

SPINE:

Ms. Levi is a 37-year-old woman with a six-week history of right posterolateral radicular leg pain and paresthesias with onset while working as a paramedic. Symptoms have been persistent over the past six weeks, and she also has weakness in great toe extension on the right foot. Bowel and bladder function is normal. She has been on oxycodone for pain control.

ROS:

CONSTITUTIONAL:

Fever no. Weight Loss no. Weight Gain no. Fatigue no. Chills no. Night Sweats no.

CARDIOVASCULAR:

Chest Pain no. Irregular Heart Beat no. Poor Circulation no. Leg/feet swelling no. Leg/foot ulcer no.

GENITOURINARY:

Blood in urine no. Pain in urinating no. Unable to urinate no. Bladder Infection no. Frequent Urination no. Difficulty with urination no.

NEUROLOGICAL:

Paralysis no. Frequent Headaches no. Seizures **yes**. CVA/ITA no. Syncope no. Anxiety/Depression no. Tremors no. Speech Problems no. Feeling of hopelessness no. Sleep disturbance no. Vision Changes no.

-EYES:

Decreased Vision no. Cataracts no.

RESPIRATORY:

COPD no. Asthma no. Persistent Cough no. Shortness of Breath no. Wheezing no. Pneumonia no.

ENT:

Recent loss of hearing no. Sinusitis no. Headache no.

GASTROINTESTINAL:

GERD **yes**. PUD/Gastritis no. Liver Problems no. Stomach Pain no. Diarrhea no. Abdominal Pain no. Nausea/Vomiting no. Black tar-like or bloody stool no.

SKIN:

Rash or itching no. Dryness of Skin no. Ulcer **yes**. Cancer no. Open sores no. New Moles no. Poor wound healing no. Skin Infection no.

PSYCHIATRIC:

Depression no. Bipolar Disease no.

ENDOCRINE:

Diabetes no. Thyroid disease no. Heat intolerance no. Cold intolerance no.

HEME/LYMP:

Anemia no. Bleeding Problems no. Blood Transfusion no. Bruises no.

ALLERGIC/IMMUNOLOGIC:

Seasonal no. Iodine no. Food Allergies no.

MUSCULOSKELETAL:

Joint Swelling or Stiffness no. Muscle aches no. Joint Pain no. Pain in multiple joints no. Weakness no.

13

No changes found in review of system since last checked on, No chest pain or shortness of breath.

Medical History: Seizure Disorder/Epilepsy, HX OF HGERD, Hernia, Esophageal ulcer.

Surgical History: Nissen fundoplication, hysterectomy, c-section X 5, Left wrist ORIF, Medial plantar fascia release, tarsal tunnel release, calcaneal spur excision/Dr Tom Anderson 11-17-2010.

Hospitalization/Major Diagnostic Procedure: see surg hx.

Family History: Family: HTN Father: alive 65 yrs HYPERTENSION, HYPERLIPIDEMIA Mother: alive 60 yrs HYPERLIPIDEMIA, HYPERTENSION
3 STEP CHILDREN.

Social History: no Alcohol. Smoking: yes Are you a: current smoker, How many cigarettes a day do you smoke? 11-20. no Recreational drug use.
Resides in Greenville, is married.

Medications: Keppra tablet 1000 mg 1 tab(s) 2 times a day, lyrica, Medication List reviewed and reconciled with the patient

Allergies: NSAIDs, Darvocet N 50, morphine, nubain.

Objective:

Vitals: Ht 64, Wt lbs 169, Wt kg 76.66, BMI 29.01, HR 76.

Past Orders:

Examination:

SHCC SM Spine:

On physical examination, truncal flexion 80 degrees, truncal extension 10 degrees; both with low back pain. Motor 0/5 in right great toe extension and 3/5 in right foot eversion. Otherwise 5/5 at all other levels of her lower extremities. Decreased sensation over the right third toe and lateral heel. Straight-leg raise on the right produces posterolateral paresthesias and pain down to her ankle region.

Assessment:

Assessment:

1. DISPLACED LUMBAR INTERVERT DISC - 722.10 (Primary)

I reviewed imaging studies including MRI scan of the lumbar spine which shows a paracentral disc herniation at L5-S1 on the right side.

Plan:

1. DISPLACED LUMBAR INTERVERT DISC Start Lortab 7.5/500 tablet, 500 mg-7.5 mg, 1 tab(s), orally, every 6 hours prn pain, 40, Refills 0.

We discussed options including epidural steroid injection and/or microdiscectomy surgery. We discussed the risks and limitations of both including with the surgery risks of infection, damage to nerve with loss of function or paralysis, recurrence. At this point, she is hesitant to pursue injection because of problems with an epidural steroid injection during her pregnancy, and I discussed with her that it is unlikely that her problem of incomplete pain control with an anesthetic epidural would indicate there would be any problems with an epidural injection for disc herniation. After a prolonged discussion, however, she would like to proceed with surgical intervention which would be an L5-S1 right-sided microdiscectomy surgery. Physical examination was completed, and chest is clear to auscultation bilaterally, heart regular rate and rhythm without murmur. We will arrange for surgery on an elective basis. TM/bep.

2. Others

ADDENDUM: Apparently following my interaction with the patient and her husband, there was a prolonged discussion concerning pain management and treatment options with Mr. Turnbull. There was some psychosocial concerns about this interaction including apparently some conflict at home; and at one point, the patient struck her husband on the shoulder after a disagreement in the examination room. In any event, with this factor known, we will bring her back into the clinic next week for re-evaluation and further discussion of treatment options before planning to proceed with surgery and to make sure, psychosocially, that she is a reasonable candidate for surgery at this point. TM/bep.

Immunizations:

Labs:

Preventive:

14

Follow Up: 3 weeks after surgery

Provider: Timothy McHenry, MD

Patient: LEVI, KERRY DEANNA **DOB:** 11/27/1973 **Date:** 04/27/2011

Electronically signed by Timothy McHenry MD on 05/02/2011 at 06:54 PM EDT
Sign off status: Completed

15

PROGRESS NOTES

Patient: LEVI, KERRY D
DOB: 11/27/1973 **Age:** 37 Y **Sex:** Female
Phone:
Address: LAURENS, SC-
Pcp: James Franklin, MD

Provider: Timothy McHenry, MD
Date: 05/06/2011

Subjective:

CC:

1. Rto to discuss surgery.

HPI:

History of Present Illness:

Pain: cramping, radiating, weakness & numbness, satisfactorily controlled. Pain score is 7/10 today.

SPINE:

Mr. and Ms. Levi returned today for followup. Ms. Levi continues to have right radicular leg pain and paresthesias. She continues to have weakness in her right foot and ankle. She states the symptoms have worsened slightly. They have discussed treatment options further at home and today are committed to surgery and consider this her best option to recover. Overall, the interaction was much more harmonious and appropriate, in my opinion.

ROS:

CONSTITUTIONAL:

Fever no. Weight Loss no. Weight Gain no. Fatigue no. Chills no. Night Sweats no.

CARDIOVASCULAR:

Chest Pain no. Irregular Heart Beat no. Poor Circulation no. Leg/foot swelling no. Leg/foot ulcer no.

GENITOURINARY:

Blood in urine no. Pain in urinating no. Unable to urinate no. Bladder Infection no. Frequent Urination no. Difficulty with urination no.

NEUROLOGICAL:

Paralysis no. Frequent Headaches no. Seizures **yes**. CVA/ITA no. Syncope no. Anxiety/Depression no. Tremors no. Speech Problems no. Feeling of hopelessness no. Sleep disturbance no. Vision Changes no.

EYES:

Decreased Vision no. Cataracts no.

RESPIRATORY:

COPD no. Asthma no. Persistent Cough no. Shortness of Breath no. Wheezing no. Pneumonia no.

ENT:

Recent loss of hearing no. Sinusitis no. Headache no.

GASTROINTESTINAL:

GERD **yes**. PUD/Gastritis no. Liver Problems no. Stomach Pain no. Diarrhea no. Abdominal Pain no. Nausea/Vomiting no. Black tar-like or bloody stool no.

SKIN:

Rash or Itching no. Dryness of Skin no. Ulcer **yes**. Cancer no. Open sores no. New Moles no. Poor wound healing no. Skin Infection no.

PSYCHIATRIC:

Depression no. Bipolar Disease no.

ENDOCRINE:

Diabetes no. Thyroid disease no. Heat intolerance no. Cold Intolerance no.

HEME/LYMP:

Anemia no. Bleeding Problems no. Blood Transfusion no. Bruises no.

ALLERGIC/IMMUNOLOGIC:

Seasonal no. Iodine no. Food Allergies no.

MUSCULOSKELETAL:

Joint Swelling or Stiffness no. Muscle aches no. Joint Pain no. Pain in multiple joints no.

Weakness no.

No changes found in review of system since last checked on, No chest pain or shortness of breath.

Medical History: Seizure Disorder/Epilepsy, HX OF HGERD, Hernia, Esophageal ulcer.

Surgical History: Nissen fundoplication , hysterectomy , c-section X 5 , Left wrist ORIF , Medial plantar fascia release, tarsal tunnel release, calcaneal spur excision/Dr Tom Anderson 11-17-2010.

Hospitalization/Major Diagnostic Procedure: see surg hx .

Family History: Family: HTN Father: alive 65 yrs HYPERTENSION, HYPERLIPIDEMIA Mother: alive 60 yrs HYPERLIPIDEMIA, HYPERTENSION
3 STEP CHILDREN.

Social History: no Alcohol . Smoking: yes Are you a: current smoker, How many cigarettes a day do you smoke? 11-20. no Recreational drug use.
Resides in Greenville, is married.

Medications: Kappra tablet 1000 mg 1 tab(s) 2 times a day, lyrica , Medication List reviewed and reconciled with the patient .

Allergies: NSAIDs, nubain, Darvocet N 50, morphine.

Objective:

Vitals: Ht 64, Wt lbs 169, Wt kg 76.66, BMI 29.01, HR 76.

Past Orders:

Examination:

SHCC SM Spine:

On physical examination, straight-leg raise on the right side reproduces posterolateral radicular leg pain down to the ankle. Decreased sensation over the right third toe dorsum and lateral heel. She is 3/5 in right foot eversion and ankle dorsiflexion and 0/5 in right great toe extension. No significant changes in neurologic status compared with last week.

Assessment:

Assessment:

1. DISPLACED LUMBAR INTERVERT DISC - 722.10 (Primary)

Plan:

1. DISPLACED LUMBAR INTERVERT DISC Refill lyrica, 75 mg, 1 tab, PO, BID, 60, Refills 1 ; Start Lortab 7.5/500 tablet, 500 mg-7.5 mg, 1 tab(s), orally, every 6 hours, 5 day(s), 40, Refills 0 . We discussed lumbar microdiscectomy surgery, which would be a right-sided L5-S1 microdiscectomy. We discussed again the option of injection as well, and she would like to proceed with surgical treatment. We discussed risks including infection, damage to nerve with loss of function or paralysis, recurrence of symptoms from either re-herniation or scar formation, persistence of symptoms, need for further surgery, medical risks including heart attack, stroke, blood clot and/or death. We will arrange for surgery on an elective basis. TM/bep.

Immunizations:

Labs:

Preventive:

Follow Up: for surgery

Provider: Timothy McHenry, MD

Patient: LEVI, KERRY D **DOB:** 11/27/1973 **Date:** 05/06/2011

Electronically signed by Timothy McHenry MD on 05/11/2011 at 09:33 AM EDT

Sign off status: Completed



UNIVERSITY MEDICAL GROUP

LEVI, KERRY D
 37 Y old Female, DOB: 11/27/1973
 LAURENS, SC.
 Home: .
 Guarantor: LEVI, KERRY D Insurance: PLANNED
 ADMINISTRATORS
 PCP: James Franklin, MD Referring: William D Byars
 (GHS-UMG), MD
 Appointment Facility: Southeastern Neurosurgical and Spine Institute (Upper)

06/08/2011

Progress Notes: Charles C. Kanos

Current Medications

Keppra tablet 1500 mg 1 tab(s) 2 times a day
 Duragesic-12 film, extended release 12
 mcg/hr 1 PATCH every 3 days
 Medication List reviewed and reconciled with
 the patient

Past Medical History

Seizure Disorder/Epilepsy
 HX OF HGERD
 Hernia
 Esophageal ulcer

Surgical History

Nissen fundoplication
 hysterectomy
 c-section X 5
 Left wrist ORIF
 Medial plantar fascia release, tarsal tunnel
 release, calcaneal spur excision/Dr Tom
 Anderson 11-17-2010

Family History

Family: HTN
 Father: alive 65 yrs
 HYPERTENSION, HYPERLIPIDEMIA
 Mother: alive 60 yrs
 HYPERLIPIDEMIA, HYPERTENSION
 3 STEP CHILDREN.

Social History

no Alcohol .
 Smoking: yes Are you a: current smoker ,
 How many cigarettes a day do you smoke?:
 11-20.
 no Recreational drug use.
 Resides in Greenville, is married.

Allergies

NSAIDs
 nubain
 Darvocet N 50
 morphine

Hospitalization/Major**Diagnostic Procedure**

see surg hx

Reason for Appointment

1. WC Injury 03/10/11, 2nd opinion visit. Right leg pain with
 numbness. Weakness in the right ankle/foot. Patient last saw Dr.
 McHenry on 05/06/11.

Assessments

1. Low Back Pain - 724.2 (Primary)
2. Leg discomfort or pain - 729.5
3. HNP Lumbar - 722.10

Treatment**1. Low Back Pain**

Start Oxycodone tablet, 5 mg, 1 tablets, orally, every 12 hours as needed
 for pain, 50, Refills 0

2. Others

37 year old woman who injured herself at work on 3/10/11 working at
 Vital Care. She was transferring a patient and attempted to help a
 patient from falling and she felt a pop in her lower back. She had
 immediate low back pain. She denies any pain at all prior to the injury.
 Her back hurt for a few days, and then the back pain improved. She
 complained of right leg pain soon after the injury. The pain goes from
 her right buttocks, posterior thigh into her calf and great toe on the
 right. No left leg pain. She has been treated with several steroid dose
 packs. Her lumbar MRI shows a right L5-S1 herniated disc that likely
 contributes to her symptoms. There are multiple hemangiomas that are
 non-contributory. I agree with Dr. McHenry's assessment for a right
 L5-S1 microdiscectomy. It would be ideal to try a course of physical
 therapy, but she is very limited in the office today and I doubt that she
 could participate fully. I also feel a right L5-S1 ESI could be
 appropriate, but she says that she that she has had bad experience with
 epidurals during childbirth. Her right L5-S1 herniated disc does not
 explain her right dorsi flexion weakness, but it may be limited because
 of pain. In summary, I agree with a right L5-S1 microdiscectomy.

Follow Up

prn

History of Present Illness**Lower Extremity Pain:**

Patient: LEVI, KERRY D DOB: 11/27/1973 Progress Note: Charles C. Kanos 06/08/2011

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

Review of Systems**Musculoskeletal:**

Muscle pain NO. Painful joints NO.

Weakness YES.

Integumentary:

Bruises easily NO. Poor wound

healing NO. Skin dryness NO. Skin

lesions NO. Skin pigmentation changes NO.

Skin rash NO. Sores NO.

Neurological:

Change in alertness NO. Change in

vision NO. Difficulty speaking NO. Excessive

daytime sleepiness NO. Headache NO.

Seizures, unknown type NO. Paralysis NO.

Psychological:

Feels sad more than usual NO.

Endocrine:

Feels hot when others do not NO. Feels

cold NO.

Allergic, Infectious, and Immunologic:

Food intolerance NO. Seasonal

rhinitis NO.

Genitourinary:

Blood in urine NO. Urination NO

problems. Frequency of urination NO.

Pain or burning with urination NO.

Respiratory:

Cough NO. Pain or tightness in chest NO.

Shortness of breath or difficulty

breathing NO. Wheezing NO.

Cardiovascular:

Chest pain NO. Irregular heartbeat or

feeling of fast, pounding heartbeat NO.

Swelling including ankles or legs NO.

Constitutional Symptoms:

Patient Denies change in appetite.

Fever and chills NO. Night sweats NO.

Unintentional weight change NO.

Eyes:

Loss of vision NO. Spots or specks NO.

Ears, Nose, Mouth, and Throat:

Hearing loss NO. Nasal congestion NO.

Location right lower extremity. Quality burning, stabbing, throbbing, cramping, numbing, radiating, tingling. Severity Pain score (scale of 0 to 10) is a 6/10.

Previous Treatments / Therapies:

Medications Duragesic Patch, Lortab 7.5mg, Lyrica .

Vital Signs

Wt lbs 169, Wt kg 76.66, HR 70, BP 119/79.

Examination**Imaging Studies:**

MRI lumbar w/o on 03/11/11 at GHS- PACS.

General Exam:

General Appearance: Well developed , Well nourished and groomed, Communicates normally. Cardiovascular: no abnormal sounds, no bruits or tenderness., no murmurs, normal S1S2.

Respiratory: Auscultation: normal breath sounds, effort normal.

Neurological:

Capacity for sustained mental activity and abstract thinking within normal limits. Cerebellar: within normal limits. Cranial Nerves: 3rd, 4th, and 6th cranial nerves:, Extraocular muscles with full conjugate range of motion, without nystagmus or complaints of diplopia, 7th Cranial Nerve:, No facial asymmetries at rest or to grimacing.

Gait: walks with a slight limp. Level of consciousness: awake and alert, Orientation normal to time, place, person, and situation, judgement and insight, normal. Mental Status: immediate, recent, and remote memory seem normal. Mood and Affect: normal. Motor: 3/5 right dorsi flexion. Nerve and Spinal Cord Tension-Compression

Signs: Straight leg raising is negative on the right, Straight leg raising is negative on the left. Reflexes: Knee reflexes normal (2+) bilaterally, Ankle reflexes normal (2+) on the left, absent on the right.

Station: Normal.

Lumbar Spine / Lower back:

Inspection: painful ROM of lumbar spine.

Hip / Thigh:

Right Hip and Thigh: no tenderness.

Electronically signed by Charles Kanos on 06/10/2011 at 02:28 PM EDT

Sign off status: Completed

Southeastern Neurosurgical and Spine Institute (Upper)

111 Doctors Drive
Greenville, SC 29605
Tel: 864-797-7150
Fax: 864-797-7155

Patient: LEVI, KERRY D DOB: 11/27/1973 Progress Note: Charles C. Kanos 06/08/2011

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

PROGRESS NOTES

Patient: LEVI, KERRY D
 DOB: 11/27/1973 Age: 37 Y Sex: Female
 Phone:
 Address: , LAURENS, SC.
 Pcp: James Franklin, MD

Provider: Timothy McHenry, MD
 Date: 07/22/2011

Subjective:

CC:

1. HFU POST OP.

HPI:

History of Present Illness:

Pain: dull, cramping, not satisfactorily controlled. Pain score is 3/10 today.

SPINE:

(Evan Turnbull, P.A. dictating for Dr. Timothy McHenry)

Ms. Levi returns nearly three weeks following a right L5-S1 microdiscectomy for severe radicular leg pain on the right. The procedure was performed on 07/05/2011 after a hospital admission for pain control. Preoperatively, she was also not moving her right leg at any level. She did well following the procedure. Today, she reports at least 90% improvement in her right leg pain. Currently, she just has a mild, achy sensation in the posterior thigh. She is very pleased with the results of surgery. She also states that she does not have any lower extremity weakness any more.

ROS:

Musculoskeletal:

Muscle pain no. Painful joints no. Weakness yes.

Integumentary:

Bruises easily no. Poor wound healing no. Skin dryness no. Skin lesions no. Skin pigmentation changes no. Skin rash no. Sores no.

Neurological:

Change in alertness no. Change in vision no. Difficulty speaking no. Excessive daytime sleepiness no. Headache no. Seizures, unknown type no. Paralysis no.

Psychological:

Feels sad more than usual no.

Endocrine:

Feels hot when others do not no. Feels cold no.

Allergic, Infectious, and Immunologic:

Food intolerance no. Seasonal rhinitis no.

Genitourinary:

Blood in urine no. Urination no problems. Frequency of urination no. Pain or burning with urination no.

Respiratory:

Cough no. Pain or tightness in chest no. Shortness of breath or difficulty breathing no.

Wheezing no.

Cardiovascular:

Chest pain no. Irregular heartbeat or feeling of fast, pounding heartbeat no. Swelling including ankles or legs no.

Constitutional Symptoms:

Patient Denies change in appetite. Fever and chills no. Night sweats no. Unintentional weight change no.

20

Eyes:

Loss of vision no. Spots or specks no.

Ears, Nose, Mouth, and Throat:

Hearing loss no. Nasal congestion no.

Medical History: Seizure Disorder/Epilepsy, HX OF HGIRD, Hernia, Esophageal ulcer.

Surgical History: Nissen fundoplication , hysterectomy , c-section X 5 , Left wrist ORIF , Medial plantar fascia release, tarsal tunnel release, calcaneal spur excision/Dr Tom Anderson 11-17-2010.

Hospitalization/Major Diagnostic Procedure: see surg hx .

Family History: Family: HTN Father: alive 65 yrs HYPERTENSION, HYPERLIPIDEMIA Mother: alive 60 yrs HYPERLIPIDEMIA, HYPERTENSION
3 STEP CHILDREN.

Social History: no Alcohol . Smoking: yes Are you a:: current smoker , How many cigarettes a day do you smoke?: 11-20. no Recreational drug use.

Resides in Greenville, is married.

Medications: Keppra tablet 1500 mg 1 tab(s) 2 times a day, Duragesic-12 film, extended release 12 mcg/hr 1 PATCH every 3 days, Medication List reviewed and reconciled with the patient

Allergies: NSAIDs, nubain, Darvocet N 50, morphine.

Objective:

Vitals: Wt lbs 169, Wt kg 76.66, HR 70, BP 119/79.

Past Orders:

Examination:

SHCC SM Spine:

On physical examination, she has 5/5 strength at all levels of the bilateral lower extremities. Sensation is intact at all levels of the bilateral lower extremities. The wound is well healed without signs of infection. There is no swelling or significant redness.

Assessment:

Assessment:

1. Surgical Follow up Exam - v67.00 (Primary)
2. Leg discomfort or pain - 729.5
3. DISPLACED LUMBAR INTERVERT DISC - 722.10

Plan:

1. Surgical Follow up Exam

The patient was seen and examined by Dr. McHenry, and the following plan was developed by him. Ms. Levi is doing much better following L5-S1 microdiscectomy. We recommend beginning physical therapy for strengthening and stretching and reconditioning her core musculature. We will plan to follow up with her in six weeks time. We will also plan to gradually wean down her narcotic pain medication with each request. ET/TM/bep.

2. Others

I, as Attending Physician participated in the care of this patient and was physically present for the key or critical components of the services provided by the Physician Assistant.

Immunizations:

Labs:

21

Preventive:

Med Reconciliation: Pt.Ed: Complete and current medication list reviewed and given to patient.
Follow Up: 6 Weeks

Provider: Timothy McHenry, MD

Patient: LEVI, KERRY D **DOB:** 11/27/1973 **Date:** 07/22/2011

Electronically signed by Timothy McHenry MD on 07/29/2011 at 10:26 AM EDT

Sign off status: Completed

22

PROGRESS NOTES

Patient: LEVI, KERRY D
 DOB: 11/27/1973 Age: 37 Y Sex: Female
 Phone:
 Address: , LAURENS, SC-
 Pcp: James Franklin, MD

Provider: Timothy McHenry, MD
 Date: 09/21/2011

Subjective:

CC:

1. RTO.

HPI:

History of Present Illness:

Pain: dull, throbbing, radiating, not satisfactorily controlled. Pain score is 5/10 today.

SPINE:

(Evan Turnbull, P.A. dictating for Dr. Timothy McHenry)

Ms. Levi returns today for followup of her residual right leg pain after a right L5-S1 microdiscectomy procedure performed on July 5th of this year. At her last visit, she reported approximately 90% improvement in her symptoms. She was referred to physical therapy. She went to one visit and then unfortunately had a seizure on the ride home and had not returned to physical therapy after that. She feels that her leg pain has worsened a little bit and feels that she is approximately 70% better compared to before surgery today.

ROS:

Musculoskeletal:

Muscle pain no. Painful joints no. Weakness yes.

Integumentary:

Bruises easily no. Poor wound healing no. Skin dryness no. Skin lesions no. Skin pigmentation changes no. Skin rash no. Sores no.

Neurological:

Change in alertness no. Change in vision no. Difficulty speaking no. Excessive daytime sleepiness no. Headache no. Seizures, unknown type no. Paralysis no.

Psychological:

Feels sad more than usual no.

Endocrine:

Feels hot when others do not no. Feels cold no.

Allergic, Infectious, and Immunologic:

Food intolerance no. Seasonal rhinitis no.

Genitourinary:

Blood in urine no. Urination no problems. Frequency of urination no. Pain or burning with urination no.

Respiratory:

Cough no. Pain or tightness in chest no. Shortness of breath or difficulty breathing no. Wheezing no.

Cardiovascular:

Chest pain no. Irregular heartbeat or feeling of fast, pounding heartbeat no. Swelling including ankles or legs no.

Constitutional Symptoms:

Patient Denies change in appetite. Fever and chills no. Night sweats no. Unintentional weight change no.

23

Eyes:

Loss of vision no. Spots or specks no.

Ears, Nose, Mouth, and Throat:

Hearing loss no. Nasal congestion no.

Medical History: Seizure Disorder/Epilepsy, HX OF HGERD, Hernia, Esophageal ulcer.

Surgical History: Nissen fundoplication , hysterectomy , c-section X 5 , Left wrist ORIF , Medial plantar fascia release, tarsal tunnel release, calcaneal spur excision/Dr Tom Anderson 11-17-2010.

Hospitalization/Major Diagnostic Procedure: see surg hx .

Family History: Family: HTN Father: alive 65 yrs HYPERTENSION, HYPERLIPIDEMIA Mother: alive 60 yrs HYPERLIPIDEMIA, HYPERTENSION
3 STEP CHILDREN.

Social History: no Alcohol . Smoking: yes Are you a: current smoker , How many cigarettes a day do you smoke?: 11-20. no Recreational drug use.
Resides in Greenville, is married.

Medications: Keppra tablet 1500 mg 1 tab(s) 2 times a day, Duragesic-12 film, extended release 12 mcg/hr 1 PATCH every 3 days, Medication List reviewed and reconciled with the patient

Allergies: nubain, NSAIDs, Darvocet N 50, morphine.

Objective:

Vitals: Wt lbs 169, Wt kg 76.66, HR 70, BP 119/79.

Past Orders:

Examination:

SHCC SM Spine:

Motor and sensory intact at all levels of bilateral lower extremities. Straight-leg raise on the right causes some mild discomfort in the posterior thigh, negative on the left. She walks with a normal gait. The incision is well healed.

Assessment:

Assessment:

1. Surgical Follow up Exam - v67.00 (Primary)
2. Back pain, low back with radiculopathy - 724.3

Plan:

1. Surgical Follow up Exam

The patient was seen and examined by Dr. McHenry, and the following plan was developed by him. Ms. Levi is about two and one-half months following a right L5-S1 microdiscectomy. She has done well and is overall very pleased with the significant reduction of her leg pain compared to prior to surgery. We encouraged her to continue a home exercise program. It was felt that her leg symptoms are likely secondary to residual nerve irritation. She is neurologically intact. She does not feel that she can return to work. Therefore, we will refer her to Upstate Medical Rehab for evaluation and treatment and developing a rehabilitation program. We will plan to follow up on a PRN basis. ET/TM/bep.

2. Others

I, as Attending Physician participated in the care of this patient and was physically present for the key or critical components of the services provided by the Physician Assistant.

Immunizations:

24

Labs:

Preventive:

Med Reconciliation: Pt.Ed: Complete and current medication list reviewed and given to patient.
Follow Up: next available UMR

Provider: Timothy McHenry, MD

Patient: LEVI, KERRY D **DOB:** 11/27/1973 **Date:** 09/21/2011

Addendum:

11/18/2011 02:11 PM McHenry, Timothy > I completed a SC WC Form 14B based on this clinic visit determination that she had recovered from the lumbar microdiscectomy surgery with some residual symptoms. IAW AMA Guides to the Evaluation of Permanent Impairment, she is lumbar DRE category 3 with 13% impairment to the whole person.

Electronically signed by Timothy McHenry MD on 10/07/2011 at 04:36 PM EDT

Sign off status: Completed

25

04/06/11 15:04 BK

MAR-31-2011 10:44 From: N A C E M S

854 295 8644

To: 17704103661

P.1/2

Claim # 55003001

Mail FR-10 to: Office of Financial Responsibility SC Department of Public Safety PO Box 1488, Columbia, SC 29216				SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY FR-10 (REV 07-2010) NOTICE OF REQUIREMENT							
Date	Time	Com	1-Suburban 4-Secondary 2-UR Primary 5-County 3-SC Primary 6-PP	Collision Location (Rt # / Name)	Station the 6-Operator 2-Alternate 7-Business 5-Spec	Miles	Dir	In	City or Town of		
03-28-2011	1725	04		8402 / 83		1.66	NE	SW	GREENVILLE		
To Vehicle Owner/Operator Failure to comply could result in appropriate action under 56-10-270 and 56-10-20 of the 1976 code of laws of S.C. as amended, if vehicle subject to registration in S.C., and upon conviction thereof, the Department must suspend your driving and/or registration privileges until all compliances have been met under the above sections of law.											
E-032868		Driver/Pedestrian's Full Name JOSHUA DANIEL				E-032869		Driver/Pedestrian's Full Name AMBER LAYNE			
Unit #	Sex	Race	Stream/RFD	Unit #	Sex	Race	Stream/RFD				
01	M	W		02	F	W					
Birth Date		City, State, & Zip		Birth Date		City, State, & Zip					
12-19-1989		SASLEY SC		09-12-1982		SASLEY SC					
State	Driver's License #	Class	Insurance Company	State	Driver's License #	Class	Insurance Company				
SC	160686322	D	COMPANION PROPERTY & CASUALTY	SC	007054990	S	ALLSTATE				
Year	Body	Vehicle Make	VIN #	Year	Body	Vehicle Make	VIN #				
2006	SV	FORD	1F00S34P76HA48523	2003	SV	CHEV	16N0S1A002L00591				
State	Year	License Plate #	Owner's D.L. #	State	Year	License Plate #	Owner's D.L. #				
SC	2011	SC13145		SC	2011	6P-2848					
Home Telephone		Owner's Full Name		Home Telephone		Owner's Full Name					
		NORTHERN ANDERSON COUNTY SCS				DONALD RAYMOND					
Bus Telephone		Stream/RFD		Bus Telephone		Stream/RFD					
		10709 HIGHWAY 33 NORTH									
Contributed To Collision		City, State, & Zip		Contributed To Collision		City, State, & Zip					
Yes		SASLEY SC 29642		Yes		DALLASTON SC					
Driver/Pedestrian's Full Name											
State Year License Plate # Owner's D.L. #											
Home Telephone											
Owner's Full Name											
Bus Telephone											
Stream/RFD											
Contributed To Collision											
City, State, & Zip											
Yes No											
Accident Insurance Information for Unit # 01											
Company Name											
ALLSTATE											
Area Code/Phone Number											
(843) 5934854											
Agency Name											
WALTONS END ARCY IN											
Policy Number											
Accident Insurance Information for Unit #											
Company Name											
COMPANION PROPERTY & CASUALTY											
Area Code/Phone Number											
(854) 2327040											
Agency Name											
WILSON & BROWN OF SC											
Policy Number											
Insurance Information											
Notice of Requirement Accepted											
Signature Dave Roberts											
Y N Noted in After Summary?											
Y N Vehicle Subject to Registration in SC?											
To Be Completed By Insurance Agency, Broker, Or Other Company Representative											
The information as contained herein is based solely upon my knowledge and belief as a representative of the above insurance company and no warranty of liability is intended here or above mentioned information as I have listed below											
Reference to Unit # I hereby affirm that to the best of my knowledge the vehicle described above was insured by the below named insurance company on the date of the collision											
Insurance Company											
Policy #											
Signature											
Title											
Beginning Date											
Ending Date											
Policy Holder											
Notice (Noted by G-4 Dept of Ins)											
Bus Telephone											
Notice: Failure to have this form completed by your insurance broker, agent, or representative and returned to the South Carolina Department of Public Safety within 15 days may result in suspension of your driving and/or registration privileges.											
If any of the below are applicable, disregard the above portion.											
Form FR-10 Not Issued: Section 56-10-270 56-10-520											
No FR-10 issued to Operator/Owner of Unit #											
Summons issued to:											
For operating or allowing the operation of an uninsured vehicle											
Summons Number											
Signature											
Insuring Owner's Name											
CURTIS - T W											
Name											
DANIEL											
Date											
4/6/11											
Motorist's Name											
Name											
Internal Agency Code											
33AN016740											

MARKET CLAIM OFFICE
Palmetto MCO

PHONE NUMBER: 803-213-3636
OFFICE HOURS: MONDAY-FRIDAY 8:00-5:30

SEPTEMBER 9, 2011

Constangy, Brooks & Smith LLP
105 N. Spring Street
Suite 105
Greenville, South Carolina 29601
ATTN: David H. Keller

Allstate Insurance Company
Claim Number: 0196922777
Loss Date: 3/29/2011
Our Insured: Donald Proell
Your Client: unknown
Your File No.: 08020-53203
Kerry Levi v Northern Anderson County EMS

Dear Mr. Keller:

With respect to yours of August 4th, enclosed please find our file documents pertaining to the claim of Kerry Levi. We have yet to receive any medical bills or reports with respect to the injury sustained by Mr. Levi.

If you require anything further, feel free to contact me.

Sincerely,

Kim Eargle
Allstate Property-Casualty Claim Service Organization

Financial Log >

Payment Summary

EFT/Check #:	117560642	Cashed Date:	4/19/2011
Payee:	Kerri Levi		
Mail To:	Kerri Levi	Payment Amount:	550.00 USD
	LAURENS, SC JS		
In Payment For: Full and final settlement of any and all claims for bodily injury arising from loss of 3/29/2011.			
Invoice Date:		Invoice #:	Invoice Amount:
Payment Method:	System Issued	Dates From:	To:
Issued By:	CYNTHIA ANDERSON-WEISBRICH	Issue Date:	4/12/2011
		Company:	Allstate Insurance Co...

Additional Comments:

Check Stub Wording: In payment for Bodily Injury Liability for Date of Loss 3/29/2011.

Payment Type	Method of Settlement	Transaction Reason	Svc. Benefit Type	Billed Amount	Amount To Pay
Claim #: 0196922777		Insured: DONALD R. PROELL			
Kerri Levi/Bodily Injury Liability					
Loss Payment	Fast Track	Regular Bodily Injury	Damages		550.00 USD

[View Pay File Notes](#)
[Payment Setup](#)
[Payment Details](#)
[Back](#)

22

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #:	1104304
Carrier File #:	55003001
Carrier Code #:	1034
Employer FEIN #:	570868164

Claimant's Name: Kerry Levi SSN: _____ Employer's Name: Northern Anderson County EMS
Address: _____ Address: PO Box 51222
City: Laurens State: SC Zip: _____ City: Piedmont State: SC Zip: 29673
Home Phone: _____ Work Phone: (864) 269 - 8047 Insurance Carrier: Cornhusker Casualty Company
Preparer's Name: Nicole Albrecht Preparer's Phone #: (800) 661 - 6029

Date of Injury: 03/29/2011
month day year

A. Total Wages Paid

1. Check Applicable Method:

- ☒ Report of earnings of injured employee based on four completed quarters.
☐ Report of earnings of injured employee who did not complete four quarters based on actual time worked.
☐ Report of earnings of similar employee. Injured employee did not work sufficient time before alleged injury. Hire date: _____
☐ Report of earnings of injured employee based on alternative method because Form 20 results in a compensation rate that is not fair and just (attach documentation to show how average weekly wage and compensation rate were calculated).

2. List total wages paid as reported to the Employment Security Commission on the Employer Quarterly Contribution and Age Reports during the four quarters immediately preceding the quarter in which the injury occurred. Do not include the quarter during which the injury occurred.

Quarter	Ending Date	Total Wages Paid
1st	3/31/2010	\$4724.76
2nd	6/30/2010	\$4942.57
3rd	9/30/2010	\$6936.26
4th	12/31/2010	\$3686.63

Total Paid 2. \$20290.22

3. List total value of other allowances of any character made in lieu of wages during four quarters above.

3. \$0.00

4. Add lines 2 and 3.

TOTAL WAGES PAID:

4. \$20290.22

5. List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred.

5. 46

B. Average Weekly Wage

6. To calculate average weekly wage, divide total wages (line 4) by total weeks paid (line 5).

AVERAGE WEEKLY WAGE: 6. \$441.09

C. Compensation Rate

7. The general rule for calculating the compensation rate is to multiply average weekly wage (line 6) by .6667. Estimate compensation rate by multiplying average weekly wage (line 6) by .6667. See part 8 below to determine the actual compensation rate.

7. \$294.07

8. The compensation rate is as follows (choose one):

- ☐ When average weekly wage (line 6) is less than \$75.00, the compensation rate is the average weekly wage. Enter average weekly wage on line 8.
☐ When the estimated compensation rate (line 7) is less than \$75.00 and average weekly wage (line 6) is more than \$75.00, the compensation rate is \$75.00. Enter \$75.00 on line 8.
☐ When the estimated compensation rate (line 7) is more than the maximum compensation rate for the year in which the injury occurred, enter the maximum compensation rate for the year in which the injury occurred on line 8.
☐ Employee is within the exceptions listed in S.C. Code Ann. Section 42-7-65. List applicable exception here and enter appropriate compensation rate on line 8. _____
☒ The calculated compensation rate (line 7) applies. Enter amount from line 7 on line 8.

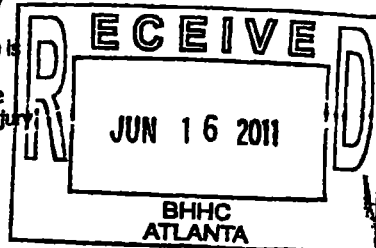
WEEKLY COMPENSATION RATE: 8. \$294.07

Employer's representative shall prepare a Form 20 and serve per R.67-211 a copy on the claimant within thirty days of beginning temporary compensation. See R.67-1803 when no temporary compensation is paid. NOTE: Average weekly wage represents average gross pay before taxes and other deductions. WHEN THE CLAIMANT DOES NOT AGREE WITH THE COMPENSATION RATE ON LINE 8, HE OR SHE SHOULD CONTACT THE EMPLOYER'S REPRESENTATIVE TO TRY TO REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE CLAIMS DEPARTMENT AT (803)737-5723.

WCC Form # 20
Rev. Date 3/97

20

STATEMENT OF EARNINGS
OF INJURED EMPLOYEE



South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #:	1104303
Carrier File #:	55002883
Carrier Code #:	1034
Employer FEIN #:	57-0868164

Claimant's Name: Kerry Levi SSN: _____

Employer's Name: NORTHERN ANDERSON COUNTY EMS

Address:

Address: P.O.Box 51222

City: Laurens State: SC Zip: _____

City: PIEDMONT State: SC Zip: 29673

Home Phone: _____ Work Phone: (864) 269-8047

Insurance Carrier: Berkshire Hathaway Homestate Insurance Company

Preparer's Name: Kim Eaton Law Firm: _____ Preparer's Phone #: (800) 661-6029

1. Date of Injury: 3/10/2011 2. Total Weeks Compensation Paid: N/A
(m/d/yyyy)

3. Type of Compensation Paid (TP or TT)/Periods of Payment:

	(m/d/yyyy)		(m/d/yyyy)
Type: <u>N/A</u>	From: _____	To: _____	
Type: <u>N/A</u>	From: _____	To: _____	
Type: <u>N/A</u>	From: _____	To: _____	

4. Date of First Payment: N/A
(m/d/yyyy)

5. Total Amount Paid (a) Compensation: \$ 0.00
(b) Medical (Include Nursing, Hospital, Drugs, Etc.): \$365.75

6. Informal Conference is Requested: ☐ Yes ☒ No (check one)

Use these lines to send a memo to the Commission:

Kim Eaton
Employer's Representative

(800) 661-6029
Phone

8/31/2011
Date

Type or print all information. File this form six months after the alleged injury date and each six months until the Commission's File is closed. Form 18 must be filed whether or not compensation is ongoing. Check "yes" after Number 6 to request an Informal conference. Refer to R.67-413, R.67-507, and R.67-804 for further information.

WCC Form # 18
Rev. Date 3/96

18

Periodic Report

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675



WCC File #: 1104303/1104304
Carrier File #: 55003001
Carrier Code #: 1034
Employer FEIN #: 57-0868164

Claimant's Name: Kerry Levi SSN: _____ Employer's Name: Northern Anderson County EMS
Address: _____ Address: P.O. Box 51222
City: Laurens State: SC Zip: _____ City: Piedmont State: SC Zip: 29673
Home Phone: _____ Work Phone: 864 269 8047 Insurance Carrier: Cornhusker Casualty Company
Preparer's Name: David Hill Keller Law Firm: Constangy Brooks & Smith, LLP Preparer's Phone #: 864 890 1882

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ claimant ☒ employer (check one) Date of Injury: 3/10/11 & 3/29/11

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See Attached

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Michael Hart, Esq.

The Dick James Law Firm, 611 N. Main Street, Greenville, SC 29601

on the 3rd day of February, 2012 by ☒ first class mail ☐ personal service ☐ certified mail.

[Signature] Attorney at Law February 3, 2012
Preparer's Signature Title Date

Check this box if you are not represented by an attorney. ☐

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701B. Otherwise, file the original and four copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

WCC Form # 30
Rev. 3/97

30

REQUEST FOR COMMISSION REVIEW

5. In noting in his order that the Defendants maintain a lien for the medical, as the reason for not finding an election of remedy, the error being §42-1-560, also gives the Defendants a lien for indemnity which they will not be able to recoup.

6. In finding is a fact and concluding as a matter of law that the South Carolina Workers' Compensation Commission has jurisdiction over the claim, the error being that the Claimant's acceptance of a settlement from Allstate Insurance Company deprives the South Carolina Workers' Compensation Commission of jurisdiction over the matter.

Respectfully submitted,



David Hill Keller, Esq.
Attorney for Defendants
Constangy, Brooks & Smith, LLP

**BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

Kerry Levi,)
)
Employee/Claimant,)
)
Northern Anderson County EMS,)
)
Employer,)
)
Berkshire Hathaway Homesite Companies)
)
Carrier/Defendant)
_____)

**CLAIMANT'S
MEMORANDUM OF LAW**

WCC File Nos.: 1104303 / 1104304

STATEMENT OF THE CASE

A hearing was held before the Honorable Avery B. Wilkerson on January 2, 2012 pursuant to a Motion to Dismiss filed by the Employer / Carrier. Ms. Levi was involved in two admitted on-the-job accidents while working for the defendant employer. The first accident occurred March 10, 2011 and the second accident occurred March 29, 2011.

The Motion to Dismiss pertains only to the March 29, 2011 accident which involved Ms. Levi being a passenger in an automobile accident while in the course and scope of her employment. The defendants take the position that Ms. Levi is barred from pursuing her workers' compensation claim in the second accident because she "settled the third party claim involving the motor vehicle accident of March 29, 2011 on April 19, 2011 with Allstate Insurance Company in the amount of \$550.00." The Motion also stated that S.C. Code Ann. §42-1-560 places on the Claimant "the duty and responsibility of placing the employer/carrier and workers' compensation commission notice of any third party claim and/or settlement thereof."

In his Order dated January 20, 2012, Commissioner Wilkerson found, after reviewing all the evidence that Ms. Levi did not select her remedy and is not barred from pursuing a claim through the Commission because she did not settle her case against the at-fault third party who was insured by Allstate. To the contrary, Ms. Levi only received money for pain and suffering which does not limit the workers' compensation carrier from pursuing indemnification for temporary total disability payments they may pay, for permanency they may pay or for medical benefits they may pay since Allstate has never been released from liability. Ms. Levi has never signed a release presented by Allstate as it pertains to liability of the at-fault driver. In fact, a release has never even been presented by Allstate.

STATEMENT OF THE FACTS

On March 10, 2011 while doing her job at Northern Anderson County EMS, Ms. Levi and a co-worker were transferring a very heavy patient on a slide board from the stretcher to the wheelchair. The patient slid off the slide board and when the claimant attempted to get her off the floor she felt a pop in her back. She could not straighten back up after she felt the pop. (Levi Depo. p. 25, Ins. 2-15). She reported the accident in a timely fashion and the defendants began providing medical care for the back and leg injuries. The start of Ms. Levi's back and leg problems occurred with this first accident on March 10, 2011. (Depo of Levi, p. 16 Ins. 10-13). She was sent to Doctor's Care on the accident date and treated for a severe back strain and taken out of work and instructed to begin physical therapy. (APA p. 10). She was sent to The Center for Health and Occupational Services for back pain and right leg paresthesias on March 22, 2011.

At that visit she was prescribed Tylenol, given self care instructions for a herniated disc and it was recommended that she be on a three man truck until cleared through Proaxis therapy. (APA pg. 1).

On March 29, 2011 Ms. Levi was riding in a work vehicle on duty when the vehicle was struck in the rear by another vehicle. Ms. Levi did not go the doctor or hospital on the date of the accident; rather, she went back to the company doctor on March 31, 2011. She complained of the same injured body parts as before the March 29, 2011 accident. Additionally, the doctor noted "no acute process". At that visit she stated that "she feels ready to return to regular work." The doctor returned her to work that same day. (APA pg. 2). She returned to the company doctor by recommendation of the employer on April 26, 2011 and was placed on restricted duty. (APA pg. 5).

As stated above, the second accident occurred on March 29, 2011 when the ambulance she was riding in was rear-ended. Ms. Levi received a letter dated April 10, 2011 from Ms. Cynthia Anderson-Weisbrich of Allstate Insurance Company which stated..."As we agreed, I will be sending a check to you in a separate letter in the amount of \$550 for full and final settlement on your injury claim. Please understand that signing and cashing this check settles your claim from the above accident. **Any medical expenses incurred by you from this loss will be presented to us from your Workers' Compensation Adjuster.**" (APA Ex #1, emphasis added).

In addition to the letter of April 10, 2011 from Allstate, another letter was sent to the Claimant's former attorney, The Dick James Law Firm which stated: "This will confirm that Allstate paid and Ms. Levi cashed a settlement check for \$550.0. **This was for pain**

and suffering only with the understanding we would pay for the reasonable and related medical bills." (APA Ex #2, emphasis added). Ms. Levi never signed a release of any nature with Allstate.

ARGUMENT

The primary object of the Workers' Compensation Act is to create and preserve rights of employees who may sustain personal injuries in the course of their employment. McLain v. Carolina Power & Light Co., 172 F.Supp. 273 (1959). It is South Carolina's policy to resolve jurisdictional doubt in favor of the inclusion of employers and employees under the Workers' Compensation Act. Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002) (See, Baggett v. Southern Music, Inc., 330 S.C. 1, 496 S.E.2d 852 (1998) where the Supreme Court stated that the general policy is to construe the Workers' Compensation Act in favor of coverage, rather than exclusion. See also, Moore v. Family Service of Charleston County, (1977) where the Supreme Court held that the Court is committed to including injured employees within its protection rather than excluding them).

The March 29, 2011 accident is the only accident that the Defendants' motion pertains to since that is the only one that involves a third party. The Defendants argue that the second injury severely aggravated Ms. Levi's pre-existing condition from her earlier injury and since that time she has been receiving ongoing medical care. This simply not supported by the evidence. She complained of the same problems before the second accident as she did after the second accident and there is no factual basis for stating that the second accident caused her initial injury to require more medical than

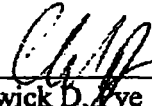
before her initial injury. She was actively receiving treatment prior to the second accident and **she did not even go to the hospital or doctor's office on the date of the second accident and no one else in the car with her was injured in the second accident.** In contrast to the second accident that the Defendants want to blame for her current problems, Ms. Levi went to Greenville Memorial Hospital on the date of her first accident, was kept overnight, and an MRI was performed revealing a herniation at L5-S1. After that first MRI, there were no more MRIs performed on her back. The objective medical evidence reveals that the injury to Ms. Levi's back occurred in the first accident.

The Defendants take the position that Ms. Levi did not notify her employer or the workers' compensation carrier of the \$550 check she was offered to settle the pain and suffering portion of her March 29, 2011 accident. However, as evidenced by the attached Affidavit of Kerry Levi, she met in person with the owner of the company, Dave Roberts, and told him about the \$550 offer before she received it and once again after she received it but before cashing it. Both times he told her to go ahead and accept the money. Likewise, Ms. Levi called adjuster Shawn Heine at Cornhusker Casualty Company and notified him at the time the \$550 was offered and after she received it but before she cashed it. The workers' compensation adjuster also told her she should accept the money from Allstate. Ms. Levi was not represented by counsel when the check was cashed and she informed the employer and carrier on two occasions each and relied on them when they said to go ahead and cash it.

CONCLUSION

Ms. Levi told company owner Dave Roberts in person on two occasions about the \$550 offer and told Shawn Heine, her contact at the workers' compensation insurance company about the \$550 offer on two occasions over the phone. Ms. Levi did not violate S.C. Code Ann. § 42-1-560 and the defendants' Motion to Dismiss should be dismissed and the Commission should retain jurisdiction of the March 29, 2011 accident. Finally, there is no prejudice at all to the workers' compensation carrier because the letters from Allstate confirm that the intent of Ms. Levi and the third party liability carrier was for Allstate to remain liable for all damages other than pain and suffering which is not covered by workers' compensation.

Respectfully Submitted,



Chadwick D. Fye
Attorney for the Claimant
P.O. Box 6346
Spartanburg, SC 29304
(Ph) 864-583-5658
(Fax) 864-583-5672

05/01, 2012

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 1104303/1104304

Kerri Levi,

Claimant,

v.

Northern Anderson County EMS,
Employer,

and

Berkshire Hathaway Homesite Companies
Carrier,

**AFFIDAVIT OF
KERRY LEVI**

PERSONALLY, appeared before me, the undersigned, who being duly sworn deposes and states that:

I am the above-named claimant and this affidavit pertains to the \$550 I received from Allstate Insurance Company regarding the March 29, 2011 auto accident. I met in person with Mr. Dave Roberts, the owner of Northern Anderson County EMS, and told him about the \$550.00 that was offered from Allstate Insurance Company before I received it. I also spoke with Mr. Roberts after I received the \$550.00 but prior to cashing it. Both times he told me to go ahead and accept the \$550.00.

I also spoke with the adjuster, Shawn Heine at Cornhusker Casualty Company, and notified him of the \$550.00 that was offered from Allstate. I also spoke with him by phone once I received the \$550.00 and prior to cashing it. Mr. Heine also told me to accept the \$550.00.

I relied on Mr. Roberts and Mr. Heine before accepting or cashing the \$550.00 and I have never received a release from Allstate nor have I signed a release from Allstate.

5/2/12
Date

Kerry Levi
Kerry Levi

SWORN to before me this
3 day of May, 2012.

Maige S.
NOTARY PUBLIC FOR S.C.

My Commission expires: 4/27/21

RECEIVED
MAR 28 2013
SC COURT of Appeals

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.

MOTION TO STAY APPEAL

This motion is filed pursuant to Rule 240 of the South Carolina Appellate Court Rules, which governs motions and petitions generally.

This case involves the part of the Workers' Compensation Act that explains how an injured person can pursue both a tort lawsuit *and* a workers' compensation claim when a third party causes the work-related injury. The relevant statute gives the employer or its insurance company a lien on the recovery from the tort suit, and it also requires the employee to protect the lienholder by doing things like giving notice before filing suit.

After the commission dismissed her claims, Kerry Levi filed a lawsuit against the third-party that caused her work-related car wreck and gave notice of that suit to the appropriate entities. These developments make this appeal unripe for review. If Ms. Levi

has not forfeited the right to maintain her tort suit, the commission's decision, which should never have been issued in the first instance, will be wholly incorrect. Ms. Levi accordingly requests a stay of this appeal while her third-party suit is pending.

FACTUAL/PROCEDURAL BACKGROUND

Ms. Levi was working as a paramedic when she was in a car crash in March of 2011. This crash was caused by a third party and aggravated a work-related injury Ms. Levi suffered earlier that month while moving a patient. The parties dispute whether any portion of Ms. Levi's current disability is attributable to the first incident (as opposed to being caused entirely by the car crash), but that dispute is not material to the issues on appeal.

About two weeks after the wreck, Ms. Levi accepted \$550 from the at-fault driver's insurance company. About four weeks after the wreck, Ms. Levi initiated workers' compensation claims for both incidents. Both claims concerned alleged injuries to Ms. Levi's back, and both claims were accepted by the respondents. Ms. Levi began receiving temporary total disability benefits in May of 2011, and she also received various types of medical treatment including back surgery.

In September of 2011, the respondents filed a request for a hearing and a motion requesting dismissal of both claims. In support of their motion, the respondents argued that in accepting \$550, Ms. Levi had "settled" her claim against the at-fault driver, that she had done this without giving them notice, and that she had thus damaged their ability to seek reimbursement for her workers' compensation benefits.

Ms. Levi had no legal representation at the time of the \$550 payment and never executed any documents that traditionally mark a settlement. She never executed a release,

a covenant not to execute, or a covenant not to sue. See *Wade v. Berkeley County*, 348 S.C. 224, 227, 559 S.E.2d 586, 587 (2002).

The primary evidence the commission considered was written correspondence to Ms. Levi from the at-fault driver's insurance company. The first letter was dated about two weeks after the car crash. Although this letter offered that the \$550 was for "full and final settlement" of Ms. Levi's "injury claim," it also advised that the workers' compensation carrier would be presenting Ms. Levi's medical expenses to the at-fault's insurance company.

The second piece of evidence was another letter from the insurance company. This letter advised that Ms. Levi's \$550 check was only intended to compensate her for her "pain and suffering" from the crash. Both letters are attached to this motion as **Exhibit A**.

On January 20, 2012, a hearing commissioner issued an order denying the motion to dismiss. **Exhibit B**. The hearing commissioner found that Ms. Levi had only been compensated for her pain and suffering, and the hearing commissioner 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, and the appellate panel issued a written order reversing the hearing commissioner's decision and granting the motion. **Exhibit C**. The panel held that Ms. Levi had settled with the third party, that Ms. Levi had not notified the carrier, and that in taking \$550, Ms. Levi had elected her remedy and deprived the commission of jurisdiction over the claim. The panel noted that a provision of the Workers' Compensation Act gave the respondents the right to participate in all aspects of a claim against a third party and that Ms. Levi had not

complied with that statute, which requires an injured worker to give the employer, its insurance carrier, and the commission "[n]otice of the commencement of the action" against the third party. S.C. Code Ann. § 42-1-560 (1985).

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

On March 5, 2013, Ms. Levi commenced a civil lawsuit against the at-fault driver. About two weeks later, she provided notice of the lawsuit to the commission, her employer, and its workers' compensation insurance carrier. See **Exhibit D**.

ARGUMENT

This case not ripe for review. The commission based its decision to dismiss Ms. Levi's claims on the facts that Ms. Levi failed to follow the relevant provision of the Workers' Compensation Act and that this failure negatively impacted the rights of her employer and its insurance company. Both conclusions were premature. The statute required Ms. Levi to give notice to the commission, the employer, and the insurance carrier; all within 30 days of filing suit against the third party. This had not happened at the time of the commission's decision, but it has happened since. Unless Ms. Levi loses her third party lawsuit on the basis of this supposed settlement agreement, the facts will command reversal of the commission's decision. If there was no settlement, there was no election of remedy.

This is an odd case. The respondents' motion should never have been heard by the hearing commissioner: a commission regulation forbids parties from bringing motions to dismiss. See 25A S.C. Code Ann. Regs. 67-215 B. In similar fashion, the respondents' appeal should never have been heard by the appellate panel: the right to commission review

lies only from a hearing commissioner's "award," see S.C. Code Ann. § 42-17-50, and the denial of a motion to dismiss is not an "award." The only evidence offered below was that Ms. Levi's employer advised her to take the \$550, and if Ms. Levi's employer was truly interested in protecting its subrogation rights (as opposed to avoiding payment on a valid claim), it would have sued the third party directly, which the statute allows it to do. These proceedings have been a wasteful use of administrative and judicial resources. Ordering a stay in this matter would avoid further waste while the record becomes ripe for review.

A. The Third Party Recovery Statute Is Designed to Treat Both Sides — the Injured Worker and the Employer — Fairly.

Some on-the-job injuries occur in circumstances that allow an injured worker to pursue a tort claim against a third party. The Supreme Court has described that an injured worker has three options in these circumstances. First, he may chose to sue the third party in tort and forego seeking workers' compensation benefits. Second, he may seek workers' compensation benefits and allow his employer to seek reimbursement from the third party. Third, he may seek workers' compensation benefits and sue the third party himself, albeit for his employer's benefit. *Fisher v. S.C. Dept. of Mental Retardation-Coastal Center*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982).

The *Fisher* decision describes these options as functions of "case law," see *id.*, but in reality, they are creatures of statutory law. Section 42-1-550 of the Code (1985) preserves the injured worker's right to sue the third party on his own behalf and at the time of his choosing. Another statute, section 42-1-560, contains a description of what an injured worker must do in order to enforce his rights against a third party while also seeking

workers' compensation benefits. This second statute is quite lengthy. Among other things, it specifies intervals when the right to sue the third party shifts from the injured worker to the insurance carrier, and then back again. See § 42-1-560(b) & (c).

South Carolina's appellate courts have observed that the goal of this statutory scheme is "to effect an equitable adjustment of the rights of all the parties." See, e.g., *Kimmer v. Murata of Am., Inc.*, 372 S.C. 39, 47, 640 S.E.2d 507, 511 (Ct. App. 2006) (stating this principle and referencing two Supreme Court decisions that do the same). This Court has described that the specific results desired are protecting the carrier's right to recoup its workers' compensation payments and preventing an injured worker from receiving a double recovery. *Id.* at 51, 640 S.E.2d at 513.

Because the statute (§ 42-1-560) contemplates the employer or its insurance carrier having a meaningful chance to assist with the third party lawsuit, South Carolina courts have consistently held that if an injured worker prosecutes or settles a third party lawsuit without complying with the statute's notice requirements, the injured worker is deemed to have elected the first *Fisher* option — the worker is deemed to have chosen to sue the third party in tort and forego seeking workers' compensation benefits. *Kimmer*, 372 S.C. at 52, 640 S.E.2d at 513-14 (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*, 277 S.C. at 574, 291 S.E.2d at 200 (settled the third party suit without giving notice).

At the same time, South Carolina courts have rejected the invitation to deny workers' compensation claims when the circumstances show that compliance with the statute remains

a realistic possibility. See *Callahan v. Beaufort County Sch. Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007) (third party suit that plaintiff brought without notice became a "nullity" when the plaintiff voluntarily dismissed it); *Johnson v. Pennsylvania Millers Mut. Ins. Co.*, 292 S.C. 33, 354 S.E.2d 791 (Ct. App. 1987) (this Court remanded so the commission could determine whether the injured worker provided notice of the third party suit).

All of these cases observe that the underlying purpose of this 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.

B. Unless Ms. Levi's Third Party Lawsuit Is Dismissed, the Terms of the Statute Will Have Been Followed and the Purpose of the Statute Will Be Realized.

A third party caused Ms. Levi's work-related car crash, and Ms. Levi's lawsuit against that third party is currently pending in the court of common pleas for Greenville County. Unless that lawsuit is dismissed based on a finding that the \$550 check constituted a settlement, the facts of the workers' compensation case will compel a finding that Ms. Levi followed the terms of the statute and a finding that the purpose of the statute was realized. Ms. Levi gave notice of the third party suit to the appropriate entities in the appropriate window of time, and the employer/carrier will have enjoyed a meaningful opportunity to participate in the third party litigation. This lawsuit will not impact Ms. Levi's workers' compensation case unless the at-fault driver's insurance company prevails by taking the position that a \$550 check, with no release, constitutes a binding settlement. The insurance company may not even take this position, and if Ms. Levi's employer and its carrier participate in the lawsuit, the parties may be able to reach a negotiated settlement.

Unfortunately, however, the previous conduct of Ms. Levi's employer and its carrier does not suggest that they are interested in protecting their subrogation rights. Instead, the history of this litigation suggests that the respondents' only interest is avoiding payment of a valid workers' compensation claim. The evidence of this is in the statute.

Once the carrier accepts liability or makes a payment on the award, the injured worker has one year to file a third party lawsuit. See § 42-1-560(b). At the expiration of that one year period, the right to sue the third party passes to the employer and its carrier. See § 42-1-560(c). The right to sue also passes to the carrier if there are less than 30 days to the expiration of the statute of limitations on the third party suit. *Id.* The carrier is required to give the injured worker notice of whether it intends to sue the third party, and failing to give this notice results in the right to sue the third party reverting to the injured worker. *Id.*

That is what happened here. Ms. Levi's car accident occurred March 29, 2011, and the carrier has never notified Ms. Levi of its intentions with respect to suing the third party.

There is more. Subsection (f) of the statute instructs that if Ms. Levi *had* settled the third party case without the carrier's consent, the settlement would be invalid against the carrier — the carrier would still have the right to sue the third party. The commission found that the respondents could not pursue their subrogation rights, see **Exhibit C**, p.6, but that cannot be reconciled with this part of the statute. Here, the commission ignored the law.¹

¹The relevant part of the commission's decision is the sentence that begins "Important to the construction of the current matter" The commission was discussing the Supreme Court's decision in *Stroy v. Millwood Drug Store, Inc.*, but the *Stroy* case was decided at a time when the statutory law did not allow an injured worker to seek both workers' compensation benefits and pursue a claim against a third party. See 325 S.C. 52, 55, 109 S.E.2d 706, 707 (1959) (citing section 72-123 of the 1952 Code of Laws). Thus, in reaching its decision, the commission relied on a law that is no longer valid.

CONCLUSION

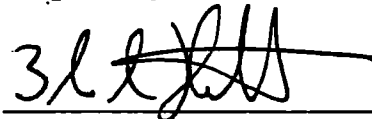
Section 1-23-380 of the South Carolina Code is the statutory authority for this Court to review the decision of an administrative agency. Subsection (c) of that statute authorizes this Court to stay an administrative agency's decision "upon appropriate terms."

Staying this case allows this incomplete record to ripen into a platform for meaningful review. Indeed, there should not be much room for argument once the record becomes ripe for review; the third party case will either have been dismissed on the grounds of a settlement or it will not have been dismissed. If there was no settlement, there was no election of remedy; if the settlement was a nullity, the case is similar to *Callhan v. Beaufort County School District*, where the entire third party lawsuit was held to be a nullity.

As long as Ms. Levi has not forfeited the right to maintain her tort suit, the commission's decision will be factually incorrect. Ms. Levi accordingly requests a stay of this appeal while her third-party suit is pending.

March 28, 2013

Respectfully submitted,



Blake A. Hewitt, SC Bar #73674

John S. Nichols, SC Bar #4210

BLUESTEIN, NICHOLS,

THOMPSON & DELGADO

P.O. Box 7965

Columbia, SC 29202

(803) 779-7599

(803) 779-8995 (facsimile)

bhewitt@bntdlaw.com

jsnichols@bntdlaw.com

Attorneys for Appellant

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1104303

KERRY LEVI,	)	
	)	FULL COMMISSION HEARING
CLAIMANT,	)	PANEL B
vs.	)	
	)	COMMISSIONER BECK - CHAIR
NORTHERN ANDERSON	)	COMMISSIONER ROCHE
COUNTY EMS,	)	COMMISSIONER JAMES
	)	
EMPLOYER,	)	
	)	
and	)	
	)	
BERKSHIRE HATHAWAY	)	
HOMESTATE COMPANIES,	)	
	)	
CARRIER,	)	
DEFENDANTS.	)	
	)	

THE WORKERS' COMPENSATION HEARING, TAKEN BEFORE
CORA ELLIS BRUTON, A NOTARY PUBLIC IN AND FOR THE
STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF
10:59 A.M., TUESDAY, MAY 22, 2012, SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION, 1333 MAIN STREET,
COLUMBIA, SOUTH CAROLINA 29202.

**CORA ELLIS BRUTON
COURT REPORTER
131 BROWNING COURT
LEXINGTON, SOUTH CAROLINA 29073
803-397-0189**

APPEARANCES**FOR THE CLAIMANT**

CHADWICK D. PYE, ESQUIRE
 CHADWICK D. PYE, LLC
 213 MAGNOLIA STREET
 SPARTANBURG, SOUTH CAROLINA 29306
 864-583-5658

FOR THE DEFENDANTS

DAVID H. KELLER, ESQUIRE
 CONSTAGNY, BROOKS AND SMITH, LLP
 105 NORTH SPRINGS STREET, SUITE 105
 GREENVILLE, SOUTH CAROLINA 29601
 803-896-5891

REPORTED BY

CORA ELLIS BRUTON
 COURT REPORTER
 131 BROWNING COURT
 LEXINGTON, SOUTH CAROLINA 29073
 803-397-0189

INDEX

BY MR. KELLER	.3
BY MR. PYE.	.6
BY MR. KELLER	10
CERTIFICATE	12

EXHIBITS

(No Exhibits Proffered)

1 THE COURT REPORTER: Today is May 22, 2012. This
2 is South Carolina Workers' Compensation Case Number
3 1104303. This is the case of Kerry Levi, Claimant,
4 versus Northern Anderson County EMS, Employer and
5 Berkshire Hathaway Homestate Companies is the Carrier.
6 The Appellant is the Defendant represented by Attorney
7 David H. Keller. The Respondent is represented by
8 Attorney Chadwick D. Pye.

9 Each side is allowed ten minutes for oral
10 argument and Appellant three minutes in reply. You
11 are requested to argue the grounds of exception and
12 stay within the record.

13 THE COURT: Mr. Keller.

14 BY MR. KELLER: This is a case of Ms. Kerry Levi
15 who worked for -- as an EMT for Northern Anderson
16 County EMS. She had two accidents. The first
17 accident was on March 10th, 2011 that involved lifting
18 and dropping a patient. She was treated at Doctors
19 Care and was treated by Dr. Newsome at the Center for
20 Health and Occupational Services. She was returned to
21 light duty, never had any compensable lost time and
22 was fully released without restrictions on March 22nd
23 by Dr. Newsome. The second accident occurred on March
24 29th of 2011. She was riding in an ambulance with a
25 co -- co-employee driving, she was apparently

1 restrained and the ambulance was rear-ended. She
2 returned back to -- that was on March 29th. She
3 returned back to Dr. Newsome on March 31st and if you
4 go through the notes and in my reply Brief I believe
5 those notes are at length. But essentially, both Dr.
6 Newsome and Dr. McHenry said that she had a new
7 accident, ended up having surgery. Dr. Newsome
8 specifically states ruptured disc post motor vehicle
9 accident. I took her deposition in August of 2011 and
10 at that time it was revealed that she had settled the
11 third party claim with the driver for the car that had
12 rear ended the ambulance. She received a \$550
13 settlement check from Allstate; that was on April
14 12th, 2011. And one of the issues in this case
15 involves the Claimant's contention that because
16 Allstate had said that they are still responsible for
17 medical that that somehow -- that somehow should
18 relieve her of the election of remedy. When I briefly
19 discussed all the case law which absolutely I think
20 confirms that, but the other side of it is that this
21 lady is currently potentially going to be totally and
22 permanently disabled so that even if we can get the
23 medical back we'll never be able to retrieve any
24 medical or anything by virtue of her settling for that
25 \$550 that's wiped out. (Inaudible) -- seeking and/or

1 conducting (inaudible) without notice deprives the
2 Defendants of their subrogation rights. (Inaudible)
3 -- Justice Ness (inaudible) and he pointed out the
4 issue, of course, was not proper notice (inaudible),
5 Justice Smith in the Fisher opinion it's --
6 (inaudible). He also said that -- (inaudible). The
7 Court in the Kimmer case that Kimmer had elected his
8 remedy by not following their notice provisions and
9 that -- that's the absolute issue. Briefly --
10 (inaudible) -- the Legislature did not intend for --
11 (inaudible) without regard to the Employer to
12 subrogate (inaudible) in a workers' compensation claim
13 where they have elected their remedy. Based upon --
14 (inaudible). There are other cases that I know y'all
15 are aware of cited in my Brief on pages six and seven
16 (inaudible) relative to the fact of determination of
17 whether he had given notice (lost testimony). The --
18 the Hudson -- I believe the -- the Hudson case, in
19 particular, versus Townsend Chain Saw where
20 (inaudible) all the way to the conclusion that without
21 proper notice (inaudible). The Callahan case is
22 (inaudible).

23 I think that the medical records will show that
24 -- Dr. McHenry said that this was an exacerbation of a
25 preexisting condition resulting in a ruptured disc

1 from a motor vehicle accident (inaudible).

2 THE COURT: Mr. Pye.

3 MR. PYE: Thank you. May it please the Court.

4 The two accidents Mr. Keller spoke of are admitted
5 accidents. One was March the 10th, 2011 and one was
6 March the 29th of 2011. It really doesn't matter
7 which one she was hurt in because the issue on appeal
8 today is whether or not the third party -- (inaudible)
9 she chose a remedy. (Inaudible) -- specifically said
10 "this is for pain and suffering only". There's no
11 release that's ever been signed in these records. If
12 you look in the records there's evidence -- I've never
13 seen a -- there's no copy of the check in the record.
14 Now I submit to you and would agree that if there is a
15 check that's on the memo line said "According to
16 satisfaction, settled upon cashing of this check";
17 that's one thing. They didn't make that argument.
18 There is no check in the record. As far as I know
19 there's a check for \$550 dollars that was sent to Ms.
20 Levi and cashed. So they're -- and I would make an
21 analogy if you hired a plumber and he sends you a bill
22 for \$1000 dollars, you send that plumber a check for
23 \$500 dollars and three months later he calls and says
24 your bill is not paid in full, you send him a check
25 for \$500 dollars. I mean we all know that

1 (inaudible), because you're liable for \$500 dollars.
2 Him cashing that check means nothing unless you put
3 for full satisfaction on the memo line. That's not
4 the case here. They didn't put -- I think that's not
5 the case here; they didn't put according to
6 satisfaction. They didn't put if you cash this you
7 are fully settled. In fact, it's just the opposite.
8 (inaudible)

9 COMMISSIONER ROCHE: So was it (inaudible)?

10 MR. PYE: That's the thing, the Defense did not
11 put that into evidence so we do not know. I've never
12 seen the check. I don't think Mr. Keller has the
13 check so that's their burden to present it. But the
14 key here is that there's been no release signed and
15 Allstate believes they're still liable. Now Mr.
16 Keller also says that Kimmer --

17 COMMISSIONER BECK: You also argue that there has
18 or has not been an accident connected?

19 MR. PYE: Well, by accident I'm not sure if you
20 mean by filing of a suit or there has not been an
21 accident filed in the car wreck (inaudible).

22 COMMISSIONER BECK: (inaudible).

23 MR. PYE: (inaudible) from Allstate.

24 COMMISSIONER ROCHE: Didn't they also send a
25 release in a different letter in the amount of \$550

1 for full and final settlement on this injury claim?

2 MR. PYE: That wasn't clarified.

3 COMMISSIONER ROCHE: Signing and cashing this
4 check settles this claim from the above accident with
5 the medicals being incurred by using (inaudible) by
6 the workers' comp adjuster. (Inaudible).

7 MR. PYE: Well, Commissioner, the December 29th
8 letter which came after the April 10th letter and I
9 don't know that she -- I don't know when she cashed
10 the check, but there was a letter several months after
11 the April 10th letter that said this will confirm that
12 also paid and received by settlement check
13 (inaudible). This is for pain and suffering only.
14 Clearly -- and I wasn't involved in the case so I
15 don't want to start misleading the Commission, but it
16 seems like that first letter (inaudible) and I need
17 clarification on that check. Clarification -- in my
18 opinion they cleared. But I just -- if I may, in the
19 Kimmer versus Murata case Mr. Keller says slams the
20 door on my client; the huge difference in that case is
21 first of all, and I don't know if the amount really
22 matters, but the policy limits were \$15,000 dollars,
23 but the biggest thing is he signed a full release of
24 all claims and my client has never done that. I can
25 file a claim tomorrow (inaudible). There is nothing

1 saying that I cannot do that and so --

2 COMMISSIONER JAMES: For what, though?

3 MR. PYE: Well, for -- for any injury that she
4 may have sustained in the accident.

5 COMMISSIONER JAMES: Can you (inaudible)?

6 MR. PYE: Yes, ma'am.

7 COMMISSIONER JAMES: Have you ever seen a payout
8 without a release?

9 MR. PYE: Allstate does that all the time, ma'am.
10 Allstate -- I haven't seen anybody else does it, but
11 Allstate does. They send checks now and don't send a
12 release. And it's the craziest thing I've ever seen,
13 but if they don't put something on the check that says
14 you sign this and you're settled and they don't send a
15 release they've left themselves open to liability.
16 You have to have that document.

17 COMMISSIONER JAMES: By now why don't we have it?
18 What happened -- whoever had it, why do we have to
19 have this document and why does the Claimant not have
20 it? Who has it?

21 MR. PYE: Your Honor, I can't answer that. I've
22 been involved with this case for about three or four
23 weeks and -- maybe a week longer than that, but in my
24 opinion the Defense has the burden -- they're the ones
25 making the argument the case is barred from the

1 jurisdiction of the Commission; it's not my client's
2 responsibility. They made the claim and the evidence
3 isn't available.

4 THE COURT: Mr. Keller.

5 BY MR. KELLER: I did subpoena the file, Madame
6 Commissioner, and what I got back from Allstate was
7 that letter saying to her -- they didn't give me the
8 check -- for whatever reason would not give me the
9 check. They sent me the letter to her saying here's
10 the \$550 dollar settlement check for this claim.
11 (inaudible). I don't know what better we can have but
12 the letter, because --

13 COMMISSIONER ROCHE: The letter seems to
14 contradict that?

15 MR. KELLER: No, ma'am, I don't think so. No,
16 ma'am, I don't think it does, because in their view --
17 car insurance is long term, so they're -- they're
18 paying her for all her personal injuries (inaudible).
19 But -- but -- but here's the -- at this point because
20 she took that settlement if we don't follow that and
21 say because she took the settlement (inaudible),
22 what's going to happen is I'm going to get sued and
23 (inaudible), and the whole point of the Statute is --
24 I'm not supposed to be able to defend something that
25 -- that this client did. She took that \$550 dollars

1 and you know darn good and well Allstate's position is
2 that was for settlement. They left the medical open;
3 I don't know why they did that, but that doesn't solve
4 my problem because I'm going to end up paying her
5 thousands of dollars in indemnity. (Inaudible). She
6 shouldn't have taken that money and when she took it
7 she elected her remedy. (inaudible). It is my
8 impression -- I don't think -- because we had a
9 discussion (inaudible). She didn't give any notice to
10 anybody, so -- and that's the point of the Statute,
11 she didn't report anything, otherwise you have to go
12 back and (inaudible). But I put into evidence that,
13 you know, this is double dipping when you signed this
14 check and she signed that check way before December
15 14th.

16 THE COURT: That concludes the proceeding.

17 (The hearing concluded at 11:17 a.m.)
18
19
20
21

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,

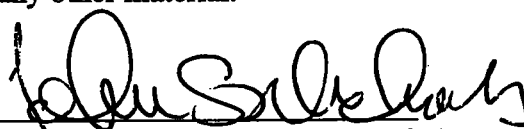
v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

September 9, 2013


Blake A. Hewitt, SC Bar No. 73674
John S. Nichols, SC Bar No. 4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant

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.

BRIEF OF APPELLANT

Chadwick D. Pye, Bar # 15834
THE CHAD PYE LAW FIRM
Post Office Box 6346
Spartanburg, SC 29304
(864) 583-5658
(864) 583-5672 (facsimile)
cpye@chadpye.com

Blake A. Hewitt, Bar # 73674
John S. Nichols, Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities	ii
Questions Presented	1
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	1
Argument	3
I. This Court Should Vacate the Commission's Decision Because the Denial of a Motion to Dismiss Is Not Immediately Appealable	3
a. A Party May Not Appeal a Hearing Commissioner's Decision until There Has Been an Award	4
b. An Order Denying a Motion to Dismiss Decides Nothing and Is Not an Award	5
c. Appealability Is Not Subject to Error Preservation Rules and Is Jurisdictional	5
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	7
a. Contingent Disputes Are Not Ripe for Decision	7
b. Defects in "Ripeness" Can Be Raised at Any Time	8
c. The Question Whether Ms. Levi "Settled" Her Third Party Case Is Not Ripe as Long as That Case Is Pending	9
Conclusion	12

TABLE OF AUTHORITIES

Cases

(South Carolina)

<i>Baber v. Greenville County</i> , 327 S.C. 31, 488 S.E.2d 314 (1997)	7
<i>Baldwin Const. Co., Inc. v. Graham</i> , 357 S.C. 227, 593 S.E.2d 146 (2004)	6
<i>Callahan v. Beaufort County Sch. Dist.</i> , 375 S.C. 92, 651 S.E.2d 311 (2007)	10
<i>Chastain v. Spartan Mills</i> , 228 S.C. 61, 88 S.E.2d 836 (1955)	4, 5
<i>Fisher v. South Carolina Dep't of Mental Retardation-Coastal Center</i> , 277 S.C. 573, 291 S.E.2d 200 (1982)	11
<i>Great Games, Inc. v. South Carolina Dep't of Rev.</i> , 339 S.C. 79, 529 S.E.2d 6 (2000)	6
<i>Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.</i> , 249 S.C. 561, 155 S.E.2d 618 (1967)	7
<i>Hitter v. McLeod</i> , 274 S.C. 616, 266 S.E.2d 418 (1980)	8
<i>Hudson v. Townsend Saw Chain Co.</i> , 296 S.C. 17, 370 S.E.2d 104 (Ct. App. 1988)	11
<i>Johnson v. Paraplane Corp.</i> , 321 S.C. 316, 468 S.E.2d 620 (1996)	6
<i>Kimmer v. Murata of Am., Inc.</i> , 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006)	10, 11
<i>Leviner v. Sonoco Prods. Co.</i> , 339 S.C. 492, 530 S.E.2d 127 (2000)	6

<i>McLendon v. South Carolina Dep't of Highways and Pub. Transp.</i> , 313 S.C. 525, 443 S.E.2d 539 (1994)	5
<i>Riddle v. Fairforest Finishing Co.</i> , 198 S.C. 419, 18 S.E.2d 341 (1942)	4
<i>Sloan v. Friends of the Hunley, Inc.</i> , 369 S.C. 20, 630 S.E.2d 474 (2006)	8
<i>South Carolina Dep't of Transp. v. McDonald's Corp.</i> , 375 S.C. 90, 650 S.E.2d 473 (2007)	6
<i>Stanley Smith & Sons, Inc. v. Dumas</i> , 315 S.C. 30, 431 S.E.2d 595 (Ct. App. 1993)	9
<i>Stroy v. Millwood Drug Store, Inc.</i> , 235 S.C. 52, 109 S.E.2d 706 (1959)	11
<i>Talley v. John-Mansville Sales Corp.</i> , 285 S.C. 117, 328 S.E.2d 621 (1985)	10
<i>Treasured Arts, Inc. v. Watson</i> , 319 S.C. 560, 463 S.E.2d 90 (1995)	8
<i>Waters v. South Carolina Land Res. Conservation Comm'n</i> , 321 S.C. 219, 467 S.E.2d 913 (1996)	8
(Other Jurisdictions)	
<i>Misegades Douglas v. Schuyler</i> , 456 F.2d 255 (4th Cir.1972)	8

Statutes & Other Authorities

S.C. Code Ann. § 42-1-560 (1985)	1, 9, 10, 11
S.C. Code Ann. § 42-17-50 (Supp. 2012)	4
8 S.C. Code Ann. Regs. 67-709 (2012)	4
1952 Code of Laws § 72-123	11

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. (R. pp. 25-26). 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 (R. pp. 27-29) (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. (R. p. 29, ¶¶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. (R. p. 28, ¶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., (R. pp. 90-95) (a later memo containing Ms. Levi's arguments).

On January 20, 2012, a hearing commissioner issued an order denying the motion to dismiss. (R. pp. 1-5). 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. (R. p. 5).

The respondents asked the full commission to review the denial of the motion to dismiss. (R. p. 87). 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 (R. pp. 6-23) (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*

¹Per 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. (R. 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 reenactment 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

²The 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 America, 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

³Under 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.

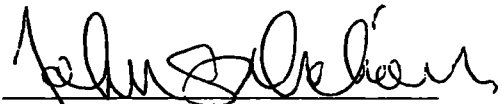
In the realm of possibility, it is possible that the third party may never even claim that the \$550 payment constituted a settlement of its liability for Ms. Levi's car crash. If that proves to be the case, dismissing Ms. Levi's workers' compensation claims cannot be the proper result. Under those circumstances, 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.

September 27, 2013

Respectfully submitted,



Blake A. Hewitt
John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1104304

Kerry Levi, ...Appellant,

v.

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

BRIEF OF RESPONDENTS

David Hill Keller
Constangy Brooks & Smith, LLP
105 N. Spring Street Suite 105
Greenville, South Carolina 29201

TABLE OF CONTENTS

Table Of Contents	i
Table of Cases and Authorities	ii
Statement of Issues on Appeal	iv
Statement Of The Case	1
ISSUE I	4
ISSUE II	5
Standard Of Review	6
Argument	6
Conclusion	18

TABLE OF CASES AND AUTHORITIES

<u>Busillo v. City of North Charleston</u>	p.5
(Ct. App., Op. No. 5155 filed 7/3/ 2013)	
<u>Callahan v. Beaufort County School District</u>	p. 8,15, 18
375 SC 92, 651 SE2d 311 (2007)	
<u>Drake v. Reybestos Manhattan, Inc.</u>	p. 5
241 SC 116, 127 SE2d 288 (1962)	
<u>Fisher v. South Carolina DMR</u>	p. 10, 11, 12, 13, 14, 15
277 SC 573, 291 SE2d 200 (1982)	
<u>Holston v. Allied Corp.</u>	p. 5
300 SC 174, 386 SE2d 793 (Ct. App. 1989)	
<u>Howell v. Pacific Columbia Mills</u>	p. 6
291 SC 469, 354 SE2d 384 (1987)	
<u>Hudson v. Townsend Sawchain Co.</u>	p. 14
296 SC 17, 730 SE2d 104 (Ct. App. 1988)	
<u>Johnson v. Pennsylvania Millers Mut. Ins. Co.</u>	p. 13
292 SC 33, 354 SE2d 791 (Ct. App. 1987)	
<u>Jones v. Georgia-Pacific Corp.</u>	p. 6
355 SC 413, 586 SE2d 111 (2003)	
<u>Kimmer v. Murata, Inc.</u>	p. 10, 12, 13, 15, 17
372 SC 39, 640 SE2d S07(Ct. App. 2006)	
<u>Lark v. Bi-Lo, Inc</u>	p. 6
276 SC 130, 276 SE2d 304 (1981)	
<u>Stroy v. Millwood Drug Store, Inc.</u>	p. 9, 10, 11
235 SC 52, 109 SE2d 706 (1959)	
<u>Talley v. John-Mansville Sales Corp.</u>	p. 14
328 SC 621, 285 SE2d 117 (1985)	
<u>Wilder Corp. v. Wilke</u>	p. 5
330 SC 71, 497 SE2d 731 (1998)	

Wise v. Wise d/b/a Wise Services p. 15, 17, 18
394 SC 591, 716 SE2d 117 (Ct. App. 2011)

§42-1-560.....p. 2, 3, 7, 8, 10, 11, 12, 13, 14, 15, 16, 18

§42-1-560(f) p. 10

§1-23-380(5) p. 6

Title 42.....p. 3, 15, 17

Title 42, Chapter 11.....p. 14

SCACR Rule 220 (b) (2).....p. 5, 19

Rule 41 FRCP.....p. 16

STATEMENT OF ISSUES ON APPEAL

ISSUE I

MAY APPELLANT RAISE NEW ISSUES FOR THE FIRST TIME ON APPEAL?

ISSUE II

WHETHER APPELLANT ELECTED HER REMEDY PURSUANT TO SECTION 42-1-560

Statement of the Case

This is a Workers' Compensation case in which the Full South Carolina Workers' Compensation Commission determined Appellant, Kerry Levi, elected her remedy by accepting a settlement from a third party insurance carrier. As a result the Full Commission dismissed her Workers' Compensation claim.

The sole issue before the court in this case is whether there is substantial evidence on the whole record which supports the determination of the Commission that Kerry Levi settled her claim with a third party carrier and, thereby, elected her remedy.

