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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]

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[1]The 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.

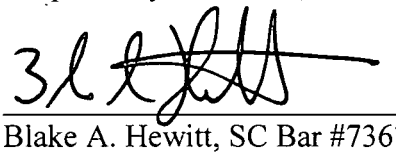
CONCLUSION

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.

Respectfully submitted,



March 28, 2013

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Attorneys for Appellant

Exhibit A

Allstate. You're in good hands.
Palmetto
P.O. BOX 650536
DALLAS TX 75266

Kerri Levi
217 WINDSOR DR
LAURENS SC 29360-1660

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 ou 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

10000201104111TR00200537000100100837 9

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 ans 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

Exhibit B

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. SUMBISSIONS

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 Form 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 worked 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.

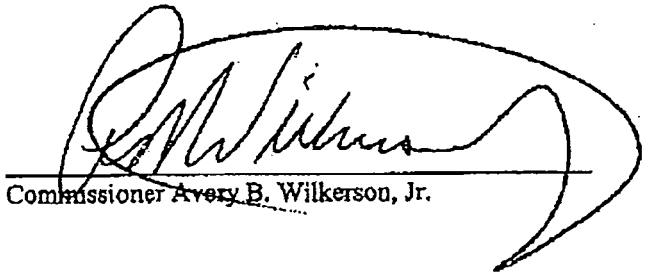
ORDER

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

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party. January 20, 2012

By: Elaine Boyd, Administrative Assistant to Commissioner Wilkerson

Exhibit C

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 ans (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, Bluette 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 tort feasor 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 tort feasor 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 SE2d @ 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 voluntarily 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 intervert 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 Melody 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 October, 2013

By Valerie D Keller

Administrative Assistant to the Commissioner

Chadwick D. Pye

David Hill Keller

1919903.1

Exhibit D

STATE OF SOUTH CAROLINA	)	**COURT OF COMMON PLEAS**
	)	**THIRTEENTH JUDICIAL CIRCUIT**
COUNTY OF GREENVILLE	)	
	)	
	)	
Kerry Levi and Ben Levi,	)	
	)	
Plaintiff,	)	**COMPLAINT**
	)	
vs.	)	
	)	
Donald Proell and Amber Bishop,	)	
	)	**C.A. No. 2013-CP-32-01284**
	)	
Defendants.	)	
	)	

2013 MAR -5 11:25

Plaintiffs, Kerry Levi and Ben Levi, by and through their undersigned counsel of record, will show unto this Honorable Court the following:

GENERAL ALLEGATIONS

1. Plaintiffs are husband and wife and are citizens and residents of Greenville, South Carolina.
2. Defendant Proell, upon information and belief, is a citizen and resident of Darlington County, South Carolina. Defendant Bishop, upon information and belief, is a citizen and residents of Greenville County, South Carolina.
3. On March 29, 2011 Plaintiff Kerry Levi was traveling on I-85 in Greenville County as a passenger when the Defendant Amber Bishop caused an accident with Plaintiff's vehicle. As a result of the collision Plaintiff suffered injuries and damages as set forth herein below.
4. Defendant, Amber Bishop was the driver of the car during the accident and defendant, Donald Proell was the owner of the car driven by Bishop at the time of the accident.

PLAINTIFFS' CAUSE OF ACTION
(NEGLIGENCE)

5. The Plaintiffs incorporate herein the relevant and consistent portions of the preceding paragraphs which do not conflict with the following allegations.

6. Defendant Amber Bishop was negligent, grossly negligent, reckless, willful and wanton at the time and place in question in one or more of the following particulars, to wit:

(a) In failing to keep her vehicle under proper control;

(b) In failing to stop, swerve, or take other evasive action to avoid the collision;

(c) In failing to act as a reasonable and prudent driver would have acted under the same or similar circumstances;

(d) In failing to follow the traffic laws of South Carolina.

PLAINTIFFS' SECOND CAUSE OF ACTION
(NEGLIGENT ENTRUSTMENT)

7. The Plaintiffs incorporate herein the relevant and consistent portions of the preceding paragraphs which do not conflict with the following allegations.

8. Defendant Donald Proell was negligent, grossly negligent, willful and wanton at the time in question in one or more of the following particulars, to wit:

(a) In failing to keep his vehicle in his possession.

(b) In allowing Amber Bishop to drive the vehicle knowing that she was not a responsible driver.

9. As a direct and proximate result of the aforementioned acts of negligence, gross negligence, recklessness, willfulness and/or wantonness on behalf of Defendants, Plaintiffs suffered injuries to her person that required extensive medical care and treatment, and resulted in lost wages, pain and suffering.

PLAINTIFFS' THIRD CAUSE OF ACTION
(LOSS OF CONSORTIUM)

10. The Plaintiffs incorporate herein the relevant and consistent portions of the preceding paragraphs which do not conflict with the following allegations.

11. As a result of the aforesaid injuries to Plaintiff Kerry Levi, she has been under the care of certain physicians, and undergone certain medical procedures, and has been unable to care for herself and perform her normal functions, had to endure great pain and mental anguish and distress and upon information and belief certain of her injuries are permanent and disabling to the extent that his ability to perform her normal daily and physical functions will be impaired in that she will continue to require medical treatment all to Plaintiff Ben Levi's damage.

12. As a result of the injuries to Plaintiff Kerry Levi, Plaintiff Ben Levi was deprived and continues to be deprived of the society, companionship, consortium, and services of his wife.

13. Plaintiff Ben Levi is informed and believes that he is entitled to a judgment against the Defendants for damages in an appropriate amount.

WHEREFORE, the Plaintiffs prays for joint and severable judgment against the Defendants for actual and punitive damages in amounts to be deemed appropriate by the Court at the trial of this case, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

CHADWICK D. PYE, LLC

Chadwick D. Pye
SC Bar No. 15834
P.O. Box 6346
Spartanburg, SC 29304
(864) 583-5658
Attorney for Plaintiff

February 28, 2013

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

I.C. File #: 1104303

The use of this form is required under the provisions of the South Carolina Workers' Compensation Law.

NOTICE OF THIRD PARTY ACTION EMPLOYEE

In the Workers' Compensation Claim of

Kerry Levi , Employee

_____ , Claimant(s)

vs.

Northern Anderson County EMS , Employer

Berkshire Hathaway Homestate Ins. Co. , Carrier

TO THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION and the above-named Carrier or Self-Insurer Employer:

PLEASE TAKE NOTICE that an action has been commenced against Donald Proell and Amber Bishop as defendant(s) in the Court of Common Pleas for the Thirteenth Judicial Circuit County of Greenville and State of South Carolina under date of March 5, 2013.

Kerry Levi
Employee or Surviving Workers' Compensation Beneficiary

DATED: RECEIVED 3/18/13

MAR 21 2013

Division of Claims
Claims Administrator

Attorney for Employee or Surviving Workers' Compensation Beneficiary

A copy of this form must be served upon the South Carolina Workers' Compensation Commission, the Workers' Compensation carrier or self-insurer employer by personal service, registered or certified mail within thirty (30) days after third party action commenced; and, the third party action must be commenced within one (1) year after employer-carrier accepts liability for or makes payment of compensation as provided in the Workers' Compensation Law.

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.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Motion to Stay Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

David H. Keller, Esquire
Constangy, Brooks & Smith, LLP
105 N. Spring Street, Suite 205
Greenville, SC 29601

Erin Bridges

March 28, 2013
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC