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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.

REPLY IN SUPPORT OF MOTION FOR STAY

This reply is filed pursuant to Rule 240(f) of the South Carolina Appellate Court Rules.

I.

The respondents' return includes two misleading statements that are material to this motion.

First, on page 2, the respondents claim that the present dispute began when they filed a petition to terminate Ms. Levi's temporary benefits.

The appropriate form for such a request is a Form 21, and although the respondents filed such a form, they also filed a document that was captioned as a "Motion" and requested dismissal of Ms. Levi's claims. This motion is attached to this reply as **Exhibit E**. The

hearing commissioner and the commission's appellate panel specified that their decisions were based on the motion as opposed to the Form 21. See **Exhibit B**, pp.3, 5; **Exhibit C**, p.2.[1]

Workers' compensation law does not permit a motion to dismiss. This is not an opinion; it is a fact. The relevant regulation reads, "[t]he commission will not address a motion involving the merits of a claim, including, but not limited to, a motion (1) [f]or dismissal." 25A S.C. Code Ann. Regs. 67-215B.

In similar fashion, it is a fact that the hearing commissioner's decision was not immediately appealable. The Workers' Compensation Act allows an aggrieved party to ask the full commission to review a hearing commissioner's "award." S.C. Code Ann. § 42-17-50. The denial of a motion to dismiss is not an "award." Cf. *McLendon v. South Carolina Dept. of Highways and Public Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish any law for the case).

Second, on page 2 of the return, the respondents claim that Ms. Levi made "numerous" previous requests that this appeal be stayed. The respondents further claim that they "did not object" to these requests and that by January of 2013, it was evident that the parties would not be able to mediate this matter.

Ms. Levi filed one previous request for a stay. She filed this request in February of 2013, shortly after receiving the transcript of the appellate panel's hearing. It was only when Ms. Levi received the respondents' return to that motion that she learned that the respondents

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[1]Exhibits B and C were attached to Ms. Levi's principal filing on the present motion.

were not interested in mediation. In light of that return, Ms. Levi withdrew her request that the case be stayed to allow mediation.

Both of these misrepresentations are material to the present motion. To overlook the fact that this appeal concerns an improper motion to dismiss is to imply that the respondents followed the law in requesting that the commission dismiss Ms. Levi's claims. They did not. Similarly, to falsely claim that Ms. Levi has made repeated requests to postpone the resolution of this appeal is to suggest that Ms. Levi is trying to game the system. She is not. The purpose of this motion is to create an environment where Ms. Levi's workers' compensation claim will maintain the potential for being viable while the parties who have a legitimate interest in adjudicating whether Ms. Levi settled her third party suit resolve that issue. *Of course* the respondents want Ms. Levi to have settled her third party case — doing so releases their obligation to pay a valid claim. But Ms. Levi disputes that she has settled anything, and the parties with a legitimate stake in that debate are Ms. Levi and the third party's insurance company.

II.

In their return, the respondents point out that the arguments in Ms. Levi's motion were not presented below. That is true. Ms. Levi's argument to the appellate panel did not include appealability or a contention that she had complied with the third party statute. There are two reasons why it does not matter that these arguments were not raised below.

First, appealability can be raised at any time and is often raised by an appellate court on its own motion. See *Main Corp. v. Black*, 357 S.C. 179, 592 S.E.2d 300 (2004); *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010).

Second, in contending that these proceedings are not presently "ripe" for review, Ms. Levi's motion relates to the justiciability of this case. "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Coop. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). Justiciability can be raised at any time and is often based on acts that occur during the course of litigation. See *Misegades Douglas v. Schuyler*, 456 F.2d 255, 255 (4th Cir.1972) (cited in *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006)). Ms. Levi did not tell the panel that she had complied with the third party statute because at the time of the hearing, she hadn't.

III.

The essential element of a settlement is a release from liability, and there is no evidence that Ms. Levi ever executed a covenant not to execute, a covenant not to sue, or a release. This point is not a back-door attempt to litigate the merits of this appeal; the point is that the question whether Ms. Levi's claim is truly "settled" is an open question and will be litigated in the tort action. This point was not contested in *Fisher* or *Kimmer*; the cases cited in the return. Neither decision references a dispute about the fact of a settlement. *Fisher v. S.C. Dept. of Mental Retardation-Coastal Center*, 277 S.C. 573, 291 S.E.2d 200 (1982); *Kimmer v. Murata of Am., Inc.*, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006).

The appropriate way to resolve this dispute is to do what Ms. Levi is doing — pursue the third party suit and determine whether what occurred amounts to a settlement. This approach also allows the purpose of the third party statute — giving the employer and its insurance carrier a meaningful chance to assist with the third party lawsuit — to be fulfilled.

IV.

The respondents' contention that Ms. Levi has "destroyed" their right to reimbursement cannot be squared with reality. Any settlement made without the carrier's consent is invalid as to the carrier. S.C. Code Ann. § 42-1-560(f). This is the statute's plain language, yet in their motion to dismiss, the respondents told the commission that Ms. Levi's supposed settlement "has substantially harmed and prejudiced [their] right to recoup [their] statutory lien against [the third party insurer]." **Exhibit E**, p.2.

CONCLUSION

If the third party suit is resolved because Ms. Levi settled the case, Ms. Levi will have no choice but to withdraw her workers' compensation claim. At the same time, if the third party suit goes forward, the commission's decision will be plainly incorrect. Ms. Levi accordingly requests that this appeal be returned to the commission under the condition that it is stayed while the third-party suit is pending. Section 1-23-380(2) of the Code grants this Court the authority to enter such an order.[2]

Respectfully submitted,

April 12, 2013

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[2]Ms. Levi's principal filing cited the statute as § 1-23-380(c) instead of § 1-23-380(2).

Exhibit E

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,	)	
	)	
Carrier/Defendants.	)	

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
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PROOF OF SERVICE

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

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Erin Bridges

April 12, 2013
Columbia, South Carolina

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