Appellant suffered two workers' compensation injuries while an employee of Northern Anderson County EMS. The first injury occurred on or about March 10, 2011. Levi was working as a paramedic for Northern Anderson County EMS when she was moving a large patient from a bed to a wheelchair. She and another paramedic were using a sliding board to move the patient. The patient started to fall from the board and Appellant grabbed the patient and felt a "pop" in her back. Medical records indicate Appellant received a brief period of treatment from Doctors Care and Dr. Newsom at the Greenville Memorial Hospital Center for Health and Occupational Services (CHOS). She was released back to light duty and fully released by Dr. Newsom on March 22, 2011. Appellant never had any compensable lost time as a result of the first accident.

On or about March 29, 2011, Appellant was in an ambulance driven by a co-employee, Josh Thomas, when she and Thomas were rear-ended by another driver. This accident severely exacerbated her pre-existing condition from her earlier injury, and since that time she has received on going medical care and treatment.

Through investigation, Respondents subsequently determined the owner of the vehicle which struck Thomas and Levi was owned by Donald Proell. Proell was insured by Allstate Insurance Company. During discovery, Respondents realized Appellant had elected her remedy. When her deposition testimony was taken on August 3, 2011 attorney for Appellant admitted she had already settled the third party claim without the required notice to Respondents.

It became clear by early September 2011, Levi had settled with Allstate Insurance Company in the amount of Five Hundred Fifty Dollars (\$550.00) on April 10, 2011. That check was cashed by her on April 19, 2011. Levi never filed any forms with the South Carolina Workers' Compensation Commission or the Carrier and never advised the Commission, the Employer or the Carrier of the settlement. After receiving confirmation from Allstate Insurance Company that Appellant had indeed accepted a Five Hundred Fifty Dollar (\$550.00) settlement for her claim, Respondents filed a South Carolina Workers' Compensation Commission Form 21 requesting a hearing on the issue of whether Claimant had elected her remedy pursuant to South Carolina Code of Laws Ann. § 42-1-560 and established case law.

The matter was heard on Respondents' Form 21 on January 3, 2012 and an order issued on January 20, 2012 by Commissioner Avery Wilkerson, finding Appellant had not elected her remedy. After the initial hearing, in which Commissioner Wilkerson refused to dismiss Levi's claim, Respondents immediately appealed to the full South Carolina Workers' Compensation Commission.

Oral argument was held before a three member panel of the Full South Carolina Workers' Compensation Commission on May 22, 2012. During oral argument, Levi, by

and through her attorney, Chad Pye of Spartanburg, South Carolina, conceded had she taken a settlement for the automobile accident she would have elected her remedy. However, it was Levi's contention the claim was still open and she had never settled the claim at all. Rather, she urged, the injuries she was compensated for by Allstate were not covered by Title 42 and defendants remain free to seek additional recovery from Allstate.

It was the contention of Appellant, because she did not settle her claim with Allstate involving her workers compensation accident, her settlement does not affect the defendants' rights. It was, and remains the position of Respondents, however, that Levi's theory is not supported by the case law, and there is a "bright line" rule in South Carolina law regarding settlement of third party claims which was designed to protect defendants' liens and right to subrogation. Respondents now have no right to collect against Allstate without the filing of a lawsuit against them in Circuit Court, the very situation which the notice requirements of § 42-1-560 were designed to avoid. The likelihood of success of such a lawsuit is unknown, but the expense of such a suit, even if successful was occasioned by the legal error of Levi. Further, the evidence presented before the Commission, submitted by Appellant herself, shows the settlement, in the amount of Five Hundred Fifty Dollars (\$550.00), was for a full and final settlement of Appellant's injury claim.

On July 2, 2012 the full Commission issued a unanimous order reversing the determination of Commissioner Wilkerson and finding Claimant had elected her remedy. This order was based on well established South Carolina case law. This appeal by Levi followed.

The court should also note the parties attempted resolution of the matter through mediation and Appellant, without objection from Respondents, requested several extensions to determine if mediation would be practical.

In December 2012 Respondents finally advised Appellant that mediation would be of no value and the matter was then assigned for briefing. However, before the initial brief of Appellant was filed Appellant made a separate motion to hold the appeal in abeyance pending filing of a civil suit against the third party. This motion was subsequently denied by the court.

ISSUE I

MAY APPELLANT RAISE NEW ISSUES FOR THE FIRST TIME

ON APPEAL?

First, all portions of Appellant's Issue I have never been raised at any level prior to this appeal. In her memorandum to the full South Carolinas Workers' Compensation Commission, Appellant raised the issue of whether she had notified the employer and carrier of her acceptance of a Five Hundred Fifty Dollar (\$550.00) settlement. In that memorandum the attorney for Appellant at the time of the appeal, Chad Pye, mentions an affidavit from Ms. Levi. However no such affidavit exists, it was never entered into evidence and was never mentioned at Oral Argument. (ROA pp. 90-95; pp. 111-116) Further, there is no record of the initial hearing because Commissioner Wilkerson never opened the record. There was no testimony taken and the Appellant did not testify at the initial hearing.

At oral argument Mr. Pye only argued whether a release was ever signed by Levi for Allstate and whether the letters in evidence were sufficient to show Claimant had settled her claim. (ROA pp. 111-115) He further questioned whether the settlement involved issues not covered by the workers' compensation act. (ROA p. 113)

As to the arguments in Appellant's brief, none of the issues now argued were raised to the Single Commissioner or the Full Commission. In fact, there is not one argument contained in Appellant's brief which was raised to the Single Commissioner or Full Commission. Consequently the entire appeal should be dismissed.

It is axiomatic that issues not presented to the tribunal below are not preserved for appeal. Drake v. Raybestos Manhattan, Inc. 241 SC 116, 127 SE2d 288 (1962); Holston v. Allied Corp. 300 SC 174, 386 SE2d 793 (Ct. App. 1989); See also, Busillo v. City of North Charleston (Ct. App., Opinion Number 5155 filed 7/3/2013) (Issues not adequately presented or not presented at all are not preserved for appellate review); Wilder Corp. v. Wilke, 330 SC 71, 497 SE2d 731 (1998) (An issue can not be raised for the first time on appeal but must have been raised and ruled upon by the lower tribunal to be preserved for appellant review).

Further, the issue of lack of ripeness was raised to this Court by way of a motion to hold the appeal in abeyance, and the issue was dismissed by this Court (ROA p.24; pp. 90-105).

As such, the appeal of Kerry Levi should be dismissed under SCACR Rule 220 (b) (2) as manifestly without merit, and pursuant to the established case law, cited above, should be dismissed.

ISSUE II

**WHETHER APPELLANT ELECTED HER REMEDY PURSUANT
TO SECTION 42-1-560.**

The underlying dispute in this matter, which Appellant has scrupulously avoided discussing in her brief, involves whether she elected her remedy by accepting a settlement in the amount of Five Hundred Fifty Dollars (\$550.00) from Allstate Insurance Company. This determination is governed by the “substantial evidence” rule.

STANDARD OF REVIEW

If the substantial evidence on the whole record supports the determinations of the Commission, particularly as it relates to settlement of the Claimant’s claim with Allstate, then this court is bound by those findings. Under the Administrative Procedures Act, an appellate court may not substitute its judgment on factual determinations for that of the agency, as to the weight and credibility of the evidence . S.C. Code of Laws, Ann., § 1-23-380(5)

The courts will not overturn a decision of the Commission unless the determination is unsupported by substantial evidence. Jones v. Georgia-Pacific Corp. 355 SC 413, 586 SE2d 111 (2003); Lark v. Bi-Lo, Inc 276 SC 130, 276 SE2d 304 (1981).

Substantial evidence is that evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the administrative agency reached. Lark; Howell v. Pacific Columbia Mills 291 SC 469, 354 SE2d 384 (1987).

ARGUMENT

The sole issue before the court is whether the acceptance of the Five Hundred Fifty Dollar (\$550.00) settlement in April 2011 by Appellant constitutes an election of remedy under § 42-1-560 and the case law attendant thereto. As noted above, at oral argument Appellant conceded had she taken the settlement for the automobile accident she would have elected her remedy. However, it was the Levi's contention the claim was still open and that she never settled the claim. Rather she argued the injuries she was compensated for by Allstate are not covered by Title 42 and the defendants are free to seek additional recovery from Allstate. This argument flies in the face of the statutory scheme set up for resolution of third party workers' compensation claims set up by the legislature in §42-1-560, which will be discussed further, below.

Appellant actually had two injuries. Her first injury occurred on March 10, 2010. She was working as a paramedic for Northern Anderson County EMS when she was moving a large patient from a bed to a wheelchair. She and another paramedic were using a sliding board to move a patient. The patient started to fall from the board and Appellant grabbed the patient and felt a "pop" in her back.

The medical records, in evidence, indicate Appellant received a brief period of medical treatment from Doctors Care and Dr. Newsom at the Greenville Memorial Hospital CHOS. (ROA pp. 34-38; pp. 57-59). She was released to light duty by Dr. Newsom and was fully released on March 22, 2011 to full duty with no restrictions. (ROA p. 35; p. 57).

On March 29, 2011 Appellant was in an ambulance driven by a co-employee, Josh Thomas, when she and Thomas were rear-ended by another driver. (ROA p.82). This accident severely aggravated the pre-existing condition for which she had previously

been released. (ROA p.42; p.58). Through investigation, Respondents subsequently determined the owner of the vehicle which struck Thomas and Levi was Donald Proell. (ROA p.82). Proell was insured by Allstate Insurance Company. Respondents also subsequently determined Levi had settled with Allstate for her automobile accident in the amount of Five Hundred Fifty Dollars (\$550.00) on April 12, 2011 and that check was cashed by her on April 19, 2011. (ROA pp.83-84) Appellant never filed any forms with the South Carolina Workers' Compensation Commission or the Carrier and never advised the commission, the employer or the carrier of the settlement as required by § 42-1-560.

By way of background, § 42-1-560 provides the framework for the recovery of benefits when a workers' compensation injury is caused as a result of the acts of a third party, as occurred here. Section 42-1-560 gives three options to the employee. First, the employee may proceed solely against the third party and waive workers' compensation benefits. Second, the employee may seek workers' compensation benefits, and in the event he/she does so the third party claim may be pursued by the carrier. Third, and most commonly, the employee may proceed against both the workers' compensation carrier and the carrier for the third party *provided the notice provision of the section are complied with.* See, Callahan v. Beaufort County School District, 375 SC 92, 651 SE2d 311 (2007). It is uncontested in this case that the notice requirements were not complied with.

The case law on the issue of settlement of a third party action in Workers' Compensation practice is completely clear: The acceptance of a settlement without the knowledge and consent of the employer and carrier is invalid and results in an election of

remedy on the part of the Claimant, who then may not proceed against the Workers' Compensation carrier for further benefits.

The initial case involving an election of remedy was decided under a previous statute with somewhat different wording. In the case of Stroy v. Millwood Drug Store, Inc., 235 SC 52, 109 SE2d 706 (1959), the Supreme Court held the acceptance of a settlement under similar circumstances to those in this case, resulted in an election of remedy. The statute in effect at the time of the Stroy case had similar provisions as the current statute concerning election of remedy. However, the statute in 1958 specifically held the "filing" of a tort claim and the prosecuting of the claim by the employee, represented an election of remedy. Important to the understanding of the current case before this court is the Supreme Court's determination that a settlement has the same effect as a trial because the seeking and collection of a settlement without notice deprives the defendants of their subrogation rights against the third-party insurance carrier and tort-feasor.

The Supreme Court, citing Professor Larson stated "Since the object of the third party statute is to effect an equitable adjustment of the rights of all the parties, it would defeat this objective to allow the employee to demand compensation from the employer after having destroyed the employer's normal right to obtain reimbursement from the third-party." 109 SE2d @ 709.

The other significant holding in Stroy is that the violation of the notice provisions of the third-party statute deprived the South Carolina Workers' Compensation Commission of further jurisdiction over the claim.

Under the current statute, amended by the legislature in 1978, partly to codify the Stroy holding, the Claimant has the opportunity to seek a judgment against a third party, seek a workers compensation award, or to pursue both. § 42-1-560. However, should the employee decide to proceed against both the third-party and the workers' compensation carrier it is necessary for her to place the employer, carrier and Commission on notice of the potential claim. Id. Further, the employee may not settle the third party claim without approval of the employer and carrier. Section 42-1-560(f).

The settlement of the third-party case without proper notices and consent of the employer and carrier constitutes an election of remedy. Fisher v. South Carolina DMR, 277 SC 573, 291 SE2d 200 (1982); Kimmer v. Murata, Inc., 372 SC 39, 640 SE2d 507(Ct. App. 2006); cert. den. 10/18/2007.

In the Fisher case, the Claimant, Bluette Fisher was injured at Sears Roebuck while shopping for clothing for her employer, the Department of Mental Retardation. The injuries she sustained were completely admitted by the defendants, the DMR and the South Carolina State Accident Fund. However, without the knowledge of the employer or carrier, the Claimant settled with Sears Roebuck. Justice Ness, writing for the Court affirmed the finding of the single Commissioner, Full Commission and Circuit Court that the failure of the Claimant to comply with the notice provision in § 42-1-560, consistent with the Stroy holding, deprived the Workers Compensation Commission of jurisdiction over the claim.

It is important to note both in Fisher and the remainder of the cases to be cited in this brief, the action which elects the remedy is not the acceptance of a settlement in and

of itself, but the failure of the Claimant to comply with the *notice provisions* of § 42-1-560.

In Fisher the court unanimously held §42-1-560 sets forth the terms and conditions which *must* be met by an employee in order for an employee to maintain both a workers' compensation claim and a liability claim. The Court further held while the Code Section does not specifically state the Claimant may not settle his third party case without the carrier's consent, nonetheless "it is clear from a reading of the statute that the legislature did not intend for a Claimant to settle his third-party case without regard to the employer's right for subrogation...and still maintain a workmens' (sic) compensation claim." 291 SE2d @ 201. The court further held the Claimant's non-compliance with the statutory notice procedures, and her disregard of the rights and remedies of the carrier violated § 42-1-560 and the holding in Stroy, which it noted remained good law even though the statute had been amended. Therefore, Fisher had elected her remedy and waived any rights she may have had under the South Carolina Workers' Compensation Act to request further benefits Id.

Justice Ness cited Stroy in the Fisher case for the proposition that allowing an employee to accept compensation from the third party tort-feasor without regard to the defendants' rights, defeated the objectives of § 42-1-560. The Court specifically held "Appellant's noncompliance with the statutory procedure and disregard for the rights and remedies of the carrier violates the spirit of the act. It is clear Mrs. Fisher made an election and has waived any rights she may have had under the South Carolina Workmens' (sic) Compensation Law." 291 SE2d @201.

The Fisher case, a South Carolina Supreme Court case, was cited directly in Kimmer by the Court of Appeals. In Kimmer the Claimant was seriously injured in an automobile accident. He subsequently settled for the policy limits of the third party driver's policy, in the amount of Fifteen Thousand Dollars (\$15,000.00). This settlement was undertaken without the knowledge, permission or consent of the employer and workers' compensation carrier and was unknown to the Commission. The Single Commissioner and Full Commission dismissed Kimmer's claim for failure to comply with the notice provisions of § 42-1-560, as applied in Fisher.

The Circuit Court reversed and awarded the Claimant total and permanent disability giving the defendants a credit of Ten Thousand Dollars (\$10,000.00), the actual amount of the settlement received by Kimmer after attorney fees. The Circuit Court reasoned since it was giving a \$10,000 credit to the employer and carrier they had suffered no prejudice.

The Court of Appeals reversed and reinstated the determination of the Full Commission on several grounds. First, the Court held the settlement of a third party claim without following the notice requirements violated § 42-1-560. Second, the Court ruled the acceptance of the settlement by the employee without the consent of the employer and carrier is a "per se" violation of § 42-1-560 and results, automatically, in an election of remedy, without regard to any other factors. The Court specifically stated because Kimmer resolved his third-party claim against the tort-feasor without *notice* to Murata, his actions automatically resulted in an election of remedy. The Court specifically noted taking a settlement without notice is clearly forbidden by the code section and Fisher, and any such settlement automatically constitutes an election of remedy on the part of the

Claimant. The Court further held prejudice is not an issue under § 42-1-560. The Court reasoned prejudice cannot be an issue when the statute itself lays out specific requirements but does not mention prejudice.

The Court concluded "...that the settlement of the third-party claim without notice to the employer and carrier bars a workers' compensation action. We hold that prejudice is **NOT** an element to be considered in regard to the failure to give the mandated statutory notice..."640 SE2d @513-514. (emphasis in original).

However, the court also specifically held prejudice is implicit and assumed within the terms and provisions of the act when the employer and carrier are denied the right to participate in litigation or effect the full and final release of the Claimant. The carrier, further, by virtue of the Claimant's settlement without notice, has no opportunity to investigate whether there are other assets or other coverages available to the Claimant from the third-party. Id.

The Kimmer decision cites three other South Carolina Workers' Compensation cases which further support the automatic election of remedy in a case such as this one. First, the Court cited Johnson v. Pennsylvania Millers Mut. Ins. Co. 292 SC 33, 354 SE2d 791 (Ct. App. 1987). In Johnson, the Claimant prosecuted a case to a full and final, but adverse, conclusion. Because neither the Single Commissioner nor the Full Commission had determined whether the notice requirements of § 42-1-560 had been met, the Court remanded the case back for such a determination. However, the court noted if the notice and consent provision of § 42-1-560 had not been complied with, then Claimant would have elected his remedy under Fisher.

The Court further cited Hudson v. Townsend Sawchain Co., 296 SC 17, 370 SE2d 104 (Ct. App. 1988), in which the Claimant also prosecuted the claim to a full but adverse conclusion. However, in Hudson the Commission had specifically found as a fact the Claimant had *not* put the employer and carrier on notice of the third-party claim and the court held the Claimant had, therefore, elected his remedy under Fisher. The court also noted in Hudson, had the Claimant settled the case during litigation process without notice and consent, the Supreme Court holding in Fisher would have still barred him from pursuing a workers' compensation claim thereafter.

Another South Carolina Supreme Court case decided in a different context nonetheless affirms the necessity of notice as it relates to election of remedy. In Talley v. John-Mansville Sales Corp. 285 SC 117, 328 SE2nd 621 (1985) the Court held it could not carve out an exception to the election of remedy/notice provisions in the statute. As such, any exception was a matter for the legislature, not the Courts. In Talley, a group of asbestos plaintiffs found themselves in a legal predicament caused by two different statutes. It was necessary for the asbestos plaintiffs to file claims within the statute of limitations in the Circuit Court. However, because they suffered no disability under Chapter 11 of Title 42, they could not yet file a workers' compensation claim. The court would not allow them to put the employer and carrier on notice because there was no current workers' compensation claim. However because the Court could not carve out an exception to the notice requirement, it ordered the defendants be allowed to file their claims in Circuit Court with the claims being held in abeyance until such time as the employees suffered disability and could put the workers' compensation employer and carrier on notice pursuant to the terms of § 42-1-560.

The two most recent cases involving election of remedy only collaterally touch on the issues in this case, but are consistent with the previous holdings of the Supreme Court and Court of Appeals. In Callahan v. Beaufort County School District, 375 SC 92, 651 SE2d 311 (2007) the Supreme Court cited Fisher as good law. The Claimant, Callahan, filed a third party suit in state court which was removed to federal court. Claimant then voluntarily dismissed her third-party suit pursuant to Rule 41 FRCP. The Supreme Court held a voluntary dismissal leaves the situation as though no suit had ever been filed. The Court reasoned, therefore, Claimant could go forward with her third party claim because of the voluntary non-suit if she filed the notices with the employer, carrier and Commission required by Title 42. The Court, nonetheless, specifically held the notice provisions of § 42-1-560 “must be strictly followed in order for a Claimant to preserve her right to proceed against both an employer and the third-party.” 651 SE2d @314. This is precisely the holding of Fisher and Kimmer.

In the case of Wise v. Wise d/b/a Wise Services, 394 SC 591, 716 SE2d 117 (Ct. App. 2011) the Court affirmed the prior election of remedy cases. The Wise case, once again, arises under a slightly different scenario than the case at bar. The issue is Wise is whether evidence of the election of remedy could be admitted after a Commission hearing had previously taken place. However, the court in Wise assumed the election of remedy would have taken place without the required notice, thus fully affirming the holdings of Fisher and Kimmer. The court specifically stated “Further, because Claimant did not *strictly comply* with the notice provisions in filing suit against a third party, he is barred from recovering under the Act.” (emphasis added) 716 SE2d @122.

Consequently, the only issue that the Court needs to currently address is whether the notice requirements of § 42-1-560 were complied with by Levi. There is no testimony or evidence in this record that the Claimant complied with or ever attempted to comply with the notice requirement. Further, contrary to the argument of Appellant, there is more than substantial evidence to support Commissions' finding Levi settled her third party claim without notice. At the initial hearing, Levi submitted a letter dated April 10, 2011 from Cynthia Anderson-Weisbireh at Allstate which states "As we agreed, I will be sending a check to you in a separate letter in the amount of \$550.00 for full and final settlement of your injury claim. Please understand that signing and cashing this check settles your claim for the above accident." (ROA p.50). Respondents submitted a document subpoenaed from Allstate Insurance Company dated April 19, 2011 indicating a payment was made and accepted in the amount of Five Hundred Fifty Dollars (\$550.00) for "full and final settlement of any and all claims for bodily injury arising from loss of 3/29/2011." (ROA pp.21-22). Appellant also submitted a letter dated May 9, 2011 which states "It appears that your client has accepted the sum of Five Hundred Fifty Dollars (\$550.00) for his (sic) general damages from this auto accident." (ROA p.54). Appellant also submitted a letter from Allstate dated December 29, 2011 stating Appellant settled her claim for bodily injury with in the sum of Five Hundred Fifty Dollars (\$550.00) with medicals to be referred to the Berkshire Hathaway. (ROA p.52).

Appellant has previously raised the issue of whether this settlement was sufficient to rise to the levels required under § 42-1-560. Commissioner Wilkerson apparently felt a small settlement was not enough to trigger the notice requirements. However, the

settlement has clearly cut off Respondents' right to recovery for indemnity payments from Allstate, and may have cut off recovery of medical payments.

First, at the time of the original hearing in this matter defendants had already paid Appellant over Seventeen Thousand Dollars (\$17,000.00) in temporary disability compensation payments with permanency yet to be determined or awarded. Levi was, at the time, seeking total and permanent disability. Even under the best argument Appellant has, even if her release to Allstate covered only the indemnity/disability portion of the claim, respondents would be unable to recoup somewhere between Seventeen Thousand (\$17,000.00) to over Two Hundred Thousand (\$200,000.00) Dollars in indemnity payments, depending on the final result had the case gone to trial.

Second, the Full Commission addressed this issue directly, and correctly, in their order of July 2, 2012. The Commission noted, as the Court did in Kimmer and Wise that Levi's theory that she did not settle her claim with Allstate and somehow the settlement did not affect the rights of defendants, is not supported by the facts or the case law. The Commission stated "Rather the very purpose for the strict, bright line rule of South Carolina case (law) was to protect the Defendants' lien and subrogation. The Defendants now have no right to collect against Allstate without having to file a lawsuit against them in Circuit Court, and the likelihood that such a lawsuit would be successful is unknown." (ROA p.10). The Commission further found the two letters from Allstate of April 10th and December 29, 2011 were sufficient proof "by preponderance of the evidence" that Claimant settled her claim and the settlement constituted an election of remedy because of failure to follow the *notice provisions* of Title 42. Levi settled without regard to the rights of the defendants to be reimbursed for indemnity benefits already paid to Appellant

and for additional indemnity benefits she might be seeking “even if additional benefits might be available to her” from Allstate. (ROA p.11)

The Commission further, in detail, listed fourteen (14) Findings of Fact as to why Levi had elected her remedy and what evidence that that was based on. (ROA pp 20-21) The Commission specifically found Appellant settled her claim for Five Hundred Fifty Dollars (\$550.00) based on the letter of April 10, 2011; that the Five Hundred and Fifty Dollars (\$550.00) payment was for settlement of her personal injury claim pursuant to the letter of April 10th; that Appellant cashed the settlement check; and that she did not notify the employer, carrier or workers’ compensation commission of the settlement of the third-party claim pursuant to §42-1-560 or any of the case law cited hereinabove. (ROA p.21)

In fact it is undisputed Appellant settled with Allstate on or about April 10, 2011 some two weeks after her accident. It is further undisputed she did not follow the notice requirements of § 42-1-560. The case law cited herein is unquestionably clear that Appellant’s actions constituted an election of remedy. There has never been any holding to the contrary in South Carolina and as recently as 2011 the court confirmed that the *notice provisions* of section 42-1-560 must be strictly followed in order for a workers’ compensation Claimant to preserve her right to proceed against both employer and third party. Callahan; Wise.

CONCLUSION

It is therefore respectfully submitted that this case should be dismissed under SCACR Rule 220(b)(2), as manifestly without merit.

In the alternative, it is respectfully submitted the order of the Full Workers' Commission is fully supported by the substantial evidence on the whole record and the law, and should be affirmed.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "D. Hill Keller", written over a horizontal line.

David Hill Keller, Esq.

Bar # 003345

Constangy, Brooks & Smith, LLP

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1104304

Kerry Levi, ...Appellant,

v.

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

CERTIFICATE OF COUNSEL

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

September 25, 2013



David Hill Keller
Constangy, Brooks & Smith, LLP
105 North Spring Street, Suite 105
Greenville, South Carolina 29601
(864) 990-1882
Attorney for Respondents

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

Chadwick D. Pye, Bar # 15834
THE CHAD PYE LAW FIRM
Post Office Box 6346
Spartanburg, SC 29304
(864) 583-5658
(864) 583-5672 (facsimile)
cpye@chadpye.com

Blake A. Hewitt, Bar # 73674
John S. Nichols, Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities	ii
Argument	1
A. This Is Not a “Substantial Evidence” Case. Appealability and Justiciability are Questions of Law	1
B. Error Preservation Does Not Apply to Questions of Appealability or Justiciability	1
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	3
Conclusion	5

TABLE OF AUTHORITIES

Cases

(South Carolina)

<i>Ashenfelder v. City of Georgetown</i> , 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010)	2
<i>Busillo v. City of N. Charleston</i> , 404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013)	1
<i>Drake v. Raybestos-Manhattan, Inc.</i> , 241 S.C. 116, 127 S.E.2d 288 (1962)	2
<i>Fisher v. South Carolina Dep't of Mental Retardation-Coastal Center</i> , 277 S.C. 573, 291 S.E.2d 200 (1982)	4
<i>Holston v. Allied Corp.</i> , 300 S.C. 174, 386 S.E.2d 793 (Ct. App. 1989)	2
<i>Hudson v. Townsend Saw Chain Co.</i> , 296 S.C. 17, 370 S.E.2d 104 (Ct. App. 1988)	4
<i>Main Corp. v. Black</i> , 357 S.C. 179, 592 S.E.2d 300 (2004)	2
<i>Kimmer v. Murata of Am., Inc.</i> , 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006)	4
<i>St. Francis Xavier Hosp. v. Ruscon/Abco</i> , 285 S.C. 584, 330 S.E.2d 548 (Ct. App. 1985)	2
<i>Stroy v. Millwood Drug Store, Inc.</i> , 235 S.C. 52, 109 S.E.2d 706 (1959)	4
<i>Treasured Arts, Inc. v. Watson</i> , 319 S.C. 560, 463 S.E.2d 90 (1995)	3
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998)	2

(Other Jurisdictions)

Misegades Douglas v. Schuyler,
456 F.2d 255 (4th Cir.1972) 3

Statutes & Other Authorities

S.C. Code Ann. § 42-1-560 (1985) 4
Act. No. 355, 1969 S.C. Acts 622 4

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 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.

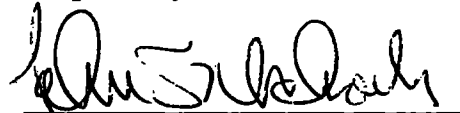
Yes, Ms. Levi accepted \$550 from the at-fault driver's insurance company. This was two weeks after her work-related car crash, and Ms. Levi said in an affidavit that her boss advised her to take the money. See (R. p. 96). But regardless of who is telling the truth—and regardless of whether this was 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.

September 27, 2013

Respectfully submitted,



Blake A. Hewitt

John S. Nichols

BLUESTEIN, NICHOLS,

THOMPSON & DELGADO

P.O. Box 7965

Columbia, SC 29202

(803) 779-7599

(803) 779-8995 (facsimile)

bhewitt@bntdlaw.com

jsnichols@bntdlaw.com

Attorneys for Appellant